Consumer Legislation in the Federal Republic of Germany

Consumer Legislation in the EC Countries

Editor: Professor N. Reich
Prepared for the EC Commission Consumer Protection Service

These books present the first comprehensive analysis of consumer law in the nine EC countries. Their main emphasis is on the presentation and evaluation of legislative activity and reform movement which have resulted in many new — however divergent — solutions. In this connection, 'case law' is considered inasmuch as it is relevant to consumer protection. Its importance differs widely in the nine countries. The administrative implementation, in whatever form, is extensively covered; the main emphasis has been placed on centralised institutions — institutions on a membership basis or institutions safeguarding the consumer's interests — which are of great importance to the development and enforcement of consumer law and have therefore been mentioned throughout. The study makes many suggestions for law improvement and approximation on an EC basis.

The comparative report and the national reports follow basically the same scheme. The first chapter gives an introduction to the organisation of consumer interests and the position of consumer law. The next chapter is devoted to the consumer's interest in reasonable prices for goods and services. The following chapters consider marketing practices under aspects of consumer information, advertising and sales promotion. In later chapters, the authors consider legal solutions for the safeguard and promotion of the consumer's interest in safety and quality. Considerable attention is then paid to regulations of consumer credit, and unfair contract clauses. The last chapter of each book evaluates the means of law enforcement in the interest of the individual consumer.

Consumer Legislation in the EC Countries: A Comparative Analysis
Verbraucherschutzrecht in den EG-Staaten: Eine vergleichende Analyse
Le Droit de la Consommation dans les Pays Membres de la CEE: Une Analyse Comparative —*Reich & Micklitz*

Consumer Legislation in Belgium and Luxemburg
Le Droit de la Consommation en Belgique et au Luxembourg —*Fontaine & Bourgoignie*

Consumer Legislation in Denmark —*Dahl*

Consumer Legislation in France
Le Droit de la Consommation en France —*Calais-Auloy et al.*

Consumer Legislation in the Federal Republic of Germany
Verbraucherschutzrecht in der Bundesrepublik Deutschland —*Reich & Micklitz*

Consumer Legislation in Italy —*Ghidini*

Consumer Legislation in The Netherlands —*Hondius*

Consumer Legislation in the United Kingdom and the Republic of Ireland —*Whincup*

Consumer Legislation in the Federal Republic of Germany

A study prepared for the EC Commission

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Preface

The present study forms part of a research project of the EC Commission in which consumer legislation in the nine EC countries is analysed and compared. The national reports have been prepared by jurists doing research in the respective countries; this is the report on the Federal Republic of Germany.

The study is the first comprehensive analysis of this new field of law, based on a theoretical concept of consumer law. It therefore penetrates deeply into areas of business law which, because of the prevailing separation of civil and public law, are still carefully distinguished both in practice and jurisprudence. In view of the wealth of legal rules, the main difficulty has been to make a proper selection and to analyse and evaluate the really relevant issues in law. Whether we have always succeeded in so doing will be for the reader to decide. Numbers given in brackets refer to the respective reference numbers in the text and are to draw attention to the interlocking of the various functional areas of consumer law.

The study focuses on legislation and court practice. Special importance has been attached to the incorporation of reform. The actual law enforcement, whether by authorities, the courts or associations, has been studied very little so far; here it has often been possible only to point out loopholes, unless, by way of exception, appropriate empirical studies are available as in the case of unfair competition and advertising. It is this deficiency that renders a scientific evaluation of the existing law particularly difficult.

In line with its structure, the study is confined to the commodity market (goods and services). The real property and capital markets, in which consumer protection is sure to be necessary and does exist, has not been included in the analysis.

The study reflects the state of development of the law as of late 1979. In some cases it has been possible to point out more recent trends.

Hamburg, Spring 1980

Norbert Reich
Hans-W. Micklitz

Abbreviations

ABB	Allgemeine Bausparkassenbedingungen General Building Societies Savings Contracts
ABl	*Amtsblatt* (der EG) Official Journal (of the EC)
AbzG	Abzahlungsgesetz Act on Instalment Sales
AcP	*Archiv für civilistische Praxis* (periodical on doctrinal developments in civil law)
ADAC	Allgemeiner Deutscher Automobilclub General German Automobile Club
ADSp	Allgemeine Deutsche Spediteurbedingungen General German Forwarding Agents' Conditions
AfP	*Archiv für Presserecht* (periodical containing reports and judgments on press law)
AG	*Aktiengesellschaft* Corporation Law Journal
AGB	Allgemeine Geschäftsbedingungen standard form contract conditions; standard form contracts
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen Standard Form Contracts Act
AgV	Arbeitsgemeinschaft der Verbraucher Association of Consumers
AMG	Arzneimittelgesetz Drugs Act
AÖR	*Archiv für öffentliches Recht* (periodical on the theory of constitutional and administrative law)
ARB	Allgemeine Reiseveranstalterbedingungen Travel Organisers' Standard Form Contracts
ASJ	Arbeitsgemeinschaft Sozialdemokratischer Juristen Association of Social Democratic Lawyers
AVB	Allgemeine Versicherungsbedingungen General Conditions of Insurance

AVB EIT	Verordnung über allgemeine Bedingungen für die Elektrizitätsversorgung von Tarifkunden Order concerning General Conditions for the Supply of Electricity to Normal-Rate Consumers
AVB Gas	Verordnung über allgemeine Bedingungen für die Gasversorgung von Tarifkunden Order concerning General Conditions for the Supply of Gas to Normal-Rate Consumers
AvD	Automobilclub von Deutschland Automobile Club of Germany
AWG	Außenwirtschaftsgesetz Foreign Trade and Payments Act
BAG	Bundesarbeitsgericht Federal Labour Court
BAK	Bundesaufsichtsamt für das Kreditwesen Federal Banking Supervisory Office
BAnz	Bundesanzeiger Information published by the Federal Government
BAV	Bundesaufsichtsamt für das Versicherungswesen Federal Supervisory Office for Insurance Companies
Bay ObLG	Bayrisches Oberstes Landesgericht Bavarian Supreme Court
BB	*Betriebsberater* (periodical containing reports and judgments on commercial law)
BDSG	Bundesdatenschutzgesetz Federal Data Protection Act
BGB	Bürgerliches Gesetzbuch Civil Code
BGBl	*Bundesgesetzblatt* (periodical containing new legislation and decrees)
BGH	Bundesgerichtshof Federal High Court
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen Federal High Court Judgments in Civil Cases
BIBB	Bundesinstitut zur Berufsbildung Federal Institute for Vocational Training
BJM	Bundesjustizministerium Federal Ministry of Justice
BKA, BKartA	Bundeskartellamt Federal Cartel Office
BR-Drucks.	Bundesrats-Drucksache Bundesrat papers and proceedings
BSpKG	Bausparkassengesetz Act on Building Societies
BT-Drucks.	Bundestags-Drucksache Bundestag papers and proceedings
BVerfG	Bundesverfassungsgericht

	Federal Constitutional Court
BVerfGE	Entscheidungen des Bundesverfassungsgerichts Federal Constitutional Court Judgments
BVerwG	Bundesverwaltungsgericht Federal Administrative Court
BVM	Bundesverkehrsministerium Federal Transport Ministry
DAR	*Deutsches Autorecht* German Car Law Journal
DB	*Der Betrieb* (periodical containing reports and judgments on commercial law)
DGB	Deutscher Gewerkschaftsbund German Trade Unions' Federation
DIN	Deutsches Institut für Normung German Institute for Standardisation
DJT	Deutscher Juristentag German Lawyers' Assembly
DJZ	*Deutsche Juristenzeitung* German Lawyers' Journal
DRV	Deutscher Reisebüro-Verband German Travel Offices Association
DuR	*Demokratie und Recht* (legal periodical)
E	Entscheidung court decision
EG	Europäische Gemeinschaften European Communities
ER	Europarat Council of Europe
ErgLfg.	Ergängzungslieferung supplement
EuGH	Europäischer Gerichtshof European Court of Justice; Court of Justice of the European Communities
EWG	Europäische Wirtschaftsgemeinschaft European Economic Community
FAZ	*Frankfurter Allgemeine Zeitung* (daily paper)
FernUSG	Fernunterrichtsschutzgesetz Correspondence Course Protection Act
G	Gesetz Act, law
GG	Grundgesetz Basic Law
GRUR	*Gewerblicher Rechtsschutz und Urheberrecht* (periodical containing reports and judgments on industrial property protection and copyright law)

GRUR	*Gewerblicher Rechtsschutz und Urheberrecht — internationaler Teil* (periodical containing reports and judgments on industrial property protection and copyright law — international part)
GSG	Gerätesicherheitsgesetz Act on Safety of Appliances
GStW	Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft Act to Promote Stability and Growth of the Economy
GüKG	Güterkraftverkehrsgesetz Road Haulage Act
GVBl	*Gesetz- und Verordnungsblatt* Gazette of Laws and Ordinances of the German Länder
GVG	Gerichtsverfassungsgesetz Administration of Justice Act
GWB	Gesetz gegen Wettbewerbsbeschränkungen Act Prohibiting Restraints of Competition
HBG	Hypothekenbankengesetz Private Mortgage Banks Act
HdVR	*Handbuch des Verbraucherrechts* Handbook of Consumer Law
HGB	Handelsgesetzbuch Code of Commercial Law
HWG	Heilmittelwerbegesetz Act on Advertising of Drugs
JA	*Juristische Arbeitsblätter* (legal periodical)
JR	*Juristische Rundschau* (legal periodical)
JuS	*Juristische Schulung* (legal periodical)
JZ	*Juristenzeitung* (legal periodical)
KAGG	Gesetz über Kapitalanlagegesellschaften Act on Investment Companies
KG	Kommanditgesellschaft limited partnership
KVO	Kraftverkehrsordnung (Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und O-Busverkehr sowie den Linienverkehr mit Kraftfahrzeugen) (Order concerning general conditions of carriage by tramway and trolley bus and motor cars running regular services)
KWG	Gesetz über das Kreditwesen Act on Supervision of the Banking Business

LG	Landgericht Regional Court
LM	Lindemaier-Möhring, Entscheidungssammlung law reports
LMBG	Lebensmittel- und Bedarfsgegenständegesetz Food and Consumer Goods Act
LRE	Lebensmittelrechtliche Entscheidungen food law decisions
LVG	Landesverwaltungsgericht regional administrative court
MDR	*Monatszeitschrift für Deutsches Recht* (legal periodical)
MSchG	Maschinenschutzgesetz Technical Labour Materials Act
Nds.Rpfl.	*Niedersächsischer Rechtspfleger* (legal periodical)
NJW	*Neue Juristische Wochenschrift* (legal periodical)
OECD	Organisation for Economic Cooperation and Development
OLG	Oberlandesgericht Higher Regional Court
OLG Ffm.	Oberlandesgericht Frankfurt am Main Higher Regional Court of Frankfurt am Main
OLGZ	Entscheidungen der Oberlandesgerichte in Zivilsachen Higher Regional Courts Judgments in Civil Cases (collection of cases)
PflichtversG	Pflichtversicherungsgesetz Compulsory Insurance Act
PHB	Bedingungen für die Produkthaftpflichtversicherung Conditions of Product Liability Insurance
RabattG	Rabattgesetz Discount Act
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht* *Rabel's Journal of Private Foreign and International Law*
RBG	Rechtsberatungsgesetz Legal Advice Act
Ref.E.	Referentenentwurf officials' draft; preliminary draft
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen Supreme Court Judgments in Civil Cases by the former Reichsgericht
RGRK	Reichsgerichtsrätekommentar (commentary on the Civil Code)
RZ	Randziffer reference number

SchuldR	Schuldrecht law of obligations
StGB	Strafgesetzbuch Penal Code
UNICEF	United Nations Children's Fund
UWG	Gesetz gegen den unlauteren Wettbewerb Act Prohibiting Unfair Competition
VAG	Versicherungsaufsichtsgesetz Insurance Supervision Act
VBZ	Verbraucherzentrale Consumer Advice Centre
VersR	*Versicherungsrecht* Insurance Law (periodical)
VO	Verordnung order, decree
VPK	*Verbraucherpolitische Korrespondenz* (periodical of the consumer's umbrella organisation)
VVG	Versicherungsvertragsgesetz Act on Insurance Contracts
VwGO	Verwaltungsgerichtsordnung Act on the Constitution of and Procedure in Administrative Courts
VwVG	Verwaltungsverfahrensgesetz Act on Agencies' Procedure of Administration
VZ	Verbraucherzentrale Consumer Advice Centre
WiVerw	*Wirtschaftsverwaltung* (legal periodical containing reports and judgments on economic administration law)
WM	*Wertpapiermitteilungen* (legal periodical containing reports and judgments on securities law)
WRP	*Wettbewerb in Recht und Praxis* (legal periodical containing reports and judgments on competition law)
WuW	*Wirtschaft und Wettbewerb* (legal periodical containing reports and judgments on competition law)
ZAW	Zentralausschuß des Deutschen Werberates (Central Committee of the German Advertising Council)
ZdK	Zentralverband des Kfz-Gewerbes Central Association of the Automobile Trade
ZFU	Zentralstelle für Fernunterricht Central Agency for Correspondence Courses
ZHR	*Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* Journal of the Entire Commercial and Business Law

ZLR	*Zeitschrift für Lebensmittelrecht* Journal of Food Law
ZPO	Zivilprozeßordnung Code of Civil Procedure
ZRP	*Zeitschrift für Rechtspolitik* Journal of Legal Policy
ZVP	*Zeitschrift für Verbraucherpolitik* Journal of Consumer Policy

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CHAPTER 1

General Remarks on the Consumer's Position in German Law

I GENERALITIES

1 It can be noted that in the Federal Republic of Germany during the past decade the issue of consumer protection has increasingly been taken up by the legislator, the courts and jurists[1]. As a result of legislation, but also as a result of court practice, the traditional legal system of the Federal Republic as it manifests itself in the traditional distinction between civil law and public law is superimposed by a new field of law, *consumer law*.

To many people it appears that the development and formation of consumer law these days constitutes a process as fundamental as the development of labour law at the beginning of this century. This process does, of course, meet with resistance and criticism: advocates of a legal conception conforming to the traditional law offer fierce resistance to the development of consumer law and try to fit it into the traditional categories of civil law and public law[2].

It is the task of this study to give a comprehensive description and critical evaluation of consumer law in the Federal Republic of Germany. The main emphasis will be placed on *legislation*, which is accorded a leading role in this context. However, it does not suffice to consider merely legislative acts. They are often put into concrete terms only through *court practice* and it is only then that their effects on consumers, enterprises and government institutions are readily grasped and that they become practicable. In addition, it is worth mentioning that the courts where they enjoy a wide scope of interpretation and regulation, e.g. in connection with general clauses (Nos. 104, 165, 265) under civil law and under the law of competition, may pursue or, conversely, preclude a policy of consumer protection, although in principle here they also purport to administer and not to lay down the law[3].

A comprehensive conception of consumer law also includes institutions which are not created by law, but flow from 'self regulation'[4]. The entire system of standardisation should be mentioned here: it was created as a 'self-help' of industry and contains quasi-government regulations in the area of labelling and product safety (Nos. 75, 161)[5]. A similar process may be noticed in the area of what is known as 'self-control in advertising' (No. 126). Standard form contract conditions are often based on concerted action, e.g. recommendations by associations (No. 309). With respect to consumer law two questions are of particular importance: the extent to which the state exercises or controls 'the law laid down by industry itself'; and in what way do consumer organisations as

a collective participate in shaping the law[6]. At this point it should be pointed out that — unlike the situation in labour law — collective regulation by way of coalitions seems hardly to be developed. This is due to the lack of representation of consumers by organisations (No. 6) and the poor ability of consumers to organise (No. 9). It appears to us that, despite these problems of consumer representation, there should be here an important possibility of furthering the development of consumer law.

Consumer law must also be evaluated in terms of its *actual working*. So far, little reliable information is available to us. That is why the following questions arise. Are the provisions of consumer law applied by those concerned (enterprises)? How is consumer law enforced? What gaps in enforcement are discernible? Who benefits from the provisions of consumer law? Are there any findings as to whether the effects of regulations are specific to certain groups of the population? Are consumers, particularly those from the so-called marginal groups, in a position at all to make use of the regulations and remedies made available to them? Can proposals to reform the law be inferred from the knowledge of the actual working of consumer law?

II REMARKS ON THE CONSUMER'S SOCIO-ECONOMIC FUNCTION IN THE ECONOMIC SYSTEM OF THE FEDERAL REPUBLIC OF GERMANY

1 Consumption and consumer

2 Consumer law as a new legal category owes its development to the shifts and changes that have occurred in the socio-economic system of the Federal Republic of Germany. The economic system in this country is characterised by the existence and prevalence of *market mechanisms* in the area of production, distribution and consumption[7].

'Consumption' is a category which presupposes the existence of a market where buyers' wishes meet with offers made by manufacturers, traders and suppliers of services. Accordingly, a consumer is any person who as a buyer seeks to satisfy his needs in the market.

A notion of consumption and the consumer as non-specific as that is of no use in explaining the economic peculiarity of consumer law. It disregards the relation of 'consumption' to society and thus the consumer's position in the social community. It is unable to explain why the legislator made this 'natural' function of consumption the pivotal point of his intervention.

2 Consumer sovereignty

3 More of a theory setting political standards is the theory that links the consumer's socio-economic function to the idea of consumer sovereignty[8].

This is in line with the classical market theory in so far as the consumer by deciding and shifting his requirements controls production and distribution. If this consumer sovereignty is impaired, e.g. through suppliers' or traders' market power, consumer sovereignty must be restored by means of consumer policy and possibly consumer law. The consumer's function, namely to control

market processes, and the right to governmental and political action, namely the restoration of consumer sovereignty, coincide as a tendency, even if in the process of economic concentration disparities are admitted.

The thesis of consumer sovereignty pervades more or less clearly various political programmes for consumer protection and specific regulations[9], particularly in connection with measures relating to competition and information policy (Nos. 43, 100). However, modern consumer research has shown that the thesis of consumer sovereignty in its different varieties is largely a mere illusion and that it is impossible to restore it through political and legal measures[10]. The relative causes have often been mentioned in the political economy of capitalism and can only be repeated: the process of concentration in the area of suppliers, of late also in the area of traders, tends to impair the consumer's choices[11]. In this connection it is not important to measure in detail the degree and forms of market power in particular markets, as, for instance, is done by the market theory. Rather, it is important that as a result of his isolated, passive and receptive position the consumer is *a priori* inferior to producers and traders operating on the market. Hunzicker has rightly pointed out that the structure of communication on markets is carried into effect in an asymmetrical and unilateral way at the expense of the consumer[12]. This becomes the more critical, the higher the degree of concentration and the smaller the possibility for the consumer to exert an influence on suppliers by shifting his demand or even by refraining from satisfying it.

In the area of marketing and advertising, enterprises have created instruments by which they try to influence the structure of the consumer's needs and preferences to their liking[13]. Conversely, consumers have no opportunity of informing suppliers about their consumption interests and of articulating them politically[14].

Criticism of this thesis of consumer sovereignty does not exclude that in a particular case a clever consumer or a group of consumers, specifically in the higher income brackets, may succeed in securing himself or themselves optimum conditions to satisfy his or their needs (it being quite possible for legislation to back them up), in preventing suppliers from totally missing consumer needs in production and in ensuring competition, specifically competition based on substitutes, also on markets with high concentration ratios and the like. The consumer's partial encroachment on the structure of communication of the market does not alter in principle the one-sidedness and asymmetry of this communication structure.

3 The need to protect the consumer

4 If the thesis of consumer sovereignty does not get us any further on our way to clarify legal intervention in favour of the consumer, we may ask whether or not the consumer as the weaker party is in need of protection. Indeed, we conclude from many political programmes and regulations that the consumer is being 'exploited' and therefore is in need of protection, a fact which is denied energetically by suppliers[15]. In this global wording, the thesis of need for protection is certainly not tenable and has not been verified empirically. As under consumer protection legislation the rich and the poor, buyers of a luxury car as

well as of a second-hand car[16], are all considered to be consumers, it is hardly possible in terms of empirical sociology to speak of the same need for protection in each case.

It is at this point that a dilemma of consumer policy and consumer law becomes apparent that has not yet been solved to date. Research in America on the subject of 'The poor pay more'[17] has shown that poor consumers are specifically detrimentally affected by the deficiencies of the market and that they are practically beyond the reach of the traditional instruments of consumer policy[18]. On the contrary, present consumer policy seems to be intended for the middle classes earning a good salary; this is proved by the reading of test magazines and their readers[19].

Within the scope of this study it is impossible to show how to get out of this dilemma. Taking into account this knowledge it seems at least possible, though, to point out present deficiencies under the existing law and to describe those business practices which hit poor consumers especially hard, e.g. manipulative promotional activities (coffee party excursions — equivalent to Tupperware parties — and the like) (No. 105), unfair contract terms (No. 264), and usurious credit brokerage (No. 346). In this respect consumer law may well work particularly to the benefit of the lower classes, provided it allows for their position and may thus *also* gain sociopolitical momentum. In this regard consumer law is *also* of socio-political importance.

Nevertheless, *legally* it does not yet seem possible in general to go on from the specific need for protection felt by an individual consumer or by a group of consumers in order to ask for regulations and determine their scope of application. Rather, it turns out to be necessary to look for a general economic category demanding an independent consumer law and to differentiate under a consumer law so conceived, depending on a concrete case of need for protection.

4 Satisfying consumer needs as a basis of consumer law

5 As a central criterion in determining the consumer's socio-economic position, we shall employ the distinction to be found in political economy between the value-in-exchange (Tauschwert) and the value-in-use (Gebrauchswert)[20]. In the sphere of production and distribution, values-in-use (goods, services and the like) are produced and turned over in order to flow back to the enterprises in the form of values-in-exchange (money and the like). However, this dialectic of conversion of the value-in-use to the value-in-exchange does not apply to the consumer. He *acquires values in use for their sake* and employs values-in-exchange, specifically money, in making use of goods and services for the renewal of his own working capacity and that of the collective. To the consumer, in contrast to enterprises in the field of production and distribution, it is not the value-in-use as a subsequent value-in-exchange that matters, but the value-in-use of the merchandise or service as such. That is why the economic interests coming into play in such a process necessarily differ from those coming into play in the preceding exchange processes.

There is a necessary (contradictory) contrast[21] between enterprises offering on the market values-in-use to have them flow back as values-in-exchange and consumers acquiring values-in-use as such in order to use them in the renewal of

their working capacity (household, leisure time and the like). Because of the existence of market mechanisms and the prevalence of interests of enterprises in values-in-exchange, the consumer's interest in values-in-use tends to be endangered. Consumer law tries to oppose this process by intervening in the structurally conditioned functional gaps in the market[22]. It wants to prevent enterprises from asking excessively high prices which may well be asked on the 'market' (No. 29). It wants to oppose a one-sided communication structure on the market by controlling advertising (No. 79) and contract terms (No. 264). It wants to enable the customer to get objective information (No. 43). It wants to maintain the customer's value-in-use interest in a safe product (No. 128), in his expectations as to quality (No. 194), in an after-sales service (No. 235) and in reasonable credit terms (No. 337). Lastly, it wants to make available to the consumer effective means to safeguard his interests judicially and extra-judicially (No. 357).

III CONSUMER ORGANISATION IN THE FEDERAL REPUBLIC OF GERMANY

1 The principle of organisation on the basis of representation

6 Consumer policy and consumer law generally assume that an individual consumer is isolated as regards his economic and legal interests. Consumption, as is apparent from the functional analysis made above, is at the same time also a *collective*, that is, a *social phenomenon*. The question is whether consumers maintain their rights also collectively and, if so, in what forms of organisation.

In the Federal Republic of Germany there is no collective representation of consumer interests. Rather, the interests of consumers are safeguarded by way of *organisations on the basis of representation (Fremdorganisation), i.e. consumer institutions which are government subsidised or sponsored otherwise*[23]. Their legitimacy has recently come under severe criticism, especially on the background of consumer research directed at the creation of a countervailing power[24].

Organisations on the basis of representation may be found in five sectors[25].

(*aa*) *The Arbeitsgemeinschaft der Verbraucher* (AgV) (Association of Consumers) is an umbrella organisation domiciled in Bonn in which organisations participate that claim to represent the consumer's interest without, however, having to furnish proof to that effect in each case. That is why the AgV consists of very heterogeneous associations; it is an *organisation on the basis of indirect representation* which receives government subsidies. The AgV is concerned mainly with articulating the consumer's interest in a political way and advises the government as well as various other organisations on these matters at a national and at a European level.

(*bb*) The structure of the *Verbraucherzentralen der Länder* (consumer centres of the German Länder) is likewise that of an organisation on the basis of representation. Usually, their members are associations only; individual members are an exception and are carefully selected by the boards. Consumer centres are, so to speak, entrusted with the work at the base: consumer counselling, consumer

education, and of late also legal advice as well as bringing collective actions under the Gesetz gegen den unlauteren Wettbewerb (UWG) (Act Prohibiting Unfair Competition) and the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGBG) (Standard Form Contracts Act). Consumer centres in the German Länder, with the exception of the city-states, in addition maintain local advice centres to which individual consumers may turn with their problems. The emphasis of their work is on information and advice to the individual, the effectiveness of which is doubted[26]; also, these centres are largely working for the middle classes. With the exception of the Consumer Centre of Baden-Württemberg, they have not yet become active in the field of the collective action[27]. Following some initial difficulties, they have generally been permitted to give legal advice which seems to be a matter of first priority (Nos. 358ff). More recently, they have participated in various complaint procedures to settle consumer complaints (No. 367). Consumer centres are usually financed jointly by the German Federal and Länder Governments. This joint financing has recently been contested on constitutional grounds.

(*cc*) A relatively independent and central consumer institution is the *Verbraucherschutzverein* (Consumer Protection Association) in West Berlin. By way of delegation of functions, this institution attends to prosecution within the framework of the collective action. It is likewise an organisation on the basis of indirect representation and is government subsidised.

(*dd*) Another institution on the basis of representation which is of relevance to consumer policy is the *Stiftung Warentest* in West Berlin. It is a foundation under private law capable of acting as legal entity and is supported by the Federal Government and other consumer institutions. As evidenced by its by-laws, it is in charge of the product test system, i.e. the determination of objectifiable, comparative criteria of the value in use of goods and of late also of services (travel, insurance and the like)[28]. It derives its funds largely from the proceeds of sale of the 'test' magazine. In addition, it operates in the area of standardisation (No. 161) and product labelling (No. 76).

(*ee*) To improve education and counselling, the *Verbraucherinstitut* (Consumer Institute) was founded in West Berlin in late 1978 as a foundation under private law. The Institute is designed to develop advanced training programmes for personnel engaged in consumer counselling. The extent to which it will in addition become active in the entire area of consumer education, e.g. at schools and universities, is still open. We regret to say that the Institute is not competent to give legal advice to consumers (see Chapter 9, Nos. 358ff), not even in the sense of training consumer advisers.

2 Trade unions as consumer organisations?

7 The position of *trade unions*, particularly that of the individual trade unions united in the Deutscher Gewerkschaftsbund (DGB) (German Trade Unions' Federation), with regard to the representation of the consumer's interest is still largely undecided in the Federal Republic. Trade unions represent mainly

employees' interests and are constitutionally legitimised to do so pursuant to the freedom of association and collective bargaining as laid down in Art. 9, para. 3 Grundgesetz (GG) (Basic Law). They exercise in particular autonomy in negotiating wage rates and the right to strike. However, as the interests of employees and consumers often tend to go in the same direction, particularly as concerned with the value in use, it seems to be a legitimate task for the DGB to speak also for the interests of consumers[29]. On the occasion of the 10th Federal Congress in 1975, the DGB advanced pertinent demands in terms of consumer policy and included an appropriate wording in its by-laws[30]. In this way the DGB or its trade unions contribute to the consumer's political representation. Consumer counselling proper — the enforcement of individual or collective claims — is not handled by the DGB though, unlike the case in labour and social welfare law. It cannot be predicted yet whether this will change in future.

Although we are in favour of trade unions representing the consumer in terms of consumer policy, we should be well aware of the fact that *conflicts* may arise between the interests of employees and consumers[31]. This becomes obvious especially if, for example, car manufacturers with the consent of trade union representatives demand price increases which are contrary to the consumer's interest in low prices. Such conflicts of goals also exist in other areas of trade union activity and flow from the socio-economic bases of the market system. It seems possible to conceive them as merely 'contrary' but not as contradictory opposites, which may be reconciled in a particular case[32].

3 Other representation of the consumer's interest

8 In addition to the general bodies of consumer representation, there are in the Federal Republic of Germany numerous bodies representing special consumer interests. These are for example:

(*aa*) The organisation of *tenants* which will not be described here, because the real property market is not a subject of our study.

(*bb*) A special body representing consumer interests in the area of instruction and courses is the *Aktion Bildungsinformation* in Stuttgart. It represents the interests of students, particularly in correspondence courses, and in this respect has exerted an influence on statutory provisions (Nos. 258ff) and prosecutes violations of the law by way of the collective action[33].

(*cc*) The associations of motorists, specifically the Allgemeiner Deutscher Automobilclub (ADAC) (General German Automobile Club) and the Automobilclub von Deutschland (AvD) (Automobile Club of Germany), also see themselves as consumer organisations so far as the interests of motorists are concerned. They exercise an influence on manufacturers, e.g. in car production, testing, safety regulations and the like, and cooperate in the drafting of contracts for the sale or repair of motor cars (No. 309). On an increasing scale they also deal with complaints and conciliation matters (No. 367). However, they may be termed consumer associations in a very special sector only and apart from that see themselves as advocates of motorisation, as the 'lobby of

motorists', so to speak. This activity may clash with other consumer interests, e.g. in speed limits, safety cars, environmental protection and the like. That is why we can speak of consumer organisation to a very limited extent only. Also, they do not institute collective actions.

4 Problems of self-organisation of consumers

9 On the whole, the dilemma of consumer organisation in the Federal Republic of Germany is rightly pointed out in the sociological discussion. One reason is that consumer representation is largely determined by organisations on the basis of representation and in the theoretical sense of democracy is not assigned genuinely to articulate the consumer's interests. Here consumer interests are often equated with the interests of associations and functionaries. On the other hand, attempts at a self-organisation of consumers have so far ended in failure or because of the risk of failure have not been made at all. Exceptions are local consumer associations and spontaneous consumer initiatives[33a].

So far, there has been no way to get out of this dilemma, even if various initiatives in this direction are under discussion. Accordingly, Czerwonka, among others, suggests[34] a policy of 'selective stimuli' to promote self-articulation of consumer interests, e.g. by providing shopping tips, assistance in law enforcement, and the like. Biervert[35], among others, argues for a model of self-organisation enabling consumers to take part in the decision-making process, which by way of discussion will develop and articulate consumers' needs and demands. The AGBG (No. 294) also provides that associations with more than 75 individual members may institute a collective action and in this regard calls on consumers to organise of their own accord. There is little practical experience with all these proposals as yet.

IV CONSUMER POLICY AS A GOVERNMENTAL ISSUE

1 Consumer-policy programmes

10 In the course of the discussion about consumer policy in the industrial states, but at the latest since President Kennedy's well known State of the Union message in 1962[36], consumer policy has also been considered a governmental issue of the utmost importance in the Federal Republic. In concrete terms this manifests itself in that the Federal Government, since the so-called coalition of Social Democrats and Liberals has come into power, has initiated a batch of measures and summarised them in two Consumer Reports of 1971[37] and 1975[38].

(*aa*) The *Consumer Report of 1971* makes some critical comments on the position of the consumer, especially in view of the advanced concentration of enterprises. The consumer's market position will be improved by governmental measures enabling him to make better use of his chances.

The *Consumer Report of 1975* demands that the consumer be *active* and that freedom of consumption and contract be protected. The following objects of consumer policy are mentioned:

— strengthening of the consumer's position on the market through the maintenance and promotion of workable competition in all sectors of the economy;
— information and advice to the consumer on basic economic connections, current market tendencies, proper market behaviour and economical house keeping;
— improvement of the consumer's legal position and protection of the consumer against deception, unfair sales practices and contract terms which are unreasonably prejudicial to him;
— safeguarding the supply of foodstuffs which are optimal in terms of quality and quantity, at the best possible prices;
— comprehensive protection of the consumer against risks to his health and an environmentally acceptable design of production and products;
— best possible supply of the customer with public services;
— safeguarding the supply of low-cost housing with optimum town planning conditions being taken into account;
— strengthening and streamlining of the bodies protecting interests in terms of consumer policy and safeguarding the consumer's interest in the case of quality labelling and standardisation.

The analysis of the text reveals three central elements in the area of legal consumer policy: *competitive policy, informative policy* and *protective policy*[39]. In addition, other highly heterogenous objectives are mentioned which have only little to do with consumer policy proper, but concern economic, social and other policies.

(*bb*) The parties and political organisations have also submitted lists of consumer policy objectives and measures which differ depending on the extent to which the market is relied upon to secure the consumer's freedom of choice or on whether policies of intervention are needed to enforce the consumer's interests. We shall not go into details here, but refer to the documentation presented by Czerwonka-Schöppe[40].

(*cc*) So far, governmental consumer policy has hardly been reflected in the *establishment of institutions*. There is no central political authority in charge of consumer policy, but the ministries concerned in each case also deal with consumer policy which often has to be coordinated with other interests. The Ministry of Justice, for instance, is responsible for matters of unfair competition, advertising, unfair contract terms, consumer credit and law enforcement, unless special products or services (drugs, foodstuffs and correspondence course contracts) are concerned, which again belong to other departments. The Ministry of Economics deals primarily with antitrust law and consumer information. The Ministry of Agriculture is in charge of the law of foodstuffs. The Ministry of Health deals with the law of drugs and related areas, e.g. advertising of cigarettes and cosmetics. The Ministry of Culture and Education centrally coordinates correspondence courses. The confusion over the division of responsibilities not only creates problems of coordination which are to be solved through appropriate horizontal 'inter-ministerial consumer committees', but also results in noticeable deficiencies in policy.

Generally speaking, the Ministry of Economics in the German Federal and Länder Governments is regarded as being the primary institution responsible for consumer policy. As regards the machinery, this is underlined by the fact that one official from each, responsible for consumer affairs, is appointed at the ministry. So-called *Consumer Advisory Councils* (Verbraucherbeiräte) constitute a sort of information representation of the institutions (Nos. 6ff) and competent scientists participating in consumer activities. The advisory councils attached to the Federal and some German Länder Governments make recommendations and comment on general consumer policy problems and projects (e.g. in legislation). These recommendations are not in any way binding upon the ministries as may be demonstrated, for instance, by the example of the reform of the price recommendation law (No. 28): the consumer advisory council attached to the Federal Minister of Economics has for some time requested that this instrument be abolished, while the Minister of Economics has been speaking up vehemently for its retention. A further drawback of consumer advisory councils is that they lack both a formal legal basis and independence. The minister concerned has a completely free hand to appoint the council's members and to determine the organisation of their work; the consumer organisations' right to propose members has to be taken into account only indirectly.

2 Critical evaluation of present consumer policy — the need for alternative conceptions

11 The consumer policy outlined above is based on the so-called *market paradigm*. According to that policy the market, while having to be protected against defects and dysfunctions, is basically a workable instrument to safeguard the consumer's interest in an optimum way. In this respect consumer policy *conforms to market principles*[41]; it continues to be protection in response to social grievances, as Biervert has set forth[42]. As far as that goes it will meet with a wide consensus, as it does not change anything in the economic system and ultimately also serves the true interests of suppliers[43].

On an ever-increasing scale, however, the question is raised as to whether the restriction of consumer policy to competitive, informative and protective policies suffices in view of accelerated concentration ratios, a communication structure which continues to be unilateral, the continued dispersion of the consumer, and the like. This becomes very clear, for instance, in the discussion about advertising law (Nos. 92ff). Furthermore, it is questioned whether consumer policy measures, particularly in the area of informative and protective policies, achieve their objectives in the first place, especially as regards the socially disadvantaged groups of consumers. If politicians, legislators and judges base their considerations on the prudent consumer, who in a particular case may also need protection (although the real situation is quite different), consumer policy encounters problems as regards its legitimisation. This calls for a consumer policy which is more of a market-regulating type[44] and for an attempt to subject certain consequences of the market mechanism to stricter control in the interest of the consumer and to mobilise a countervailing power by consumers. Others speak of the need for a 'consumer policy which tries to

influence the consumer at an early stage', which means the attempt to let consumers as a collective share as early as possible in the decision-making processes of industry[45], e.g. in the area of advertising control (Nos. 119ff), standard form contract conditions (No. 309), standardisation (Nos. 133, 161), and law enforcement (Nos. 366ff). However, these tendencies are still in a state of flux.

The constitutional legitimacy of such a market-correcting consumer policy flows from the *idea of the welfare state* (Sozialstaat) as laid down in the Basic Law[46]. It accords the state a wide scope of intervention and the socially relevant groups a wide scope of action which may well collide with the market positions held by suppliers. Such collision must be weighed within the framework of the principle of reasonableness[47] on the basis of the so-called basic rights of the enterprises concerned in each case. The question becomes more pressing in connection with restrictions on advertising (Nos. 100ff).

V PRINCIPAL DIRECTIONS OF CONSUMER LEGISLATION AND COURT PRACTICE IN THE FEDERAL REPUBLIC OF GERMANY

12 In the following, we shall point out briefly the most important directions in which consumer legislation and court practice have gone to develop a separate consumer law. The area of consumer education and consumer guidance must be disregarded in just the same way as the area of economic advice to the consumer. The main items in consumer legislation are competitive policy, informative policy and protective policy. Issues of consumer representation and promotion of the consumers' countervailing power are hardly to be found (yet) in legislative programmes.

1 Competitive policy

13 Consumer policy in the Federal Republic of Germany is based on the unadmitted premise that the maintenance and promotion of 'workable competition' best serves the interest of the consumer[48]. Competitive policy in the Federal Republic of Germany rests on the two pillars of fight against restraints of trade (this is done by the Federal and Regional Cartel Offices) and prevention of unfair and misleading competition (this is done by means of the law of unfair competition and by supplemental acts). In the law prohibiting restraints of competition, *price competition* plays a prominent part[49]. Legislative measures, e.g. to abolish resale price maintenance, to regulate price recommendations and fight abuses of market power, are of direct importance to consumer policy, even if antitrust law protects the consumer only *indirectly*[50].

According to German jurists, the law of *advertising* and *trade practices* is a sub-category of the law of unfair competition which recently, particularly through court practice, has incorporated in its system the idea of consumer protection. However, these systems collide with the traditional protective purposes of the law of unfair competition and German jurists have not yet been able to come to grips with these collisions for the purposes of consumer protection.

The main object continues to be the prevention of 'unfair' degenerated competition[51].

2 Information policy

14 In the past decade information policy in consumer law has been the subject of numerous initiatives and has been an issue specially promoted within the framework of the EC. Its main purpose is to instruct the consumer about the composition, safety, value in use, etc., of goods or services as well as about his rights and duties. The emphasis here is on public law under which numerous so-called marking regulations have been issued. But the idea of information is also to be found in the law of contract and law of torts, and associates with the aims of protective policy[52]. In the law of advertising first signs pointing to the regulation of advertising along the lines of objective consumer information may be noted (No. 100).

3 Protective policy

15 Protective policy in favour of the consumer certainly accounts for the major part of legislative measures during the past decade. Protective policy has two objectives: it is designed to protect the *individual* consumer's economic and legal interests, e.g. protect him against harm, secure his contractual freedom, enable the enforcement of his rights, and prevent fraud; and at the same time it aims at influencing the behaviour of enterprises, which shall offer him only harmless products, put on the market high-quality goods or services, draw up contracts acceptable to him, instruct him about his rights and provide him with means to enforce his rights (with governmental agencies and consumer organisations participating). The comprehensive means of intervention pervade practically all fields of law. What is striking, though, is that intervention takes place merely at certain points, e.g. in the case of certain types of contract, and that it is still far from *regulating the consumer's interests in a comprehensive way*. Even where the codification of parts of a consumer law is far advanced, there are few implementing regulations which are required in the interest of the consumer, e.g. concerning the definition of warning notices in the case of tobacco products and consumer goods (No. 55).

4 Consumer representation

16 Representation, not taking into account political participation, is not very advanced in the consumer law of the Federal Republic of Germany and in practice is to be found only in the design of the collective action in the UWG and AGBG (Nos. 118, 293). In other fields of law, e.g. antitrust law, food law, or the area of law enforcement, there are no such instruments. Collective rights to enforce provisions under antitrust, food or safety laws do not exist either. This is a necessary consequence of the principle of consumer representation through organisations. In this respect there is a fundamental difference between German and American consumer laws.

VI THE CONCEPT OF THE CONSUMER IN LAW

1 Different statutory criteria

17 In the consumer law of the Federal Republic of Germany there is *no uniform concept of the consumer*[53]. This is already due to the blurred definition of the consumer's socio-economic function. German statutory provisions on consumer protection, unlike British provisions, do not go on from the concept of 'acting as consumer', but from other legal features. Often each act relevant to consumers obeys its own rules of application which results in considerable gaps. The different provisions on the application of the Abzahlungsgesetz (Instalment Sales Act) (Art. 8 AbzG), AGBG (Art. 24 AGBG) and of the Gerichtsstandnovelle of 1974 (Act to Regulate Jurisdiction Clauses) (Art. 38 Zivilprozeßordnung, ZPO, Code of Civil Procedure) may be recalled here. The essence of the relative statutory provisions is the legislator's decision to deny the *trader* (Kaufmann) within the framework of his trade (commercial transactions) the protection of certain regulations. In this connection distinctions are made as to whether or not a trader is registered in the Commercial Register, whether he is a 'full' or a 'minor' trader, whether other persons, e.g. public corporations, have to be treated as traders, to what extent professional men are equivalent to traders or rather to consumers, and the like.

In the law of unfair competition and of price marking the concept of the ultimate consumer does exist but is not defined with regard to consumer policy. In this context the ultimate consumer is any person who does not 'turnover' goods any further; for instance, the craftsman who manufactures a product from the goods supplied to him, the minor trader who buys goods in a wholesale market for his own requirements, possibly even the big industry manufacturer who uses goods in his production process[54].

Other acts again, for instance the food act, speak of 'household' (Art. 6 I, Lebensmittel- und Bedarfsgegenständegesetz (LMBG), Food and Consumer Goods Act) and determine the scope of application of food provisions accordingly. Finally, special acts regulate the scope of application relative to the individual case, for instance in the area of correspondence courses or in the law governing travel contracts (Nos. 247ff, 258ff). A participant in a correspondence course or in a tour is for all practical purposes a consumer within the meaning of the Act, without being defined as such.

2 The attempt to arrive at a uniform definition

18 The extensive legislation relating to consumer law has caused people to consider whether, despite the differences in the statutory concept of the consumer, it is possible to arrive at a concept of the consumer which is uniform in principle even if there are differences in the way it is applied. Since consumer law is the result of certain socio-economic structures and intervention strategies reflecting the government's policy, it must also be possible in principle to formulate a *general concept of the consumer* as a basic concept in law. Despite all the differences in application, there is a core common to all concepts of the consumer in law. This core is as follows.

(*aa*) Initially a consumer is a *private person* or a group of private persons striving to renew his or their working capacity through consumption in his or their private sphere. Thus there is a fundamental difference between the consumer and, for instance, *enterprises* which are governed by specific economic regulations, e.g. in the field of antitrust law[55].

(*bb*) If we talk of a consumer as a private person, we exclude any person who carries on a trade or business or supplies professional services. In a particular case, a consumer protection act may also be extended to include those activities, e.g. for the sake of protecting small and medium-sized firms.

(*cc*) The position of a consumer exists if his contracting party is an enterprise as defined above, but not if he enters into a contract with another private person, i.e. with another consumer, for instance when buying a second-hand car[56]. Here the socio-economic specifics of the position of a consumer do not apply. Unlike British law, German law does not go as far as that, which may be explained by a still insufficient understanding of consumer law.

(*dd*) The consumer's concrete need for protection, social status, income, etc., is (still) of no importance to the application of an act of law under the existing law: in applying consumer law the rich and the poor are 'equal'. However, protection may vary in intensity, for instance under the AGBG when the requirements of incorporation pursuant to Art. 2 are determined[57].

(*ee*) Consumer-law regulations concern the *market-related* activity of enterprises. Problems of internal business organisation, the enterprise/employee relationship and similar matters are not covered by consumer law.

(*ff*) *Government institutions* come under consumer law only if they are active in a market-related way, e.g. when offering public services in the area of transport and energy. Governmental control functions are subject to consumer law in so far as they affect the market-related activity of enterprises, e.g. the control of foodstuffs and drugs.

3 Consumer law as an independent field of law

19 The extent to which a special law for the consumer, a *consumer law*, does exist is a highly controversial issue in view of the government's active regulative activity[58]. This question is of importance primarily in the field of legal theory and will not be dealt with in greater detail in this study. The extensive analysis of legislation and court practice has shown that a field of law has developed here which is beyond the reach of the traditional categories of the law.

The special character of consumer law follows from the socio-economic specifics of the consumer's position. Arguments against the specific nature of consumer law do not take account of changes in the law which have occurred specifically in the past decade. In terms of application, the recognition of a special consumer law plays a part where it is a question of fitting the protective purpose of new consumer acts into the present law. If the special character of

consumer law is denied, legislative measures aiming at consumer protection must be subordinated to the general principles of legal construction, e.g. the law of standard form contract conditions must be fitted into the general law of contracts[59]. Conversely, if the special character of consumer law is emphasised, it has to be construed in accordance with its protective purpose and not in accordance with the general principles of legal systematics. Throughout this study, we have attempted to demonstrate the special character and protective purpose of consumer law and to show the rules of its construction.

VII SURVEY OF THE METHODS OF CONSUMER PROTECTION

1 Starting point in the legal system

20 In this study the methods of consumer protection will be explained and described in their factual connections. As regards legal systematics, classification into civil-law, criminal-law and administrative-law means of consumer protection prevails[60].

(*aa*) In the law of the Federal Republic of Germany, *civil law* occupies a prominent position. This is explained by the fact that civil law regulates and determines the contractual and non-contractual legal relations between consumers and enterprises on the market. As it here became especially apparent that enterprises were guilty of gross abuses in relation to consumers, the need for legislative intervention was felt. Generally speaking, the consumer's economic and legal interests are directly affected by a transaction relevant to civil law. Therefore, it is only natural that civil law should play a prominent part in consumer law.

Less clear, though, is the part civil law plays where problems are concerned which exist prior to the formation of contractual relations, for instance in the case of advertising or the use of standard form contract conditions. Here, particularly in view of the idea of prevention, administrative regulations may be more appropriate than civil-law regulations[61]. All the same, in the area of unfair competition, misleading advertising and unlawful standard form contract conditions, German law concedes civil law control mechanisms priority over administrative ones. This choice of methods, which is not very convincing from the point of view of consumer law, is attributable on the one hand to historical and on the other to economic and legal grounds. More recently it has also been connected with the promotion of consumer interests by associations on the basis of representation and has resulted particularly in the institution of the *collective action* (Nos. 118ff, 293ff). It may, however, only take up grievances in certain cases, but is unable actually to eliminate unfair advertising techniques or illegal standard form contract conditions from the market.

(*bb*) *Administrative law* plays a part in the consumer law of the Federal Republic of Germany particularly where it is a matter of fighting against behaviour in restraint of trade and of enforcing measures to protect health, safety and the design of packaging. The provisions of antitrust law, on the one hand, and food law, the law of drugs, technical labour materials law, weights

and measures law, etc., on the other hand, are therefore of a public-law nature. They forbid or control, in general, practices which from the point of view of the consumer's interest are considered harmful or prejudicial. In the interest of the consumer they impose certain legal duties on the enterprises concerned, for instance regarding the marking of products or proof of effectiveness of a drug. The sanctions available under administrative law must, however, be seen on the basis of the principle of *reasonableness* (Verhältnismässigkeit[62]) in line with which they are to be kept as small as possible, usually being limited to fines for administrative offences. Further sanctions (bans on the marketing of products, duties to recall products) are viewed with scepticism under German as compared with American law (No. 132).

(*cc*) Methods of *criminal law in consumer protection*, apart from the general provisions on fraud, usury and fraudulent conversion, are hardly developed or enforced in the law of the Federal Republic of Germany. Unlike the situation under French and English laws, criminal law has been almost completely unable to shape the discussion about consumer law, so we cannot speak of specific consumer protection by criminal law. In the law of advertising it plays a negligible role (No. 125). In the law governing standard form contract conditions no criminal sanctions whatsoever exist. Criminal law as the law of petty offences merely serves to enforce administrative regulations.

2 Subjects of law enforcement

21 Another classification by methods of consumer protection may proceed from the subjects able to assert certain rights or enforce certain regulations. According to a preliminary analysis of the existing law, the following degrees of intensity may be distinguished which partly coincide with the criteria developed above, but are not identical with them:

(*aa*) The *individual consumer* continues to be the most important subject in the enforcement of consumer law, particularly as regards contractual relations and other relations under the law of obligations. He is also expected actively to offer resistance to measures taken by enterprises and to take appropriate steps. Here the consumer is presumed in principle to be a citizen versed in law — irrespective of his social status, education or knowledge of the law.

(*bb*) *Consumers' associations* have only limited possibilities of enforcing consumer protection, i.e. under the UWG and the AGBG. Officially, they do not participate in the institution and implementation of administrative proceedings.

(*cc*) *State control* is to be found within the framework of supervision of restrictive trade practices, general supervision of trade and supervision of certain branches of trade as well as in food law and the law of drugs. It often bears on the assertion of rights by individual consumers, particularly under the law of torts.

(*dd*) Under development are institutions of *self-regulation* and self-help in certain branches of the economy and a *joint* effort by enterprises, consumer organisations and the government to achieve certain objectives which are important in terms of consumer policy, for instance in advertising, trade practices, voluntary measures of labelling and product information. In general, an *indirect effort by the state* makes itself felt here, for instance through exemption from the operation of antitrust laws, through subsidising and financing, and through political influence. The methods of self-regulation and participation of consumer organisations in such efforts will also be evaluated in detail within the scope of this study.

3 The need for horizontal interlocking of the various methods of enforcement

22 The various methods of enforcing consumer law which still exist side by side urgently require *horizontal interlocking*[63]. Under the existing law first signs pointing in that direction may be noted; for instance, if certain forms of forbidden advertising regarding food law are termed unfair within the meaning of the UWG, if statutory safety standards give rise to civil liability and terms recommendations become controllable both under antitrust law and the law of standard form contracts. Through such horizontal interlocking it seems possible to improve the means of law enforcement altogether and systematically to make allowance for the *unity of consumer law*.

NOTES

1. v.Hippel, *Verbraucherschutz*, ed. 2 1979; id., RabelsZ 40 [1976], p. 513ff; Simitis, *Verbraucherschutz — Schlagwort oder Rechtsprinzip*? [1976]; Reich/Tonner/Wegener, *Verbraucher und Recht* [1976]; Reich, ZRP [1974], p. 187ff; id., *Markt und Recht* [1977], p. 179ff; Schricker, GRUR Int. [1976], p. 315ff; id., RabelsZ 40 [1976], p. 535ff; Tonner, DuR [1975], p. 119ff; Damm, JZ [1978], p. 173ff; Brinkmann, *Die Verbraucherorganisationen in der BRD und ihre Tätigkeit bei der überbetrieblichen technischen Normung* [1976]; Rebe, 'Verbraucherschutz', in: *Recht im sozialen Rechtsstaat*, Kritik vol. 5 [1973], p. 69ff; *Handbuch des Verbraucherrechts* [1976ff], ed. AGV and DGB; Hart/Joerges, Verbraucherrecht und Marktökonomik, in: *Wirtschaftsrecht als Kritik des Privatrechts* [1980], p. 83ff.
2. H.P. Westermann, AcP 178 [1978], p. 150ff; Lieb, AcP 178 [1978], p. 196ff.
3. This is justly pointed out by Ott, FS L. Raiser [1974], p. 403ff.
4. On these problems, cf. Mertens/Kirchner/Schanze, *Wirtschaftsrecht* [1978], p. 133ff.
5. Brinkmann, *op. cit.* (note 1), p. 57ff.
6. Cf. esp. Brinkmann, *op. cit.* (note 1), p. 97ff; Mertens *et al.*, *op cit.* (note 4), p. 141.
7. Reich, *Markt und Recht* (1977), throughout.

8. Cf. the representations and objections in Scherhorn, *Gesucht: Der mündige Verbraucher*, ed. 2 [1974], p. 16ff; Meyer/Dohm, *Sozialökonomische Aspekte der Konsumfreiheit* [1965], p. 38ff; *Wirtschaftlicher und sozialer Wandel in der BRD* [1977] p. 405ff (with a presentation of the different views).
9. Cf. the good representations in Czerwonka/Schöppe, ZVP [1977], p. 277ff.
10. Reich, *op. cit.* (note 7), p. 103f; Meyer/Dohm, *op. cit.* (note 8), p. 57ff; Biervert/Fischer — Winkelmann/Rock, *Grundlagen der Verbraucherpolitik* [1978], p. 48ff; Simitis, *op. cit.* (note 1), p. 97ff; Thiedig, *Suggestivwerbung und Verbraucherschutz* [1973], p. 21ff; Kroeber-Riel, *Konsumentenverhalten*, ed. 2 [1979], p. 588ff.
11. Scherhorn *et al.*, *Verbraucherinteresse und Verbraucherpolitik* [1975], p. 30ff; *Wirtschaftlicher Wandel, op. cit.* (note 8), p. 405.
12. Hunzicker, *Erziehung zum Überfluß, Soziologie des Konsums* [1972].
13. Kroeber-Riel, *op. cit.* (note 10), p. 589; Thiedig, *op. cit.* (note 10), p. 25ff; Biervert *et al., op. cit.* (note 10), p. 89ff.
14. Scherhorn, *op. cit.* (note 11), p. 40ff, points this out using the Hirshman theory on 'exit' and 'voice'; also Czerwonka *et al., Der aktive Verbraucher* [1976], p. 144ff.
15. Cf. minority opinion in *Wirtschaftlicher und sozialer Wandel, op. cit.* (note 8), p. 405.
16. Cf. the instructive facts in BGH NJW [1973], 452 concerning the law of instalment transactions.
17. Caplovitz, *The Poor Pay More* [1963]; also Williams, *Why the Poor Pay More* [1977]; Scherl ZVP [1978], p. 110ff.
18. No. 10ff; cf. also the findings of Naegele, *Konsumverhalten sozial schwacher älterer Menschen* [1977].
19. Biervert, *et al., op, cit.* (note 10), p. 134ff; Kroeber-Riel, *op. cit.* (note 10), p. 511ff.
20. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 8ff; Reich, *Markt und Recht* [1977], p. 180, 190ff; Biervert *et al., op. cit.* (note 10), p. 229ff; on this Hart/Joerges, *op. cit.* (note 1), p. 167ff.
21. Biervert *et al.*, p. 229.
22. Reich, *Markt und Recht* [1977], p. 197.
23. Scherhorn *et al., op. cit.* (note 11), p. 105ff.
24. Biervert *et al., op. cit.* (note 10), p. 64ff; Biervert *et al., Verbrauchervereine als Form der Selbstorganisation von Verbrauchern in der BRD* [1979].
25. Cf. the statements in Brinkmann, *op. cit.* (note 1), p. 5ff and Biervert *et al.*, p. 237ff.
26. *Meta-Enquête über die Entwicklung der den Verbrauchern dienenden Institutionen*, Metaplan [1975].
27. v.Falckenstein, *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* [1977], p. 40.
28. Brinkmann, *op. cit.* (note 1), p. 30ff; Hüttenrauch, ZVP [1977] p. 143ff; BGH NJW [1976], p. 620ff.
29. Tonner, DuR [1975], p. 119ff; Reich, *Markt und Recht* [1977], p. 225;

Tonner, ZVP [1979], 252; criticised by Petri, ZVP [1979], 260.

30. Angenommene Anträge des zehnten Bundeskongresses 1975 des DGB [1975], p. 52ff.
31. Scherhorn *et al.*, *op. cit.* (note 11), p. 31ff; Biervert *et al.*, *op. cit.* (note 10), p. 53ff.
32. Biervert *et al.*, p. 55; Braun-Wimmer, in: Biervert *et al.*, *Verbraucherpolitik in der Marktwirtschaft* [1978], p. 279ff; Minte, 'Zusammenhänge von Arbeit und Konsum als Problem einer aktiven Verbraucherpolitik', In: *Aus Politik und Zeitgeschichte*, B 24/78, p. 3ff.
33. v.Falckenstein, *op. cit.* (note 27), p. 35f.

33a. Biervert *et al.*, *op. cit.* (note 24) with empirical material.

34. Czerwonka *et al.*, (note 14), p. 197ff.
35. Biervert *et al.*, *op. cit.* (note 10), p. 217ff.
36. Printed in v.Hippel, *op. cit.* (note 1), p. 225ff.
37. In v.Hippel, p. 239ff.
38. BT-Drucks. 7/4181.
39. Simitis, *op. cit.* (note 1), p. 93ff speaks only of the policy of competition and transparency; he neglects the policy of protection; cf. Reich, *Markt und Recht* [1977], p. 217ff.
40. ZVP [1977], p. 277ff; also Biervert *et al.*, *op. cit.* (note 10), p. 46ff.
41. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 20f.
42. Biervert *et al.*, p. 39.
43. Cf. BGH NJW [1976], p. 622 on goods testing; resulting therefrom the criticism of Simitis, *op. cit.* (note 1), p. 135f, 209f.
44. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 21ff; Reich, *Markt und Recht* [1977], p. 214ff.
45. Biervert *et al.*, *op. cit.* (note 10), p. 233ff; Czerwonka *et al.*, *op. cit.* (note 14), p. 144ff; Martiny, 'Privater Konsum als öffentliche Aufgabe', in: *Aus Politik und Zeitgeschichte*, B 24/78, p. 24ff.
46. Reich, *Markt und Recht* [1977], p. 197ff.
47. Reich, *op. cit.*, p. 92ff, 109ff.
48. Cf. v.Hippel, *op. cit.* (note 1), p. 22 on competition as the consumer's 'best friend'.
49. Reich, *Markt und Recht* [1977], p. 271ff.
50. Reich, ZVP [1977], p. 227ff.
51. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 86ff; Schricker, GRUR [1974], p. 579ff.
52. Reich, NJW [1978], p. 519.
53. Schneider, BB [1974], p. 764ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 8ff; cf. also Reifner, ZVP [1978], p. 203ff; on this Bernitz, ZVP [1978], p. 214ff.
54. Basically on this see the Metro decision of the BGH, NJW [1978], p. 267, as well as Schricker/Lehmann, *Der Selbstbedienungsgroßhandel* [1976].
55. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 16f; on this the objections raised by Reifner, ZVP [1978], p. 203ff.
56. Reich, ZRP [1974], p. 190.
57. Reich, NJW [1978], p. 517; above (4).
58. Cf. on the one hand, Reich, ZRP [1974], p. 187ff; id., *Markt und Recht*

[1977], p. 190ff; Damm, JZ (1978), p. 173ff; Hart/Joerges, *op. cit.* (note 1), p. 91ff, 229; for a different view, see H.P. Westermann, AcP 178 [1978], p. 150ff; Lieb, AcP 178 [1978], p. 196ff.

59. Reich, ZVP [1978], p. 236ff and the criticism of Ulmer, ZVP [1978], p. 248ff.
60. Cf. Schricker, GRUR Int. [1974], p. 694ff (especially on the law of unfair competition).
61. v.Hippel, *op. cit.* (note 1), p. 35ff; below (117ff, 274ff).
62. Reich, *Markt und Recht* [1977], p. 110ff.
63. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 209; WiVerw (1977), p. 233ff.

CHAPTER 2

Consumers and Prices

I GENERALITIES

1 Overall price policy and consumer protection

23 The price at which goods or services are offered is the most important parameter of action to the consumer in addition to quality and safety. The price is an indication of whether certain goods can be consumed at all and by whom, an indication of how the consumer may shape his various needs and of what freedom of action he enjoys in actual fact. To him income and price policy are closely connected: any increase in his income in the form of wages, salary, pension or benefits will only have a positive effect on his real income unless such wage increases are 'eaten up' by increased prices. His *interest in the value in use (No. 5) of consumer goods relates especially to the price factor.*

(aa) These remarks at the same time suggest that determining of the price factor in a country's economy is not only a problem of consumer protection, but in general concerns the basic principles of the economy. The problem of prices has been given priority from the point of view of *exchange stability* and the *fight against inflation*[1]. This is also the starting point in the Federal Republic of Germany, i.e. in Art. 1 of the Gesetz über Stabilität und Wachstum (GStW) (Stability and Economic Growth Act) of 1967 and in Art. 3 of the Währungsgesetz (Currency Act) of 1948. Art. 1 GStW runs: 'In their financial and economic measures the German Federal and Länder Governments have to take into account the requirements of the macroeconomic equilibrium. Measures are to be taken in such a way that they, within the framework of the free-market system, contemporaneously contribute to the stability of the price level, a high degree of employment and the balance of payments equilibrium at a steady and appropriate economic growth'. This provision shows that price stability forms an integral part of the objectives of economic policy towards which the state may work through certain measures but which must *never be seen as isolated* objectives[2]. That is why the consumer's interest in price stability cannot be considered the only goal, but must be seen in connection with full employment, economic growth and the balance of payments equilibrium. It is also a decisive factor that, according to the German legal system, Art. 1 GStW does not include an actionable standard with the aid of which, for instance, an individual consumer and consumers 'as a whole' might force the state to pursue

a certain price policy. This provision is merely intended to be an *overall* enabling provision making it possible for the state to pursue the economic policy it considers appropriate for its objectives, with the general constitutional limitations to be observed.

(*bb*) Art. 3 of the Währungsgesetz, which in particular prohibits price index clauses in long-term agreements, additionally backs a policy directed at price stability which is also in the interest of the consumer. However, the German Bundesbank may grant permission to include such clauses, which deprives the provision of some of its effectiveness[3]. Furthermore, the courts have developed certain clauses escaping the prohibition, for instance for the purpose of adapting pension plans to changing economic conditions, which they do not measure against Art. 3 of the Währungsgesetz and which in a particular contract permit adjustment of the price to allow for inflation[4].

2 The market and the limit of usury

24 (*aa*) In terms of economic policy, the Federal Republic of Germany tries to satisfy the public interest and the consumer's interest in stable prices through a *consistent competitive policy*[5]. Disregarding certain exceptions, the determination of the price factor is left to the market. Prices determined by the market become effective in contracts with final consumers by way of appropriate agreements. The market principle and freedom of contract supplement each other; they are the decisive regulator of price setting and are thus of direct importance in terms of consumer policy[6].

(*bb*) There is a general limit to the principle of the market and freedom of contract only under the prohibition of usury, Art. 138, para. 2 Civil Code, Art. 302a Penal Code, Art. 4 Wirtschaftsstrafgesetzbuch (Code of Penalties for Economic Offences). The provisions on usury have also been revised in the interest of the consumer by the first Gesetz zur Bekämpfung der Wirtschaftskriminalität (Act to Fight Economic Criminality) of 1976[7]. Usury exists only if two requirements are satisfied, one being of an objective, the other of a subjective nature. As regards the objective requirement, there must be an *obvious disproportion* between performance and consideration. There are no general guidelines, but this obvious disproportion must be established in each incident; in the final analysis the courts decide on this matter in line with market conditions[8]. As regards the *subjective* requirement, the usurer must have exploited the other party's need, carelessness, inexperience or considerable lack of willpower. Owing to this subjective element, the fact of usury will usually exist in the case of marginal groups of society, for instance foreigners, poor consumers, elderly people and the like; in this way consumer protection offsetting some of the social inequities is possible (No. 4). Attempts at deleting the subjective element of usury have not yet become law. The provision on usury under criminal law resembles that under civil law and additionally requires intent on the part of the usurer.

All of this shows that the provision on usury does not in actual fact imply any restriction of the principle of price determination through the market and

through freedom of contract. On the contrary, this provision confirms freedom of contract and makes adjustments only in some extreme cases. That is why in legal practice the prohibition of usury, except for consumer credit transactions (No. 346), plays practically no role. This is even confirmed by the fact that the courts in the case of usury refuse to continue the contract for an appropriate consideration, but demand that the contract be completely null and void[9]. However, often it is not at all in the interest of the consumer to have a legal transaction concluded for a higher consideration annulled; rather, the consumer is interested in an appropriate reduction of the excessive price which is not possible under the existing law.

Consumer protection against excessive prices or price increases overall is based on the priority of the market principle and allows state intervention in exceptional cases only. This subject will be dealt with below. An accompanying factor for the purposes of consumer protection is clarity of price which is imposed as a legal obligation on enterprises competing in the market. The peculiarities of supranational price controls, for instance over steel and agricultural products by authorities of the EC, will not be dealt with here, although especially in this area the aspect of consumer protection through a system of minimum prices for the sake of the producer is neglected dreadfully.

II INDIRECT PRICE CONTROL THROUGH ANTITRUST LEGISLATION (GWB)

1 Significance of the GWB in terms of consumer protection

25 If the state as in the Federal Republic of Germany leaves price determination to market forces, it must take subsidiary measures to ensure that workable competition is maintained, especially price competition. Any determination of the price or of price elements outside the competitive system by means of agreements, business concentration and similarly coordinated action of enterprises on the market must be either prohibited by way of appropriate legal instruments or checked for abuses. Such is the function of antitrust law which in this respect also pursues a *protective purpose in terms of consumer policy*. For all that, it seems worth mentioning that in the discussion about the protective purpose of antitrust law consumer protection has not so far been ranked. While people are willing to concede that antitrust law pursues an indirect protective purpose for the benefit of the consumer, they reject the idea that it has a direct protective purpose. As the author has elaborated elsewhere, this opinion seems no longer justified, particularly in view of the comprehensive antitrust reform legislation of 1973[10]. At that time the legislator expressly noted that 'apart from the requirement of safeguarding the system of workable competition, priority had to be given to the promotion of competitive activities to restore economic stability and improve consumer protection'[11]. Likewise, individual provisions of the Gesetz gegen Wettbewerbsbeschränkungen (GWB) (Act Prohibiting Restraints of Competition) reveal that consumer protection has become a prime objective of antitrust law.

The significance in terms of consumer policy of antitrust legislation with regard to the control of the price factor in the market manifests itself in the following directions.

2 Prohibition of price agreements

26 (*aa*) Pursuant to its basic regulation in Art. 1 GWB, antitrust law prohibits specifically price cartels, price agreements, quota agreements, competitive bidding and the like. Enterprises competing in the market are forbidden to make agreements concerning the price factor and thus to exclude or limit price competition in relation to the consumer. With some qualifications, this is also understood as a principle concerning variants of price competition, for instance discount competition (Art. 3 GWB), with the Rabattgesetz (Discount Act) in this case limiting the announcement of discounts to final consumers[12]. So-called cartels designed to secure uniform rationalisation, and marketing cartels designed to bring about a common price policy among competing enterprises are subject to strict regulations pursuant to Art. 5, paras. 2 and 3 GWB, and practically do not occur in relation to final consumers.

(*bb*) The strict handling of the prohibition of horizontal restriction of price competition has even been extended through the Kartellnovelle (Amendment to the Antitrust Law) of 1973 and through court practice. Here we can mention only a few key words. The revised Art. 25, para. 1 also prohibits *coordinated action in restraint of trade*[13]. The Amendment was occasioned by a ruling of the Federal High Court in the so-called coal tar cases, which did not submit coordinated price increases by enterprises to the ban on cartels[14]. There continues to be great uncertainty, though, about what exactly is coordinated action in antitrust law[15], for instance in connection with the simultaneous price increases by car manufacturers agitating the German public quite regularly every spring. Since coordinated action requires a minimum of coordination, which reportedly does not exist in what are known as oligopoly situations, because the alleged 'market pressure' forces oligopolists to act in parallel, the prohibition is virtually ineffective in practice. Even recently such procedures by the Federal Cartel Office have not become known or have been unsuccessful.

(*cc*) Other cases of indirect agreements among competing enterprises concerning the price factor are so-called *sales organisations* which are under no obligation to sell exclusively through the organisation and so-called *price information systems*. A characteristic feature of these institutions is that, without a formal price agreement, it is possible to achieve, either by agreement to the effect that products will be sold exclusively through the sales organisation or by disclosure of the price to competitors, that all enterprises *de facto* offer their products at the same price, specifically if they form an oligopoly. The German courts have meanwhile subjected such institutions to the ban on cartels or the prohibition of coordinated action[16]. They have come to advocate principles similar to those advocated by the European Court of Justice under the European law of competition.

3 Vertical price fixing

27 What is known as vertical price fixing, especially resale price maintenance, is prohibited pursuant to Art. 15 GWB. The most important result in terms of consumer policy of the Kartellnovelle of 1973 is the abrogation of resale price maintenance; only price fixing concerning books and published material is allowed[17]. This is to render possible the marketing of the same product at different prices, the consumer then being able, depending on his level of information and his preferences, to select the offer most favourable to him.

Price fixing concerning books and published material, which continues to exist, is quite a controversial issue in consumer policy[18]. On the one hand, numerous circumventions and abuses are recorded, for instance through split prices, price cutting, different make-ups of an essentially identical product which already render price fixing almost meaningless and make the situation on the market for published material intricate for the consumer. On the other hand, consumer buying organisations structured like cooperatives have striven to pass on to consumers the high booksellers' discounts, but have been prevented from doing so by publishers refusing to supply them, measures to which no objections were raised. It is still unresolved whether in the course of the forthcoming reform of antitrust law this legal situation will be changed. It is to be expected, though, that the legislator for the sake of protecting the book trade will retain price fixing for books[19].

4 Price recommendations

28 The Kartellnovelle of 1973 revised the law of price recommendations. The new Art. 38a allows price recommendations only in the case of *branded goods* if such recommendations admit price competition, reflect fair market prices and are expressly marked as being non-binding. To prevent abuses in connection with price recommendations, the Act provides the Federal Cartel Office with certain powers to take action. Within the scope of its supervision to prevent abuses, the Federal Cartel Office has prohibited some price recommendations in a great number of cases, because they have resulted in overcharging or deception (Art. 38a, para. 3, items 1 and 3 GWB). However, the requirements of proof present difficulties in practice[20].

In consumer policy price recommendations continue to be a matter of argument[21]. In this connection two forms are challenged by consumers as being of a price-fixing nature: what is known as market price recommendation, and price recommendations within the framework of selective distribution. The *market price recommendation* (Handelspreisempfehlung) is not intended for the final consumer, but for the dealer[22]. According to experience, dealers use it as a substitute for price fixing, especially if they deal in a large variety of goods. There is no reason why the dealer should deviate from the producer's price recommendation, unless there is considerable competitive pressure which influences the consumer's preferences. In actual fact, the result achieved is the same as in the case of price fixing. An additional factor is that a price recommendation of that sort need not be disclosed to the consumer. In the case of so-called *selective distribution*, i.e. distribution being limited to a number of specialist dealers or

authorised dealers, for instance in the area of the motor-car market, price recommendations result in the producer's price ideas being kept to by the dealer in his own interest. Here price recommendation also actually implies price fixing[23].

That is why consumer organisations, the Consumer Advisory Council attached to the Federal Economics Minister, and trade unions have demanded that price recommendations be prohibited altogether[24]. In its report on price recommendations, which was submitted to the public in August 1977, the Federal Government could not as yet bring itself to take a decision as far-reaching as that[25]. Rather, it considered price recommendations including those of market prices and recommendations in connection with selective distribution to be a traders' means of rationalisation not to be dispensed with. Here consumer interests are discriminated against in favour of trade interests. In its bill on a Fourth Kartellnovelle, which was submitted in 1978, the Federal Government intends merely to tighten the control of abusive practices regarding price recommendations, while retaining the price recommendations[26]. The bill (No. 29) has been enacted by Parliament.

5 Abusive prices by market-dominating enterprises

29 It has been a matter of intense discussion under antitrust law whether the Federal Cartel Office may prohibit market-dominating enterprises from fixing abusive prices and is thus allowed to fix price ceilings on them. The legal basis is Art. 22 GWB. Pursuant thereto, market-dominating enterprises are subject to supervision to prevent abuses. In the meantime it has been established by the highest court that supervision may also relate to prices, so that the Federal Cartel Office may prohibit a market-dominating enterprise from asking improperly excessive prices[27].

(*aa*) The interpretation of Art. 22 GWB continues to be highly controversial and its complexity can only be touched upon here. To begin with, the problem is how *market domination* (Marktbeherrschung) by an enterprise or several enterprises can be ascertained in the first place. To that end it has first of all to be established in which relevant market, in terms of product, time and region, the enterprise concerned occupies a market-dominating position. The courts determine the relevant market on the basis of the demand structure[28]: hence, the market is determined by the needs of the opposite end of the market, and consequently, in markets relevant to consumers, by the needs of consumers. For this, various tests have been developed, for instance in the case of drugs where subjective prescribing habits of doctors[29] and the range of indication of certain products were considered to be decisive[30]. An enterprise occupies a market-dominating position only if in a certain market it is either not exposed to significant competition or has dominant market power. According to the courts, significant competition may also exist if there is no price competition[31]. Dominant market power is determined by the range of market conduct which flows in particular from market shares. However, according to court practice, market shares cannot be considered separately, but competitive conditions have to be taken into account. If, for instance, quantitative market shares decline

while the market share in terms of sales of the enterprise concerned remains essentially the same, because of a high-price policy made possible by an atypical market structure, the courts do not consider this to be dominant market power[32]. On the other hand, the Federal High Court assumed dominant market power in the case of Valium-Librium if the products of the enterprise concerned accounted for about half the total market share of such products and if also for other reasons the enterprise exercised controlling influence over the market[33].

(*bb*) Finally, it has to be examined in what way market-dominating enterprises abuse their position on the market. The Act does not define in detail what constitutes an abuse[34]; however, abuses may be taken up by the Cartel Office in the case of excessive prices. Meanwhile, it has become established practice to ascertain abusive prices by comparing them with prices on *reference markets*[35]. We must distinguish between reference markets in terms of time and of region. The time reference market test establishes the limit of abuse by comparing the old price with the new one. It is therefore applicable mainly to the *price increases* of market-dominating enterprises. However, this procedure has been widely criticised and has not so far been confirmed by the highest court[36].

The regional reference market test is applied more often. The price charged by a market-dominating enterprise is compared with prices on other markets characterised by significant competition or with prices charged by other competitive enterprises. In so far as the markets are comparable, it is possible to establish a so-called competition-induced price. Foreign markets may also be included in the comparison[37]. However, the Federal High Court has made it clear that only structural and not business-induced factors may be included in the determination of the competition-induced price; in a particular case delimitation is extremely difficult and renders price control under antitrust law practically impossible[38]. If the competition-induced price has been so determined, this does not, according to a recent ruling by the Federal High Court, mean that exceeding such a price constitutes an abuse. Only if such a price is exceeded in an *excessive* way is an abuse deemed to exist[39]. When this is the case can only be decided in particular instances. Moreover, enterprises are free to decide in which way they will submit to a possible price ceiling order by the antitrust authorities[40]. The Kartellnovelle of 1980 (BGBl I 458) in Art. 22, para. 4, sentence 2 lists examples of abusive prices with regard to court practice. In item 2 the price asked by a market-dominating enterprise is considered to be abusive if it deviates from that which would most likely result in the event of workable competition. Here special attention must be paid to the behaviour of an enterprise on reference markets where there is workable competition. Thus the 'reference market concept' has been laid down by statute. The decisive difference compared with court practice is that the price need not be exceeded excessively any more; as demanded by the Federal Cartel Office a merely 'noticeable' (spürbar) exceeding of the price is sufficient[40a]. Item 3 concerns instances of price discrimination which have so far been taken up very little in relation to consumers; for example, those known to occur in the case of split distribution (where goods or services sold through various channels of trade at ultimately different prices) or in the case of regional markets forming part of a larger market (e.g. petrol at motorway service stations being much more

expensive than at neighbouring service stations off the motorway). However, an abuse is deemed to exist only if the market-dominating enterprise is unable to give factual reasons in justification of discrimination. (For example, motorway service stations have different hours of opening and consequently different overheads, but also higher sales; that might justify a higher average price.) The newly formulated facts constituting an abuse do not make it clear as to how far a market-dominating enterprise may be said to be guilty of abuse in cases of discrimination because of different marketing systems.

(*cc*) The brief survey of the practice of price control over market-dominating enterprises clearly shows that this instrument is *not a genuine corrective* of the price behaviour of powerful enterprises. This is also revealed by statements made by the courts that control over abusive prices charged by market-dominating enterprises was not intended as control over their conduct in general[41]. The requirements of proof for the purpose of applying the law are so high that the antitrust authorities have not so far succeeded in proving abusive prices[42]. That is why the antitrust authorities have refrained from further procedures to fight such prices. An additional factor is that, even if a price ceiling order has been issued, the enterprise involved is by no means compelled to reduce its prices immediately: by appealing against the order it may prevent the order from taking effect and thus may secure itself monopoly profits for some years. Under the existing law, the retroactive *skimming off* of such profits was not possible, but is included in legislation in Art. 37b of the Fourth Kartellnovelle[43].

The fight against abusive prices charged by market-dominating enterprises continues to be a central issue of consumer policy which apparently can be solved only through a comprehensive *law reform.* Two measures in particular are under discussion: an obligation on market-dominating enterprises to notify price increases, and a duty of enterprises to disclose their price calculation[44]. As yet, both proposals have little chance of becoming law. It must be assumed that under the existing law in the Federal Republic of Germany there is a considerable gap of protection concerning market-dominating enterprises and their price policy.

6 Problems of law enforcement

30 The enforcement of the antitrust regulations described above is incumbent upon the Federal Cartel Office. Available to the Office are in particular two types of sanction: an *administrative* sanction (prohibition of a price cartel or of coordinated action pursuant to Art. 37a GWB; prohibition of abusive prices from a certain ceiling, Art. 22, para. 5 GWB[45]) and measures under the *law of criminal offences* pursuant to Art. 38 GWB (fines in connection with a price agreement and an illegal price recommendation, etc.)[46]. *Civil-law sanctions*, for instance by an action for damages for price fixing as may be imposed under US antitrust law (treble damage suit)[47], do not exist in German antitrust law[48].

Generally speaking, consumers and their organisations participate neither *indirectly nor directly* in the various types of sanction. While they may suggest to the Federal Cartel Office that a certain conduct which is contrary to antitrust law be taken up, they do not enjoy a formal right to apply nor a right to participate

or be heard. However, pursuant to Art. 51 GWB, the Federal Cartel Office has occasionally granted consumer organisations a hearing[49]. Contrary to the law of unfair competition and standard form contract conditions (Nos. 118, 293), consumer organisations do not enjoy any right either of action for a cease and desist order or for damages in connection with price conduct of enterprises which is contrary to antitrust law. Pursuant to Art. 35 GWB, consumers have no right to bring individual actions and consumer organisations have no right to bring collective actions[50]. This goes to show how weak the consumer's position is regarding abusive prices on the market. So far the consumer has benefited from the protective system of antitrust law only indirectly, although consumer protection is one of the purposes of antitrust law.

The Federal Government is hopeful that law enforcement will be improved by two measures: an amendment of Art. 35 para. 2 GWB is to ensure that in the case of an inappealable price ceiling order issued by the Federal Cartel Office the party injured may charge the tortfeasor, i.e. the market-dominating enterprise, for the damage[51]. An amendment of Art. 63 GWB is to ensure that the appeal against a price ceiling order pursuant to Art. 22, para. 5 has no suspensory effect because in the past it was understood as a principle that if a complaint was made the market-dominating enterprise could continue asking its challenged prices unpunished, since the courts considered the complaint to have a suspensory effect[52].

The Kartellnovelle of 1980 has rejected a new wording of Art. 63, i.e. a complaint against a price ceiling order usually has a suspensory effect. The extended right to claim damages for the time between the service of a (price ceiling) order and the latter's incontestability in Art. 35, para. 2 GWB new version, shall also be for the benefit of consumers[52a]; however, the amendment does not provide for a collective action of consumer associations. In addition, the cartel authority may skim off excess proceeds, Art. 37b GWB, unless the damage has already been made good. Either form of improvement of law enforcement is effective only if the Federal Cartel Office is able to prove that the market-dominating enterprise charges abusive prices; since it has not so far succeeded in proving that, the reforms should for the time being exist only on paper.

III DIRECT PRICE INTERVENTION BY THE STATE

1 Significance of the Preisgesetz (Price Act) of 1948/52

31 As already described above, fixing or even only supervision by the state of prices or price increases is the exception and not the rule under existing commercial law in the Federal Republic of Germany. Neither have the trends towards increased consumer protection in recent years altered this state of affairs. Only in those areas where the market principle is officially considered to be impossible or not to work sufficiently, that is to say, in those areas which antitrust legislation terms 'exceptional sectors' (agriculture, transport, guided energy, and in a certain way also banks and insurance companies), is there state intervention in the price.

To begin with, it should be noted that the Preisgesetz of 10 April 1948/7 January 1952, which is still in force, has created a general enabling provision regarding price control by the state. Art. 2 of the Preisgesetz reads: 'The authorities responsible for price control may issue orders and instructions under which prices, rents, charges and other considerations in respect of all goods and services, with the exception of wages, are established or approved or with the aid of which the price level is to be maintained'.

The scope of application of the very far-reaching enabling provision under the Preisgesetz has, however, been reduced considerably by a ruling of the Federal Constitutional Court[53]. We must note that the Federal Constitutional Court has inferred from the enabling provision included in Art. 80 Basic Law that price control is possible only with a view to price-stabilising measures. Accordingly, price orders may be issued only to ward off serious disturbances of the overall price level. An active economic policy transforming the price and market structure cannot be pursued on the basis of the enabling provision in Art. 2 Preisgesetz. Thus, considerable restrictions on an active consumer policy with respect to prices have been imposed.

In current practice, the Preisgesetz plays hardly any role. Direct price controlling measures, be it in the form of price orders, individual price decrees or price ceiling orders, have seldom been issued under the Preisgesetz for the past twenty years. The Federal Republic does not intend either to use the enabling provision under the Preisgesetz, for instance to fight inflation or to pursue an active consumer policy. Regulations on discounts in the book trade regarding omnibus orders for school books have been declared to be unconstitutional by the Federal Constitutional Court with reference to the limited scope of the enabling provision under the Preisgesetz[53a].

Further enabling provisions on price formation are included in what are known as laws to ensure the functioning of the economy in an emergency. They will not be dealt with here as they do not relate to measures in terms of consumer policy, but to measures to meet an emergency in which consumer policy in any case plays a minor role[54].

2 Control of price elements in standard form contracts

32 Certain indirect price controls are found in the AGBG. Pursuant to Art. 11, item 1 of the AGBG (No. 268), in standard form contracts, clauses in regard to non-traders (final consumers) providing for price increases regarding goods or services to be delivered or performed within four months of the conclusion of the contract are forbidden. This is to ensure that the customer who has been promised a certain price under the contract is not after a short while saddled with an increase. However, this prohibitory regulation applies only on two restrictive conditions: it does not include price increases if the commodity or service is to be delivered or performed only four months *after* the conclusion of the contract[55], and it does not apply if no fixed date has been stipulated in the contract and the entrepreneur reserves the right to fix the price[56]. Furthermore, it is a controversial issue whether the prohibition of price increases applies if in the meantime certain price elements as, for instance, value added tax, have been increased; there is no uniform court practice so far. In two rulings by the

regional court of Cologne[57] *v.* the Central Association of the Motor Car Trade and the regional court of Frankfurt[58] *v.* the Association of the German Car Industry and the Association of Car Importers it has been decided that a clause providing for the passing on of the increase in value added tax effective 1 January 1978 infringes Art. 11, item 1 AGBG and therefore must not be recommended for use in standard form contracts. The rulings are definitely to be welcomed from the point of view of the consumer's interest and the legislative objective. They have been approved by the Federal High Court[58a]. Moreover, Art. 8 of the AGBG makes it clear that the law of standard form contract conditions does not allow the control of prices or price elements.

3 Price control over the energy market

33 (*aa*) On the energy market, the price of electricity is controlled. Pursuant to a Price Freeze Order of 1936, which continues in force in connection with Art. 7 of the Energiegesetz (Energy Act) of 1935/1961, increases in electricity prices require the approval of a supervisory authority[59]. In this connection various rate categories are distinguished. Household rates, which generally relate to households of private final consumers, are subject to approval both as regards the base price and the supply price. In the case of farms and industrial consumers, only supply prices are controlled. So-called special rates allowed to bulk consumers are not subject to any approval. An amendment of the Bundestarifordnung Elektrizität (Federal Rate Scale for Electricity) of 30 January 1980 (BGBl I 122) has brought about several structural changes in the system of rate scales for the purpose of energy conservation. Art. 12a provides for a power to the competent authority to approve increases in rates. Approval is made contingent upon the cost and revenue situation of the public utility concerned and upon the requirements of as safe and low-cost an electricity supply as possible. With respect to household rates, the different rate categories are retained, with the consumer automatically being conceded invoicing at most favourable rates. Art. 3a introduces a so-called linear factor into the rate for household bulk consumers which in the past had been characterised by a degressive factor (inviting waste of energy). That is to introduce into the rate system not only the consumer's interest in low-price electricity, but also in the conservation of energy.

(*bb*) Another subject of discussion is whether in addition to official price control supervision to prevent abuses under antitrust law is possible according to principles similar to those described above in the case in Art. 22 GWB[60]. Art. 104a GWB has made it clear that energy supply companies are also subject to the general prohibition of abuse and discrimination as regards the shaping of their rates. The antitrust powers are of importance, though, only concerning special consumers (described as industrial bulk consumers, government agencies, etc.) where the free shaping of rates, i.e. practically the unilateral fixing of rates by electricity supply companies, is possible, but *not concerning private final consumers*. Because of the concept of the consumer used here, we shall not go into further details (No. 18).

Other sources of energy are basically subject to price formation by the market

and in the case of abuses merely come under antitrust regulations. This applies both to gas and long-distance heat and to petroleum products (gasoline, fuel oil)[61]. With respect to petroleum products, an enabling provision exists covering price regulation in an emergency[62].

4 Transport

34 By Art. 99 GWB, transport services have largely been exempted from antitrust law. Here rates and prices are fixed by means of official orders. Particularly relevant to the consumer are the provisions of the Personenbeförderungsgesetz (Carriage of Passengers Act) which in Arts. 39, 45 and 51 provides for official price control in the case of regular transport services, bus services and taxis[63]. Specifically, the provisions of the Personenbeförderungsgesetz imply that increases in rates must be submitted to the supervisory authority for approval. In the control procedure, allowance is made not only for consumer interests in being charged reasonable prices, but also for the interests of the enterprises concerned in being able reasonably to cover their costs. There is thus a conflict of interests which has not yet been resolved, but has additionally been aggravated by the deficits in public local transport.

Further provisions on the approval of rates exist in long-distance goods traffic inclusive of removals, air traffic and inland navigation[64]. Rates in long-distance goods traffic are shaped with regard to the German Federal Railways and serve less consumer protection than the public interest in the continued existence of the German Federal Railways. We shall not go into further details here.

5 Banks, savings banks

35 Banks and savings banks may basically shape charges for their services according to their discretion. Although pursuant to Art. 102 GWB credit institutions are largely exempted from the ban on cartels, they are no longer subject to official control as regards the formation of their 'prices'. However, *abuses* may be prosecuted by antitrust authorities. In detail the following cases may be distinguished.

As far as credit institutions grant consumers loans, they may shape the *debtor interest rate* under the general law of credit; this matter will be dealt with below in connection with consumer credit (No. 345).

The *credit interest* payable by banks and savings banks to consumers as depositors of savings and the like is in theory determined by the laws of competition, but in practice by the German Bundesbank's current discount rates in connection with the pertinent recommendations of the associations of banks and savings banks. The very practice of the top organs of banks and savings banks of recommending certain so-called credit interest rates to the institutions associated with them has called the Federal Cartel Office into action, which presumes an abuse of the exemption under antitrust law[65]. However, the Federal Cartel Office was unable to carry its legal point, because either agreement with the Federal Banking Supervisory Office concerned, required pursuant to Art. 102 GWB, could not be reached or abuse pursuant to Art. 104 GWB could

not be proved[66]. The top organisations of banks 'voluntarily' gave up credit interest recommendations; in practice there is, of course, no competition. Concerted action to keep the interest rates down could not be proved by the Federal Cartel Office in proceedings brought against the major banks in 1979.

Bank charges for other services, for instance account keeping, bookkeeping transactions, administration of deposited items and the like, are in theory likewise subject to free agreement and the market principle[67], but in practice were initially determined by pertinent recommendations of the central associations. Here also the question arose as to whether or not such recommendations constitute an abuse within the meaning of Art. 102 GWB. In response to the Federal Cartel Office's remonstrances, banks and savings banks, in shaping their charges, have discarded the practice of recommendations by their associations, so that theoretically the customer is in a position to choose the bank offering the services he desires on the most favourable terms. However, in practice the customer will largely be dependent on the bank as soon as he opens an account with it and only very rarely will he be able to change his bank if the cost level changes. The lack of elasticity of demand in this area bars price competition for banking services.

6 Insurance companies

36 Insurance companies are in principle free to shape their rates in the various categories of the insurance system; however, they are subject to supervision by the Federal Supervisory Office for Insurance Companies as regards their business conditions and business programmes. With respect to the majority of insurances, Arts. 5, 8 of the Versicherungsaufsichtsgesetz (VAG) (Insurance Supervision Act) of 1931 provide for approval of the business programme by the supervisory authority. This also relates to the *structure of charges*[68] inclusive of changes thereto. In approving the business programme, the supervisory authority gives consideration not so much to the insured's interest in as reasonable a rate as possible combined with, for instance, high refunds, but to the fact that the level of premiums shall be calculated in such a way that contracts can be performed in the long run and the insurance company can get back its costs, Art. 8, para. 1, item 2 VAG. Instead of the consumer's interest in closely calculated insurance services, the safety requirement is at the centre of the supervisory authorities' activity. Combined with an obligation to accord equal treatment, 'price competition' in insurance is thus paralysed or concentrates on other factors[69].

In the area of *motor insurance*, Art. 8 of the Pflichtversicherungsgesetz (PflichtversG) (Compulsory Insurance Act) of 1965 introduced more far-reaching official supervision[70]. Under Art. 8 a detailed scale of charges of 20 November 1967 was issued which lays down the principles governing the approval of charges in motor insurance. Commissions to insurance agents, which in the final analysis are payable by the consumer, are limited in amount to 11% for full-time and 5% for part-time agents. Also, the insurance supervisory authorities here pursue less consumer protection, but rather protection of those already carrying on a business (cf. Art. 8, para. 2 PflichtVersG), combined with the requirement for insurance companies to be able to cover at any time all

risks accruing to them under liability insurance[71]. We shall not go into further details of insurance supervision here.

7 Agriculture

37 In the area of agriculture, Art. 100 of the GWB and the relevant regulations of the EC Treaty provide for exemptions from the ban on cartels. In practice producer prices of farm products are not determined by the market mechanism, but by the relative market regulations, whether at a supranational or at a national level. We shall not go into the details of these very particular and complicated regulations here[72]. The system of guiding prices created by the market regulations governing farm products is to ensure a minimum income to producers of farm products within the EC and at the same time prevent a depression of the price level in consequence of surpluses and imports. From the consumer's point of view, this system of intervention is, of course, extremely prejudicial, since prices within the EC are kept at an artificially high level. By contrast, the system of competition applies to the further *processing* stages of farm products, but is workable in part only because of the fixing of producer prices of farm products.

8 The professional classes

38 Certain 'professional' services, for instance services rendered by physicians and dentists, lawyers, architects, tax consultants and similar professional classes, are subject to more far-reaching governmental price regulation. We shall not go into details of the various scales of charges here. A characteristic feature they all have in common is that they do not safeguard the consumer's interest in a competitive structure of services offered at favourable prices, but try to ensure adequate revenues to the professional classes in each case. To what extent in addition to these scales of charges the general antitrust regulations apply, has been a matter of argument in recent years in the commercial law of the Federal Republic. Basically, it may be said that the enterprise concept under antitrust law by no means exempts liberal professions from the ban on cartels. However, antitrust law applies only as far as the scales of charges of the relative professions are not applicable[73]. For instance, if a certain scale of fees fixes the honorarium for a service, as in the case of a lawyer, there is no room for application of the ban on cartels. However, if scales of charges fix only the limits within which an honorarium may be charged, the ban on cartels remains applicable if a certain professional class by agreement tries to achieve a situation in which only the highest rates are charged in each case.

9 Reform of the 'exceptional sectors' of the GWB

39 Price supervision concerning the exceptional sectors (Ausnahmebereiche) (Nos. 33–37) of the GWB has for decades been a matter of economic-policy dispute, particularly because of the restraints of competition accepted in this connection, because of the principle of adequate revenues which is hostile to competition (above all, the enterprises concerned are to be enabled to generate adequate profits), and because of insufficient supervision by antitrust authori-

ties and specialised agencies. Consumers have deplored in particular the *lack* of *price competition* which results in the demand that these exceptional sectors be abolished or restrained extensively[74]. In its report on the exceptional sectors of 1975[75], the Federal Government did not share this point of view. It suggested only minor corrections, for instance to stimulate competition (based on substitutes) in the energy sector and to improve cartel supervision. The Fourth Kartellnovelle[76] provides in Art. 103 GWB for a definition of abuses in the area of public utilities which does not relate to facts relevant to consumers (No. 33). Moreover, it is planned to render cartel supervision, especially in the banking and insurance sector, more effective. Any exemption from the ban on cartels and the ban on recommendations applies only after notification to the supervisory authority and after the expiry of a three-month term; supervision to prevent abuses continues to be possible. According to the wording of the Act, it is not yet clear whether interest and cost recommendations by bankers' associations will continue to be possible under the new legislation.

IV DUTIES TO FURNISH INFORMATION

40 In the Federal Republic of Germany in recent years the *duties of traders and services companies to furnish information* have been improved in many respects in favour of the consumer. Under the present law, these duties exist in two ways: firstly, the duty to indicate the price of basically all transactions for goods or services which an entrepreneur enters into with final consumers, and secondly, the duty to indicate additionally the unit price of certain goods specified by law. The legislative purpose of the price-marking obligation, as expressly stated in Art. 1, para. 7 of the amended Preisangabenverordnung (Price Marking Order) of 10 May 1973, is the enforcement of the principles of *clarity and truth in pricing*[77]. The obligation to indicate the unit price under the Eichgesetz (Weights and Measures Act) is intended to enable the consumer to compare prices of certain products and to provide a clearer view of the market. In detail the following can be said regarding statutory regulation.

1 Obligation to indicate prices to final consumers

41 (*aa*) The obligation to indicate the price to final or ultimate consumers under the present law results from the *Preisangabenverordnung* of 10 May 1973 which superseded the Order of 18 September 1969. The new Act has been extended to include *services* as well as goods. The indication of the price must in particular include value added tax. In the case of split prices, the final price must be shown (in any way), Art. 1, para. 7, sentence 3 of the Preisangabenverordnung. A distinction must be made between individual offers and advertising. In the case of individual offers in writing, final prices must always be given, but not in the case of verbal offers, Art. 7, para. 1, sentence 4 Preisangabenverordnung. Prices need not be given in advertisements; if they are used, however, the enterprise must state final prices, otherwise the advertisement will be regarded as misleading. According to the Federal High Court's new practice, an obligation to indicate the price is also imposed on an entrepreneur if his offers not only

contain a general advertisement, but convey willingness to enter into a contract[77a]. This is important with respect to consumer credit (No. 348). In addition to prices, as far as this is in line with the dominant view, units of sale and of performance as well as grade labels must be given; as far as that goes, the Preisangabenverordnung supplements the general marking obligations (Nos. 64ff).

The price marking obligation is placed upon *any person* who regularly offers goods or services to ultimate consumers. In recent years in connection with self-service supermarkets for retailers (so-called cash and carry markets), the question has arisen whether 'ultimate consumers' within the meaning of the Preisangabenverordnung includes *industrial consumers* who acquire goods to meet their *requirements outside their business*[78]; in this case particularly, VAT should not have been indicated separately, as is done by self-service wholesalers. In a leading decision, the Federal High Court has taken as a criterion less the consumer concept than the economic purpose of the Preisangabenverordnung; accordingly, prices need not be indicated if the self-service supermarket by means of appropriate controls ensures that only industrial consumers gain access; to a limited extent they are also permitted to buy for their 'private' purposes. From the consumer concept advocated above a similar view results, because buyers in a self-service supermarket do not need the information required under the Preisangabenverordnung and here a consumer interest is not taken into account.

The price marking obligation exists also regarding particularly cheap or expensive goods; however, certain goods and services are exempted from price marking under Art. 7, for instance objets d'art, demonstration cars and goods in respect of which the entrepreneur acts as agent only.

As expressly stipulated in the Act, the final price shall include VAT and other price elements, irrespective, however, of the granting of a discount. Indications of prices must be in harmony with trade practices and the principles of clarity and truth in pricing, must clearly refer to the offers advertised and must be clearly legible or otherwise easily noticeable, Art. 1, para. 7 Preisangabenverordnung. In contrast to the former law, it is no longer prohibited to break down the price, but the final price must be rendered prominent. The admissibility of breaking down the final price, primarily in the case of services by craftsmen, is to enhance clarity as to price.

For the sake of clarity and truth as to price, Art. 1, para. 5 forbids what are known as clauses on current prices, i.e. clauses permitting the entrepreneur to raise his prices within a period of four months. Reservations to adjust the prices of goods or services are admissible only if the terms of delivery or performance exceed four months.

(*bb*) Detailed regulations on the *form* of price marking are included in Art. 2 (retailers), Art. 3 (services), Art. 4 (restaurants) and Art. 5 (service stations). In the case of goods displayed visibly in shop windows and the like, the price must be marked by means of price tags or labels on the goods. Goods which are kept at hand in the sale-room in any other way must also be marked in such a way that the containers or shelves housing the goods are labelled or price lists are displayed for inspection. In the case of sales of goods by catalogue or list of

goods, particularly in the mail-order trade, prices must be indicated next to the illustrations or descriptions of the goods. In the case of offers of services, the prices of essential services must be included in the price lists to be displayed on the business premises. However, an exception to Art. 3, para. 2 gives rise to criticism. According to this, it suffices to keep at hand a price list for inspection in the place where the service is offered if, according to generally accepted standards, the prices and accounting rates of all services offered are included in price lists and the display of such price lists cannot reasonably be expected owing to their volume. This applies particularly to repair shops and practically results in the consumer not having the faintest notion of prices, at least as regards essential services. Here a reform would þe needed to the effect that at least the most important services pursuant to Art. 3, para. 1 must be included in the price list and must be displayed.

In the case of restaurants and service stations, the legislator has made very detailed regulations, in particular serving the purpose of providing the consumer with information on prices at a stage where he decides whether or not to use the services offered by a restaurant or service station in the first place. That is why price lists of restaurants must be displayed outside the premises. Indications of prices at service stations must be perceptible to the motorist driving past the service station. This regulation ensures that price competition is possible, and that it is easy for the consumer to compare prices.

(*cc*) The legal consequences of an infringement of the Preisangabenverordnung result from the general principles of the law of administrative offences. Infringements of obligations under the Preisangabenverordnung are punished by fines; imprisonment, although possible, does not occur. Especially in this area, the percentage of undetected offences and a great number of unpunished infringements of the price marking obligation is greatly deplored.

Nevertheless, in court practice it is assumed that sanctions under *civil law* or under the *law of unfair competition* basically do not come into question. With respect to the prohibition of *current price clauses* in the Preisangabenverordnung, the Federal High Court has stated that an infringement thereof does not result in nullity of the contract under civil law[80]. Thus the prohibition largely lacks sanctions and is ineffective in regard to the consumer. However, if the entrepreneur in his standard form contract uses current price and other adjustment clauses which relate to a term of performance or delivery of less than four months, that clause is ineffective (No. 32); the reservation to increase prices is not effective; the entrepreneur cannot plead the price increase clause in regard to the consumer. This has meanwhile brought about a certain congruity of the law of the Preisangabenverordnung with the civil law.

In the *law of unfair competition* it was above all a controversial issue whether an infringement of the obligations under the Preisangabenverordnung at the same time implied an unfair act of competition under Art. 1 UWG. The Federal High Court has denied this in several rulings, since the price marking obligation merely implies a regulatory provision which is 'neutral in content'; by contrast, infringements are not *per se* contrary to public policy unless the entrepreneur acts with the intention to gain an advantage over his competitors[81]. Numerous authors have rejected this view, pointing out the common objective of consumer

protection under the Preisangabenverordnung and under the UWG[82].

However, wrong price marking, and as far as that goes there is agreement, may imply an act of misleading competition within the meaning of Art. 3 UWG (No. 85). This will be the case particularly if the entrepreneur does not give the final price in his advertisement, but a different one which tends to mislead the consumer.

2 Unit pricing

42 (*aa*) The obligation to indicate unit prices was introduced into German law for the first time by the Eichgesetz of 1969. It has been altered by the Act amending the Eichgesetz of 20 January 1976, in force since 1 July 1977, and has in particular been adapted to EC directives. The objective of both the old and the new Act was: 'It should be emphasised specifically that new regulations on unit pricing . . . shall enable the consumer easily to compare prices and to get a clearer picture of what is offered on the market'[83].

The duty to indicate unit prices exists in addition to the price marking obligation as expressly stated in Art. 1, para. 6 Preisangabenverordnung. Furthermore, it must be seen in connection with standardisation and the indication of net weights on prepacked goods (No. 67).

(*bb*) Under Art. 17 of the amended version of the Eichgesetz, the obligation to indicate unit prices exists in the following way: 'Any person who offers for sale to final consumers prepacks with foods, feedstuffs for domestic animals and birds living in freedom, detergents and cleaners, cosmetics, polishes and preservatives, adhesives, ready-to-use varnishes and coating compounds, petroleum products and fuels, in nominal net weight volumes of no less than 10 g or ml and not more than 10 kg or l, offers goods by catalogue or advertises them giving prices must indicate the price asked by him for 1 kg or 1 l or, if the nominal net weight does not exceed 250 g or ml, the price of 100 g or ml of the product (unit price)'. Art. 15 of the Fertigpackungsverordnung (Order Concerning Prepacked Goods), as amended on 20 December 1976, provides that the unit price in the case of prepacked goods held for sale must be indicated on the package or on a price tag on or next to the package; if packages are offered by catalogue, the unit price must be found next to the picture or description of the goods, in notes or in price lists connected with catalogues. Furthermore, the unit price must be indicated so as to be readily discernible and legible directly next to the price of the product.

A fact about the amendment of Art. 17 which is worth mentioning is the general tendency of the Eichgesetz to subject both small packages and large containers to unit pricing. The obligation to indicate unit prices was extended regarding adhesives and feed stuffs for domestic animals and birds. Polishes and preservatives are now generally included. A controversial issue during the debates in parliament has been whether fruit and vegetable tins should also be subject to unit pricing. The legislator has rejected this, because he felt that this would result in an excessive burden on small retailers[84].

(*cc*) Art. 17b Eichgesetz includes essential *exceptions* to the obligation to indicate unit prices, the practical consequence of which is that the statutory requirement is hardly ever satisfied[85]. This obligation does not, for example, apply to packages with cosmetics used exclusively to dye or beautify the skin, hair or nails. Neither does it apply to packages which may be put on the market only in certain net weights or in containers of certain volumes. As far as packages are standardised, unit pricing is not required[86]. This is problematic because standardisation is by no means uniform and the consumer cannot be expected to convert the price readily into a certain unit. Pursuant to Art. 17b, para. 4, the indication of a new unit price may be omitted if the price asked for is reduced by a uniform amount and packages of different nominal net weights of the same unit price are concerned; the same is true of packages with highly perishable foodstuffs if the price asked for is reduced because of imminent spoilage.

NOTES

1. Rinck, *Wirtschaftsrecht*, ed. 5 [1977], p. 73ff; Steindorff, *Einführung in das Wirtschaftsrecht* [1977], p. 128ff; Schmidt-Preuß, *Verfassungsrechtliche Zentralfragen staatlicher Lohn- und Preisdirigismen* [1977], p. 105ff, as well as the respective annual opinions of the board of experts for the assessment of overall economic trends.
2. Reich, *Markt und Recht* [1977], p. 103f.
3. On the certainty of this provision cf. BVerwG NJW [1973], 530; the question as to what extent the government, especially the courts, must also make allowance for inflation, for instance in the case of public utility services, will not be dealt with here exhaustively; on this see Kötz/Reichert-Facilides (ed.), *Inflationsbewältigung im Zivil- und Arbeitsrecht* [1976]; v. Maydell, *Geldschuld und Geldwert* [1974]; Horn, *Geldwertveränderungen, Privatrecht und Wirtschaftsordnung* [1975].
4. Dürkes, *Wertsicherungsklauseln*, ed. 8 [1972].
5. Zweiter Verbraucherbericht der Bundesregierung, BT-Drucks. 7/4181, p. 5f; Reich, *op. cit.* (note 2), p. 198 ff; and (13).
6. M. Wolf, 'Vertragsrecht und Sozialwissenschaften', in: *Sozialwissenschaften im Stadium des Rechts*, I [1977], p. 19f.
7. Reich, *Verbraucherkredit*, ed. 2 [1979], items 71ff.
8. Cf. Palandt-Heinrichs, *Komm. zum BGB*, ed. 39 [1980], §138, note 4.
9. BGH BB [1977] p. 769, cf. now though BGH NJW [1979], 808.
10. Reich, ZVP [1977], p. 277ff with further references; also v.Hippel, *Verbraucherschutz*, ed. 2 [1979], p. 123.
11. BT-Drucks. 7/765; on the importance of price competition in general, see Reich/Tonner/Wegener, *Verbraucher und Recht* [1976], p. 29ff.
12. Meanwhile what are known as Gesamtumsatzrabattkartelle (total-sales discount cartels) are also forbidden, cf. BKA-Bericht [1976], BT-Drucks. 8/704, p. 15; on rebate cf. No. 109.
13. Cf. BT-Drucks. 7/765, p. 2, as well as Reich, *op. cit.* (note 2), p. 272.
14. BGH WuW/E BGH 1147.

15. From a legal point of view, see Ulmer, *Abgestimmte Verhaltensweisen im Kartellrecht* [1972]; Lübbert, *Das Verbot abgestimmten Verhaltens im deutschen und europäischen Kartellrecht* [1975]. From an economic point of view, see Fleischmann, 'Das Problem des oligopolistischen Verhaltens', in: *Sozialwissenschaften, op. cit.* (note 6), p. 193ff; Heuß, WuW [1974], p. 369ff.
16. BGH NJW [1975], p. 1837; WuW/E BGH 1337; KG WUW/E OLG 1487.
17. BT-Drucks. 7/765, p. 4.
18. On the concept of published material BGHZ 46, 74 (records are not regarded as published material), WuW/E BGH 1463 (while printed stamp albums are).
19. OLG Düsseldorf WuW/E OLG 1849; KG WuW/E OLG 1805; BGH WuW/E BGH 1584 — 'Anwaltsbücherdienst'.
20. Cf. KG WuW/E OLG 1593 [1920]; on the whole Bundeskartellamt, in: BT-Drucks. 7/703, p. 21ff; KG WuW/E OLG 2140. On the whole subject see Reich, 'Preisempfehlungen', in: *Handbuch der Wettbewerbspolitik*, 1981.
21. Cf. Reich, ZVP [1977], p. 235ff; Schultes, ZVP [1977], p. 339ff, with the different reasonings in each case; on the whole matter also Schöppe, ZVP [1978], p. 175ff.
22. On this see the Bericht der Bundesregierung über die Erfahrungen mit der unverbindl. Preisempfehlung, BT-Drucks. 8/703, p. 7, however, without an evaluation of these facts in terms of consumer policy.
23. Reich, ZVP [1977], p. 237; also BKA-Bericht [1977], BT-Drucks. 7/1925, p. 44.
24. References in Reich, ZVP [1977], p. 238.
25. BT-Drucks. 8/703.
26. WRP [1978], pp. 188, 193; BT-Drucks. 8/2136, pp. 7, 16, 27.
27. BGH NJW [1976], p. 2261 with notes of Reich; NJW [1977], p. 675 with notes of Reich.
28. Reich/Tonner/Wegener, *op. cit.* (note 11), p. 41.
29. BGH NJW [1976], p. 2259.
30. BGH NJW [1977], p. 675.
31. BGH NJW [1977], p. 675; differently KG NJW [1976], p. 859.
32. BGH NJW [1976], p. 2261 criticised by Reich; cf. also Hintze, WuW [1977], p. 18ff; Ulmer, BB [1977], p. 357ff.
33. BGH NJW [1977], p. 675.
34. From this result numerous controversial issues in economic and legal literature, cf. Reich, NJW [1974], p. 1353ff; Möschel, *Der Oligopolmißbrauch im Recht der Wettbewerbsbeschränkungen* [1974]; *id.* JZ [1975], p. 393ff; Hoppmann, *Preiskontrolle und Als-ob-Konzept* [1974]; Monopolkommission, *Sondergutachten* 1 [1975]; Kommission für wirtschaftlichen und sozialen Wandel, *Wirtschaftlicher und Sozialer Wandel in der BRD* [1977], p. 390f; from a constitutional point of view: Ipsen, *Kartellrechtliche Preiskontrolle als Verfassungsproblem* [1976]; Scholz, ZHR 141 [1977], p. 52ff; Schmidt-Preuß (note 1), p. 234ff.
35. Reich, ZVP [1977], p. 233ff.
36. Monopolkommission, *op. cit.* (note 34), items 38, 48.

37. BGH NJW [1977], 675; KG WuW/E OLG 2053.
38. Ulmer, BB [1977], p. 357ff; Reich, ZVP [1977], p. 233f; KG WuW/E OLG 2053 — 'Valium III'; — at present set aside by the BGH, BB [1980], p. 543.
39. BGH NJW [1977], 675; differently KG NJW [1976], p. 859; according to the Federal Cartel Office a 'noticeable' exceeding shall be sufficient, BKA-Bericht [1976], BT-Drucks. 7/704, p. 26.
40. BGH NJW [1976], 2262.
40a. BT-Drucks. 8/3690, p. 25.
41. KG BB [1975]; 1270; for a different view, see Reich NJW [1974], p. 1357.
42. Cf. BKA-Bericht [1977], BT-Drucks. 8/1925, p. 23; all the same the Federal Government in its *Vorlage zur vierten Kartellnovelle* has refused to put the concept of abuse into concrete terms, in BKA-Bericht [1977], p. IV.
43. WRP [1978], p. 191f; BT-Drucks. 8/2136, pp. 6, 15, 26.
44. Reich, ZVP [1977], p. 344f; Kommission für wirtschaftlichen Wandel, *op. cit.* (note 34), p. 395f.
45. BGH NJW [1976], p. 2259; NJW [1977], p. 675.
46. For the implementation of these measures cf. BKA-Bericht [1977], BT-Drucks. 8/1925, p. 45.
47. Riesenfeld, RabelsZ 40 [1976], p. 579ff.
48. Steindorff, ZHR 139 [1974], p. 504ff; K. Schmidt, *Kartellverfahrensrecht* [1977], p. 271ff; *id., Aufgaben und Leistungsgrenzen der Gesetzgebung im Kartelldeliktsrecht*, 1978, p. 46ff. On this Reich ZHR 143 [1979], p. 104ff; Tilmann, ZHR 141 [1977], p. 32ff; in each case also on possibilities of improvement.
49. Cf. K. Schmidt, *op. cit.* (note 48), p. 490f.
50. Cf. OLG Frankfurt WuW/E OLG 1615 on the buyer's right of action in the event of infringements of §1; BGH NJW [1974], 901 refuses to regard §22 GWB as protective legislation within the meaning of §35 GWB; on the whole matter, see K. Schmidt, *op. cit.* (note 48), p. 414ff; largely Wolf, *Das Klagerecht der Verbände* [1971]; cf. now the proposal for amendment of the Bundesrat regarding §35, para. 3 GWB which provides for an action for injunction of consumers' associations, BT-Drucks. 8/2136, p. 35.
51. WRP [1978], 191; BT-Drucks. 8/2136.
52. KG WuW E/OLG 1467.
52a. BT-Drucks. 8/3690, p. 28.
53. BVerfGE 8, 274, 311, 324; on this Rinck (note 1), p. 90ff; Schmidt-Preuß (note 1), p. 131ff; Reich (note 1), p. 92ff.
53a. BVerfG NJW [1980], p. 929.
54. On this Rinck (note 1), p. 77ff.
55. On this Kock/Stübing, *Komm. zum AGBG* [1977], §11, No. 1, note 13ff.
56. *op. cit.* (note 22).
57. 76 O 63/78 of March 15, 1978; OLG Düsseldorf, NJW [1979], p. 1509.
58. 2/6 O 38/78 of February 8, 1978; confirmed by OLG Ffm, WRP [1979], 207.
58a. BGH BB [1980], p. 906.

59. On this, see Rinck, *op. cit.* (note 1), p. 141; Steindorff, *op. cit.* (note 1), p. 143ff; Büdenbender, JUS [1978], p. 150ff; Hensen in: HdVR, Gruppe 230, p. 11f.
60. On this Emmerich and Baur; in: *Ordnungspolitische Überlegungen zur leitungsgebundenen Energieversorgung* [1977], 45ff, 75ff; Monopolkommission: Hauptgutachten 1973–75, *Mehr Wettbewerb ist möglich* [1976], p. 407ff.
61. Cf. KG WuW E/OLG 1467 (BP).
62. Rinck, *op. cit.* (note 1), p. 142f.
63. On this see Gleiss/Hotz, in: *Gemeinschaftskommentar zum GWB*, item [1974], §99 note 12; Rinck, *op. cit.* (note 1), p. 135f; on the constitutional admissibility BVerfG NJW [1976], p. 2140.
64. On this see Rinck, *op. cit.* (note 1), p. 136 and Gleiss/Hotz, *op. cit.* (note 63), notes 11, 13.
65. BKA-Bericht [1973], BT-Drucks. 7/2250, p. 106.
66. On the relationship between cartel control and credit control, cf. esp. Möschel, *Das Wirtschaftsrecht der Banken* [1973], p. 363ff; Rinck, *op. cit.* (note 1), p. 164; Gleiss/Hotz, *op. cit.* (note 63), §102, notes 19, 21ff. On this see now the amended version of §102 GWB, cf. BT-Drucks. 8/3690, p. 31.
67. On this see Gudian, in: HdVR, Gruppe 80, p. 23ff.
68. Prölß-Schmidt-Sasse, *Kommentar zum VAG*, ed. 8 [1978], p. 177ff, 181ff.
69. Cf. the apt criticism in Gärtner, *Privatversicherungsrecht* [1976], p. 222ff, 292ff.
70. Prölß-Schmidt-Sasse, *op. cit.* (note 68), p. 253ff.
71. Cf. the criticism in Gärtner, *op. cit.* (note 69), p. 239f, as well as the reference in Prölß-Schmidt-Sasse, *op. cit.* (note 68), p. 253 on the impossibility of price competition which is also intended to justify the exemption of the insurance industry from the ban on cartels in §102 GWB; cf. the controversy about the reduction in premiums of the Allianz insurance company, FAZ of 20 November 1978.
72. Cf. on this, for instance, Rinck, *op. cit.* (note 1), p. 139ff.
73. BGH WuW/E BGH 1474; KG WuW/E OLG 1687; on the whole subject, see Rinck, *op. cit.* (note 1), p. 243.
74. Cf. AGV, *Stellungnahme zum Entwurf einer vierten Kartellnovelle* [1978], p. 20f; Kommission, *op. cit.* (note 34), p. 397ff; also Monopolkommission, *op. cit.* (note 34), p. 434ff on the area of power supply where especially competition based on substitutes is to be improved; Gärtner, *op. cit.* (note 69), p. 307ff on the insurance industry; Möschel, *op. cit* (note 66), p. 337ff on banks.
75. BT-Drucks. 7/3206.
76. BT-Drucks. 8/3690, p. 31ff.
77. Cf. on this Baumbach-Hefermehl, Wettbewerbsrecht I, ed. 12 [1978], §3 ref. no. 316.

77a. BGH, BB [1980], p. 494.

78. On this Schricker-Lehmann, *Der Selbstbedienungsgroßhandel* [1976].
79. BGH NJW [1978], p. 267; on this Lehmann, WRP [1978], p. 345ff.

80. BGH NJW [1974], 804; cf. also BGH NJW [1979], 540 (541).
81. BGH NJW [1973], 1371; [1974], 140. BGH, BB [1980], p. 494.
82. Reich/Wegener, JUS [1974], 561; Schricker/Lehmann, in: HdVR, Gruppe 180, items 104ff; cf. also BGH NJW [1979], 808.
83. BT-Drucks. 7/4282, p. 2.
84. BT-Drucks. 7/4282, p. 2.
85. On this see BT-Drucks. 7/4016, p. 13.
86. On this see item 67; and Strecker/Höhfeld, in: HdVR Gruppe 240, p. 18.

CHAPTER 3

The Law of Consumer Information

I GENERALITIES

43 Governmental measures to improve consumer information are nowadays an uncontested instrument of consumer policy (No. 14). In this connection not the principle, but its design and use to the consumer is a debatable question. Trade and industry demand freedom to shape the consumer information to be furnished by them; information is thus an element of freedom of advertising which follows the principle of the enterprises' autonomy (No. 78). Enterprises are willing to cooperate in voluntary information systems (No. 75), but view extensive statutory duties to furnish information critically. Conversely, what matters in terms of consumer policy is that the consumer *in addition to* or contrary to one-sided advertising in the interest of enterprises is provided with objective and factual *counter-information*[1]. Here it is a matter of argument, though, whether the information made available or required by law is actually useful to the consumer. As a criterion in this connection the US Federal Trade Commission has established the principles of 'useful', 'usable' and 'used'[2]. Consumer research has found that information may be useful, but is not necessarily usable or used in actual fact[3]. This is all the more true if the information is directed at socially weak consumers, for instance elderly people, foreigners, marginal groups of society.

For lack of empirical investigations, the jurist cannot (yet) answer the question of what information is 'useful' to the consumer, or 'usable' and 'used' by him. Of greater importance are problems of the *legal bases* of consumer information as well as of possible *constitutional barriers* to the imposition of duties to furnish information. Numerous labelling obligations are based on law, in particular the specific product labelling obligations or prospectus requirements in the case of services (Section II); in addition, there exists a general labelling obligation concerning weights and measures (Section III). The information activity of consumer organisations (price comparisons, testing of products and services, criticisms, etc.) is based not on law, but on constitutional freedoms of action which must, however, remain within certain general civil-law bounds (Section IV). Information systems by suppliers originate from their autonomous decision on which the consumer does not exert a direct influence; here limits exist primarily in the law of competition (Section V).

In a ruling of 25 October 1977[4], the Federal Constitutional Court has for constitutional purposes held the detailed labelling obligations concerning

margarine with a medium-fat content (compulsion to use a specified form and symbol, to include a warning, to use specified indicators) to be compatible with the basic right of freedom to practise a profession and the principle of equal protection of rights[5]. Thereby the Federal Constitutional Court in the interest of *consumer protection* has permitted far-reaching statutory intervention through labelling obligations.

The information activity of consumer organisations in terms of constitutional law implies the use of *freedom of opinion and freedom of speech* pursuant to Art. 5 Basic Law[6]. Its limits stem from general legislation, for instance tort-law and criminal-law regulations on defamation, which in the case of reasonable and objective information are, however, not usually applicable.

II LABELLING OF PRODUCTS AND SERVICES

44 Over the past ten years, the law of labelling in the Federal Republic of Germany as in other countries of the European Economic Community has been characterised by a rapid development[7]. EC draft directives to harmonise certain labelling regulations have likewise influenced national legislation[8].

It should be noted that the labelling of goods and services as an obligation on the supplier to provide the customer with objective and verifiable information about the product, relates to very different questions relevant to consumers. This will be described in detail below. Depending on the type of product, labelling may pertain to the following areas:

- composition of the product
- dangerousness of the product
- side effects
- additives and foreign substances in the product
- perishability, perhaps date of manufacture of the product
- use of the product
- product quality, for instance within the framework of certain standardised groups or objectified criteria of the value in use
- nutritional values in foodstuffs.

In the case of services, the 'labelling obligation' is replaced in prospectuses by references to the various elements of the service, the duties incurred by the customer, etc.

This listing of the different criteria of labelling goes to show that it is practically impossible to create a general labelling regulation. The German legislator has therefore decided to introduce *labelling specific to the product* or, in the case of certain services, an obligation to provide a prospectus in the most different fields of law. Here food law is most important[9]. In other product areas labelling of goods is little developed as yet. Labelling of services is only in its infancy.

In addition to statutory labelling, there may also be *voluntary labelling*[10], either on the entrepreneur's initiative, or by agreements specific to the different trades exempted from the operation of antitrust laws; for example, labelling of the tar and nicotine content in cigarettes which despite the existing enabling provisions has not been brought about by statutory order, but by appropriate agreements

among cigarette manufacturers although with the Federal Cartel Office's support[11].

In the following we shall deal first with the law of labelling regarding foodstuffs and other goods subject to food law. Then we shall describe the labelling of other goods. Finally, we shall make reference to the obligation to provide a written statement in the case of services, as far as this obligation has been realised through legislation or is in process of realisation.

1 Labelling obligations in food law

45 (*aa*) The overall reform of *food law* by the LMBG of 17 August 1974 has also established extensive enabling provisions with respect to labelling regulations[12]. The LMBG itself includes labelling regulations only in exceptional cases, for instance in Art. 16 regarding the marking of additives in foodstuffs, Art. 17, para. 1, item 2 regarding the marking of atypical foodstuffs, and Art. 28 regarding the labelling of cosmetics. These are only minimum standards which under the extensive enabling provisions may, however, be supplemented to give rise to statutory orders.

Art. 19, item 1 includes a general enabling provision with respect to foodstuffs authorising the issuance of statutory orders to the effect that certain statements as to the contents, manufacturer or person otherwise marketing such foodstuffs, be made on the packings, containers or other wrappings in which the foodstuffs are put on the market or else on the foodstuffs themselves. Item 2 extends this obligation to include certain other labels, for instance concerning manufacture and perishability, the origin of a foodstuff or contents of storage bins. Art. 21, para. 1, item 1 includes an enabling provision with respect to *tobacco products* which provides for the marking of smoke components. Art. 29 with respect to *cosmetics* includes an enabling provision authorising the issuance of statutory orders under which certain statements as to the contents, dates (in particular of manufacture or packing), or imperishability and directions for use must be made on the packagings or containers in which cosmetics are put on the market or on the inserts or leaflets accompanying them. Finally, Art. 32, para. 1, item 9 in the case of *consumer goods* provides for an enabling provision to the effect that the following must be marked: the content of certain substances in certain consumer goods, any limitation on their intended purpose and, regarding certain goods, the fact that they are unfit to be used as consumer goods in connection with foodstuffs. Furthermore, food legislation provides for the issuance of *warnings*, Art. 21, para. 1, item 1g, and Art. 32, para. 1, item 8 in the case of foodstuffs, tobacco products and consumer goods.

These enabling provisions have in some cases been exhausted. We shall refer in the following to some of the important more recent labelling regulations on food law and related fields of law.

46 (*bb*) The basic regulation on external labelling of foodstuffs is the *Lebensmittelkennzeichnungsverordnung* (Food Labelling Order) of 25 January 1972 including amendments[13]. As far as it provides for the labelling of weights and measures, this will be described below. In addition to the quantitative labelling of foodstuffs specified in Art. 1, which we shall not enumerate here,

Art. 2 provides in particular for the following statements which must be made in a *conspicuous place* in the *German language* and in *readily discernible, easily legible* characters: the name of the manufacturer and company, an indication of the contents according to the description customary in trade, and the like. In the case of certain foodstuffs additional statements must be made; for instance, in the case of meat and sausages, the species of animal, and in the case of meat products, the date of production, or alternatively, the minimum keeping date. Such labelling must clearly indicate to the consumer which date is referred to. If the term of imperishability of a certain product is given, an appropriate statement must be made if such a term is contingent upon certain temperatures. Such statements need not be conspicuous, though. In the case of meat products, Art. 3 supplements the labelling obligation by the obligation to indicate that the product, even if cooled, will keep for a limited period only.

As regards statements of perishability, special regulations apply in the case of special foodstuffs, which we shall comment on below.

The labelling obligation is safeguarded by sanctions to the effect that without the prescribed labelling, foodstuffs subject to the labelling order must not be held for sale, sold or otherwise put on the market in packagings or containers, Art. 1, para. 2. An infringement of the labelling obligation or of the ban on marketing gives rise to an administrative offence, Art. 3b.

47 (*cc*) *Dairy products* are subject to a strict *labelling obligation* which originates from the Milchgesetz (Milk Act) of 1952[14]. It is supplemented by the Butterverordnung (Butter Order) of 10 August 1970[15]. Art. 9 extends the labelling obligation to include indications of classes of quality, weight, additives, and of late the date of manufacture and packing and indications of the minimum keeping quality. The data must be uncoded, viz. easily discernible to the consumer; they may, however, be given on the bottom of the packaging.

The Käseverordnung (*Cheese Order*) of 19 February 1976[16] also includes extensive labelling regulations concerning cheese and cheese products. Art. 8 of the Käseverordnung includes the principle that cheese must not be put on the market without due labelling. The label must be in the German language, clearly visible and applied in an indelible way and in readily legible characters. Regarding cheese products, Art. 9 lays down that the fat content, the production and minimum keeping dates must be given. For products manufactured from cheese, depending on the type of product, the dry matter, fat content and control number must be given, but not the minimum keeping date. Finally, Art. 24 provides for the marking of foreign substances. We shall not go into details here.

A special labelling obligation exists under the Konsummilchverordnung (Milk Order) of 19 June 1974 regarding the fat content[17]. The date of production and the keeping date must also be marked.

48 (*dd*) *Margarine products* have for some time been subject to an especially strict labelling obligation which serves less the interests of consumer protection than the purpose of warding off competition from milk products (butter, etc.). The Margarinegesetz (Margarine Act) of 1 July 1975[18] extended that development to include low-fat margarine. In particular, Art. 2 of the Act provides for

a special form of packaging for margarine products. The product must be labelled 'margarine' or 'low-fat margarine'; in the case of low-fat margarine, a warning is also necessary. The date of production and the keeping date must also be given. This is to protect the consumer against mistaking margarine for butter and to provide him with certain precise product information.

49 (*ee*) *Meat products*, as mentioned above, are subject to special labelling requirements under the Lebensmittelkennzeichnungsverordnung regarding production and minimum keeping quality. Art. 4 of the Fleischverordnung (Meat Order) of 6 June 1973, as amended on 10 May 1976[19], regulates the marking of additives; if certain additives are marked, this does not constitute an adulteration of the meat and the otherwise applicable ban on marketing does not apply. Additives that are admissible but must be identified are, for instance, lactoprotein for boiling sausages and corned beef, blood protein, bread rolls and the like for certain meat preparations. The label must be provided in easily discernible characters on the product, on the packaging or on the menu. Pursuant to Art. 4a, products with meat as additive are excepted; here such labelling is not necessary.

The Hackfleischverordnung (Minced Meat Order) of 10 January 1976[20] Art. 7 regulates labelling as regards description of the product, species of animal, meat weight, production, perishability and manufacturer. In addition, there must be a note that the product is intended for immediate consumption (following purchase of a fresh product, or after thawing a frozen product).

Under the EC directive of 15 February 1971[21], the Geflügelfleischhygienegesetz (Poultry Meat Hygiene Act) of 12 July 1973 was issued regarding poultry, which in Art. 12 requires labelling in accordance with the official investigation of poultry.

50 (*ff*) With respect to *cocoa products* and confectionery, the Kakaoverordnung (Cocoa Order) of 30 June 1975[22] was issued on an EC basis. Art. 6 provides for the labelling of additives.

51 (*gg*) Since 1 June 1978, *fruit juices* have been labelled better as regards their production and composition under the Fruchtsaftverordnung (Fruit Juice Order) of 25 November 1977[23], which was issued pursuant to EC directives. In fruit juices made 100% from the juice of fresh ripe fruit, additives such as sugar, carbon dioxide or citric acid must be indicated. Juices made from concentrates must be designated as such. In the case of non-alcoholic refreshing drinks containing fruit juice, the minimum content of fruit juice must be stated. Fruit nectar — a new description of drinks — and fruit syrup are products containing fruit juice or fruit pulp which do not come under the term fruit juice. Fruit nectar contains no less than 50% fruit juice, or fruit pulp and fruit juice to which water and sugar has been added. The minimum content of fruit ingredients and admixtures of fruit pulp, honey, lemon juice, tartaric acid or lactic acid must be indicated.

52 (*hh*) The *Nährwertkennzeichnungs-VO* (Order concerning Labelling of Nutritional Values) of 12 December 1977[24] does not require general labelling of

nutritional values, but regulates merely the form and type of labelling related to nutritional values, with the description 'kilojoule' having been introduced in accordance with the harmonisation of nutritional values within the EC. Only dietary foodstuffs are excepted pursuant to Art. 14a of the revised version of the Diätverordnung (Diet Order) with regard to changes in nutrients and the type and quantity of ingredients reducing nutrients.

53 (*ii*) *Dietary foodstuffs* are regulated in detail in the Diätverordnung of 24 October 1975[25]. Arts. 15 *et seq.* contain extensive labelling regulations which relate in particular to additives, sweetening agents and the like. General labelling must include specifically either the date of production or the minimum keeping date. In the case of special dietary foodstuffs, additional labelling is required which cannot be reported here in detail. Art. 25 includes the general principle of labelling law, viz. that labels must be applied in the German language in a conspicuous way and in readily discernible and easily legible writing.

54 (*jj*) Further labelling regulations are included in the *Weingesetz* (Wine Act) of 14 July 1971[26], especially with regard to geographical data and grades of quality. Numerous other acts concern the marking of *preserving agents, classes of quality* and the like[27]. We shall not go into details here.

55 (*kk*) *Gaps in the labelling obligation*. The by no means complete enumeration of labelling regulations under food law must not obscure the fact that the enabling provisions concerning the labelling of products have not at all been exhausted. Thus, with the exception of the general labelling regulations under the Lebensmittelkennzeichnungsverordnung, there is no special regulation on the labelling obligation regarding bread and bakery products; the Brotgesetz (Bread Act) of 9 June 1931 is completely inadequate in terms of consumer protection. In the case of sausages and similar meat products it is, for instance, not required that the fat content be marked as in cheese products because of the suppliers' opposition; here there are voluntary labelling systems (No. 75). In any case, German food law does not include the *principle of complete identification of the composition of a product*[28]. In the area of tobacco products, the labelling obligation has not so far been regulated by an order, but by voluntary agreement cancellable at any time by the manufacturers (No. 76). As regards consumer goods, labelling is so far completely inadequate; the scope of statutory authorisation has not yet been exhausted.

Also, the authority issuing orders has not yet availed itself of the opportunities provided under food law to prescribe warnings (except for low-fat margarine and certain dietary foods). This applies to both tobacco products and consumer goods, although such warnings are often required for the purpose of effective consumer protection and are already used in other countries. By 'voluntary agreement' between the tobacco industry and the Federal Health Ministry, packagings and advertising material will carry warnings effective 1981.

2 Labelling of other products

Labelling regulations on other products exist in isolated cases only; as was stated earlier, a general labelling obligation for goods does not exist. The existing statutory regulations essentially relate to the labelling of textiles, cosmetics and drugs.

56 (*a*) *Labelling of textiles*

In respect of the labelling of textiles, the Act of 25 August 1972[29] is decisive. It is the outgrowth of an approximation of laws within Europe. The Textilkennzeichnungsgesetz (Textile Labelling Act) is a compromise between the different wishes of consumers in the various EC countries and the likewise diverging interests of trade and industry. The basic features of the present regulation are as follows: all textiles that are a subject of business dealings or are offered for sale in the Federal Republic of Germany must bear a label indicating the type and percentage by weight of the textile raw material used (*declaration of raw material content*). Here only the descriptions designated by law may be used. Labelling is required at all levels of the textile and clothing industry and trade. Mail-order businesses are in addition required to ensure the labelling of textile goods offered in their catalogues. If a textile product contains only one raw material at the rate of no less than 85% of its net weight, only that raw material need be indicated, for example 85% cotton. If in the case of blended products none of the textile raw materials used accounts for 85% of the net weight of the textile product, only the percentage by weight of the fibre prevailing in terms of weight need be stated, while the remaining fibres shall be enumerated merely by type. The allowable variation on the declaration of the mixing ratio is no more than 3%. The presence due to the method of manufacture of fibres not named in the declaration of raw material content is tolerated at the rate of no more than 2% of the textile net weight. In the case of textile goods manufactured by the carded yarn process, the allowable variation in terms of foreign fibres is increased to 5%, and with the use of the description 'shorn wool' decreases to 0.3%.

The declaration of raw material content must show uniform characters and must contain only the prescribed and expressly permitted descriptions. Trademarks and company names may be incorporated directly with the declaration of raw material content, but may also be used separately therefrom.

An amendment of the Textilkennzeichnungsgesetz of 8 September 1978[30] will reintroduce the labelling of materials sold by the metre, which had been rendered impossible by a ruling of the Federal High Court of 6 June 1977[31].

57 (*b*) *Cosmetics*

Composition and labelling of cosmetics are regulated uniformly at an EC level under the Verordnung über kosmetische Mittel (Order on Cosmetics) of 16 December 1977[32]. Arts. 4 and 5 regulate in detail the labelling obligations, specifically regarding admissible components, warnings and latest dates of sale or consumption. The declarations must be made on the packaging or on an insert.

The long transitional period as laid down in Art. 10, para. 2 is disquieting, though; only as from 1 August 1979 has the order become fully effective.

58 (*c*) *Drugs*

The Arzneimittelgesetz (AMG) (Drugs Act) of 24 August 1976, which has been in force since 1 January 1978[33], adopting previous regulations, has in Arts. 10 *et seq.* also standardised labelling as far as drugs are concerned. In detail, Art. 10 requires that prepacked drugs must include the following data in clearly legible writing in the German language and indelibly: the name and company of the manufacturer, description of the drug, registration number, batch number, form of administration, contents, method of application, active substances, latest date of sale or consumption, reference to the fact that the drug is sold only on prescription and, if necessary, reference to the fact that it is a doctor's sample. *Warnings* may be ordered by the Federal Health Authority (Bundesgesundheitsamt). The various forms of labelling are explained in detail in the following regulations. Art. 11 lays down that the drug shall be accompanied by an insert which shall contain information in particular on the fields of application, contra-indications, side effects, reciprocity, dosage prescription, possibly the term of application and shall include a reference to the fact that the drug should not be used after the latest date of sale or consumption. Art. 12 contains an enabling provision to the effect that the labelling obligation may be extended to include other drugs and that warnings may be issued.

The scope of application of the law of labelling presents problems specifically outside drugs in the proper sense. This applies, for instance, to so-called 'pseudo-drugs', to foodstuffs causing effects similar to those caused by drugs, and to semi-luxuries. Here the law of drugs does not apply[34] unless pursuant to Art. 12 it is extended by statutory order to include other *drugs*. The food law to be applied does not contain a special labelling obligation (except in the case of cosmetics and dietary food), for instance regarding ineffectiveness or a warning of contra-indications. It remains to be seen how this gap in consumer protection will be filled.

59 (*d*) *Other products*

As regards other products, particularly technical products, there is *no* statutory labelling obligation. The Gesetz über technische Arbeitsmittel, the so-called Maschinenschutzgesetz (Technical Labour Materials Act) of 24 June 1968[35] does not contain labelling regulations, but only minimum standards for product safety and product use.

By the amending law of 13 August 1979, the Maschinenschutzgesetz was renamed 'Gerätesicherheitsgesetz' (Safety of Appliances Act)[35a]. In addition to regulations under the law of safety, which concern primarily the dealer's inclusion in the statutory powers of intervention (No. 159), the amendment contains provisions on a 'GS-geprüfte Sicherheit' (safety tested) label. The test label is awarded if the appliance has been subjected to a design test by a technical inspection agency. There is no legal obligation to conduct a test or to affix a test label. However, in the case of medical apparatus and instruments it may be

required under an order that they must not be put on the market without a test label. The unauthorised application of the 'GS-geprüfte Sicherheit' label constitutes an offence against public order. In the legislator's opinion the label is to serve primarily the purpose of consumer information[35b].

3 Services

60 (*aa*) The law of 'labelling' of *services* is still in its infancy and has not actually been perceived as a problem in terms of consumer policy. Services are generally provided for by contract in accordance with standard form conditions. Since the principle of freedom of contract applies, which in the case of standard form contracts is restricted only in certain extreme cases (No. 258ff), it is for the supplier in shaping his contracts and advertising his services to give to or withhold from the customer the information he deems fit. In this connection, only the regulations on deceptive and misleading advertising apply. In addition, the supplier must inform the customer about the contents of his standard form contract conditions pursuant to the law of standard form contracts. Beyond that the supplier is not required to 'label' his services. As services are intangible goods, special difficulties are encountered as regards the type and form of labelling. To reach the customer, such labelling should be included either in the contract form itself or in the advertisement or prospectus. Apart from a few exceptions, such regulations do not exist in the law of the Federal Republic of Germany.

61 (*bb*) An exception is the Gesetz zum Schutz der Teilnehmer am Fernunterricht (FUSG) (Correspondence Course Protection Act) of 24 August 1976[36]. In Art. 3 the Act imposes detailed duties on the organiser to furnish information which must be included in the written contract. In particular, the contract must include: the name and address of the organiser, a description of the subject, goal, commencement and term of the correspondence course, the final examination and its recognition, details of the tuition fees and dates of payment thereof and also reference to the right of cancellation. Furthermore, the document shall include the structure of the correspondence course as well as statements about the delivery dates of educational material, additional material, requirements as to educational background, etc. If the statements prescribed are not included, the contract is null and void. In the case of optional data, the consumer may exercise a right of notice, without details being provided by law (No. 260).

Art. 16 regulates advertising by distributing information material which must provide a clear survey of the contract terms and standards the participant has to meet. Here the labelling obligation existing in the case of products is replaced by a corresponding obligation to provide a *prospectus*.

62 (*cc*) A bill on the *travel contract*, which had been submitted to the German Bundestag[37], contained certain labelling obligations tailored to the type of contract involved. The basis here was the travel document which must in particular include all data on the travel services envisaged. If these data are included in a prospectus, reference to that effect may be made in the travel document. These provisions were not enacted by the Reisevertragsgesetz (Travel Contract Act) of 1979 (No. 247).

63 (*dd*) In the *law of insurance*, a general *obligation to provide a prospectus* does not exist. Pursuant to Art. 3 of the Versicherungsvertragsgesetz (VVG) (Insurance Contracts Act) there exists merely an obligation to surrender an insurance policy *later*[38]. Under the law of supervision of insurance companies, standard insurance conditions must be combined with the application for insurance or the insurance policy.

(*ee*) Obligations to provide a prospectus in connection with the sale of investments and closed-end investment funds[39] will not be dealt with here. Duties to furnish information in the law of consumer credit will be dealt with elsewhere (No. 323).

III MEASURES, WEIGHTS, PACKAGINGS

1 Generalities

64 The present section deals primarily with the law of *labelling* of weights and measures. Detailed regulations in the interest of the consumer became necessary when manufacturers and traders departed more and more from the classical method of selling loose goods, of filling containers in the presence of the customer, by counting the volume or length, by weighing, bottling, etc. *Prepacked goods* are dominant in trade today. They offer considerable advantages to manufacturers and traders in terms of rationalisation and advertising: they allow industrial packaging, facilitate planning and stock-keeping, standardise sizes and volumes and are particularly suited to present product characteristics through appropriate advertising and design. To the consumer, though, the advantages of prepacked goods are less obvious. They may obscure market conditions and often render price comparisons impossible, for instance if different net weights, non-standardised packages, product differentiation by means of package design or even slack-fill packagings occur in the market[40]. The use of packages as advertising media makes the consumer (children!) a potential victim of suggestive advertising. On the other hand, the consumer may also benefit from prepacked goods, since certain goods, such as deep-frozen foods and tinned products are put on the market prepacked only. For aesthetical reasons the consumer may also be interested in prepacked goods, for instance in the case of cosmetics and sweets. Detrimental to the consumer may be the fact that prepacked goods are more expensive and that they may involve a load on the environment, for instance as a result of non-returnable bottles.

The German legislator recognised the importance of prepackaging in terms of consumer policy at a relatively early stage. In the amended Eichgesetz of 1969[41] the idea of consumer protection as regards prepackages appeared for the first time. Also, at an EC level, the relevance of regulations on prepacked goods in terms of consumer policy and competition policy soon became apparent: the approximation of laws on prepacked goods and their labelling in the member countries is designed to remove at the same time trade barriers which may result

from different weights and measures, different sizes, different labelling, the use of linguistic symbols, etc.

Under the Amending Act of 20 January 1976, which has been in force in the Federal Republic of Germany since 1 July 1977[42], the law of prepacked goods has undergone a fundamental revision, being geared to the requirements of modern trade in the Common Market, and has been improved from the point of view of consumer protection. In particular, the limited application of the law to packagings containing between 50 and 5000 g or ml has been abolished. Initially, the Federal Government had intended to refix the limits between 25 and 10 000 g or ml. At the suggestion of the Bundesrat such a fixed limit was abandoned in favour of a more flexible regulation, which in each individual case may be determined through statutory orders[43].

The law of labelling of net weights was extended to the effect that a mean net weight must be observed and that filling variations are regulated in a certain way. This is to make the state of the market more easy to grasp and to regulate filling accuracy in the interest of the consumer. Packages sold by dimensions other than weight and volume are also included in the regulation.

Through the law of labelling of net weights and the law of filling accuracy, the legislator has imposed an obligation to indicate unit prices, which was dealt with elsewhere (No. 42). Finally, the prohibition of slack-fill packages was extended, particularly in the case of so-called extra-small packages and large containers.

The present law of quantitative labelling is included in the amended provisions of Arts. 14 *et seq.*, Eichgesetz, in the Lebensmittelkennzeichnungsverordnung of 25 January 1972 and in the Fertigpackungsverordnung as amended on 20 December 1976[44]. We shall go into the details of these regulations below.

First, the basic concept of the *prepackage* as defined in the Eichgesetz should be clarified. Art. 14 of the Eichgesetz says that prepackages are products in packagings of any type which are packed and closed in the absence of the buyer, the quantity of the product contained therein not being alterable without opening or materially changing the packagings. Prepackages are also such packages as are easy for the customer to open, for instance jars with screw caps. Art. 17d includes in addition the concept of 'open packages', for instance fruit baskets. Moreover, refillable and non-refillable prepackages are distinguished. To open packages, the regulations on quantitative labelling and unit pricing are applicable in principle; however, the regulation concerning net weights is different, depending on whether or not the packages are refillable[45].

2 The law of quantitative labelling

65 (*aa*) Art. 16 Eichgesetz contains the basic provision on the quantitative labelling of prepackages, irrespective of whether they are closed or open prepackages. Pursuant thereto, prepackages may be put on the market on a commercial basis only if they include an easily discernible and clearly legible declaration of quantity by weight, volume or number of pieces or by any other dimension. The Eichgesetz furthermore regulates certain exceptions or modifications of the labelling obligation and permits detailed regulations on quantitative labelling to be issued by means of statutory order. These provisions are now included

in the Fertigpackungsverordnung and in the Lebensmittelkennzeichnungsverordnung[46].

A distinction is made between *labelling by weight, volume, length, and area* and *labelling by pieces*. As a rule, labelling is by weight, for instance labelling of foodstuffs, feedstuffs for domestic animals, detergents and cleaners, cosmetics, polishes and preservatives, adhesives, ready-for-use varnishes and coating compounds as well as mineral oils and fuels. Declarations of length or area come into question in the case of textile products, wire, cable, hoses, wallpaper, etc. There must be quantitative labelling by length and area also if the products are unpacked. Compared with these, labelling by pieces is the exception which must be expressly provided for in the Fertigpackungsverordnung and in the Lebensmittelkennzeichnungsverordnung. Pursuant to the Fertigpackungsverordnung, labelling by pieces is admissible only in the case of bath tablets and bath pearls, mouthwash tablets, cleansing tissues and pads, as well as adhesive sticks and coloured pencils, Art. 7. The Lebensmittelkennzeichnungsverordnung permits labelling by pieces as regards some products, particularly shaped chocolates, large-size uniform cakes and biscuits that keep, chewing gums and also fruit and vegetables.

As regards the type and place of labels to be affixed it has been provided that they must be in the German language, readily discernible and clearly legible. They must be affixed in a conspicuous place.

It is a matter of the individual case and of trade standards — which are mostly determined by suppliers — when the requirements of being readily discernible, clearly legible and affixed in a conspicuous place have been satisfied[47]. The Fertigpackungsverordnung prescribes in Art. 16 certain type sizes. An additional factor is that the type must stand out against the background. Inconspicuous labelling exists, for instance, if the labelling is provided on the bottom of the package and the consumer cannot reasonably be expected to lift the package in order to be able to read the quantitative labelling.

Art. 5 Fertigpackungsverordnung contains in addition general basic principles of the declaration of net weights to the effect that they must not be vague, limited to a range of net weights, or indicate the gross weight. With respect to large quantities, Art. 5 II provides that in addition to the declaration of nominal net weight on the individual packages, the larger wrapping must also include the number of individual packages and their nominal net weight. This does not apply if all individual packages are visible and may be easily counted and the declaration of net weight is discernible on at least one of the packages.

The Lebensmittelkennzeichnungsverordnung also regulates that labels on packages or containers must be affixed in a conspicuous place, in the German language and in readily discernible, easily legible writing, particularly regarding the manufacturer or weight of the various foods contained in the prepackage, for instance in the case of tinned meat or tinned fruit. Furthermore, the Lebensmittelkennzeichnungsverordnung requires that in the case of certain goods, for instance baking powder and pudding powder, the volume of flour or liquid necessary to prepare the contents of the package should be stated.

66 (*bb*) In the *law of drugs*, there also exists a quantitative labelling obligation although here it is less important than in the area of other prepackages.

Pursuant to Art. 10, para. 1, item 6 AMG, the contents by weight, volume and/or number of pieces of the prepacked drug must be marked on the package. Para. 8 then contains some detailed provisions on the application of labels; Art. 12 authorises the extension of the labelling obligation.

3 Accuracy of data on prepackages

67 In the case of prepackages, not only must certain labelling obligations be met, but at the same time certain values regarding filling accuracy and allowed variations must be observed. The provisions laid down in Art. 15 Eichgesetz and in the supplementary provisions of the Fertigpackungsverordnung relate only indirectly to the information of the consumer, but are designed to protect the consumer against overcharging and deception. As far as that goes, it is appropriate to deal with them in this context.

Here Art.15 is the basic standard. It requires that prepackages of equal nominal net weight must be produced on a commercial basis only in such a way that the net weight at the time of production on an average does not fall below the *nominal net weight* and does not exceed the *established minus variations* provided for in the Fertigpackungsverordnung. Prepackages of equal nominal net weight, when put on the market on a commercial basis for the first time, must contain a net weight which at that time does not exceed a lowest minus variation as defined in the Fertigpackungsverordnung. With respect to open packages the special regulation of Art. 17d applies.

The distinction made in Art. 15 between mean net weight and the regulation of allowed variations is of great significance in terms of regulative policy[48]. The requirement that the mean value be observed means that the manufacturer has to offset minus variations from the actual net weight by adding the deficient quantity. He is thus forbidden to realise a special profit by regularly letting the contents fall short of the nominal net weight. The requirement of allowed variations by contrast relates to individual packages. In connection with the requirement of mean value it guarantees to the consumer that nominal net weight and actual net weight are usually the same.

The regulation of allowed variations is laid down in Arts. 17 *et seq.* of the Fertigpackungsverordnung. To begin with, the allowable variation, depending on the product's capability of being put into containers, is given as far as weight or volume are concerned. In the case of net weight labelling of a product by length or area, the minus variation is 2% with lengths and 3% with areas. In the case of labelling by number of pieces, no variations are allowed in packages containing 30 pieces or less, in the case of any fraction of 100 pieces, the allowed variation is one piece.

Pursuant to Art. 15, para. 3, it is sufficient that the allowed variations exist at the time the products are first put on the market. This means in particular that traders cannot be held responsible for subsequent losses by desiccation. The Federal Government's comment thereon is: 'The debatable question of whether an established lowest minus variation shall be observed upon marketing at any marketing stage or only upon marketing for the first time has been decided in favour of the latter'[49]. Thus under the Eichgesetz traders cannot be held responsible for subsequent losses by desiccation, since they cannot reasonably be

expected to refill closed packages. In the case of open refillable packages, for instance fruit baskets, traders must make up for deficiencies.

4 So-called slack-fill packagings

68 Slack-fill packagings are all forms of packagings having the *outward appearance of a prepackage* that make the consumer believe that the net weight is greater than the actual contents. Examples are, for instance, thick-walled bottles in the case of alcoholic drinks, cosmetics packagings with hollow spaces, voluminous wrappings in the case of toothpaste. A package may constitute a slack-fill packaging and deceive the consumer even if it is labelled correctly and the respective mean values and allowed variations pursuant to Arts. 15, 16 Eichgesetz are observed. That is why Art. 17a Eichgesetz as amended includes a general clause concerning the prohibition of slack-fill packagings and Art. 35 provides for fines in case of infringement. The provision runs: 'Prepackages must be designed so as not to delude the consumer into believing that they contain more than their actual net weight'.

The provision is formulated along the lines of a general clause and does not state the precise details of delusion. Rather, it has to be established in each individual case when such delusion exists, although meanwhile certain guidelines issued by the Federal Economics Ministry and standard specifications exist which are not legally binding[50]. Also, in the case of so-called extra-small packagings, Art. 17a applies.

Art. 17a requires two things: firstly, that there be a disproportion between the contents and the size of the packaging and, secondly, that the packaging makes the consumer believe that it contains more than it actually does. Three types of slack-fill packaging can be distinguished, namely: deception through measures of design and make-up, disproportion between the contents and size of the packaging, and prohibited hollow spaces[51]. Some examples of such slack-fill packagings are: raised bottoms, hollow bottoms of bottles; thick walls or double walls with hollow spaces; excessively large stoppers, caps, lids; double packagings; larger packagings than technically required; reduction of the nominal net weight while the packaging is retained unchanged; incomplete filling.

Meanwhile the Federal Economics Minister has issued special regulations on chocolates, cosmetics, tinned small sausages and plastic cups. This is designed to remedy grievances regarding slack-fill packaging especially in these markets. However, as these are but ministerial directions to the authorities in charge of weights and measures, the regulations are not binding upon manufacturers[52].

A contravention of Art. 17a may be punished by fines. Slack-fill packagings may constitute an act of misleading advertising pursuant to Art. 3 UWG, since declarations are made also if they appear on the product or on the wrapping. They are the responsibility of the manufacturer or trader. The simulation of a greater net weight may also constitute unfair advertising. Under civil law, a slack-fill packaging is no cause for rescission of the contract. However, the consumer may be entitled to claim damages pursuant to Art. 823, para. 2, Civil Code because the provision of Art. 17a is also a protective law in the individual consumer's favour. He must prove the damage sustained, causation not being excluded by the fact that the quantitative labelling is correct[53].

IV CONSUMER INFORMATION THROUGH CONSUMER ORGANISATIONS

1 Economic significance and legal bases

69 However comprehensive a regulation of labelling may be, it is unable to ensure that the customer in his economic planning is provided with the information he needs to use his income in an optimum way and to decide what he will consume. The law of labelling is limited to 'basic information', for instance regarding prices, classes of quality, product components, and weights and measures, but does not enable comparative evaluation of the range of goods offered in terms of price and quality, and does not satisfy the need for information separate from the product which the consumer may use before making a purchase decision.

Hence it is undisputed among people in the Federal Republic discussing problems of consumer policy that the creation of a system of information separate from the product is a central task of consumer policy. This has repeatedly been pointed out both by the Federal Government and the EC Commission in their respective consumer reports[54].

70 (*aa*) The concept of consumer information must not be conceived in too narrow a sense. The consumer is interested not only in being provided as best as possible with information about the price and quality of goods offered on markets, so that he may compare and evaluate supply, but also in public criticism of harmful or useless products, manipulative sales methods, and unfair trade practices. Since the process of consumption in the current economic system of the Federal Republic of Germany is public, suppliers have to face public criticism. The consumer's decision and thus consumer information must not be reduced to the conduct of private households, but must include the public element as well[55].

This at the same time describes the legal approach to the proper appraisal of consumer information. Consumer information inclusive of consumer criticism takes its bases from the constitutional guarantee of freedom of opinion, of information and of the press in Art. 5, paras. 1 and 2 Basic Law[56]. The Constitution itself lays the foundation for the legal regulation of consumer information. In its well known Blinkfüer decision, the Federal Constitutional Court had previously recognised this principle regarding the appeal to boycott for non-economic reasons: 'An appeal to boycott the basis of which is the expression of a certain opinion is protected under Art. 5, para. 1, sentence 1 Basic Law, particularly if it is used as a means of public argument in a matter materially affecting the public, viz. if at its base there is not the promotion of private interests, but the concern for political, economic, social or cultural interests of the public'[57]. What has been said about the most powerful means of consumer information, namely boycott in the widest sense as described above, applies all the more to other forms of consumer information.

Apart from that there are no special statutory rules regulating consumer information and consumer criticism that include boycott. Rather, the general principles of the law of torts and the law of unfair competition must be taken

into consideration. Here it was initially a matter of argument whether consumer information furnished by consumer associations, consumer institutions and organisations and by public agencies is subject to the provisions of the law of unfair competition or of torts. Since consumer organisations in the widest sense do not act with the intention to compete (that is, do not provide information for the purpose of promoting their own or somebody else's business) the courts have made it clear that the regulations and limits under the law of unfair competition do not apply to objective and independent consumer information[58]. An exception to this rule may be the borderline case that a consumer organisation itself pursues business purposes, for instance as a buying ring within the meaning of Art. 6b UWG, or asks consumers to buy at a certain shop; then it promotes at least somebody else's business and is subject to the provisions under the law of unfair competition pursuant to Art. 1 and pursuant to Art. 3 UWG as well as Art. 14 UWG (prohibition of disparagement) and Arts. 25, 26 GWB (particularly prohibition of boycotts)[59]. This is a matter of argument only as far as price comparisons are concerned (No. 73).

71 (*bb*) The basis of consumer information in terms of civil liability is therefore the law of torts in the Civil Code. Here the function of the law of torts is not so much to regulate responsibility for consumer information, but rather to mark its barriers and limits in terms of liability. The German law of torts, in accordance with what has meanwhile become established court practice, distinguishes between consumer information by means of *representations* and consumer information by means of *statements of opinion*[60].

Representations are regulated in Art. 824 Civil Code as regards their admissibility under the law of liability. Civil liability for damages in the case of endangering credit arises also if somebody is guilty of negligent misrepresentation. He is not liable for damages, though, if he pursues a legitimate interest. The provision of Art. 824 means that consumer organisations in furnishing information may generally plead the pursuance of legitimate interests. In the event of negligent misrepresentations they do not therefore incur civil liability for damages. However, also in this case, court practice admits of a claim for retraction (not a claim for damages) which is independent of fault; nobody can plead that misrepresentations are spread to safeguard legitimate interests[61].

In the case of *statements of opinion*, a distinction is made by intensity of the value judgment. If the statement of opinion takes the form of malicious or defamatory criticism, it may constitute an intentional act against public policy which renders a consumer organisation liable for damages pursuant to Art. 826[62]. If the criticism is defamatory or insulting, for instance if a certain trader is claimed to cheat customers, it is a criminal offence and at the same time gives rise to civil liability for damages and a claim for injunction pursuant to Arts. 823, para. 2, 1004 Civil Code. These extreme instances of criticism are hardly of importance at all and are not in accordance anyway with the consumer's interest in objective and factual information and criticism.

Much more difficult to judge under German law are those cases where a consumer organisation makes statements of opinion (value judgments), for instance regarding the quality or good value of a product or several products or regarding competitive practices, without acting wilfully or in an insulting way.

Under certain circumstances these statements of opinion are for civil law purposes regarded as an infringement of the right to an established and operative business (eingerichteter und ausgeübter Gewerbebetrieb) pursuant to Art. 823, para. 1 Civil Code. Negligent statements of opinion may also give rise to liability pursuant to Art. 823, para. 1, which, if successful, may considerably obstruct the activity of a consumer organisation[63].

This is not the proper place for a critical reconstruction of court practice relating to the interpretation of Art. 823, para. 1[64]. Rather, we should mention only the most important grounds that may give rise to civil liability of consumer organisations for statements of opinion. Such liability first of all presupposes that the infringement related to a business[65]. Such a business-related infringement exists only if the consumer organisation's statement of opinion refers to a particular supplier or to an identifiable, concrete group of suppliers[66]. General statements of opinion not referring to a particular business do not therefore result in the applicability of Art. 823, para. 1. This business-related infringement must also be *unlawful*. The unlawfulness does not result from the mere fact of a statement of opinion, but only from a *test of reasonableness*, with the constitutional guaranty of freedom of information and opinion as mentioned above being taken into account. In the Federal High Court's practice a central principle has been established to the effect that in a contribution to a controversial issue materially affecting the public, the admissibility of freedom of speech is presumed[67]. There is a limit to this only where a statement of opinion ceases to be fair. Then a consumer organisation must expect to be made civilly liable by the enterprise concerned[68].

Consumer information that constitutes a tort within the limits outlined above gives rise to claims for damages which are determined by the damage the enterprise concerned has suffered as a result of incorrect, unobjective or even immoral consumer information. In a particular case, this may involve considerable risks of liability[69]. In addition, enterprises may advance claims for injunction and removal against consumer organisations. Negligence is not required on the part of the consumer organisation. However, there must be unlawful interference or the apprehension of such interference. Then the enterprise may have recourse to a claim for injunction. Such a claim may also take the form of a claim for retraction or correction. A right of the opposer to reply does not exist under civil law, but may flow from the law of the press. The opposer's right to reply comes into play when consumer organisations make representations in the press prejudicing the rights of enterprises. Unlawfulness or fault are not required[70].

2 Comparative testing

72 In the Federal Republic of Germany, comparative testing has no statutory basis but is carried out in the public interest by the Stiftung Warentest, a foundation under private law. The founder of this institution is the Federal Government, which makes available to the Stiftung Warentest the funds required by the latter in performing its duties. Meanwhile the Stiftung Warentest generates its funds at the rate of two thirds through the sale of its magazine *Test* and at the rate of one third through government subsidies. In Art. 2, para. 1 of the bye-laws

of the Stiftung Warentest its task is defined as follows: 'Information of the public about objectifiable features of the value in use of goods and services which are offered everywhere in major areas in basically the same quality and in a manner sufficient to render them identifiable'[71]. Pursuant to Art. 2, para. 2, the Stiftung shall test comparable goods and services according to scientific methods and shall publish the test results. The Stiftung publishes its results in its own magazine in the form of a test compass comparing the test results of several similar products or services by rating the product tested according to a particular scale (very good, good, satisfactory, less satisfactory, unsatisfactory) and giving the average price asked for them on the market. Unlike its French counterpart, the Stiftung Warentest does not compare prices asked and quality judgments. In addition to the Stiftung Warentest, there are other private testing institutions, particularly in the area of motor vehicles. For example, the big automobile clubs conduct comparative goods tests with respect to cars and accessories and publish the results in magazines for their members.

Since there is no statutory basis for the activity of the Stiftung Warentest and other testing institutions and organisations, their position in legal transactions and particularly their responsibility under the law of torts is determined by the principles of civil law outlined above. Since in general the activity of the Stiftung Warentest, of associated testing institutes and of other testing institutions does not serve business purposes, the law of unfair competition is not applied. Liability is then determined either pursuant to Art. 824 Civil Code, if the test report is to be regarded as factual information, or pursuant to Art. 823, para. 1 Civil Code, because of a possible interference with the tested enterprise's established and operative business, if the test report is regarded as a value judgment and statement of opinion.

Important questions of civil liability of the Stiftung Warentest were clarified particularly by a leading decision of the Federal High Court of 9 December 1975[72]. The Federal High Court first of all emphasises that test reports, because they are mostly of the nature of a value judgment, should be qualified as statements of opinion and not as statements of fact. Liability is thus determined by Art. 823, para. 1 Civil Code. The Court attaches importance to the fact that not every negative rating of a product or service by the Stiftung Warentest should be considered unlawful interference with an enterprise's business; in this connection the basic right of Art. 5 Basic Law plays a part pursuant to which the comparative test contributes to issues materially affecting the public. According to the Court the Stiftung Warentest is engaged in consumer guidance which is imperative to provide a clear view of market conditions, not only in the interest of the consumer but from the viewpoint of the economy in general. It also serves the true interests of manufacturers and suppliers. That is why it is necessary that the Stiftung Warentest should enjoy an adequate scope of action, which is ensured by the performance of its testing projects in line with its bye-laws. Only in the case of malicious, defamatory criticism and unobjective disparagement should liability arise.

In its decision, the Federal High Court then states the *requirements* a comparative test has to satisfy in order that it will *not* be subject to *civil liability*. The test must be conducted in a *neutral, objective* and *expert* way. Here it is less important whether the result is correct from an objective point of view; rather

what matters is the effort in arriving at a correct result. The testing institute, the Court holds, enjoys a *considerable scope* as regards the adequacy of testing methods, selection of objects to be tested and presentation of test results. Only if the path of action and the conclusions drawn from the tests conducted appear no longer defensible (debatable) does unlawful interference exist. A comparative test may also be performed in such a way that merely a single product is tested, as far as branded articles are concerned. For in a branded article a product of unchanging quality is presented to the consumer (Cf. Art. 38a, I GWB).

In a comparative test it is also admissible particularly to point out a product made by one manufacturer as against that of another; such pointing out, according to the Court, does not constitute unlawful interference with the prejudiced enterprise.

On account of the Federal High Court's decision the Stiftung Warentest has been largely exempted from risks of liability[73]. Meanwhile it has also been established that the testing institute may make price comparisons[74]. In addition, it may be assumed that the testing institute is also allowed to compare the price and quality of a product, as far as is reasonable (price comparisons are, for example, based on misleading or incorrect data). Claims for retraction cannot be enforced against the testing institute, because such claims exist only in the case of factual representations, but not in the case of value judgments. Lastly, the Federal High Court has rejected direct liability on the part of testing institutes enlisted by the Stiftung Warentest[75].

Thus the risk of liability of the Stiftung Warentest is reduced to those cases in which it uses testing methods that are not defensible and where its tests are based on misrepresentations. As the testing procedure of the Stiftung Warentest is designed in such a way that suppliers are informed beforehand on several occasions, this remaining risk of liability is practically excluded[76].

A point still unclear according to the new legal position is in how far other testing organisations and testing institutes also enjoy the privilege of non-liability which the Federal High Court developed in respect of the Stiftung Warentest. Basically, the principles are the same which must then be verified in an individual case on the basis of the structure of the testing institute involved, its testing methods, its rating, etc[77]. It may be assumed that these requirements are satisfied in tests conducted by automobile clubs.

The privilege of non-liability does not exist if 'testing organisations' of trade and industry submit comparative goods tests to the public. Here generally a business purpose exists, so that the stricter principles of the law of unfair competition apply.

3 Price comparisons and other information systems

73 Apart from comparative testing, consumer information systems are the regional price surveys and price comparisons conducted by consumer advice centres and other consumer organisations. Shopping hints, hints at new products, guidance as to special offers, etc., by consumer organisations may also include additional information systems. The Federal Government supports such price comparisons by granting subsidies[78].

Here, too, it is understood as a principle that the establishment and conduct of such information systems by independent consumer organisations bears no relation to competition and is not therefore subject to the regulations under the law of unfair competition. This must hold true also if, for instance, certain enterprises are recommended to the consumer as charging particularly moderate prices or as being particularly quality-conscious. However, this principle of law is quite controversial[79]. It is assumed in some cases that the naming of individual shops in the form of a recommendation where to buy already bears a relation to competition. For the same reasons as those given in the Federal High Court's decision on comparative testing, this cannot be accepted: recommendations as to where to buy serve primarily to inform about market conditions and to guide the consumer, but not to promote business. Therefore there is no act of competition. Civil liability for such information systems will generally flow from Art. 824 Civil Code, since price comparisons, hints to quality and the like are based on facts. In the case of negligent misrepresentations, the consumer organisation may thus generally refer to its legitimate interest in consumer guidance; however, it must expect a claim for retraction or correction to be raised should the information be false, incomplete or misleading. Again, this holds true only if in its price comparisons individual suppliers are mentioned by name. General price surveys, price trends, quality information and the like are not subject to civil liability.

If the information systems contain opinions instead of facts, liability under Art. 823, para. 1 arises. Generally speaking, there will be no liability, unless concrete names are given, for instance in the form of shopping hints. However, if names are mentioned, the principles of court practice concerning comparative testing must be obeyed.

4 Consumer criticism, consumer boycott

74 Public criticism of goods and services by consumer organisations and appeals to boycott do not constitute legal problems to be judged on the principles of unfair competition, since consumer organisations do not act to promote business. The principles of the law of torts as described above are applicable. Liability for public criticism and appeals to boycott arises the sooner, the more intense the form of criticism (so-called defamatory criticism) and the more the criticism affects specifically a particular supplier[80]. In the case of defamatory criticism, liability will already arise because of intentionally unfair damage or because of defamation. In the case of criticism based on representations, the basis of liability is Art. 824. As described above, in the case of negligent misrepresentations, liability for damages does not arise if the consumer organisation can plead the safeguarding of legitimate interests. There is a legitimate interest in general consumer information on grievances, for instance, in trade. However, the consumer association may have to retract its representations if they are incorrect or cannot be proved (claim for retraction or correction).

Liability pursuant to Art. 823, para. 1 Civil Code comes into play if the criticism is based predominantly or exclusively on value judgments or is expressed in value judgments. This is generally the case with *appeals to boycott*. Criticism

and appeals to boycott on the part of consumer organisations, as has been established by court practice, are generally allowed by the basic right of freedom of opinion[81]. In the case of general criticism of goods, an appeal to boycott, for instance, a product marketed by several producers (meat boycott, boycott of cigarettes) there will be no business-related interference, so that the preconditions of Art. 823 do not exist. If the boycott hits a particular supplier or a particular product, more exacting standards have occasionally been applied in court practice. Here often a weighing of interests is taken as a criterion; consumer interests are weighed against business interests of the criticised or boycotted enterprise. Thus, in a case where a certain automobile brand had come under severe public criticism from a consumer self-help institution the Regional Court of Berlin[82] has stated that in this case the criticism was justified, because the consumer had come forward with his negative experiences which were in contrast to the manufacturer's advertising. Moreover, the manufacturer had come under public criticism already from other quarters, so that it was only fair for those injured to 'follow the matter up', as it were. Whether from that the converse conclusion may be drawn that other forms of criticism are inadmissible, has not been decided by the court.

In another case, the Higher Regional Court of Stuttgart[83] had to consider a consumer boycott on the occasion of what is known as 'camouflaged advertising' on television. While the court assumed that generally such criticism of the manufacturer had to be accepted, this was meant to apply only as long as camouflaged advertising on television was not in general felt to be offensive. Since meanwhile there had been a change in the attitude towards camouflaged advertising, particularly as it is practised openly by television companies, an appeal to boycott, it was argued, was no longer admissible, because the facts challenged were lacking in offensiveness. The decision gives rise to doubts because it compels consumer organisations to accept without criticism grievances that have 'become a habit'.

In the weighing of interests in connection with the judgment of appeals to boycott it is also taken into account whether the boycott is based on incorrect facts, whether it keeps within the limits of what is necessary and required, whether it is leveled at persons uninvolved and whether it is arbitrary. On balance, this means that the selective boycott for a certain enterprise or a certain product by consumer organisations involves considerable risks of liability.

V VOLUNTARY LABELLING AND INFORMATION SYSTEMS

1 Actual occurrence

75 In addition to the introduction of statutory labelling obligations and the promotion of counter-information through consumer organisations, voluntary labelling by suppliers plays an important part in the consumer policy of the Federal Republic of Germany. In the Federal Government's Second Report on Consumer Affairs of 1975 it says: 'The Federal Government also attaches considerable importance to voluntary informative labelling of goods'[84]. Through economic and legal measures, the Federal Government induces trade and

industry to enhance voluntary informative labelling. The following systems of information may be mentioned.

(*aa*) In the area of *safety labelling*, enterprises associated with the Deutsche Institut für Normung (DIN) (German Institute for Standardisation)[85] may use the DIN label if their product corresponds to the institute's guidelines; the label 'DIN tested' is used if the merchandise before being put on the market was tested by an independent testing agency recognised by the DIN for compliance with the standard concerned[86]. However, manufacturers are under no obligation to test and/or label their products.

A similar practice is followed in the area of testing and labelling of electrotechnical goods (VDE label)[87], technical equipment (TÜV-maschinenschutzgeprüft, mechanically tested and approved by the Technical Inspection Authority)[88], gas and water installations (DIN-DVGW inspection label)[89]. In addition, the Federal Government has demanded that a general safety label protected under trade mark law be introduced. This is to be done by the 'Trägergemeinschaft Sicherheitszeichen e.V.' (Industrial Federation 'Safety labels')[90]. The activity of the Federal Government has been discontinued after the introduction of the safety label 'GS-geprüfte Sicherheit' (No. 59).

(*bb*) Of greater importance to the consumer is what is known as *quality labelling*. Examples are the Deutsche Weinsiegel (German wine label), the Badische Weinsiegel (wine label of Baden), the RAL label of producers who are members of the RAL, for instance producers of furniture and windows[91]. However, consumers also level criticism at quality labelling: in most cases it is a matter of minimum requirements only, so that for the consumer a comparison of qualities is impossible; the label serves to promote sales. Its design, use and testing is the responsibility of manufacturers[92].

(*cc*) Furthermore, the Federal Government supports what is known as product information. Such information is to explain to the consumer in a brief and intelligible way the main qualities of a product and, if necessary, arrange them in a reference scale, for instance energy consumption, performance, loading capacity. Consumer representatives[93] take part in the preparation of product information which is currently being tested in the area of electrical household appliances (refrigerators, washing machines, etc.).

(*dd*) In the case of products injurious to health, for instance tobacco products, the Federal Government exerts an influence on manufacturers endeavouring to induce them to label harmful substances. The declaration of tar and nicotine components in cigarettes may serve as an example[94]. Particularly, the Federal Government was successful in persuading suppliers to introduce warning notes; (but not before 1980); the statutory authorisation was not utilised (No. 55).

A development similar to the above is beginning to appear in the case of sausages, where manufacturers and traders are beginning 'voluntarily' to indicate the fat content. In other respects the obligation to indicate harmful side effects follows from the law of manufacturer's product liability (Nos. 165ff).

As far as that goes, labelling may be uniform for certain groups of products, for example inflammable or toxic household goods.

(*ee*) In the discussion about these questions, more far-reaching proposals are being maintained. The Commission of Economic and Social Changes has demanded that quality labels and at the same time quality classes of products be introduced to make it possible for the consumer to compare prices and qualities on an objective basis[95]. A minority of the Commission members even demanded that the test results of the Stiftung Warentest be indicated when the goods are sold[96]. It is not clear, though, whether such labelling should be on a voluntary or on a statutory basis.

2 Legal bases and consequences of voluntary labelling

76 Since labelling is performed on a voluntary basis, legal regulations play only an indirect part regarding participation in an information system as well as in its design and consequences. Without claiming completeness, we may refer to the following points.

(*aa*) A safety or quality label may be registered as a collective trade mark and is then subject to trade mark protection[97]. The holder of the label — the Trägergemeinschaft (industrial federation) — under trade mark law may take action against the use of the label contrary to the holder's statute (for instance, non-compliance with the testing criteria). At the same time a consumer association may challenge a manufacturer making unauthorised use of a safety or quality label for misleading advertising (No. 118).

(*bb*) An association for a collective mark is subject to certain antitrust barriers, particularly if it is used as a means of regulation of the market. As far as the requirements made by the association are the same in respect of all competitors it is exempted from the ban on trusts[98].

(*cc*) If it is a matter of public interest, the Federal Cartel Office or the Minister of Economics may exempt uniform labelling from the operation of antitrust law if it tends to restrain competition, e.g. in advertising. This has been done in the case of an agreement of cigarette manufacturers on the marking of smoke components[99].

(*dd*) Under civil law, the use of labels does not entail any legal consequences. A safety or quality label does not imply any promise to assume liability to third parties, particularly to final consumers[100]. Because of such court practice, voluntary labelling has lost much of its practical importance to the consumer; it remains a means of sales promotion for manufacturers and may therefore hardly be considered to be in the interest of consumers.

(*ee*) The application of the test results of the Stiftung Warentest on products — possibly demanded under a voluntary or statutory labelling system — is subject to the prohibition of misleading advertising[101]. Deception will always

exist if a certain time has elapsed between the test and the labelling, since then the bases of evaluation no longer apply. The indication of the results of comparative testing valuations within the framework of a labelling system may be subject to the prohibition of comparative advertising (No. 91).

3 The future of voluntary labelling systems

77 The brief survey of the actual and the legal position is *not encouraging* as regards voluntary labelling. It serves primarily the sales interest of manufacturers, traders and suppliers of services. It is based on the voluntary decision of enterprises and on the voluntary cooperation of individual suppliers. Consumer representatives participate in information systems only in exceptional cases. They do not enable the consumer to make genuine price and quality comparisons.

In other areas 'voluntary' labelling — like 'voluntary' restrictions on advertising (No. 126) — serves to prevent state intervention, for example in the tobacco industry.

For all these reasons — in contrast to the Federal Government's opinion — voluntary labelling *should no longer be promoted.* Instead, *counter-information by consumer organisations* should be improved.

NOTES

1. Reich, ZRP [1974], p. 190; Simitis, *Verbraucherschutz — Schlagwort oder Rechtsprinzip*? [1976], p. 116ff; Scherhorn, *Gesucht: Der mündige Verbraucher* [1974], p. 70ff; *id.*, *Verbraucherinteresse und Verbraucherpolitik* [1975], p. 211ff; Reich/Tonner/Wegener, *Verbraucher und Recht* [1976], p. 26ff, 134ff; Kübler/Assmann, ZHR 142 [1978], p. 413ff.
2. Miller, ZVP [1977], p. 62ff; Diller, ZVP [1978], p. 24ff.
3. Padberg, ZVP [1977], p. 5ff; Kroeber-Riel, *Konsumentenverhalten* [1979], p. 600f; Biervert/Fischer — Winkelmann/Rock, *Grundlagen der Verbraucherpolitik* [1978], p. 134ff; Simitis, *op. cit.* (Note 1) p. 133ff.
4. BVerfG EuGRZ [1978], p. 125ff. Also BVerfG NJW [1980], p. 1511.
5. On this, see Reich, *Markt und Recht* [1977], p. 94ff.
6. BVerfGE 25, 256 (264); BGH NJW [1976], p. 620.
7. Cf. the Berichte der Bundesregierung zur Verbraucherpolitik von 1971, BT-Drucks. VI/2724 and 1975, BT-Drucks. 7/4181, as well as the OECD documentation in v.Hippel, *Verbraucherschutz*, 2nd edn. 1979, p. 308ff.
8. Cf. the EG-Aktionsprogramm of 14 April 1975, Abl C 92 of 25 April 1975 with numerous references; Krämer, *Gemeinschaftsaktionen zugunsten der Verbraucher* [1978], p. 87ff.
9. On this, see Rambow, ZVP [1977], p. 160.
10. Weser, *Warenkennzeichnung — ein Mittel der Verbraucherinformation* [1976]; *id.*, ZVP [1977], p. 80.
11. Jahresbericht 1976, BT-Drucks. 8/704, pp. 9, 79.
12. On this Rambow, ZVP [1977], p. 160; Borth/Röpper, *Die Kennzeichnung von Lebensmitteln*, 2nd edn. [1977].
13. BGBl I 85.

14. BGBl I 96.
15. BGBl I 1287.
16. BGBl I 321.
17. BGBl I 1301.
18. BGBl I 1841; on this, see BVerfG EuGRZ [1978], p. 125.
19. BGBl I 553 [1973] and 1200 [1976].
20. BGBl I 1186.
21. BGBl I 776.
22. BGBl I 1760; cf. on this, see BVerfG NJW [1980], p. 1511.
23. BGBl I 2274.
24. BGBl I 2569.
25. BGBl I 2688 with amendments of 9 December 1977, BGBl I 2569.
26. On this Borth/Röpper, *op. cit.* (Note 12), p. 85ff; BGBl I 893.
27. KonservierungsstoffVO of 19 December 1959, BGBl I 735, Neufassung des HandelsklassenG of 23 November 1972, BGBl I 2201, on this see Borth/Röpper, *op. cit.* (Note 12), p. 11ff.
28. Rambow, ZVP [1977], p. 160f; zweiter Verbraucherbericht der Bundesregierung, BT-Drucks. 7/4181, p. 14f.
29. BGBl I 1545.
30. BGBl I 1645; on this see BT-Drucks. 8/1910, 1921.
31. VIII ZR 181/75.
32. BGBl I 2589.
33. BGBl I 2245; the considerations of the Federal Government are summarised in the Begründung zum Regierungsentwurf of 7 January 1975, BT-Drucks. 7/3060.
34. Cf. BT-Drucks. 7/3060, p. 47 (similar problems exist in the area of advertising); on this see No. 98.
35. BGBl I 717.

35a. BGBl I 1432.

35b. BT-Drucks. 8/2824, p. 10.

36. BGBl I 2525; for the field of application and contents see Bartl NJW [1976], p. 1993; Dörner, BB [1977], p. 1730.
37. BT-Drucks. 7/5141; meanwhile newly introduced; on the whole matter now see Bartl NJW [1978], p. 729ff; and No. 247ff.
38. Prölß/Sasse/Schmidt, Komm. zum VAG, 8th edn. [1978], §10, note 12.
39. Cf. BT-Drucks. 8/1405, p. 9ff on a bill concerning the sale of investments.
40. Cf. the controversy about the problems of obsolescence and the aesthetics of goods, for instance Hillmann, ZVP [1977], p. 48; Röper, ZVP [1977], p. 185ff; Schmidt, 'Geplanter Verschleiß', in: *Handbuch des Verbraucherrechts*, ch. 90; Haug, *Warenästhetik* [1971].
41. BGBl I 759.
42. BGBl I 141; on this see BT-Drucks. 7/4016 and 4282.
43. BT-Drucks. 7/4016, p. 10f; 7/4282, p. 1.
44. BGBl I 3730; amended by VO of 9 December 1977, BGBl I 2576.
45. On this see Strecker/Höhfeld, 'Informationsprobleme am Konsumgütermarkt', in: *Handbuch des Verbraucherrechts* (HdVR) [1976], Gruppe 240, items 7ff.

46. Strecker/Höhfeld, *op. cit.* (Note 45), items 9ff.
47. Strecker/Höhfeld, *op. cit.* (Note 45), items 12ff.
48. Strecker/Höhfeld, *op. cit.* (Note 45), items 22ff.
49. BT-Drucks. 7/4016, p. 12.
50. Cf. Strecker/Höhfeld, *op. cit.* (Note 45), items 68ff; Püttner, NJW 1979, p. 2131.
51. Strecker/Höhfeld, *op. cit.* (Note 45), items 53ff; also BT-Drucks. 7/4016, p. 13.
52. Strecker/Höhfeld, *op. cit.* (Note 45), items 68ff.
53. The BGH does deny this with respect to §3 UWG NJW [1974], p. 1503; but since §17a EichG is expressly worded as a consumer protection provision and includes a prohibition, §823 II should be applicable; Reich, WiVerw [1977], p. 235.
54. Erster Verbraucherbericht der Bundesregierung, BT-Drucks. VI/2724; zweiter Verbraucherbericht, BT-Drucks. 7/4181; EC-Program of 15 April 1975, ABl. C. 92/1.
55. Kübler, AcP 192 [1972], p. 177ff; Schricker, AcP [1972], p. 203ff (esp. on comparative advertising); Kübler/Assmann, ZHR 142 [1978], p. 413ff (419).
56. Cf. BGH NJW [1976], p. 620 and the references cited therein.
57. BVerfG E 25, 256 (264).
58. Cf. BGH GRUR [1966], p. 386; Reich/Tonner/Wegener, *op. cit.* (Note 1), p. 118ff; KG DB [1978], p. 2403.
59. Wegener, 'Boykott und Preisvergleich', in: *HdVR*, Gruppe 200, item 4.
60. Tilmann, NJW [1976], p. 624; Brinkmann, ZVP [1977], p. 255ff; Wegener, *op. cit.* (Note 71), item 6; Kübler/Assmann, ZHR *op. cit.* (Note 55), p. 421ff.
61. BGH DB [1972], p. 279.
62. Wegener, *op. cit.* (Note 59), item 9.
63. Wegener, *op. cit.* (Note 59), items 10ff.
64. Reich/Tonner/Wegener, *op. cit.* (Note 1), p. 119ff; Wiethölter, KJ [1970], p. 121ff; Kübler, AcP 172 [1972], p. 190ff.
65. Wegener, *op. cit.* (Note 59), item 11.
66. Wegener, *op. cit.* (Note 59), item 11; Brinkmann, ZVP [1977], p. 258.
67. BGHZ 45, 296; NJW [1970], p. 187; [1976], p. 620.
68. Wegener, *op. cit.* (Note 59), item 12.
69. Tilmann, NJW [1975], p. 1913ff.
70. Brinkmann, ZVP [1977], p. 263f.
71. Hüttenrauch, ZVP [1977], p. 143ff; above item 6.
72. BGH NJW [1976], p. 620.
73. On this see Brinkmann, ZVP [1977], p. 261 with references; for a discerning treatment see Kübler/Assmann, ZHR *op. cit.* (Note 55), p. 423ff; Hart/Joerges, Verbraucherrecht und Marktökonomik, in: *Wirtschaftsrecht als Kritik des Privatrechts* [1980], p. 191ff.
74. On this OLG Köln 15 U-262/75; OLG Hamburg, WRP [1979], 68.
75. Brinkmann, ZVP [1977], p. 261.
76. Hüttenrauch, ZVP [1977], p. 143ff.
77. Cf. Brinkmann, ZVP [1977], p. 261f.

78. Zweiter Verbraucherbericht, BT-Drucks. 7/4181, pp. 11, 16f.
79. Wegener, *op. cit.* (Note 59), items 16ff with further references; to the same effect also KG DB [1978], p. 2403; KG WRP [1979], 202; OLG Hamburg WRP [1979], 68; OLG Köln WRP [1979], 230.
80. Wegener, *op. cit.* (Note 59), items 23f.
81. Wegener, *op. cit.* (Note 59), item 24.
82. LG Berlin DB [1976], p. 528.
83. OLG Stuttgart JZ [1975], p. 698; on the whole subject see Wegener, *op. cit.* (Note 59), item 24.
84. BT-Drucks. 7/4181, p. 17.
85. Brinkmann, *Die Verbraucherorganisationen in der BRD und ihre Tätigkeit bei der überbetrieblichen technischen Normung* [1976], p. 68ff.
86. Strecker/Höhfeld, *op. cit.* (Note 45), item 97.
87. Strecker/Höhfeld, *op. cit.* (Note 45), item 95; Brinkmann, *op. cit.* (Note 85), p. 116f.
88. Strecker/Höhfeld, *op. cit.* (Note 45); Brinkmann, *op. cit.* (Note 85), p. 133ff.
89. Strecker/Höhfeld, *op. cit.* (Note 45); Brinkmann, *op. cit.* (Note 85), p. 131ff.
90. Zweiter Verbraucherbericht, BT-Drucks. 7/4181, p. 17; Brinkmann, *op. cit.* (Note 85), p. 139ff; cf. item 59.
91. Strecker/Höhfeld, *op. cit.* (Note 45), item 100; Brinkmann, *op. cit* (Note 85), p. 143ff.
92. Strecker/Höhfeld, *op. cit.* (Note 45), item 104.
93. Strecker/Höhfeld, *op. cit.* (Note 45), item 102 .
94. Cf. BKA-Bericht [1976], BT-Drucks. 8/704, pp. 18, 79.
95. *Wirtschaftlicher und sozialer Wandel in der BRD* [1977], p. 412f.
96. *Ibid.*
97. BGH GRUR [1977], p. 488.
98. Strecker/Höhfeld, *op. cit.* (Note 45), item 102.
99. Note 94.
100. BGH NJW [1974], 1503.
101. Fezer, GRUR [1976], p. 476ff; Kübler/Assmann, ZHR *op. cit.* (Note 55), p. 447ff.

CHAPTER 4

Advertising and Sales Promotion

I PRELIMINARY REMARKS

78 The complexity of legislation and court practice in the Federal Republic of Germany dealt with here comprises a large variety of regulations on consumer protection and trade practices. The starting point in terms of consumer policy is the fact observed in all industrial countries of the European Community that *advertising* and '*marketing*' take *a prominent position in the world of consumption*[1]. For the *manufacturer*, they are the decisive means of putting his products or services on the market, of keeping them on the market, of winning additional market shares at the expense of his competitors and of 'courting the customer's favour'. *Traders*, at least outside the sale of branded articles, are also largely using advertising and their own marketing, by pointing out the advantageous shopping opportunities they offer, by emphasising the supply of products they have on sale or by creating their own brands (so-called dealer's brands — Handelsmarken). As has been shown by numerous empirical investigations, for the *consumer*, advertising and marketing *cum grano salis* continue to be the main incentive and information as regards the purchase decision. Generally, the consumer is introduced to a new product through advertising, viz. through the supplier. Advertising is designed to determine his preferences, whether for certain brands, certain outlets or certain demand priorities. Advertising gives him an idea of price and quality, and, at least in branded goods, provides him with the image, the so-called 'additional benefit' of a product or service[2]. Marketing makes him familiar with a product by means of prize competitions, promotional activities, etc., and confronts him with new marketing methods.

The types and shapes of advertising and marketing are so numerous, constantly evolving and characterised by rapid change that it is hardly possible to give a general definition. However, about *three main types* of advertising may be distinguished which are reflected in the so-called *marketing mix* of enterprises[3]: advertising in the form of product and packing design, in the case of services through the layout of prospectuses (so-called *product accompanying advertising*), *media advertising* including outdoor advertising, and advertising in the form of *sales promotion* (sales promotion methods, trade practices in the narrow sense as, for instance, door-to-door sales, gifts, discounts and the like).

The constitutional starting point for *consumer protection legislation* in the Federal Republic of Germany is the admissibility of all types of advertising and

marketing not infringing 'public order'. This follows from the basic right of freedom to choose and practice a profession which allows the entrepreneur, regardless of the level of trade, freedom to use the necessary methods to promote the sale of his products or services[4]. Other constitutional provisions guarantee *cum grano salis* this kind of *'freedom of advertising'*, without defining their limits in a particular case to be outlined here. It is a matter of argument, though, whether the admissibility of (media) advertising should be based on the principle of freedom of opinion and of the press pursuant to Art. 5 Basic Law[5]: we should not forget that the freedom of the press was granted for the sake of political and social communication, but not for the sake of sales promotion in the interest of enterprises. Basically, this also applies to media advertising with, however, the peculiarity emphasised by the Federal Constitutional Court regarding the advertisement section of a newspaper, that this section is also subject to the protection of freedom of the press and of opinion[6].

The basic constitutional freedom of advertising in this broad sense is not, however, guaranteed by the Constitution without limit. Since advertising usually concerns the *practice* of a profession, more precisely of a trade or business, and not its commencement as such, Art. 12 Basic Law largely allows statutory restrictions and interventions in the freedom of advertising. The constitutional barrier in this case is merely the principle of *reasonableness*, as the Federal Constitutional Court has ruled in connection with the ban on advertising in road traffic[7]. Intervention must not be an excessive burden on the advertiser; less intensive forms of intervention should be preferred to those aiming at stricter regulation. On the other hand, the *interests of the public* affected by advertising must also be considered. These should meanwhile also include *consumer interests*[8] if the Constitution is *interpreted in line with the idea of the welfare state*. This is no doubt recognised in the area of subjects relating to the consumer's health and safety, for instance in food and drug law: here the legislator on account of his constitutional obligation is even obliged to take steps against abuses in advertising, for instance health-related advertising. As has meanwhile been recognised, in many places the legislator has exercised his right to issue appropriate regulations. Furthermore, the legislator is called upon to protect the *consumer's freedom of choice* which follows from Art. 2 Basic Law. This is of importance particularly to the regulation of trade practices, for instance those invading the customer's privacy, trying to deceive him or to manipulate his purchase decision[9].

Thus the Federal Constitutional Court considered the ban under the law of unfair competition on calls by gravestone solicitors a constitutionally admissible restriction of the freedom to practice a profession[10]. This principle may well be generalised. It also applies *mutatis mutandis* to media advertising and to advertising on or attached to a product, which in particular must not be deceptive and misleading. The *prohibition to deceive and mislead the consumer* therefore has a *firm constitutional basis.*

For the customer's purchase decision it is also important that he be provided with *expert, objective and neutral information* to enable him to use his freedom of decision concerning economic issues in the first place[11]. In the author's opinion this principle, too, derives from the conception of our state as a welfare state and therefore, beyond the scope of public health regulations, may justify

restrictions of the freedom of advertising. The obligation to furnish information may either be placed on the advertiser himself or be fulfilled by the establishment of appropriate counter information systems which independent of supplier advertising provide the customer with criteria for his purchase decisions; this has already been discussed in Chapter 3. At the same time this defines the constitutional scope of more recent consumer legislation and court practice concerning the informative value of advertising. Hence, regulations on consumer information and on advertising overlap.

In addition to the aspect of information, the aspect of control, specifically in terms of the *objectivity* of marketing, plays a prominent part. Depending on the scope of the trade practice involved, control of varying intensity may constitutionally be required or allowed. Lastly, the *protection of the individual consumer* must not be forgotten: since advertising in the broad sense as described above, particularly aggressive, manipulative or deceptive forms of advertising, often results in the customer binding himself under a contract, he must be given an opportunity to free himself from decisions which are prejudicial to him and which he would not have taken had he had second thoughts. The principle of *pacta sunt servanda* which is 'sacred' to civil law, requires restrictions for the sake of consumer protection.

This presentation will deal first with the law of advertising messages (advertising in the narrow sense), then with the law of sales promotion (trade practices in the narrow sense) and lastly with the control mechanisms inclusive of self-control and proposals for reform. Because of the wealth of German case law, the presentation will be confined to consumer affairs.

II ADVERTISING MESSAGES

79 In the law of the Federal Republic of Germany, there have been no regulations so far controlling and restricting *advertising messages* specifically from the viewpoint of consumer protection. Rather, matters of advertising are regulated in the UWG of 1909 and in numerous special acts. The UWG was not initially a consumer protection act, but an act for the protection of competitors[12]. Only recently, particularly through the introduction of the collective action by consumer organisations in 1965 and as a result of more recent court decisions, has *consumer protection* come to be considered *one of the objectives* of the law of unfair competition[13]. The new codifications in the area of drugs and foodstuffs expressly claim to protect the consumer against deceptive advertising[14]. Other special acts, for instance the Weingesetz, aim more at the protection of producers and traders and provide consumer protection only indirectly.

In the following, the existing law of advertising under aspects of consumer protection will be described first on the basis of the law against unfair competition and then on the basis of special acts.

1 The general prohibition of misleading advertising

80 The basic standard of any advertising measure is Art. 3 UWG, which prohibits misleading advertising. Because of its importance, the regulation is quoted literally below:

Any person who in the course of any trade or business for the purpose of competition makes misleading statements about business circumstances, particularly about the condition, origin, production method or price determination of individual goods, commercial services or of the supply in general, about price lists, the method of supply or source of supply of goods, the possession of awards, the occasion or purpose of the sale, or about the quantity of stock, may be sued for an injunction.

In the opinion of most people, Art. 3 contains a prohibition of misleading advertising and therefore requires *truth in advertising*[15]. The importance and scope of this prohibition is revealed only on the basis of court practice which will be evaluated here through an analysis of cases typical of consumer affairs. However, beforehand the essential legal aspects of Art. 3 will be briefly reported on.

81 (*aa*) The prohibition to mislead relates only to *statements* about circumstances made in the course of business for the purpose of competition. The concept of acting in the course of 'business for the purpose of competition' is administered by the courts under Art. 3 UWG in a similar way as under Art. 1. It is always required that the advertising measure should promote *one's own or somebody else's business*[16]. Such a promotion of business (wettbewerbsbezogene Handlung) always exists in the case of advertising measures of enterprises on the consumer goods market. Difficulties of delimitation are encountered only if, for instance, trade associations, other organisations and similar institutions engage in advertising. The 'rule of thumb' is that advertising measures by industrial associations, for example consumer guidance, come under the prohibition of Art. 3 UWG, but statements by consumers' associations, political parties or trade unions[17] do not. Also, broadcasting corporations and the press are not subject to the provision of Art. 3 UWG as regards their editorial sections, but enjoy the privilege of Art. 5 Basic Law in connection with the law of the press and the law of torts[18]. Problems of delimitation can be imagined, for instance as regards the misleading design of a *public relations* measure in the form of editorial contributions[19]. In such cases freedom of the press as a protected basic right may not be invoked. Rather, the provisions of the law of unfair competition apply. The state participates in competition if it engages in business activity, but not if it enters on the market in its official function or serves basic needs[20]. Thus advertising measures by, for instance, the German Federal Railways, the Federal Postal Administration and public utilities must conform to the provisions of Art. 3 UWG.

It is more complicated to determine what the law means by '*statements*' (Angaben) about business circumstances. To begin with, such statements are defined in a very wide sense in court practice. Specifically, the form in which such statements are made does not matter. Statements in writing, by word of mouth, in pictorial form or audio declarations come under the prohibition to mislead just as descriptions of goods, company names, packages, labels, etc[21]. However, as far as the description of goods and traders' names and addresses are concerned, generally speaking special protective provisions have priority which in turn include a special prohibition to mislead, for instance in Art. 4, II, item 4 Warenzeichengesetz (Trade Marks Act)[22]. If the trade mark or distinctive

sign is apt to mislead the consumer, the courts do not apply Art. 3 UWG, because they do not want to destroy the goodwill[23] — a type of court practice which is very prejudicial to the consumer.

As far as special labelling provisions exist, they do not exclude the general prohibition to mislead. On the other hand, a merchandise labelled in accordance with the statutory provisions will be unable to mislead the consumer[24].

However, statements coming under Art. 3 must, and there is agreement to this effect, contain a certain factual content[25]. Mere expressions of opinion, value judgements, puffs and the like are not generally considered statements, unless a factual core can be singled out. This differentiation is of great importance to *suggestive advertising* which will be dealt with below: advertising which appeals primarily to the unconscious or subconscious, for instance by linking a merchandise with certain status symbols, does not generally contain 'statements' and according to existing court practice does not come under Art. 3 UWG[26]. The extent to which this fact is still acceptable today will be investigated below.

82 (*bb*) The *contents* of such statements is described by way of examples in Art. 3. There is agreement to the effect that basically *all statements* are subject to the prohibition to mislead[27]. For example, this also applies to the public relations measures of an enterprise. According to the present state of legislation, it does not matter *to whom* the statements are made. The amendment of the UWG of 1965 also made it clear that statements made to private parties, for instance in private sales talks, by canvassing, etc., come under the prohibition to mislead[28]. Statements may be addressed both to an unlimited number of persons, for instance in the case of media advertising, and to a group of people, for instance in a sales talk, on the occasion of a Tupperware party (Kaffeefahrt) or by accosting people in the street[29].

According to established court practice, statements about *contractual rights*, for instance the right of cancellation in an instalment transaction, are also subject to the prohibition to mislead[30]. The Federal Government's bill to amend the UWG of 26 May 1978 expressly provides for such practice in the amended version of Art. 3 UWG[31].

83 The core of Art. 3 is the concept of *deception*. According to the predominating view of legal writers, it contains the principle of truth in advertising, which is also found in special statutory provisions. Thus, the question of how to determine the extent to which an advertising message is misleading becomes a central problem of consumer protection[32].

The principle followed in court practice here is that the concept of deception is assessed not by objective, but by *subjective* criteria[33]. This means in particular that in case of disputes the truth of a statement is not verified by objective standards: deception is assessed and determined in each case by the consumers and business people *affected by the advertising measure*. This leads to the initially paradoxical but quite consistent result on the basis of the subjective criterion of deception, that *true statements* may also be *misleading*, while, on the other hand, *false statements* need *not be misleading*[34]. For example, an independent service station had advertised the sale of 'branded petrol'. In court

proceedings it was able to prove that it was buying its petrol from one of the major oil companies. The petrol sold by the service station was thus of the same grade as the 'branded petrol' offered for sale by the big oil companies at their service stations. Yet the courts held that it was a matter of deception and an act of unfair competition: the consumers and business people concerned expected the description 'branded petrol' not only to stand for the same origin and quality as the petrol sold by the big oil companies, but also to justify the sale as a 'branded product'[35]. An example of the reverse case, i.e. that false statements need not be misleading, is that of spruce-needle extract, which is made not, as the description suggests, from spruce needles, but from spruce bark. The courts denied that this was misleading, since consumers and business people do not go by the exact composition of the product as regards its ingredients and are not therefore apt to be misled by the statement, which was actually false[36]. Much the same is true of the descriptions 'Bauernbrot' (home-made bread), 'Holzofenbrot' (bread baked in an old-fashioned oven), and the like: while this type of bread was neither 'home made' nor was a wood stove used in its production, consumers are not misled, since this is merely a generic description.

However, the courts do not handle the principle of deception quite consistently, but also use *objective* standards, for instance in advertising making reference to experts, in advertising claiming an exclusive position, and in health-related advertising[37].

To mislead, the *likeliness* or danger of misleading the consumers and business people concerned is sufficient[38]. The prohibition to mislead must not be confused with the requirement of objectivity nor with the requirement of informativeness in advertising. Advertising is not necessarily misleading even if it is unobjective or not informative[39].

The courts have established definite principles to determine the extent of deception. Firstly, advertisements are distinguished according to the people to whom they appeal. Advertising appealing to experts must satisfy standards different from those of general consumer advertising[40]. The relevant view in this connection is not determined by extremely tolerant, extremely strict or critical attitudes, but by an *average standard*. The perfunctory observer who is typically affected by an advertising measure is the decisive criterion of deception[41]. However, it does not suffice that a completely irrelevant portion of the public is apt to be misled. Conversely, neither is it necessary that the majority of potential consumers is misled. Rather, it is assumed that it is sufficient if about 10–15% of the consumers concerned are misled by an advertising measure[42].

The standards of deception may be ascertained by the court itself or established through a public opinion poll. The advertising measure must always be considered as a whole, but from the point of view of those to whom it appeals and not from the advertiser's point of view[43]. If the standards have changed, this is of importance in deception. If they have been fixed by legislation, particularly in the law of labelling, this does have an effect on deception.

However, if the standards so established result in certain statements being considered misleading, before a prohibition of advertising is issued there must be a *weighing of interests* against the advertiser's interests warranting protection[44]. Here especially the protection of *goodwill* plays a great role in practice. The buyer or consumer's interests in advertising that is not misleading shall not

result in the destruction of goodwill which has been attained through many years of advertising[45]. The result in such a case may be that in spite of deception no injunction is granted or that through an appropriate addition a possible danger of misleading is removed.

2 Cases to be distinguished

84 As regards deception, the following cases play a part in practice from the consumer's point of view:

(*aa*) *Incomplete advertising*: from Art. 3 UWG the courts do *not* infer the requirement of completeness in advertising[46]. The advertiser is in no way obliged to point out disadvantages of his product, unless a special obligation is placed upon him by law or on account of the generally accepted standards. Such an obligation to furnish information may exist by way of exception if the concealment of disadvantages is of importance to consumers and in turn results in deception. If incomplete advertising creates a wrong overall impression, an indirect obligation to provide complete data may exist. This principle is of importance, for instance, in *health-related* advertising, as the courts have repeatedly established in the case of coffee advertising: in the case of semi-luxuries 'any doubts about the effects of a product on health require a restriction of advertising'[47]. Statutory labelling obligations result in an obligation to furnish information only if the omission of such information is relevant to consumers[48]. Otherwise, the appropriate sanctions under the law of labelling are applicable.

(*bb*) In the case of so-called *ambiguous statements*, the courts judge *each statement* on the basis of the extent to which it is misleading[49]. An example was a razor advertisement: 'best-selling safety razor in the world'. It was a fact that the advertised razor sold best all over the world, but not in the Federal Republic. The courts assumed in this case an ambiguous statement and therefore considered it to be misleading, because the razor was not the best-selling safety razor in the Federal Republic of Germany.

(*cc*) Advertising using *self-evident facts* may be misleading if the competitor points out things he is obliged to do anyway; for example, if he emphasises that a certain product does not contain any contaminations, although such additives are illegal and all competitors observe the statutory regulations[50].

(*dd*) According to prevailing court practice, *puffs* are not usually misleading. Advertising is conceded a certain degree of 'puffing' and a limit is practically set only where gross deception begins. It is understood as a principle that consumers do not take puffs seriously and that therefore an advertising measure need not be measurable in the light of the truthfulness of its message[51]. The limits are more liberal in slogan advertising than in pictorial advertising: since the language of advertising has necessarily a 'puffing' quality it is not the task of the prohibition to mislead to reduce such language to a normal standard. On the other hand, pictorial advertising has a greater influence on the consumer, so

here a stricter standard is applied to puffs[52]. Much the same is true of advertising with a scientific slant (toothpaste, margarine).

3 Price advertising

85 Statements about pricing, price lists, etc., must be in accordance with the prohibition to mislead as expressly stated in Art. 3. It should be noted that in this context Art. 3 is invoked only in cases where other standards are not applied, while the price marking obligation follows from the Preisangabenverordnung and the obligation to indicate the unit price follows from the Eichgesetz (Nos. 40ff). Moreover, special regulations apply to the allowance of discounts, wholesalers' advertising and the like. It should also be noted that the cases of misleading price advertising decided in practice do not always relate to facts relevant to consumers, but are often used to extend the protection of branded goods. In practice, Art. 3 has developed into a typical instrument for *combating outsiders*, which may be particularly detrimental to the consumer if it prevents aggressive but correct price advertising, for instance through price reductions[53].

In practice the following cases may play a part.

(*aa*) So-called *bait advertising* (Lockvogelwerbung) may be prohibited as being misleading advertising pursuant to Art. 3[54]. Four cases of prohibited bait advertising are recognised:

- — price advertising of a product not available to the advertiser;
- — advertising of a product available to the advertiser in insufficient quantities only;
- — advertising of a product available to the advertiser in sufficient volumes with the intention of persuading the customer in a sales talk to buy a different, more expensive product;
- — advertising of the specially favourable pricing of a product, thus creating the wrong impression that the advertiser's overall assortment of goods is as closely calculated.

The first three cases play hardly any role in practice because of the difficulty of producing proof. More problematical, though, is deception as to the overall supply in the form of misleading bait advertising. According to court practice, it is a matter of deception if the exceptionally favourable pricing of a product is advertised in such a way that the consumers concerned consider such a price to be an example of the pricing of the overall assortment of goods, while in actual fact the other articles are normally or even excessively priced. The more obvious it is to the customer that it is a special offer detached from the other products, the less there is a danger of deception as to the market value of the overall supply. However, if a dealer offers only a few goods, the price of which the consumer knows, at strikingly favourable prices without pointing out that they are special offers, the danger of deception increases[55]. From this decision several lower courts as well as trade associations have taken the idea that price advertising below the factory price or cost price should be considered misleading[56]. However, the Federal High Court has opposed this opinion in a recent decision

and has pointed out that the danger of deception must not be inferred from in-company factors as, for example, the falling below the cost price or the arbitrariness of price making[57]. Hence it becomes clear that advertising of *prices below costs* does not constitute misleading advertising. Generally speaking, price cutting cannot therefore be opposed pursuant to Art. 3, which is a development to be welcomed from the point of view of the consumer[58].

(*bb*) A second form of misleading advertising takes place through *false price comparisons*. According to court practice, such advertising is prohibited if the higher price was not previously charged by the dealer at all or was not charged seriously. The courts allow the enterprise to advertise price reductions and use them as advertising media. However, a price reduction must not merely be invented. The courts, therefore, decide in each individual case when a price is to be considered seriously charged[59].

The CDU/CSU parliamentary group in a proposal for amendment made in 1978 wanted to prohibit all *comparative price* advertising in a new Art. 3a UWG[60]. Such a prohibition must be rejected on grounds of legal policy, since it aims at withholding from the consumer useful (and not misleading) data in advertising[61].

(*cc*) Another aspect is the advertising of so-called *Mondpreise* (fictitious prices) or *Mondpreisempfehlungen* (recommendations of fictitious prices). Fictitious prices exist if the price asked is not guided from the start by market conditions, but serves primarily to make a 'price reduction' possible to the dealer for the purpose of deluding customers into believing that it is an attractive offer. Fictitious prices, as far as they occur in the form of price recommendations, are controlled under antitrust law (No. 28). If a supplier or trader has violated the provisions of the law of restrictive trade practices (recommendations of fictitious prices, false descriptions, No. 29), he may be liable under Art. 3 UWG[62].

(*dd*) As regards the way in which the *price is quoted* and presented the courts see to it that the consumer is not misled. This applies to descriptions such as the manufacturer's price, wholesale price, discount price and cost price. We shall not go into details here[63].

4 Advertising of the quality and condition of goods or services

86 To the consumer it is a matter of importance that he should buy goods or services of as high a quality as possible at favourable prices, while conversely the advertiser is interested in claiming the superiority of his products or services. The basic standard employed to resolve conflicts of interests arising in this connection is again Art. 3 UWG. As a principle it may be noted that the courts assume misleading advertising of the quality of goods only if the actual condition differs from the advertised condition to a *material* degree[64]. Here the disadvantage that the advertiser is not required to ensure that his advertising is objectively correct becomes particularly apparent.

From court practice a few examples may be cited: hyperbolic claims concerning the quality and condition of a product are generally accepted within

certain limits; 'puffing is part of the trade'[65]. There is a limit only where, for instance, an exclusive position (Alleinstellung) is claimed, average performance is passed off for maximum performance, used goods are claimed to be brand-new, and goods are provided with fictitious or self-evident guarantees[66]. On the other hand, the courts also see to it that quality advertising does not infringe any other interests of competitors warranting protection, for instance in the case of the addition 'genuine Skai', which the courts prohibited as misleading because the product simulated leather[67]. If certain quasi-drugs or medicinal products not subject to the law concerning drugs are said to have certain effects which in actual fact cannot occur, the prohibition to mislead does not as a rule apply[68]. The same is true of cosmetics, potency drugs and tonics, tranquillisers, etc. However, here the pertinent provisions of food and drugs law must be observed which will be dealt with below. It may also be noted that recently the courts have applied *stricter standards*.

5 Other cases

87 (*aa*) By contrast, advertising which misleads as to *geographical origin or origin in terms of a particular manufacture* plays a great role in court practice[69]. Here the courts have developed strict principles which contrast sharply with the rules regarding the advertising of quality. Misleading advertising of origin exists already if, for instance, symbols or linguistic reminiscences create the impression that a product comes from a certain region as, for instance, the bocksbeutel flask in the case of wine from Baden[70]. Furthermore, in court practice the change in meaning regarding a description of origin is considered a criterion, so that a description of origin formerly considered misleading for the purposes of advertising need no longer be misleading[71]. Also, the advertiser's interest in preserving his goodwill is weighed against the interest of consumers in correct statements of origin[72].

Special regulations exist particularly concerning statements of origin in the case of wine and similar products. This does not follow from the UWG, but from the provisions of special legislation[73].

88 (*bb*) *Advertising of an exclusive position* (Alleinstellungswerbung), which is prohibited because it is misleading, exists according to court practice if the advertising enterprise claims a top position (quality, turnover, pricing, etc.) which it does not actually occupy. However, such advertising also requires that there be a factual content[74]. If meaningless statements are used in advertising, for instance 'white, whiter is impossible', this is not prohibited. Not so in the case of the description: 'this one and no other'[75].

The form of advertising does not matter[76]. The most common case will be advertising using superlatives, but other means may also be used. Likewise, the circumstances in which an enterprise engages in advertising or how the relevant consumers and business people understand the advertisement may amount to a claim of exclusive position.

Prohibited advertising of an exclusive position may also take the form of comparative advertising. However, specific reference to other competitors is a precondition which is ascertained depending on a particular case.

Actions against advertising of an exclusive position usually concern not consumers but diverging interests of competing enterprises.

89 (*cc*) Particularly misleading are advertisements that are wrongly based on *somebody else's authority, opinions, comparative testing*, etc. Here the courts start from the premise that the advertiser also makes claims by third parties his own if they are described as such in his advertisement. The advertiser has to bear the full risk of any incorrectness involved in using someone else's authority. Advertising may be misleading both if it is false and if it is objectively correct[77].

Of late, advertising using the results of *comparative testing*[78] has played a particular role. As far as the problem of comparative advertising is touched upon here, it will be dealt with below (No. 91). Deception within the meaning of Art. 3 UWG exists if the comparative test is reproduced incorrectly or incompletely. Deception may also exist if the product referred to in the test is not the same as the advertised product. Other cases of test advertising which may be misleading depend very much on the circumstances in an individual case. Thus, test advertising may be misleading if it emphasises characteristics that are of little importance but have been assessed in a positive way, while the overall test result is negative rather than positive. In no way do the courts require the advertiser to reproduce the comparative test completely. It suffices, for instance, that the overall result is advertised, even if some of the characteristics tested were not satisfactory. Also, the advertiser has not so far been required to state the comparative test result in respect of his product, which consumer organisations demand him to do.

6 Supplemental application of Art. 1 UWG

90 Art. 1 UWG, which prohibits acts of competition that are *against public policy*, is of importance primarily to trade practices such as sales promotion. For the legal evaluation of advertising, Art. 1 UWG is used only subsidiarily. In particular, the principle of fairness concerning trade practices in a narrow sense (Werbemethoden — No. 104), which was developed in court practice, has not yet been extended to include all advertising messages.

Pursuant to Art. 1 UWG, for instance, the following statements may be prohibited, with the circumstances in each individual case to be weighed carefully. Thus, for example, advertising in the press or in any other medium in the form of editorial publicity infringes not only Art. 3, but also Art. 1 UWG. According to more recent court practice, this is true of all public relations measures[79]. Grossly unsubstantiated advertising claims may also be *against public policy*. It is regarded to be *against public policy* to deceive the customer about his statutory rights, for instance the right of cancellation in the AbzG[80]. Certain types of advertising exploiting fear, appealing to children, abusing pity or exciting prejudices may be against public policy, a gross infringement being required in this case also[81]. The legal evaluation of what is known as 'camouflaged advertising' on television (during the broadcasting of sports events advertising messages displayed in the sports fields are broadcast simultaneously) is a debatable question. While initially it appeared that this type of camouflaged advertising infringed Art. 1 UWG, more recent court practice has essentially

dismissed these doubts. As a result, the commercialisation of camouflaged advertising is in practice recognised by the courts[82]. Consumer associations merely have the possibility of criticising these forms of advertising (No. 74).

7 Comparative advertising

91 We speak of *comparative advertising* if the advertiser through his *true* advertising messages simultaneously refers to properties, prices, etc., of somebody else's products, particularly those of a competitor[83]. Here again a distinction is made according to the content of the advertising message: comparative advertising may be positive or negative. In the case of positive comparative advertising, an offence against public policy may exist inasmuch as an advertiser passes off the good reputation of somebody else's product[84]. Of greater importance in practice is what is known as negative or critical comparative advertising. In its early rulings, the Supreme Court of the German Reich has initially assumed the general inadmissibility of comparative advertising[85]. The advertiser should not be judge in his own cause. Competitors need not accept the (bad!) results of their performance being used in promoting somebody else's competition. In the practice of the Supreme Court of the German Reich and later on of the Federal High Court, certain exceptions to the prohibition were developed, for instance in the case of comparison of different technical systems, in defence against attacks by a competitor, in the furnishing of information upon a consumer's request and in the description of technical progress.

In its recent rulings, the Federal High Court has extended this list of exceptions to the effect that it considers comparative advertising admissible if in a particular case there is *sufficient* cause for such advertising and if it keeps within the limits of reasonableness. Sufficient cause may also be consumer guidance. However, the full burden of proof that there is such cause and that the comparative advertisement is not reasonable is imposed on the advertiser. If he is unable to furnish proof to that effect, he must bear the risk of paying damages[86].

In reality, the Federal High Court's decisions, specifically in the area of advertising relevant to consumers, have brought about hardly any changes. Correct comparative advertising, despite its possibly informative nature, today continues to be an exceptional situation. Conversely, numerous rules of competition pursuant to Art. 28 GWB endeavour to impose in certain branches of trade 'self-control' and a prohibition of comparative advertising, for example in insurance advertising[87]. Moreover, recent decisions by the Federal High Court have shown that it continues to adhere to the exceptional nature of comparative advertising despite its admissibility under a general clause[88]. This legal position can be changed only by the legislator.

From the point of view of consumer policy it may be noted that comparative advertising has *ambivalent features*. It may serve to throw more light upon market conditions if it provides the consumer with the information he requires for his purchase decision. Conversely, it may cause confusion if it unduly emphasises certain characteristics of a product as compared with other products and thus leads to a potential danger of deception. As long as the prohibition of misleading advertising is conceived in a subjective rather than in an objective way, in particular not placing any obligation on the advertiser as to complete-

ness and objectivity of advertising messages, the consumer is more likely to suffer than benefit from any liberalisation of comparative advertising.

8 Suggestive advertising

92 Despite much uncertainty and controversy in marketing research we define *suggestive advertising* as advertising that appeals less to the value in use of a product than to *additional quasi-benefits*, for instance status symbols, certain social prejudices, ungratified desires and sexuality[89]. From the point of view of the consumer, suggestive advertising is thus characterised by an *unobjective influence* which does not provide him with the information required for his purchase decision, but diverts from such information, intentionally or unintentionally, conceals it, in a slogan: manipulates the consumer[90].

This is not the proper place to discuss suggestive advertising in the social sciences. While representatives of consumer organisations, in particular, strongly challenge suggestive advertising as being manipulative or unreasonable, advertisers point out that the consumer has become critical and that even suggestive advertising does not impair his sovereignty as consumer.

For legal purposes, it may be noted that the prohibition of deception pursuant to Art. 3 is not usually effective in the case of the common types of suggestive advertising, since the latter lack any factual content. However, this opinion is completely dependent on a construction of Art. 3 UWG criticised here. Through stricter handling of deceptive advertising no doubt certain types of suggestive advertising would be reached, specifically if additional quasi-benefits have been promised which the product does not have, primarily in the area of health-related advertising (cosmetics, foodstuffs and semi-luxuries, etc.).

The application of Art. 1 UWG remains to be examined. So far the courts have declined to consider forms of suggestive advertising to be *contrary to public policy*, unless it is an extreme case as described above (advertising exploiting fear, pity and the like)[91]. More recently, legal writers have tried to develop criteria which make the general clause of Art. 1 UWG applicable also in connection with suggestive advertising. Schricker and Lehmann develop lists of examples of *unobjective advertising*[92]. Löwenheim, for instance, considers a decisive factor to be how far the consumer is able to control advertising messages. If the perfunctory average observer either fails to recognise the suggestive influence of an advertising message (cognitive sphere) or is no longer able to judge its rank in the motivation process and is no longer able to activate counteracting forces (voluntary sphere), the tolerance limit is exceeded. It must then be established in an individual case where the tolerance limit is, with due regard to the findings of social psychology[93]. In the final analysis, only the legislator is able to solve these problems, for instance through prohibitions of certain forms of advertising, quantitative restrictions on the extent of advertising or a general prohibition of unobjective advertising[94].

9 The burden of proof

93 In advertising, it is understood as a principle that the person who challenges an advertising message as being misleading or *against public policy* has to prove

the correctness of his claim[95]. If he does not succeed in doing so, i.e. if it remains open whether or not an advertising measure is misleading or contrary to public policy, the plaintiff will lose his case and have to pay considerable litigation fees. This regulation of the burden of proof is particularly prejudicial to consumer organisations.

In recent years one of the main subjects of the discussion about legal-policy problems in the Federal Republic of Germany has therefore been whether a reversal of the burden of proof should be advocated by law. Proposals to that effect have been submitted, for instance, by consumer organisations or the Consumer Advisory Council[96]. These proposals have been severely criticised and rejected by advertisers in trade and industry who claim that this would amount to a general verdict on advertising as being misleading and would expose the advertiser to a risk no longer tolerable. Such far-reaching intervention into advertising, it was claimed, was not constitutionally admissible[97].

The courts have meanwhile adopted a solution trying to reconcile the conflicting interests. They accept exceptions to the general rule of the burden of proof, if deception has occurred within the advertiser's sphere of influence and he can reasonably be expected to prove the correctness of his advertising claim. Also, if the plaintiff encounters difficulties in furnishing proof, a reversal of the burden of proof to the detriment of the advertiser may occur[98].

In practice the courts have developed several cases where they presume a *reversal of the burden of proof*, or handle the general rule more subtly in obliging the defendant to substantiate his advertising message. The first and most important case is that known as *advertising of an exclusive position*[99]. Any person who claims an exclusive position has to prove that such a position actually exists and that consumers are not misled by his claim. If he does not succeed in furnishing proof to that effect, he has to bear the full litigation risk. The courts have meanwhile developed the same principle concerning *price comparisons*[100]. Whether or not the previous price was actually asked can of course be proved only by the advertiser and not by the person challenging the advertising measure. Difficulties in furnishing proof suffice for the presumption of a reversal of the burden of proof. Another field of application is advertising using *expert opinions, authorities, comparative tests* and the like[101]. Here, too, the advertiser has to prove that the opinions, tests, etc., cited by him are true. If an advertising measure was initially misleading and the advertiser asserts that it became correct at a later date, for instance through product development, the advertiser has to prove correctness[102]. It is still an open question how to proceed in the case of uncertain and contested claims, such as in the area of health advertising. The courts have not committed themselves to a strict rule on the burden of proof, but may presume an advertisement to be against public policy if the advertiser takes up contested or uncertain claims in his advertisement without further examination[103].

Whether apart from this an extension of the reversal of the burden of proof should be recommended is first of all contingent on a change of the substantive law of advertising, an aspect often disregarded in the discussion. A reversal of the burden of proof makes sense if deception is assessed only on the basis of *objective* and not predominantly on the basis of subjective criteria[104]. As long as the courts assess deception predominantly on the basis of subjective criteria, a

reversal of the burden of proof does not help the consumer much, since false statements need not be misleading. Only after an objective test of deception has been introduced may a reversal of the burden of proof be considered. Such objective tests exist only in special legislation, where it does make sense to reverse the burden of proof.

Furthermore, it should be considered that a reversal of the burden of proof presupposes government control of advertising, as exists, for instance, in the USA and in France[105]. For only this ensures that the reversal of the burden of proof is not abused by competitors to ward off undesirable advertising.

In the discussion about a reform of the UWG, not the Government, but the CDU/CSU parliamentary group has suggested that a new Art. 13a UWG should provide for a reversal of the burden of proof combined with certain obligations on the advertiser to furnish information[106]. This suggestion, which essentially fixes court practice, is to be welcomed.

10 Special prohibitions of misleading advertising in the UWG

94 By legislation in 1969, the general prohibition to mislead was supplemented by new provisions of Arts 6a and 6b UWG, which in relation to the *ultimate consumer* prohibit advertising in cases where the status of a manufacturer or a wholesaler is particularly emphasised; they also forbid the issuance of admission cards to certain low-price shops (Kaufscheinwerbung) available for repeated purchases. These provisions try to protect the consumer against misleading bargain offers whether or not the consumer is deceived in actual fact. In reality they are used mainly in fighting self-service wholesale and other modern types of distribution in favour of the established retail trade and hence do not promote the consumer interest[107]. The provisions also raise doubts as to whether the term 'ultimate consumer' relates to persons conducting a trade or business who use the products purchased to meet their own requirements, i.e. do not turn over the goods any further[108]. The courts showed a tendency towards interpreting the matter in broad terms, thereby negating the protective purposes of Arts 6a, 6b[109].

In a leading decision, the Federal High Court has meanwhile considerably restricted the sphere of application of Arts 6a and 6b UWG. Accordingly, traders and bulk consumers who purchase goods for use in their operations are not 'ultimate consumers'. A tolerance limit of 10% of the sales made by a self-service wholesaler is allowed if the ultimate, i.e. commercial consumer, uses the goods for private purposes. The burden of proof to the effect that this limit was exceeded is on the plaintiff who objects to the advertising[110]. Consequently, self-service wholesalers are scarcely hindered in their business activity by Arts 6a and b UWG[111], but a class of privileged 'consumers' is created which may avail itself exclusively of the favourable shopping opportunities offered by self-service wholesalers.

11 Comparison between German law and the planned EC approximation of laws on misleading and unfair advertising

95 In the EC, work has for some time been under way concerning the approxima-

tion of advertising laws[112]. Meanwhile, the draft directive by the EC Commission has been submitted[113], which in the section dealing with substantive law conforms mostly to German law, but at the same time *develops it further*. It should be noted that in the draft greater importance is attached to the idea of *consumer protection*. This is reflected in the objective test used in determining deception (No. 83), with a view to covering specifically the advertising of product properties as well as incomplete advertising (Art. 3). The idea of fairness is developed further (Art. 2) and may be used to fight suggestive advertising. True and fair comparative advertising is allowed in Art. 4 beyond the scope of German law. Lastly, Art. 6 provides for a reversal of the burden of proof. On the whole it may be said that the draft will constitute an improvement of German law as regards consumer protection.

III SPECIAL REGULATIONS ON THE PROHIBITION OF DECEPTIVE AND MISLEADING ADVERTISING

96 As outlined above, the prohibition of misleading advertising is to be found not only in the general law of unfair competition, but also in numerous new codifications, such as the food and drugs acts. The law has developed the general idea of *prohibition of misleading advertising*. This is the leading principle of consumer protection under advertising law.

The following presentation is a survey of the provisions in specific acts and is essentially confined to explaining common features and differences in each particular case. Case law cannot be dealt with in detail here, especially if it has been developed before the new legislation was enacted. Duties to furnish information and special prohibitions of advertising will be dealt with elsewhere (Nos. 100, 101).

1 Food law

97 The new codification of food law by the Act of 15 August 1974 in Arts 17, 23 and 27 LMBG contains the general prohibition of misleading advertising of foodstuffs, tobacco products and cosmetics[114]. The basic standard is Art. 17, para. 1, item 5 whose exact wording is:

> It is prohibited . . . to put foodstuffs on the market in the way of business using a misleading description, indication or make-up, or to advertise foodstuffs either generally or in a particular case using misleading representations or other statements. Deception is deemed to exist in particular
> (1) if foodstuffs are said to have effects which according to scientific findings they do not have or which have not been sufficiently proved scientifically,
> (2) if descriptions, indications, make-ups, representations or other statements about the origin of foodstuffs, their quantity, weight, date of manufacture or latest date of consumption, or about any other important circumstances are used which are apt to deceive,
> (3) if foodstuffs are made to look like drugs.

Art 23 LMBG declares that provision applicable to tobacco products. Art. 27, para. 1 LMBG contains an appropriate prohibition of misleading advertising of cosmetics, which in line with the peculiarities of cosmetic products forbids especially indications creating the wrong impression that success is safe to be expected.

(*aa*) According to the unanimous opinion of legal writers and the courts, the *concept of deception* is about the same in food law as in the law of unfair competition[115]. However, it should be noted, as is explained by the wording of the law, that the concept of deception in food law is objectified to a greater extent and thus makes it *easier to furnish proof of misleading advertising* than Art. 3 UWG.

Here also it is understood as a principle that deception must arise from statements having a certain factual content, while mere expressions of opinion do not suffice. It is sufficient, though, that the advertisement contains a certain *factual content* even if this is not expressly mentioned. Such statements may, for example, be included in the packaging, in connotations of the advertisement, in overt or hidden references, etc.[116]. Thus it is, for instance, inadmissible to make advertising of coffee or of liqueur flavoured with herbs appear as if these were products furthering health[117].

In food law, as in the law of unfair competition, deception is determined on the basis of the generally accepted standards (Verkehrsauffassung), with greater weight being attached to consumer expectations than in the law of unfair competition. It is sufficient that a minority of consumers is deceived, unless a completely insignificant section is affected by the advertisement. It is assumed in food law that the limit is between 5 and 10% of the consumers concerned, which is below the standard of the law of unfair competition. Here also the average consumer is taken as a criterion and not radical views, be they especially tolerant or especially critical of advertising[118].

Also, the meaning certain terms or prefixes, such as 'pure', 'unadulterated', 'excellent quality', 'specially treated', 'choice', 'full', etc., have acquired, through pertinent labelling and other regulations, is taken into consideration in food law to a greater extent than in the general law of competition. Here the advertiser may not claim that his advertising message is irrelevant to those to whom it appeals if it has infringed the labelling regulations concerned[119]. This, too, is in line with the trend towards greater objectification of the standard of deception in food law.

In food law as in the law of unfair competition, the *concealment* of statements does not constitute a deception, unless there exists a statutory labelling obligation or the consumer may reasonably demand disclosure[120]. The obligations to disclose are again stricter in food law than in the law of unfair competition. This does not mean that the advertiser may not emphasise the positive characteristics of a foodstuff, tobacco product or cosmetics. If a product is said to have certain effects that are insufficiently tested, this may be a deceptive statement. The entire *follow-up advertising* is beyond the reach of the law anyway, as is shown in particular by tobacco advertising. According to established court practice, suggestive advertising does not generally come under the food law regulations; for example, in cigarette advertising suggesting 'youthfulness', 'love of

adventure', 'leisure time', etc., measures of self regulation try to correct things in a certain way (No. 126). Despite the strictness of the regulations on advertising in food law, here there is a considerable loophole.

(*bb*) A special norm concerning misleading advertising is included in Art. 18 LMBG, which provides for a general prohibition of *health-related advertising* of foodstuffs. This is to avoid foodstuffs being made to appear as if they were drugs or quasi-drugs. Thus, for example, there is a general prohibition of advertising exploiting fear, advertising using connotations of diseases, members of the medical profession, etc.[121]. Of late, health-related advertising of margarine has become a controversial issue[122]. In reality, this regulation is interpreted in a restrictive way, disease being taken only in the medical sense and not in the sense of any abnormal situation in life. In particular, according to the dominant view, advertising of baby food, tonics and the like, which concerns psychic ailments, certain periods of life, symptoms of a disease, etc., shall not come under the prohibition of Art. 18.[123] Another problematic aspect seems to be that the legislator set aside the prohibition of health-related advertising in the case of dietary foods[124].

(*cc*) In addition, the LMBG in Arts. 19, 21, 29 and 32 contains certain *enabling provisions for the protection against deception*. These powers have been used in isolated cases, for instance in Art. 7, para. 1 Nährwertkennzeichnungsverordnung of 9 December 1977[125] with respect to advertising of slimming diets (with the exception of dietary foodstuffs).

2 Advertising of drugs

98 Advertising of drugs has always been subject to the general reservation that misleading advertising is prohibited. The Gesetz über die Werbung auf dem Gebiet des Heilwesens (HWG) (Advertising of Drugs Act) of 11 July 1965, as amended by the AMG of 24 August 1976, contains in Art. 3 a general prohibition of misleading advertising of drugs[126]. The present wording of Art. 3 is:

> Misleading advertising is forbidden. Deception exists in particular
> (1) if drugs, processes, treatments, appliances or other means are claimed to be therapeutically effective or to have effects they do not have;
> (2) if the wrong impression is created that
> (*a*) success is safe to be expected,
> (*b*) use as provided or over an extended period of time is not harmful,
> (*c*) advertising is not performed for business purposes;
> (3) if untrue statements or statements apt to deceive are made
> (*a*) about the composition or quality of drugs, appliances or other means and about the type of process or treatment, or
> (*b*) about the person, educational background or qualification or success of a manufacturer or inventor or about the persons who had acted on their behalf.

The prohibition of misleading advertising is put into still more detailed regulations by the following provisions of the HWG.

Art. 8 of the AMG includes an appropriate prohibition of deception as regards the description, indication or make-up of drugs. Since advertising and make-up will often overlap, in a particular case both regulations may be applicable. Art. 8 reads:

> It is prohibited to manufacture or market drugs which. . .
> (2) are characterised by a misleading description, indication or make-up. Deception is deemed to exist in particular if drugs are claimed to be therapeutically effective or to have effects which they do not have. . .
> (*a*) the wrong impression being created that success can safely be expected or that use as provided or over an extended period of time is not harmful,
> (*b*) descriptions, indications or formulations being used which are a factor in the evaluation of drugs and which are apt to deceive as to their quality.

From the legislative history it should be stated that the Federal Government had intended to extend this prohibition to include cases where a misleading description refers to the fact that success may be expected. The Bundestag (Parliament) rejected this proposal as being too uncertain[127].

A feature peculiar to the regulations on deception in both the law of drugs and food law is the fact that they go more by *objectified criteria*. Here it is also less important how consumers in a particular case understand an advertisement, but it is decisive whether there is a discrepancy between the advertising promise or product statements, on the one hand, and the medical success that can actually be achieved, on the other. The principle under the law of competition that false statements need not be misleading should not therefore be applicable to the law governing advertising of drugs. Established court practice does not yet exist, which is indirectly also due to the amendment of the AMG and the HWG effective 1 January 1978.

The HWG in addition includes certain requirements of information in advertising which will be dealt with below.

3 Weingesetz

99 The prohibition to mislead is also to be found in Art. 46 Weingesetz of 14 July 1971. The regulation reads[128]:

> I Products with misleading descriptions, instructions, other statements or formulations must not be marketed, imported or exported or made the subject of advertising.
> II In particular it is considered to be misleading if
> (1) descriptions, instructions, other indications or formulations are used without the product meeting the requirements of the statements or make-ups concerned as laid down in or on account of this Act,
> (2) indications are used that are apt to create a wrong impression of special quality.
> III Considered to be misleading are furthermore:
> (1) formulations, representations or true statements which are apt to

give wrong ideas about geographic origin; this shall apply even if the country of origin is indicated properly;

(2) true statements that are apt to give wrong ideas about manufacture, bottling or storage, quality, products, grape variety, vintage or other circumstances which are important for an evaluation;

(3) fancy names that

(*a*) are apt to create the wrong impression that they stand for an indication of geographical origin, or

(*b*) contain a geographical indication if the requirements of use of such geographical description as provided for under this Act are not satisfied.

It should be noted here that the Act proceeds from a more objective concept of deception and continues to include certain forms of 'suggestive advertising' (No. 92).

IV TENDENCIES TOWARDS OBJECTIFICATION IN THE LAW OF ADVERTISING

1 Disclosure and information requirements

100 A prime concern of modern consumer protection in both the Federal Republic of Germany and other EC countries is to provide the consumer with the *information he needs for his purchase decisions*. The numerous regulations under the law of labelling outlined above especially serve the purpose of information (No. 44ff). However, such disclosure does not suffice to make the supply in terms of quality, quantity, price, etc., clearly intelligible to the consumer, since it virtually sticks to the product and in general there is no obligation to satisfy the statutory labelling requirements through advertising going beyond product characteristics as such. That is why there is an urgent need in terms of consumer policy for giving advertising itself, especially media advertising, an appropriate informative content, so that the consumer may take his time to compare different offers, products, etc.[129].

In the law of unfair competition and in special legislation, the prohibition to mislead includes an obligation of disclosure and objectivity in advertising only in exceptional cases. In that respect a really strict prohibition to mislead leaves a considerable gap from the point of view of consumer policy if it is considered important that advertising must provide the consumer in a proper way with the information he needs for his purchase decision.

(*aa*) Requirements as to disclosure in advertising are relatively new in German legislation, still highly controversial as regards their wording, and not yet tested as regards their effect. A clear landmark in this context is put up by Art. 3a of the HWG as amended by the AMG of 1976. The provision reads:

(1) Any advertisement of drugs. . . must include the following statements:

(*a*) the name, business name and registered office of the pharmaceutical undertaking;

(*b*) the name of the drug;
(*c*) the composition of the drug by type and quantity of effective ingredients;
(*d*) fields of application;
(*e*) contra-indications;
(*f*) side-effects;
(*g*) warnings in so far as they are prescribed for the labelling of containers and wrappings. . .

(3) In advertisements for the general public, the statements as per para. 1, item (c) may be omitted. If the statements as per para. 1, items (e) and (f) cannot be made, they may be omitted.

(4) The statements required by para. 1 must be clearly discriminated from the other advertising messages and must be easily recognisable. Para. 1 applies to advertising messages in audiovisual media *mutatis mutandis*.

(5) Para. 1 does not apply to follow-up advertising. Follow-up advertising is a type of advertising using exclusively the name of the drug or additionally the company name or trademark of the pharmaceutical undertaking.

In its memorandum, the Federal Government states that the provision is to objectify advertising of drugs not only with regard to advertising aimed at doctors and pharmacists, but also with respect to *advertising for the general public*. 'To that end an obligation is imposed on anybody who engages in advertising of drugs to include in the advertisement a minimum of information about the drug. That is to enable the person to whom the advertisement is directed to form a clear idea of the value of the drug'[130]. Much as that provision is to be welcomed as a step in the right direction, it is disquieting that certain pieces of information, especially on contra-indications and side-effects, may be omitted if they cannot be furnished. Here it is open to question whether or not the omission of statements is left to the discretion of the drug manufacturer[131]. The Act is ambiguous on that point, so further interpretation will have to be left to the courts.

(*bb*) Other more recent legislation on consumer protection likewise begins to point towards disclosure requirements in advertising, although not as clearly as in the HWG. Thus Art. 16 of the Gesetz zum Schutz der *Teilnehmer am Fernunterricht* (Fern USG) demands that in commercial advertising of correspondence courses the organisers should give a complete survey of the terms of the contract and the requirements the participant has to meet by transmitting information material. If a correspondence course has not yet obtained final approval, this must be clearly indicated in the information material. In the Federal Government's view, the purpose of this provision is to so design the information material, because of the different types and the anonymity of correspondence courses, as to enable the participant to take an appropriate decision[132]. However, the provision relates only to a certain section of advertising, namely the transmission of information material. In other respects, apart from the prohibition to mislead, the organiser is not subject to any restrictions on his advertising.

(*cc*) The LMBG does not yet contain any such disclosure requirements, but provides for powers to the Federal Government to issue pertinent orders. Of particular importance here is the power to prescribe warnings for tobacco products. Furthermore, the government is empowered to require that certain smoke components be indicated. The Federal Government has not so far used these powers, but supports 'self-regulation' agreements by trade and industry[133]. It remains for the future political development of advertising law to provide for an appropriate advertising requirement in this context.

Similar powers pursuant to Art. 32 exist (so far on paper only) for so-called consumer goods (for instance cleaning agents, polishes, detergents); it is not clear from the Act whether this covers (media) advertising as well[134]. Lastly, informative advertising is demanded under appropriate legislative initiatives in the area of the sale of shares in property[135].

2 Prohibitions of advertising relative to certain media, products and marketing methods

101 In addition to the general regulations under advertising law mentioned above, the legislator has increasingly imposed specific prohibitions of advertising.

(*aa*) First of all, the *Heilmittelwerbegesetz* must be mentioned here. This Act distinguishes between advertising for specialists (doctors, pharmacists, etc.) and advertising for the general public[136]. Whereas advertising for specialists, apart from the above-mentioned regulations on the prohibition to mislead and some disclosure requirements, is not subject to any restrictions, many are imposed on advertising to the general public. Art. 8 HWG relates to the basic prohibition of advertising to the general public of prescription drugs or sleeping pills. Art. 9 HWG forbids certain types of advertisements for drugs to the general public, which create or exploit feelings of anxiety, refer to medical authorities, human suffering, etc., or appeal specifically to children and young persons under 18 years of age. Lastly, pursuant to Art. 10 HWG, advertising of drugs to the general public must not refer to certain diseases enumerated in the Act, such as epidemics, cancer or mental diseases.

In line with its objective, the Act serves to protect public health, and is thus rather a police regulation than a regulation in terms of consumer protection. Whether the tight restrictions imposed by the HWG are absolutely necessary for the sake of consumer protection has to be examined more closely, which is impossible in this context. Constitutional objections to the prohibition of advertising under the HWG have not been voiced by the courts.

In addition to the special regulations of the HWG, the provisions of the UWG are fully applicable. Here the courts proceed from the assumption that an infringement of the regulations of the HWG on health protection are generally speaking also contrary to public policy pursuant to Art. 1 UWG[137]. So competitors and their associations usually defend themselves against prohibited drugs advertising by using remedies available under the law of unfair competition.

102 (*bb*) Another special (though product-related) prohibition of advertising is contained in Art. 22 LMBG. Pursuant thereto it is prohibited to advertise *cigarettes*, tobacco products resembling cigarettes, and loose tobacco designed to be made into cigarettes by the consumer *over the radio or on television*. That prohibition of advertising of cigarettes and cigarette-like products was highly controversial during the debates on the bill. The tobacco industry had rejected the prohibition, because it felt it would be able to check public criticism of cigarette advertising in the mass media through self-imposed restrictions on advertising. The legislator nevertheless resolved to include such a prohibition in the Act because of the particularly dangerous nature of media advertising of cigarettes[138].

It seems worth mentioning that the prohibition is confined to cigarettes, i.e. does not include other tobacco products, such as cigars and pipe tobacco. Also, it applies only to radio and television, with the controversial question remaining of whether or not advertising by German enterprises in foreign media broadcast into the Federal Republic of Germany is prohibited[139]. In line with the dominant view it is assumed that because of the territoriality principle the prohibition of advertising is limited to German broadcasting and television companies only. This constitutes a considerable gap in the practical enforcement of such a prohibition. Another question is whether so-called 'camouflaged advertising' of cigarettes on the radio and specifically on television is prohibited. From the context of Art. 22 LMBG such a prohibition may be inferred. The prohibition of advertising applies only to the media specified therein and in particular does not apply to major magazines, billboard advertising and the like. Here, cigarette manufacturers are trying to establish a system of self-imposed restrictions on advertising[140].

102a (*cc*) Apart from the prohibition relative to certain media provided for in Art. 22 para. 1, Art. 22 para. 2 LMBG includes a prohibition on health-related advertising of tobacco products. In addition, the Federal Government may by way of statutory order issue regulations to enforce the prohibition, in particular to regulate the type, extent or design of advertising in certain media or places, or to prohibit or restrict the use of representations or expressions by members of certain classes of persons. These may, for example, be prohibitions of advertising of tobacco products in magazines using symbols which appeal specifically to young people. The Federal Government has used these powers in one case only. It has prohibited the terms 'unadulterated' and 'nicotine-free' and instead permits only the term 'with very little nicotine'. There are no other restrictions on advertising. This seems to be disquieting, particularly because cigarette advertising continues to create the impression of youthfulness, freshness, sportiness, gregariousness and the like, all of which are objectives standing in marked contrast to Art. 22[141].

102b (*dd*) Besides the prohibitions on advertising of drugs and tobacco products mentioned above, there are a great many restrictions on advertising regarding certain professions, for instance doctors, lawyers, tax consultants, certified public accountants, consulting engineers and architects. The vocational regulations in each case will not be dealt with here. It should be noted that they were

not issued for the purpose of consumer protection but exclusively with regard to professional interests. Whether from the point of view of consumer policy these restrictions on advertising relative to certain professions should be modified will not be discussed here[142].

On the other hand, there are no binding restrictions on advertising of *alcoholic beverages*, although this has been demanded in reform discussion for some time. It is doubtful whether the existing agreements on self-imposed restrictions[143] provide sufficient protection.

Lastly, restrictions on advertising in the so-called *outdoor area* should be pointed out; for instance, on federal motorways pursuant to Art. 9 Bundesfernstraßengesetz (Act on Federal Trunk Roads) and regarding traffic in towns and cities pursuant to Art. 33 Straßenverkehrsordnung (Road Traffic Regulations)[144]. They serve 'safety and ease of traffic' rather than consumer protection.

V MARKETING METHODS AND SALES PROMOTION (TRADE PRACTICES IN THE NARROW SENSE)

1 Generalities

103 In contrast to the advertising described above, marketing methods and sales promotion campaigns in all trade practices (Vertriebsmethoden) aim at influencing the consumer's preferences and at inducing him to enter into a contract. Marketing methods thus relate to the method of selling and less to the presentation of a particular product in the media. Admittedly, in a particular case, especially if enterprises use a so-called *marketing mix* and brand names, the boundaries between advertising and trade practices are not easy to determine.

In German law the basic standard for the regulation of marketing methods, also in terms of consumer protection, is the general clause of Art. 1 UWG. Its general aspects and construction by the courts from the angle of consumer protection will be discussed in detail later.

In addition, there are a great many special regulations which in terms of their legal form may be distinguished as to whether they belong to the law of unfair competition, administrative, criminal or civil law. Additional regulations under the law of unfair competition are to be found, on the one hand, in the UWG itself, specifically regarding admission cards in Art. 6b, which was discussed earlier (No. 94), seasonal sales and clearance sales in Arts. 7 *et seq.* UWG, as well as special sales in Art. 9a and a statutory order of 4 July 1935 on 'Sonderveranstaltungen' issued thereunder[145]. Special provisions are included in the Zugabeverordnung (Order concerning Collateral Gifts) of 3 March 1932, and the Rabattgesetz of 25 November 1933.

Administrative rules are to be found especially in the Industrial Code (Gewerbeordnung), for instance on itinerant peddling (Reisegewerbe). The law of drugs contains certain regulations on marketing methods and additionally on outlets. We should also mention the FernUSG, which makes sales calls for the purpose of concluding correspondence course contracts subject to restrictive conditions.

In *criminal law* the decisive standard is the general provision on fraud con-

tained in Art. 263 Penal Code, which plays only a small role from the point of view of consumer protection, even if consumers often fall victim to fraudulent deceit. No special mention will be made here.

Civil law indirectly plays a role where it reserves to the deceived purchaser a right of cancellation (Anfechtungsrecht), Art. 123 Civil Code. A special cooling-off period is granted by the law of instalment sales (No. 324), the law of foreign investments and the law of correspondence courses. This is to be extended to door-to-door transactions. We should mention that civil law does not prohibit such marketing methods directly, but provides for a right of withdrawal on the part of the consumer which may result in an indirect restriction on such marketing methods. We shall go into details of these questions later (No. 111ff).

2 The general clause of Art. 1 UWG

(a) *Significance of the general clause*

104 Art. 1 UWG reads:

> A person who in the course of business for purposes of competition commits an act which is contrary to public policy may be sued for an injunction (Unterlassung) and damages.

The general clause in the German law of unfair competition has been in existence since 1909. It covers many trade practices which are of importance by no means only from the point of view of consumer protection; for instance, labour poaching, passing off and boycott[146]. Originally, the courts used the general clause not for the purpose of consumer protection, but for the protection of competitors. However, since the thirties the general clause has been interpreted in such a way as to protect not only the interests of competitors, but also those of the *general public*. Of late there has been no doubt that both the general clause and Art. 3 UWG intend to provide *consumer protection*, a controversial question being, however, whether consumer protection is the primary aim of that standard or, as it were, flows only indirectly from the existence of the general clause[147]. While according to the dominant view consumer protection is guaranteed only indirectly by Art. 1, according to modern writers consumer protection has equal priority. Consumer protection should be viewed both in terms of the collective and of the individual: it is a matter of protecting both consumers as a whole and the individual consumer potentially injured or endangered by a certain trade practice.

The idea of consumer protection against trade practices is most clearly revealed in the *principle of fairness* (Sachlichkeitsgrundsatz) developed by the Federal High Court in its ruling[148]. On the whole, trade practices must be fair; they must not influence the consumer in an undue way, restrain his freedom of decision, persuade him in an improper way to make a buying decision or molest him. Here there is a striking difference as compared with the prohibition to mislead, which in no way includes the principle of fairness.

However, as will be explained by analysing the case law, court practice is by no means uniform. On the contrary, the courts often argue in a multi-faceted

way in which *consumer protection is only one among many points of view*. Thus the protection of *workable competition* (Leistungswettbewerb) is often regarded as a starting point for putting the general clause into specific terms in a particular case[150]. Also, the courts want to prevent trade practices from 'degenerating' and to preclude other competitors from imitating unfair practices[151]. Another factor taken into account, although not as a main point, is the effect a certain trade practice may have on competitive structures, especially in terms of protection of small and medium-sized firms[152]. However, there is great uncertainty and controversy about details; the majority of legal writers reject the protection of small and medium-sized firms on the basis of Art. 1 UWG[153].

The scope of application of the general clause resembles that of Art. 3 UWG: there must always be an act in the course of business *for the purpose of competition*. In this respect reference may be made to the above statements.

As was mentioned above, trade practices coming under Art. 1 are numerous and complex. Because of the constant changes in the area of competition it is hardly possible to shape general rules. Certain directions of case law can, however, be distinguished which may serve as a guide in determining which trade practices pursuant to Art. 1 UWG are considered detrimental to competition in terms of consumer protection and which are not.

(*b*) *Trade practices impeding the consumer's freedom of choice (belästigende Werbung)*

105 It is a central idea of the law of unfair competition developed in the Federal High Court's more recent practice that trade practices that put the consumer in a psychological predicament, molest him, invade his privacy or endanger his personality should be prohibited pursuant to Art. 1 UWG as being contrary to public policy and unfair[154]. Here it is less a matter of the protection of consumers collectively than of the individual consumer who through certain marketing methods is more or less forced to enter into a contract. A criminal act is not required. It is sufficient that only a few consumers be affected if there is a danger that such a marketing method will be used again or will be imitated.

To put these prohibited trade practices into more concrete terms, the following cases have been developed in court practice[155].

(*aa*) *Touting* in the street ('Anreißen') and in general anywhere outside regular salerooms, for instance sales through agents, and sales representations for book and record clubs, is forbidden in principle[156]. This does not apply to places where the consumer knows that he will be approached to make a buying decision. At markets, at fairs, in specially marked sales promotion campaigns, etc., he must expect to be accosted for the purpose of concluding a contract. If he does not want to be accosted, he should not frequent such places[157].

(*bb*) What constitutes touting is allied to canvassing by *telephone and telex*[158]. The use of the telephone as a device for canvassing constitutes an invasion of privacy, even if it need not result in a decision to enter into a contract. According to the courts, the consumer is free as regards his telephone connection which is not to be 'turned into' a sales promotion instrument. Here the courts use as a

strong argument the danger of imitation which might result in any businessman resorting to telephone canvassing and the consumer never being free from harassment. The same applies to what is known as telex canvassing, although this hardly affects private consumers. Inadmissible telephone canvassing does not become admissible by the fact that it is announced in writing beforehand, unless the consumer has so requested.

(*cc*) To a large extent there is clarity in court practice to the effect that the *unsolicited sending* of goods is prohibited pursuant to Art. 1 UWG as being against public policy[159]. The courts give as a reason the molesting effect of such trade practices if the consumer is requested to return the goods in the event that he does not want them. Meanwhile this prohibition has been extended to include subtler forms of unsolicited sending, for instance in connection with the processing of films where the mere fact that an order form is *not sent in* is taken to be an order for a new film[160]. Here the consumer's normal behaviour is practically reversed and silence is construed to signify acceptance of an offer.

The courts except certain cases on the principle that the unsolicited sending of goods is detrimental to fair competition; for instance, if the sending was announced beforehand and the consumer is under no obligation to return the goods, or if the consumer made it clear that he wanted the goods to be sent[161]. Therefore the trader may easily circumvent the ban on unsolicited goods. The courts have reacted only very hesitantly to these circumventions.

(*dd*) By comparison, according to present court practice there are practically no limits to the sending of *advertising and information material*. Exceptions exist only if a consumer made it clear that he does not want to have such material sent to him or if the sending serves to pave the way for another prohibited sales promotion measure, for instance the unsolicited sending of goods as described above. Also, it is inadmissible to pave the way for an unwanted sales call by such trickery[162].

(*ee*) The courts have recently developed clear principles regarding what is known as *marketing activities at the scene of an accident*: in line therewith it is inadmissible under the law of unfair competition for a towing company requested to help in an accident to hand out forms of an agency renting cars. Here a shock situation on the part of the consumer, in which he is not psychologically free to decide, is exploited for the purpose of sales promotion[163].

(*ff*) Likewise forbidden is what is known as *subliminal advertising*, even though it plays only a minor role in practice. As distinct from suggestive advertising, here advertising techniques are used which the customer is unable to recognise and which induce him to make a certain contract, e.g. fade-ins in television and film spots which the consumer does not recognise but which impair his freedom of decision[164].

(*gg*) A very controversial issue both in theory and practice is the treatment of unsolicited sales calls under the law of unfair competition. Door-to-door transactions will be dealt with elsewhere (No. 111). The courts stick to the principle

that sales calls are basically admissible, because sales representatives are a professional class which has been in existence for quite some time and because such calls are not in general prohibited in the Industrial Code. All the same, the courts set certain limits: thus, in the event of the death of a member of the family, calls by gravestone solicitors are generally inadmissible even after the expiry of a waiting time[165]. This again is an invasion of privacy which the consumer need not tolerate. This rule does not apply, however, if members of the family have asked for a visit by such a solicitor. It is here that the possibility of abuse and cirvumvention becomes apparent, if for instance through letters of sympathy the consumer is encouraged to see a gravestone solicitor.

Furthermore, the courts recognise that certain *practices used by solicitors* are prohibited. To begin with, it is already an infringement of criminal regulations if a solicitor gains access to a consumer's dwelling without the latter's consent. If this is done regularly and if there is a danger of repetition, it is also an offence under the law of unfair competition[166]. On the other hand, the selective accosting by groups of solicitors of certain socially handicapped persons, for instance elderly people in old people's homes, young persons or persons in need of care, is not considered to be contrary to public policy. The courts recognise, however, that a solicitor should not pay a visit under false pretences by making the customer believe that it is a talk for the purpose of information or that there is a chance of winning in a game, while in actual fact it is a sales call[167]. In a particular case it will, of course, be very difficult to prove unfair methods on the occasion of a sales call.

(c) *Gift-giving as a trade practice — so-called 'psychological obligation to buy'*

106 Another principle developed by case law in recent years concerns gifts creating a 'psychological obligation to buy' (Wertreklame, psychologischer Kaufzwang)[168]. In this case the courts go beyond the law of collateral gifts (Zugaben) or discounts. Gifts will be subject to stricter interpretation under the law of unfair competition once they have exceeded the limits of merely attracting attention. The courts likewise start from the explicit or at least implied *premise of fairness* which requires that the consumer should not be influenced in his purchase decision by the often marginal or unimportant additional benefit derived from the gift or by a 'feeling of gratitude'. Here also, the courts advance many reasons in shaping the law: they refer to the tempting effect of certain gifts, criticise the effects of exaggeration and degeneration in competition, and are afraid of imitation and concentration effects which would practically result in small and medium-sized firms no longer being able to compete in handing out gifts[169].

Here, too, the significance of the facts is revealed only in particular cases which may roughly be grouped as follows.

(*aa*) In court practice *games* play a great part. It is understood as a principle that games, prize competitions, etc., are not generally contrary to public policy, but only on certain additional conditions. For example, a game is prohibited if a so-called pyramid system is used[170]. In the case of prize competitions, it must be

made clear that the customer's order has no influence on his chances of winning[171]. Furthermore, it is inadmissible to make a visit to a saleroom a precondition of the right to participate. For this would mean practically that the customer buying a lottery ticket would see himself compelled indirectly to buy a number of other things at the same time[172]. It is inadmissible to veil the chances or hold out exaggerated hopes of winning to the customer[173]. Perhaps this also constitutes misleading advertising pursuant to Art. 3 UWG. According to court practice, it is not generally contrary to public policy to include children in prize competitions and games; the trader may well take advantage of a child's play instinct. Such trade practices are considered to be contrary to public policy only if the inexperience or carelessness of children is employed intentionally in the advertising method[174].

(*bb*) Related to games, although occurring in a slightly different form, are gifts having pecuniary value even if these are not prohibited collateral gifts (Zugaben). Thus the courts have considered it inadmissible to make available free of charge to consumers buying a Volkswagen a so-called Volkswagen diagnosis[175]. They claim that usually a trader has 'nothing to give away', the gift in such a case being against public policy. The distribution of coupons upon the purchase of detergents was judged in a similar way. In this case, the courts say, there is a danger of the customer making his purchase decision because of the coupon and not because of the product. Besides, this is an undesirable imitation effect[176].

(*cc*) The giving away of *goods in original packages* is generally inadmissible for the same reason. Also in this context the factor of degeneration and imitation, combined with considerations of protection of small and medium-sized firms, plays a greater role than consumer protection. The giving away of goods in original packages is admissible only if a new product is being launched on the market or tested[177]. The extent to which goods in original packages are given away is determined by the purpose of testing the market. Usually the competitor is obliged to manufacture special packages not for sale elsewhere, because samples of goods are not intended to satisfy normal requirements. An excessive giving away of trial packages may also be detrimental to competition if it reaches proportions practically equivalent to the giving away of goods in original packages[178].

A highly controversial issue in this context is the treatment under the law of unfair competition of so-called newspapers running mostly advertisements (Anzeigenblätter). These cases bear a special relation to the law of the press, and therefore cannot be discussed adequately here. Where a newspaper publisher or publishing firm distributing free of charge an Anzeigenblatt including a certain editorial section to households in a certain region, this practically amounts to the 'giving away' of an editorial service, if only a minor one, to the detriment of other press organs. On the advertising market this contemporaneously has an undesirable effect of concentration on a few advertising pages and supra-regional daily papers which practically results in the disappearance of regional daily papers[179]. However, in the discussion about the admissibility of advertising pages under the law of unfair competition, considerations of consumer

protection have played hardly any role so far. The consumer's position is ambivalent here: on the one hand, there are no objections to additional, free information material; on the other hand, the consumer is interested in a workable local press whose existence is often threatened by such advertising pages.

(*dd*) In the court practice of recent years, so-called *tie-in and leader offers* (Koppelungs- und Vorspannangebote) have been the subject of animated discussions[180]. We speak of tie-in offers if a certain performance is sold together with another performance in such a way that the second is to be had more favourably if bought together with the first. Tie-in offers are usually admissible if they keep within the limits of what is usual in trade, particularly if they do not link objects with each other which to the consumer have no connection whatsoever. We speak of 'leader offers' if competitors outside their sales proper sell a different product which is especially attractive to the consumer on particularly favourable terms and thus create an additional enticement for the product actually sold by them. In this context particularly, the coffee trade is of importance, where leader offers in the form of low-priced books, gift articles and articles to take away have been used to promote the sale of coffee.

So far, the courts have been very strict with respect to leader offers. They have claimed that so-called leader offers involving goods foreign to the trade are inadmissible[181]: shops selling coffee must not sell other goods foreign to their trade at a seemingly particularly favourable price if they sell those goods only together with the main commodity, in this case coffee. There is an exception to this rule only where there is a 'proximity of use' between the main commodity and the collateral commodity, for example if the collateral commodity can be used as a container for coffee. According to recent court practice it is also a leader offer if a commodity foreign to the trade is offered at a price higher than that of the commodity whose sale is to be promoted by the tie-in arrangement (so-called 'top-heavy leader offer')[182]. This case also relates to coffee sellers who sold a certain attractive book on animals at a very favourable price to customers buying their coffee.

The problematical side to these decisions is that they fail to take as a criterion the customer's freedom and ability of decision and instead protect established channels of trade. Particularly in the case of so-called 'top-heavy leader offers' we do not see why an average consumer should not be able to make his purchase decision objectively and independently. Any proof to that effect has not yet been furnished by the courts. There is also the question of whether in this case the strict regulation of gifts may be advanced. Furthermore, price competition is not restrained but promoted by such leader offers — a positive result for the consumer. In actual fact it is a matter of protecting established channels of trade, here particularly the book trade, and of fighting outsiders. This is not the task of consumer protection[183].

In the new decisions of the Federal High Court a more liberal treatment of leader offers therefore seems to gain ground: if there is no direct or indirect link between the sale of the main commodity (for instance, coffee) and the so-called 'leader commodity', i.e. if the consumer may acquire the two commodities separately, this is a *diversification* to which there are no objections under the law of competition[184], even if the price of the 'leader commodity' (a book on

animals) is particularly attractive and just covers the prime cost.

(*ee*) Also of importance in court practice are *advertising excursions*, coffee party excursions, sightseeing tours and similar 'advantages' to the consumer[185]. In such cases a certain convenience, for instance transport by bus or aeroplane, is always offered for the purpose of persuading the customer to conclude a certain contract or to take him near a place where such a contract will be concluded. Here also the courts go very much by the circumstances of a particular case. Accordingly, sightseeing tours are considered detrimental to fair competition if, for instance, for the purchase of property in Spain the sightseer's wife is taken along free of charge; this, they claim, is an excessive incitement[186]. Transport free of charge to the advertiser's business premises is usually inadmissible; however, the courts permit exceptions, particularly to offset a disadvantage in terms of location, provided the name of the carrier is not disclosed and the ride is short and of a temporary nature[187]. Coffee party excursions for the sake of sales promotion, i.e. excursions exploiting the consumer's wish for entertainment and fondness of company for the purpose of sales promotion, are considered contrary to public policy[188]. It should be recognised that the courts tend to apply stricter standards, especially if such coffee party excursions serve the exclusive purpose of launching a sales promotion drive.

3 Special provisions under the law of unfair competition

107 Certain trade practices are also regulated in terms of the law of unfair competition by the Zugabeverordnung and the Rabattgesetz as well as by the regulations on clearing sales and special offers[189]. In this context only the Zugabeverordnung and the Rabattgesetz are of importance; the Acts date back to the economic crisis of 1932/33 and are not characterised by a protective purpose in terms of consumer policy. Rather, their distinct feature is the *protection of small and medium-sized firms*, which is revealed by the fact that neither the Zugabeverordnung of 1932 nor the Rabattgesetz of 1933 include the right of consumer associations to bring a collective action pursuant to Art. 13 para. 1a UWG. They are intended to prevent small and medium-sized enterprises from suffering setbacks as a result of the fact that large enterprises, by engaging in the distribution of collateral gifts or announcing and promising discounts and similar price reductions secure themselves competitive advantages, thus ousting small competitors from the market.

The courts continue to adhere to these considerations of the protection of small and medium-sized firms, so the question has arisen of whether or not for the very purpose of promoting competition and the interest of the consumer these Acts should be abolished or at least interpreted in a restrictive way[190]. As they continue to be in force, we shall briefly discuss their essential points in the following.

108 (*aa*) The *Zugabeverordnung* does not purely and simply prohibit all gifts, but only certain forms of them. The prohibition takes effect only if there is a collateral gift. According to court practice, this presupposes three circumstances: the gift must be sold as a collateral commodity together with the main

commodity or service, there must be a close relationship between the main commodity and the collateral commodity, and either no or only a sham consideration may be asked for the collateral gift[191]. The notion of a close relationship presents the greatest difficulties. In more recent court practice the view continues to prevail that the mere 'hope' of striking a bargain does not turn an allowed gift into a prohibited collateral gift. As a result, the very popular practice of giving away, for instance, so-called Christmas gifts, special gifts and the like is not covered by the Zugabeverordnung[192]. No consideration may be asked for a collateral gift. Thus the sale of a particularly low-priced commodity together with the main commodity does not infringe the Zugabeverordnung. This has been made clear by the courts particularly in connection with 'leader offers', in which a commodity foreign to the trade is sold at a favourable price together with the main commodity, specifically in the coffee trade. These do not therefore infringe the prohibition of collateral gifts[193], but may be prohibited by Art. 1 UWG (No. 106). In consequence of this narrow interpretation, the Zugabeverordnung has lost much of its importance in the legal treatment of gifts. According to more recent court practice, the prohibition of Art. 1 UWG outlined above is of greater importance.

There is no collateral gift either, if merely advertising articles of low value are given away; however, in more recent court practice the feature of low value is not only determined on the basis of the objective value, but also on the basis of the properties pointed out in advertising which may turn a valueless thing into a valuable one[194].

We shall not go into further details here. It should be noted though, that collateral gifts are forbidden not only if given to final consumers, but at all levels of trade and industry.

109 (*bb*) The *Rabattgesetz* of 25 November 1933 on the one hand covers the announcement or granting of discounts as a trade practice and on the other hand simultaneously aims at precluding deception of the consumer which may typically occur in the granting of discounts and special prices[195]. Thus the Rabattgesetz stands between the regulation of misleading advertising, on the one hand, and the control of certain unfair trade practices on the other. The regulative purpose of the Act is subject to even greater controversy than that of the Zugabeverordnung. Thus, for example, the Consumer Advisory Council attached to the Federal Minister of Economics has come out in favour of abolishing the Rabattgesetz altogether[196].

The prohibition of discounts refers to two restrictive requirements: it relates only to goods for everyday consumption and applies only to final consumers. Both criteria are highly controversial. Generally speaking, goods for everyday consumption are not only foodstuffs and semi-luxuries, but also big purchase items, such as motor vehicles. Only typical articles of luxury do not come under the prohibition of discounts[197]. Ulmer, in particular, has found fault with that interpretation; he holds that a prohibition of discounts, for instance regarding motor vehicles, results in an intolerable restraint of competition[198]. Goods for everyday consumption, he claims, are not only goods the consumer uses every day, but also goods he has to buy every day. Here the prohibition of discounts might mislead consumers.

Furthermore, the prohibition of discounts applies only to final consumers, but not to retailers, wholesalers and the like. This criterion is interpreted by the courts to the effect that a final consumer is any person who does not turn over goods any further; he need not be a private consumer as developed above (No. 18)[199] but may also be an industrial consumer. This very interpretation of the concept of the consumer by case law has resulted in the fact that specifically so-called self-service wholesalers selling goods to industrial consumers to meet not only their business requirements and resale purposes but also their personal requirements coming under the prohibition of discounts. Especially in the case of mixed purposes of use it is often difficult to see whether or not goods are typically sold to the 'final consumer'[200]. The Federal High Court has expressed its view approximately to the effect that industrial consumers may buy goods for 'private use' at the rate of 10% only. It is for the self-service wholesaler to control observance of that percentage rate. If he permits sales exceeding that rate, he may be sued for violation of the prohibition of discounts[201].

Within the meaning of Art. 1, para. 2 Rabattgesetz, discounts are deductions from those prices an entrepreneur announces or generally asks or special prices granted because the consumer is a member of certain groups of consumers, professions, associations or societies. Discounts are granted not only if a percentage deduction from the price is announced, but also if, for instance, special prices are allowed to specific groups or other price discounts are granted[202]. It is recognised, though, that the Rabattgesetz does not restrict the entrepreneur's freedom of price shaping and does not forbid him to advertise price reductions[203]. The Rabattgesetz does not forbid price cutting, tie-in offers and the like in general, but only the announcement or granting of price *discounts*. A mere price reduction is not a price discount. Price comparisons, for instance, unless they are misleading as outlined above (No. 68), are not forbidden by the Rabattgesetz. Here again, we cannot go into details[204].

The Rabattgesetz permits certain exceptions to the granting of discounts, specifically the 3% cash discount granted by commercial enterprises and cooperatives. The Rabattgesetz does not apply if the profits from purchases at reduced prices are repaid to consumers having joined to form a society and they get a refund on their shares. According to court practice, this is not an announcement or granting of a discount which is inadmissible under the law of competition, but a form of sharing in profit, admissible under company law[205]. As a result of this pattern it is possible in most cases to evade the regulations of the Rabattgesetz, which has been done on an increasing scale recently; however, in antitrust court practice it is taken that such enterprises need *not* be supplied[206].

4 Trade practices concerning specific products

110 Legal restrictions on trade practices exist primarily in the case of *drugs*. However, considerations of consumer protection have been decisive in the formulation of the restrictive provisions of the HWG and AMG in some cases only. Rather, what is of prime importance to the legislator is the protection of pharmacies organised in small and medium-sized enterprises. This is very often justified by reason of public health and consumer protection, but is not a compelling

reason in each case. Actually, restrictions on the marketing of drugs subject to sale by pharmacists result only in a considerable increase in prices and are not therefore in the interest of the consumer, unless they are imperative from a medical point of view.

(*aa*) Art. 6 *HWG* forbids trade practices inducing consumers to buy drugs that are subject to sale by pharmacists only by mail order. Art. 7 forbids advertising of teletheraphy. Art. 9, item 13 forbids advertising involving prize competitions, lotteries and other methods whose result is due to chance, item 14 forbids the unsolicited giving of specimens, samples or coupons therefor. Certain forms of gift also falling under the law of unfair competition are strictly forbidden under the law of drugs, Art. 5 HWG as amended[207].

(*bb*) The new *AMG*, like the previous one, lays down in Art. 47 that drugs may be sold by pharmacists only. Art. 50 confines the sale of drugs not to be sold exclusively by pharmacists to expert persons. Art. 51 forbids the offering for sale of drugs and the soliciting of orders for drugs through peddling. Art. 52 contains a prohibition of self-service or sale through vending machines.

(*cc*) With respect to other products there are no corresponding restrictions on trade practices, particularly not in respect of *tobacco products*. In view of the noxious nature of tobacco products, though, restrictions on marketing of tobacco products should at least be considered, for instance concerning prize competitions. Art. 22, para. 3, item 1 LMBG contains an enabling provision to that effect, not yet put into force.

VI DOOR-TO-DOOR SALES

111 Door-to-door sales and similar transactions made outside an entrepreneur's regular business premises, for instance on the occasion of coffee party excursions, by accosting passers-by, etc., are a special subject of consumer protection from several points of view. One point of view stems from the law of unfair competition or trade law, the other from the law of contract. The starting point of trade law (Gewerberecht) or the law of unfair competition is that this trade practice restricts the consumer's freedom of decision; direct selling confronts the often inexpert consumer with a trained salesman for whom it is much easier to talk the consumer into closing a deal than would normally be the case. From the point of view of trade law, such marketing methods result in annoyance to consumers and competitors, possibly even in the sale of products that should not be marketed by way of peddling. From the point of view of the law of contract, the problem is whether the consumer is bound by such a contract or whether he may withdraw therefrom[208].

1 Regulations on door-to-door sales under trade law and the law of unfair competition

112 (*aa*) The most important provisions on the regulation of door-to-door sales

and similar transactions are to be found in the *Industrial Code* of 1869 as amended. Under title 3 'Itinerant Trade' ('Reisegewerbe'), Arts. 55 *et seq.* Industrial Code, certain restrictive conditions are imposed on itinerant trade for the protection of public order, indirectly also for the protection of the consumer. It is understood as a principle that a trader who wants to engage in itinerant trade has to register and requires a *pedlar's certificate.* The Act regulates in detail the conditions prerequisite to the granting and cancellation of a pedlar's certificate. We shall not go into details here. Art. 56 excludes certain activities from itinerant trade, in particular the soliciting (offering for sale and inviting orders) of:

— goods insofar as their sale is forbidden in non-itinerant trade;
— poisons and poisonous goods;
— orthopaedic appliances;
— electromedical appliances;
— appliances and objects which are designed to protect against rays (except light and heat);
— securities, etc.,
— alcoholic beverages (except beer and wine);
— watches;
— used clothes, etc.,
— brokerage of credit transactions unless they are linked with a sales transaction or the conclusion of a building society savings contract.

The activities forbidden in the Industrial Code have been included in the Act on different considerations. One consideration is that certain goods, by reason of their potential dangerousness, should not be marketed by way of peddling; for instance, poisons, any kind of medical appliance, high-proof alcoholic beverages. In the case of other objects, the prohibitions in the Industrial Code are designed to protect the non-itinerant trade, for instance concerning the marketing of watches and the like. A number of other prohibitions concern transactions that typically involve special risks to the consumer and that if concluded through itinerant peddling might result in the consumer inflicting damage on himself in a way unacceptable under our legal system, for instance in connection with credit transactions, which will be discussed later (No. 343).

From the list of exceptions it may also be gathered that the Industrial Code does not consider door-to-door sales and similar marketing methods to be dangerous to the consumer in principle and does not therefore forbid them in general[209]. This becomes quite clear in connection with the provision that expressly excepts from the prohibition of itinerant peddling sales transactions linked with a credit transaction. This case is certainly an issue of consumer protection, because the trader sells a commodity by instalments, while the consumer is hardly able to realise the liabilities he incurs. In such a case only the protective provisions of the Abzahlungsgesetz (discussed elsewhere — No. 322) can be of any help.

113 (*bb*) Beyond the Industrial Code a limited prohibition of door-to-door sales exists under Art. 17 of the Gesetz zum *Schutz der Teilnehmer am Fernunterricht* of 24 August 1976. Art. 17 reads:

Para. 1:
For advertising purposes or guidance on correspondence courses offered by an organiser, the organiser or his agents may call on persons only if such persons:
(1) have received beforehand information material answering the requirements of Art. 16, and
(2) after receipt of such information material have asked for advice in writing.
The organiser or his agents shall be qualified to offer guidance pursuant to sentence 1.

Para. 2:
The organiser or his agents must be instrumental neither in making a declaration of intention to conclude a contract nor in the transmission of the declaration of intention outside the organiser's business premises.

The government's comment on this provision is as follows: 'A high proportion of grievances in the correspondence course system is attributable to the fact that persons eager to learn but not accustomed to learning are caused by agents or traders working on a commission basis to enter into contracts for correspondence courses without having the necessary educational background and without being able to judge their own learning capacity. The regulation of Art. 17 does not exclude all personal advice, but only the calling on parties interested in correspondence courses without the latter's express request and without prior instruction through information material. Furthermore it excludes the organiser's or his agents' assistance in the making of a declaration of intention to conclude a contract[210].

Thus Art. 17 does not forbid door-to-door transactions involving correspondence courses altogether, but provides for guidance and protects the participant's freedom of choice. The customer shall be offered only such expert guidance as he expressly requested. He shall not be 'advised' against his will. The prohibition of assistance in the conclusion of a contract shall contemporaneously ensure that the customer may take his decision to enter into a contract unbiased by a sales call or a guidance talk. The regulation reveals much greater appreciation of the psychological situation of a customer who has been visited by an agent than, for instance, the Industrial Code and deals in detail with the trade practices peculiar to correspondence courses.

114 (*cc*) In addition to these administrative provisions, considerations under the law of unfair competition must be taken into account in the regulation of door-to-door sales. This has already been discussed above (No. 105). Generally speaking, the courts consider door-to-door sales to be unobjectionable under the law of unfair competition, unless additional circumstances give rise to an infringement of public policy[211]. In this connection the courts base their views in particular on the admissibility of itinerant trade under trade law and thus of door-to-door sales, which generally forbids sanctions against door-to-door sales under the law of unfair competition. The only exception developed by the courts is the unsolicited calling by gravestone solicitors, because this constitutes unfair annoyance pursuant to Art. 1 UWG. In so far as the law of unfair com-

petition is applicable, no penalties are imposed but actions for injunction (No. 118).

2 Contract law provisions

115 The (limited) prohibition under trade law or the law of unfair competition of certain forms of door-to-door sales does not say anything about the handling of contracts made between a customer, of the one part, who in violation of the statutory regulations is induced to make a contract, and a trader, of the other part, who himself or through his agents has concluded an illegal door-to-door transaction. This question is regulated in the law of contract and is highly controversial. According to established court practice, it is assumed that a violation of the provisions under trade law and the law of unfair competition does not automatically void the contract under civil law[212]: this, the courts claim, is possible only if the consumer cancels the contract because of error or fraud, which is not usually the case in forbidden door-to-door sales or cannot be proved by the customer. Generally speaking, a transaction violating a statutory prohibition under Art. 134 Civil Code, a transaction *against public policy* under Art. 138 I or a usurious transaction under Art. 138 II Civil Code, does not exist because these articles relate only to the subject matter of the transaction, not to the way in which the contract is concluded. Prohibitions under trade law and the law of unfair competition, the courts claim, refer to certain trade practices, but not to the conclusion of such transactions in the first place.

This opinion must be criticised on the very principles of the existing law. If it is correct that the prohibitions under trade law and the law of unfair competition of certain forms of door-to-door sales intend to protect the consumer, such protection cannot be confined to the prohibition of a certain trade practice only, but must also include consequential contracts; otherwise the protection will be largely ineffective. Therefore it must be assumed that a door-to-door transaction prohibited under trade law or the law of unfair competition at the same time violates a statutory prohibition pursuant to Art. 134 Civil Code, and therefore results in nullity[213]. It may also be argued that any ignoring of such a prohibition by the entrepreneur or his agents already constitutes fraud and that the conclusion of a contract has therefore been caused by such fraud; hence the consumer may cancel the contract.

Others argue that a violation by the enterpreneur or his agents of the provisions under trade law or the law of unfair competition at the same time constitutes a tort pursuant to Art. 823, para. 2 Civil Code. The consumer may claim damages. In line with the principles of compensation for damage, the claim for damages first and foremost includes the right to withdraw from the contract[214]. Interesting as this argument may be, it has little persuasive power dogmatically, for in this case it is a matter not of claims for damages, but of the validity of a contract under civil law. However, this is not a question of the law of torts, but of the general law of contract and thus can be solved pursuant to Art. 134 Civil Code.

The planned reform of the UWG[215] (No. 121) intends to give the consumer in door-to-door sales violating the law of unfair competition a special right to claim damages, which also includes a claim for cancellation. This, however,

covers only gross breaches, not door-to-door sales in general. The planned right of cancellation does not thereby become superfluous.

3 Introduction of a general right of cancellation in door-to-door sales

116 In addition to the regulation under trade law or the law of unfair competition of door-to-door sales, a question taken up in legal discussions in the Federal Republic in recent years has been whether the customer could be helped more effectively if a *right of cancellation* (Widerrufsrecht) were introduced with respect to door-to-door sales and similar transactions[216]. The civil-law solution to the problem would offer the advantage that, on the one hand, door-to-door sales would not be subjected to a general sanction under trade law or the law of unfair competition and, on the other hand, the introduction of a right of cancellation would enable the customer to withdraw from contracts that are a nuisance to him (because of either their contents or the way in which they were concluded) and would enable him to stick to contracts that he would still have concluded after careful consideration.

Under existing law, a right of cancellation exists in three cases: one case is regulated in the law of instalment sales and will be discussed in connection with consumer credit (No. 324), a special case of the right of cancellation is contained in Art. 11 of the Gesetz über den Vertrieb ausländischer Investmentanteile (Act on the Sale of Foreign Investment Fund Shares), and a third case is regulated in Art. 4 of the FernUSG[217]. The right of cancellation in the law of instalment transactions and in the law of correspondence courses is not restricted to door-to-door sales, but applies irrespective of the way and place in which the contract was made. Here the right of cancellation is justified by the long-term commitment undertaken by the customer involving considerable financial means. The right of cancellation in Art. 11 of the Act on the Sale of Foreign Investment Fund Shares starts from the facts of door-to-door selling.

Attempts to introduce a right of cancellation concerning door-to-door sales and similar transactions have been dealt with by the German Bundestag during the last term in connection with reform of the law of instalment transactions. However, for reasons of equality and possibly unconstitutional discrimination against itinerant merchants, the legislator has not yet been able to decide in favour of the introduction of such a general right of cancellation in door-to-door sales. Rather, he has given preference to the solution confined to the law of instalment transactions and similar transactions[218]. It has turned out, though, that the solution under the law of instalment transactions does not suffice, specifically not in the case of transactions made on the doorstep that do not satisfy the requirements of an instalment transaction or a similar transaction. So, at the beginning of the new term of the Bundestag, a new bill on the cancellation of door-to-door and like transactions was introduced by the Bundesrat (Upper House of Parliament)[219].

Also, there are endeavours within the EC to accomplish an approximation of laws on consumer protection with respect to contracts concluded outside regular business premises. In the meantime the Commission of the European Communities has submitted a draft directive to that effect[220]. The bill submitted by the

Bundesrat will be compared below with the draft directive submitted by the Commission.

(*aa*) Both drafts start out from the desirable introduction of the right of cancellation in door-to-door sales and similar transactions. In Art. 1 of the German draft, door-to-door sales are defined as representations of entering into a contract which the customer was caused to make as a result of negotiations conducted with the other contracting party (the trader) or his agent outside the latter's regular business premises. Art. 1 of the EC draft includes the same concept of business premises, which is defined as a permanent business establishment from where a person conducts his business or practices his profession; this includes stalls at fairs and on markets. Such contracts outside regular business premises need not necessarily be made on the doorstep, but can also be made at the place of work, in the street, and in places other than fairs and markets. However, it is this very aspect that the Federal Government has criticised in its comment on the Bundesrat bill. The Government holds that the wording 'outside regular business premises' is too wide and that it is sufficient to name positively those types of contract that are subject to the right of cancellation, such as transactions on the doorstep or at the place of work[221]. The wide wording of the Bundesrat draft and the EC draft offers the advantage, though, that it also includes possible forms of circumvention and thus makes it easier for the agencies entrusted with consumer protection to handle matters of consumer protection.

The drafts also agree in that the right of cancellation is applicable not only to business activities, but also to what are known as professional services (irrespective of their admissibility in terms of professional ethics) outside regular business premises.

(*bb*) There is also largely agreement between the two drafts as to what *types of transaction* should not be subject to a right of cancellation: in particular, contracts concluded exclusively on the customer's initiative, declarations certified by a notary public, real estate transactions and petty transactions. Whereas the German draft does not give any details as to when a consideration is regarded as small, the draft directive prepared by the EC Commission tries to fix the consideration in terms of quantity at 25 European units of account. The German draft requires in addition that in the case of petty transactions the services/goods be supplied immediately and the small consideration be paid immediately. According to both drafts the person conducting a trade or business (including professional services) has to prove that the requirements of the exceptional cases mentioned exist.

(*cc*) A striking difference between the Bundesrat draft and the EC draft lies in the fact that the latter requires that the contract be in writing, while the German legislator feels that he can do without such a requirement. The legal position pursuant to Art. 1a AbzG may be recalled here, where in the case of instalment sales writing is required and certain statements, for instance about the instalment price and the effective annual rate of interest must be made to the customer in the written contract. The German draft results in a material gap in consumer

protection by waiving the requirement of writing. For this reason a regulation pursuant to Arts. 3 and 4 of the EC draft seems advisable.

(*dd*) In both drafts, the exercise of a right of cancellation is made contingent upon the customer giving the entrepreneur, or persons equal in status to him, notice of cancellation *within one week*. Under German law, cancellation must be in writing, while the EC draft says that any notice will suffice, leaving it to the individual member countries whether or not they choose to attach to it any additional formal requirements. In any case it seems sensible to refrain from requiring writing for the notice of cancellation as is shown by practical experience with the law of instalment sales. Through conclusive behaviour the customer must also be able to exercise his right of cancellation, for instance by returning the goods[222].

Both drafts provide that the customer must be instructed in writing as to how to exercise his right of cancellation and as to when the cooling-off period starts to run, i.e. not until after a pertinent instrument of instruction has been delivered to him. In addition to that, the EC draft is intended to provide the customer with a printed form of cancellation, if possible upon conclusion of the contract, in order that he can actually exercise his right of cancellation and does not refrain from doing so out of ignorance of formalities and the like. It is advisable also to incorporate such a proposal into German law which may, however, be done in the form of a recommendation only.

Lastly, both drafts provide that, in the event of disputes about the beginning of the cooling-off period, the burden of proving that the right of cancellation was not exercised in time shall be on the person conducting the trade or business. This regulation is of particular importance in the case of predated instruments. Art. 12 of the EC draft in addition provides that in such a case the law of the member countries may require that the consumer should date door-to-door contracts in his own hand or that the door-to-door contract should be registered with an appropriate public agency. Such provisions are not included in the German proposal.

According to both drafts the consumer cannot waive his right of cancellation. Pursuant to the German draft, the right of cancellation lapses one month after both parties to the contract have fully met their obligations of performance. This regulation clearly deviates from the right of cancellation under the law of instalment transactions, in which case the right of cancellation lapses upon the performance of the contract. As the explanatory memorandum correctly points out, the difference lies in the fact that otherwise it would be easy to circumvent the right of cancellation. For door-to-door sales are not credit transactions, often performance is effected immediately; also in such a case the customer (apart from petty transactions) shall retain his right of cancellation.

(*ee*) Regulating the *legal consequences*, both drafts ensure that the customer is not practically forced to refrain from exercising his right of cancellation because of any obligation to pay conventional penalties or damages, to accept liability for deterioration or wear and tear as provided, or to make a compensation for use. Here the EC draft goes even further than the Bundesrat draft. Pursuant to the EC draft, the consumer is not obliged to pay a consideration for ordinary use

of goods during the cooling-off period, while under German law he will have at least to pay for the value of use, but will not be required to compensate for a reduction in value.

In terms of persons benefitting from the regulations it is made clear that the right of cancellation applies only to transactions under what is known as *consumer law* (No. 19). If the customer acts in the course of business or as a professional, he has no right of cancellation. Conversely, if the other contracting party is not engaged in a business activity, there is no right of cancellation either. This ensures that a right of cancellation exists only in the case of consumer contracts proper, not in the case of transactions between consumers and consumers, and not between traders or the professional classes, respectively.

(*ff*) In addition to the civil-law regulation, the EC draft includes a power to issue regulations under trade law or the law of unfair competition on door-to-door sales and similar transactions. This ensures in particular that in those countries where door-to-door sales are regulated by more restrictive criteria under trade law than under German law; such a legal position is not precluded by EC law.

VII CONTROL SYSTEMS

117 The legal regulation of advertising and trade practices in the narrow sense exists on paper only as long as there are no appropriate *law enforcement mechanisms* to implement the prohibitions and requirements contained in the statutory regulations in an effective and rapid way in the interest of the consumer. In the area discussed here, German law provides for different control systems. These will be evaluated side by side first, with proposals in terms of legal policy being taken into account. In a further section we shall try to describe the horizontal interlocking of the various control mechanisms.

1 The system of sanctions in the law of unfair competition

118 In so far as German advertising law is based on the law of unfair competition, the latter provides for elaborate law enforcement instruments created in decades of court practice. Under German law, sanctions *under the law of unfair competition* play a leading role in contrast to the law in other EC countries, so they will be discussed first. These sanctions are applied primarily to misleading advertisements and to prohibited trade practices, pursuant to Arts. 1 and 3 UWG and special legislation on unfair competition.

Sanctions under the law of unfair competition are of a *civil-law* nature. Pursuant to Art. 1 and Art. 3 UWG the party injured by an unfair or misleading advertising measure may, to begin with, apply for an injunction. Within the meaning of those articles, such parties are the other competitors whose business is impaired by a competitor's measure. In the event of unfair acts of competition, the injured competitor may in addition sue for damages; the injured consumer has no such right[223].

The objective of the law of unfair competition — there can be no doubt about this any more — is not only the protection of the individual businessman, but also the maintenance of workable competition in the interest of the general public and for the good of consumers, collectively and individually. So, in Art. 13 UWG, the right to sue has been extended in two directions. To begin with, associations of traders may assert claims for removal and for injunction. This type of action is now very common in the law of unfair competition and accounts for the majority of disputes. In addition, in 1965 the collective action by consumers was also incorporated into the Act[224], but was linked to restrictive requirements; a claim for injunction may be asserted without restriction only in cases of misleading advertising. Infringements of the prohibition of unfair acts of competition may be taken up by consumer associations by an action for injunction only in so far as the claim relates to misleading statements about goods or industrial services or other trade practices for the purpose of competition which materially affect consumer interests. The consumer associations' right of action in these cases does not refer to all infringements of the rules of fair competition, but only to those affecting consumer interests. The forbidden trade practices discussed above may be taken up by an action of consumer associations. Not every consumer association enjoys a right of action, but only those whose by-laws provide for the safeguard of the consumer's interests through education and guidance and those that actually safeguard these interests through appropriate advisory services[225]. As expressly provided by statute, consumer associations may not ask for damages. It is the intention of the government bill to amend the UWG of 26 May 1978[226] to make the collective action more 'serious' through some technical changes. Pursuant to a new Art. 13 para. 5 UWG, the association shall be subject to government supervision, so that not every consumers' association may claim to be safeguarding consumer interests. In addition, associations on a membership basis having 75 members may bring an action as under the law of standard form contract conditions (No. 294ff), but likewise require registration.

In the beginning, consumer organisations made use of the possibility of bringing a collective action only with hesitation[227]. This was attributable to the restrictive handling of such matters by the courts, which were reluctant to grant associations, for instance so-called 'anwaltliche Gebührenvereine' (associations of lawyers founded for the sole purpose of getting fees), the right of action without close examination of their activities as laid down in their by-laws. The *de facto* restriction results from the limited funds available to consumer associations. As disputes arising from issues of unfair competition generally involve high values in dispute and a considerable litigation risk, consumer associations are forced to take up only clear-cut contraventions of the law without the possibility of having borderline cases clarified, for instance through test cases[228]. Only recently has there been a change since consumer associations have made more active use of their right of action. Moreover, the question is still unsettled as to what extent a trader infringing the rules on fair competition can be asked to reimburse the cost of extrajudicial proceedings, for instance lawyers' and experts' fees, to the consumer association. The risk to which consumer associations are exposed, of paying damages under the law of torts for unsuccessful litigation, is also considered to be very high[229]. Overall, *v. Falckenstein* in an

empirical study has pointed out some cases where a collective action has been successful, but has also shown serious deficiencies, for instance concerning widespread trade practices and direct selling.

Another inadequacy of a collective action brought by consumers lies in the *risk of litigation costs*. True, Art. 23a UWG provides that the value in dispute (Streitwert) in issues of unfair competition may be reduced if the burden of the full amount of litigation costs *considerably* jeopardises the financial situation of either party (so-called split value). But the courts interpret this provision restrictively as regards the granting of a reduction of the value in dispute to consumer organisations. The courts hold that consumer organisations should comply with the general litigation rules governing the law of unfair competition and if necessary should go to court less often. Moreover, they say, it is the task of those agencies financing consumer organisations to provide the necessary funds for taking cases to court. According to the courts, costs cannot be awarded against the opponent and the lawyer should not get his fees based on a lower value in dispute[230].

The government bill mentioned earlier wants to clarify in a new Art. 23a UWG that the funds granted by public authorities should not be taken into account in the evaluation of the consumer association's financial situation[231]. Moreover, a standard value in dispute of DM 5000 shall be introduced if the association is exclusively dependent on public funds, as are consumer advice centres and the Consumer Protection Association in Berlin (No. 6).

Overall, German court practice in the area of prosecution of infringements of the law of unfair competition is thus distinctly *asymmetrical*, in favour of associations of trade and industry and to the disadvantage of consumer organisations. This finding cannot be disproved on the grounds that allegedly associations of trade and industry also safeguard consumer interests indirectly or that consumer associations are equivalent to trade organisations[232]. After all, pursuant to the Gesetz über Prozeßkostenhilfe (No. 370), consumer associations may be granted aid if they are unable to defray the costs and failure to prosecute the case would be contrary to the 'public' interest (Art. 116, item 2 Code of Civil Procedure, new version).

2 Improvement of law enforcement through a claim for damages under the law of unfair competition

119 The decisively weak point of a collective action brought by consumers — apart from its limited practicability so far — lies in the fact that law enforcement is confined to a *claim for injunction*. The injunction imposed on an advertiser or a trader — by way of a warning carrying a penalty, interlocutory injunction (einstweilige Verfügung) or (less often) cease and desist order[233] — cannot repair the damage the consumer has suffered through an act of unfair competition and cannot really foil the impression created by the advertising measure. Three new types of sanction are therefore presently under discussion: the *collective claim for damages*, the *claim for damages by an individual consumer* and *corrective advertising*. The draft directive of 1 March 1978 submitted by the EC Commission expressly provides for these types of sanction, although their shaping is largely left to the laws of the member countries.

Meanwhile it has been confirmed by empirical investigations that the consumer may suffer considerable *losses* through acts of unfair competition and misleading advertising[234]. Various potential types of damage are distinguished: damage from enticement or expenses, damage from entering into a contract, differential damage, damage resulting from misleading prices, incidental and consequential damage, and law enforcement costs. Of greatest importance in practice are *damage resulting from entering into a contract* and *differential damage*. It is a case of damage resulting from entering into a contract if a consumer, for instance through an unfair door-to-door sale, is induced to make a contract which he would not have made under normal circumstances. These types of damage occur primarily in the case of acts of unfair competition under Art. 1 UWG (No. 103ff) and account for about 50% of all empirically ascertained cases of damage. By differential damage we mean a loss of property on the part of the consumer which he has suffered primarily as a result of misleading advertising: a commodity is claimed to have certain properties which it does not actually have (sale of cheap German whisky as expensive Scotch whisky: the difference in price between the two constitutes the damage to the consumer). Differential damage may also occur in such a way that in an advertisement a commodity or service is claimed to have a particular quality which it does not have in actual fact (for instance, slimming agents), without therefore being sold at a higher price than comparable products. According to a probability analysis, the sum total involved in the above mentioned types of damage is 1.5 to 2 billion D-marks per annum. The other types of damage could either not be specified in the investigation or were negligible.

So far, under the existing law, compensation for damage as described above has hardly been possible for factual or legal reasons. Damage stemming from entering into a contract is accepted in line with the principle *pacta sunt servanda* unless, by way of exception, there is a reason for nullity or cancellation pursuant to the Civil Code (No. 115). No compensation whatsoever is provided for differential damage, either under the law of contract or under the law of torts, unless properties are warranted in a contract of sale or services (No. 239ff). Often the damage suffered by an individual consumer is so negligible that he will scarcely try to enforce a claim by way of litigation. This calls for the possibility of collective assertion of claims through consumer associations.

(*a*) *Collective claims for compensation*

120 The demand for a *collective claim for compensation* has in the first instance been developed by *legal writers*[235]. So far, there has been an imbalance in the law of unfair competition, because competitors and to a limited extent also their organisations, but not consumer organisations may claim damages from the party engaging in misleading advertising measures, although it is often the consumer who is adversely affected by an advertising measure. The courts have rejected the idea of extending the *de lege lata* situation by awarding a right to claim for damages in tort[236].

The problems presented by a law reform are, on the one hand, a definition of the group of parties injured and, on the other, a definition of the damage. Currently, consumer organisations are not run on a membership basis and

therefore are hardly authorised to assert a claim for damage suffered by a third party (except for the rare case of taking up claims assigned to them — No. 6). Their own damage includes only the cost of law enforcement[237]. Even if these difficulties are surmounted, for instance by the creation of consumer organisations on a membership basis, the problem of assessing the damage remains. *Class actions*, as under US law, do not exist in the law of the Federal Republic. The German law of torts compensates only individual damage. In the case of a collective claim for damages, such compensation plays a minor role. The proposals submitted by the Commission to Fight White-Collar Crimes, *inter alia*, include considerations to the effect that here statistical data should suffice to ascertain the loss (difference between hypothetical market value and decrease in value)[238].

(*b*) *Withdrawal from contract*

121 Of far greater importance to the individual consumer is a remedy enabling him *to withdraw from the contract*. According to prevailing though not undisputed court practice, the contract entered into by a consumer by means of misleading advertising or unfair trade practices continues to be effective even if the trader by way of an injunction was forbidden to continue such practices (No. 115)[239]. Only in exceptional cases will the consumer be able to advance fraud or an infringement of public policy. The consumer remains bound by the contract — an untenable result in terms of legal policy.

The new proposals submitted by the Commission to Fight White-Collar Crimes and by the Consumer Advisory Council now envisage for the individual consumer a right to *withdraw* from the contract[240]. Accordingly, if a contract with a final consumer is the result of a misleading advertising measure, the consumer shall have a right to withdraw from the contract. Such a right must not be confused, though, with the reform attempts to introduce, for instance, a right of cancellation in the case of door-to-door sales, since that eventual right of cancellation exists irrespective of damage and merely requires that a time limit be observed (No. 241). In reality, the scope of application of the right to withdraw from the contract and the right of cancellation in door-to-door sales and similar transactions will overlap. It is therefore conceivable that the heated legal-policy discussion concerning the right to withdraw from the contract will calm down if the consumer is granted a right of cancellation, limited in time, in door-to-door sales and similar transactions.

(*c*) *Corrective advertising*

122 A third proposal in terms of legal policy amounts to the introduction of what is known as *corrective advertising*[241]. This was initially developed under US law and means that the advertiser has to retract, or possibly correct, his advertising claim at his own expense in the same media[242]. Under German law corrective advertising has so far been a subcategory of the so-called claim for removal (Beseitigungsanspruch), which exists in the law of torts irrespective of fault and may be invoked against misleading advertising. Such a claim may be either for retraction or for correction[243]. In addition, Art. 23 para. 2 UWG provides for

publication by order of the court of the substance of the judgement. The opposing party's right to reply exists only in the law of the press, not in advertising law.

In court practice the claim for correction and the right to publication have so far played a minor role. Therefore their theoretical possibility does not invalidate the demand for corrective advertising. The real problem of corrective advertising is not one of civil procedure but one of *substantive law*. For as long as the concept of deception is determined by subjective criteria (No. 83), corrective advertising is based on a weak foundation, for there is no requirement by law that an advertiser should make objectively correct statements. He has only to remove the misleading element, which does not necessarily require corrective advertising; conversely, corrective advertising may give rise to further deception.

The right of action on the part of associations continues to be a problem, though, for it is quite controversial whether the claim for removal requires that the party be affected personally or, irrespective thereof, belongs to any organisation which may demand that the other party should refrain from doing a particular thing[244]. Lastly, the publication of court rulings should also be extended to include prohibitory injunctions (einstweilige Verfügungen). On the other hand, legislation should provide not only for the substance, but also for the findings of court rulings to be made public[245].

Corrective advertising so far has been used only by persons conducting a trade or business whose 'rights' were 'encroached upon' by competitors, consumer organisations or organs of the press. In this context, the claim derives from the law of torts and is regarded as a means of restitution within the meaning of Art. 249 Civil Code. The Federal High Court permits reimbursement of expenses (for instance, advertising in newspapers) for making good a damage. The claim for reimbursement, however, is limited to the correction or supplementation of the preceding misrepresentation, i.e. the corrective advertisement must bear reference to the violation of the law[245a].

The Federal High Court's practice gives rise to a considerable additional risk of liability for critical press reports on the behaviour of traders. The extent to which this court practice will be applicable to consumer organisations has not yet been decided. This means that a trader in the case of misrepresentation (No. 71) may impose the cost of 'corrective advertising' on press organs or consumer organisations. In this context it must be said, though, that the Federal High Court is trying to restrict such a 'right of self-help'. 'Corrective advertising', not in favour but at the *expense of consumer organisations* (!), may clash with the principle of freedom of speech as defined in Art. 5 Basic Law. If the Federal High Court in permitting 'corrective advertising' refers to 'consumer expectations', this does not say anything about passing on the cost of advertising campaigns. If an advertiser comes forward with his statement, he must also tolerate critical, possibly even wrong reports, provided he has occasioned such reports.

(d) Bill to amend the UWG

123 The government bill of 26 May 1978 to amend the UWG[246] provides in a new

wording of Arts. 13 to 13c UWG for appropriate sanctions under the law of torts, but as regards corrective advertising leaves the *de lege lata* situation unchanged. Under a new Art. 13a para. 2, the legislator first of all would provide for a claim for damages to the consumer injured by an unlawful trade practice if he was *induced* to enter into the contract as a result of such unlawful practice. In the case of (punishable) untrue advertising pursuant to Art. 4 amended version UWG, the claim for damages is extended in two directions: the consumer has a right to claim damages in respect of the differential damage (comparison between the actual value of the commodity and the value claimed in the advertisement), and he is granted a special right of rescission pursuant to Art. 13b. If the advertising claim originates from a third party, the customer has a right of rescission only if the other party to the contract knew or should have known that the claim was untrue or participated through his own measures in advertising such a claim.

A striking feature of the bill as compared with the first draft is the restrictive handling of the claim for damages in the case of false advertising: according to the first draft, any misleading advertising was sufficient; according to the present government bill it must be a case of *punishable* advertising — which is often hard for the consumer to prove[247]. Another problem is presented by selling on a division-of-labour basis: often the advertiser and the consumer's contracting party are two different persons, especially in the sale of branded articles. According to the first draft, any objective participation in advertising by the contracting party was sufficient, whereas according to the government bill such a party either could culpably have been familiar with the falsehood of the advertisement or must have had a share in it through his own measures. So the right to damage and the special right of rescission against the seller will play only a small role in law enforcement. Of greater importance seems to be the right to claim for damages against the *advertiser* which, for example, may also take the form of a claim to be released from contractual obligations the consumer has entered into with a third party (the seller).

The legislator grants such an individual claim for compensation less in the interest of the individual consumer than as a prerequisite for a 'collective' assertion of such a claim. This is effected through the assignment of claims to the consumer association. Pursuant to a new Art. 13c, the assignment must be in writing and may be withdrawn until filing of the action. The Federal Government prefers this type of collective claims to a class action on the US model or a collective action in the consumer organisation's own right, since in the Federal Republic of Germany consumer organisations are not run on a membership basis[248]. The assignment of claims will, however, present problems in legal practice, especially if they concern only minor losses, all of which have to be ascertained individually in court, particularly as regards causation and the amount of damage[249]. Thus, it is not to be expected that the combination of claims will have a preventive effect and that it will be possible actually to make good the damage suffered by the consumer. The bill — unlike the EC draft directive — does not in any case provide for the skimming off of excess profits.

The functioning of the device of the new collective action will also depend on the extent to which an association may assert a claim for its own damage, particularly for the purpose of law enforcement and prosecution. The courts are

reluctant to grant to consumer associations the right, for instance, to charge extrajudicial lawyer's fees and expert's fees (No. 120). This is altered by the draft only in that the association, if the collective action for damages has been successful, may deduct costs prior to paying out the amount of compensation (Art. 13c, para. 3 draft UWG). The bill *does not provide for corrective advertising* beyond the provisions of the existing law.

3 Administrative and criminal sanctions

124 (*aa*) *Administrative control* of advertising does not play a great role in the Federal Republic of Germany for various reasons, although the possibilities of such control do exist.

The broadest powers to take action are included in the *AMG*, which enables the supervisory authority to examine advertisements (Art. 64 para. 3 AMG) in the case of drugs subject to sale by pharmacists only, and to object to media advertising and marketing pursuant to the HWG[250].

Art. 23 of the Gesetz über das Kreditwesen (KWG) (Act on Supervision of the Banking Business) and Art. 81 of the Versicherungsaufsichtsgesetz provide for the possibility of supervisory authorities raising objections to advertisements of banks and insurance companies. Such a right is exercised occasionally, but more in an informal way than through appropriate administrative action. The possibility under Art. 23 KWG of establishing advertising guidelines by statutory order has remained unused since 1967[251].

Within the framework of the supervision of *food advertising*, tobacco advertising and cosmetics advertising there also exist powers to take administrative action. Infringements of the advertising provisions regulated in the above Acts, particularly of the prohibition to mislead, may be fined. The authorities may forbid or criticise certain advertising measures also through administrative action, which almost never occurs in practice.

Beyond its power of supervision of the rules on workable competition, the *Federal Cartel Office* may also take action against advertisements or trade practices of market-dominating enterprises in the event of abuse. With reference to that provision, the Federal Cartel Office forbade an advertising campaign by a leading enterprise on the margarine market, but did not succeed with its decision before the Kammergericht (Regional Court of Berlin)[252]. Government supervision of trade practices forbidden under trade law, for instance within the framework of direct sales, plays practically *no* role from the point of view of consumer protection[253].

125 (*bb*) Intentional infringements of certain administrative regulations are regarded as *criminal* offences. However, in practice they will hardly ever be prosecuted, since so far there has been no comprehensive criminal law of advertising in the Federal Republic of Germany.

Grossly misleading or false advertising may be punished pursuant to Art. 4 UWG. The prerequisites for punishment are described in a very restrictive way, however: an advertiser is punishable only if he intends to create the impression that something is an exceptionally favourable offer, if he makes his claim to a large audience and if he knows that these statements are false or apt to mislead.

Art. 4 stands out clearly against the civil-law provision of Art. 3 UWG. The statutory provisions present the prosecuting authorities with almost insurmountable difficulties, so that punishments for punishable advertising hardly ever occur[254].

In the more recent legal-policy discussion it has therefore been demanded that Art. 4 UWG be extended. There are two different directions. The Commission for Economic and Social Change plans to consider advertising punishable as soon as there is 'conditional intent' and misleading statements have been made, irrespective of whether or not they are knowingly false[255].

The political public has also demanded that a criminal sanction should take effect as soon as misleading statements are made negligently[256]. However, that reform would come close to the civil-law provisions in the law of unfair competition. Another question to be asked is whether criminal law is generally a suitable means to fight infringements of the law of unfair competition. The present practice in Germany tends to prove the contrary.

The government bill to amend the UWG provides for an amendment of Art. 4 UWG also. The advertiser will be punished in case of *conditional intent*. Only such untrue advertising claims shall be covered as are directed to a major group of persons *and* are essential to the conclusion of a contract; misleading statements are not punishable[257]. The amendment is of special importance as a prerequisite for the consumer's claim for damages and his right of rescission of the contract (No. 123).

4 Self-regulation

126 Of late the demand for self-regulation schemes by trade and industry and the advertising business has increasingly been voiced in the Federal Republic to replace or supplement state control[258]. An express statutory basis does not therefore exist. It should be noted, though, that these schemes may become important from the point of view of antitrust law if they are apt to influence market conditions through restraint of trade; they will then require exemption by the Federal Minister of Economics, Art. 8 GWB. On several occasions in recent years, the Federal Minister of Economics has permitted such arrangements in order to enable self-control of advertising both in terms of quality and quantity, e.g. the Orderly Market Arrangements of the tobacco industry in 1973 and the agreement of cigarette manufacturers to indicate harmful substances on cigarette packages. The Federal Minister of Economics advances consumer protection and public health interests as express reasons for his exemption decisions. It is also possible that the Federal Cartel Office will tolerate the agreement for reasons of public policy[259]. It is disquieting, though, that here the powers envisaged under food law should remain unused. It should not be forgotten that infringements of such self-regulation arrangements do not entail effective sanctions in terms of public or consumer policy.

Another means of self-regulation are the rules of fair trade practices agreed upon by trade and industry. Thus there are, for example, rules concerning the insurance business and rules of pharmaceutical advertising[260]. In 1975, the Markenartikelverband (association for branded goods) reported detailed regulations on trade practices under Art. 28 GWB to the Federal Cartel Office.

However, these rules do not intend consumer protection, but organise self-help against certain types of discrimination and obstruction. Consumer associations do not take part in the establishment and registration of such rules, so that it is a question of whether or not this may be regarded as an effective means to be welcomed in terms of consumer policy[261]. An infringement of these rules may perhaps constitute a practice *against public policy* within the meaning of Art. 1 UWG; in other respects there are no sanctions, particularly not against outsiders[262].

Lastly, the Deutscher Werberat (German Advertising Council) should be mentioned which comprises representatives of the various branches of trade and industry and as a supreme self-regulation organ supervises media advertising. In line with its by-laws, there are no sanctions available to the German Advertising Council. Rather, it tries to remedy grievances in advertising in an informal way through the moral pressure of its authority[263]. Consumer associations do not take part in the activity of that agency either, but may complain to the Advertising Council. So far, the Council's activity has not been very successful[264]. There is no formal legal basis for its activity. Since the Council does not impose sanctions, it is assumed according to the dominant view that its activity is not hindered by regulations under antitrust law or the law of unfair competition. Also, civil-law liability for its activities is generally rejected.

5 Horizontal interlocking of the systems of sanctions

127 The different systems of sanctions which so far operate parallel to each other in German consumer law urgently require *horizontal interlocking*[265]. It is in the interest of the consumer that infringements of, for instance, administrative regulations should also have consequences under the law of unfair competition and under civil law and vice versa. First steps in that direction have been made by the courts. Thus, misleading advertising forbidden under food law and the law of drugs not only results in administrative sanctions, but gives rise to an injunction under the law of unfair competition pursuant to Art. 3 UWG. In a particular case, however, differences may exist. Also, slack-fill packages prohibited pursuant to Art. 17a Eichgesetz constitute misleading advertising, possibly even contrary to public policy. Thus consumer organisations may ask for an injunction against a prohibited trade practice under Art. 13, para. 1a UWG even if administrative agencies refuse to take action.

A misleading statement by a supplier about the existence of information regulations on advertising may constitute an unfair trade practice. This has been recognised in court practice with respect to instalment sales[266]. That principle may be a generalisation. In addition, it may be assumed that infringements of consumer protection regulations contemporaneously constitute infringements of public policy under Art. 1 UWG for public policy is put into concrete terms through appropriate statutory regulations. Thereby it is possible, for example, to have consumer organisations enforce labelling rules directly by means provided for under the law of unfair competition[267].

Conversely, it is rightly demanded that the prosecution of *infringements of the law of unfair competition* pursuant to the UWG should not only be left to private associations entitled to bring an action, but should also be a matter of

public concern. Whether to that end a special consumer protection authority or the Federal Cartel Office should be invested with appropriate powers requires careful consideration[268].

NOTES

1. Reich/Tonner/Wegener, *Verbraucher und Recht* [1976], throughout; Thiedig, *Suggestivwerbung und Verbraucherschutz* [1973]; Scherhorn *et al.*, *Verbraucherinteresse und Verbraucherpolitik* [1975], p. 53ff; Biervert *et al.*, *Grundlagen der Verbraucherpolitik* [1977], p. 91ff; Kroeber-Riel, *Konsumentenverhalten*, ed. 2 [1979], p. 535ff.
2. Blume, *Werbung für Markenartikel* [1976]; Moritz, *Marktpolitische Probleme der Konsumgüterwerbung* [1977].
3. Röper, *Werbung für Markenartikel* [1976]; Reich, WiVerw [1977], p. 218ff.
4. BVerfG E 40, 371; Friauf, 'Die verfassungsrechtlich beachtlichen Grenzen bei der Ausgestaltung von Werbeverbotsnormen im Bereich der Tabak- und Alkoholwerbung, Rechtsgutachten' [1973]; Reich, WiVerw [1977], p. 220ff.
5. Lerche, *Werbung und Verfassung* [1967], p. 77ff; Oppermann, 'Wirtschaftswerbung und Art. 5 GG', in: *Festschrift Wacke* [1971], p. 393ff; Albrecht/Wronka, GRUR [1977], p. 83ff (90f); Weides, WRP [1976], p. 585ff; Wacke, 'Werbeaussagen als Meinungsäußerungen', in: *Hamburger Festschrift für Schack* [1966], p. 197ff.
6. BVerfG E 21, 271 = NJW [1967], p. 976.
7. BVerfG E 40, 371; Reich, *Markt und Recht* [1977], p. 109ff.
8. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 23f; Friauf, op. cit. (note 4); Chapter 1, item 11 above.
9. Krüger/Nieland, GRUR [1974], p. 561; Schricker, *Gesetzesverletzung und Sittenverstoß* [1970], p. 226ff.
10. BVerfG E 32, 311 = GRUR [1972], 356.
11. BGH NJW [1976], p. 620.
12. Ulmer-Reimer, *Das Recht des unlauteren Wettbewerbes in der EWG*, Vol. III, Deutschland [1968], items 1–8.
13. Schricker, RabelsZ 40 [1976], p. 537ff; Reich/Wegener, JUS (1974), p. 565ff, Baumbach/Hefermehl, *Komm. z. UWG*, ed. 12 (1978), Introduction 41f; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 86ff; Simitis, *Verbraucherschutz* [1976], p. 21ff; Schricker/Lehmann, 'Werbung und unlauterer Wettbewerb', in: HdVR [1976], ch. 180, item 6ff, Hart/Joerges, Verbraucherrecht und Marktökonomik, in: *Wirtschaftsrecht als Kritik des Privatrechts*, 1980, p. 145ff.
14. Cf. Rambow, ZVP [1977], p. 158f.
15. Baumbach/Hefermehl, *op. cit.* (note 13), preceding §3 note 5ff; Reich, WiVerw [1977], p. 226ff.
16. Baumbach/Hefermehl, *op. cit.* (note 13), Introduction, notes 185ff; Schricker/Lehmann, *op. cit.* (note 13), items 18ff (with criticism).

17. Cf. Brinkmann, ZVP [1977], (note 13), p. 256f; BGH GRUR (1961), p. 386; Baumbach/Hefermehl, *op. cit.* (note 13), Introduction, note 206ff.
18. BGH GRUR [1966], p. 692f; BVerfG E 25, 256.
19. Baumbach/Hefermehl, *op. cit.* (note 13), preceding §3 note 4.
20. BGHZ 67, 81 = NJW [1976], p. 154; [1977], p. 951; we cannot go into the details here, on this see Renck, JUS [1978], p. 459ff.
21. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 12ff; BGH NJW 1979, p. 2245.
22. On this see from court practice BGH GRUR [1966], p. 445 (449); the prohibition is handled very leniently and largely fails to provide for sanctions in cases of deception of the consumer, for instance as to product qualities through pertinent trademarks.
23. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 19.
24. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 50.
25. BGH GRUR [1963], p. 482; Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 13ff.
26. Thiedig, *Suggestivwerbung und Verbraucherschutz* [1973]; Löwenheim, GRUR [1975], p. 99ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 104ff.
27. BGH GRUR [1961], p. 544.
28. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 5.
29. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 10.
30. BGH NJW [1977], p. 714; Reich, JUS [1978], p. 455; below item 324.
31. BR-Drucksache 226/78, p. 9; BT-Drucksache 8/2145, p. 9.
32. Schricker, RabelsZ 40 [1976], p. 543; Schricker/Lehmann, *op. cit.* (note 13), items 29ff; BR-Drucksache 226/78, p. 9.
33. BGHZ 13, 244; Reich, WiVerw [1977], p. 226ff.
34. BGHZ 28, 1; Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 23ff.
35. BGH GRUR [1966], p. 45.
36. BGH GRUR [1963], p. 369.
37. BGH DB [1978], p. 835; below item 88.
38. BGHZ 13, 244; GRUR [1970], p. 467; [1973], p. 206.
39. Cf. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 101ff.
40. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 31.
41. BGHZ 13, 244; GRUR [1970], p. 425.
42. Schricker/Lehmann, *op. cit.* (note 13), item 29.
43. BGH GRUR [1970], p. 425; cf. Schricker, RabelsZ 40 [1976], p. 543f.
44. BGHZ 42, 134; GRUR [1971], p. 313.
45. BGH GRUR [1964], p. 269; [1965], p. 368.
46. BGH GRUR [1957], p. 91; Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 47.
47. BGH GRUR [1973], p. 429 (431); WRP [1976], p. 40; DB [1978], p. 835 (836), cf. also OLG Frankfurt, DB [1978], p. 790 (duty to disclose that certain types of skis will be discontinued).
48. BGH GRUR [1964], p. 269; [1965], p. 368; Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 50.
49. BGH GRUR [1972], p. 129.

50. BGH GRUR [1956], p. 550; Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 52.
51. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 55ff; differently Schricker/Lehmann, *op. cit.* item 31.
52. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 60.
53. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 94ff.
54. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 94ff; Lehmann, GRUR Int. [1977], p. 135ff (with comparative references).
55. BGH NJW [1969], p. 2143.
56. Cf. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 96.
57. BGH GRUR [1974], p. 344.
58. BGH NJW [1978], p. 2598 (2600 f.); also BGH NJW [1979], p. 2611.
59. BGH NJW [1974], p. 1822; also GRUR [1970], p. 609; BB [1980], p. 545.
60. BT-Drucksache 8/1670, p. 7.
61. Reich, ZRP [1978], p. 104.
62. BGH NJW 1980, 288; also OLG Frankfurt NJW [1978], p. 2102. For details see Reich, Preisempfehlungen, in: *Handbuch der Wettbewerbspolitik* [1981].
63. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 304ff; Schricker/Lehmann, *op. cit.* (note 13), item 46; BGH NJW [1971], p. 378.
64. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 102ff; cf. also the references in Schricker/Lehmann, *op. cit.* (note 13), item 44, which are of little use from the consumer's point of view; Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 123ff.
65. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 55ff.
66. BGH NJW [1970], p. 1364; for details see Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 145ff; Schricker/Lehmann, *op. cit.* (note 13), item 44.
67. BGH GRUR [1963], p. 539.
68. Cf. especially the study made by the AGV on 'Misleading Advertising' [1974], and the ensuing controversy as well as in general Beier, *Zur Problematik von Werbeaussagen*, MS Hamburg [1978].
69. Tilmann, *Die geographische Herkunftsangabe* [1976], as well as Schricker/Lehmann, *op. cit.* (note 13), items 45ff.
70. BGH GRUR [1971], p. 313; much the same is true of German champagne which through French expressions is made up as French champagne, BGH GRUR [1971], p. 21.
71. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 213ff. For example, the description of beer as 'Pils', which is not regarded as a misleading description conveying the idea of beer of 'Pilsen'.
72. BGH GRUR [1971], p. 313.
73. Cf. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 252.
74. BGH GRUR [1963], p. 482; OLG Düsseldorf BB [1977], p. 58, on the whole subject see Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 66ff.
75. BGH GRUR [1965], p. 365.
76. BGH GRUR [1969], p. 415; [1970], p. 425.
77. BGH GRUR [1962], p. 45; [1966], p. 92.
78. Fezer, GRUR [1976], p. 472ff; Brinkmann, BB [1978], p. 1285;

Kübler/Assmann, ZHR 142 [1978], p. 413ff (p. 447ff).

79. BGH NJW [1974], p. 1141.
80. BGH NJW [1977], p. 714; Reich, JUS [1978], p. 454f.
81. BGH GRUR [1959], p. 277; [1977], p. 699; differently the UNICEF decision, BGH GRUR [1974], p. 308; Schricker/Lehmann, *op. cit.* (note 13), items 98ff.
82. Bayr. OLG VU 2285/75.
83. Schricker, in: *Problemi attuali di diritto industriale* [1977], p. 1027ff; *id.* AcP [1972], p. 210ff; *id.* RabelsZ 40 [1976], p. 554ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 116ff; Schricker/Lehmann, *op. cit.* (note 13), items 108ff; Kübler/Assmann, *op. cit.* (note 78), p. 435ff.
84. BGH GRUR [1972], p. 553.
85. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 117; Schricker, *op. cit.* (note 83).
86. BGH of Jun. 10, 1964, GRUR [1965], p. 96; of 10 January 1968, GRUR [1968], p. 645; 23 February 1968, GRUR [1968], p. 443; 27 November 1970, GRUR [1971], p. 159.
87. Printed in Baumbach/Hefermehl, *op. cit.* (note 13), p. 1132ff.
88. BGH of 3 May 1974, GRUR [1974], p. 666.
89. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 104ff; Löwenheim, GRUR [1975], p. 99ff; Thiedig, *Suggestivwerbung und Verbraucherschutz* [1973]; Schricker, RabelsZ 40 [1976], p. 551ff; Baudenbacher, *Suggestivwerbung und Lauterkeitsrecht* [1978].
90. Biervert *et al.*, *op. cit.* (note 1), p. 175ff doubt the possibility of including suggestive advertising within the scope of the law.
91. BGH NJW [1976], p. 753; OLG Ffm WRP [1971], p. 379; KG WRP [1976], p. 372; LG Trier NJW [1976], 755; BGH GRUR [1977], p. 699.
92. Schricker/Lehmann, *op. cit.* (note 13), items 88ff.
93. Löwenheim, *op. cit.* (note 89), p. 108ff; also Baudenbacher, *op. cit.* (note 89), p. 106ff.
94. Reich/Tonner/Wegener, *op. cit.* (note 1), pp. 110, 129; Schricker/Lehmann, *op. cit.* (note 13), item 28.
95. Baumbach/Hefermehl, *op. cit.* (note 13), §3 note 118.
96. Cf. the documentation in ZAW, *Diskussionspapier zur Werberechtspolitik* [1976], pp. 99, 149, 154; on this Schricker, Rabelz 40 (1976), p. 544ff.
97. ZAW, *op. cit.* (note 96), p. 101f.
98. Schricker, *op. cit.* (note 96), p. 547; BGH GRUR [1963], p. 270.
99. BGH GRUR [1961], p. 85; [1963], p. 270; WRP [1978], p. 210.
100. BGH NJW [1974], p. 1822 = GRUR [1975], p. 78; GRUR [1978], p. 249.
101. BGH GRUR [1971], p. 153.
102. BGH GRUR [1970], p. 461.
103. BGH GRUR [1961], p. 284; [1964], p. 146; [1971], p. 153.
104. Reich, WiVerw [1977], p. 228.
105. Correctly as far as that goes: ZAW, *op. cit.* (note 96), p. 100f.
106. BT-Drucksache 8/1670, p. 11; Reich, ZRP [1978], p. 104.
107. Schricker/Lehmann, *Der Selbstbedienungsgroßhandel* [1976], p. 99ff.

108. Schricker/Lehmann, *op. cit.* (note 13), *HdVR*, item 51.
109. Cf. the examples in Schricker/Lehmann, *op. cit.* (note 13), item 52ff; BGH NJW [1975], p. 877 who submits a consumer association to the prohibition of issuing Kaufscheine (admission cards to low-price shops); criticised by v.Hippel, *Verbraucherschutz*, **2** ed. [1979], p. 113.
110. BGH NJW [1978], p. 467ff.
111. Lehmann, WRP [1978], p. 345ff.
112. Schricker, WRP [1977], p. 1ff; Albrecht, RIW [1977], p. 257ff; Stuyck, ZVP [1978], p. 326ff.
113. ABl C 70 of 21 March 1978, p. 4ff.
114. Eckert, ZLR [1974], 434.
115. Eckert, *op. cit.* (note 114); Holthöfer/Nüse/Frank, *Komm. z. LMBG*, §17 note 450; Zipfel, *Lebensmittelrecht*, §17 note 322.
116. Holthöfer, *op. cit.* (note 115), note 468ff.
117. BGH, Lebensmittelrechtliche Entscheidungen (LRE) 5, 168; 7, 182.
118. Holthöfer, *op. cit.* (note 115), note 523; Zipfel, *op. cit.* (note 115), note 218.
119. Holthöfer, *op. cit.* (note 115), note 493ff; Zipfel, *op. cit.* (note 115), note 213ff.
120. Zipfel, *op. cit.* (note 115), note 282.
121. Schricker, RabelsZ 40 [1976], p. 552f; Holthöfer, *op. cit.* (note 115), §18 note 1ff.
122. FAZ of Apr. 4, 1978, p. 14; Oppermann, ZLR [1978], p. 200ff.
123. Holthöfer, *op. cit.* (note 115), note 7.
124. For a criticism of the exception in relation to dietary foods, see: Rambow, ZVP [1977], p. 159. While the prohibition may be extended to include also those foodstuffs by way of statutory order, the VO über dietätische Lebensmittel of 24 October 1975 does not include such a prohibition.
125. BGBl I 2569.
126. Albrecht/Wronka, GRUR [1977], p. 81f.
127. BT-Drucksache 7/5091, p. 6.
128. Baumbach/Hefermehl, *op. cit.* (note 115), §3, appendix IV.
129. Zweiter Verbraucherbericht, BT-Drucksache 7/4181, p. 11ff. For a criticism of this 'model of information' of consumer policy cf. Simitis, *Verbraucherschutz* [1976], p. 97ff; Biervert *et al.* (note 1), p. 134ff; p. 5.
130. BT-Drucksache 7/3060, p. 37; on this Rambow, ZVP [1977], p. 159; Reich, WiVerw [1977], p. 230ff; criticised by Albrecht/Wronka, GRUR [1977], p. 83ff, who in this case even assume an infringement of the Constitution.
131. On this Rambow, ZVP [1977], p. 159; Albrecht/Wronka, *op. cit.* (note 130), p. 92ff.
132. BR-Drucksache 530/75, p. 19.
133. Bundeskartellamtsbericht [1976], BT-Drucks. 7/704, pp. 9, 79.
134. Reich, WiVerw [1977], p. 231.
135. BT-Drucksache 8/1405.
136. Baumbach/Hefermehl, *op. cit.* (note 13), appendix to §3 I.
137. BGH GRUR [1970], p. 558.
138. Holthöfer, *op. cit.* (note 115), §22 note 1ff.

139. Oehler, *Die Grenze des Verbots der Werbung für Zigaretten im Rundfunk* [1975]; Holthöfer, *op. cit.* (note 115), §22 note 12ff; constitutional doubts in Weides, WRP [1976], p. 585ff; ZAW WRP [1975], p. 512ff.
140. Holthöfer, *op. cit.* (note 115), notes 10a, 37ff.
141. Holthöfer, *op. cit.* (note 115), notes 17ff.
142. With reference to the constitutional freedom of opinion attempts are being made in the USA to eliminate these restrictions, cf. Meeker, ZVP [1977], p. 271. By contrast, the Federal Constitutional Court has considered the restrictions on advertising by certain professional groups (here pharmacists) to be constitutional.
143. ZAW, Werbung 1976/77 [1977], p. 23f.
144. On this BVerfGE 40, 371.
145. Cf. Baumbach/Hefermehl, *op. cit.* (note 113), §9a, note 4ff; Schricker/Lehmann, WRP [1977], p. 296ff; Tetzner, GRUR [1976], p. 129ff; BGH DB [1977], p.1134; [1973], 416; [1975], p. 1501.
146. Ott, *Festschrift Raiser* [1974], p. 403ff; Baumbach/Hefermehl, *op. cit.* (note 13), Introduction UWG, notes 63ff; Teubner, *Standards und Direktiven in Generalklauseln* [1971], in each case with attempts to create certain types.
147. Baumbach/Hefermehl, *op. cit.* (note 13), Introduction UWG, note 76ff; Schricker, *Gesetzesverletzung und Sittenverstoß* [1970].
148. Thiedig, *Suggestivwerbung und Verbraucherschutz* [1973], p. 75ff, Reich/Wegener, JUS [1974], p. 561ff; Ott, *op. cit.* (note 146), p. 428ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 90ff; Schricker/Lehmann, in: HdVR, ch. 180, items 6ff.
149. BGH GRUR [1972], p. 603; [1973], p. 81 etc.; on this Lehmann, GRUR [1975], p. 239; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 110ff.
150. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 89f; cf. of late the discussion about what is known as power of demand: Reich, *Markt und Recht* [1977], p. 259ff, 280ff. Baumbach/Hefermehl, *op. cit.* (note 13), Introduction 115, 92ff.
151. BGH GRUR [1965], p. 489ff; [1970], p. 523ff; [1973], p. 210; NJW [1975], pp. 689, 691.
152. BGH GRUR [1965], p. 489; [1969], p. 295; [1975], p. 26.
153. Schricker, GRUR [1974], p. 579ff; Lehmann, GRUR [1977], p. 580ff.
154. BGH GRUR [1970], p. 523; [1971], p. 317; [1973], p. 210; NJW [1975], pp. 689, 191 etc.; Krüger-Nieland, GRUR [1974], p. 561ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 111ff.
155. Cf. Schricker, RabelsZ 40 [1976], p. 547ff; Schricker/Lehmann, *op. cit.* (note 148), items 55ff.
156. BGH GRUR [1960], p. 431; [1965], p. 315, etc.
157. Schricker/Lehmann, *op. cit.* (note 148), item 58.
158. BGH GRUR [1970], p. 523; [1973], p. 20; OLG Hamburg BB [1975], p. 1546.
159. BGH GRUR [1959], p. 277; [1960], p. 382, etc.
160. BGH DB [1976], p. 1713.
161. BGH GRUR [1966], p. 47.
162. BGH GRUR [1973], p. 552.

163. BGH GRUR [1975], pp. 264, 266 = NJW [1975], pp. 689, 691.
164. Baumbach/Hefermehl, *op. cit.* (note 13), §1, note 129.
165. BGH GRUR [1971], p. 317; BVerfG GRUR [1972], p. 358; on this Reich/Tonner/Wegener, *op. cit.* (note 1), p. 114ff.
166. Schricker/Lehmann, in: *HdVR* ch. 180, item 68; Schricker, RabelsZ 40 [1976], p. 549.
167. BGH GRUR [1973], p. 81; [1974], p. 341.
168. Lehmann, *Die Werbung mit Geschenken* [1974]; Schricker, RabelsZ 40 [1976], p. 549ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 112ff; Schricker/Lehmann, WRP [1977], p. 302ff.
169. BGHZ 23, 371; 65, 68; NJW [1965], 1325; NJW [1974], p. 45.
170. BGHZ 15, 357; under the Amendment to the UWG pyramid selling systems are to be punished, cf. BR-Drucksache 226/78, p. 12ff.
171. BGH BB [1976], p. 435.
172. BGH NJW [1973], p. 1972.
173. BGH GRUR [1974], p. 729.
174. OLG Düsseldorf, GRUR [1975], 167.
175. BGH NJW [1971], p. 190.
176. BGH NJW [1974], p. 46.
177. BGH GRUR [1965], p. 489; [1969], p. 295.
178. BGH NJW [1974], p. 1559 = GRUR [1975], p. 26.
179. BGH NJW [1969], p. 744; [1971], p. 2025; cf. in addition NJW [1977], p. 1060 on the gratuitous distribution of a technical journal; also BKA-Bericht [1977], BT-Drucksache 8/1925, p. 42ff.
180. Sack, WRP [1975], p. 65ff; Schricker/Lehmann, WRPI [1977], p. 289ff (295); Hefermehl, GRUR [1974], p. 542ff; Tetzner, JZ [1977], p. 29ff; Baumbach/Hefermehl, *op. cit.* (note 13), §1, note 65ff.
181. BGHZ 65, 68.
182. BGH BB [1976], p. 1241.
183. Tetzner, JZ [1977], p. 29; Schricker/Lehmann, WRP [1977], p. 289ff (302); similarly now BGH NJW [1978], p. 2598 (2600f).
184. BGH NJW [1978], p. 2598.
185. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 113; Baumbach/Hefermehl, *op. cit.* (note 13), §1, note 65ff.
186. BGH NJW [1972], 203.
187. BGH NJW [1970], p. 248; [1972], p. 291; GRUR [1972], p. 603.
188. Baumbach/Hefermehl, *op. cit.* (note 13), §1, note 86ff.
189. A good survey in Schricker/Lehmann, *op. cit.* (note 13), items 113ff.
190. Cf. P. Ulmer, *Festschrift Hefermehl* [1971], p. 201ff; Schricker/Lehmann, *op. cit.* (note 13), item 120.
191. Baumbach/Hefermehl, *op. cit.* (note 13), §1 Zugabe VO, note 1.
192. BGH GRUR [1959], p. 544; [1968], p. 649.
193. BGHZ 65, 68.
194. BGH BB [1976], p. 2104.
195. Baumbach/Hefermehl, *op. cit.* (note 13), §1 RabattG, note 8.
196. Cf. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 85.
197. BGHZ 27, 369.
198. *Festschrift für Hefermehl* [1971], p. 201ff.

199. BGH DB [1974], p. 1856 = GRUR [1975], p. 375.
200. Schricker/Lehmann, *Der Selbstbedienungsgroßhandel* [1976], p. 110ff.
201. BGH *op. cit.* (note 199), note 193; cf. also BGH NJW [1978], p. 267ff.
202. Baumbach/Hefermehl, *op. cit.* (note 13), §1 RabattG, note 24ff; BGH DB [1977], p. 1134; NJW [1978], p. 542.
203. Baumbach/Hefermehl, *op. cit.* §1 RabattG, note 18.
204. Baumbach/Hefermehl, *op. cit.* §1 RabattG, notes 29ff.
205. BGH NJW [1975], p. 215.
206. OLG Düsseldorf, WuW E/OLG 1849; BGH WuW/E BGH 1584.
207. On this Albrecht/Wronka, GRUR [1977], p. 94f.
208. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 114ff, 242ff. Schade, *Geschäfte an der Haustür durch unbestellte Vertreter*, 1978.
209. Schricker/Lehmann, *HdVR* Gruppe 180, item 66.
210. BR-Drucksache 530/75, p. 19; Reich, WiVerw [1977], p. 231.
211. Lehmann, GRUR [1974], p. 133ff; Schricker/Lehmann, *op. cit.* (note 13), items 64ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 114ff on the criticism of this view.
212. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 248ff; Sack, *Unlauterer Wettbewerb und Folgeverträge* [1974]; v.Falckenstein, *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* [1977], p. 96ff, at the same time including an evaluation of consumer-policy aspects.
213. Reich, JZ [1975], p. 553; similarly BGH NJW [1974], pp. 50 and 557; [1977] pp. 38 and 431 on the Rechtsberatungsgesetz; BGH NJW [1978], p. 1970 on the arranging of loans through peddling.
214. Schricker, GRUR [1975], p. 111; ZRP [1975], p. 189; Sack, NJW [1975], p. 1303; for a negative view, see BGH NJW [1974], p. 1503.
215. BR-Drucksache 226/78, p. 14ff; Reich, ZRP [1978], p. 100ff; BT-Drucksache 8/2145, p. 20f, 24.
216. v.Hippel, *Verbraucherschutz*, ed. 2 [1979], p. 222; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 242ff.
217. BR-Drucksache 530/75, p. 15 on the legislator's motives.
218. On this BT-Drucksache 7/1398; on the experiences herewith cf. the report of the Federal Government, BT-Drucksache 8/234; also v.Falckenstein, *op. cit.* (note 212), p. 91ff.
219. BT-Drucksache 8/130.
220. BT-Drucksache 8/75.
221. BT-Drucksache 8/130, p. 18.
222. Cf. Reich, JZ [1975], p. 553.
223. Baumbach/Hefermehl, Introduction UWG note 367; Wolf, *Die Klagebefugnis der Verbände* [1971].
224. On the reasons cf. BT-Drucks. IV/2217 and 3403.
225. BGH GRUR [1973], p. 78; Knieper, NJW [1971], p. 2251ff.
226. BR-Drucksache 226/78; BT-Drucksache 8/2145.
227. Cf. the study of v.Falckenstein, ZVP [1977], p. 172ff, id., *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* [1977].
228. v.Falckenstein, *op. cit.* (note 227), p. 140ff.
229. On this Reich/Tonner/Wegener, *op. cit.* (note 1), p. 225ff; Tilmann,

NJW [1975], p. 1913ff; v.Falckenstein, *op. cit.* (note 227), p. 151ff.

230. OLG Düsseldorf BB [1977], p. 360; Deutsch, GRUR [1978], p. 19; v.Falckenstein, *op. cit.* (note 227), p. 141ff.
231. BR-Drucksache 226/78, p. 29; BT-Drucksache 8/2145, p. 29.
232. ZAW, *op. cit.* (note 143), p. 107; against it v.Falckenstein, WRP [1978], p. 502ff with factual references.
233. For detail, see v.Falckenstein, *op. cit.* (note 232), p. 116ff, 133ff.
234. v.Falckenstein, *Schäden der Verbraucher durch unlauteren Wettbewerb* [1978]; *id.*, ZVP [1978], p. 303ff.
235. Cf. the analysis in Reich/Tonner/Wegener, *op. cit.* (note 1), p. 229ff; ZAW, *op. cit.* (note 143), p. 33ff, 143ff; Mertens, ZHR 139 [1975], p. 439ff; Schricker, ZHR 139 [1975], p. 208ff.
236. BGH NJW [1974], p. 1503; criticised by Sack BB [1974], p. 1369; Schricker, GRUR [1975], p. 111.
237. Cf. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 227; v.Falckenstein, *op. cit.* (note 227), p. 120ff.
238. In ZAW, *op. cit.* (note 143), p. 144.
239. Cf. LG Trier NJW [1974], 101; Schricker, GRUR [1975], p. 111; Sack, *Unlauterer Wettbewerb und Folgeverträge* [1974]; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 248ff; v.Falckenstein, *op. cit.* (note 227), p. 91ff.
240. In ZAW, *op. cit.* (note 143), pp. 143, 148.
241. Cf. the documentation in ZAW, *op. cit.* (note 143), p. 77ff; Schricker, RabelsZ 40 [1976], p. 566ff; v.Falckenstein, *op. cit.* (note 227), p. 252.
242. Miller, ZVP [1977], p. 62ff.
243. BGH GRUR [1964], p. 686 (resulting in a prohibition of sales); GRUR [1966], p. 92 (publication of the wording of the judgment if in the case of a weighing of interests that is the only means of eliminating the consequences of a misleading advertisement); NJW [1973], 2285; NJW [1978], p. 210 (in the event of violation of a manufacturer's rights through an incorrect press report the manufacturer has a claim for correction through an advertisement to be paid for by the press organ concerned).
244. Schricker, RabelsZ 40 [1976], p. 569; a different view is taken by Albrecht, WRP [1975], p. 568.
245. Schricker, *op. cit.* (note 244), p. 570.

245a. BGHZ 66, 182; 70, 39; NJW 1979, p. 2197.

246. BR-Drucksache 226/78; on the discussion Reich, ZRP [1978], p. 100ff; Schricker, GRUR [1979], p. 4; criticised by Micheli, GRUR [1979], p. 8ff; Reich, in: *Alternativkommentar* BGB [1979] preceding §§459ff, ref. nos. 41ff. For a full treatment Hart/Joerges, *op. cit.* (note 13).
247. Reich, ZRP [1978], p. 102; BR-Drucksache 226/78, p. 20ff; the criticism of Ahrens, WRP [1978], p. 677ff seems exaggerated.
248. BR-Drucksache 226/78, p. 17ff; BT-Drucksache 8/2145, p. 20ff.
249. Reich, ZRP [1978], p. 102f; Stein, ZVP [1979], p. 29ff.
250. Albrecht/Wronka, GRUR [1977], p. 86f.
251. Bähre/Schneider, Komm. zum KWG [1977], §23, note 8.
252. FAZ of 17.4.1978; KG WuW/E OLG 1983 (Rama) with emphasis on aspects of competition policy without a treatment of consumer protection.

253. v.Falckenstein, *op. cit.* (note 227), p. 176f.
254. Schricker, RabelsZ 40 [1976], p. 573; cf. also BGH NJW [1978], p. 173f.
255. Kommission für Wirtschaftskriminalität, in: ZAW, *op. cit.* (note 143), p. 145; Klug, GRUR [1975], p. 217ff. 289ff.
256. Beschlüsse der ASJ-Bundeskonferenz [1976], p. 35.
257. BR-Drucksache 226/78, p. 9ff; BT-Drucksache 8/2145, p. 9ff.
258. ZAW, *Werbung in Grenzen* [1976], p. 51ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 219.
259. BKA-Bericht [1976], BT-Drucks. 8/704, pp. 9, 79; also the decision of the BMW on advertising of cigarettes, BB [1972], p. 464 with note by Möschel.
260. Baumbach/Hefermehl, *op. cit.* (note 13), p. 1167ff; ZAW, Werbung 1976/77, p. 219ff.
261. BKA-Bericht [1976], BT-Drucksache 8/704, p. 33.
262. BGH NJW [1977], p. 631; DB [1977], p. 392.
263. ZAW, *Werbung in Grenzen* [1976], p. 55ff; on the problem of liability on the whole Ulmer, AfP [1975], p. 549ff.
264. Cf. ZAW, Werbung 1976/77, p. 15ff and the criticism in: VPK of 16 January 1979; Beier, ZVP [1979], p. 300ff. On the whole subject see Brandmeier, *Die freiwillige Selbstkontrolle der Werbung*, 1978.
265. Reich/Tonner/Wegener, *op. cit.* (note 1), p. 209ff; Reich, WiVerw [1977], p. 233ff.
266. BGH NJW [1977], p. 714; Reich, JUS [1978], p. 451ff.
267. Reich/Wegener, JUS [1974], p. 565 with references; differently hitherto the courts.
268. v.Hippel, *Verbraucherschutz*, ed. 2 (1979), p. 88; Simitis, *Verbraucherschutz* [1976], p. 269ff; BKA-Bericht [1976], *op. cit.* (note 261), p. 111; Schricker, RabelsZ 40 [1976], p. 576ff; Reich/Tonner/Wegener, *op. cit.* (note 1), p. 210ff; Scherhorn, *Verbraucherinteresse und Verbraucherpolitik* [1975], p. 144ff.

CHAPTER 5

Safety of Products and Services

I INTRODUCTION

128 Technical progress not only benefits the consumer in a variety of ways: mass production also involves a great number of risks to the consumer's health and property. The aspect of safety is therefore of prime importance to the consumer when he purchases a product or avails himself of a service. Over the last few years it has become apparent that manufacturers do not provide adequate protection to the consumer. Competition, which according to the liberal theory of economics is to ensure that only manufacturers of the best products will survive, does not fulfil its function in practice either. Therefore it is the task of the state to ensure the necessary protection for the public. Even before the adoption by the Federal Government of the first consumer protection programme, which expressly provides for the protection of the public against dangers to their health and property, legislation was enacted for two spheres of life which are of vital importance to the consumer, namely foodstuffs and drugs. Both Acts have since been amended and have strengthened the consumer's position with lasting effect. The LMBG of 1 August 1974, which came into force on 1 January 1975, extended the government's powers of control. The AMG of 24 August 1976, which came into force on 1 January 1978, introduced the procedure of prior approval of drugs which had so long been wished for. The Acts regulate the existence of powers to take official action. The implementation of the Acts is incumbent on the competent authorities, i.e. the food inspection authorities of the German Länder and — for drugs — the Federal Health Authority. Also subject to a certain degree of state control are 'technical labour materials' which, in addition to implements proper, include household appliances and toys. The Maschinenschutzgesetz (MSchG) (Technical Labour Materials Act) of 24 June 1968 (renamed Gerätesicherheitsgesetz (GSG, Act on Safety of Appliances) on 13 August 1979) tries to check the dangers emanating from these products by imposing on manufacturers and importers the obligation to produce and market only products that according to the established standards of technology are not dangerous to the consumer if used as provided. It is the task of industrial inspection boards to check whether manufacturers observe the established standards of technology. As such standards are established by manufacturers practically without any governmental influence, it is for the official supervisory authorities to check whether manufacturers observe their own guidelines.

Apart from special legislation on explosives or poisons, there are no other *statutory* regulations ensuring the protection of the consumer, although many products do involve dangers.

The control of these product areas may be exercised by industry itself. To that end self-regulatory institutions are available for a variety of products that do not come under the GSG (radio, TV), although in a certain way they are similar to the appliances mentioned there. Here control is likewise exercised through the establishment of standards which in most cases the manufacturers concerned undertake to observe. Here there is also an important field of activity for consumer organisations. However, in this connection it may be pointed out that consumer organisations currently lack the necessary personnel and power to exercise effective control.

If we consider all possibilities for protection that may be employed in the course of the production process (i.e. both those available to the government and those trade and industry have created for themselves), it must be noted that they do not suffice to prevent dangerous products from being manufactured and passed on to the consumer. Since dangerous products do come onto the market, damage occurs and the question arises of who is liable for such damage. Generally, the seller of a product does not come into question as a person against whom a claim lies. His primary obligation is to supply the buyer with a commodity which is unobjectionable in quality. Depending on the source of defect, aspects of safety may come into play in the judgment of quality. Basically, though, the quality aspect has priority in the law of implied warranty. Claims for damages based on lack of safety of products may in a particular case be justified from the viewpoint of positive breach of contract (positive Forderungsverletzung). The narrow scope of application of contractual liability shows that the person actually to be held liable for any claims for damages is the manufacturer. Hence, the type and scope of any liability on the part of the manufacturer will have to be shown. Since under German law the manufacturer's liability is not codified, it was incumbent upon the courts to design it. Meanwhile, a court practice has been established whereby the consumer's protection may be judged according to the principles laid down. Special importance will be attached to a comparison between proposals made in Europe for an amendment of the manufacturer's liability and the existing German law.

II POSSIBILITIES OF CONTROL

1 Preliminary remarks

129 As has been said above, the present industrial mass production of products and services may involve considerable risks to safety. To keep the production and marketing of dangerous products to a minimum, control measures must be taken. The possibilities of control vary widely, though, depending on who is in charge: industry, government or consumer organisations. Through legislation and its enforcement the government is able to achieve a greater measure of binding force than industry within the framework of its self-regulatory agreements. Consumers largely lack statutory powers, so that they depend on actual pressure to achieve their objectives.

Before we examine the avenues of control open to the three institutions in charge, we must find out at what stage of production intervention is possible. The earliest possibility of intervention is in the production process itself. Such measures are of a *preventive* nature: they control the products before they leave the production line. Preventive control is possible even if the products have already reached the sphere of marketing, but have not yet been made accessible to the consumer. However, if dangerous products are already on the market, we must distinguish between measures which have for their object the avoidance of a theoretical danger to the consumer, which are classed with *preventive* measures. If a theoretical danger has become practical, though, and injury is imminent, only retrospective measures can be taken in an attempt to check the danger or to prevent it from spreading. Measures of an exclusively *retrospective* nature can only be taken if damage has already occurred.

2 Control measures of industry

130 Representatives of industry, particularly, point out that, because of its selective mechanisms, the market is the appropriate means of ensuring the greatest possible safety[1]. Although from that point of view measures of self-control are a contradiction in terms, there are self-regulatory institutions in some branches of industry[2]. In some cases they were established because the branches of industry concerned thereby escaped imminent and much stricter state control[3]. Another reason was to let the legitimate interest of entrepreneurs in a branch prevail over the short-sighted interests of individuals which would otherwise have resulted in economic and non-material loss to all those in that branch[4]. Such reasons have been advanced by representatives of the various branches of industry according to whom there is a black sheep in every sector that has to be eliminated (cf., for instance, the reasons given in support of the terms recommendations by the Deutscher Reisebüroverband (German Travel Offices Association)).

Self-regulatory institutions of industry in the area of safety are designed in such a way that industry establishes industrial standards which it undertakes to observe (No. 157).

The Federal Cartel Office considers such agreements to be unobjectionable under antitrust law, because they do not aim at restraint of competition, but are only meant to ensure technical safety and protect people or products against dangers[5]. Such exemption applies even to cases where the establishment of a new safety standard completely blocks the sale of the obsolete product[6]. The reasons given by the Federal Cartel Office seem to be quite unrealistic. Safety standards do serve competitive purposes. Thus the German export industry is interested in German standards being introduced in developing countries in order to block these markets for foreign products. Conversely, German safety standards impede the import of foreign products[7]. Self-regulatory institutions are of a preventive nature, for they aim at influencing the sphere of production: only products that comply with the established standard shall be manufactured. In this connection it is not the interests of consumers, but primarily those of the manufacturing industry that are taken as a criterion.

Moreover, self-regulatory institutions lack an important prerequisite to their effectiveness: they have no retrospective powers. Thus overall, self-regulating

measures of industry cannot be said to be of decisive importance in consumer protection. This is not surprising, because the prime objective of self-regulation is not to see that the manufacture of products conforms to consumer needs but to safeguard production interests. The pursuance of that objective implies that consumer protection as a mere by-product cannot be pursued as appropriate. Precisely because consumer protection is an instrument of protection of the weaker party against the stronger, it calls for more exact and purposive elaboration.

3 State control measures

(*a*) *Preventive control measures*

131 From the consumer's point of view, preventive measures are the most effective means of affording effective protection. The more the state wants to interfere in the sphere of production, the fiercer the resistance it will meet from trade and industry. All the same, the amendments of the LMBG and AMG show a tendency towards increased preventive state control.

One possibility for the state to exert an influence on the sphere of production is *measures to promote competition*, so activities by the state to promote competition must be mentioned here. When introducing bills which are by their nature intended to strengthen the consumer's position unequivocally, the Federal Government emphasises that such bills at the same time promote competition[8]. This goes to show the overall conception both of present and previous governments, which is based on the idea that promotion of competition contemporaneously improves consumer protection. This explains why the Government is reluctant to intervene in the course of economic events through control measures that attach greater importance to the consumer's legal position. Instead, measures conforming to market trends play a prominent part in considerations aimed at improving preventive protection[9].

The Industrial Code and the respective special legislation include the requirements to be satisfied as to *the manufacturer's qualifications and/or the design of his enterprise*. The Industrial Code deals, *inter alia*, with products which constitute a danger to the general public. Of course, these dangers also threaten the consumer. Because in this study the consumer is interpreted as the final consumer, regulations made for the protection of the general public may be ignored.

The requirements as to manufacturers and enterprises engaged in manufacture for the final consumer flow from the respective special legislation. Thus special requirements exist with respect to the manufacturers of drugs, Arts. 13–20 AMG. With respect to pharmaceutical undertakings, internal rules and regulations may be made prescribing to the manufacturer of drugs how to design his enterprise from packaging to control, storage, hygienic standards, requirements as to his personnel, Art. 54 AMG. Special regulations govern the sale of food and beverages under the Gaststättengesetz (Hotels and Restaurants Act) and the production of dairy products.

The *inspection of goods according to criteria of substantive law* was introduced by the AMG. The legislator considers the *procedure of prior approval* to

be necessary to guard the consumer against dangers involved in taking potent drugs[10].

Since 1 January 1977 correspondence courses have also been subject to prior approval, to ensure that the student is provided with teaching material enabling him to reach the goal aimed at. The Government had initially tried to get organisers to have their courses voluntarily examined by the governmental admission agency. However, it was only possible to subject 150 out of 1150 courses to such examination[11].

In some cases the legislator bases his considerations on the assumption that preventive protection of the consumer's health may be achieved by the legislator imposing certain *prohibitions* prescribing the *use or non-use of certain substances*. In order that the competent authority (as a rule the federal ministry involved) may comply with the prohibitions, it is authorised to issue regulations for the protection of the consumer's health. The prerequisite for the issuance of an order is a suspected danger to health. This principle is to be found primarily in the new food law[12], but the law of drugs also includes the instrument of preventive regulations (Arts. 5–7 AMG).

The *production process may be controlled* by the Government becoming active of its own accord without the manufacturer having occasioned such control. Such powers are provided for in the food law and the law of drugs, where enterprises must be controlled regularly (every two years); on such occasions samples from a series may be taken.

Another possibility of preventive intervention is in the *control of the exchange of goods sphere*, which can be exercised in several ways. Thus the legislator may lay down mandatory provisions to the effect that certain goods must not be marketed at all. Such provisions are included in the LMBG and AMG, but the legislator may also issue regulations on the manner of the exchange of goods process. This has been done in the law of drugs, where drugs may be sold only to particular persons or institutions who/which in turn are entitled to sell them to the consumer.

The AMG and LMBG include another special feature which influences the exchange of goods sphere: they provide for the drawing up of the food codex and the pharmacopoeia to include binding rules on the quality, testing, storage, etc., of foods and drugs. Both books reflect fair trade usage and legitimate consumer expectations. In their effects, they are equivalent to prohibitions and thus are also of importance to the sphere of production. The central recording of drug risks and the official collection of samples and investigation reports on foods serve the same purpose.

(*b*) *Retrospective control measures*

132 Retrospective control measures are measures initiated by competent authorities to control a production process, because they have received information about concrete dangers to safety. In most cases, the authorities do not become active until after damage has occurred. In both cases, the goods concerned may be seized or their further sale prohibited. If the damage is due to a violation of the manufacturer's duty, a comprehensive list of sanctions is available to the authorities, at least under food law and the law of drugs. If products are sold

despite a ban placed on their sale by the competent authorities, as a rule contracts underlying the purchase should be void because they infringe Art. 134 of the Civil Code.

4 Control by consumer protection associations

133 Consumer associations have *no statutory powers* to control economic processes. Just as little does the legislator permit them to participate on a par in the decision-making processes of trade and industry. Consumer protection associations perform advisory functions, if any. In some cases these are performed within the framework of legislation the object of which is the improvement of consumer protection. In other cases, the associations are assigned such functions through administrative measures or are involved by industry itself. In the law of drugs, consumer representatives participate neither in the procedure of prior approval nor in the control of the *production sphere*. Much the same is true of the food law. Consumer organisations do participate in the establishment of technical standards. The DIN (German Institute for Standardisation) may serve as an example of consumer associations sitting on various committees. However, their number is always such as not to jeopardise the decision-making powers of industry[13].

While the Government has not issued any regulation on the contents of the pharmacopoeia, representatives of industry and science, consumers and the Government cooperate side by side on a par basis in drawing up the food codex. Resolutions may be taken only by a 75% majority. In addition to ascertaining manufacturer habits and consumer expectations, these resolutions shall have a creative function. Despite this changed objective, the commission cannot be expected to make a significant contribution to consumer protection, because as in the past the commission's underlying idea continues to be that consumer interests may be enforced in cooperation with the manufacturer.

In addition to truly legal participation, only an actual position of power might enable consumer associations to exert an influence on the Government's or industry's economic decisions. Apart from a few exceptions, the associations do not occupy such a position[14]. They lack the organisation that might exercise a 'countervailing power'. It is a question anyhow of whether consumer associations may be organised along the lines of trade unions, which are in a position to force industry to take certain decisions[15]. Apart from problems relating to the associations' structure[16], to their willingness to face conflicts[17], and to the question of who is a consumer[18], what is of importance here is the fact that the associations do not see themselves as representatives of a majority requiring protection as the weaker party in terms of economic power, but as partners of industry[19] helping to improve and stabilise the market system[20].

The same partnership considerations characterise their relationship to the state. As far as consumer representatives participate in state organisations, they act as representatives of the individual consumer whose interests are also determined by the state, and not as representatives of a group which has its own will[21].

The remodelling of consumer associations into a countervailing power against industry and also against the state would therefore require that these associations arrive at an entirely new conception of themselves.

5 Control by the individual consumer

134 It would be conceivable to have the *individual* consumer participate in the *preventive* control of the safety of products by entitling him as *an advocate for the general public* to take action against a *manufacturer* and to see to it that the manufacturer is forbidden to continue selling the product which is a danger to safety or to sue the competent *administrative authorities* for taking the necessary steps. However, under the existing law it is doubtful whether an individual consumer has such powers. The courts and legal writers view these remedies with some reservations, because the consumer would thus participate in the enforcement of legislation: the consumer would control the manufacturer with regard to his statutory obligations, and could even have the administrative authorities controlled as to whether they duly perform their obligations.

Remedies against the *manufacturer* may stem only from civil law, as the consumer as a citizen would take action against another citizen. The entire German civil law is based on the idea that an individual citizen may defend himself if *his* statutory rights or spheres of protection are infringed or threatened by another citizen (Arts. 823, 1004)[22]. It does not provide for any right on the part of an individual to bring an action for any damage or threat to the general public. The action numerous women have brought recently against the publishers of *Stern* to the effect that repeatedly running photographs of nude women in magazines discriminated against them has reconfirmed that attitude[23]. There must always be a threat to an individual *himself* or an individual must have suffered injury. In the event of injury to a consumer, the consumer may *claim damages* according to the principles of the manufacturer's liability (No. 165ff). He may avoid a *threat* emanating from a dangerous product by way of a preventive action for injunction[24], if *his* health, property or person are threatened. Preventive control to a limited extent may therefore be achieved only if the product which is a threat to the general public at the same time constitutes a concrete threat to the rights of a suing consumer. According to the courts, such a threat exists if in the circumstances there is an immediate danger of successive infringements of the law[25]. Applied to the cases to be studied here, numerous questions arise: does the consumer have to buy a dangerous product in order to be exposed to the threat himself or does it suffice that he intends to buy the product because he needs it, but refrains from doing so because of its dangerousness? An additional factor is that to bring a preventive action for injunction the danger of repetition must be shown[26]. Many products are bought by the consumer only once, so that any repeated threat is excluded. It would no doubt be worth considering whether or not the consumer could be helped by an action for removal on account of constant interference. In the final analysis, recourse to an action for removal cannot obscure the fact that the remedies mentioned are tailored to other cases. It is conceivable that the requirements mentioned can be satisfied in a particular case, but then another problem emerges. The claim for removal pursuant to Art. 1004 Civil Code is subject to the same restriction as the claim for compensation pursuant to Art. 823 Civil Code. In the law of torts it is understood as a general principle, however, that for lack of damage to property no compensation may be claimed for damage that arises from the defective product itself. The consumer involved has

acquired ownership of an unsafe, that is to say defective, product. In its recent Schwimmschalter (float switch) decision the Federal High Court[27] has extended the manufacturer's liability risk, though. According to that decision the person concerned, whether consumer or trader, may himself raise claims in tort for a defective product within the limits set by the Federal High Court. A consumer might be entitled to bring a preventive action for injunction or an action for removal against an *enterprise* which fails to comply with its obligation to recall dangerous products pursuant to Art. 823 Civil Code. Any manufacturer is also under an obligation to watch his products after having marketed them and to take steps in the event of any danger[28]. However, if the manufacturer is under an obligation to recall a product, it is only reasonable to give the consumer threatened by a danger emanating from that product, for instance because he drives on dangerous tyres, an opportunity to require the manufacturer to recall the product. On the occasion of the ADAC-Juristentag (German Lawyers' Assembly organised by the ADAC) in 1978, Löwe suggested that consumer associations be granted such right of action by virtue of law[29].

The requirements of an action against the *administrative* authorities are determined by administrative law. Irrespective of the type of action, such action is possible only if the suing consumer is able to show that his rights *as a person* are infringed, Art. 42, para. 2 Verwaltungsgerichtsordnung (VwGO, Act on the Constitution of and Procedure in Administrative Courts). This requirement is to prevent citizens from bringing a type of action (Popularklage) which has for its object the allegation of infringements of the law which do not affect the plaintiffs[30]. This is to keep querulous actions away from the courts. Attempts at inferring such a type of action from the existing law fail as a rule, because of the above requirement of admissibility[31]. In actual fact, what is behind this negative attitude towards that type of action is a certain conception of the state. The citizen is not permitted to participate in the administration himself, but is excluded therefrom with reference to the fact that administrative authorities safeguard the interests of the general public as well as his own interests. On the other hand, only the enforcement of a welfare state law by way of that type of action would make allowance for the principle of the constitutional state as defined in Art. 20, para. 3 Basic Law, which not only protects the citizen against encroachments upon his freedom and property, but is also designed to ensure that administrative authorities act only if so empowered by law. Above all, that would satisfy the requirement under the theory of democracy arising from Art. 20, para. 1, 28 Basic Law, according to which any legal provision enacted by parliament implies the obligation of implementation[32]. Considering what has been said above, the introduction of the above type of action would seem desirable. It may not be inferred, though, from the existing provisions on administrative procedure.

An action by an individual consumer is possible — and thus is a possible preventive measure — only if the consumer is able to show that *his rights* are infringed. This means that the consumer must plead a right in respect of which he is the party entitled. Such a right need not expressly be mentioned in the law, but may also follow from the legislator's intent if the latter wants to protect the individual in addition to the general public[33]. The courts find it hard to come to grips with this problem, in most cases they interpret legislation as being aimed

merely at the protection of the general public[34].

As far as can be ascertained, in the areas of the LMBG, AMG and GSG, which will be discussed here, individual consumers have not yet tried to have the respective supervisory authorities forced judicially to act in a certain way. It would be decisive for the issue of any proceedings if the legislation mentioned in addition to protecting the general public aims also at protecting individuals. Much may be said in favour of the intention to ensure the necessary protection of the individual. If we take a look at the tradition of court practice, the chances of actions are quite pessimistic.

If legislation fails to include the consumer in its protective purpose, and if therefore there is no right of action pursuant to Art. 42, para. 2 VwGO, theoretically it is still possible to plead an infringement of constitutional rights. With respect to environmental protection, the Federal Administrative Court has recently stated that even the Basic Law does not grant an individual directly enforceable claims for certain measures of environmental protection[35].

III CONTROL OF SPECIAL GOODS

1 Control of foodstuffs

135 The Gesetz zur Neuordnung und Bereinigung des Rechts im Verkehr mit Lebensmitteln, Tabakerzeugnissen, kosmetischen Mitteln und Bedarfsgegenständen (LMBG, Act to Reform and Streamline the Law on Trade in Foodstuffs, Tobacco Products, Cosmetics and Consumer Goods) of 15 August 1974 has brought to a close for the time being many years of endeavour to achieve a sweeping reform of the entire food law. The main reform objective is the extension and enhancement of protection against the impairment of health. This objective will be achieved by an extension of the powers to take preventive official action. The intensified control of foodstuffs is another important objective of the reform endeavours.

(a) Preventive control measures

136 Foodstuffs are not subject to prior approval (which would present great difficulties in view of the large number of products). They are controlled in such a way that the legislator or authority issuing orders prescribes to manufacturers the use of certain substances or restricts their use. In some cases the law mentions the prohibition directly, in other cases the legislator is authorised to issue new prohibitions or to put general prohibitions into more concrete terms. Orders issued under the old LMG are not superseded by the new Act. The official reasons given for the respective provisions show that the legislator considers the principle of prohibition suitable to enforce the consumer's protection. Reference is made to international legislation which employs the same means[36]. Para. 2 of the LMBG 'Verkehr mit Lebensmitteln' (trade in foodstuffs) regulates the scope and terms of the prohibitions.

137 *(aa)* The central standard of prohibitory food legislation is the general clause of Art. 8 LMBG. Pursuant thereto it is forbidden to produce or market food-

stuffs that are apt to harm the consumer's health. The term 'harm' includes the meanings of damage and destroy. The impairment of health includes not only disease in the medical sense, but any temporary, more than slight disturbance of health. Mere aversion or disgust are not sufficient[37].

Specifications of this prohibitory standard related to certain production methods, marketing methods and the like supplement the general provision of Art. 8 (Arts. 9–15 LMBG). They are always linked with the power granted to the competent minister to issue regulations that develop the standard. The protective provisions are initially directed against dangers that may emanate from any foodstuff (Art. 9 LMBG), but eventually also regulate special matters and dangers (Arts. 12–15 LMBG).

Generally speaking, the authority issuing orders has regulatory powers as soon as any *impairment of health* is imminent (Art. 9 LMBG). This is to enable timely preventive action in favour of the consumer[38]. Merely theoretical dangers which according to the normal experience of life may result from foodstuffs, can constitute a case of impairment[39]. While a concrete danger may be assumed in many cases with the aid of current scientific research and investigation methods, it cannot be proved. Effective protection of health against dangers requires, however, that foodstuffs be forbidden if there is even a remote suspicion that their consumption may be harmful[40]. The regulatory powers are defined more closely in items 1–6 of Art. 9: accordingly, what is required and what is forbidden may be laid down only for certain foodstuffs (para. 1, items 3 and 4) or certain substances (items 1a, 5 and 6) or certain methods (item 1b). Pollution through contaminants arising from the environment is regulated in detail in Art. 9, para. 1, item 2 LMBG; even the restriction follows from the tenor. On the basis of the regulatory power defined in Art. 9, para. 1, though, a number of regulations have been issued which do not exhaust the scope provided[41].

The special requirements of *food hygiene* are not covered by Art. 9, which is exclusively to prevent any impairment of health, but are expressly regulated in Art. 10[42]. It is quite possible that Art. 9 and Art. 10 LMBG overlap. The hygienic requirements are deemed to be infringed if there is a danger that foodstuffs are affected in a nauseating or otherwise detrimental way by microorganisms, impurities, odours, temperatures, atmospheric effects or treatment and preparation.

In this area the German Länder may issue appropriate orders (Art. 10 LMBG) if the federal minister does not exercise his right. Although it is generally accepted that a uniform hygiene order for the entire Federal Republic is necessary[43], so far there exist only Land orders which in most cases are limited to meat and meat products[44].

In addition to these general protective provisions, the LMBG also includes *special prohibitions and special regulatory powers* (Arts. 11–15). The provisions are systemised in such a way that to begin with a prohibition is imposed. Such a prohibition is not absolute, though, which means that the use of certain substances or certain processes is not generally forbidden, but only the use of substances or processes not officially approved. Following the prohibition, the federal minister concerned is authorised to permit exceptions to the relative prohibition if this is *compatible* with consumer protection, or to restrict the use

of certain substances or processes if so *required* by consumer protection. The following details may be noted: it is forbidden *to use non-approved additives*, to employ ion exchangers as far as they allow non-approved additives to get into foodstuffs and to use processes for the purpose of producing non-approved additives in foodstuffs (Art. 11 LMBG). Which substances are approved for use in the production of foodstuffs follows from Art. 2 LMBG. Pursuant thereto, additives are substances designed to be added to foodstuffs to influence their condition and to produce certain effects. As distinguished from the food law in force until 1974, the new food law not only takes qualities and characteristics as criteria, but primarily goes by the purpose for which substances are intended[45]. Thus, what an additive is is determined irrespective of its value in terms of physiology of nutrition. As a result, an essentially greater number of substances are included than came under the former term 'foreign substances', so that above all the majority of agents, such as colorants, preservatives, emulsifiers, stabilisers, antifoams, humectants, bleaching agents and swelling auxiliaries fall within the Act[46]. However, the intended purpose should not be the only criterion of a definition, for otherwise flour, yolk and spices would also be additives. To avoid such exceptions, which are not justified for practical reasons, Art. 2 LMBG includes a restrictive provision. Substances are not classed with additives if they are of natural origin or if their chemical composition is equivalent to that of a natural substance and if according to generally accepted standards they are used primarily because of their nutritional value, their value in terms of smell or flavour or if they are used as semi-luxuries.

The consumer's rights have not only been extended through the changed definition of what an additive is. In a departure from the old LMG, the production of non-approved additives in foodstuffs by means of ion exchangers and certain methods of treatment is forbidden[47]. For some time, ion exchangers have been used primarily to soften water, where they exchange calcium and magnesium ions, which cause hardness, for sodium ions. It is the legislator's intention to preclude undesirable and uncontrolled additives from getting into foodstuffs through an ion exchange[48].

However, there are *exceptions* to the prohibition mentioned (Art. 11, para. 2 LMBG):

Agents employed only in the technological process may be used if the final product includes only technically unavoidable and technologically ineffective residues in proportions that are unobjectionable in terms of health, smell and flavour. Technically unavoidable means that according to the current standards of technology such amounts cannot be eliminated[49]. Furthermore, certain additives are excluded which are commonly unobjectionable in terms of health or otherwise, such as distilled and demineralised water, air, nitrogen and carbon dioxide unless they are used as propellant gases (e.g. in sprayers with whipped cream).

Lastly, the competent minister is authorised *to permit exceptions to the prohibition of Art. 11 LMBG*, Art. 12, para. 1 LMBG. However, additives may be approved only if this is compatible with consumer protection considering requirements in terms of technology, physiology of nutrition and diet[50]. Among these would be substances which according to the current supply situation and to the current standards of technology cannot be completely done without and,

on the other hand, seem defensible in case of strict pharmacological testing[51]. In the first place, consumer protection relates to objections from the health point of view, but the consumer also has a legitimate interest in not being deceived as to the use of chemical substances to which he frequently objects[52]. In this connection, labelling as required under Art. 16, para. 1, sentence 1 LMBG does not suffice. The authority issuing orders must weigh the interests of industry against those of consumers. If there are any objections to the approval of substances from the point of view of consumer protection, the entrepreneur concerned is not entitled to claim approval[53].

The exceptional regulations issued under the old LMG may be subdivided into three groups according to their subject matter[54]: (1) General Order concerning foreign substances, (2) Orders concerning preservation, antioxidants and colorants, (3) Orders relating to individual foodstuffs or groups of foodstuffs. Furthermore, the competent minister is authorised to issue regulations on maximum quantities and purity as regards ion exchangers and additives (Art. 12, para. 2 LMBG). The objective of this regulation is thus opposite to the one of Art. 12, para. 1 LMBG as it confers the power to impose restrictions. However, the measures as defined in Art. 12, para. 2 LMBG must be required for the protection of the consumer. Objections in terms of health and hygiene must be considered as much as protection against financial loss[55].

It is also *forbidden to subject foodstuffs to any non-approved treatment with ultraviolet or ionising rays or to market foodstuffs that have been subjected to such treatment* (Art. 13, para. 1 LMBG). This prohibition is based on possible impairment of health. Thus the treatment of milk with ultraviolet rays to increase its vitamin B content, which has been approved for a number of years, has not yet received final approval, because according to the Federal Health Authority the photochemical behaviour of milk components is no exact proof of the harmlessness of irradiation from a health point of view[56]. On account of their energy, ionising rays may produce ions in the substances they irradiate. Such rays are intended primarily to delay microbiological spoilage, fight salmonella, kill parasites and hinder the sprouting of potatoes[57].

With respect to this prohibition the competent federal minister is also authorised to permit *exceptions* by way of statutory order if this is compatible with consumer protection. To judge the harmlessness of irradiated foodstuffs, the Fremdstoffkommission der Deutschen Forschungsgemeinschaft (Commission for Foreign Substances attached to the German Society for Promotion of Research) in its bulletin of 21 November 1968 compiled criteria to be taken into account in considerations as to whether approval of such foodstuffs is compatible with the consumer's interests[58]. The Commission requires that the application for approval should include data on the type, purpose and effect of irradiation. In the approval procedure it must be considered that approval does not come into question if according to present scientific findings a risk cannot be excluded. Moreover, if approval is given, any notice to that effect must include a detailed description of the process, and must lay down minimum and maximum irradiation as well as storage time.

The authority issuing orders has exercised its regulatory powers in the Lebensmittelbestrahlungs-Verordnung (Food Irradiation Order) of 19 December 1959 (BGBl 1, page 761) especially regarding particular purposes. The Order

continues in force. Pursuant to Art. 2 of the Order, treatment with direct ultraviolet rays is permitted in the case of sterilisation of drinking water, regarding the surface of fruit and vegetables and in the case of hard cheese for storage purposes; also permitted is the indirect irradiation of foodstuffs which occurs in the disinfection of air through ultraviolet rays. Tentatively it was also permitted to irradiate potatoes by means of electron rays and to sell them to a limited group of persons[59].

The authority issuing orders may prescribe certain technological processes for use in irradiation approved under Art. 12, para. 2, item 1, Art. 13, para. 2, item 2 LMBG. If it turns out that the process prescribed does not eliminate the danger, the authority issuing orders must cancel the approval given[60]. Furthermore, it is *forbidden under food law to market foodstuffs by way of business if in or on them there are plant protectives, fertilisers and pesticides exceeding the fixed maximum amounts* (Art. 14, para. 1, item 1 LMBG). Furthermore, such plant protectives as within the meaning of the Pflanzenschutzgesetz (Plant Protection Act) are not approved or may not be used must be absent in or on foodstuffs or present only in approved maximum quantities (Art. 14, para. 1, item 2 LMBG). This prohibition is of special importance to imported foodstuffs which at the place of their cultivation or production are treated with agents that in some cases are unknown or cannot be controlled[61]. The maximum quantities of the above plant protectives and preserving agents (including pesticides) allowed to be used must be established by the authority issuing orders (Art. 14, para. 2, item 1a LMBG). Scientists expressed the desire that maximum quantities be envisaged only for certain plant protectives[62]. The approved maximum quantities are laid down in the Höchstmengenverordnung Pflanzenschutz, pflanzliche Lebensmittel (Order concerning Maximum Quantities in Plant Protection, Vegetable Foodstuffs) as amended on 13 June 1978 and Vegetable Foodstuffs as amended on 29 August 1978[63]. We regret to say that the legislator failed to authorise the Federal Health Authority to establish tolerable maximum quantities in a legally binding way. The Federal Health Authority may provide in the approval of new agents for lower quantities than those provided for in the Höchstmengenverordnung (Order on Maximum Quantities), but a requirement to that effect does not directly cause an amendment of the Höchstmengenverordnung to be made, so that food inspection authorities which go by the order may disregard such a Federal Health Authority requirement[64].

Pursuant to Art. 14, para. 2, item 2b, the authority issuing orders in addition may forbid the use of certain pesticides. Lastly, para. 2, item 2 authorises the authority issuing orders to permit exceptions to be made to the prohibition of para. 1, item 1. The interplay between rule and exception is shown by the Höchstmengenverordnung of 13 June 1978[65].

It is forbidden to market animal feedstuffs by way of business if in or on them are substances having pharmacological effects or products of transformation thereof which exceed the established maximum quantities (Art. 15, para. 1 LMBG). Among the substances having pharmacological effects are in particular drugs and such additives to feedstuffs as may exert a special influence on the texture, condition and function of the body, or above all increase useful performance or serve preventive health protection[66]. Any effective protection of the consumer of foodstuffs must be based on the concept that the fields of law

touched on here — food law, drugs law and feedstuff law — complement each other in a sensible way.

Furthermore, *waiting periods* must be observed; that is to say, periods during which residues of substances that are not harmless from a health point of view must be expected to be present in the meat of animals having been treated with drugs according to their designated purposes (Art. 15, para. 2 LMBG). The provision proceeds from the assumption that, in future, substances having pharmacological effects must either be registered or be approved as feedstuff additives pursuant to the regulations under feedstuff law and will have to be controlled from the point of view of food hygiene. Pursuant to Art. 15, para. 2, sentence 1 LMBG, foodstuffs with respect to which the waiting periods are not provided for in the drugs and feedstuff laws must not be produced or marketed. As waiting periods in respect of all substances coming into question here cannot be fixed at too short notice, Art. 15, para. 2, sentence 2 LMBG provides for a safety period of five days. If an animal is treated with drugs, the producer has to specify the waiting period (Art. 23, para. 1 AMG), which is determined by additional analyses by residue. As Art. 23 came into force only on 1 January 1978, it will take some time before drugs intended for use in animals will carry pertinent data.

Also, the competent minister may lay down maximum quantities by way of statutory order, exclude the use of certain substances having pharmacological effects and equate certain substances with substances having pharmacological effects (Art. 15, para. 3, item 1 LMBG). This regulatory power ensures the complete concurrence of food, animal drugs and feedstuff laws and enables better supervision of what is known as the grey drug market, where pharmacologically effective substances are used illegally[67].

On the basis of Art. 15, para. 3, item 1b and c LMBG, the Verordnung über Stoffe mit pharmakologischer Wirkung (Order concerning Substances having Pharmacological Effects) of 3 August 1977 was issued, pursuant to which a number of substances having antimicrobic, estrogenic, androgenic or gestagenic effects must not be administered to certain animals[68]. Pursuant to Art. 15, para. 3, item 2 the Order concerning Exceptions to the Waiting Period pursuant to Art. 15, para. 2, sentence 2 was issued as early as 2 January 1975[69]. The Annex to Art. 1 of the Order lists the substances that may be administered to animals also within a period of less than five days. Among these are proteins, carbohydrates, fats, vitamins, provitamins, vitamin B (up to 500 000 IU), sodium, potassium, calcium and magnesium compounds of organic or inorganic acids as well as trace elements of iron, iodine, cobalt, copper, manganese, selenium and zinc.

138 (*bb*) *The German Food Codex* is a compilation of guiding principles describing the production and condition of foodstuffs or other features important to their marketability. It does not include legally binding regulations, but only lays down in an objective way how foodstuffs are constituted according to general trade practice and legitimate buyer expectations. The Food Codex was introduced by Art. 7 of the Amending Law of 1958. It was designed to satisfy the need on the part of industry, food inspection authorities and the courts for certainty as to what the law is[70]. The legislator considered the Food Codex a

suitable means to make allowance by rapid adjustment for the progressive development in food chemistry. In practice the concept did not prove a success[71]. It turned out to be easier to amend a statutory order than a guiding principle. The commission's activity was exhausted mainly in the laying down of rules that were already accepted. This is explained by the make-up of the commission in which representatives of industry, government, science and consumers were represented on a par basis and had to decide unanimously[72]. The new food law wants to remedy that grievance, for one thing by providing that resolutions may now be adopted by a three-fourths majority, and for another thing by extending the powers conferred under it, Art. 34, para. 3, sentence 2 LMBG. In future all features important to marketability shall be described. In this way the guiding principles beyond establishing manufacturer habits and consumer expectations shall have a creative function although basically without binding force[73]. Doubts about the realisation of this concept continue to be appropriate[74]. The make-up of the commission on a par basis moreover precludes assigning the commission further tasks as, for instance, the definition of general legal terms under food law. As the German Food Codex does not include legally binding regulations, it is as important as an objectified opinion. As the guiding principles are laid down by all interested groups involved, it may be assumed that they are observed by all those engaged in food trade as a manifestation of honest trade usage and legitimate consumer expectations. Such is the control function of the Food Codex which is also of a preventive nature. Proposals aiming at granting the commission the power to issue regulations itself are therefore open to constitutional doubts.

The LMBG also includes a provision regulating the procedure to be followed in taking control measures. The *Federal Health Authority is obliged to make public an official compilation of methods for drawing samples and examining foodstuffs*, Art. 35, para. 1 LMBG. The purpose of that regulation is to achieve standardisation through a compilation of the various methods of examination. Standardisation is necessary, since in most cases foodstuffs are judged by an examination and the method of examination selected is often of prime importance to the result of such judgment[75]. The methods are laid down in cooperation with experts from the fields of food inspection, science and industry, Art. 35, sentence 2 LMBG.

(*b*) *Retrospective control measures*

139 (*aa*) The success of food law control is entirely dependent on an efficient control system. This requirement has been lacking during the past few years[76]. The Food Act of 15 August 1974 aims at an increase in the efficiency of control primarily by the establishment of efficient inspection institutions in addition to the assignment of a greater number of qualified persons on all levels. These are not only important to control within the country, but also to efficient import control[77].

The German Länder are in charge of implementing the food law, Art. 40, para. 1, sentence 1 LMBG. This involves certain problems regarding a uniform standard of control. On the other hand, Art. 45 LMBG enables uniform implementing regulations to be made. The involvement of the German Länder is

ensured by the fact that the administrative rule requires the approval of the Länder. From the official reasons[78] given for Art. 45 LMBG follow the scope and objective of the administrative rules, which the legislator expects to be established in a uniform way for the entire Federal Republic. Accordingly, detailed regulations on increased control in manufacturing and importing enterprises, on regular controls over restaurants and canteens, on the establishment of central institutions and rules on standardised reporting by inspection institutions will prove to be necessary. The Federal Government and the Federal Council (Bundesrat) have not so far acted on this legislative mandate.

Control comprises first of all the inspection of objects coming into question (Art. 41) as well as the drawing (Art. 42) and examination of samples.

The competent authorities have to satisfy themselves by *regular controls and the drawing of samples* as to whether regulations are complied with, Art. 41, para. 1, sentence 2 LMBG. The competent Land authorities are authorised at any time within the framework of their constitutional mandate to implement federal law in accordance with Arts. 44, 45 LMBG and, if need be, to issue general regulations on the frequency of inspections, the method of drawing samples and the instructions to be given to the personnel in charge of inspection. The circular of the RMdI of 21 June 1934 (uniform implementing orders)[79] includes uniform regulations on how trade in foodstuffs shall be controlled pursuant to the provisions of Arts. 41, 42 LMBG. They were put into force by the German Länder governments, in some cases amended by further regulations. The enforcement of the control measures provided for in Art. 41 are the task of police or administrative authorities replacing the former in the field of public health for whose guidance pursuant to Art. 1, para. 1 of the uniform implementing orders chemical, veterinary and medical experts (scientific experts as well as chemical, veterinary and medical inspection boards) shall be appointed[80].

As a control organ, Art. 41, para. 2 LMBG names vocationally trained persons. Among these rank persons whose official duty it is to control foodstuffs. In the case of imminent danger, any police enforcement officer may take the necessary measures. Art. 41, para. 2, sentence 2 authorises the federal minister subject to the Federal Council's consent to issue regulations by way of statutory order regarding professional requirements as to the persons involved. Here, also, the authorities issuing orders have not yet become active, so the respective Land law continues to apply, which in some cases provides for special food inspectors or other control personnel — just as in the case of trade inspection boards[81]. Control persons are those appointed as experts (food chemists, veterinarians) by the competent authority. In addition to giving assistance to the competent administrative personnel, they may also be charged with making inspections and drawing samples. The tasks of medical inspection institutions are summarised in Art. 4, para. 2 of the uniform implementing regulations. Several German Länder have already consolidated their investigation institutions as aimed at under Art. 44, para. 1, item 1a LMBG[82]. Further powers of control which exist besides Art. 41 LMBG follow from legislation which links the commencement and conduct of trades dealing with the production of foodstuffs to certain business-related and/or personal requirements. The running of a restaurant or licensed house, the retail trade in spirits and enterprises selling

milk[83] are subject to approval or licence. To a certain extent the powers of control overlap, because the duties of health officers differ from the measures taken by food inspectors[84].

The *powers* the above-mentioned persons have are as follows: (Arts. 41, 42 LMBG): (1) entry to properties, offices and business premises; (2) inspection inside and to some extent also outside these premises; (3) further rights of entry also to flats to avoid imminent danger; (4) inspection of business records, drawing of samples; (5) access to all necessary information.

Art. 7 of the uniform implementing order gives some instructions as to how the powers of control shall be exercised within the framework of what is admissible. Recommendations exist as to the reasons for inspection (strikingly low-price offers), the manner of inspection (inconspicuously and in plain clothes), etc. The control organs enjoy a right of entry only during *normal working and business hours*, unless there is imminent danger, Art. 41, para. 3, item 1. We are fully aware of the fact that through this time schedule the legislator restricts the increased control he is demanding.

As the law grants the persons involved a right of entry, the *official* may *employ force to gain entry*, without this being considered forcible entry. If the persons involved offer resistance to such officers, the police may be called in for assistance. The expert who is not a member of but only commissioned by the authority enjoys the same right.

To inspect means *more than just to look at*. The official may look for hidden objects and push aside shelves as well as feel and taste goods. Any different interpretation of the word would drastically reduce the powers of control and would practically make them valueless[85]. Which rooms are subject to the right of inspection is regulated in Art. 41, para. 3, item 1 LMBG. Accordingly, the law makes a distinction depending on the purpose they serve. The inclusion of properties shows that it does not matter whether the enterprise operates indoors. Living accommodation may be entered only if it is used also for business purposes. In the interest of the consumer, producing, treating and marketing activities on a commercial basis mean that any person who pursues a gainful activity within the scope of the law is subject to control[86].

The right to inspect business records is designed primarily to facilitate tracing the source of a rejected commodity and where it went to. In addition to the making of notes the right of inspection includes the power to make photostats. We fail to see why the legislator excepted production specifications from the right of inspection, since such a right exists under Art. 58 Weingesetz. For production specifications, which include formulae of all types, manufacturing regulations, special production processes and even the composition of foodstuffs, are important data for drawing conclusions[87]. Their exclusion from the general right of inspection considerably limits the possibilities of the competent authorities to gain knowledge.

The right to demand information was newly introduced under Art. 41, para. 3, item 4 LMBG. Information may be demanded both upon inspection of the premises, directly in connection with control, and in writing. The right to demand information also extends to include production specifications as expressly stated in Art. 41, para. 3, item 3 LMBG.

Police law continues to be the responsibility of the German Länder. There are

differences mainly concerning the regulation of responsibility. The practical functions of the police or the competent administrative authorities have not changed as far as food law is concerned; they continue to include preventive measures by police officers to avoid dangers. That presupposes a concrete danger to the general public or to an individual. Police powers with respect to foodstuffs range from warnings, requirements and prohibitions to seizure.

Warnings by authorities that have no police powers also come into question. Such warnings are pronounced by the Federal Health Authority or by the competent departmental minister. Against such warnings the manufacturers concerned cannot take legal action, as they are not verifiable in the course of law[88].

The drawing of samples likewise serves to control foodstuffs. This is regulated in Art. 42 LMBG. In addition to the persons in charge of control, police officers are also entitled to draw samples, but basically only those officers who under Land law are in charge of drawing samples. However, in case of imminent danger any police officer may take action.

Again the competent minister is authorised (Art. 44, para. 2 LMBG) to issue regulations on the method of drawing samples. Until the issuance of such regulation the respective Land law applies.

Criteria to go by are currently still to be found in the uniform implementing order (Art. 10). Samples may be drawn not only from finished products but also from semi-finished products (Art. 7). This does not include advertising matter, although in most cases it is made available voluntarily[89]. A contrasting sample must be left behind, Art. 42, para. 1, item 2. That is, a second amount of the sample drawn which is of the same type and comes from the same manufacturer. Two circumstances interfere with this principle: manufacturers and importers, unlike wholesalers, middlemen or retailers, may do without the contrasting sample; and it must be left behind only if the sample can be divided without the purpose of examination being impaired thereby. Moreover, it is not necessary to leave a sample behind where officials of the competent authorities buy samples without disclosing their identity. Since in this case the possibility of drawing a contrasting sample does not exist from the start, a result of examination arrived at in such a way may be less conclusive. The contrasting sample may be examined only by approved experts (Art. 9 VII). The contrasting sample is not at the owner's disposal, rather it forms part of the seized sample. This regulation is necessary to guard against abuse, for instance through exchange or alterations[90]. Official seizure is performed by official locking or sealing, which is sanctioned by Arts. 137, 136 Penal Code. The contrasting sample must be provided with a date after the expiry of which the seizure ends automatically (Art. 42, para. 2, sentence 2 LMBG).

140 (*bb*) The LMBG contains a detailed list of acts that are forbidden on *penalty*, Arts. 51 et seq. Basically, it may be assumed that any obligation irrespective of its legal form which the LMBG imposes on the group of persons coming within its scope is backed by a system of appropriate sanctions. Generally speaking, the law distinguishes between administrative offences and punishable acts. Art. 51 which provides for imprisonment for a term not exceeding two years (in the event of negligence not exceeding one year) or a fine — in very grave cases a

sentence of imprisonment for a term of six months to five years may be passed — punishes above all infringements of the general clauses under food law. Pursuant to Art. 52, a sentence of imprisonment of up to one year or a fine may be imposed on any person who infringes the principles laid down in Arts. 11–19 LMBG. If the acts defined in Art. 52 are committed negligently, they are regarded as administrative offences and are punishable by a fine of up to DM 50 000. Art. 54 enumerates a number of less serious administrative offences which are punishable by fines ranging from DM 1000 to DM 25 000, depending on the type of violation.

2 Control of cosmetics

141 The control of cosmetics is likewise regulated in the LMBG. In contrast with the former law, the control of cosmetics is now set forth separately. The contents and structure of the control system is modelled on the system for foodstuffs.

(a) Definition

The LMBG defines cosmetics as substances or preparations from substances which are intended for external use by man or for use in his mouth cavity to clean, care for or influence his appearance or body odour, or to convey fragrances, Art. 4, para. 1 LMBG. The express regulation of the field of cosmetics (Arts. 4 and 24–29 LMBG) is the principal item of the extended protection of the public in the area of consumer goods. Moreover, the number of cosmetics coming within the scope of that Act has been enlarged. Now means of influencing body odour, i.e. deodorants or external spray-deodorants for feminine hygiene, and means of conveying fragrances, i.e. perfumes proper, belong here as well[91]. By contrast, the implements used in cleaning and caring do not come within the scope of the Act[92]. Likewise, substances designed primarily to alleviate or cure diseases, ailments, or bodily defects are not classed with cosmetics. Cosmetics are distinguished from drugs, for one thing, by the fact that they are not intended for external use by man or use in his mouth cavity. For another, the inclusion of the intended purpose serves to except only such cosmetics as are designed primarily to fight disease. A striking feature is that it was the legislator's intention not to exclude from the definition of cosmetics means for the prevention of diseases, so-called preventives[93]. It should be noted that substances designed to influence bodily shapes are also considered drugs, Art. 4, para. 3 LMBG. This clarification of terms redresses many grievances caused through the uncontrolled marketing — specifically in the mailorder trade in response to press advertisements — of bust beauty creams and weight reducing creams. Their classification with drugs is justified on account of the fact that such creams usually contain major portions of female sex hormones.

142 *(b) Preventive measures: Prohibitions and regulatory powers to issue preventive regulations*

The legislator uses the same means here as in the case of foodstuffs to protect

the consumer against dangers to his health.

The regulations on cosmetics also include a general clause standardising general health protection (Art. 24 LMBG, which is modelled on Art. 8). *It is forbidden to manufacture, process and market harmful cosmetics.* The term harmful is the same as that used in Art. 8 LMBG. The prohibition of harmful drugs extends beyond that of harmful foodstuffs, though, because it includes not only means which may impair health when used as provided for, but also when used as foreseeable. This is to compel the manufacturer in his instructions for use to make allowance for the inadvertent consumer.

Basically, it is *forbidden* in the manufacture or processing of cosmetics on a commercial basis — even for private use — *to employ without permission substances requiring a doctor's prescription*, Art. 25, para. 1, item 1 LMBG in combination with Arts. 48, 49 AMG. Likewise, it is forbidden to market cosmetics on a commercial basis if they contain non-approved substances requiring a doctor's prescription. The prohibition to use substances requiring a doctor's prescription is one of the essential improvements of prophylactic health protection which reform legislation on food law had aimed at[94]. The underlying reason of the prohibition is that nowadays, in the manufacture of certain cosmetics, substances are used which, if sold to the consumer as drugs, require a doctor's prescription, i.e. are taken only under medical supervision. The danger to be avoided lies in the fact that such cosmetics are often used for many years without any control[95]. At the same time it is made clear that substances that do not require a doctor's prescription may also be used in cosmetics, Art. 25, para. 2, item 1 LMBG.

However, here too, the authority issuing orders (Art. 25, para. 2, item 2 LMBG) may approve certain forbidden substances (as defined in Art. 25, para. 2, item 1) if this is compatible with consumer protection. In such a case, strict pharmacological examination is required.

Lastly, the authority issuing orders may also establish *maximum quantities* as to the contents of approved substances. In this connection the measures taken by the Cosmetics Commission attached to the Federal Health Authority must be taken into account.

If certain preconditions exist, the authority issuing orders may become active in a *preventive* way *to avoid any impairment of human health*, Art. 26 LMBG (cf. the parallel to Art. 9 LMBG).

The manufacture or marketing of certain cosmetics may be made contingent upon *a licence or notice*, Art. 26, para. 1. This is to facilitate the control of enterprises processing organ preparations, hormones, and the like. The authority issuing orders may also set standards as to the microbiological nature of certain cosmetics, Art. 26, para. 2. It has turned out to be necessary to set such standards, because the shelf life of cosmetics preparations depends on their initial germ content following manufacture. Above all, bacteria contained in cosmetics may cause grave injuries to health. Furthermore, *positive or negative lists* concerning purity regulations on cosmetics may be issued, Art. 26, para. 3. In particular, warnings or instructions as to how to behave in the case of accidents may be prescribed and the intended purpose restricted.

However, regulations under Art. 26 may be issued only for *certain* cosmetics; that is to say, not for all of them.

Generally speaking, Art. 26 LMBG leaves a wide scope for enhancing the protection of the consumer's health.

The authority issuing orders has made a first step with the Verordnung über kosmetische Mittel of 16 December 1977 (Federal Law Gazette I, page 2589)[96]. This Order is based on the regulatory powers provided for under Art. 25, para. 2, item 1 and Art. 26, para. 1, item 3 of the LMBG. The Order *forbids* the use of certain substances listed in Annex 1 in the manufacture or processing of cosmetics on a commercial basis (Art. 1 of the Order). This principle, which is to be welcomed, is restricted immediately afterwards in manufacturers' favour, for the substances concerned may be contained in cosmetics if their presence is technically unavoidable and harmless from a health point of view (Art. 1, sentence 2 of the Order). This is a dangerously flexible provision which is not apt to make things clear. The Order, moreover, includes the list of substances which are approved to a limited extent, Art. 2. Lastly, the extent to which colorants may be used is laid down, Art. 3.

(*c*) *Retrospective control measures*

143 As regards *control by inspection*, what has been said concerning foodstuffs also applies to cosmetics, for the increase in control envisaged by law to be achieved by an extension of the powers under Arts. 40–46 LMBG applies to the same extent to cosmetics.

As in the case of foodstuffs, the LMBG contains detailed *penal regulations* concerning cosmetics. Penal acts are infringements of the general clause of Art. 24 and of the principles laid down in Arts. 25 and 26. Administrative offences relate either to negligent breach of duty in respect of the principles laid down in Arts. 25 and 26 or less important infringements which do not constitute such a grave danger to the consumer.

3 Control of consumer goods (Bedarfsgegenstände)

This body of subjects is likewise regulated by the LMBG. The amendment to the Act has extended the scope of the Act quite considerably. The control system is largely in line with that for foodstuffs and cosmetics.

(*a*) *Definition*

144 Art. 5, para. 1, items 1–9 of the LMBG contains a comprehensive list of what are known as consumer goods, but does not give a general definition. We could say that these are goods for use and consumption which in the event of imperfect condition and wrong treatment may involve dangers to human health. The former LMG included cosmetics in the same term, but these are now regulated separately. In addition to this merely technical classification, the new act also incorporates several improvements in substance. It not only enumerates goods, but in a number of cases goes by their intended purpose and consequently by the effects they may have on the human body. Moreover, the list of objects has been extended considerably. Whereas the LMG listed only tableware, drinking vessels and kitchen utensils as examples of objects which upon

extraction, production, preparation, measurement, weighing, packing, storage or consumption are designed to come into direct contact with foodstuffs and may thereby exert a strong effect on them, Art. 5, para. 1 LMBG also subjects, *inter alia*, objects which come into contact with the mucous membranes (Art. 5, para. 1, item 3), cleaning and preservative agents for household use (item 7), cleaning and preservative agents for consumer goods within the meaning of item 1 (item 8), and means and objects for deodorisation or insect control indoors to the regulations of the LMBG (item 9)[97]. For reasons of size, the objects specified will not be enumerated and discussed here. It should be pointed out, though, that Art. 52, para. 2 LMBG distinguishes consumer goods from drugs.

A *power* enabling statutory regulations to be made equating further objects and means for domestic requirements with consumer goods within the meaning of Art. 52, para. 1 LMBG is to be found in Art. 52, para. 3. The provision makes allowance for unforeseeable technical development.

(*b*) *Preventive control measures: Prohibitions and regulatory powers to issue preventive regulations*

145 The legislator employs the same means of control as in the case of foodstuffs and drugs. Thus *prohibitions* designed to serve health protection have been imposed (Art. 30, items 1–4 LMBG). It is forbidden to manufacture or process consumer goods of the type specified in such a way that, upon use as provided for or upon foreseeable use, they are apt to impair health (Art. 30, item 1). The terms 'use as provided or foreseeable use' must be interpreted in a broad sense, since the protective intent of the law, which includes children, must be taken into account[98]. At the same time it is forbidden to market consumer goods which were manufactured in violation of the prohibitions previously imposed (Art. 30, item 2 LMBG which is modelled on Art. 8, item 2 and Art. 24, item 2). The prohibition also includes consumer goods that were not manufactured as such if they are marketed as 'consumer goods' and are dangerous to health within the meaning of Art. 30, item 1[99]. Lastly, the prohibition is also extended considerably: even the use of consumer goods in the production or processing of foodstuffs is forbidden if thereby foodstuffs are influenced so as to be likely to impair the consumer's health, Art. 30, item 3. It is also forbidden to use objects as consumer goods on a commercial basis in such a way or to market them for such intended purposes that they give off substances that pass into foodstuffs or onto the surface thereof, unless these are portions that are unobjectionable in terms of health, odour and flavour and are technically unavoidable, Art. 31, para. 1. This relates to all objects irrespective of the purposes for which they were manufactured if they are used as consumer goods within the meaning of their definition. As regards the harmfulness of substances being given off, the possibility of impairment is sufficient. Wording in such broad terms is explained by the fact that according to the current level of scientific knowledge it is impossible to prove that something is actually apt to impair health[101]. Art. 31, para. 2 LMBG enables legally binding regulations to be made laying down for certain substances those quantities which are to be considered legally unobjectionable when passing from consumer goods into foodstuffs. Lastly, it is forbidden to market objects that may be mistaken for foodstuffs, Art. 30, item 4.

This regulation was occasioned by a number of accidents: children had drunk dishwashing detergents, because they had mistaken them for a juice because of the lemons illustrated thereon.

The federal minister is authorised to take measures by way of statutory order to avoid dangers to health emanating from consumer goods (Art. 32 LMBG). This regulation largely corresponds to the regulation of Art. 9 LMBG. So far the authority issuing orders has not used this power.

(*c*) *Retrospective measures*

146 The possibilities of control of consumer goods by inspection correspond to those described with respect to food law.

Infringements of the general clause of Art. 30 LMBG or of the duties laid down in the principles of Arts. 31, 32 LMBG are *punished* in the same way and to the same extent as infringements of the regulations on foodstuffs or drugs.

4 Control of drugs

147 The control of drugs is regulated in the Gesetz zur Neuordnung des Arzneimittelrechts (Act to Reform the Law of Drugs) of 24 August 1976. It is the declared objective of that Act to afford the consumer better protection against harmful drugs in future, cf. Art. 1 AMG. Not least the Thalidomide catastrophe has shown that the registration procedure provided for in the AMG 61 did not suffice to ensure effective protection of the consumer. Despite these experiences it took almost 20 years before the new legislation came into force. The Federal Republic is thus one of the last countries to transform into national law international agreements and regulations on the approximation of German law to a certain established standard[102].

The core of the Act is the revised procedure of prior approval of drugs and the provision on strict liability. In addition the Act includes several other instruments for improving preventive health protection.

(*a*) *Definition*

148 The terms 'drugs' and 'substances' as well as other terms used in the AMG are defined in Arts. 2–4 AMG. Drugs are substances and preparations from substances which by internal or external application to the human or animal body are designed to cure diseases, reveal mental conditions, and kill agents of diseases, Art. 2, para. 1 AMG. Art. 2, para. 2 contains further basic rules about objects regarded as drugs. These rules essentially retain the former concept of drugs. At the same time they objectify matters; thus for the sake of certainty in law the scope of the law of drugs is more clearly distinguished from that of food and feed law. Substances are chemical elements, plants, parts of plants, animal carcases and live animals, as well as body components and micro-organisms inclusive of viruses and components of viruses, Art. 3 AMG. This definition is in line with the present law. A number of definitions important to the understanding of the terminology of the AMG are to be found in Art. 4 AMG: not only definitions of individual chemical terms, but also of terms

relating to the production method (waiting time, manufacture, quality, batch, and marketing).

(*b*) *Preventive control measures*

149 (*aa*) Like the food law, the law of drugs imposes *prohibitions in connection with powers* to interpret the prohibitions and to grant exceptions.

As the procedure of prior approval was retained, the legislator puts the principle of prohibition as a means of preventive health protection besides regulations on the procedure of prior approval. Harmful drugs may be forbidden, Art. 5 AMG. Harmful according to the definition of the law (Art. 5 AMG) are drugs where there is strong suspicion on the basis of scientific knowledge at any time that, if used as provided, they will have harmful effects exceeding the measure defensible according to the findings of medical science. The suspicion must be substantiated in line with the level of scientific knowledge at any time and must exist when the drug is being marketed[103]. The provision shows at the same time that harmful effects in drugs must be accepted if they are outweighed by their therapeutical value. Since the prohibition exists side by side with the procedure of prior approval, it may only be interpreted as an expression of the responsibility of the manufacturers of drugs. Public discussion about the drug Duogynon shows the problems involved in the constituent facts of 'harmful' and 'sufficient suspicion' very clearly[104].

The use of certain substances or objects in the manufacture of drugs may also be forbidden or restricted by the authority issuing orders, and marketing may be prohibited if the drugs were not manufactured pursuant to these regulations, Art. 6 AMG. This provision serves the consumer's interest in preventive protection against harmful substances endangering his health. In addition to the prohibition pursuant to Art. 5 AMG and the decision on prior approval pursuant to Art. 25 AMG, Art. 6 AMG is important *per se*, because according to the former provisions the dangerousness of individual drugs has to be judged, while under Art. 6 AMG the general danger situation is taken as a criterion[105].

Furthermore, it is forbidden to use and market radioactive substances and drugs treated with ionising rays, Art. 7, para. 1 AMG. Exceptions to this prohibition may be made in the case of radioactive drugs if these are to be used in animals, Art. 7, para. 2. If ionising rays are used in the manufacture of such drugs, exceptions may be approved provided that their use is not harmful to man or animal by the level of medical science.

As far as exceptions are made for radioactive drugs, the authority issuing orders may prescribe channels of trade and packing. Any use of radioactive rays requires that the principles laid down in the Strahlenschutzverordnung (Radiation Protection Order) of 13 October 1976[106] be complied with.

150 (*bb*) Further control is ensured by the fact that the *manufacture* of drugs is *subject to the requirement of licencing*, Arts. 13–20 AMG. Basically, any person who intends to manufacture drugs on a commercial basis for sale to others requires a licence. Who is a manufacturer follows from Art. 4, item 14 AMG. Excepted are: pharmacists, hospital institutions, the veterinarian as regards the manufacture of drugs he sells for use in animals treated by him, the wholesaler for the decanting/bottling, packing or labelling of drugs, unless

packages designed for sale to the consumer are concerned, the retailer who has the expert knowledge (Art. 50 AMG) for decanting/bottling, packing or labelling drugs for direct sale in unchanged form to the consumer. Reasons for denial of a licence to manufacture from which simultaneously follow the pertinent requirements of licensing are set forth under Art. 14 AMG. In accordance with the World Health Organization, a control manager who is independent regarding his responsibility is assigned to the production manager, who used to be solely responsible under public law for compliance with the statutory provisions on manufacture. Both have to have the expert knowledge defined in Art. 15, paras. 1–3 AMG. Proof to that effect is deemed to have been furnished if the person concerned is a registered pharmacist or has a diploma evidencing completed university studies in pharmacology, chemistry, biology and human or veterinary medicine. The latter must in addition command sufficient basic knowledge of a number of specifically listed basic subjects (Art. 18, item 3 AMG). Furthermore, both persons must have done practical work for no less than two years in the area of manufacture or testing of drugs. Owing to the complexity of the testing and manufacture of drugs, it is open to doubt whether practical work as an examiner actually proves the qualification required for the manufacture of drugs. These objections, which were raised by the Bundesrat, were not taken into account in the final wording of the law[107]. The production manager is responsible for compliance with the regulations on trade in drugs, Art. 19, para. 1 AMG. The control manager has to test drugs for the necessary quality, Art. 19, para. 2 AMG. A further requirement for licensing is that the person planning to start operations appoints a sales manager who need not command expert knowledge. He is solely responsible for the marketing of drugs in accordance with legislation and for compliance with the regulations on advertising in the field of medical and therapeutic services, Art. 18, para. 3 AMG. The sales manager may also hold the position of production manager, Art. 15, para. 2, sentence 1 AMG. In enterprises that apply exclusively for a licence to decant/bottle, pack or label drugs or to prepare prepacked drugs from drug premixes, the production manager may perform all three functions.

Further requirements for the grant of a licence are appropriate premises and facilities for the planned manufacture, testing and storage of drugs. The law does not specify what is meant by appropriate premises and facilities. However, the competent authority issuing orders may use its power pursuant to Art. 54, para. 2, item 5 AMG to put the law into more concrete terms.

The licence to manufacture may be limited in time (Art. 16 AMG) and may be withdrawn if afterwards it turns out that a reason for denial existed or came into existence after the licence had been granted, Art. 18 AMG.

The regulations on a licence to manufacture do not apply without restriction to enterprises that had been in existence at the time the AMG came into force. Under Sect. 3 of the transitional regulations under the law of drugs, Arts. 1–4 contain provisions concerning enterprises that have been engaged for some time in the manufacture of drugs. The position of established pharmaceutical enterprises is protected by the licence required under the AMG being simulated as appropriate, Art. 1. However, a simulated licence covers only the scope granted under the former law. Manufacturers of drugs are allowed a period of three years starting from the date the Act enters into force to engage a competent

control manager, Art. 2, para. 1. Moreover, the latter may also hold the position of production manager for another five years, Art. 2, para. 3. Overall, a term of eight years from the entry into force of the Act is planned to be granted for full adjustment to the World Health Organization's directive on the basic rules of manufacture and quality protection of drugs. The sales manager must be appointed within six months. Also the position of those production managers who upon entry into force of the Act had performed that function pursuant to the regulations of the former law of drugs remains unaffected, Art. 4 of the transitional regulations under the AMG.

151 (*cc*) *Control by the establishment of operating regulations* (*Art. 54 AMG*). This regulation is closely connected with the provisions on granting licenses, for it enables the factual and personal requirements (listed in Arts. 13–20 AMG) as to enterprises manufacturing drugs to be extended to the entire field of business organisation. What is initially required is that these be measures that are necessary to ensure regular operations and required quality. The authority issuing orders has broad powers of intervention in the organisation of an enterprise. In addition to regulations on manufacture, testing, storage, packing, maintenance and filing of documents evidencing such business operations, requirements as to personnel, quality of premises and containers, and requirements as to hygienic standards may be made. As regards its substance, the regulatory power under Art. 54 AMG extends far beyond the former Art. 39. Any improvement of health protection through mandatory provisions on business organisation remains an illusion as long as the authority issuing orders fails to exercise its powers. Under Art. 39 only a regulation of relatively minor importance was issued[108]. Regulations under the law of the German Länder exist only in Berlin and Schleswig-Holstein[109].

152 (*dd*) The principal items of the new law of drugs are the provisions on the *procedure of prior approval*, Arts. 21–37 AMG. There are numerous reasons for the introduction of this procedure. The increased incidence of side effects in new drugs, the Thalidomide catastrophe[110], the increase in the consumption of drugs by 400% since 1961 and the setting of standards by the EC have forced the legislator to brush aside his initial objections to state control.

Prepacked drugs are subject to prior approval, and so to a limited extent are veterinary preparations. Prepacked drugs are drugs manufactured in advance and marketed in packages intended for sale to the consumer, Art. 4, para. 1 AMG. The procedure of prior approval is designed in such a way that basically the manufacturer himself has to test the quality, effectiveness and harmlessness of his drug, approval of which he seeks from the Federal Health Authority. To that end he has to enclose with the application, *inter alia*, the following data (Art. 22, para. 1, items 1–15 AMG): the description of the drug, its components, effects, range of application, side effects, reciprocity in regard to other drugs, dosage, limits of non-perishability, and methods of controlling quality as well as the results of analytical, pharmacological/toxicological and clinical examinations, Art. 22, para. 2 AMG. In certain cases the manufacturer may replace the pharmacological/toxicological and analytical examinations by other scientific findings, Art. 22, para. 3 AMG.

Regarding drugs intended for use in animals, the waiting time, established by special residue examinations, must also be specified, Art. 23 AMG. To a certain extent other scientific findings may also be submitted, Art. 23, para. 1, sentence 4 AMG.

Expert opinions summarising and evaluating control methods and test results shall be enclosed with the documents on the results of the various examinations required under Art. 22, paras. 1–3 and Art. 23 AMG. Criteria on which the respective opinions must comment are defined in Art. 24, paras. 1–3 of the Act. Details follow from the notification by the Federal Health Authority concerning the prior approval and registration of drugs of 10 September 1977 and the explanations published thereunder[111].

An application for approval may be refused only if the documents submitted are incomplete, if the drug has not been tested on the basis of the current standards of technology and science or lacks the quality appropriate according to accepted pharmaceutical rules, if the drug lacks the therapeutic effectiveness claimed by the manufacturer or if such effectiveness has not been sufficiently proved by the applicant according to the accepted standards of technology and science, if there is suspicion that the drug upon use as provided produces harmful and not defensible effects, if the waiting time indicated is not sufficient, or if the marketing of the drug would infringe the statutory regulations (Art. 25 AMG). In this context the AMG uses many terms which are not defined precisely (accepted pharmaceutical rules, harmlessness, proof of effectiveness, and standards of science).

The proof of therapeutic effectiveness of a drug to be furnished by the manufacturer was and continues to be a controversial issue under discussion[112]. The opponents of the proof of effectiveness object primarily to the issue of the burden of proof[113]. Since the manufacturer is required to furnish proof, the Federal Health Authority is entitled to decide points of scientific controversy. That amounts to an encroachment upon the freedom of science, which in the final analysis results in a curtailment of the rights of the consumer involved[114]. This view presupposes that the consumer's well-being is better taken care of by the manufacturer of drugs. In actual fact, the procedure of prior approval was introduced because manufacturers of drugs did not always make due allowance for the consumer's health. Criticism is justified inasmuch as the extent to which proofs are accepted or rejected depends on the interests in terms of science or social policy prevailing in the Federal Health Authority. Furthermore, we may assent to the criticism in that shifting of the power to take a decision from the manufacturer to an authority does not in itself ensure improved protection of the consumer's health. All the same, consumers' interests should be better taken care of by the Federal Health Authority. Lastly, and this should not be overlooked, the administrative courts are the last instance to decide about approval. This fact does not alter the problem of the burden of proof, but shifts responsibility from the authority to the judiciary.

Much more serious is another criticism of the proof of effectiveness: it is quite sure that clinical tests as the essential means of furnishing proof are meaningful to a limited extent only[115], but legislation forces manufacturers to furnish proof in that manner. For this reason, strongly objecting legal writers have even been led to argue that a controlled test is punishable[116]. Even if the example given in

support of this thesis is fictitious[117], it must not be overlooked that legislation favours red tape concerning facts and statistics and in the past has left out of account any effects of drugs that were impossible to explain or to examine. Problems concerning proof of effectiveness result also from the plurality of therapeutic methods. Classical medicine and homeopathy, anthroposophical medicine and phytotherapy are in some cases incompatible. If the same requirements of proof of effectiveness were to be made of these types of therapy, a measure of uniformity that would fail to do justice to the different modes of action would be achieved. While drugs contain chemical substances which may produce provable effects, homeopathic remedies are always diluted to such an extent that even trace elements are no longer present in them. The AMG tries to solve that problem by involving a commission of experts whose make-up depends on whether or not a drug requiring a doctor's prescription is concerned (Art. 25, paras. 6 and 7 AMG). While the members of both commissions are appointed by the federal minister at the recommendation of the chambers of therapeutic professions, doctors, dentists, veterinarians, non-medical practitioners and manufacturers of drugs, commissions for specific therapeutic methods may be formed in respect of drugs not requiring a doctor's prescription. Even if the law does not specify the number of members, we are hopeful that in the therapy commissions representatives of a different method will not be outvoted right away. The last instance to take a decision in any case is the Federal Health Authority. It is not bound by the examination results arrived at by the commission, Art. 25, para. 6, sentence 3 and Art. 25, para. 7, sentence 3 AMG. The commissions have not only to deliberate on the requirements as to proof of effectiveness, but also to decide on what is to be understood by standards of medical science, Art. 25, para. 2, items 2, 4 and 5 AMG.

The problems encountered regarding proof of effectiveness resemble those regarding 'standards of medical science'. Standards of medical science are controversial. The authors of the Bill did hold, though, that the authorities shall take account thereof and shall confine themselves to what is uncontested. Rather, the authorities side with one of the parties in a scientific controversy and take decisions which are binding also upon those scientists who take a different point of view. What are the criteria for the authority to go by in assessing standards of science? If different experts express contradictory opinions, the competence and experience of the experts involved might be taken as a criterion. That would be a decision not for reasons of fact, but for reasons of authority. Moreover, guidance by what renowned scientists have tried for years might preclude new drugs from prevailing on the market. Despite these dangers, the Higher Regional Court of Hamm in a decision of 1964 took as a criterion the number and notability of university teachers in a methodological controversy[118]. This is to illustrate the dynamite of the criterion 'standards of science'[119].

Art. 27 AMG dispels doubts about undue delays in the possible use of new drugs by obligating the Federal Health Authority to take a decision on an application for approval within four and in exceptional cases within seven months. In complicated cases that term could be too short and in turn might lead to the rash approval of drugs for fear of claims for damages.

The Federal Health Authority may link approval with present and subsequent *requirements*, Art. 28 AMG. It is obliged to revoke approval on certain condi-

tions, particularly if it turns out that the drug lacks therapeutical effectiveness. Without prejudice to approval under Art. 32 AMG, sera, vaccines and test allergens may be marketed only if the batch concerned has officially been tested and released.

The federal minister's power to exempt certain drugs or groups of drugs from the procedure of prior approval, Art. 36 AMG, may be of considerable practical importance. For the issuance of such a regulation, guiding principles have already been worked out[120]. It will be the objective of that regulation to establish standards for certain prepacked drugs in respect of which effectiveness, harmlessness and quality have been proved; to relieve the competent federal authority of the burden of having to process many individual cases of approval of the same kind; to relieve the entrepreneur of the trouble of having each drug approved individually and of preparing and submitting the documents for approval connected therewith and to contribute to clarity as to the supply of drugs on the market. In the preparation of the regulation, a number of institutions are to participate, *inter alia*, institutions not safeguarding particular interests, such as university institutes and the Arzneimittelprüfdienst München (Munich drug testing service). Consumer representatives are not mentioned. With a regulation worded in such broad terms, the danger of abuse is quite obvious.

Homeopathic drugs which do not require a doctor's prescription have been regulated in a special way (Arts. 38, 39 AMG). They are not subject to the requirement of prior approval, but merely to that of registration. The procedure followed here is largely modelled on the procedure of prior approval; however, here statements regarding effects and fields of application as well as documents and opinions on pharmacological, toxicological and clinical tests are not required.

The changeover from the registration procedure to that of prior approval of 1 January 1978 requires a *transitional regulation* which is provided for in Arts. 5–10 of Sect. 3 AMG.

Special approval in the area of sera and vaccines is simulated if under the present provisions of the law of drugs these drugs were subject to approval, Art. 5. Those cases where upon entry of the Act into force registration in the special register under the AMG 61 had been required are now subject to the procedure of prior approval under the new Act, Art. 6. This applies to all special drugs within the meaning of Art. 4 AMG 61, viz. all drugs whose composition is always the same and which are marketed with special descriptions in packages ready for sale. That in itself very strict and far-reaching regulation is ignored in some cases (Arts. 7–10). Special regulations apply primarily to prepacked drugs which at the same time are drugs within the meaning of Art. 2, para. 1 or para. 2, item 1 AMG, Art. 4, para. 1. The extent to which such drugs are exempted from the regulations on prior approval under the AMG is contingent upon the time of marketing. If the drug is on the market *on the day of promulgation* of the new Act or if an application for registration in the speciality register has then been filed, the drug is considered to have been approved (Art. 7, para. 1), however, within six months of the coming into force of the new Act a description of effective components and fields of application must be reported to the Federal Health Authority. The approval of a drug

reported within the period prescribed expires only 12 years after the coming into force of the Act. If, however, an application for registration of a drug in the speciality register was filed only *after promulgation* of the Act and if the application is granted prior to the Act coming into force, the drug is considered to have been approved if it is on the market when the Act comes into force, Art. 8. Approval is limited to a period of six months; thereafter the manufacturer has to file an application for approval pursuant to Arts. 20 et seq., AMG.

Where drugs are prepared in a pharmacy and dispensed by it to the consumer, such drugs may be marketed without approval for another five years after the coming into force of the Act, Art. 10.

153 (*ee*) As the clinical test was made a prerequisite for approval, it is also necessary to regulate the *conduct of clinical tests* in order adequately to protect the group of test persons (Arts. 40–42 AMG). The necessary protection of test persons must be weighed against the interest in developing new drugs. Basically, the Act distinguishes between test persons who are healthy, that is do not suffer from any disease the drug is meant to fight, and persons suffering from a disease which the drug in question is meant to cure. A special regulation exists for minors, Art. 40, para. 4 AMG. The first requirement for a clinical test in persons belonging to the first group is that the test be defensible from a medical point of view. The test person must be informed about the nature, importance and implications of the clinical test and must be able to judge the matter. Consent may only be given personally and in writing. Further requirements relate to the physician conducting the test. Drugs may be tested in minors only if it is necessary to diagnose or prevent (not fight) diseases occurring only in minors. The necessary consent is given by the legal representative or guardian and if the minor is capable of judgment, he must give his consent in writing. If a drug is tested in a patient whose disease is to be cured by the drug, there must in addition be an indication for use of the drug to be tested. A test may also be conducted in patients incapable to contract if the legal representative has given his consent. Consent may be dispensed with if the test serves to save the patient's life or to restore his health and the patient does not seem to object, Art. 41, item 7 AMG. This exception is worded in too broad a manner and should be restricted to cases where there is actual danger to life.

The regulations do not apply where a drug is being tested which has already been approved or which does not require approval, Art. 42 AMG.

154 (*ff*) There are also regulations on *who may act as drug salesman* (Arts. 43–54 AMG). Drugs within the meaning of Art. 2, para. 1 or para. 2, item 1 AMG may be sold only by retail in pharmacies. Drugs intended exclusively for purposes other than the cure or alleviation of diseases, Art. 44, are not subject to sale by pharmacists only. Among these range artificial and natural mineral, medicinal and sea waters, healing earth, mud baths, plants and parts of plants, plaster and dressings for burns. Pursuant to Art. 45 AMG, the authority issuing orders may exempt other drugs from the requirement of sale by pharmacists only.

The channel of distribution for drugs subject to sale by pharmacists only is regulated as follows (Art. 47 AMG): manufacturers and wholesalers may

dispense them, in addition to pharmacies, for instance, only to other manufacturers and wholesalers, to a limited extent to hospitals and doctors, and to veterinary authorities and veterinarians.

The requirement of prescription of drugs is embodied in Arts. 48 and 49 AMG. Special regulations on retail trade, sale through peddling, prohibition of self-service and hearing of experts are to be found in the provisions of Arts. 50–53 AMG. We shall not go into details of the channels of distribution, but will point out the following: by far the majority of drugs is bought in pharmacies. The involvement of pharmacies as an intermediate agency between patient and doctor originally served the purpose of protecting the consumer against questionable decisions by doctors. Such control was ensured as long as the pharmacist prepared drugs himself and therefore knew their composition and was able roughly to judge their effects. Nowadays, the pharmacy is increasingly developing into a mere retail outlet of large-scale industry, so the appropriate regulations safeguard primarily the pharmacists' position, i.e. serve their professional interests, while additional protection of the consumer against dangerous drugs is more and more on the wane[121].

155 (*gg*) The *Pharmacopoeia* is a compilation of accepted rules on the quality, testing, storage, sale and description of drugs (Art. 55 AMG), and also contains requirements as to the nature of containers and wrappings. The rules laid down in the Pharmacopoeia are *legally binding* upon manufacturers of drugs. This is an important feature distinguishing the Pharmacopoeia from the Food Codex. The effect of the Pharmacopoeia must therefore be rated much higher, for in the event of infringements manufacturers are liable to punishment, Art. 97, item 16 AMG. Consequently, it may be assumed that manufacturers comply with the German Pharmacopoeia, which thus serves to avoid dangers to health.

The competent authority issuing orders may amend or supplement the Pharmacopoeia according to the standards of science and technology at any time. As far as this goes, the former regulation is retained as provided for in Art. 5 AMG 61 which the Government had intended to abolish in favour of a more practicable solution[122].

156 (*hh*) To avoid direct or indirect risks to human or animal health the competent federal superior authority has to *record and evaluate centrally* the risks that may occur in the use of drugs, particularly side effects and reciprocity in regard to other drugs, and has to coordinate measures to be taken; this is laid down in Art. 62 AMG. The central recording of such matters may be regarded as a direct outgrowth of the Thalidomide catastrophe, for in that case failure to pass on suspicious facts about side effects resulted in consumers and doctors not having been informed appropriately and in time[123]. The passing-on of information presupposes, though, that the Federal Health Authority obtains such information in the first place. That is the decisive problem encountered in the establishment of a recording agency. The Act does not say anything about how it intends to make manufacturers, doctors and consumers report risks that occur. As regards doctors, the legislator is hopeful that their professional organisations will take action by establishing a drug commission[124]. True, the authority issuing orders may issue a phased plan for the performance of functions incumbent upon the

recording agency (Art. 63 AMG), but regulations on a duty to notify are not envisaged here, either. For the issuance of a general administrative regulation, the competent federal ministry has meanwhile submitted guiding principles entitled 'System to Record Drug Risks'[125].

(*c*) *Retrospective control measures*

157 (*aa*) The control of regulations under the law of drugs is of great importance to the consumer, for the best prohibitory legislation or procedures of prior approval offer optimum safety only if compliance with them is controlled. It was here that in the past the system showed great deficiencies[126]. The new Drugs Act is designed to improve the control of trade in drugs. The uniform *control* of pharmacies by the competent control authorities serves that purpose. The respective provisions of the Gesetz über das Apothekerwesen (Act on Pharmaceutical Service), Arts. 18, 19, 25, para. 1, item 3 are superseded by Art. 9, item 6 AMG. Furthermore, the control organs' powers were extended and consequently an extension of the control authorities became necessary. The control regulations conform to the respective regulations under food law and anticipate the transformation of Arts. 16 and 17 of the 2. Pharmazeutische EG-Richtlinie (Second Pharmaceuticals EC Directive)[127].

The German Länder are in charge of implementing the law of drugs. They do not have a uniform authority[128]. Unlike the LMG, the AMG does not give the authority issuing orders powers enabling implementing regulations to be made. Only Art. 68 AMG imposes on the respective Land and federal authorities the obligation to render reciprocal administrative assistance.

Every two years the competent authorities have to perform inspections and have drug samples officially examined, Art. 64, para. 3 AMG. Within the scope of their constitutional competence to implement the law, the Land authorities may at any time make general regulations on the method of sampling and give instructions to the persons charged with inspection. The persons entrusted with control must perform these functions in a professional capacity. Unlike the food law (cf. Art. 61, para. 2 LMG), special training is not required. Therefore it is the task of the authorities to determine the necessary expert knowledge. In case of imminent danger any police enforcement officer may take the necessary measures to avoid dangers to the general public or to an individual[129].

The powers of the competent Land officials are enumerated in Art. 64, para. 4: (1) entry to properties, offices and business premises during normal business hours; (2) inspection inside and usually to some extent also outside these premises; (3) further rights of entry to living accommodation to avoid imminent danger; (4) inspection of business records and drawing of samples; (5) access to all necessary information. The respective rights are similar to those granted under food law. For that reason, reference may be made to them.

As regards details, there are some peculiarities. The AMG permits entry even in case of imminent danger only during normal business hours, an absurd regulation: the legislator acts as if dangers occur only during business hours. Like the LMBG, the AMG exempts manufacturing specifications from the right of inspection. In this context an interpretation doing justice to all interests

requires that at least the right to information be extended to include manufacturing specifications.

The powers to draw samples, Art. 65 AMG, correspond to the regulation under Art. 42 LMBG.

The competent Land authorities must give necessary *orders* to inspect *violations* that have been ascertained and avoid future violations, Art. 69 AMG. The measures referring to a violation of the law are of preventive importance for the future only. For that reason they are preventive control measures to a limited extent only. However, as compared with the former regulation, the scope has been extended in that now marketing may already be forbidden in the case of danger to an individual and not as in the past to the general public. The authorities may put drugs in safekeeping, forbid their marketing or order their recall if they have not been approved as required, if the drug is not of the appropriate quality, if it lacks therapeutical effectiveness, if harmful side effects are suspected, if the prescribed quality controls have not been performed or if the required licence to manufacture drugs has not been obtained.

158 (*bb*) Like the LMBG, the AMG *sanctions* a great number of breaches of duty by imprisonment or fines. The distinction made between punishable acts and administrative offences and the degree of punishment is identical in both Acts. The AMG is stricter in two ways, because imprisonment for a term between one and ten years may be imposed on particularly severely punishable acts and *all* administrative offences may be punished by a fine of up to DM 50 000. The provision that violations of the general clause of Art. 5 as well as of the principles laid down in Arts. 6 and 7 are punished the most severely is identical under the LMBG and AMG. It is astonishing that infringements of the duties to be fulfilled in the procedure of prior approval do not belong here. Such breaches of duty may even constitute a mere administrative offence if they were committed negligently. We shall not go into the details of the regulations, since the provisions under Arts. 95–97 AMG are very involved.

5 Control of technical labour materials

159 The intention of the GSG is to increase the prevention of industrial accidents and to fight accident hazards in the household.

(*a*) *Definition*

160 Technical labour materials are *ready-for-use* working equipment, above all tools, implements, processing machines and engines, lifting apparatus and conveyors as well as means of transportation, cf. Art. 2, para. 1 GSG. According to the legal definition, ready-for-use working equipment is equipment that may be used for its intended purpose without the addition of further parts. In this respect the bill by the Bundestag (Federal Diet) of 29 August 1977 also provided for an extension of the scope of the Act to include parts of working equipment which usually have to be procured separately and when used as provided have to be fitted in[130], such as machine tools, drills, grinding disks and spare parts. In the Act Amending the Gesetz über technische Arbeitsmittel

of 13 August 1979[131] (henceforth called Gerätesicherheitsgesetz, GSG) that extension has been omitted. Therefore Art. 2, para. 1 GSG is retained in its old version. The GSG also applies to household appliances, athletic implements and amateur handicraft equipment and to toys (Art. 2, para. 2, item 3 and 4 GSG). Beyond the reach of the Act are household appliances coming under entertainment electronics (stereo sets and the like).

(*b*) *Preventive control by self-regulatory measures of industry*

161 The *manufacturer* or *importer* of technical labour materials may market such materials only if according to the generally accepted standards of technology they are so constituted that users or third parties are protected against dangers to their life and limb as far as that is possible in the intended use, Art. 3, para. 1 GSG. The bill of 29 August 1977 provided for an extension of that duty to *suppliers*. The reasons given for the proposal for amendment were the interest in increased control of the enforcement of the law and improved protection of the consumer[132]. The bill that eventually became law did not consider that reform proposal. The above-mentioned duty incumbent on the groups of persons concerned includes a restriction of importance to the consumer. He is protected only as far as is permitted by the type of intended use. Intended use is use for which the working equipment is suitable according to the manufacturer's or importer's specifications or, particularly, advertising, and customary use is use following from the construction and design of technical labour materials (Art. 2 GSG). For that reason, foreseeable misuse by the consumer comes within the scope of intended use. The Act does not regulate 'generally accepted standards of technology'. From the administrative regulation issued under Art. 11[133] it follows that the legislator equates technical standards established by industry with the generally accepted standards of technology. This amounts to statutory recognition that trade associations determine the safety of technical labour materials themselves.

(*aa*) Technical standards are technical specifications or regulations governing the manufacture or installation, nature or description, and application or use of objects. Objects may be corporeal things as well as processes or reactions[134]. They serve rationalisation and the safeguarding of safety and quality in all spheres of life. They include technical, economic, scientific, social and regulatory characteristics. We speak of standardisation above single-enterprise level if standards are established by associations for a great number of enterprises. Important standardisation organisations in the Federal Republic today are the Deutsche Institut für Normung e.V., the Verein Deutscher Ingenieure, the Verband Deutscher Elektrotechniker and the Deutsche Verein von Gas- und Wasserfachmännern. In addition to these, there are a number of other associations. A general survey of all organisations does not exist.

As technical standards are established merely by private associations they are *not original legal rules*; all the same, they are of great practical importance[135]. While manufacturers are not bound to comply with these standards, they often make the mistake of believing that technical standards are binding. Pressure is also exerted by the state, which often makes the awarding of contracts contin-

gent upon compliance with existing technical standards. The importance of standardisation to the consumer lies in the fact that there is a growing trend towards standardisation of consumer goods. This is again and again pointed out to the consumer by governmental agencies. And for that reason the state is decisively instrumental in the consumer equating the label of technical standardisation with satisfactory quality and safety.

(*bb*) *How a technical standard is established* will be briefly described on the basis of the activity pursued by the Deutsche Institut zur Normgebung e.V. (DIN) (German Institute for Standardisation). The DIN is the most important organisation for standardisation. With effect from 1 September 1975, the DIN received its present name. That same year, i.e. 6 May 1975, the Federal Government made a contract with the DIN regulating their relationship to each other. Under that contract the Federal Government recognised the DIN as the national organisation for standardisation. The contract at the same time includes skeleton terms governing the rights and duties of the contracting parties. Pursuant thereto, the Government is granted seats in the managing body, without the majority ratio being impaired thereby. Practically speaking, the contract amounts to governmental recognition of the self-regulation of industry[137]. Under Art. 1 of the effective by-laws of 20 April 1975, the DIN in a cooperative effort with interested groups establishes standards for the benefit of the general public (that is, its conception of itself). A distinction must be made between the general DIN label and the DIN tested label. The former only indicates whether according to the manufacturer the product complies with existing DIN standards. The 'DIN tested' label, which was introduced in 1972, means that the product has been tested by a testing agency (Standards Testing Agency) and is subject to regular control[138]. Enterprises and legal persons may be members of the DIN, but neither governmental institutions nor consumer organisations. As regards its organisational structure, the DIN comprises the members' meeting, a president, a director and standardisation committees. On 1 January 1975 the presiding board included 37 members, 22 thereof coming from industry. The specialised committees (Fachausschüsse) which make up the standardisation committees (Normungsausschüsse) are in charge of standardisation proper[139]. The honorary members of the committees are experts from the groups of those interested (user, authority, trade cooperative association, university, handicraft, manufacturer, testing industry, property insurance company, and consumer) who shall be represented in the committees in an appropriate ratio to one another. In actual fact, manufacturers are usually decisively predominant[140]. In the case of disputes concerning committee make-up, the managing body will decide.

According to the by-laws, any person may apply for initiation of the standardisation procedure, but in practice this is usually done by industry. The proposal drafted by the relevant specialised committee is submitted for review to the Standards Testing Agency, which then releases the respective standards for publication.

The Standards Testing Agency comprises 20 honorary members, 13 thereof belonging to large-scale industry. This predominance makes it possible for enterprises to fix the contents of DIN standards by agreement among themselves

prior to the specialised committees taking up their activities at all. Technical standardisation proper then takes place in the conference rooms of large-scale industry[141].

The entire procedure is open to serious doubt as to whether the established standards actually serve the general public. Since the interested industry practically binds itself without any control, it is suspected that often economic interests play a more prominent part than safety, which the DIN label is said to ensure. Moreover, a great number of standards are obsolete, so it cannot be assumed that DIN standards always reflect the latest level of technology.

Consumer associations are represented in the respective standardisation committees[142]. Because of the committees' make-up their proposals do not carry weight. In the mid-sixties, consumer under-representation resulted in the establishment of the Committee for Fitness for Use attached to the DIN which was to incorporate consumer interests in the standardisation activity. It was the task of that Committee to work increasingly towards requirements relevant to consumers being established by way of standards, and to organise consumer representation in the various specialised committees. The Committee comprised representatives of industry, the state and consumers on a par basis. Because of its make-up the Committee was unable to fulfil its coordination function. In 1974, the Consumer Advisory Council[143], attached directly to the DIN managing body, took over that function. The advisory board comprises five members, one representative each of the AGV (Association of Consumers), Stiftung Warentest, Bundesanstalt für Materialprüfung (Federal Institution for Materials Testing) and the Ministry of Economics, and one independent person. The advisory board does not establish standards, nor does it represent an interested group in specialised committees. It performs exclusively functions of coordination. It has to render relevant assistance to the representatives of final consumers by counseling and giving advice.

The situation described in the case of the DIN may serve as an example of all the other standardisation organisations. The entire field of technical standards is controlled by industry. As far as consumer organisations participate, they do not jeopardise powers of decision. Therefore the consumers' interests are practically ignored in standardisation. There are no efforts to change this state of affairs through legislation.

(*cc*) It should be pointed out that supplier interests also influence the implementation of the GSG, as the Committee for Technical Labour Materials attached to the Federal Minister of Labour under Art. 8 GSG shall advise the Minister concerning the implementation of the law and make recommendations. The Committee is firmly controlled by manufacturers: they have more seats than employees and consumers jointly[144]. Even if the Committee has only an advisory function, its make-up shows how insignificant the state's and the consumer's influence are in the field of technical standardisation.

(*c*) *Areas of state control*

162 (*aa*) Basically, there is no state control in the *preventive* area of *standardisation*. Only by way of exception may the state intervene in a regulatory way if

there are no technical standards; it is authorised to that effect under Art. 4, para. 2 GSG. The competent agency has not so far made use of its regulatory power. As far as the respective requirements (also defined in Art. 4, para. 2) actually exist in a particular case, a different method is used: the competent German Land government officials prepare safety directives, which serve as a basis for orders of prohibition and are later adopted by standardisation institutions[145]. Under Art. 8a, which was inserted by legislation of 13 August 1979, the Federal Minister of Labour may direct, following a complicated procedure governing the issuance of statutory orders, that medical apparatus may be marketed or exhibited only if so required for the purpose of protection against danger under Art. 3 GSG. In seven items, Art. 8a regulates the factors to be considered in a statutory order. So far the powers have not been used.

The state's main function under the GSG is to check whether *manufacturers* comply with the *established standards of technology*. That function is exercised by the industrial inspection boards of the Länder governments. The authorities' powers are contained in Arts. 5 and 7 GSG and in the Administrative Regulation of 27 October 1970 issued under Art. 11 GSG[146]. The authorities have *powers to take official action* to a limited extent only. Thus it is not the task of inspection boards to test the approximately 180 000 apparatuses appearing on the market every year for their compliance with the generally accepted standards of technology. Industrial inspection boards may only control products endangering safety on a preventive basis, Art. 5, para. 1 GSG. These are measures taken by the authorities before an injury or danger has become known. A striking feature is that the Act and the Administrative Regulation do not go into further details regarding such general power of control. In actual fact, the authorities can fulfil their obligations in a very inadequate way only because they lack the necessary funds[147].

(*bb*) *In the area of retrospective control*, the legislator concerned himself where the need was greatest with regulating the powers of industrial inspection boards in cases where damage has occurred or where there is a threat of damage. Therefore it is obvious that the GSG does not aim at comprehensive control but takes effect only at certain points where there is a danger to health. Thus the competent industrial inspection board may take action under Art. 1 of the Administrative Regulation either if an accident connected with the condition of a technical labour material has occurred or if the board is informed about the insufficient safety of a product by, for instance, the Stiftung Warentest. Some of the German Länder governments even provide for the possibility of taking action only in case of an accident[148]. In this manner the consumer's protection is considerably limited[149]. In practice, measures are often taken only after accidents have occurred[150]. If an industrial inspection board becomes active, it must ascertain whether the product complies with the established standards of technology (Art. 2, para. 1, item 1 of the Implementing Order). In the case of DIN and VDE standards, the authority must base its considerations thereon (Art. 3, para. 1 of the Order). The authority may do without an examination under Art. 2 GSG if a test certificate by an accepted testing agency is available for the product. In addition to the official organisations, such testing agencies are above all the DIN and the institutions of the VDE and DVGWV. The

authority's powers are considerably limited by the fact that it equates the accepted standards of technology with the DIN standards. Apart therefrom, the industrial inspection board must check whether the manufacturer complied with the effective industrial safety regulations and accident prevention regulations, Art. 8, para. 1, items 2–4 of the Order. If the competent authority is not in a position to judge whether the technical labour material complies with the requirements mentioned in Art. 2, it may ask for information and other assistance necessary in the performance of its functions, Art. 7, para. 1 GSG. As far as is necessary, the authority may demand that the manufacturer or importer should have the technical labour material tested, Art. 7, para. 1, sentence 3. The expert shall be appointed by mutual consent, Art. 5, sentence 2 of the Administrative Regulation. Moreover, the competent officials (pursuant to Art. 7, para. 2 GSG) may enter premises or properties in or on which technical labour materials are manufactured, inspect and test such materials, and in particular conduct tests in the manufacturing plant. If, considering these principles, the competent authority comes to the conclusion that the material fails to comply with the respective requirements, it may take the necessary measures to prevent marketing or exhibition of the product tested. The most drastic means is the order of prohibition (Untersagungsverfügung) pursuant to Art. 5, para. 1, sentences 2 and 3 GSG. Since the Act came into force, about 400 orders of prohibition have been issued, which is little indication of the effectiveness of the industrial inspection boards' activity[151]. The Act of 13 August 1979 considerably extended the group of those to whom an order of prohibition may be issued. Industrial inspection boards may now also take action against organisers of fairs (Art. 5, para. 1, sentence 2) and against suppliers (Art. 5, para. 3); however, this is only a subsidiary possibility — organisers of fairs may be forbidden to market or exhibit dangerous products only if the manufacturer or importer concerned cannot be identified. As regards suppliers, the requirements are even stricter: an order of prohibition is admissible only if the manufacturer or importer had previously been forbidden to market the product concerned *and* the supplier, despite his knowledge of the order of prohibition, does not make use of his right to return the defective product. The bill of 29 August 1977 did not provide for such a graded responsibility. It stands to reason that the merely subsidiary responsibility, particularly on the part of the supplier, cannot be in the interest of effective consumer protection.

The authorities do not have further powers to take official action, for instance to recall dangerous products. Products are recalled by manufacturers, if at all. Apart from industrial inspection boards, the Stiftung Warentest and the ADAC may exert indirect pressure. The latter in some cases enters into direct negotiations with the manufacturer concerned to bring about a recall. In the final analysis threatening claims for damages by injured consumers should be crucial for the recall of a product.

(*cc*) As far as the manufacturer or importer wilfully or by gross negligence *contravenes* an order of prohibition or any other measure within the meaning of Art. 5, para. 1 GSG or *infringes his obligations* under Art. 7 GSG, he may be fined up to DM 50 000 in the case of Art. 5 GSG and up to DM 1000 in the case of Arts. 7, 9 and 10 GSG. However, punishment is also incurred by the compe-

tent officials of industrial inspection boards who disclose a trade or business secret entrusted to them in their capacity as official persons. The punishment is up to one year imprisonment, in grave cases up to two years imprisonment and/or a fine.

6 Control of imported goods

163 All imported goods are subject to German law if they are marketed in the Federal Republic of Germany. Import control serves the purpose of additional examination, which may be exercised in such a way that certain goods must not be imported in the first place. It can also be imagined that the import of goods is made contingent on the fulfilment of certain requirements.

The *Außenwirtschaftsgesetz* (AWG) (Foreign Trade and Payments Act) is concerned with the *import of goods*. Basically, this Act regulates trade relations between the Federal Republic and countries outside Germany. As far as the import of goods is concerned, the subject matter of the Act coincides with international regulations under the Allgemeines Zoll- und Handelsabkommen (General Agreement on Tariffs and Trade, GATT)[152]. Accordingly, the AWG (Art. 10) lays down the principle of free import of goods by residents, as far as this follows from the import list which is announced in the Federal Journal as an Annex to Art. 10 AWG as amended[153]. Limitations on free import are possible only to protect the German economy or superior security interests. Consumer expectations do not play a part here. The import list specifies the requirements residents have to meet for the import of goods and names the governmental agencies responsible for examination, licences, etc. The list is subdivided in such a way that it follows from the respective columns:

- within whose scope of responsibility the commodity comes: Federal Minister of Food, Agriculture and Forestry and Foreign Trade Agency for Food and Agricultural Commodities, or Federal Minister for Economic Affairs and Federal Office for Trade and Industry:
- whether import is exempted from licensing or subject to licensing, with exemption from licensing applying in case the country of purchase and the country of origin are specified in country lists A, B or C;
- whether further regulations must be observed upon import, particularly whether the commodity involved is subject to market regulating laws or whether upon import a certificate of origin has to be produced.

Certificates of origin are documents identifying a commodity by type, quantity, and the like and certifying its origin by an authorised agency[155]. Such certificates need not necessarily include qualitative statements.

The situation is different as regards market regulating laws and other regulations imposing requirements on the importer. These statutory regulations go beyond the general control of goods import ensured by the AWG which protects indirectly also the consumer's need for safety. Some of them regulate limitations on trade in goods, so-called *market regulating acts*[156]:

- Gesetz über den Verkehr mit Zucker (Act on Trade in Sugar)
- Gesetz über den Verkehr mit Getreide und Futtermitteln (Act on Trade in Grain and Feedstuff)

— Gesetz über den Verkehr mit Vieh und Fleisch (Act on Trade in Cattle and Meat)
— Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fleisch (Act on Trade in Milk, Milk Products and Meat).
— Gesetz über den Verkehr mit Hähnchenfleisch (Act on Trade in Chicken Meat)

Some of these *acts* were enacted for the *protection of human health* and therefore limit the import of goods[157]:

— Viehseuchengesetz (Act concerning Epizootic Diseases)
— Arzneimittelgesetz (Drugs Act)
— Lebensmittelgesetz (Food Act)
— Gerätesicherheitsgesetz (Act on Safety of Appliances)

Art. 147 LMG, just as Art. 73 AMG, include bans on imports of foodstuffs and drugs not complying with the substantive German law in force. That is to ensure *preventive* protection of the German consumer.

The ban as such does not, of course, ensure that importers comply with the German regulations in force. That is why the *control of bans on imports of goods* is of decisive importance. The legislator has realised this weak point. Control will now be improved by a greater involvement of customs offices in the control activity[158]. Arts. 48, 49 LMBG and Art. 74 AMG include enabling provisions permitting statutory orders to be issued which regulate cooperation between the control authorities of the German Länder and customs offices and the customs offices' powers to take action[159]. In addition, a regulatory power with respect to certain foodstuffs has also been included, Art. 49 LMBG. Pursuant thereto, import may be made contingent upon recognition of the manufacturing enterprise, notification to or production before the competent food inspection authority, and examination or production of an official test certificate. At the same time it may be ordered that these foodstuffs be imported only via certain customs offices. The powers to take action provided under the respective articles, which are applicable irrespective of the statutory regulations, do not suffice to afford effective protection. The statutory orders described above are therefore urgently needed to put into practice the desired improvement of import control[160].

The GSG equates importers with manufacturers of *technical labour materials* (Art. 3, para. 1 GSG). Like the manufacturer, he must obey the rules of technology accepted in the Federal Republic of Germany (No. 179).

If importers of foodstuffs or drugs violate their duties, they *incur a penalty* as well. Those concerned must expect to be fined up to the amount of DM 25 000 under the LMBG and imprisoned up to one year under the AMG.

In addition to national legislation, *interstate agreements* regulating the import of goods must be obeyed[161]. Upon import, importers must obey such agreements if the legislative bodies have agreed to them in the form of a federal act, Art. 59, para. 2, sentence 1 EC Treaty. Among these range the treaties on the Europäische Wirtschaftsgemeinschaft (EWG, European Economic Community, now EC), on the Europäische Gemeinschaft für Kohle und Stahl (Montanunion, European Coal and Steel Community) and on the Europäische Atomgemeinschaft (Euratom, European Atomic Energy Community). Such

agreements are made essentially for economic purposes. Consumer protection is more and more emphasised as is shown by the first EC Programme on a Policy of Consumer Protection and Information, of 14 April 1975. The protection of the consumer's health and safety is a special item of the Programme to be achieved by increased administrative measures of a preventive nature[162].

The significance of the EC Treaty has recently been underlined by a decision passed by the European Court of Justice[163]. The Court had to interpret the subject matter and scope of Art. 30 under which quantitative limitations on imports or measures having equivalent effect are forbidden. In the initial proceedings a Dutch trader had been charged with having infringed Dutch health regulations when importing drugs from Great Britain because he had lacked the accompanying documents necessary for import. The Court found an infringement of Art. 30 EC Treaty, because the licensing procedure meant an insurmountable obstacle to importers for their lack of power of disposition of the necessary documents. This does not forbid all licensing procedures in general. Rather, the requirements must be such that importers — even if they have to incur additional expenditure — can meet them. Current practice of the Federal Health Authority definitely does not infringe Art. 30 EC Treaty. From the point of view of consumer policy it must rather be criticised for not ensuring sufficient examination[164].

7 Summary

164 The above study focused on a presentation of the various wordings of the law and powers to take official action granted to the authorities. To sum up, we may say that the AMG, LMBG and GSG, at least as regards their wording, have considerably improved the consumer's protection against unsafe technical labour materials and against drugs and foodstuffs dangerous to health. Whether the great legislative objectives have been realised will be proved only by effective implementation of the Acts. Such implementation is not ensured by any of the said Acts. As far as the Acts include regulatory powers for the issue of preventive orders, we may note throughout that these powers are not being exercised. Without orders putting the Acts into concrete terms — here we are thinking primarily of the AMG and LMBG — such Acts are devoid of meaning. While the general clauses thereunder do contain pleasing declarations of intention by the legislator, they are of no benefit to the consumer. There are many reasons why the Federal Government or the competent federal ministers do not exhaust their regulatory powers. Firstly, it must be taken into account that before individual orders are issued comprehensive scientific examinations must be made in the specialised field involved. Of still greater importance should be the aspect that any issuance of an order is preceded by a general weighing of interests. Since in the final analysis any order entails costs — either in the form of an increase in budgetary expenditure owing to increased requirements of administrative personnel, or in the form of a rise in product prices owing to an increase in the prime cost — its issuance is hard to justify in the present economic and political climate.

Implementation of the said legislation is characterised by yet another deficiency: it is not sufficiently ensured that the competent supervisory authorities

control compliance with the laws and orders issued thereunder. The food inspection authorities of the German Länder, the industrial inspection boards and the Federal Health Authority are not in a position to exercise the many functions assigned to them. The authorities lack both the personnel and the technical equipment to control and enforce the laws. Overall, the consumer's *preventive* protection has been neglected — true, this type of protection requires the greatest expenditure, e.g. regular controls of enterprises. The authorities intervene mostly in a *retrospective* way, that is only after damage has already occurred. For this reason the consumer may expect at best to be protected in future. As long as the authorities, for fear of possible claims for damages by trade and industry for conduct detrimental to their business, fail to bring before the public, with a view to warning it, measures they have taken or results they have achieved by way of negotiation[165], the consumer's protection against dangers *already* known will never get past the rudiments.

It is not the task of this study to explain why the effective enforcement of control measures laid down by legislation is so deficient. We should note that in other areas of consumer legislation the poor powers invested in the executive are a bar to radical changes. As long as this state of affairs remains unchanged, consumer protection legislation has only an alibi function. The government is able to say that it stands up for the consumer's interests. The lack of enforcement then precludes an offence of trade and industry by the government. Consumer organisations must intensify their efforts at achieving the enforcement of legislation. As long as this problem has not been solved in favour of the consumer, it is not very sensible to keep calling for new legislation. This applies, of course, only to legislation which to become effective requires state control. On the background of these problems we shall give a brief survey of the existing loopholes in legislation.

In the *food law* these loopholes consist mainly in the lack of appropriate regulations. As long as the law has not been supplemented by regulations, detailed comments are impossible. The same applies to the *law of drugs*. We regret to say that in amending the law of drugs the legislator did not take occasion to fight the flow of drugs more vigorously. Control that obliges the manufacturer to prove the harmlessness of a product may serve to check that flow somewhat, but it will not make the state of the drug market easier for the consumer to grasp. The *GSG* continues in force in its old version. Industrial inspection boards are, however, overtaxed by the functions assigned to them under that Act. All the same the powers granted are insufficient. Beyond the order of prohibition concerning continued marketing which has been imposed on manufacturers, the GSG does not enable the authorities involved to take action *directly* against suppliers. This merely secondary possibility of taking action implies the danger that in the Federal Republic of Germany there remain a thousand and one dangerous products on sale[166]. Furthermore, the Act must be criticised in that it does not include the area of entertainment electronics, although also these products involve dangers (household fires and electric shocks). Parts of working equipment are also excluded. Industry even fails to exercise due self-regulation as provided by law. For many devices there are no standards (e.g. skate boards)[167], DIN standards are unsatisfactory[168], or standardisation begins too late (for skis and skiing accessories only in 1972, for

skin diving equipment only in 1973). There is great uncertainty for the consumer as to which label means what. A first step towards standardisation to combat the confusion of labels has been made by the introduction of the new GS — geprüfte Sicherheit (tested safety) label; all testing agencies, including since 1 January 1978 the VDE testing agency, have declared their willingness to the Federal Ministry of Labour to adopt the new GS safety label, so that the introduction of a uniform safety label in the Federal Republic may be considered successful[169]. On the mediation committee's (Vermittlungsausschuß) initiative, this regulation was included in the Act of 13 August 1979[170]. Even if industry were to remedy all the deficiencies enumerated, two basic deficiencies would continue to exist: government and consumers do not adequately participate in standardisation, and — which may perhaps be more serious — even if participation were envisaged, the fact remains that manufacturers, importers and soon possibly also traders need not comply with the standards they established in a joint effort, since under Art. 3, para. 1 GSG they may prove safety also in a different manner. In this context the question is bound to arise of whether or not technical labour materials should be subject to state control as regards standardisation. However, that question will be put in theory only, since in the Federal Republic no efforts to change the present state of affairs are identifiable as yet. In the light of the difficulties of state control described above, caution is in any case advisable as regards the demand for more state control.

IV CIVIL LIABILITY FOR SAFETY OF PRODUCTS

1 The manufacturer's liability under German law

165 The *manufacturer* is responsible for the safety of products. He controls the production process and by using appropriate technical means may influence the safety of the product to be manufactured. By comparison, the *seller* of the product is responsible to the consumer primarily for fitness for use (No. 128).

166 (*aa*) There are no general regulations under German law on the manufacturer's liability. In addition to the system of the Civil Code, there exists in some cases special legislation which gives rise to strict liability on the part of the manufacturer[171]. If these exceptions are left out of account, either Art. 823 Civil Code — that is, liability for fault — or provisions under special legislation are applicable. However, as early as 1908[172] the Reich Supreme Court rejected the analogous application of regulations on strict liability arguing that such liability was an exception to the general principle of liability for fault which did not admit of analogy. The Federal High Court has continued that practice[173]. Thus the manufacturer's liability has been shifted to the scope of liability for fault under Art. 823 Civil Code. Yet the result of the increasing mechanisation of industrial production was that the injured party who had to prove all requirements of Art. 823 Civil Code encountered more and more difficulties in proving the manufacturer's fault in the making of a product that caused damage. Moreover, the entrepreneur had the possibility of furnishing exculpatory evidence pursuant to Art. 831 Civil Code and could thus pass liability on to the

individual worker. The result of that situation was that since the beginning of the sixties legal writers have criticised liability for fault on the part of the manufacturer under Art. 823 Civil Code as being unreasonable and unjust. The discussion reached its climax on the occasion of the 47th Deutscher Juristentag (German Lawyers' Assembly) (1968)[174]. To solve the problem it was suggested that because of the special legal relationship between manufacturer and injured party the manufacturer should be liable irrespective of fault[175]. Other authors tried to justify the analogous application of regulations under the law of contract[176]. In its chicken-pest decision[177] the Federal Court has definitely rejected all attempts at making the manufacturer liable irrespective of fault through contractual or quasi-contractual devices. In that same decision the Federal High Court has set forth that the manufacturer's liability is conceivable only within the scope of Art. 823 Civil Code. However, the Federal High Court has taken into account technical development in that now it does not require the injured party to prove fault on the part of the manufacturer, but requires the manufacturer to prove that he is not at fault. The presumption of the entrepreneur's fault holds until proof to the contrary is furnished. It is presumed that the defect occurred merely because the manufacturer failed to organise his plant adequately. The presumption of what is known as organisational fault holds true only if the injured party proves that the damage was caused within the manufacturer's scope of organisation and risk, namely by an objective defect or a condition of non-compliance with the requirements as to technical design of the products[178]. It is not necessary to prove *how* the defect was caused in the tort-feasor's plant; that is, through defective design, defective production or defective instruction (No. 162). As long as only the objective defect is certain, a presumption is raised. According to a more recent Federal High Court decision[179], the principles of presumed organisational fault relate also to persons who are liable in addition to the manufacturer and who hold a prominent and responsible position in the manufacturer's production department, i.e. executive employees. In support of its decision, the Federal High Court pleads that executive employees hold a position similar to that of the manufacturer[180]. Such extension of the manufacturer's liability should be rejected[181]. For one thing, the executive employee's liability is relevant from an economic point of view only if the manufacturer himself is unable to pay and, for another, such a shifting of damage is in contrast to the generally accepted fact that basically the manufacturer shall be liable for damage arising from the sphere of production. Lastly, the executive employee cannot offset his liability against profits, so that an essential basic idea of the manufacturer's liability does not apply to him.

In its chicken-pest decision, the Federal High Court made it clear that the manufacturer's liability is a case of liability in tort, particularly of what is known as breach of the duty of care, since the manufacturer's liability is created mainly as a result of tortious misconduct by the manufacturer. That is why it was and is necessary to determine the contents and scope of duties of care in the production process. To that end, legal writers have taken pains to classify the manufacturer's liability by type of defect[182]. Something of a classical categorisation is division into defective design, defective production, defective instruction and development defect.

A defective design is attributable to the design of a product and is therefore

inherent in the entire series of production. The Federal High Court has accepted this category in the so-called brake decision[183] and has confirmed it in a number of others[184].

Defective manufacture occurs in the production process itself and is thus found only in some products. The causes are as numerous as the processes. The chicken-pest decision is classed in this category.

Defective instruction is insufficient and incomplete instruction for use, which does not adequately warn of dangerous product characteristics. Instructions and warnings must be sufficiently obvious; that is, they must clearly point out possible dangers to the person concerned. For that purpose the manufacturer must bear in mind the danger of obvious misuse (No. 164). In the Estil case, the Federal High Court has also accepted this category[185].

Development defects are defects that were not foreseeable by the standards of technology current at the time the product was under development.

In addition to these four categories the manufacturer incurs liability in the event of breach of his duty to watch a product or violation of his recall obligation[186]. For, after having placed his products in the stream of commerce, the manufacturer must watch the market in order to ascertain whether the products manufactured by him cause unexpected dangers[187].

Dogmatically, the duty to watch a product is a subcategory of the duty of care. Thus nothing stands in the way of its acceptance in principle. However, only recently have the courts and legal writers attempted to put the duty to watch a product into concrete terms[188]. The duty to watch a product lies with the manufacturer in respect of all his products, irrespective of whether they are new designs or products that have been mass-produced for years without any risk[189]. There is agreement that the manufacturer must not wait for the first case of damage. Rather, he has to trace any information indicating that the product manufactured by him might involve dangers. In this context technical publications and trade conferences play a special part. If the manufacturer knows about a danger, the decisive question is as from what time of realisation of this the manufacturer must warn his buyers, dealers or consumers or recall the product from the market in order to fulfil his duty of care. The Higher Regional Court of Celle commented on this problem for the first time from the point of view of court practice. As a prerequisite for the obligation to warn, it demands that there be a concretely foreseeable product-related danger and a reliable factual basis[190]. Rumours are not sufficient, any more than are regional data. Moreover, the Higher Regional Court of Celle says that the manufacturer must be allowed a reasonable time for checking the data. The definition is still very vague and leaves him adequate scope for manoeuvre. It is completely obscure which requirements must exist for the obligation to warn to become a recall obligation. The only thing identifiable at present is that the requirements to be met according to the courts are stricter in the case of drugs[191]. If the manufacturer fails to fulfil his obligation to watch his products, he is liable to make good the damage resulting from breach of duty.

With respect to all sources of defect, the Federal High Court has extended the manufacturer's liability decisively in the so-called float switch decision[192]. Accordingly, the fact that there exist or existed direct claims under a contract of sale between damaging manufacturer and injured party does not preclude laying

a claim to the manufacturer under the manufacturer's liability. Hence there is a conflict of laws between contractual claims and claims in tort. That is also why, after the short period of contractual limitation has elapsed, the injured party may hold the tortfeasor liable in tort. In addition, the Federal High Court has redefined the relationship between claims in tort and contractual claims. So far it had been understood as a principle that the manufacture of a new, but defective product did not constitute a case of damage to property. Hence the conclusion was drawn that the seller was liable under a warranty for things supplied by him, but liability in tort did not come into question. Now liability in tort may be incurred if it is a matter of a functionally limited deficiency/defect in the object purchased which in relation to the whole thing is of minor importance and only later, i.e. after passing of the risk, causes additional, more far-reaching damage in the initially flawless thing[193]. The Federal High Court has thus given up the traditional distinction between tort and contract. No doubt a decisive factor for the extension was the short limitation under the law of contract in respect of claims of a tortious nature. The decision has given rise to animated discussion among legal writers[194]. Shortly afterwards the same division of the Federal High Court confirmed its practice in the so-called Hinterrad decision[195]. Any change in that court practice could be brought about only by a decision of the Große Senat (Union of the various divisions of the Federal High Court). From a dogmatic point of view a number of doubts remain unresolved. Thus the functional concept of property will give rise to many problems of delimitation[196]. In the final analysis the question will arise whether or not the method chosen by the Federal High Court will result in the law of torts and the law of contract existing side by side, since a differentiation within the concept of property is somewhat artificial[197]. The conflict of laws gives rise to the question to what extent claims in tort may be excluded through contractual exemption clauses (No. 210). The Federal High Court's float switch decision has considerably strengthened the consumer's legal position. As via the law of torts, he is now in a position to receive compensation for a setback suffered in cases where his legal position under a contract used to be weak.

167 (*bb*) Since the chicken-pest decision, a number of further Federal High Court decisions have been handed down relating to goods of every description. The manufacturer's liability has practically been completely generalised; there are no fields of production that are privileged under the law of torts[198]. With respect to the four accepted case categories the following picture emerges: for defective designs[199] and defective instructions[200] the manufacturer is liable without any possibility of exculpation. Any person who markets products that according to the state of the art at the time of manufacture constitute a faulty design infringes his general duty of care. The same applies to any person who markets products without appropriately pointing out to the consumer dangers possibly arising from such products, knowledge of which he cannot reasonably expect of the buyers involved. With respect to defective production we must differentiate: the manufacturer is liable for defective production only if he may also be blamed for violation of his duty. In the case of what are known as 'escapers' (Ausreißer), which may occur in any industrial production method even if all safety measures were taken with due care, the manufacturer cannot be blamed[201]. Therefore the

manufacturer may escape liability for defective production if he can prove that the injured party was injured by an escaper. While it should be quite difficult to furnish such proof[202], two cases that have recently been decided show that exculpatory proof may be successful[203]. With respect to development defects, the manufacturer is not liable in principle. If a development defect occurs, the manufacturer cannot be blamed because at the time the product was designed and manufactured its dangerous characteristics were not objectively perceptible[204]. Although consequently it is impossible by definition to include development dangers in the concept of liability for fault, liability can be imagined on account of the fact that duties to watch products have been recognised. The duty to watch forces the manufacturer also to recall products that, according to the then state of the art, were flawless at the time they were under development. As regards development defects, if any, the manufacturer is liable only for defects that occur after the time a duty to take action had existed under the duty to watch. Theoretically it could be imagined that the manufacturer himself should be liable for the first series of damages if before damage occurred dangers had already been pointed out in scientific publications. In its decision the Higher Regional Court of Celle had to examine for the first time whether liability on account of the duty to watch a product existed in the case of a development defect[205]. The problems involved in protection against development defects afforded by the duty to watch a product can be illustrated nicely in the light of that decision. For one thing, it is obvious that the main point at issue in lawsuits is when a scientific publication gives rise to a duty to take action. Thus the dispute is argued out at a scientific level and results in a grading from important examinations, that is to say those to be pursued, to unimportant ones, i.e. those to be neglected. Another point is that the burden of proof that the manufacturer infringed his duty to watch the product is on the plaintiff[206]. If the manufacturer has proved that the damage is due to a development defect he may take his time waiting for the injured party's reasoning. It would be completely wrong to say that the problem of development losses has been eliminated with the aid of liability on account of the duty to watch a product[207]. The consumer continues to bear the risk of development defects. The same is true of escapers. An examination of the cases decided shows that that risk occurs only very rarely. With respect to all the other groups of defects the courts have arrived at quite reasonable results. The consequence is that the number of those who want to accept interpretation of the manufacturer's liability by the courts as a permanent solution is becoming larger and larger.

168 (*cc*) Such approaches do not take into account that court practice shows essential deficiencies in addition to the gaps in protection indicated. Certainly there is not much sense in attacking the dogmatic reasons given by the Federal High Court for a reversal of the burden of proof, for in that respect the Federal High Court's practice is of a common law nature[208]. What carries much more weight is that the distinct casuistry cannot obscure the fact that a successful definition of the manufacturer's duties as to his conduct has not been achieved. For development, design, manufacture and sale are so closely connected that for legal purposes only an integral view of product damage proves adequate and practicable[209]. Lastly, the courts also use general standards of judgment, which

involves the danger that the concrete contents of duties as to conduct incumbent on the manufacturer are accurately defined practically only after damage has occurred and not at the time of possible acts or omissions as required in the case of liability for certain conduct[210]. Such court practice is hard to calculate in advance both for the tortfeasor and the injured party. The dilemma cannot be solved as long as the type and scope of the duty of care inferred from Art. 823 Civil Code is decisive for the creation of liability.

As a permanent solution, such court practice must also be rejected because the manufacturer's liability is not a problem of the burden of proof as the courts wish us to believe. Possibly the Federal High Court had to choose this method because according to the traditional understanding of the law it is not authorised to introduce liability regardless of fault by way of court judgment. It is, however, of far greater importance that the Federal High Court need not comment on how the problems of the manufacturer's liability were caused, but may withdraw to the seemingly neutral ground of procedural regulations[211]. Because of this loophole, there is no discussion in principle about the level of the manufacturer's liability in relation to the function and importance of the law of torts in an industrial society. Thus, discussions about the problem on whom the burden of proof should be placed push into the background considerations about the demand for new rules of substantive law. The apparently neutral solution offered by the Federal High Court cannot prevent any shift in the burden of proof entailing a change in the requirements as to the manufacturer's liability proper. This does not apply only to the reversal of proof in the area of fault, even if here the change is most obvious. Strictly speaking, the Federal High Court has introduced quasi-strict liability under the cloak of procedural law at least in those cases where there is no possibility of exculpation[212]. Moreover, the Federal High Court has made allowance for the injured party's difficulty in proving the causal link between defect and damage by appropriately facilitating the burden of proof. The Federal High Court has given the injured party an opportunity of producing *prima facie* evidence and at the same time has taken care that objections by the manufacturer which might ruin such evidence may often be dismissed as mere protective claims[213]. The decisive point about such court practice is not the facilitation of the burden of proof in favour of the injured party; but the increasing impossibility for the manufacturer to exculpate himself, which is another factor changing the requirements of liability.

Disguised under the cloak of procedural law there are indications of something many people would not admit. The problems of the manufacturer's liability cannot be solved by means of liability for fault without liability for fault cancelling itself, so a permanent solution to the problems of the manufacturer's liability can be found neither by procedural methods nor by liability linked to the manufacturer's fault as an individual. Sooner or later this last bulwark of traditional reasoning is also bound to fall and clear the way for regulatory devices tuned to the peculiarities of industrial series production[214].

2 Comparison between the convention by the Council of Europe (CE), the draft by the European Community (EC) and German court practice on the manufacturer's liability

169 Signs of a further development of the law of torts are not to be expected in the area of national legislation. Meanwhile it has become a generally accepted fact that German law in force does not make sufficient allowance for the consumer's need for protection[215]. The Federal Government has also emphasised the need for reform in its Second Report on Consumer Policy of 12 October 1975[216], but has postponed the solution of problems at a national level in favour of a new arrangement at a European level. At present there exists the convention by the Council of Europe of 27 January 1977[217] and the draft by the EC Commission of 1 October 1979[218]. The Convention has already been signed by the competent Belgian, French, Luxemburg and Austrian ministers. The EC draft of 1 October 1979 is the result of many years of deliberation[219]. Since the pre-draft had been a point of discussion in the European Parliament as early as 26 April 1979[220], the present draft has now been submitted to the Council of Ministers for decision. It cannot be predicted yet whether the desired regulation will materialise.

(a) *Comparison between the basic features of the convention/draft and of German court practice*

170 Both propositions provide that the manufacturer of a moveable article shall be liable *regardless of fault* for damage caused by a defective product (Art. 3, para. 1 CE, Art. 1 EC). In the Commission's opinion, only *strict liability* is suited to make allowance for the injured party's difficulty in furnishing proof and to include the essential causes of damage[221]. The inclusion of development dangers was a highly controversial issue, but the majority of people felt that the consumer should not bear the risk of new technologies (cf. expressly Art. 1, para. 2 EC)[222]. Since escapers also come within the scope of protection of the propositions, the gaps in protection resulting from liability for fault would be filled and the consumer's legal position considerably strengthened. However, the two Commissions were unable to settle on absolute liability (Kausalhaftung)[223]. To give rise to the manufacturer's liability, the injured party must prove not only the defect and damage, but also causation[224]. As far as that goes, the propositions do not differ from moderate liability for fault under German law.

171 *(aa)* To those involved in the present discussion it was almost a matter of course to regard the *defective product* as the essential item of consideration regarding the manufacturer's responsibility. Also, the Commissions went to great trouble to arrive at a definition of defect. Resort to the concept of defect shows that the justification of the manufacturer's liability for damages continues to be attributed to no matter what kind of blameworthy conduct. It may be said in justification of the Commissions, though, that they were aware of the danger. In order not to leave a loophole for the principle of fault via the concept of defect, both propositions are based on an objective concept of defect[225]. They take as a criterion the safety the consumer may reasonably expect

considering all circumstances (Art. 2c CE and 4 EC). The manufacturer has to take all precautions that 'people' may reasonably expect, which means nothing else but that in the manufacturing process he has to comply with the standards of science and technology. 'People' signals the basic condition of liability. Although it is possible so to objectify the concept of defect, doubts are appropriate as to whether or not the principle of fault will take effect again as a result of wordings such as 'people' and 'defect'. We can think of situations where a product causes damage, but where 'people' cannot blame the manufacturer for a 'defect'. Depending on how the user's horizon of knowledge and experience is defined, 'people' may variously define what is expected of the manufacturer and may thus save him from liability for damages. Art. 1, para. 1 of the draft of the EC Commission merely indicates that a stop shall be put to attempts at such interpretation. The passage says that the manufacturer has to make good the damage caused by a defective product no matter whether he knew or should have known of the defect. If it does not matter in how far the manufacturer should have known of a certain defect, it should hardly be possible to find cases where he is not liable to make good the damage[226]. Disregarding the mention of development dangers in Art. 1, para. 1 of the EC draft, neither proposition goes by case categories[227], as the German courts and legal writers have done to define liability. By defining the concept of defect, the European propositions enhance legal protection. Moreover, this regulation permits inclusion in the scope of liability of defects that cannot be imagined at present or have not yet occurred, without the need for assigning them to the established case categories. For some time, German jurisprudence has tried to define what is meant by a defective product. Accordingly, a product is considered defective if by the accepted standards it lacks the necessary quality[228]. Such a definition of defect was dismissed, since it was impossible in the law of torts to base considerations on a concept of defect yet to be defined[229]. Criteria had to be taken from the duties to avoid danger, which are characterised by great diversity. The use of a concept of defect and the establishment of case categories meant, it was said, a restriction. The decisive question could only be whether through his products the manufacturer had occasioned in a foreseeable way any violation of rights protected under the law of torts[230]. Hence the limits of liability would be there where the manufacturer could still be blamed for fault.

The courts have not so far tried to give a general definition of defective product. They have merely recognised the case categories of defective design and defective construction and laid down for those two groups different rules on the burden of proof as to fault[231]. Therefore, from the point of view of court practice, the propositions include something really new, although the courts had already taken into account the safety of a product under Art. 823, para. 2 in connection with Art. 3 GSG[232]. Here the standards of safety are technical standards (DIN, VDE). To determine the safety of goods within the meaning of the European propositions, these standards must now be applied. There are objections to the unlimited use of such technical standards in that they are established by industry itself without public control[233].

The definition of the concept of defect chosen by the Commissions also includes cases where the consumer did not use the article for its intended purpose[234]. For the consumer's legitimate expectation includes at least misuses

the manufacturer has to expect[235]. This is not changed by the amended version of Art. 4 EC in which use for the intended purpose as a requirement of liability has expressly been set forth[236].

As regards German court practice[237], it initially looked as if the Federal High Court wanted to grant compensation only in the case of use for the intended purpose. However, in the Estil decision[238] the Federal High Court recognised that in the case of obvious misuse the obligation to warn the consumer is placed upon the manufacturer. The Federal High Court has apparently restricted such practice in the Spannkupplung decision[239], since now the user must take care how to use the product he bought. The decision mentioned relates to industrial consumers and not to final consumers, so that with respect to the latter the restriction need not necessarily apply. Like the Federal High Court in its Estil decision, some jurists[240] advocate compensation of the consumer if the type of use which resulted in damage was within the scope foreseeable for legal purposes. Court practice and legal literature correspond to the regulation in Art. 84 AMG[241].

172 (*bb*) *A limitation of liability* is to be found in Art. 5 of the propositions. Hence the manufacturer is not liable if he can prove that he did not market the defective article or that it was not defective at the time of marketing. The first of the two hypotheses takes up an undisputed principle: the manufacturer's liability presupposes the release of the product for use by third parties[242]. The intention of the second hypothesis is not clear for the very reason that it applies to all defects in products. Products characterised by a development defect are defective as early as at the time of marketing. These might be cases where the user himself is responsible for the damage. The manufacturer would be released from liability if he could prove that the damage occurred as a result of improper use[243]. As long as the manufacturer is unable to exculpate himself, both facts are presumed in favour of the consumer. As a prerequisite of liability the requirement is thus irrelevant.

This does not apply to German law. Here both facts are prerequisites of liability in terms of constituent facts. This is true at least if the manufacturer's liability is regarded as a subcategory of the duty of care[244]. The manufacturer is the person who creates the source of danger. He does so by marketing the defective commodity — thus liability is incurred only as from the time of marketing[245] and exists only if the article was defective at that time[246]. Neither fact has so far played an important role in German court practice. To be distinguished from the requirements mentioned is the question of whether the manufacturer must know about the defectiveness of the thing. Art. 1, para. 2 of the EC draft expressly states that to create liability knowledge is not decisive. The European Council's convention does not include such a provision. In German court practice it is recognised that the manufacturer is liable to pay damages even if he learns of the defect only later[247].

The manufacturer's liability may also be limited or excluded on account of contributory negligence on the part of the injured party. While this principle is mentioned separately in the CE convention (Art. 4), the EC Commission has not included such a provision in its draft, since the limitation of liability through contributory negligence is accepted in all member countries of the EC[248].

173 (*cc*) *The type and extent of damage to be made good* varies considerably in the two propositions. While according to the CE convention only damage to persons is to be made good (Art. 3, para. 1), the EC draft also includes damage to property (Art. 6) suffered by a private final consumer. The EC draft expressly provides (Art. 6b) that only those things not acquired for industrial use and which the consumer at the time of use intended to employ for private purposes (Art. 6b ii) will be replaced[249]. Private commodities are replaced only if they are damaged in consequence of a defective article. No compensation is paid for the damaged or destroyed article itself[250]. In this respect the national rules governing contracts of sale apply and should not be interfered with[251]. Since the draft also includes consequential damage resulting from defects, which may be provided for under Arts. 480 and 463 Civil Code, and positive breach of contract[252], overlap is possible contrary to that objective.

In German law such limitations do not exist: under Art. 823 I, II Civil Code, damage to persons and property inclusive of the damaged thing itself are compensated for. The scope of Art. 823, paras. 1 and 2 Civil Code is likewise not limited to consumers. Decisions handed down by the courts in the past related predominantly to disputes between manufacturers and industrial consumers[253]. No more is required than the damage caused by a defective product. The CE convention allows the member countries to limit the amount of liability (Annex 2). Simultaneously the convention fixes a minimum amount payable in any case (in the event of injury to or killing of a person DM 200 000). If similar products characterised by the same defect kill or injure several persons, the maximum amount of damages payable under the convention must be not less than DM 30 million. The EC draft also contains a limitation of liability (Art. 7). In the case of series accidents, liability is limited to 25 million units of account. In the most frequent case, i.e. damage to an individual, the manufacturer's liability is unlimited. It is exactly the other way round in the case of limitation of liability for damage to property. Here liability is limited in a particular case, graded depending on whether movable or immovable property is concerned. The proposals of the CE and the EC consider limitation necessary because only thus are manufacturers able to calculate the risk of strict liability, specifically regarding damage resulting from development defects[254]. From Switzerland and the USA, where there is no limitation of liability[255], no data are available to the effect that the willingness of manufacturers to take risks in developing new technologies has noticeably been affected[256]. More recently it has been claimed on an increasing scale that in the USA 'strict liability' has resulted in intolerable burdens[257]. The starting point for the discussions were two research projects undertaken in the USA, both of which came to the conclusion that unlimited liability puts persons liable to pay damages into a problematic situation[258]. Even if that judgment is true, the results obtained may be applied to conditions prevailing in Europe with great caution only[259]. The reasoning that liability must be limited because it exists regardless of fault is similarly unconvincing[260]. In the case of strict liability the attribution of damage is also based on conduct attributable to the manufacturer[261], so that it is not intelligible why, unlike liability for fault, in the area of strict liability, the possibility of calculating the risk is said to be of special importance. The Commissions did not enter into discussion. From their points of view it was positive that a departure from fault meant a limitation

of liability. They did not therefore get down to the problem that the risk of having to make good part of the damage oneself varies greatly, depending on the type of product causing damage. It is true that the dimensions of defective production in individual household appliances are different from those of development defects in drugs. Within the framework of limitation of liability the Commissions should therefore also have taken measures tuned to the type of damage. The method of differentiation chosen by the EC is not convincing, because the various causes of damage in series accidents have not been taken into account. The EC's prime concern was to establish acceptable average values. From that point of view the Commissions' decision is a compromise in favour of manufacturers[262]. If the present maximum amount which is not contingent upon the product concerned is left unchanged, the injured party's attention will soon focus on strategies of circumvention. Indications are included in the directives themselves: although the propositions aim at an approximation of laws, in the final analysis they supplement national law only by another basis of claim. The European Council and the EC Commission expressly state that claims for 'another legal cause' shall remain unaffected (Art. 11 of the convention/draft). Another legal cause above all means bases of claims linked to fault. Art. 823 Civil Code therefore has an important function in claims for damages going beyond the limitation of liability. The same is true of damages for pain and suffering, for a limitation of liability also includes claims for damages for pain and suffering granted under Art. 6c of the EC draft of 1 October 1979[263]. On the other hand, liability under the law of torts may also be limited under German law if an exclusion of liability has been provided for under the contract[264]. The limits of exclusion of liability are determined by Art. 11, item 7 AGBG (No. 210).

174 (*dd*) According to the propositions, the injured party must prove the *causal link* between defect and damage. When a defect is deemed to be the cause of damage is determined by the respective national legislation. Neither proposition deals with the difficulties encountered by the injured party in proving causation. Art. 5, para. 2 of the CE convention shows a certain peculiarity. Pursuant thereto the manufacturer is liable for damage caused both by the product and by third party influence. The EC draft does not contain such a provision. Also under German law a tortfeasor is liable if a third party intervenes in the process of causation, the requirement being that there was an adequate causal link between intervention and damage and the third party was challenged to intervene[265].

175 (*ee*) *Limitation* is designed identically in the two propositions. The injured party's claim becomes statute barred within three years of the time the damage, defect and identity of the manufacturer is or ought to have been known (Art. 6 CE, Art. 8 EC). The respective national legislation then determines when the period of limitation is interrupted or suspended. The manufacturer's interest in not being liable for an indefinite period of time is made allowance for by a ten-year time limit which begins to run upon marketing of a product (Art. 7 CE, Art. 9 EC). If the propositions are interpreted literally, in the final analysis the

manufacturer does not have to care for his products once the time limit has expired: the duty to watch a product ceases upon the expiry of the time limit. If a product which was on sale without causing damage for many years causes damage after the expiry of the time limit, such damage is not made good. Such a solution is hardly compatible with the experience regarding product damage gained in the past. In the case of drugs and cosmetics it has often turned out that seemingly harmless products may develop into serious sources of danger[266]. The great superficiality of the regulation under the propositions may be offset only if the duty to watch a product resulting from Art. 823 Civil Code continues to apply and consequently the manufacturer is liable at least under the law of torts. The German law of torts provides for a three-year period of limitation from the date on which damage occurred (Art. 852 Civil Code), so that this would afford protection to the injured party. It should also be noted that strict liability of the manufacturer of drugs is provided for under Art. 90, para. 1 AMG for a period of 30 years.

176 (*ff*) The liability created under the propositions may not be *excluded or limited by contract* (Art. 8 CE, Art. 10 EC); a common regulation of liability is to serve the purpose of equal opportunity regarding competition[267]. This goal would be missed, though, if the respective manufacturers could set aside strict liability at their discretion. Pursuant to the CE convention, provisions in favour of the consumer deviating from the convention may not be included in national legislation (Art. 10 CE). Pursuant to the EC draft it is allowed.

(*b*) *Persons entitled to claim in the draft/convention and in German law*

177 From the beginning, one of the questions discussed most was who was meant by the 'manufacturer'. There was much less discussion about the group of persons entitled to claim, although the manufacturer's liability does suggest such a question, for if the changed production process is the reason for the manufacturer's liability, then those must be protected who owing to the peculiarities of the production process are not in a position to protect themselves: these are primarily the consumers.

The European Council and the EC Commission speak in favour of limiting those entitled to claim, yet they avoid calling those entitled to claim consumers. Those entitled are defined in various ways. Pursuant to the CE convention only damage to persons is to be made good, Art. 3, para. 1 CE. Anyone who obviously refuses to make good damage to property gives to understand that he does not count manufacturers among those entitled (No. 172). Otherwise damage to property would have been an essential aspect of the duty to make compensation[268]. A limitation of the groups entitled is further emphasised by Art. 9 CE, under which claims by manufacturers against each other are not subject to the convention. Certainly there are a great number of cases where the person affected by a product damage is not a manufacturer. All the same, such a person cannot claim damage to property. The actual limitation is provided for under Art. 3, para. 1. In addition to damage to persons, the EC draft includes damage to property suffered by persons not conducting a trade or business, but only private final consumers shall benefit from the proposed regulation, not just

any person having suffered damage to his property. In support of its view, the Commission refers to its programme for the protection of the consumer[269].

Both propositions say that the private final consumer shall receive compensation regardless of whether he is the injured purchaser or a third party and regardless of whether he has used the product or was injured only accidentally[270]. Much as the limitation to consumers of those entitled to claim is to be welcomed, it cannot be concealed that cases of doubt may occur. The extent to which minor traders, craftsmen and industrialists are to be equated with manufacturers or may be treated as private final consumers should only be resolvable by way of interpretation in a concrete case. The group of persons protected under German law results from the basis of claim under Art. 823 Civil Code. The law of torts protects anyone whose rights are jeopardised by any conduct relevant to the law of torts. Consequently, any injured party is entitled to claim regardless of whether he is the buyer of the product, a user or an uninvolved third party[271]. Injury by a defective product must only relate to rights (Rechtsgüter) protected under the law of torts[272]. Liability is merely contingent upon damage and not upon any specific quality of the injured party. Compared with the present German law, the propositions include decisive restrictions, e.g. the owner of the farm in the chicken-pest decision repeatedly mentioned above would not receive compensation under them.

(*c*) *Persons opposing a claim in the draft/convention and in German law*

178 (*aa*) Both propositions deal at some length with the group of persons liable. The manufacturer of finished products and components is regarded as the responsible manufacturer (Art. 2b CE, Art. 2, para. 1 EC). The CE convention equates producers of agricultural products with manufacturers. The first draft by the EC Commission included a regulation similar thereto. However, at the European Parliament's suggestion the Commission in its draft of 1 October 1979 limited the liability of producers of agricultural, craft and art products[273]. Now the producer of such products shall not be liable if it is obvious that his product was not industrially produced. It should be almost impossible to tell 'obviously' that a product was industrially produced. A great many agricultural products are produced by industrial methods; the same applies to art and craft products. If this is so, the producers of such products should also be liable without restriction[274]. In the wording of the draft directive the courts are charged with putting this provision into concrete terms.

In respect of damage caused by a defect in a product incorporated into another product, the producer of the incorporated product is liable and so is the person having caused the incorporation (Art. 3, para. 4 CE, Art. 2, para. 1 EC). The Commission of the Council of Europe does not give any reasons for the regulation of double liability[275]. Pursuant to the convention, the producer of the incorporated product shall not be liable if he proves that the defect is attributable to the planning or instructions of the person who caused such incorporation[276]. This does not apply if the producer of the incorporated product knew or should have known of the defect[277]. The EC draft does not provide for such proof of exculpation. This solution leads to unreasonable results if the producer of the incorporated product does not even know to what subsequent

treatment his goods will be subjected[278]. Basically, the inclusion of the producer of the incorporated product is to be welcomed. For one thing, he should often have greater financial resources than the producer incorporating the product and, for another thing, the consumer may select from two manufacturers liable the one who is in a position to make good the damage.

According to both propositions, *suppliers* are not liable. In support of that decision it is argued that the supplier plays only a secondary role in the production process[279]. Certainly he cannot be included in the group of persons liable for the same reason as the manufacturer, and yet it seems too simple to reject liability on the part of the supplier just because he is not a manufacturer. This decision by the Commissions is explained by their intention, also as regards the above problem, not to interfere with the provisions under national laws of sales[280]. Pursuant to Art. 3, para. 2 CE, Art. 2, para. 1 EC, the manufacturer's liability is incurred by any person who affixes his name, trademark or other distinctive mark to a product. The CE convention requires in addition that the supplier should offer the product as his own[281]. Fears that the EC draft will also apply to persons who merely affix to a product a price tag bearing their name are unfounded[282]: the provisions of the propositions aim at holding liable powerful sales organisations that have their goods manufactured abroad and thereafter sell them as their own[283]. The supplier's liability may furthermore result from the provision of Art. 3, para. 3 CE, Art. 2, para. 2 EC, pursuant to which the injured party may take legal action against the supplier only if the manufacturer cannot be identified through the product and the supplier fails to disclose the manufacturer's identity within a reasonable period of time (the EC draft speaks of 'forthwith'). The injured party cannot be expected to identify the manufacturer himself[284].

Of special importance is the fact that the *importer* is equated with the manufacturer (Art. 3, para. 2 CE, Art. 2, para. 3 EC)[285]. The EC draft regards as an importer only the person who imports goods into the member countries. From the CE convention it is not clear whether imports are meant here to be imports from non-EC countries or also from one member country into another. Moreover, the respective explanations do not give any clues why importers were included in the liability regulation. Inclusion in the liability regulation is warranted by the fact that only by transporting goods across the border does the importer create dangers to the consumer. The importer may gather information about the safety of goods from the foreign manufacturer and may exempt himself from liability. Even if it is assumed, also according to the CE convention, that importers are only those persons who import goods from non-EC countries into the member countries, it remains doubtful whether such an inclusion serves the consumer's interests. At least this permits to keep away from the domestic market foreign competitors offering prices that are attractive to consumers[286].

179 (*bb*) When *comparing* those liable, a simple comparison of the requirements of liability is not possible, since the starting situations of the two European propositions and of German law are completely different. The European propositions try to regulate the requirements of strict liability by way of definition, while in German law the group of persons is determined by the starting

point of dogmatic considerations which led to the creation of the manufacturer's liability under Art. 823 Civil Code. That starting point existed in the judicature that developed on duties of care. Accordingly, the decisive question the courts had to examine in all proceedings was whether an obligation to watch goods in the area of design, manufacture or instruction was placed on the person opposing a claim — no matter whether producer of an incorporated product, producer incorporating a product, distributor, etc.[287]. This problem is also the basis of considerations of legal writers[288] who do not want to fit the manufacturer's liability into the area of the duty of care. Accordingly, the courts and legal writers have considered the person opposing a claim to be liable for damages only if such a duty to avoid danger was placed on him. The scope of duties incumbent upon the party opposing a claim was determined depending on whether he was a manufacturer or a producer of an incorporated product. In this connection duties to watch were placed on the final manufacturer who assembled the parts supplied to him[289], i.e. duties which are known to be presumed by the courts in those cases where the party originally subject to a duty of care assigned his duty to a third party. In its waste disposal decision, the Federal High Court applied these principles to the relationship between a large-scale enterprise and an enterprise charged with waste disposal[290]. It is accepted that the producer of an incorporated product is a manufacturer regarding the products manufactured by him[291]. However, basically his liability is limited to the individual part supplied, unless he is involved in the design of the final product[292]. Pursuant to the EC draft the producer of an incorporated product is always liable. Amending the draft the convention has adopted this regulation.

The German courts also regard as a *manufacturer* any person who assembles a *finished product* from parts supplied by third parties[293]. He must satisfy himself as to the flawlessness of the parts supplied[294] and must employ pertinent techniques in assembling them[295]. As he is not the manufacturer of parts made by third parties, duties of a manufacturer cannot be placed on him. He has to examine the parts supplied to him as to their flawlessness, but not in the same way as his supplier has to do so[296]. He must satisfy himself as to whether in the supplier's plant the necessary controls have been organised[297] and are carried out.

If a manufacturer who assembles the finished product from parts supplied to him not only assembles these parts but subjects them to further treatment, more far-reaching obligations are placed on him[298]. He now takes an active part in planning, design and instruction. Neither proposition defines the term 'producer incorporating a product'. In the final analysis it may be assumed that regardless of the manner of participation in the production process, the producer incorporating a product is liable for damage.

It is not clear whether sales organisations not participating in the production process as manufacturers are liable. If the production and sale of a defective product are handled separately for organisational, company or tax reasons, the sales organisation is liable provided it is that organisation's task to market the products made by the manufacturing enterprise[299]. Whether or not the marketing company sells the products under its own name does not matter. Hence, companies that have their products manufactured abroad and sell them in the Federal Republic of Germany under their trade names must be regarded as

manufacturers[300]. This does not apply to cases where within the framework of a multistage trading chain a trading company which had neither manufactured nor marketed the product as a legally independent company sells products under its own name or trademark. The courts refuse to include such trading enterprises in the manufacturer's liability, because duties to avoid danger within the meaning of Art. 823 Civil Code are not created by the mere fact that an enterprise affixes a trade name to an industrial product produced by somebody else[301]. This clearly goes to show that a trademark alone cannot create quasi-manufacturer's liability. For all that, in its Trevira decision the Federal High Court created liability within the meaning of Art. 463 Civil Code on the basis of the trademark. A different judgment may follow only if the user in view of his confidence in the tradename omits to take precautions he would otherwise have taken[302]. With this qualification, the Federal High Court has at least held out hope to the consumer in those cases where a trademark is associated with certain expectations. The propositions are largely identical with German court practice. While superficially the impression is given that the manufacturer's liability may be created merely on the strength of a trademark, in actual fact liability arises only if there is a close economic link between the actual producer and the bulk buyer who to the public appears as the producer[303].

The importer's liability as quasi-producer is not recognised to that extent under German law. While legal writers have taken up the issue of whether or not for reasons of domestic consumer protection the importer should be equated with the manufacturer[304], the discussions so far have not got to the heart of the problem. Once more the dogmatic starting point for the manufacturer's liability was emphasised according to which the duties are to be determined depending on the sphere of responsibility[305]. In a decision (bicycle decision) recently handed down, the Federal High Court[306] has flatly rejected demands for liability of the importer on grounds of desirable consumer protection. Importers into the Federal Republic of technical appliances made in one of the original six member countries of the European Economic Community are not obliged in principle to check such goods for defective design. Dogmatically, the Federal High Court equates importers with distributors. The reasons given are scarcely convincing. Without going into details the Federal High Court proceeds from the assumption that the level of technology is roughly identical in the six founder members of the EC. This idea at least is questionable; for the procedure of industrial standardisation in the EC countries varies widely[306a]. Furthermore, the Federal High Court rejects liability of the importer pursuant to Art. 823, para. 2 Civil Code, Art. 3 GSG. In the Federal High Court's opinion Art. 3 GSG does not impose any duties of a manufacturer on the importer. In the final analysis, the Federal High Court infers an importer's concrete duties from the duties to avoid danger laid down under Art. 823, para. 1. By the circuitous way of equating the duties of an importer pursuant to Art. 823, paras. 1 and 2 Civil Code with those pursuant to Art. 3 GSG, the Federal High Court deprives Art. 3 GSG of its independent substance. In these circumstances the introduction of the manufacturer's liability at a European level within the meaning of the convention or draft seems even more urgent.

The German courts have so far rejected liability on the part of the producer of primary agricultural products[307]. The mere production of natural products[308],

they claim, is not an activity performed by a manufacturer. In derogation of that practice a producer of agricultural products is liable in principle pursuant to the convention of the Council of Europe (Art. 2b CE) as well as to a limited extent according to the proposition of the EC[309]. Liability on the part of executive employees in line with the principles of the manufacturer's liability, which the Federal High Court is known to have recognised recently[310], is not provided for in the propositions.

3 Liability of the manufacturer of drugs

The AMG, which came into force on 1 January 1978, introduces strict liability with respect to manufacturers of drugs. It is not true absolute liability (Verursacherhaftung), since liability for compensation is linked to the proof of a defect, of causation and damage[311]. Also, the introduction of strict liability was possible only after the insurance industry had promised to assume the risk of damage.

(*a*) *History of the Act*

180 The history of the Act reveals that the solution in terms of insurance law which became law falls decisively short of the original goals to prevent cases similar to that of Thalidomide.

The second pre-draft by the Federal Health Ministry dating from 1974 provided for a three-stage regulation of liability: individual liability of the entrepreneur on the basis of liability for fault and strict liability, with the establishment of a compensation fund being secondarily liable. The fund was to be financed by pharmaceutical enterprises. Strict liability covered the generally accepted case categories — development defect, defective production and defective instruction. For the first time, the much-discussed manufacturer's liability for development damage was to be clarified through legislation. The establishment of a fund was meant to avoid social hardship. A claim was to accrue to the injured party if he was able satisfactorily to show that he could claim damages neither from a person liable to make good the damage nor from an insurance company. According to the official reasons given, this provision was meant to apply to those cases in which the injured party is unable to enforce his claim legally or cannot realise his claim for damages[312]. Manufacturer's insolvency and deficiencies in causation also count among such cases.

The cabinet bill by the coalition of Social Democrats and Free Democrats regulated the pharmaceutical entrepreneur's liability in two stages — liability for fault on the part of the manufacturer under Art. 823 Civil Code[313], and secondary liability of the fund financed by pharmaceutical enterprises. In contrast to the Federal Health Ministry's proposal, the bill does not include the entrepreneur's strict liability. As in the past the manufacturer's liability was to be determined by Art. 823 Civil Code, a provision considered almost unanimously to be unsuited to the adequate regulation of the dangers involved in industrial production. Liability on the part of a fund was to come into question only if no other person accepted liability for the damage or the claim could not be settled otherwise (in which case the burden of proof was on the fund). Hence

liability arises if the claim is unenforceable and the tortfeasor cannot be identified. Unlike the provision in the official's draft, the injured party must not only satisfactorily show but prove that he cannot claim damages from the tortfeasor. The fund was to cover damage resulting from all categories of defect, that is to say including development defects. Both the Government's bill and the Ministry's draft were based on the concept that the fund should answer for a loss if the injured party was unable to enforce his claim against the damaging manufacturer although certain minimum requirements had been satisfied. What the authors had in mind here was particularly the responsible manufacturer's insolvency. Similarly, difficulties in providing the causal link between defect and damage were not necessarily to result in the injured party not receiving compensation[314]. The implications of insolvency may be judged if one imagines Chemie Grünthal not having been in a position to make at least DM 100 million available to the Thalidomide children. The dangers that may flow from the difficulty of proving the causal connection between defect and damage were demonstrated by Wolter[315] on the basis of the Smon disease common in Japan[316].

The statutory strict liability of the pharmaceutical undertaking laid down in the new AMG does not provide for liability in the cases described above. The consequence is that the injured party has to cover his damage himself. Here he benefits from statutory health insurance if he is an employee and from statutory pension insurance. While the injured party has been helped if the insurance institutions mentioned answer for the loss, economically this means that the cost is passed on to the general public. If for some reason the insurance companies fail to answer for the loss, the injured party has to make good the damage out of his own pocket. In the case of severe injuries to health what is left in the final analysis is national assistance which may guarantee the injured party a subsistence level[317].

(*b*) *Bases of liability*

181 The decisive legislative provision is Art. 84 AMG:

> If as a result of the application of a drug intended for use in human beings, which in the area of application of this Act was sold to consumers and is subject to prior approval or has been exempted from the procedure of prior approval by statutory order, a human being is killed or his body or health are injured quite severely, the pharmaceutical entrepreneur who marketed the drug within the area of application of this Act is liable to make good to the injured party the damage resulting therefrom.
>
> Liability for compensation is incurred only if
>
> — the drug upon use as provided has harmful effects which go beyond a measure defensible according to the findings of medical science and the cause of which is in the area of development or production or
> — damage has occurred in consequence of the labelling or the instructions for use not corresponding to the findings of medical science (sentence 2).

182 (*aa*) Art. 84 AMG lays down statutory *strict liability* for the generally

accepted categories of defect. Art. 84, sentence 1 AMG deals with development defects, defective design and defective production. For damage attributable in that area, the manufacturer is liable only in respect of those defects that exceed a scientifically defensible measure. The consumer has to accept without compensation injury to his body and health which occurs within defensible limits. It goes without saying that such a limitation is contrary to the consumer's interests[318]. In practice the term 'scientifically defensible measure' is sure to result in battles between experts. In view of the complicated composition of drugs, the courts should find it difficult to draw clear lines. It must be criticised that in a particular case the manufacturer's liability is exclusively contingent upon expert opinions. Art. 84 AMG does not say which time is decisive as regards the scientifically defensible measure, the time of marketing or the time of damage. In the consumer's legitimate interest it is necessary to start out from the time of damage in order to be able to evaluate fully experiences with the drug causing the damage[319]. A further limitation of consumer protection in the cases provided under Art. 84, sentence 1 AMG follows from the fact that the manufacturer has to answer for a defect only in the event of use for the intended purpose. Use for the intended purpose is always determined by the manufacturer. If a consumer does not get a prescription for a drug by his doctor but may buy it in a pharmacy without a prescription, he is compelled to follow the instructions in any case. Basically, it is certainly correct that such a consumer does not arbitrarily change dosages or makes other mistakes in taking the drug. However, it is also presumed that the patient is in a position to realise the correct application. Those cases where a doctor prescribes the use of a drug and makes a mistake in administering it must be treated in the same way. Art. 84, sentence 1 AMG does not make any difference whether use contrary to the intended purpose is made by the patient himself or is prescribed by a doctor. However, if a doctor has prescribed a drug in contrast to its intended purpose, the patient may hold the doctor liable. In such cases it is not always justified to have the manufacturer assume liability through the intervention of a third party. Any other rules may apply only if the manufacturer caused use in contrast to the intended purpose by having failed to warn of misuse. That case is not included in Art. 84, sentence 1 AMG. What comes into question is the manufacturer's liability under Art. 84, sentence 2 AMG, which regulates liability for defective instruction. The information to be furnished by the manufacturer includes not only correct instructions for use, but also a warning of dangers that may result from misuse. If the manufacturer has not fulfilled his obligation in that respect, he must answer for the damage caused by insufficient information[320]. If the attending doctor has caused misuse, because he has not realised the dangers for lack of information, the manufacturer is bound to make compensation all the same. Art. 84, sentence 2 AMG contains the duty to answer for a loss if the cause of faulty conduct is within the producer's scope[321], yet Art. 84, sentence 2 AMG contains a limitation of consumer protection if it takes as a criterion for the necessary information merely the findings of medical science. The consumer would enjoy comprehensive protection only if intelligible consumer information appropriate to the case, in line with the level of scientific research regarding the preparation, were taken as a criterion.

183 (*bb*) *The scope* of the duty to make compensation in the event of killing (Art. 86 AMG) and bodily harm (Art. 87 AMG) corresponds to that under the law of torts, Arts. 844 Civil Code and 823, para. 1, 249 Civil Code. The amendments contained in the AMG are of a clarifying nature only; they do not extend the scope of damages. To the legislator, the introduction of strict liability was necessarily linked with limitation of liability. In the event of *one* person being killed or injured, the party to pay damages is liable up to an amount of DM 500 000 only or a pension of DM 30 000 per annum; in the event of *several* persons being killed or injured by the same drug, up to an amount of DM 200 million or a pension of DM 12 million per annum. It is not clear how the legislator arrived at a maximum of DM 200 million. It may be that the compensation amount in the Thalidomide litigation has served as a standard, without that having been expressly stated. In view of the limitation to DM 200 million and the fact that compensation for pain and suffering is not granted, claims in tort continue to have an important function. In this respect Art. 5 AMG may gain importance which constitutes a protective provision within the meaning of Art. 823, para. 2 Civil Code[322]. The claim under Art. 84 AMG becomes statute-barred within three years of the date the causes of damage are known (Art. 90 AMG). Unlike the propositions to reform the manufacturer's liability in Europe, the AMG lays down a time limit of 30 years — i.e. 30 years after the serious event has happened all claims are statute-barred regardless of knowledge — which is an improvement compared with the propositions but excludes possible late damage from liability.

184 (*cc*) The authors have not given any thought to the group of *persons entitled to claim*. What is necessary is that the injured party was injured *in consequence of the application* of a drug. It is doubtful whether persons infected by the person who took the drug may also claim damages — the Act does not give any clues. In the consumer's interest it is necessary to include those persons in the scope of liability[323].

185 (*dd*) At all events only the manufacturer marketing the drug (Art. 84, para. 1 AMG) *is liable to satisfy a claim*. This wording is apparently unequivocal. After all, one could imagine that drugs manufactured by third parties are marketed through a special sales organisation. Here reference should be made to the considerations about the concept of the manufacturer made in connection with Art. 823, para.1 Civil Code. By contrast, the producer of an incorporated product does not come into question as a person liable for compensation, since he does not usually market the finished product. Several persons liable for compensation are liable as joint debtors, Art. 93 AMG.

186 (*ee*) Pursuant to Art. 94 AMG, the entrepreneur must *provide cover* by taking out a liability insurance or by means of an indemnity obligation by a domestic credit institution. We regret to say that the injured party was not granted a direct claim against the insurance company. Such a regulation would provide greater security to the consumer than the obligation under Art. 94 AMG, the fulfilment of which the consumer must rely on.

4 The contractor's liability

187 The contractor is liable primarily for the fitness for use of the product to be manufactured by him. It may happen though that the consumer/orderer suffers damage to his person or property because a product manufactured by the contractor was unsafe. Here the courts do *not* refer to the principles developed with respect to the manufacturer's liability. They have the contractor incur liability either under Art. 635 Civil Code if lack of safety must be regarded as a defect in the work or for positive breach of contract if the manufacturer culpably infringed his obligation to protect the orderer against damage. Also, claims under Art. 823, para. 1 Civil Code were examined in some cases[324]. In connection with the float switch decision a new development is beginning to appear in outline. The courts are inclined to admit claims under Art. 823 Civil Code in addition to contractual claims for damages if the orderer makes available to the contractor his own material for subsequent treatment[325]. In the case of repairs there is also a conflict of laws. The situation with respect to case categories in which a defect in the work exists right from the start is unclear as yet. So far, there is no court practice regarding the law of contracts to manufacture that is similar to the float switch decision. In its decision of 24 March 1977, the Federal High Court at least suggests that the principles of functional ownership (funktionales Eigentum) developed in the float switch decision may also be applied to the law of contracts to manufacture[326]. That is perhaps why things are developing along the same lines as in the case of conflicting claims under a contract of sale[327]. In the case of a conflict of laws the question remains open whether the same duties to answer for a loss are placed on the contractor as are derived from the duty of care with respect to the manufacturer of goods. So far this question has been answered in the negative[328]. The negative attitude is explained by the completely different basis of liability. The contractor is liable to the orderer under contractual duties to answer for a loss; he has to duly manufacture the goods ordered and in so doing to take all precautions to avoid later damage to health or other property. By comparison, the manufacturer of goods is liable because he who creates a source of danger also has to answer for the resultant damage, if any. The basis from the point of view of the law of torts is much wider. But here also a change begins to appear in outline. In its decision of 14 June 1977, the Federal High Court recognised that duties under the law of torts may also be placed on the contractor[329]. To what extent the Federal High Court considers the application of principles under the law of torts admissible cannot yet be predicted.

Application of the rules of manufacturer's liability would, no doubt, result in a considerable extension of liability. Whether such an extension of liability would be justified must be judged by the degree to which the contractor occupies a position similar to that of the manufacturer of goods. The cause of the manufacturer's liability is the changed production process on which a comparison must therefore focus. If a work is produced by way not of single piece production, but of industrial mass production, precisely the situation warranting increased liability exists. Mass production brings in its wake that the consumer is no longer able to see through the production process, which prevents effective protection of his rights. As far as in a concrete case the contractor produces

work by way of industrial production, one might think of treating him as a manufacturer as regards questions of the law of torts[330]. Should court practice actually develop in the way described above, the scope of application of the manufacturer's liability would be even wider, since the courts do not so strictly link liability to an industrial production process.

5 Government liability

188 The question of government liability arises where the government exercises control functions in the production area, that is to say in the area of food law and the law of drugs and in the area of technical labour materials. For if consumers suffer damage through drugs, foodstuffs or technical labour materials, it is natural to examine whether or not through early intervention of the supervisory authority the damage could have been avoided. The basis of government liability is Art. 839 Civil Code in connection with Art. 34 Basic Law. Here a factor is whether the authorities fulfil the duties placed on them by the legislator exclusively in the interest of the general public; if so, a breach of their duties does not give rise to liability in relation to third parties even if the latter are injured in consequence of official action. However, if the official duty in addition to protecting the interests of the general public serves predominantly to protect an individual, a claim for damages accrues to the latter[331]. Accordingly, the objective and scope of protection of the violated official duty has always to be clarified[332]. Injured consumers would be included in the scope of protection of the Acts mentioned above if they could resort to a legal remedy or enjoyed a right under public law (subjektives öffentliches Recht) to take action[333]. As was explained above, such claims for performance do not exist; this does not mean, though, that those concerned automatically lack the protection afforded by state liability: to create a claim for performance a much stronger legal position is required than to give rise to a duty to protect the consumer[334]. As far as could be ascertained, the courts have not so far taken any decision as to whether those competent by law, i.e. food inspection authorities, the Federal Health Authority and industrial inspection boards, also fulfil their duties in the interest of the individual consumer. Judgments relate only to individual cases, which do not allow a final judgment of what decision might be reached[335]. Clues as to the attitude expected to be taken by the courts follow from the position of the Federal Banking Supervisory Office and the Federal Supervisory Office for Insurance Companies, which is of a similar nature. However, in the banking system a noteworthy development is beginning to appear in outline which will no doubt exert an influence on the entire law of state liability in the area of supervision of the economy. Until 1978 the courts had rejected state liability in insurance and banking law arguing that the respective legislation did not aim at protecting individuals[336]. In 1979, the Federal High Court had to decide whether the Federal Banking Supervisory Office had infringed its obligations in connection with the bankruptcy of the Herstatt and Hubmann banks in a way that entitled the savers concerned to claim damages from the government[337]. In the decisions handed down shortly one after the other, the Federal High Court completely broke with its practice in the past. What is decisive is no longer the matter of official duties in principle affecting third parties, but the respective legislative

provision in a particular case. Referring to the history, the official reasons and the trade inspection nature of the Kreditwesengesetz (KWG, Banking Act), the Federal High Court came to the conclusion regarding some facts of the KWG that the injured individuals shall be protected by law. To assert a claim for damages it is no longer required that there be abuse of office or evidence of incorrect official action. An incorrect discretionary decision alone may give rise to a duty to make compensation.

Even assuming that there is basically a claim for government liability, a claim for damages may nevertheless fail on account of the provision of secondary liability (Art. 839 I, sentence 2 Civil Code). According to which, the government is not liable if its officials only may be blamed for negligence and the injured party is able to obtain compensation elsewhere. For this reason government liability could be important in itself only if it were possible to establish that only the officials of an authority have acted culpably while the entrepreneur cannot be blamed for fault. As a rule this will not be the case, so that possible government liability fails because of the anachronism of the provision of secondary liability[339]. By contrast, the government is *always* liable if the official has made himself guilty of an abuse of office. For the presumption of abuse of office not any culpable breach of duty will suffice. Any wilful damage contrary to public policy (Art. 826 Civil Code) is always an abuse of office; in addition an abuse of office may exist also in the case of certain types of negligent conduct, which, however, depend on the peculiarities of a particular case. Not all negligent breaches of duty are abuses of office contrary to public policy merely because the official could have recognised his duty and told himself that a third party might suffer damage[340]. Whether the clause of secondary liability may be applied in the case of negligent abuse of office has so far been left undecided[341]. For the consumer it is in any case hard to prove abuse of office.

6 Claims settlement through insurance, collective funds and social security

189 A manufacturer of drugs or other products is bound to compensate the consumer for damage to his person and/or property arising from a defective product. The manufacturer is liable to the injured consumer in the first instance to the extent of his property or the respective corporate/partnership assets. In most cases claims are settled under a product liability insurance taken out by the manufacturer. However, it is also possible for manufacturers in a certain industry or trade to join and pay premiums into a fund which in the event of damage will answer for the loss.

The injured party does not necessarily have to hold the tortfeasor or his insurance company liable. Often he himself has insurance cover as a party to the contract. Insurance cover of the injured party is regulated under statutory health, accident or pension insurance. The extent of insurance benefits follows from legislation if the injured party belongs to the group of persons covered by the three insurances mentioned. These statutory institutions form the network of social security in the Federal Republic of Germany. The professional classes, self-employed persons, etc., do not belong to this group: they must provide for their social security themselves by taking out appropriate private health, accident or life insurance. If such persons have failed to provide for a case of

damage, the Bundessozialhilfegesetz (Federal Act on National Assistance) affords a certain minimum protection. Statutory or private insurance cover is important, because the tortfeasor's duty to make compensation is often established only after lengthy disputes, which means that initially the injured party will not receive money even from the tortfeasor's insurance company. However, the injured party depends on the assistance he is granted forthwith, irrespective of responsibility for the damage. Thus the respective institutions are bound to defray for the time being hospital charges, doctor's fees and the cost of drugs. In return, the injured party's claims devolve upon the insurance institutions which then have recourse to the tortfeasor's insurance company or possibly to the tortfeasor himself.

190 (*aa*) The *traditional employer's liability insurance* (Betriebshaftpflichtversicherung) taken out by the manufacturer of goods (with the exception of drugs) covers those cases of damage for which the manufacturer is liable under the applicable German law of manufacturer's liability. This follows from Art. 1, No. 1 Allgemeine Haftpflichtversicherungsbedingungen (AHB, Standard Conditions of Third Party Liability Insurance). Liability includes damage to *persons* and to *property*[342]. The traditional employer's liability insurance was extended in 1974 to include the special terms of the Produkthaftpflichtversicherung (PHB, product liability insurance)[343]. This insurance aims at covering liability for consequential damage resulting from lack of warranted qualities (zugesicherte Eigenschaften)[344]. The change in insurance practice is important because here a parallel is established to the insurability of a manufacturer's strict liability inclusive of development dangers. In the past an extension of insurance cover to consequential damage resulting from defects was rejected on the grounds that the risks were difficult to calculate and therefore not insurable. The insurability of a product risk has for some time been a central item in the discussion of whether or not strict liability of the manufacturer of goods should be introduced[345]. The whole discussion has become superfluous because the legislator introduced strict liability under Arts. 84 *et seq.* AMG. This solution became possible only after the insurance business had declared its willingness to assume the liability risk up to an amount of DM 200 million[346]. Under Art. 94 AMG, manufacturers of drugs are bound to take out a liability insurance or to secure an indemnity obligation or a warranty of a domestic credit institution for the amount of DM 200 million. Precise regulations on the design of the insurance contract between manufacturers of drugs and insurance companies have not so far been published.

191 (*bb*) *The establishment of a compensation fund* for product damage was under discussion for some time during the legislative process regarding the AMG. Both the officials' draft and the cabinet bill were in favour of liability on the part of a fund. Moreover, there had been agreement to the effect that the fund was to accept liability for a loss only secondarily if the injured party was unable to enforce his claims against the manufacturer. Since the manufacturer's primary obligation continued to exist, he would have had to take out an employer's liability insurance. The financing of the fund was a debatable question. Basically, all the manufacturers of drugs were to pay the necessary

contributions into the fund. Opinions were not unanimous as to whether the government should share in the costs[347].

192 (*cc*) As far as the injured party has suffered damage to his *person* through defects in a product, the *statutory health, accident and pension insurance funds* assume liability in his favour. They cover the consequences resulting from injury to health. These include curative treatment as such, continued wage payments and compensation for the reduction of income. The claims against a possible tortfeasor pass to the insurance institution which may, if need be, have recourse[348].

Statutory health insurance exists for all workers, employees up to a certain income, unemployed, pensioners, students, and certain groups of self-employed persons. A claim is due to the insured who in consequence of a disease, inclusive of an accident, requires medical treatment. The duty to continue wage payments with respect to civil servants follows from the respective special legislation concerning workers and employees from the Lohnfortzahlungsgesetz (Continued Wage Payment Act). The duty to continue wage payments exists for a period of six weeks only; thereafter income from employment is replaced by sickness benefit payable by a health insurance fund at the rate of 85% of the income. Within a period of three years, sickness benefit for one and the same disease is granted for a maximum of 78 weeks. The statutory accident insurance fund assumes liability if after the completion of curative treatment consequences of an accident remain which impair the injured party's earning capacity. The group of insured comprises all persons employed under an employment, service or apprenticeship agreement. A claim arises if the insured suffered damage in an industrial accident, an accident while on the way to or from work or in consequence of an occupational disease. If the earning capacity is reduced permanently by 20%, a claim for a pension is due to the insured. These provisions may overlap with those under statutory pension insurance, since the latter also has for its purpose protection against the consequences of premature disablement. However, in that case the victim of an accident must be subject to statutory pension insurance.

All persons who do not belong to the group of those insured under statutory pension, accident and health insurance must make provision themselves for the consequences of injuries to their health. In most cases those affected are self-employed persons who to cover the respective risks take out a health insurance combined with accident and life insurance. The amount of benefits paid by private insurance institutions is determined by the type of contract in each case.

It should be noted that statutory and private insurance companies assume liability only for the consequences of injuries to health; damage to property is not covered. In that respect the injured party must take action against the tortfeasor or his insurance company.

7 Critical evaluation

193 Manufacturer's liability is undergoing a change. The traditional instruments of control do not suffice to ensure consumer protection which is appropriate to the changed conditions of production. A factor giving rise to all reform consid-

erations regarding manufacturer's liability is the impact of changed production processes on consumers. Consumers are no longer able to see through the production process and are therefore bound to fail on account of a law of torts which presupposes transparency of the process. The adoption of new industrial production methods therefore entails changes to the system of liability. The AMG and the propositions to amend manufacturer's liability intend to solve the problem through liability regardless of fault. Yet adherence to the concept of defect shows that people continue to believe that liability presupposes the manufacturer's individual responsibility. The reason for the manufacturer's liability is not his increased responsibility but production processes causing dangers. It would therefore be better to disregard the product and to focus solely on the production process. If industrial production methods are concerned, the manufacturer should be liable for any damage caused by his products, provided they are used for their intended purpose[349]. Only true absolute liability for damage caused could solve the problems linked with industrial production. Therefore the next step should be made, i.e. a complete break with a law of torts based on blameworthy conduct. There is no doubt that the two European propositions and the AMG constitute a considerable improvement in legal production, because the gaps in protection under liability in tort are filled. Above all, the inclusion of development dangers points the way for further reform movements. We regret to say that apparently maximum amounts of liability are considered an unavoidable accompaniment of the tightening of liability. Of the two propositions, the EC draft seems to have two decisive advantages: it includes damage to property and expressly ensures liability for development defects. Even if the Federal Government has not so far commented on the propositions[350], the AMG which has just been enacted contains clues as to the attitude to be expected. For example, it is safe to say that unlimited liability and the award of damages for pain and suffering will not be introduced. Whether the Government will curtail the draft in any other way cannot be predicted. It would mean a welcome step towards increased consumer protection if the EC directive (which goes further than the CE convention not only in regard to its subject matter but also in being structured more clearly, and being less involved is to be preferred to the CE convention) were to become applicable law in the Federal Republic of Germany.

Lastly, a seasonable harmonisation of the laws of torts also requires that the law of government liability be reformed. The government cannot, on the one hand, increasingly intervene in a regulatory way in the production process for the consumer's sake and, on the other, fail to fulfil its legislative obligations in the event of damage. At this point consumer associations should start their public relations activity and initiate a process of reorientation aiming at participation of the consumer in the form of control of the administrative authorities. The manufacturer and the government should always be liable to the consumer as joint debtors if they have a part in the cause of damage. The necessary reform of the law of government liability has already been tackled. Accordingly, future government liability will be in respect of wrong done (not liability for fault) and the public authority will incur primary and not secondary liability[351]. Whether, and if so when, those plans will become law is, however, still questionable.

But the best of liability regulations cannot obscure the fact that they may merely concern the spreading of risks and compensation for damage. The most effective protection against dangerous products would be the prevention of damage through comprehensive safety precautions laying down the production process in a mandatory way, compliance with which would have to be controlled by the government.

NOTES

1. v.Hippel, *Verbraucherschutz*, ed. 2 [1979], pp. 20/21.
2. For instance, the Orderly Market Arrangement in the advertising industry as well as the notification of standard form contract recommendations; cf. Reich/Tonner/Wegener, *Verbraucher und Recht*, item 72, p. 219ff; on terms recommendations Chapter 7, items 275, 276; concerning travel organisers' standard form contracts Chapter 6, items 247–257; concerning conditions of repair Chapter 6, items 227–230.
3. On the Orderly Market Arrangements in the advertising industry see Reich/Tonner/Wegener; on the terms recommendations of the DRV cf. *Die Zeit* of 3 December 1976.
4. Simitis, *Verbraucherschutz — Schlagwort oder Rechtsprinzip*, pp. 168/169.
5. Cf. the well known Doppelstecker decision of the BKA WuW/BkartA 145; likewise *Frankfurter Kommentar zum GWB* (as of 19. Lfg. [1977] §1 ref. no. 30; Müller/Gries/Geissler, *Kommentar zum GWB*, ed. 2, §15, ref. no. 23; Tetzner, *Kartellrecht*, ed. 2 pp. 5/6.
6. Further examples in Tetzner, *op. cit.* (note 5), pp. 5/6.
7. Brinkmann, *Verbraucherorganisationen in der BRD und ihre Beteiligung bei der überbetrieblichen technischen Normung* [1976], p. 65.
8. Zweiter Bericht der Bundesregierung zur Verbraucherpolitik of 17 October 1975, p. 12ff.
9. Cf. on this Reich/Tonner/Wegener, *op. cit.* (note 2), p. 20.
10. v.Hippel, *op. cit.* (note 1), p. 61.
11. Begründung der Regierung zum Gesetzesentwurf, BT-Drucks. 7/4245 II, p. 12.
12. Zipfel, NJW [1975], p. 553ff (555).
13. Brinkmann, *op. cit.* (note 7), p. 97ff.
14. Cf. Simitis, *op. cit.* (note 4), p. 224.
15. Offe in Kress, Senghaas *Politikwissenschaft*, p. 135ff (145ff).
16. Cf. Simitis, *op. cit.* (note 4), pp. 222/223.
17. Offe, *op. cit.* (note 15), p. 145ff.
18. On the problem already Reich/Tonner/Wegener, *op. cit.* (note 2), items 4/5, pp. 8–19.
19. Cf. Simitis, *op. cit.* (note 4), p. 219.
20. Cf. Simitis, *op. cit.* (note 4), p. 216.
21. Cf. Simitis, *op. cit.* (note 4), p. 228.

22. Cf. RGRK-Pikart ed. 12 (1978), §1004, ref. nos. 1–3; Löwe DAR [1978], p. 288ff.
23. Emma no. 8 [1978].
24. On this RGRK-Pikart §1004, ref. no. 104; Soergel/Mühl, ed. 10 [1968], §1004, ref. no. 59 with references from court practice.
25. RGZ 101, 335ff (340); RGZ 151, 239ff (246); BGH LM no. 27 on §1004 and BGHZ 2, 395.
26. RGRK-Pikart §1004, ref. no. 103.
27. BGHZ 67, 359 = NJW [1977], 379, in detail item 166 at the end.
28. Diederichsen, NJW [1978], p. 1281ff (p. 1283) with reference to the Estil decision BGH NJW [1972], p. 2217 (2220); cf. on this in addition Chapter 5, item 167; Löwe DAR [1978], p. 288f.
29. Löwe, *op. cit.* (note 28), p. 295.
30. Thus the unanimous opinion in the commentaries on the VwGO, cf. in lieu of all Eyermann/Fröhler, ed. 7 [1977], §42, ref. no. 86.
31. Rehbinder/Burgbacher/Knieper, *Bürgerklage im Umweltrecht* [1972].
32. Rehbinder/Burgbacher/Knieper, *op. cit.* (note 31), p. 119; cf. also Rupp in AÖR 88, p. 479ff (483).
33. Eyermann/Fröhler, §42 VwGO, ref. no. 96.
34. Cf. BVerwGE 30, p. 135ff (137); no subjective right to exercise control over the insurance company.
35. BVerwG JZ [1975], p. 666 and Thieme NJW (1976), p. 705ff.
36. Cf., for instance, Amtliche Begründung zu §11 in Holthöfer/Nüse/Franck, *Kommentar zum Lebensmittelgesetz*, 2 vols., loose-leaf book ed. 6 as of December [1976], §11, ref. no. 1.
37. Zipfel, *Kommentar zum Lebensmittelgesetz*, loose-leaf book, 35. instalment as of April [1978], §8, ref. no. 5 with references from court practice.
38. Cf. Amtliche Begründung zu §9 in Holthöfer/Nüse/Franck §9, ref. no. 1; Kloesel NJW [1976], p. 1769ff.
39. Zipfel, §8, ref. nos. 7, 9.
40. Holthöfer/Nüse/Franck, §9, ref. no. 16.
41. Precise references in Holthöfer/Nüse/Franck, §9, ref. no. 23a.
42. Precise references in Holthöfer/Nüse/Franck, §9, ref. no. 6.
43. Precise references in Holthöfer/Nüse/Franck, §10, ref. no. 2.
44. Holthöfer/Nüse/Franck, §10, ref. no. 8, NWe der Landes VO.
45. Holthöfer/Nüse/Franck, §2, ref. no. 1 amtliche Begründung.
46. Holthöfer/Nüse/Franck, §2, ref. no. 21.
47. Holthöfer/Nüse/Franck, §11, ref. no. 2.
48. Holthöfer/Nüse/Franck, §11, ref. no. 17.
49. Holthöfer/Nüse/Franck, §11, ref. no. 25a.
50. Holthöfer/Nüse/Franck, §12 II preliminary remark.
51. Amtliche Begründung des Regierungsentwurfs zum Änderungsgesetz 58 — BT-Drucks. III/316 — on §5a, para. 1 LMG.
52. Holthöfer/Nüse/Franck, §12, ref. no. 9.
53. Holthöfer/Nüse/Franck, §12, ref. no. 10.
54. Holthöfer/Nüse/Franck, §12, ref. nos. 14–19.
55. Holthöfer/Nüse/Franck, §12, ref. no. 24.
56. Holthöfer/Nüse/Franck, §13, ref. no. 22.

57. Holthöfer/Nüse/Franck, §13, ref. no. 9.
58. Holthöfer/Nüse/Franck, §13, ref. no. 19, with a reproduction of the demands put forward by the Commission.
59. Holthöfer/Nüse/Franck, §13, ref. no. 23.
60. Holthöfer/Nüse/Franck, §13, ref. no. 20.
61. Holthöfer/Nüse/Franck, §14, ref. no. 15.
62. Holthöfer/Nüse/Franck, §14, ref. no. 16.
63. BGBl [1978], I, p. 718; and BGBl [1978], I p. 1525, respectively.
64. So Holthöfer/Nüse/Franck, §14, ref. no. 16.
65. BGBl [1978], I, p. 718.
66. Amtliche Begründung zu §15, printed in Holthöfer/Nüse/Franck, §15, ref. no. 1.
67. Holthöfer/Nüse/Franck, §15, ref. no. 19.
68. BGBl [1947], I, p. 1479.
69. BGBl [1975], I, p. 124, printed in Holthöfer/Nüse/Franck, in ref. no. 20 to §15.
70. Amtliche Begründung zu Art. 7, BT-Drucks. 3/316, printed in Holthöfer/Nüse/Franck, §33, ref. no. 2.
71. Amtliche Begründung zu §33 LMG, printed in Holthöfer/Nüse/Franck, §33, ref. no. 3.
72. Cf. Simitis, *op. cit.* (note 4), p. 177.
73. Amtliche Begründung printed in Holthöfer/Nüse/Franck, §33, ref. no. 3.
74. Holthöfer/Nüse/Franck, §33, ref. nos. 10, 14, 16.
75. Holthöfer/Nüse/Franck, §35, ref. no. 4.
76. Cf. v.Hippel, *op. cit.* (note 1), p. 43; this is also admitted by the Federal Government, cf. 2. Bericht zur Verbraucherpolitik, p. 29.
77. Amtliche Begründung zum 7. u. 8. Abschnitt, printed before the preliminary remark to §§40–46 in Holthöfer/Nüse/Franck.
78. Printed in Holthöfer/Nüse/Franck, §45.
79. Reichsgesundheitsblatt [1934], p. 590, printed in Holthöfer/Nüse/Franck as appendix A No. 1.
80. Holthöfer/Nüse/Franck, §41, ref. no. 8.
81. Holthöfer/Nüse/Franck, §41, ref. no. 11.
82. Examples in Holthöfer/Nüse/Franck, §41, ref. no. 14.
83. Holthöfer/Nüse/Franck, §41, ref. no. 20.
84. Holthöfer/Nüse/Franck, §41, ref. no. 22, with further comments on the areas of authority.
85. Holthöfer/Nüse/Franck, §41, ref. no. 44.
86. References from court practice in Holthöfer/Nüse/Franck, §41, ref. no. 50.
87. Holthöfer/Nüse/Franck, §41, ref. no. 55 at the end.
88. Holthöfer/Nüse/Franck, §41, ref. nos. 72ff.
89. Holthöfer/Nüse/Franck, §42, ref. nos. 9–11.
90. Holthöfer/Nüse/Franck, §42, ref. nos. 26, 27.
91. Holthöfer/Nüse/Franck, §4, ref. no. 8.
92. Holthöfer/Nüse/Franck, §4, ref. no. 6.
93. Holthöfer/Nüse/Franck, §4, ref. no. 15; also Zipfel, D 501, §1 AMG,

note 51 (AMG 61).
94. Holthöfer/Nüse/Franck, §25, ref. no. 3.
95. Amtliche Begründung zu §25, printed in Holthöfer/Nüse/Franck, §25, ref. no. 1.
96. BGBl [1977], II, p. 2589ff.
97. Holthöfer/Nüse/Franck, §5, ref. no. 8.
98. Holthöfer/Nüse/Franck, §30, ref. no. 9; and Chapter 5, item 182.
99. Holthöfer/Nüse/Franck, §30, ref. no. 15.
100. Holthöfer/Nüse/Franck, §31, ref. no. 9.
101. Holthöfer/Nüse/Franck, §30, ref. no. 17.
102. v.Hippel, *op. cit.* (note 1), p. 61.
103. Etmer/Bolck, vol. IV, *Materialien zum Arzneimittelgesetz*, B §52, Begründung des Regierungsentwurfs, p. 24.
104. Plagemann, WRP (1978), p. 779ff (781–784).
105. Etmer/Bolck, *op. cit.* (note 103), §6, 2; Begründung des Regierungsentwurfs, p. 25.
106. BGBl [1976], I, p. 2905; amended on 21 January 1977 — BGBl, I, p. 184.
107. Etmer/Bolck, *op. cit.* (note 103), §15, 3; Stellungnahme des Bundesrates.
108. Verordnung über Erwerb. Herstellung, Aufbewahrung und Abgabe von Arzneimitteln in Ausübung des tierärztlichen Dispensierrechts of 31 July 1975, BGBl, I, p. 2115.
109. Berlin: VO betreffend Regelung und Beaufsichtigung des Verkehrs mit Arzneimitteln, Giften und giftigen Pflanzenschutzmitteln außerhalb der Apotheken of 22 May 1962, GVBl p. 483; Schleswig-Holstein: VO über die Regelung und Beaufsichtigung des Verkehrs mit Arzneimitteln außerhalb der Apotheken of 23 July 1952, GVBl p. 1124 as amended on 23 March 1962, GVBl p. 130.
110. Cf. on this the essay worth reading by Winter/Derleder, *Demokratie und Recht* [1976], p. 260ff.
111. BAnz No. 185 of 1 October 1977, printed in Sander/Scholl, *Kommentar zum AMG*, 2. instalment as of November [1977] in appendix I/5 and I/8, respectively.
112. Basically on the problems of proof of effectiveness Plagemann, *Der Wirksamkeitsnachweis nach dem Arzneimittelgesetz v. 1976*; an introductory survey of the legislative regulation and the state of the discussion may be found in Henning NJW [1978], p. 1671ff.
113. In detail on the problems of the onus of proof Plagemann, p. 73ff and p. 167ff (176–178).
114. Kriele, ZRP [1975], p. 260ff; cf. on this also Sander/Scholl, Erl. §25 C 7.8.
115. Kienle, ZRP [1976], p. 66ff; for a critical view, see also Plagemann, *op. cit.* (note 112), p. 44/45.
116. Fincke, NJW [1977], p. 1094ff.
117. Liedtke, NJW [1977], p. 2113ff; for a negative view, see also Henning, *op. cit.* (note 112), p. 1673/74.
118. OLG Hamm, Max-Planck, *Selbstbiographie*, ed. 4 [1967], p. 22.
119. Kriele, NJW [1976], p. 355ff (p. 358), as well as esp. the decision of the VG Minden cited on p. 356. Unclear Henning, *op. cit.* (note 112), p. 1675;

Plagemann, *op. cit.* (note 112), pp. 112–121 and 168/169; cf. the Kalkar decision of the BVerfG NJW [1979] p. 359ff (362).

120. Etmer/Bolck, *Materialien zur Reform des Lebensmittelrechts* F, Leitsätze zum Erlaß der Rechtsverordnung nach §34 Abs. 1 Nr. 4 des Regierungsentwurfs zur Neuordnung des Arzneimittelrechts (Arbeitstitel: *Verordnung über Standardzulassungen*) — as of 12 February 1975.
121. This is clearly stated in the reasons given for the respective regulations. Etmer/Bolck, *op. cit.* (note 120), B §40. 2. Begründung des Regierungsentwurfs.
122. Etmer/Bolck, *op. cit.* (note 120), B §52. 2. Begründung des Regierungsentwurfs, p. 104.
123. Einstellungsbeschluß des LG Aachen, JZ [1971], p. 507ff (517).
124. Etmer/Bolck, *op. cit.* (note 120), §57. 2. Begründung des Regierungsentwurfs, p. 112.
125. Printed in Sander/Scholl, *Arzneimittelrecht* Erl. §63 C 2–12.
126. v.Hippel, *op. cit.* (note 1), p. 47.
127. Etmer/Bolck, *op. cit.* (note 120), §59. 2. Begründung des Regierungsentwurfs, p. 114.
128. Zipfel, *op. cit.* (note 39), D 501 §15, ref. no. 8 (AMG 61)
129. Zipfel, *op. cit.* (note 39), §40, ref. no. 8.
130. BT-Drucks. 8/856 p. 4.
131. Bundesgesetzblatt [1979], part I, p. 1432ff.
132. BT-Drucks. 8/856, p. 5.
133. Published in Bundesanzeiger of 3 November 1970.
134. Brinkmann, *op. cit.* (note 7), p. 57.
135. Brinkmann, *op. cit.* (note 7), p. 64ff.
136. Brinkmann, *op. cit.* (note 7), p. 83ff.
137. Brinkmann, *op. cit.* (note 7), p. 75.
138. Brinkmann, *op. cit.* (note 7), p. 91.
139. The procedure of DIN standardisation is essentially regulated in DIN 820 Bl. 1.
140. Brinkmann, *op. cit.* (note 7), p. 94.
141. Brinkmann, *op. cit.* (note 7), pp. 94/95.
142. Brinkmann, *op. cit.* (note 7), pp. 97–102; Höhfeld, HdVR, group 240, ref. nos. 85–89.
143. Höhfeld, HdVR, group 240, ref. nos. 88, 89.
144. Brinkmann, *op. cit.* (note 7), p. 76ff; Hummel/Liljegren, HdVR, group 60a, ref. no. 8.
145. Hummel/Liljegren, *op. cit.* (note 144), ref. no. 9.
146. Bundesanzeiger of 3 November 1970.
147. Hummel/Liljegren, *op. cit.* (note 144), ref. no. 13.
148. Abschnitt I Nr. 2b und 3.2 Runderlaß des Arbeits- und Sozialministers — Durchführung des Gesetzes über technische Arbeitsmittel — III A 3-8100 B (MBl NW of 19 December 1968, p. 1957). The regulations in other German Länder are similar, cf. Schmatz/Nöthlichs, nos. 2205, 2305, 2405.
149. Brinkmann, *op. cit.* (note 7), p. 77.
150. Hummel/Liljegren, *op. cit.* (note 144), ref. no. 13.

151. Hummel/Liljegren, *op. cit.* (note 144), ref. no. 13.
152. Schulz, *Außenwirtschaftsrecht*, §10, ref. no. 3.
153. Schulz, *op. cit.* (note 152), §10, ref. no. 6. Einfuhrliste — *Anlage zum Außenwirtschaftsgesetz* — Teil I u. II der Einfuhrliste in der Fassung der 57. Verordnung zur Änderung der Einfuhrliste vom 29.12.1976 (Supplement to Bundesanzeiger No. 247 of 31 December 1976), last amended by the 60. Verordnung zur Änderung der Einfuhrliste vom 27 June 1977 (Bundesanzeiger No. 116 of 28 June 1977).
154. Schulz, *op. cit.* (note 152), §10, ref. nos. 10–15.
155. Schulz, *op. cit.* (note 152), §10, ref. no. 18.
156. Schulz, *op. cit.* (note 152), §1, ref. no. 24.
157. Schulz, *op. cit.* (note 152), §1, ref. no. 25.
158. Cf. Zipfel, *op. cit.* (note 39), *Lebensmittelrecht*, §47, ref. no. 2; Etmer/Bolck, *Arzneimittelrecht*, Part B, Materialien zur Reform des Arzneimittelrechts, Begründung des Regierungsentwurfs zu Art. 1 §§67 und 68 (later 73, 74), p. 124.
159. Zipfel, *op. cit.* (note 39), §48, ref. nos. 13, 11.
160. Zipfel, *op. cit.* (note 39), §1, ref. no. 2.
161. Schulz, *op. cit.* (note 152), §1, ref. no. 27.
162. Cf. A 15a (iv) of the programme.
163. EuGH NJW [1976], p. 1575ff.
164. Reference in Sander/Scholl, *op. cit.* (note 125), Erl, §21 AMG C 5.
165. Cf. on this related to industrial inspection boards Hummel/Liljegren, ref. nos. 18, 19.
166. The original bill was more favourable to the consumer, cf. BT-Drucks. 8/856, p. 7.
167. Test 7 [1977], p. 13.
168. Cutters without carriage and remnant catching device are not in accordance with the state of the art, but with DIN 1558.
169. Klare, in: *Die Berufsgenossenschaft* [1977], p. 497ff; [1978], p. 15ff.
170. Bundestags-Drucksache 8/3029 of 28 June 1979.
171. §25 AtomG, §84 AMG; on this in Chapter 5, items 180ff.
172. Cited in Kötz, *Deliktsrecht* [1977], p. 164.
173. BGHZ 55, p. 229ff. (234).
174. For a very good survey see BGHZ 51, p. 91ff (93ff).
175. Verhandlungen des DIT [1968], vol. I part C, paper by Simon *ibid.*, vol. II, part M.
176. BGHZ, *op. cit.* (note 173).
177. BGHZ 51, 91ff., last BGH NJW [1974], p. 1503.
178. BGHZ 51, 91ff (105).
179. BGH BB [1975], p. 1031ff (Spannkupplungsurteil) = NJW [1975], p. 1827ff with note by Schmidt-Salzer, BGH BB [1975], p. 1033ff; Westphalen BGB BB [1975], p. 1034ff; Bieberstein Vers.R. [1976], p. 411ff.
180. BGH NJW [1975], p. 1827ff (1828).
181. Bieberstein, *op. cit.* (note 179), p. 141; Diederichsen, NJW [1978], p. 1283ff (1287).
182. Cf. Palandt/Thomas, §823 note 16 Dc; last impressively Leßmann, JuS [1978], p. 433ff (434/436).

183. BGH JZ [1971], p. 29 = BB [1970], p. 1414.
184. Cf. the most recent compilation in Diederichsen, *op. cit.* (note 181), p. 1284.
185. BGH NJW [1972], p. 2217ff.
186. Diederichsen, *op. cit.* (note 181), p. 1284.
187. Cf. Schmidt-Salzer, *Produkthaftung*, ref. nos. 98ff; Diederichsen, *op. cit.* (note 181), p. 1283; Leßmann, *op. cit.* (note 182), p. 436.
188. Löwe, in DAR [1978], p. 128ff; OLG Celle BB [1979], p. 392 with note by Schmidt-Salzer (note 187), p. 394.
189. Differently Schmidt-Salzer, *Produkthaftung*, ref. no. 86; as here Löwe, *op. cit.* (note 188), p. 290.
190. OLG Celle, *op. cit.* (note 188), p. 393.
191. BGH NJW [1972], p. 2217ff (2220).
192. BGH NJW [1977], p. 379ff = BGHZ 67, 359ff.
193. BGH NJW [1977], p. 380.
194. For a confirming view, see Engels, DB [1977], p. 617; Emmerich, JuS [1977], 472; v.Westphalen, BB [1977], p. 314; Löwe, BB [1978], 1495; for a negative view, see Lieb, JZ [1977], 345; Rengier, JZ [1977], 347; Schubert, JR [1977], 459; Weitnauer, *Arztrecht* [1978], p. 38; Schmidt-Salzer, BB [1979], p. 1ff; Ebel, NJW [1978], p. 2494ff.
195. BGH BB [1978], 1491 = NJW [1978], p. 2241ff.
196. See OLG Braunschweig, NJW [1979], p. 1552ff.
197. Schmidt-Salzer, BB [1979], p. 1ff (p. 10).
198. Diederichsen, *op. cit.* (note 181), p. 1284.
199. BGH VersR [1956], 625; [1959], 523; [1960], 855 and Staudinger/Schäfer, §831, ref. nos. 195, 197.
200. BGH BB [1975], 1031 (1032) if the requirements as to the duty to instruct are satisfied; also Staudinger/Schäfer, §831, ref. no. 198.
201. BGH VersR [1966], p. 410; BGH 51, p. 91ff (105) and BGH BB [1975], p. 1031ff.
202. Diederichsen, *op. cit.* (note 181), p. 1288.
203. LG Frankfurt NJW [1977], p. 1108ff; AG Frankfurt VersR (1977), p. 1137ff.
204. Contergan Fall LG Aachen JZ [1971], p. 507ff.
205. OLG Celle BB [1979], p. 392ff.
206. OLG Celle, *op. cit.* (note 205), p. 393/394; Schmidt-Salzer, *op. cit.* (note 194), p. 395.
207. But so Schmidt-Salzer, *op. cit.* (note 194), p. 396.
208. Leßmann, *op. cit.* (note 182), p. 439.
209. Leßmann, *op. cit.* (note 182), p. 436 and the Estil decision as an example of many other cases; cf. Diederichsen, *op. cit.* (note 181), p. 1284.
210. Leßmann, *op. cit.* (note 182), p. 435, 437 with reference to BGH NJW [1963], p. 484.
211. Simitis, in *Festschrift für Konrad Duden* [1977], p. 605ff (607).
212. Simitis, *Festschrift*, p. 608; cf. Nüßgens, in 25 Jahre BGH [1973], p. 96.
213. Diederichsen, *op. cit.* (note 181), p. 1288 with reference to OLG München VersR [1975], p. 606ff and BGH NJW [1972], p. 2217ff (2220).
214. Simitis, *Festschrift*, p. 611.

215. Cf. esp. the discussions on the occasion of the 47. DJT [1968], (Report in NJW [1968], p. 2047; JZ (1968), p. 715). Here belong those writers who already under the existing law support liability regardless of fault, cf. the treatment in BGHZ 51, p. 91ff (p. 95ff); Staudinger/Schäfer, ref. no. 208 on §831; Simitis — *Verbraucherschutz* [1975], p. 50ff; v.Hippel — *Verbraucherschutz* [1974], p. 28ff.
216. *op. cit.* in III 1.4 p. 27.
217. Text printed in: *European Series No. 91* and *International Legal Materials* [1977], 16:7; the proposition of 20 March 1975 is reproduced in DIR/JUR 75 printed with reasons, German text also in Lindemeyer WRP [1975], p. 426ff; Lindemeyer WRP [1975], p. 420ff, and 712ff; Micklitz, ZRP [1978], p. 37ff; Dahl, ZVP [1978], p. 343ff; Ficker in *Festschrift für v.Caemmerer* [1978], p. 343ff.
218. Amtsblatt der Europäischen Gemeinschaft of 26 October 1979, No. C271/3.
219. See the pre-draft in BT-Drucksache 7/5812.
220. However, the European Parliament wanted to exempt development defects from absolute liability, see FAZ of 3 May 1979.
221. Einleitung zum Entwurf der EG, BT-Drucks. 7/5812, p. 1; similarly the Begründung des ER Nos. 10–13, pp. 12/13.
222. On ER-Entwurf No. 36, p. 19 of the Begründung, on EG-Entwurf Art. 1a, p. 6 of the BT-Drucksache.
223. So the Atomgesetz §25; cf. Lorenz, *op. cit.* (note 217), p. 250.
224. Cf. Begründung No. 43, p. 21 of the ER-Entwurf and Lorenz, RIW 75, p. 250; it remains unclear whether Lorenz, p. 251, considers the burden of proof of the defectiveness or flawlessness of a product in general to be on the producer; as Lorenz, Lindemeyer, *op. cit.* (note 217), p. 422; on the EC-Entwurf Begründung Art. 1d, p. 6 of the Drucksache.
225. No. 34, p. 18 of the Begründung des ER-Entwurfes; Begründung Art. 4, p. 8 of BT-Drucksache. For a critical view of the concept of defect see Blenk, BB [1978], p. 1725ff.
226. Simitis, *op. cit.* (note 4), p. 625.
227. Cf. in lieu of all Palandt/Thomas, §823 note 16 D c bb.
228. Weitnauer, NJW [1968], p. 1593 (94); based on Weitnauer also Palandt/Thomas, §823 note 16 D c bb.
229. Schmidt-Salzer, *Produkthaftung* [1972], ref. no. 184.
230. Schmidt-Salzer, *op. cit.* (note 229), ref. no. 185.
231. In the case of defective production the producer may furnish the decentralised proof of exculpation under §831 BGB; cf. Reich/Tonner/Wegener, *op. cit.* (note 2), p. 162; Palandt/Thomas, §823 note 16 D c ff.
232. Palandt/Thomas, §823 D b; Lukes, JuS [1968], 351.
233. Cf. Brinkmann, *op. cit.* (note 7), p. 97ff; Chapter 5, item 161.
234. Differently the I. Vorentwurf der EG-Kommission, Dokument XI/334/74 — D of August [1974]. There the concept of defect enabled the producer to furnish proof of exculpation if he was able to show that the article was used for its intended purpose; on this see Lindemeyer, *op. cit.* (note 217), p. 425 (V 1).

235. Differently Lindemeyer, *op. cit.* (note 217), p. 712, who in the case of use contrary to the intended purpose precludes legitimate expectations as to safety.
236. That passage was incorporated on the initiative of the European Parliament; cf. on this v.Hülsen, RIW [1979], p. 365ff (375); on this also Chapter 5, item 182.
237. BGHZ 51, 91 (102); on this Schmidt-Salzer, *Produkthaftung*, ref. no. 240.
238. BGH NJW [1972], p. 2217ff.
239. BGH BB [1975], p. 1031ff, with note by Hasskarl, BB [1976], p. 165ff.
240. Schmidt-Salzer, *Produkthaftung*, ref. no. 24, p. 182; differently Simitis, Gutachten zum 47. DJT, p. 66.
241. On this Wolter, ZRP (1974), p. 260ff (p. 262); Chapter 5, item 174.
242. Simitis, Grundfragen, p. 70ff in: Verhandlungen des 47. DJZ I C 49.
243. Simitis, *Festschrift*, p. 626.
244. Cf. the references from literature and court practice in Diederichsen, *Die Haftung des Warenherstellers*, p. 58ff with criticism p. 75.
245. Cf. the references in Schmidt-Salzer, *Produkthaftung*, p. 83 footnote 1a; Schmidt-Salzer, *op. cit.*, ref. no. 98, assumes that a duty to avert danger is on the producer even before his products are put on the market.
246. So Weitnauer, NJW [1968], p. 1593 (1594); Simitis, *Gutachten*, p. 46; differently the BGH in BGHZ 48, 310 (312) in the case of the contractor's liability.
247. Cf. on this the references in Diederichsen, *Haftung des Warenherstellers*, p. 72.
248. Originally the Commission had done without such a provision, on this see Begründung Art. 5c p. 8 of BT-Drucksache.
249. Begründung zu Art. 6c, p. 9 of BT-Drucksache.
250. Begründung zu Art. 6d, p. 9 of BT-Drucksache.
251. Begründung zu Art. 6d, p. 9 of BT-Drucksache.
252. BGH NJW [1968], p. 1622ff — Kontact-Kleber-Fall.
253. Cf. on this Micklitz, ZVP [1979], p. 329ff.
254. Einleitung zum Vorschlag des EG-Entwurfs, p. 2 of BT-Drucksache and Erläuterung Nr. 50, p. 23 des ER-Entwurfs.
255. Cf. Kötz, AcP [1970], p. 1ff (37); Kötz, *Deliktsrecht*, p. 163; Lorenz, *op. cit.* (note 217), p. 253.
256. Cf. Kötz, AcP [1970], p. 1ff (p. 37); Lorenz, *op. cit.* (note 217), p. 253.
257. v.Hülsen, RIW [1977], p. 349ff; v.Hülsen, RIW [1979], p. 365ff.
258. v.Hülsen, RIW [1979], p. 369.
259. Cf. Dahl, ZVP [1979], pp. 19/20; differently v.Hülsen, RIW [1979], p. 373ff.
260. Cf. p. 2 der Einleitung zum EG-Entwurf in BT-Drucksache.
261. On this Kötz, AcP [1970], p. 1ff (p. 39).
262. Simitis, *Festschrift*, p. 633.
263. Cf. on the question of pain and suffering also in the case of absolute liability Kötz, in: *Festschrift v. Caemmerer* [1978], p. 389ff.
264. Cf. BGH NJW [1977], p. 379 (381) where the BGH makes the admissibility of such clauses contingent upon a particular case; on the relationship between §823 BGB and contractual claims for damages, BGH *op. cit.* with

notes by Lieb and Rengier, in JZ [1977], p. 344ff.
265. Cf. Palandt/Heinrichs, preliminary remark preceding §249.
266. Thorotrast/Fall, KG VersR [1975], p. 247.
267. Begründung Art. 10, p. 6 des EG-Entwurfes in BT-Drucksache.
268. Simitis, *Festschrift*, pp. 615, 616.
269. Begründung Art. 6, p. 9 of BT-Drucksache.
270. Begründung No. 45, p. 21 des ER-Entwurfs; Begründung Art. 1c, p. 6 of BT-Drucksache.
271. Palandt/Thomas, §823 note 16 D c; Staudinger/Schäfer, §831, ref. no. 215; Schmidt-Salzer, *Produkthaftung*, ref. no. 191, p. 140.
272. Schmidt-Salzer, *Produkthaftung*, ref. no. 191, p. 140.
273. FAZ of 3 May 1979.
274. Cf. Consumers Consultative Committee Opinion on the amended proposal of 21 February 1980, p. 3ff and Simitis, *Festschrift*, p. 621.
275. Cf. the Erläuterungen, p. 22, No. 47 where joint and several liability is merely noted.
276. Whether the supplier has been charged exclusively with technical responsibility, because he alone conducted the necessary materials tests, is not taken into account; cf. BGH NJW [1968], 247 and Lindemeyer, *op. cit.* (note 217), p. 423.
277. Cf. Erläuterungen No. 47, p. 22 zum Entwurf des Europarates.
278. Cf. Lindemeyer, *op. cit.* (note 217), p. 713.
279. Erläuterung No. 28, p. 17 zum Entwurf des ER; Begründung Art. 1e, p. 6 zum Entwurf der EG in BT-Drucksache; cf. also Lorenz, *op. cit.* (note 217), p. 248 who comments on the legal position in the USA, where the wholesaler and the retailer are included in the liability.
280. Erläuterung No. 28, p. 17 zum Entwurf des ER, Begründung Art. 1e, p. 6 zum Entwurf der EG in BT-Drucksache.
281. According to Erläuterungen No. 46, pp. 21/22 this does not apply to a person who affixes his name for advertising purposes or because he is obliged to do so under national law; on this also Lindemeyer, *op. cit.* (note 217), p. 423.
282. Lindemeyer, *op. cit.* (note 217), p. 714 and Begründung zu Art. 2b, p. 7 of BT-Drucksache.
283. Begründung zu Art. 2b, p. 7 of BT-Drucksache.
284. Cf. Lorenz, *op. cit.* (note 217), p. 249 zum Entwurf des ER; Begründung Art. 1b, p. 7 zum Entwurf der EG in BT-Drucksache.
285. In detail on the liability of the importer, Lindemeyer, *op. cit.* (note 217), p. 424.
286. Reference to this point of view is made by Lindemeyer, *op. cit.* (note 217), p. 424.
287. Cf. the references from court practice in Diederichsen, *Haftung des Warenherstellers*, p. 58ff; last in greater detail Schmidt-Salzer, BB [1979], p. 1ff.
288. Diederichsen, *Haftung des Warenherstellers*, p. 75; Schmidt-Salzer, *Produkthaftung*, ref. no. 98.
289. BGH VersR [1960], pp. 855/856 (Kondenstopf), also OLG Bremen as lower court, p. 855 and BGH VersR [1972], p. 559 (560) item II 1

(Förderkorb).

290. BGH BB [1975], p. 1503ff; cf. on this Schmidt-Salzer BB [1979], p. 1ff.
291. Schmidt-Salzer, ref. nos. 138ff; BGH NJW [1968], p. 247 (Schubstrebenfall); Palandt/Thomas, §823 note 16 D c aa.
292. Schmidt-Salzer, *Produkthaftung*, ref. nos. 138ff.
293. Schmidt-Salzer, *Produkthaftung*, ref. no. 145; BGH NJW [1975], p. 1827 (1828).
294. BGH VersR [1960], pp. 855/856 (Kondenstopf); BGH VersR [1972], pp. 559, 560 item II 1 (Förderkorb); BGH VersR [1977], pp. 839/840.
295. References in Schmidt-Salzer, *Produkthaftung*, p. 109 footnote 36.
296. To the same effect BGH VersR [1960], pp. 855/856 (Kondenstopf).
297. OLG Bremen cited in BGH VersR [1960], p. 855.
298. Schmidt-Salzer, *Produkthaftung*, ref. no. 147; BGH VersR [1977], p. 839ff (840).
299. So BGH BB [1977], p. 162ff (163) with note Westphalen, BB (1977), p. 313ff.
300. Schmidt-Salzer, *Produkthaftung*, ref. no. 157 with numerous references from literature, footnote 6b, p. 117; Palandt/Thomas, §823 note 16 D c aa.
301. BGH BB [1977], p. 162ff (163); Westphalen, BB [1977], p. 313ff (314) and BGH VersR [1977], p. 839ff.
302. BGH VersR [1977], p. 839; on this Schmidt-Salzer, BB [1979], p. 1ff (6/7); who considers the dogmatic starting point of the courts to be wrong.
303. BT-Drucks. 7/5812, p. 7 on Art. 2b.
304. Schmidt-Salzer, *Produkthaftung*, ref. no. 173 with references, p. 125 footnote 110; from court practice RG DR [1940], p. 1293 (1294).
305. Schmidt-Salzer, *Produkthaftung*, ref. no. 173, p. 126, so also Lindemeyer, WRP [1975], p. 412 with reference in footnote 32 to an unpublished decision of the OLG Frankfurt; cf. on this nexus of problems RG DR [1940], p. 1293 (1294).
306. BGH BB [1980], p. 443 with note by Schmidt-Salzer, p. 445ff.

306a. Cf. on this Reich & Micklitz, *Consumer Legislation*, ref. nos. 95–99.

307. OLG Hamm DB [1973], p. 325 (326) = BB [1973], p. 398.
308. So the decision cited, for a confirming view see Palandt/Thomas, §823 note 16 D c aa.
309. Cf. Lindemeyer, WRP [1975], p. 422; for a restrictive view, see id. in WRP [1979], p. 713.
310. BGH BB [1975], p. 103ff = NJW [1975], p. 1827ff; by Schmidt-Salzer, note 1 on BGH BB [1975], p. 1031ff, Westphalen, note 2, p. 1031ff; Bieberstein, VersR [1976], p. 411ff.
311. Below Chapter 5, no. 178; in general on the liability of the manufacturer of drugs Kullmann, BB [1978], p. 175ff.
312. Cf. Wolter, ZRP [1974], p. 260 (265).
313. That is, in accordance with the principles on the manufacturer's liability developed by the courts.
314. Thus at least according to the pre-draft of the Federal Health Authority under which satisfactory proof of the causal connection was to be sufficient; differently already the cabinet bill which provided for the liability of a

fund only in the event of proof of causality between defect and damage.
315. Wolter, DB [1976], p. 2001 (2003 footnote 36).
316. Wolter, DB [1976], p. 2001 (2003) and footnote 36 on the relationship between §93 AMG and §830 BGB.
317. On the question of liability of a fund in the event of an extension of the liability of the fund according to aspects of social policy, Wolter, ZRP [1974], p. 265.
318. So also Wolter, ZRP [1974], p. 262.
319. So also Scholl/Sander, *Arzneimittelrecht*, §5, note 4.
320. Consequently, the Estil decision of the BGH should also be assigned to §84, p. 2 AMG.
321. Wolter, DB [1976], p. 2001 (2004).
322. In respect of §6 AMG of 1961 established in BGHZ 23, p. 184.
323. Diederichsen, NJW [1978], p. 1289 and Wolter, ZRP [1974], p. 263.
324. RGRK-Glanzmann, ed. 12 [1975], §635, ref. nos. 39–62.
325. BGH NJW [1977], p. 1819 with note by Schlechtriem; on this also Westphalen, NJW [1979], p. 838ff (839).
326. BGH NJW [1977], p. 1819 with reference to the float switch decision.
327. Westphalen, *op. cit.* (note 325), p. 839.
328. So Leßmann, JuS [1978], p. 437 with reference to an unpublished manuscript by Lukes.
329. BGH BB [1977], p. 1117 = VersR [1977], p. 839ff.
330. Simitis, *Festschrift*, pp. 620/621.
331. Soergel/Glaser, ed. 10 [1969], §839, ref. no. 187.
332. BGHZ 39, p. 358ff (364).
333. Soergel/Glaser, §839, ref. no. 188.
334. So Soergel/Glaser, §839, ref. no. 187.
335. Cf. Karlsruhe, VersR [1954], p. 145; BGH VersR [1963], p. 477; BGH MDR [1961], p. 938ff.
336. OLG Bremen NJW [1953], p. 585; OLG Hamburg BB [1957], p. 950; OLG Köln (Herstatt-Bank) NJW [1977], p. 2213; BGH NJW [1972], p. 577 on insurance supervision.
337. BGH NJW [1979], p. 1354 (Hubmann); BGH NJW [1979], p. 1879 (Herstatt-Bank); on this Kopf/Bäumler, NJW [1979], p. 1871ff.
339. On this Wolter, ZRP [1976], p. 2005 regarding the Federal Health Authority.
340. BGH NJW [1973], p. 458ff (459).
341. BGH NJW [1973], p. 458ff; BGH MDR [1963], p. 287ff; BGH Warn [1970], No. 168; Scholl/Sander, *op. cit.* (note 319), want to limit the liability of the BGA to those cases, §25, note 20.
342. Cf. Diederichsen, *Die Deckung des Produkthaftpflichtrisikos im Rahmen der Betriebshaftpflichtversicherung*, VersR [1971], p. 1007ff (p. 1083), as well as Sieg, *Das neue Modell der Produkt-Haftpflichtversicherung*, BB [1974], p. 1176ff (p. 1176 in I 1 with further references footnote 3).
343. Appendix 1 to Rundschreiben H 16/74 M of the HUK-Verband of 30 May 1974, *Die Versicherungspraxis* [1974], p. 180ff.
344. Meyer/Kahlen, *Der Haftpflichtversicherungsschutz für Mängelfolgeschäden im Rahmen der Produkt-Haftpflichtversicherung industrieller*

Betriebe, BB [1974], p. 1613ff (p. 1615) and also Sieg, *op. cit.* (note 342), p. 1177.

345. Cf. Schmidt-Salzer, *Produkthaftung* [1972], ref. nos. 355–378; Diederichsen, *Die Haftung des Warenherstellers* [1966], p. 281ff; v.Hippel, p. 48, footnote 41 with references.
346. Cf. Wolter, DB [1976], p. 2001, footnote 6; *Der Spiegel* no. 18 [1976], p. 85.
347. On this Wolter, ZRP [1974], pp. 266/267.
348. Cf. Weyers, *Unfallschäden*, p. 400ff.
349. Simitis, *Festschrift*, p. 626.
350. Cf. BT-Drucks. 8/239 of 25 March 1977 — Question raised in parliament by the CDU on the EC draft directive and the reply of the Federal Government BT-Drucks. 8/296 of 18 April 1977.
351. Survey in Ossenbühl, *Staatshaftungsrecht* [1976], p. 235ff.

CHAPTER 6

Quality of Goods and Services

I PRELIMINARY REMARKS

194 Apart from the safety of products, what matters most to the consumer when purchasing a product or availing himself of a service is quality. The sources of information about quality available to a consumer when purchasing an article are primarily descriptions by the seller/supplier and appropriate hints by the manufacturer. In the case of services the consumer's expectations focus on comprehensive counselling by the supplier of services. There are no quality controls by the state. Only the Fernunterrichtsschutzgesetz (FernUSG, Correspondence Course Protection Act) provides for the examination of correspondence courses to check their suitability for the consumer (No. 197). So the manufacturer or supplier of services is solely responsible for the measure of quality. Trade and industry control themselves through quality standards established by them which lay down the requirements as to quality for a wide scope of technical production. A certain measure of quality control of goods and increasingly also of services by independent third parties is achieved through the publication of test results by the Stiftung Warentest (No. 6). If a product — or a service — comes off badly in the test, the manufacturer/supplier of services may be forced to remedy the quality defects noted. At the same time, test results published in daily papers also provide the consumer with quite comprehensive information.

Since statutory quality control exists to a very limited extent only, liability on the part of the person who sold and delivered the product or rendered the service to the ultimate consumer becomes a central issue to be dealt with. Liability for the quality of products and services is subject to the law of contracts. That is why in the case of complaints and litigation the party to be held liable is the contracting party and not the manufacturer as in the case of inadequate safety. The fact that in contracts of sale concerning technical appliances the seller tries to replace his warranty by the manufacturer's guarantee is indicative of liability being somewhat shifted to the manufacturer (No. 237). However, as a rule the contracting party's liability is not determined by the statutory regulations on warranty. The contractual liability provided for in the Civil Code includes non-cogent provisions from which sellers deviated in their Allgemeine Geschäftsbedingungen (AGB, standard form contracts) to the detriment of the consumer. Liability for quality of goods or services is therefore determined by exemption clauses in standard form contracts. It is not a question of what statutory rights

the consumer has, but rather of what rights he has left due to the unilateral enforcement of contractual exemptions by sellers whose economic position is stronger. The legislator tries to master the development through measures having very different objectives. The new AGBG will protect the consumer in the area of non-cogent contractual law, regardless of the design of the contract in each case. At the same time the legislator tries to regulate in a mandatory way through special legislation types of contract which have developed (FernUSG, Reisevertragsgesetz, Travel Contracts Act).

II CONTROL OF GOODS AND SERVICES

1 Control of goods

195 There is no state control of the quality of *goods*. There is neither general nor specific legislation having for its purpose the control of quality. There is control on a modest scale inasmuch as products subject to safety control are simultaneously tested for their quality if safety and quality are linked inseparably. Quality control is a mere by-product, an unavoidable corollary which the legislator accepted in order to pursue his prime objective, namely an increase in safety and health protection. The newly introduced procedure of prior approval of drugs may serve as an example of the connection between safety and quality (No. 152). The proof of effectiveness required for approval not only causes dangerous drugs to be withdrawn from the market, but ensures that the consumer will get only effective drugs. It is not to be expected in the near future that the legislator will intervene in the production process in a regulatory way beyond the unintended side effects of the aforementioned legislation to ensure a minimum quality standard in favour of the consumer. The reasons for this attitude lie in our economic system in which the manufacturer himself is responsible for the quality of a product. If the view held by advocates of the liberal economic theory is followed, intervention beyond that is unnecessary, because control is exercised by the market in which the consumer will not buy the inferior product and will thus force the manufacturer concerned to manufacture products of better quality. Competition takes care of the necessary process of selection. Actually, there is workable competition in the Federal Republic of Germany in some sectors only: the report on mergers in 1977 which was recently published by the German Cartel Office shows an increasing trend towards monopolisation[1]. Assuming there were workable competition which could cause quality control, any reduction of competition should lead to a deterioration of quality control and consequently also to a loss of quality. The fact is that topical scientific and political discussion is concerned with the question of whether products keep deteriorating. The starting point for the discussion is deterioration in quality not as a result of the concentration of enterprises, but as a result of what is known as 'planned obsolescence'[2]. The question is whether advanced industrial societies pursue a special product and marketing strategy the object of which is to manufacture goods lacking the optimum useful life and thereby to prompt early substitute purchases[3]. The theory of planned obsolescence has been under discussion in the Federal Republic since 1971. The continued economic crisis has fueled the discussion. The reason for such

continuation may be the fact that planned obsolescence is typical of stagnant or shrinking markets in which the actual or threatening saturation of the market is obviated by a policy of artificial obsolescence which aims at removing already existing goods as an obstacle to sales[4].

During the fifties and sixties, at a time when the economy experienced a steady upswing and there was apparently no limit to its expansion, the question of planned obsolescence did not play any role. Today it is not merely a question of boosting the economy by support from the state. Another item under discussion is that the sources of energy are not inexhaustible and that through the excessive load on the environment over the past 25 years they have been impaired to a degree constituting a threat to the population. The question as to the alternatives of coping with the crucial growth and environmental crisis implies the question of canalisation and as far-reaching as possible a limitation of resource-consuming goods production. The abolition of planned obsolescence would be implied in such considerations. We cannot discuss the matter any further here, since there are no indications of control as yet. It is still a point at issue *whether* there is planned obsolescence in the first place, not *how* it can be controlled.

2 Control of services

(*a*) *General possibilities of control*

196 A control system of services must make allowance for the fact that the subject matter of control is not an industrial product, but a human activity. Not only the result of work done will be subject to quality control, but work done itself. The quality of a commodity may at least in theory be controlled before the commodity is cleared for sale. The quality of a human activity does not admit of control in a similar way. To control services, only a system that takes into account the peculiarities of the service concerned can be eligible. As far as a service or contract work is concerned, control may begin with the training of those concerned or with the licence to operate. The Industrial Code and the respective special legislation lay down the preconditions for setting up a trading firm. Thus it is ensured that the contract work will be performed by skilled entrepreneurs. The disadvantage to the consumer is that such a control system checks vocational qualifications in a very general way only, but does not ensure that a *specific* service is rendered in an optimum way. That would necessitate the existence of pertinent regulations laying down precisely how a service has to be rendered. Where services are no longer rendered by individuals but are rendered within the framework of large firms, job descriptions already exist. For example, car repairs: here manufacturers make available instructions for repairs. Repairs are performed increasingly by large firms where the service is rendered on the assembly line (shoe repairs, television and radio repairs). The industrialisation of the services sector makes it unavoidable to standardise working processes. Already technical standards contain specifications of working processes[5]. Standardisation at the same time allows for control. Yet such standards do not come within the scope of the GSG, so there is no statutory control of standardised services.

(*b*) *Special control of correspondence courses*

197 Since 1 January 1977, correspondence courses have been subject to state control[6]. The introduction of the requirement of licensing was necessary for participants to be provided with suitable learning material preparing them for realistic learning objectives. Complaints by participants focused primarily on the fact that time and again offers of little methodical and expert quality had been made. This grievance could not be solved in past years, since it was left to the organiser's discretion whether or not to have his courses examined by a state agency. 150 correspondence courses had received the quality label compared with 1150 courses that had not been tested. Those concerned, mostly people from classes who had hoped for an opportunity for advancement through a correspondence course, thus suffered not only direct loss of property as a result of fees spent in vain on unqualified courses, but felt swindled out of opportunities that a professionally and pedagogically unobjectionable correspondence course would have offered them[7].

Pursuant to the FernUSG, all correspondence courses for a consideration which have for their purpose the imparting of knowledge and skills and in which the instructor and student must at least *for the most part* be at separate locations and the instructor or his agent controls progress are subject to the requirement of licensing (Art. 1 FernUSG). The portion of correspondence tuition must at least be 51%. The formalistic regulation of the Act almost invites circumvention. For example, 'programmed instruction', in which the participant controls *himself* with the aid of appropriate questionnaires, is not regarded as correspondence tuition. As it turned out, even during the process of legislation, organisers of correspondence courses increasingly switched over to programmed learning to evade the law[8]. Correspondence courses which in their subject matter and objective serve exclusively recreational activities or entertainment are not subject to the licensing requirement. Though such courses must be reported to the competent Land authority (Art. 12, para. 1, sentence 3 FernUSG), this obligation does not replace the urgently required quality control. After all, it is precisely these courses that involve the danger that the consumer is offered completely useless units of instruction.

Also not subject to the requirement of licensing are supplemental courses, the objective of which is to steadily supplement other self-contained courses offered and which can be used only in connection with the latter. Lastly, special requirements apply to the licensing of vocational correspondence courses for a consideration (Art. 14) and without a consideration (Art. 15 FernUSG). We regret to say that the scope of application of the Act is very limited and offers simple possibilities of circumvention even where there should be control according to the intention of the legislator.

198 (*aa*) An organiser planning to offer a correspondence course must apply for *a licence* to the Zentralstelle für Fernunterricht (ZFU, Central Agency for Correspondence Courses). He must prove that the objective stated and aimed at by a participant can actually be achieved through the correspondence course in a justifiable way (Art. 12, para. 2, item 1 FernUSG). The authority examines in particular the participant's pedagogic and technical guidance[9]. Also, the

correspondence course must not as regards its subject matter and objective disturb public order (item 2). This provision is to ensure that the participant in a correspondence course is neither endangered nor endangers others through improper direction, for instance in technical experiments, nor is caused to act in violation of the law[10]. Furthermore, the organiser must prove that the participant will be given complete and appropriate instruction in line with the statutory regulations in time before a contract offer is made (Nos. 61, 260). Item 3 refers to a grievance often encountered in the past, namely that unsuitable or misleading information material was distributed, inducing the participant to take a wrong decision before the contract was made. That provision forces the organiser to submit information material and to disclose his intended advertising policy[11].

A licence must not be granted if the organiser's intended design of the contract terms does not meet the statutory requirements (No. 260). The organiser must not deliberately accept contractual deficiencies, trusting that the participant will not assert his claims for damages under civil law or exercise his other rights[12]. Through legislation by the German Länder further requirements may be laid down (Art. 12, para. 2 FernUSG). If an organiser does not succeed immediately in meeting the requirements of licensing, a preliminary licence subject to certain minimum requirements may be granted (Art. 12, para. 3, items 1–3 FernUSG). A preliminary licence is granted provided that the study material is submitted for review within a period to be fixed in a particular case. The purpose of preliminary control is that in the case of comprehensive correspondence courses investments may be so high that the organiser cannot reasonably be expected to invest the full amount before the commencement of the course, being uncertain whether it will be licensed in the first place[13].

Depending on their objective, vocational correspondence courses for a consideration require proof to the effect that their objective and the details of their implementation are in harmony with the Berufsbildungsgesetz (Act on Vocational Training) (Art. 13 FernUSG). The contents and scope of reasons for denial, which follow from the nature of the vocational correspondence course, may be specified by statutory order.

Vocational correspondence courses that are free, Art. 15 FernUSG, are not subject to the requirement of licensing. However, upon application they may be recognised by the Bundesinstitut zur Berufsbildung (BIBB). Quality certification by the state is important for correspondence courses offered free of charge by non-profit associations or enterprises. This method is of special importance to correspondence courses used under an apprenticeship pursuant to the Berufsbildungsgesetz, since such correspondence tuition may be performed free of charge under Art. 5, para. 1, item 1 of the Berufsbildungsgesetz and the licensing procedure under Art. 12 FernUSG does not come into question. A licence may be *withdrawn* if one of the reasons for denial existed when it was granted or the requirements of preliminary licensing had not been satisfied. If one of the reasons for denial arises later, the licence must be revoked, Art. 14 FernUSG.

Basically, the requirement of licensing has been in existence since 1 January 1977; however, all sections of the Act came into force only on 1 January 1981 (Art. 22 FernUSG). Correspondence courses otherwise requiring a licence

were exempted from the requirement of licensing up to 1 January 1980 if the organiser filed an application for licensing not later than 1 January 1978. Vocational courses if considered suitable prior to the coming into force of the Act (pursuant to Art. 60, para. 4, sentence 3 Berufsbildungsgesetz or pursuant to Art. 5, para. 1 of the contract between the German Länder on the establishment and financing of the central state agency for correspondence courses of 20 December 1973[14]) were exempted until 1 January 1981.

199 (*bb*) The *implementation of the Act* is incumbent upon the German Länder. Prior to the Act coming into force, quality control of correspondence courses coming within the authority of the Minister of Education of the German Land concerned was exercised by the central state agency for correspondence courses under the contract between the German Länder of 20 December 1973. The German Länder will expand the functions of their present central agency competent merely for school correspondence courses (ZFU) and will establish a new central state agency for correspondence courses under a new contract between the German Länder. A contract to that effect was adopted in February 1978 and is presently under discussion in the Länder parliaments[15]. The ZFU is the state licensing agency competent for all courses offered under the FernUSG in the area of the Federal Republic. In those cases where a license for a vocational correspondence course is applied for, the ZFU and BIBB are obliged to obtain an expert opinion. Under the heading 'information', which is inaccurate, the legislator in Art. 20 FernUSG regulates certain powers of control held by the competent Land authorities and the Bundesinstitut für Berufsbildung. An organiser is obliged to furnish on demand the information these authorities require in performing their duties, to produce the necessary documents completely and within the period prescribed and, for the purpose of examination, even if the organiser's obligations under Art. 2, para. 1 FernUSG have been complied with, to tolerate during business hours the inspection of business premises where correspondence courses inclusive of accompanying instruction are held.

200 (*cc*) The fact that the legislator introduced the requirement of licensing with respect to correspondence courses is no doubt to be welcomed. The narrow scope of the Act casts doubt, though, upon whether participants can actually be protected effectively against unsuitable instruction material. It is a pity that the legislator failed to pay more attention to the questions of scope. Since no amendment is currently under consideration, it remains to be seen whether the Act is a suitable means to fight untrustworthy organisers of correspondence courses. A comprehensive judgment seems impossible one and a half years after the coming into force of the Act. It should be noted, however, that in the implementation of the Act difficulties will be encountered similar to those described in detail with respect to the law of drugs and foodstuffs as well as technical labour materials (No. 164).

III CIVIL LIABILITY FOR THE QUALITY OF GOODS

1 Statutory regulations on warranty and their realisation in practice

201 (*aa*) *The consumer as a buyer of goods* is interested in the goods being operative, flawless and of high quality. His rights are regulated in Arts. 459 *et seq.* Civil Code. If the thing bought has a defect that destroys or reduces its value or suitability for its ordinary or stipulated use, the buyer may withdraw from the contract, demand abatement of the purchase price or subsequent delivery if it is a purchase of unascertained goods. As far as the seller has promised the buyer certain qualities, the buyer may in addition claim damages for non-performance. All claims exist irrespective of the seller's fault. The system of Arts. 459 *et seq.* Civil Code aims at smooth handling of the contract of sale. In the case of movable things, the buyer is allowed a period of only six months to enforce any deficiency claims.

From a superficial glance at the statutory regulations one might have the impression that the buyer/consumer enjoys a favourable legal position as compared with the seller. Appearances are deceptive. The entire law of warranty is non-cogent law; that is, it may be contracted out. The Civil Code does not regulate the consumer's interests with priority, rather it claims to lay down the legal relationship between manufacturer, supplier and consumer in the event of a defect in the object of purchase. Specific interests under the law of sales, that is those of the various links in the chain of supply, are taken into account only in the Code of Commercial Law, where under Arts. 373 *et seq.* there are special provisions on trade purchases between enterprises. The consumer has no such right; he has to rely on the Civil Code which is not tailored to his requirements since it constitutes, so to speak, the general part of the law of sales affecting all links in the chain of supply[16].

The civil law assumes that a seller advises the customer carefully, makes promises on account of his expert knowledge and shall be liable therefor. It may be that this model reflected real conditions at the time legislative work on the Civil Code was under way. As regards legal reality in the industrial age, that model proves to be a fiction. The function of the supplier, who is the link between the manufacturer and the consumer, has undergone fundamental changes. Distribution is essentially his function. Personal advice has been replaced by the manufacturer's advertising promise[17]. Economic structures today present to us a seller who is often on a par with the manufacturer in terms of economic power. Sellers use their economic power to dictate contractual conditions to the buyer, availing themselves of the principle of private autonomy underlying the Civil Code. The buyer's freedom is restricted to freedom of contract: he has no influence on the design of the contractual relation. Contracts are shaped in line with standard form contracts which aim at saddling the buyer as far as possible with the risk of liability for inferior quality. The question of the seller's liability is therefore a question of the applicability or effectiveness of standard form contracts. Exemption clauses by the seller in standard form contracts[18] determine legal reality, not problems of the law of warranty in the Civil Code. In view of changes in the economic structures, the scope of application of the law of the Civil Code is very small. Only in day-to-day cash transactions, in the purchase of food, cosmetics, textiles, books and

magazines, does the law of warranty continue to play a part. However, this advantage is destroyed again by the fact that the customer often has difficulty in furnishing proof, since as a rule verbal contracts are concerned[19]. This does not apply to the purchase of valuable consumer durables, such as new or second-hand cars, furniture, washing machines, dishwashers and sewing machines, electric stoves, radio sets and TV sets. Here the scope of the consumer's legal protection is determined by the degree of admissibility of exemption clauses.

202 (*bb*) The purchase of *services* by a consumer involves a great variety of transactions. As regards their legal nature, some of them are contracts of service, contracts to manufacture or agency contracts, while others are mixed types also including elements of the law of sales, landlord and tenant law or company law. The legislator regulated merely the contract to manufacture in such a way as to permit adjudication on the law of warranty. The statutory rights of redhibition or abatement enjoyed by the consumer/orderer are largely in line with the regulations under the law of sales. There are essential differences only in that the consumer has a statutory right to demand repair of defects and any claim for damages presupposes fault on the part of the manufacturer. As the entire law of warranty is of a non-cogent nature (apart from Art. 637 Civil Code, which prohibits exclusion of liability in the event of malice) it was possible that in the area of services and contract work matters developed along similar lines as in the law of sales: the law of standard form contracts has superseded the statutory law of warranty. The consumer's deprivation of his rights is attributable to the disequilibrium in power between the consumer and the supplier of services. The latter today is no longer the minor craftsman, trader and industrialist living and working in the same area, but increasingly a highly industrialised enterprise. The scope of liability is determined by the limits of effectiveness of non-warranties in standard form contracts. Only in contracts for the repair of commodities, such as shoes, clothing, minor electric or plumbing work and painting jobs, does the law of warranty of the Civil Code continue to apply, because those contracts for repairs are often made without standard form contracts and in many cases not even in writing.

2 Limits of exemption in the Civil Code and under the AGBG

203 Since the Civil Code fixed hardly any limits in its provisions on warranty, it was for the courts to correct the worst abuses of economic power[20]. Over the years, the courts developed a closely knit system of decisions fixing the limits of exemption. Accordingly, the progressive development of court practice could not obscure the fact that the legal means available to the courts were unfit to master exemption clauses in the long run. Also, people increasingly became aware of the fact that the Civil Code and its interpretation by the courts did not offer the consumer adequate protection. Therefore the AGBG has as its stated aim the fight against abusive exemption clauses in standard form contracts[21].

(*a*) *Limits of exemption in the Civil Code*

204 (*aa*) *The regulations on warranty under the law of sales* do not contain any

special provisions on exemption clauses. The entire law of warranty may be contracted out with the exception of Art. 476 Civil Code (malice). The case provided for in Art. 476 Civil Code is of limited importance to the consumer anyway, as he should succeed in proving fraudulent concealment on the part of the seller only very rarely. All the same, it may be noted that the courts tend to reduce the buyer's burden of proof (No. 217). Likewise, it is impossible to exclude warranted qualities (zugesicherte Eigenschaften) because this would devoid the warranty of its meaning[22]. The seller must not bring to nothing what he has promised in his offer of a contract by inserting an exemption clause in his standard form contract. However, this applies only if by the warranty of certain qualities (zugesicherte Eigenschaften) the buyer was meant to be protected against consequential damage resulting from defects[23].

The courts determine the scope of the seller's liability. In its decision of 1956[24] the Federal High Court fixed the limits of exclusion of liability. At the consumer level the judgment concerns primarily the purchase of new durable consumer goods; in that particular case it concerned a purchase of furniture. The sum and substance of the decision is:

> In summary it follows that in the purchase of brand new furniture the exclusion of claims under contractual liability may be provided for in the seller's standard form contract if the buyer is granted a right to demand repair of defects, but that such claims under contractual liability are revived if repair of the defects is impossible for some reason or other.

In support of its view, the Federal High Court advances the buyer's interest in purchasing a commodity free from defects which warrants protection. Such an interest can be safeguarded only if the buyer may at least demand repair of the defects in the article bought. Until today, the Federal High Court has adhered to that court practice. Accordingly, many standard form contracts were changed to conform to the decision. All the same, the courts have not succeeded in solving the problems in principle[25]. If repair of defects is impossible, claims under warranty law are revived. It is a controversial issue[26] whether the buyer then enjoys the full range of rights provided for in Arts. 459 *et seq.* Civil Code — that is, redhibition, abatement of purchase money, and damages — or whether the seller in his standard form contract may restrict the buyer's option in the event of revival of statutory claims. Some people hold[27] that a limitation of the right of option such as standard form contracts are known to bring about[28] is inadmissible.

Court practice relates but to contracts of sale concerning new goods; in the case of *used goods*, a complete exclusion of the right of redhibition or abatement is admissible (No. 216).

In addition to exclusions of the right of redhibition or abatement, exemption clauses play a great part in practice, under which the buyer's rights in the event of delayed delivery or impossibility of delivery are restricted. As here the buyer's rights are not affected as regards quality of goods, such clauses may be left out of account in the present study. It should be pointed out, though, that the courts have not taken any definite view regarding these questions, so draftsmen of standard form contracts were able without hindrance to contract out the Civil Code in this area[29].

205 (*bb*) *In the law governing contracts to manufacture* it was also the task of the courts to oppose the contractors' request to exclude warranty completely. As in the law of sales, complete exclusion of warranty is inadmissible. The customer must at least be granted a right to demand repair of defects[30]. That right cannot be restricted by the fact that the manufacturer is liable only for defects for which the fault lies with him[31]. If repair of defects is impossible, claims under warranty law, that is redhibition, abatement of purchase money, and damages, are not revived contrary to the contract of sale. For in the law governing contracts to manufacture the customer may by act of law demand merely repair of defects, Art. 633, para. 2, sentence 1 Civil Code, while the rights listed in Arts. 634–635 Civil Code come into question only if the contractor failed to repair the defects[32]. That does not mean that the customer has no rights if repair of defects fails: it is inadmissible for the contractor to exclude in his standard form contract both the right to demand damages and the right of rescission if repair of defects fails[33]. However, the contractor may limit the buyer's right of option to a right of rescission if repair of defects fails[34]. Just as in the law of sales, an exclusion of liability is inadmissible if the contractor promised the customer certain qualities (zugesicherte Eigenschaften) of the goods in order to protect him against consequential damage resulting from defects[35].

It is a striking feature that court practice regarding exemption clauses always concerns cases where two companies take action against each other[36]. In most cases, machinery was concerned which was to be delivered as a whole or in parts.

(*b*) *Limits of exemption clauses in the AGBG*[37]

206 As regards its legal nature, the AGBG is a prohibitory law. Arts. 10 and 11 AGBG prohibit the use of certain clauses which are inadmissible as to substance. Art. 10 AGBG includes prohibitions providing for a scope of judgment. The court must establish whether the clause is reasonable on the basis of still further circumstances. By contrast, in the cases covered by Art. 11 AGBG the legislator made such judgment. Basically, the clauses listed there are void if their factual requirements are satisfied. The general clause makes it possible also to declare void clauses other than those listed. Thus the admissibility of exemption clauses in standard form contracts may be checked in two stages. Basically, it does not matter who — trader or consumer — is a party to the contract, since the scope of the Act is not limited to consumers. This is why the AGBG is not a distinct consumer protection act. The lists of prohibitions contained in Arts. 10 and 11 AGBG, which we shall study in the following sections, apply only to contracts where at least one party is a consumer, Art. 24 AGBG. Contracts between traders cannot be checked for compliance with the lists of prohibitions (No. 237).

3 Typical exemption clauses in standard form contracts for acquisition

207 Exemption clauses in standard form contracts are tailored to the type of *purchase transaction* involved. The legal classification of a purchase transaction as a contract of sale — irrespective of whether it is a true contract of sale, a leasing or a hire-purchasing transaction — is characteristic at best of the

common trend towards a shift of liability to the detriment of the consumer. However, exemption clauses also bear a relation to the type of *object of purchase*. Often the two are linked with each other if, for instance, certain products may be sold only in a certain legal form. The following notes try to take up these differences. To that end typical exemption clauses in standard form contracts regarding typical purchase transactions will be described.

(*a*) *Contracts of sale concerning new goods*

208 Standard form contracts are to be found only in contracts of sale concerning durable consumer goods: cars, furniture and electric appliances. Exemption clauses aim primarily at saddling the buyer with the risk of inferior quality. Art. 11, item 10 AGBG regulates in detail the consumer's rights under a warranty concerning new goods that cannot be contracted out. Art. 11, item 10 AGBG does not apply to used articles. As regards the latter, the exclusion of any liability declared admissible by the courts continues to apply [38]. An examination of the case is possible under Art. 9 AGBG, though. The Act gives no definition of the new article. What matters is not whether the thing was defective within the meaning of Art. 459 Civil Code owing to a lack of novelty, but how the customer was allowed to interpret the essence of the contract. Therefore, for example, a demonstration car which has been standing in a sales room for a year is a new car[39]. Quite a different question is whether the age of a car entitles the buyer to demand redhibition or abatement of the purchase price.

209 (*aa*) Art. 11, item 10 AGBG essentially constitutes a codification of court practice, without decisive progress having been made in favour of the consumer. Just as court practice, it forbids the seller completely to exclude warranty regarding the product mentioned or any parts thereof. Whether it is a matter of complete exclusion of warranty must be judged by whether a settlement may actually be effected on the basis of the rights left to the customer or whether in reality the customer is deprived of his rights[40]. Therefore the standard form contract provision in question need not expressly include a complete exclusion of liability. A clarification to the effect that the seller is not allowed to exclude liability for those parts that are susceptible to trouble is to be welcomed[41]. Such clauses are particularly frequent in contracts of sale concerning cars. Actually, since the Federal High Court's leading decision dating from 1956, some sellers have refrained from completely contracting out liability for quality. Their standard form contracts include the right of abatement or redhibition in one way or another; the most common practice is to grant the buyer a right to demand repair of defects instead of a right of redhibition or abatement. The seller thus secures himself the possibility of subsequently making up for lack of quality, without having to reckon with the loss of or reduction in the purchase price. From the seller's point of view the right to demand repair of defects is the lesser evil. The buyer is not released from the contract, he has to see to it that the defects are repaired and despite all the annoyance is obliged to pay the purchase price. The AGBG does not counteract that development; rather, it takes it up as a fact that cannot be changed. This alone is surprising, because the Civil Code does not provide for a right to demand repair of defects in contracts of sale. In

the case of inferior quality, the buyer should have the possibility of returning the product bought without further ado and without lengthy negotiations. Any limitation to a right to demand repair of defects is effective only if the buyer contemporaneously has the right to demand that the consideration be reduced or, at his option, the contract be rescinded should repairs fail or subsequent delivery be effected. According to present court practice, the buyer also has to be granted at least a right to demand repair of defects. A change in the legal position results from the fact that it is now certain that if repair of defects fails the consumer has a right of option to the effect that he may choose whether to rescind the contract of sale or abate the purchase price. This provision includes uncertainties inasmuch as no definition is given as to when any repair of defects must be considered to have failed. The Act does not regulate how many attempts at repair the buyer must accept, whether the buyer may fix a time limit within which the seller must repair the defects or whether the seller in his standard form contract may fix such a time limit to the detriment of the buyer. The number of attempts at repair of defects is determined in a particular case, so that even two attempts may be unreasonable. Generally the subject matter of performance should be decisive. In the case of durable consumer goods, three attempts should be reasonable; in the case of minor household appliances, coffee-grinders or the like, repair of the defects must be considered to have failed after two unsuccessful attempts[42], because repeated inferiority suggests further defects. It is a controversial issue in legal literature whether present court practice according to which the buyer is obliged to allow the seller a certain period for repair of defects continues to apply after the coming into force of the AGBG. As the Act does not require the fixing of a time limit, previous court practice is obsolete. The buyer merely has to prove that repair of the defects failed, but not that a time limit was fixed[43]. Furthermore, the Act does not regulate whether the buyer loses his statutory rights of redhibition or abatement, which are revived should repair of the defects fail, if he continues to use the commodity purchased pending the numerous attempts at repair of defects. The question gains importance in the case of cars, whose value steadily decreases especially in the first year of continued use. If a buyer were to be denied the continued use of a car pending repair of its defects, the car would be useless to him during that period. This is why he cannot lose his statutory rights of redhibition or abatement[44].

210 (*bb*) Subsequent to the regulation on the right to demand repair of defects, standard form contracts usually contain a provision in which their users exclude any *claims for damages*. Depending on the causes of damage, *two types of cases* that may cause injury to the consumer's health or property can be distinguished. It can be imagined that the seller might fulfil his duty to repair the defects not in due order, too late or not at all. Damage may also occur because the seller prior to the conclusion of the contract fails to take seriously the obligations incumbent on him, or after the conclusion of the contract makes mistakes — not connected with the duty to repair the defects — in performing it, or on the occasion of the contract even commits an act that satisfies the factual requirements of Art. 823 Civil Code. Since the AGBG in Art. 11, item 10b affords the consumer only minimum protection in the form of a right to demand repair of

defects, it seems to be obvious that such an exclusion of liability should be considered admissible. Nevertheless, exclusions of liability for rights to claim damages are admissible only if the damage is attributable to a slightly negligent act in violation of the law on the part of the seller or any person employed by him in performing his obligations. The seller cannot exempt himself in the case of gross negligence or intent, Art. 11, item 7 AGBG. The limitation of exemption is designed to safeguard the customer's rights in the event of non-performance and defective performance[45]. It is open to doubt, though, whether that aim has been achieved. It is safe to say that the consumer's rights have been strengthened considerably compared with previous court practice, for in court practice no uniform attitude towards exemption with respect to one's own or a third party's fault had prevailed[46]. The courts were particularly vague regarding the admissibility of exemption clauses in the case of gross fault on the part of persons employed to perform a principal's obligation[47]. The Act has put an end to the uncertainty. The possibilities of excluding liability under Arts. 276, 278 Civil Code have been reduced considerably. On the other hand, the consumer's protection has been limited to especially drastic cases; the majority of injuries should be attributable to slight negligence.

The legislator's basic decision cannot be applied to the *cases mentioned* without differentiation. According to the dominant view, basically the seller is liable for *culpa in contrahendo*[48] and positive breach of contract[49] only in the event of intent and gross negligence. Here it is overlooked that precisely these legal remedies, at least as far as they relate to the defectiveness of a thing, amount to an extension of statutory claims under a warranty whose exclusion is forbidden under Art. 11, item 10a. For all that, the courts also treat positive breach of contract as an element of the law of warranty by making it subject to the short period of limitation under Art. 477 Civil Code[50]. Accordingly, the seller cannot effectively exempt himself in his standard form contract from liability for slight negligence. If the damage is the result of a *tort*, the first thing to be clarified is whether liability in tort may be contracted out from the start in standard form contracts. This question has gained great importance in connection with the extension of manufacturer's liability through the Federal High Court's float switch decision[51]. In legal literature an exclusion of liability within the limits of Art. 11, item 7 AGBG is considered admissible for legal relationships involving consumers and traders[52]. The courts have joined that judgment in principle[53]. In its decision of 7 February 1979[54], the Federal High Court has set forth the requirements that standard form contracts have to satisfy in order not to be void for uncertainty. It is of decisive importance whether a *trader* may infer from the standard form contract the legal consequence in each case with sufficient certainty and clarity. The Federal High Court's decision, as expressly emphasised by the Federal High Court, merely relates to the legal relationship between businessmen. Therefore it seems premature to assume that the same principles apply to legal relationships involving consumers. A striking thing is that the courts and legal writers do not deal with the difference in principle between the reasons for liability — the law of contract and the law of torts. It is precisely that difference that forbids equal treatment. Even if Art. 11, item 7 AGBG is intended to be applied, it would have to be examined under Art. 9 AGBG whether or not the seller-producer might also be liable for a tortious act

committed by slight negligence[55]. It is inadmissible to exclude liability for slight negligence at least in the *second type of case*, if the damage is attributable to culpable violation of the duty to repair the defects[56]. Due completion of repairs is a part of the statutory right under a warranty that cannot be contracted out.

211 (*cc*) In some cases, in the motorcar trade clauses may be found in standard form contracts which limit the consumer's statutory rights under a warranty to a *right of abatement of purchase money*. The AGBG does not include any direct statements on the admissibility of such provisions. It would be possible to judge admissibility by the general clause and to decide depending on whether the right of abatement takes sufficient account of the consumer's interest[57]. Yet inadmissibility in principle follows from the legislator's judgment in Art. 11, item 10b AGBG. The right to demand repair of defects may be only limited, because if those repairs fail the statutory rights of redhibition or abatement are revived. A right of abatement cannot fail — at best it can be imagined that the consumer is unable to enforce it. As far as could be ascertained, sellers rarely try to enforce any limitation of statutory rights under a warranty to a right of abatement.

212 (*dd*) Attempts rather concentrate on limiting the consumer's *unavoidable right to demand repair of defects*. One possibility is to make the elimination of a defect or substitute delivery contingent upon prior payment in full or, depending on the circumstances, on excessive payment[58]. Such clauses are now inadmissible, Art. 11, item 10d AGBG. The prohibition of the consumer's duty to effect prepayment contained in that provision is of minor importance, because according to its tenor the provision takes effect only if a consumer does not put up with the defectiveness of the commodity and takes action against the seller himself. If the consumer raises in defence the article's defectiveness in a lawsuit brought against him, he is protected under Art. 11, item 2 AGBG which provides that the consumer must not be deprived of the right to refuse performance under Art. 320 Civil Code or Art. 273 Civil Code.

213 (*ee*) Similar purposes are served by clauses which aim at imposing on the buyer an *obligation to give notice of defect* (Rügepflicht) in the event of apparent defects. After the expiry of the time limit for claims, the rights of redhibition or abatement are forfeited. The AGBG does not forbid time limits for claims in general, but only in the event of apparent defects. Neither the Civil Code nor the AGBG defines when a defect is considered apparent and when hidden. The question must be decided on the basis of the fact that outside trade purchases a buyer is under no obligation of inspection and of making a claim[59]. Only in an exceptional case may a defect thus be apparent. The burden of proof that the defect was apparent is on the seller. In any case, the time limit for claims must be more than a week and no less than two weeks for the consumer not familiar with written matters.

214 (*ff*) The last possibility of the seller to escape his warranty is *to shorten the periods of warranty*. Such attempts are now forbidden: the minimum period is six months. According to its tenor, Art. 11, item 10f AGBG comprises only

claims under a warranty. It also applies to claims arising out of *culpa in contrahendo* and positive breach of contract. It follows from the view presented here that these legal remedies are equal by virtue of their legal nature, i.e. by being rights of redhibition and abatement. But also, according to the dominant view, the same result is bound to be arrived at, since the remedies available at least under the law of sales are subject to the statutory period of limitation[60]. As regards its meaning, the provision should also be applicable to other provisions on extension and interruption of the limitation period which are prejudicial to the buyer[61].

For the scope of legal protection, when the period of limitation begins to run is decisive. For some time it had been agreed that the period began to run upon delivery of the object of purchase. Of late, an increasing number of writers have raised the question whether or not, to avoid iniquitous hardship and curtailment of the buyer's rights, the period of limitation should begin to run as from the time damage occurs or becomes obvious[62]. As regards periods of guaranty exceeding the statutory minimum period, the Federal High Court has recently decided that the period of limitation starts to run only after the defect has become known (No. 237).

215 (*gg*) Exemption clauses limiting the seller's liability for quality are not only found in the form of exclusions of warranty. In their standard form contracts some sellers reserve the right to alter or deviate from the promised performance. Such change in performance may affect the quality of a thing. For the most part the reservation of alterations hides the seller's right to deliver goods of a quality that is inferior to that stipulated. Reservations of alterations are found primarily in the furniture trade, since there production has not yet reached as advanced a stage as to ensure that products are always identical. Often the buyer wants to obtain furniture of the same shade he saw in the sale-room and in view of which he signed the contract of sale. The AGBG now forbids the seller to include in his standard form contract such reservations of alterations. The prohibition is not absolute, though; the buyer must accept the alteration if the seller proves that the buyer can reasonably be expected to accept the deviation from the promised performance. The question on whom rests the burden of proof may gain importance if the parties argue about whether a technical alteration constitutes an improvement[64].

(*b*) *Contracts of sale concerning used goods*

216 The purchase of used goods plays a great role with respect to durable consumer goods. For second-hand motor cars, a market of their own has developed. Contracts concerning used cars are made on the basis of standard form contracts if the consumer's contracting party is a dealer. In the case of contracts of sale between consumers, standard form contracts are to be found less often. The two types of contract have in common that the seller usually excludes any liability for possible defects. The courts declared at an early stage the exclusion of any warranty to be lawful in the case of used cars[65]. In that respect the AGBG does not improve the consumer's protection, for the prohibition to exclude the warranty applies only to new goods. The Regional Court of

Munich and the Regional Court of Augsburg made a new start towards restricting the exclusion of any warranty[66]. The Regional Court of Munich motivates its decision by referring to the uncertainty of the clause 'bought as inspected and to the exclusion of any warranty'. The clause, it claims, includes only apparent, but not hidden defects. The Regional Court's reasoning is not convincing, because the exemption clause in question is unequivocal. Of greater importance should be the grounds stated by the Regional Court of Augsburg according to which the court imposes on the seller a quasi-guarantee obligation at least regarding freedom from defects affecting the roadworthiness and road safety of the used car.

The court differentiates between typical defects inherent in the purchase of a used car and defects that are so serious as to be contrary to the meaning of the type of contract defined as 'purchase of a used car'. More far-reaching still than the Regional Courts' practice is a proposal made in legal literature[67] according to which the seller of a used car is to be liable under Art. 459, para. 1 Civil Code regardless of any exemption and writing clause in his standard form contract if a defect usually present in a car of the type sold and of the age in question and detectable in a routine but expert examination is concerned. This view is essentially substantiated by considerations of equity[68]. It is argued that the seller may exempt himself from liability only if he refers to the fact that he neither examined nor overhauled the car. The proposal may be adopted by the courts to solve the problem of delimitation between Art. 459, para. 1 and Art. 459, para. 2 Civil Code[69]. The consumer's interest would be served if he had a right of redhibition or abatement in the event of extraordinary signs of wear and substantial damage[70].

In response to the action brought by the Consumer Protection Association (Verbraucherschutzverein), the Federal High Court has now decided that the clause 'used, as inspected and to the exclusion of any warranty' does not infringe Art. 9 AGBG[71]. In its decision the Federal High Court merely summarises arguments that have been known for some time. It takes for granted that the buyer has to assume the risk when buying a defective car. However, even dealers in used cars remain in doubt about such a unilateral distribution of burden, for the terms recommendations drafted by the Zentralverband des Kfz-Gewerbes (ZdF, Central Association of the Automobile Trade) in cooperation with the ADAC (General German Automobile Club) oblige the dealer to test the used car and to make a report on the condition of its most important parts. If the statements are incorrect, the buyer may demand repair of the defects for a period of three months, i.e. that the condition mentioned in the report be restored[72]. The terms recommendation has been reported to the Federal Cartel Office for registration.

Despite the fact that according to the dominant view the exclusion of any warranty is admissible in principle, the buyer is not deprived of all his rights.

217 (*aa*) If the seller of a used car fraudulently conceals a defect, he is liable despite an exclusion of warranty, Art. 476 Civil Code. However, the buyer must prove the seller's fraud. If the buyer blames the seller for fraud, the seller is not exempted from liability merely on account of the fact that he sold the car 'as inspected and seen'. If the seller knows about defects or believes that there may

be defects he must point out these imperfections[74]. Thus it is accepted that the seller must indicate in any event repairs that were necessitated by an accident[75]. Any doubts as to the existence or possibility of existence of defects may give rise to a duty of examination. The scope of such a duty of examination and thus of the duty of disclosure is determined by the seller's possibilities of gaining knowledge. Thus the requirements will be higher in the case of a dealer in used cars having a workshop than in the case of a private party. In the case of commercial sellers, fraud is generally assumed if a defect that was bound to be detected in a proper examination is concealed[76]. In any case, there must have been a reason for examination. No general duty of examination is placed on the dealer in used cars[77]. By extending the term of fraud, the courts succeeded in mitigating the buyer's difficulty of furnishing proof. That becomes especially clear in the decision handed down by the Regional Court of Nürnberg[78]. In the court's view, the seller must not give any indications as to the mileage reading if he does not know anything about it. If he does so all the same, he deliberately accepts a misrepresentation. Here the courts assume conditional intent on the part of the seller, which suffices to assume fraud. With the reasoning mentioned, the court at the same time relieved the buyer of the need to prove that the seller knew the actual mileage reading[79]. Nevertheless, in many cases the buyer should not be able to succeed in proving fraud. Therefore, the legal remedy under Art. 476 Civil Code is a suitable means to a limited extent only. The same difficulties are encountered with respect to Art. 123 Civil Code, which allows the buyer to rescind the contract for fraud. The difficulties encountered in furnishing proof have resulted in buyers attempting to hold the seller liable for negligent misrepresentation of the condition of a car on grounds of *culpa in contrahendo*. However, the Federal High Court has rejected liability attaching to *culpa in contrahendo* as far as the condition of the car was in question[80]. Although there are compelling arguments against the Federal High Court[81], a change in court practice is not to be expected in the near future.

218 (*bb*) The courts have also stopped the seller's attempts at exempting himself from any liability by holding him liable for warranted qualities (zugesicherte Eigenschaften) under Art. 459, para. 2 Civil Code even if he excluded liability (No. 204). It is decisive that according to the courts a promise may also be made tacitly. More recently the following matters were regarded as warranted qualities: kilometres travelled by the engine[82], the question whether a replacement engine has been installed or whether it is the original engine[83], and the statement included in the advertising message 'overhauled by a master-hand and inspected by the Technical Inspection Authority'[84]. Of special importance to the trade in cars is the Federal High Court's decision of 25 June 1975[85], where the mileage stated on the sales ticket gave rise to the seller's liability under Art. 459, para. 2 Civil Code. As far as exemption clauses are included in standard form contracts, Art. 11, item 11 AGBG applies, and also covers used cars[86]. There it is expressly stated that a user of standard form contracts is liable for warranted qualities (zugesicherte Eigenschaften) even if he has excluded liability in such standard form contracts.

There is a significant change over previous court practice. The Federal High Court has declared an exclusion of liability to be inadmissible only if by the

warranty of certain qualities the consumer was meant to be protected against consequential damage resulting from defects[87]. Liability for damage resulting directly from the lack of a certain quality was excluded. Pursuant to the new statutory regulation the exclusion of any liability is forbidden[88]. Likewise the user is forbidden to limit his liability to direct damage[89]. From this it is not to be gathered, however, that the user must make good consequential damage resulting from defects in addition to damage directly attributable to the lack of a warranted quality. The Act merely makes clear that the user is liable at any rate for the interest in the performance of the contract (Erfüllungsinteresse). (By way of damages the buyer must be placed in the same position as if the seller had effected due performance.) Consequential damage resulting from defects is included only if the seller's warranty has for its very object the customer's protection against such damage. The legislator wanted expressly to retain the definition adopted by the courts[90]. Cases so far decided by the courts relate throughout to circumstances where liability was excluded in a standard form contract, so that in future Art. 11, item 11 AGBG should be decisive.

219 (*cc*) The applicability of Art. 459, para. 2 Civil Code/Art. 11, item 11 AGBG does not automatically give rise to the seller's liability; all standard form contracts include what is known as a *writing clause*[91] pursuant to which amendments including warranted qualities must be in writing. Court practice regarding writing clauses lacked uniformity prior to the entry into force of the AGBG. The Federal High Court had declared that clause to be admissible in principle[92], and in some cases did not object to its validity[93]. At the same time, though, it had assumed in the cases it had to decide[94] that the parties had set aside the obligation to comply with the required form by way of informal agreement. Here no express agreement is required. It is sufficient if the parties according to the objective meaning of their statements had intended the authoritative quality of the additional verbal agreement; they need not have had in mind the writing clause[95]. In this case a notional construction to the effect that the parties had cancelled the requirement of writing becomes a mere fiction. Of late, the Federal High Court has even denied the effectiveness of a writing clause if the seller by invoking that clause contradicts his previous conduct[96]. From that decision the conclusion may be drawn that the Federal High Court considers writing clauses possible only within certain limits, because it reviews such clauses by way of checking the subject matter of standard form contracts[97]. The enactment of the AGBG brought about a new situation and legal writers are not agreed on how to handle it: some of them want the individual agreement pursuant to Art. 4 AGBG to have priority[98], while others take as a criterion whether a principal or collateral obligation is the subject matter of the writing clause[99]. It should be correct to apply the prohibition of circumvention under Art. 7 AGBG. Through the writing clause, the seller wants to establish that his liability, which is regulated in a mandatory way under the AGBG, follows a pattern other than the statutory one. This is a typical constituent fact of circumvention. For this reason it is not admissible to undermine the unlimited liability for warranted qualities (zugesicherte Eigenschaften) in standard form contracts by requiring writing for such a warranty.

It remains to be seen whether the Federal High Court will take up the

discussion in legal literature. In its latest decision made public on this body of subjects, the Federal High Court has substantiated the lawfulness of a writing clause without discussing the problems any further by simply making reference to the fact that the clause makes allowance for the interests of the seller and that the buyer should urge that verbal agreements be incorporated into the contract[97a]. Even if the decision reviewed the lawfulness of a writing clause rather in passing, doubts are appropriate whether in future the Federal High Court will take a decision in favour of consumers.

220 (*dd*) '*Intermediary clauses*' constitute a new attempt at exempting oneself from liability existing despite the admissibility in principle of an exclusion of liability. Standard form contracts in the second-hand car trade usually provide for a dealer acting merely as the seller's agent empowered to contract. The arrangement is made palatable to the seller by the fact that in a sale between private consumers he will save value added tax and therefore may obtain a higher price. In actual fact it is a matter of shifting the risk of liability to the private seller. The dealer may then pocket the commission without having to struggle with problems of warranty. The buyer must pay the higher price without getting in return a car tested by an expert. Previous court practice regarding intermediary clauses lacked uniformity. In travel contracts, the Federal High Court has cancelled the intermediary clause as an inadmissible clause excluding liability[100], and has held liable for *culpa in contrahendo* the dealer in second-hand cars who under his standard form contract acted merely as agent empowered to contract, provided he held the unqualified position of an agent[101]. The AGBG requires that the legal position be reconsidered. In some cases the inadmissibility of intermediary clauses is justified by the priority rule of Art. 4 AGBG. If a user, it is argued, presents himself to the contracting party as principal, he cannot escape direct contractual consequences by terming himself intermediary in the standard form contract. The very impression created by his conduct in relation to third parties gives rise to an individual agreement which has priority over the agreement contained in the intermediary clause[102]. Here also, it seems correct to judge the legal position by Art. 7 AGBG. The dealer wants to evade liability for warranted qualities (zugesicherte Eigenschaften) which is important in practice, Art. 11, item 11 AGBG. Liability for warranted qualities cannot be limited, though, so intermediary clauses constitute attempts at circumvention. The courts have not so far followed that reasoning. Without the AGBG being taken into consideration, intermediary clauses are considered effective[103].

221 (*ee*) Contracts of sale concerning used goods do not only relate to cars, although the purchase of used cars is a main subject in court practice and jurisprudence. Antiques, art objects, coins and stamps are also used goods. But these are hardly consumer goods, rather luxuries which only certain groups of customers can afford. All the same reference is made to an important decision in which the Federal High Court[104] has extended the principles established in the second-hand car trade to include private auctions of art objects. The judgment is of paramount importance to all auctions, particularly those concerning antiques, art objects, coins and stamps. Although the Federal High Court has

made it clear that the decision does not comment in principle on the question of exclusion of warranty by the art auctioneer, auctioneers should extend their exclusions of liability in consequence of that decision. So much the more significant therefore are reasons speaking against that decision. Apart from doubts as to the suitability of equating used goods with old objects, etc., it should be noted above all that the Federal High Court grants the auctioneer a claim for the purchase price obtained even if there is manifest disproportion between the object bought by auction and its actual value. As the party interested has only limited possibilities of checking catalogue statements[105], in the final analysis such court practice results in the highest bidder being deprived of all his rights. Therefore that decision cannot be followed.

(*c*) *Leasing contracts (No. 334)*

222 Related to contracts of sale are leasing contracts and hire-purchase agreements, respectively. In a *leasing contract* the person known as lessor lets to the person known as lessee for valuable consideration a thing or several things, with the lessor being exempted from the risk of and liability for destruction, damage and maintenance of the things. On the other hand, the lessee has the advantage of being allowed to return an obsolete product to the lessor. The distribution of risk is thus similar to that in the law of sales. As a rule, a leasing contract includes an option of purchase. The lessor may be a manufacturer, his subsidiary (in 'producer leasing') or a person independent of the producer, particularly a finance leasing enterprise[106]. Normally, leasing contracts are made on the basis of standard form contracts[107]. However, the contracts underlying leasing transactions are mostly contracts concluded between two companies, so that the consumer is less often exposed to that legal form, as leasing involves predominantly the letting or renting of movable industrial capital goods[108], among which the renting of commercial vehicles occupies a prominent position[109].

By comparison, *hire-purchase*[110] is a lease in which the lessor grants the lessee the right to purchase an object at a certain price within a specified period, with the rent paid until such time being applied against the purchase price. Hire-purchase is a lease including an option of purchase. The decisive difference compared with a leasing contract is that in a hire-purchase transaction the lessor must bear the cost of maintenance and assume the risk of accidental destruction[111]. Unlike a leasing transaction, a hire-purchase transaction affects the final consumer, for example the purchase of colour television sets where agreements are made increasingly on that basis.

223 (*aa*) The subject matter of the contract is always laid down in standard form contracts. Exemption clauses have for their object the exclusion of *statutory rights of redhibition or abatement* under the lease. The question arises whether the prohibition of exclusion of any warranty included in Art. 11, item 10 is applicable to hire-purchase transactions. The views taken by legal writers differ and the courts have not so far taken any decisions[112]. According to its tenor, Art. 11, item 10 in addition to contracts of sale relates also to contracts for delivery. The result of the broad wording of the introductory sentence is that loan for use contracts, such as leasing contracts and hire-purchase agreements,

must also admit of being gauged by the provision of the AGBG. However, the peculiarities of the contract type in question must be taken into account. Applied to hire-purchase agreements, the AGBG says that it is inadmissible to exclude any warranty. The lessee must have the right to demand of the lessor that he should maintain the subject matter of the contract in a condition fit for use. By contrast, what can be imagined is an exclusion of the right of cancellation. However, that right is revived if the lessor fails to comply with one of his principal obligations. Since the duty to maintain the subject matter of the contract continues to exist, the lessor cannot exempt himself from the consequences of violation of that principal obligation[113].

224 (*bb*) A regulation of warranty typical of hire-purchase transactions is that the lessor excludes his warranty under landlord and tenant law and instead assigns to the customer the claims he has against his seller under a warranty pursuant to the law of sales[114]. The admissibility of that clause is determined by Art. 11, item 10a AGBG. Accordingly, so-called vicarious liability clauses, which limit the buyer's claims under a warranty to the granting of claims against third parties or make them contingent upon the prior suing of third parties, are forbidden. Contrary to their misleading tenor, vicarious liability clauses are not inadmissible in general, but only if they *definitely* limit liability by reference to third parties or require the consumer to institute proceedings against a third party. Under an appropriate clause the consumer may therefore be forced to seek performance of the warranty from a third party prior to having recourse to the lessor[115]. Therefore vicarious liability clauses in lease contracts are admissible. However, this applies on the understanding that the requirements of prior recourse to a third party must be kept as low as possible[116]. Thus recourse to a third party is considered to have failed if the third party cannot perform or does not succeed in performing the warranty[117]. The consequence of failed recourse to a third party is that the user of standard form contracts will be liable himself.

(*d*) *Energy contracts*

225 Contracts for the supply of gas, water and electricity involve a special type of purchase transaction[118]. The legal relationship between consumers and public utilities is currently still regulated by the General Supply Conditions of Electricity[119] and the General Supply Conditions of Gas[120], which form part of the contracts[121]. The supply of the population with water is handled by local authorities[122]. As far as that goes, there is no regulation comparable to the General Supply Conditions applicable to all waterworks. However, local authorities have drafted model by-laws[123] which are always adopted. The pertinent standard form contracts constitute a far-reaching deprivation of the consumer's rights. In the General Supply Conditions of Gas and Electricity respectively, any liability is excluded (II 5). A different legal position applies to special customers, i.e. industry. Here individual contracts are negotiated in the case of which the General Supply Conditions do not apply or apply to a limited extent only[124]. Compared therewith, waterworks assume a somewhat friendlier attitude towards the consumer. Liability is excluded merely for inevitable events, while otherwise in the case of a breakdown, as far as it is attributable to

fault, liability is assumed, Art. 40, sentences 1 and 2 of the model by-laws.

The courts have fixed the limits of exemption of liability. They have recognised throughout the exclusion of any liability. In support thereof the well known reasoning is given that the tight price calculation justifies an exclusion of liability. The AGBG does not improve legal protection because it does not apply to standard form contracts under public law: standard form contracts must be incorporated in the contract by an agreement to that effect, Art. 2 AGBG. This requirement does not exist in the case of legal rules which determine the subject matter of the contract in advance without any agreement[125]. The General Supply Conditions of Electricity and Gas count among these legal rules. By comparison, contracts between public utilities and special customers, i.e. industry, are subject to the AGBG, since in that case contracts are not concluded on the basis of the General Supply Conditions. Art. 10 and 11 AGBG are not applicable either, Art. 23, para. 2, item 2 AGBG. The purpose of that regulation is that in contracts of a private-law nature bulk consumers are treated in essentially the same way as normal-rate consumers[126]. So in theory public utilities may also enforce the exclusion of any liability in relation to bulk consumers.

The legislator himself has recognised that the standard form contracts of public utilities call for a review. He has therefore supplemented the enabling section provided for in the Energiewirtschaftsgesetz which authorises the issuance of standard form contracts of public utilities (electricity and gas) to the effect that the authority issuing orders must in future design such standard form contracts in a well balanced way, taking into account mutual interests, Art. 26 AGBG. The same principles apply now to the Allgemeine Versorgungsbedingungen Wasser und Fernwärme (AVB Wasser und Fernwärme, General Conditions of Supply with Water and Long-Distance Heat), Art. 27 AGBG. A review of the present regulation seems appropriate at any rate in view of the fact that on account of the AGBG private enterprises are subject to much stricter liability. Such a different treatment of the state and of enterprises has frequently been criticised by the press and has been described as unjust. The pressure exercised by the media should at least have been instrumental in the fact that the Federal Economics Ministry with the consent of the Bundesrat has issued a Verordnung über Allgemeine Bedingungen für die Elektrizitätsversorgung von Tarifkunden (AVB Elt, General Conditions for the Supply of Electricity to Normal-Rate Consumers) and a Verordnung über allgemeine Bedingungen für die Gasversorgung von Tarifkunden (AVB Gas, Order Concerning General Conditions for the Supply of Gas to Normal-Rate Consumers)[127]. Both orders came into force on 1 April 1980 and at that time superseded the General Supply Conditions of Electricity and Gas. The most important changes lie in the fact that a duty to give notice of interruptions of supply was incorporated and that liability was extended. According to the future legal position, the public utility will be fully liable for damage caused to a customer through interruptions of or irregularities in supply if such damage results in killing, bodily harm or injury to health; in the case of damage to property and pecuniary damage it will be liable only in the event of intent and gross negligence limited to a maximum amount for the total damage caused to all consumers and in the amount of DM 5000 in each case of loss to an individual consumer. The design of liability will certainly have an influence on the drafting of the AVB Wasser und Fernwärme[128].

4 Typical exemption clauses in contracts for the supply of services

(a) *Contracts for the production of new goods*

226 Contracts that relate exclusively to the production of new goods are of no great importance in practice, because the majority of articles required by private consumers are bought in prefabricated condition. Consumers (except those earning high incomes) only very rarely have something specially made to meet their requirements. But it is precisely consumers earning low incomes that are especially prone to have products that have yet to be adjusted to fit their homes sold to them on the doorstep, for example roller blinds, outer door linings and radiators. As regards their legal nature, these are contracts for work and materials (i.e. nonfungible things) which in some cases are governed by regulations under the law of sales and in other cases by regulations under the law of contracts to manufacture. The problems encountered in door-to-door sales (No. 324) with reference to the AbzG and attempts on the part of manufacturers to circumvent the AbzG through cash transactions will not be discussed in detail here. Usually the legal position is such that the consumer cannot get rid of the contract, because the AbzG is not applicable and he is unable to prove fraud or the like. Therefore he is compelled to cancel the contract. The firms concerned speculate precisely on that attitude and therefore in their standard form contracts stipulate that the consumer has to pay lump-sum damages at the rate of about 40%.

Prior to the coming into force of the AGBG, the courts in contrast to some legal writers[129] had already recognised the settlement of claims in a lump sum[130] and with reference to the statutory regulation to be expected had developed principles similar to those that later became law. The extent to which the settlement of claims in a lump sum is admissible follows from Art. 11, item 5 AGBG or from Art. 11, item 6 AGBG if damages in a lump sum must be interpreted as a disguised conventional penalty. While conventional penalties are ineffective *ipso jure* in the cases provided for in Art. 11, item 6, Art. 11, item 5 *permits* settlement of claims in a lump sum if the damage to be expected in the normal course of events is not thereby exceeded and if it is not made impossible for the consumer to prove that the damage is smaller than the lump sum. In the case of each settlement agreement it is therefore a question of whether or not in actual fact it is a disguised conventional penalty. According to the Federal High Court's practice[131] it is a matter of a conventional penalty if the performance of the main contract is to be secured thereby and thus pressure is exerted on the customer, while lump-sum damages merely serve to facilitate the enforcement of a contractual claim that is presumed to exist. That such court practice gives rise to considerable difficulties in practice is obvious, since lump-sum damages, too, are of a penal nature. The simplified assessment of damages in a lump sum serves to perform the contract, so 'lump sums' must be controlled regardless of their legal qualification[132]. It is necessary to determine the limits of a defensible measure within the meaning of Art. 11, item 5 AGBG. Only thus can effective protection of the consumer against lump sums be achieved. The AGBG does not give any clues as to what is still defensible. To begin with it is necessary that liability for damages should exist on merit[133]. Therefore, in contracts to manufacture of the type in question, only such items as relate to a damage computed

in the abstract may be included in lump-sum damages. The lump sum consists mostly of a profit share and the agent's commission. The assessment must be based on the standards applicable to a reasonable man. The Federal High Court's practice concerning the law of sales shows that a lump sum of 40% exceeds the defensible measure. Thus the Federal High Court has recognised a lump sum of 20% in the trade in second-hand cars and 25% in the purchase of furniture[134]. Lump-sum damages at the rate of 40% are therefore ineffective under Art. 6, para. 2 AGBG[135]. Any reduction of the lump sum to a defensible measure is impossible. As regards the burden of proof, it is ensured both by the wording of Art. 11, item 5a AGBG[136] and by more recent Federal High Court practice[137] that not the customer, but the user of standard form contracts has to prove defensibility. However, the burden of proof that the damage was much less is on the consumer[138].

(b) Contracts for repairs

227 Contracts for repairs are separate contracts for the repair of durable consumer goods. These are not repairs to the object of purchase or work performed under a warranty. As regards their legal nature, contracts for repairs are contracts to manufacture. The subject matter of contracts for repairs is determined by the standard form contracts of the contractors involved as far as repairs to durable consumer goods are concerned. In this connection four sectors are of importance: contracts to repair motor cars and radio or television sets, contracts to clean textiles and maintenance contracts for durable consumer goods. If we disregard maintenance contracts, which are often known to be concluded in connection with the sale of complicated technical appliances — they are concluded on the basis of standard form contracts which are not, however, as uniform — a notable development may be observed in the sectors mentioned. The basis of contracts for repairs are mostly terms recommendations suggested by the umbrella organisation concerned and reported to the Federal Cartel Office under Art. 38, para. 2, item 3 GWB[139]. The drawback of these terms, though, is that they are not binding on all repair shops or tradesmen in the trade or industry involved.

228 *(aa)* Exemption clauses in contracts for repairs serve above all the purpose of exempting the contractor from any contractual liability. Such clauses are now checked by the AGBG, Art. 11, item 10 AGBG. That provision covers not only contracts for the supply of new goods, but also contracts for services[140]. According to the legislator's intent repairs shall be subject to the AGBG. The contractor may therefore restrict his standard form contract within the limits set by Art. 11, item 10 AGBG (No. 209).

The business conditions negotiated between the motor-car trade and the ADAC were adjusted to the requirements of the AGBG in 1977. The duty to repair defects, the revival of the statutory right of redhibition or abatement and the period of limitation conform to the AGBG. The principal's liability is restricted to intent and gross negligence. The exclusion of liability for slight negligence is not in line with the legislator's judgment (No. 210).

229 (*bb*) A limitation of liability to 15 times the wage in standard form contracts of dry cleaners has resulted in a number of controversial court decisions in recent years[141]. The AGBG provides for improved legal protection of the consumer in future, because limitation of liability is ineffective at any rate as far as the damage is attributable to intent or gross negligence, Art. 11, item 7 AGBG. According to the view taken here, an exclusion of liability is inadmissible also in the event of merely slight negligence. Even if that view is not followed, the ineffectiveness of a limitation of liability irrespective of the degree of fault follows from the fact that the linking of a limitation of liability to the price of cleaning is not justified and therefore infringes good faith, as the price of cleaning bears no relation whatsoever to the value of the thing. If there is a limitation of liability, it must be geared to the value of the thing to be cleaned[142]. The legal position will be clarified by the action the Consumer Protection Association has brought in the Regional Court of Cologne.

230 (*cc*) Exemption clauses in maintenance contracts have not so far made themselves felt in a particular way. This may be attributable above all to the fact that the specific problems involved in maintenance contracts have not so far been studied[143]. Problems may arise, though, if the conclusion of a maintenance contract coincides with the conclusion of a contract of sale. As a rule, the buyer is then obliged to effect monthly payments to the seller under a warranty connected with the contract of sale. It is possible that under the maintenance contract the customer pays for a service which pursuant to the provisions of the Civil Code and the AGBG the seller has to render free of charge. The problems may be solved with the aid of Art. 7 AGBG which forbids circumvention of Art. 11, item 10 AGBG[144].

Maintenance contracts often include clauses aiming at inducing the consumer to conclude long-term contracts which cannot be judged in terms of money. The AGBG, Art. 11, item 12, now puts an end to such attempts (No. 268).

(*c*) *Contracts for bank services (No. 321)*

231 The services provided by credit institutions are regulated without exception by standard form contracts[145]. Whether transfer, bill or cheque transactions or investments are concerned, the detailed provisions of the standard form contracts of banks, savings banks, etc., which hardly differ from each other, always take effect. The AGBG fully applies to the standard form contracts of banks. While in anticipation of the forthcoming AGBG banks, savings banks as well as people's banks and agricultural credit cooperatives had changed a great number of individual provisions in their standard form contracts in consultation with the Federal Banking Supervisory Office (Nos. 282–289) and the Federal Cartel Office effective 1 January 1976[146], the many changes to the Act which at that time was still a bill once again required thorough revision[147]. In credit contracts questions of warranty law do not, of the nature of things, play an important part. So much the more important to the consumer are exemption clauses *limiting liability*. In the event of delays or faulty performance in the handling of orders banks, also after the revision, had been liable basically only for loss of interest, unless the customer had especially pointed out to the bank

the occurrence of a loss (item 7 AGB). Such a limitation of liability infringes Art. 11, item 7 AGBG in so far as the damage is attributable to intent or gross negligence. In the past, clauses through which banks limited their *liability for persons employed in performing their duties* to fault in the selection of such persons have been a subject of argument. It is a fact that banks have to rely on third parties in performing the functions entrusted to them. Such endeavours of exemption have now been stopped, since banks are liable for intent and gross negligence on the part of persons employed in performing their obligations. Banks have started an attempt to circumvent statutory liability by the regulation provided for in item 9 of their standard form contracts according to which upon involvement of a third party the customer's order is deemed to have been delegated pursuant to Art. 664, para. 1, sentence 2 Civil Code and consequently their liability is limited to the careful selection and instruction of the third party they commissioned. Worded in such broad terms, that clause should infringe the prohibition of circumvention, Art. 7 AGBG. The last body of subjects to be dealt with in connection with exemption clauses relates to *liability for the giving of information*, item 10 standard form contracts of banks. In this respect, too, Art. 11, item 7 AGBG makes it clear that a bank is liable at any rate for intent or gross negligence. Even if the AGBG extended protection, especially in relation to banks, the problems involved in the admissibility of non-liability for slight negligence become clear once more. All business transactions are handled by banks and their institutions. They are not obvious to the consumer and cannot be controlled by him. Mistakes are made only in the bank's sphere of risk. From that point of view it should be considered whether or not a correction via the general clause is advisable[148].

(*d*) *Contracts of insurance*

232 Contracts providing for insurance coverage are concluded on the basis of general conditions of insurance[149]. The subject matter is determined by the type of insurance involved — i.e. life, accident, health, motor car, liability, legal expenses or household insurance. General conditions of insurance come within the scope of the AGBG irrespective of whether or not they have been approved by the supervisory authority or have even been recommended[150]. Only two provisions of the Act are expressly declared to be inapplicable to general conditions of insurance: Art. 23, para. 2, item 6 AGBG declares Art. 11, item 12 AGBG (term of long-term contracts) to be inapplicable, under Art. 23, para. 3 AGBG, Art. 2 AGBG (incorporation in the contract; No. 268) does not apply to general conditions of insurance which were approved by the supervisory authority. For reasons of size it is impossible within the framework of this study to deal with the problems of exemption clauses in the insurance business. Depending on their subject matter, insurance contracts differ widely, so that in any event either statements in a wider context or very detailed statements would come into question. All the same, it should be noted that authors close to the insurance industry try to declare the AGBG to be applicable to a limited extent only. In justification of their view these authors usually advance that the lists of prohibitions as the central element of the AGBG do not really 'fit' the insurance business[151].

It is also a matter of argument whether *descriptions of insurance benefits* in contracts of insurance are subject to control of content under Art. 9 AGBG. It could be imagined that exclusions of benefits are treated as an unreasonable discrimination contrary to good faith which would result in their being ineffective. If the legislative purpose, namely to protect the consumer against being walked all over by the involved wording of standard form contracts, is taken as a basis, that basis exists also in the case of descriptions of insurance benefits in contracts of insurance[152].

(*e*) *Marriage brokerage contracts*

233 Many problems are presented by contracts under which the consumer avails himself of the services of an intermediary, particularly of a marriage broker. Since there are only very few statutory regulations (Arts. 652 *et seq.* Civil Code), there are a great many standard form contracts in this field. Marriage brokerage contracts are also subject to the AGBG. However, the specific problems do not relate to cases of non-liability[153].

(*f*) *Contracts of carriage*

234 The subject matter of contracts of carriage of passengers or goods is determined almost exclusively by standard form contracts or similar regulations[154]. In the field of transport and communications, the Federal Minister is authorised to issue statutory orders by which he may lay down the subject matter of standard conditions of carriage in commercial passenger service, Arts. 51, 58, para. 1, item 3 Personenbeförderungsgesetz (Carriage of Passengers Act). As regards commercial passenger service, the Federal Minister of Transport has acted upon his power by issuing[155] the Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und O-Busverkehr sowie den Linienverkehr mit Kraftfahrzeugen (Order concerning general conditions of carriage by tramway and trolley bus and motor cars running regular services) of 27 February 1970. The same applies to goods traffic, Arts. 20a, para. 5, 84f, para. 4 GüKG (Güterkraftverkehrsgesetz, Road Haulage Act). Here the Kraftverkehrsordnung (KVO) für den Güterverkehr mit Kraftfahrzeugen (Beförderungsbedingungen) Reichskraftwagentarif (RKT) Part 1 of 30 May 1936 is applicable[156].

The Eisenbahnverkehrsordnung (Railway Traffic Regulation) of 8 September 1938[157], applying to the carriage of goods and passengers by rail, was issued by the Reich Minister of Transport on the basis of the authority given under Arts. 458, 460 HGB.

As regards air traffic, the authority of the Federal Minister of Transportation to lay down the conditions of carriage by regular service follow from Art. 21, para. 2 Luftverkehrsgesetz (Aviation Act)[158].

The carriage of mail and parcels by the post office is regulated in Art. 7 Postgesetz (Postal Services Act). Accordingly, the relationship between the consumer and the Federal Postal Administration is determined by the provisions of the Postgesetz and by the Postordnungen (Postal Regulations) of 16 May 1963[159], issued by the Federal Minister of Post and Telecommunications

under Art. 14 Postverwaltungsgesetz (Postal Administration Act).

The AGBG does not apply to public-law standard form contracts, since they constitute legal rules[160]. The relationship between consumer and Postal Administration concerning the use of postal services is designed exclusively according to public-law principles. Standard form contracts that differ from the KVO of 27 February 1960 are excepted: these are subject to the AGBG. However, to such standard form contracts the prohibition of exclusion of liability under Art. 11, item 7 AGBG, Art. 23, para. 1, item 3 AGBG does not apply. The reasons why the legislator made such a regulation resemble those that caused the legislator to exclude special customers from the scope of application of Arts. 10 and 11 AGBG[161]. To the consumer the exclusion of contracts of carriage from the scope of application of the AGBG means that legal protection in relation to public authorities is much smaller than in relation to private enterprises, because the provisions involved provide for non-liability within broad limits.

Likewise of importance to the carriage of goods are the Allgemeinen Deutschen Spediteurbedingungen (ADSp, General German Forwarding Agents' Conditions)[162]. These are standard form contracts which apply only subject to an agreement to that effect between the parties. Under Art. 2 they also apply in the case of forwarding transactions involving non-traders, i.e. consumers. But the ADSp are applied mostly in contracts between forwarding agents and the shipping industry.

5 Duty to perform additional services under contracts of sale and contracts for the supply of services

235 The subject of this part of the study is all obligations of the consumer's contracting party exceeding the mere repair of defects.

(a) Incidental expenses of repair of defects

236 Art. 476a Civil Code, which was inserted in the Civil Code under Art. 25 AGBG, provides in sentence 1 that the buyer, if his rights of redhibition or abatement are limited to a claim for repair of defects, may demand of the seller that he should defray the expenses incidental to such a repair of defects, particularly costs of transportation, travelling expenses, labour and material costs. Art. 476a Civil Code applies irrespective of whether the statutory rights of redhibition or abatement are superseded by standard form contracts or by individual agreements. Art. 476a Civil Code was inserted by the legislator because under the buyer's claims for repair of defects the question of who, the buyer or seller, has to bear the expenses incidental thereto was not regulated[163]. The provision now lays down that basically the seller has to bear the expenses. As regards its nature, it is a statutory standard admitting of deviating agreements. Only deviations in standard form, i.e. through standard form contracts, were prohibited by law under Art. 11, item 10c AGBG. In the process of legislation the proposal was made to design Art. 476a Civil Code as a standard of prohibition from which only traders were to be exempted[164]. That would also have ensured comprehensive protection of the consumer in the case of individual

agreements. However, that view did not gain ground. The provision should not therefore be of great importance in practice[165]. In the final analysis, Art. 476a Civil Code is a provision which was inserted for the sake of preserving the systematic pattern of legislation[166]. Art. 476a, sentence 2 Civil Code exempts the seller from such expenses incidental to repair of defects as he cannot reasonably be expected to defray. This applies if expenses increase, because the thing bought was carried following delivery to a place other than the consignee's domicile or place of business, unless such carriage is in keeping with the use of the thing for its designated purpose. The last part of the sentence presents difficulties in that it may often be a matter of argument when carriage is in keeping with the designated use. The latter shall be determined by way of interpretation, with that being decisive which the parties recognisably agreed upon to be the subject matter of the contract[167].

Pursuant to Art. 25, para. 2 AGBG the provision of Art. 476a Civil Code also applies to the *law of contracts to manufacture.*

In contrast to Art. 476a Civil Code which, although to be welcomed regarding its tendency, in the final analysis affords the consumer only inadequate protection, Art. 11, item 10c provides for a genuine extension of consumer protection as compared with previous practice. In contracts of sale[168] concerning electrical appliances[169], standard form contracts very often saddled the buyer with expenses incidental to repair of defects without the courts having taken exception to that situation. In the law of contracts to manufacture the courts[170] settled the question of law in favour of the orderer[171]. Art. 11, item 10c AGBG binds the *seller*, in connection with Art. 476a Civil Code, or the *manufacturer* of a work under Arts. 633, para. 2, sentence 2 Civil Code to bear all expenses necessary to repair defects. The Act itself mentions only the costs of carriage, labour and material. The wording 'in particular' makes it clear that other costs will also be for the seller's account if such costs accrue, because the claim for repair of defects is satisfied[172]. If the seller contests the defectiveness of a thing, but the buyer succeeds in proving it with the aid of an expert opinion, the buyer will have to bear the costs himself at least by the judgment of the AGBG. The absorption of costs presupposes the existence of a claim for repair of defects[173]. For the same reason the buyer should be bound to bear the expenses incurred as a result of his asserting his claim for substitute delivery under Art. 480, para. 1, sentence 1 Civil Code. For as regards its legal nature, the claim under Art. 480, para. 1, sentence 1 Civil Code is a claim for performance and not a claim under a warranty[174], as is the right to demand repair of defects. But the buyer is not deprived of all his rights. It would be worth considering whether or not on the principles of agency law (§683) he could be granted a refund claim in respect of those expenses. As Art. 11, item 10c was newly inserted it remains to be seen what steps users of standard form contracts will take in order to keep the costs imposed on them to a minimum. No doubt, in future the user will dictate the mode of dispatch to the buyer. If a standard form contract does not provide for the mode of dispatch, the buyer must choose the least expensive one. If a standard form contract provides that repair of defects shall be carried out by a third party, such a contract must at the same time stipulate in which way the buyer is exempted from incidental transport charges[175]. If there is no such regulation, the seller must repair the defects himself. The seller must bear the

expenses incidental to repair of defects even if they are extremely high in relation to the type of defect. This does not apply to the law of contracts to manufacture, Art. 633, para. 2, sentence 3 Civil Code. Here the contractor may refuse to repair the defects if the expenses are disproportionately high[176].

(*b*) *Guarantee*

237 Provisions in standard form contracts often include under the heading 'guarantee' the consumer's rights in the event of a defect in the thing bought or the work produced. What precisely is meant by 'guarantee' differs widely. The terminology in both commercial and legal areas varies widely and there is no established court practice. The greatest protection to the consumer is afforded by the *independent guarantee contract* (selbständiger Garantievertrag). Under such a contract the seller warrants to answer for a certain result or purpose irrespective of impossibility and fault[177]. However, the result or purpose must differ from the mere contractual performance[178]. To be discriminated therefrom is the dependent guarantee contract (unselbständiger Garantievertrag). These are guarantees within the meaning of warranty of qualities under Arts. 459, para. 2, 633, para. 2 Civil Code[179]. In the majority of cases such a guarantee restricts implied warranty. Here we speak of a *guarantee of durability*[180]. If from the wording of the contract it cannot be gathered beyond doubt what is contemplated by the parties, the aim and purpose must be established through interpretation.

Independent contracts of guarantee are very rare in practice. The problems involved in dependent guarantee contracts within the meaning of Art. 459, para. 2 Civil Code have already been discussed (No. 237). We shall therefore focus on what are known as guarantees of durability. Of practical importance are guarantees in the case of technical articles in which defects are to be expected after short periods of time, for instance electrical appliances[181] and cars[182]. Guarantees of durability for *work* produced have not so far gained such importance. They may occur in two different types of case.

It is a matter of a *seller's* guarantee of durability if the seller warrants freedom from defects or the existence of warranted qualities (zugesicherte Eigenschaften) not only for the time when the risk passes, but also for a limited period thereafter. In this case the seller undertakes to effect performance in excess of his obligations in that he promises to answer for freedom from defects in the thing sold also while the buyer is using it[183]. Often such liability has not expressly been stipulated; however, the seller's guarantee of durability, which he gives for a certain period, will have to be interpreted to the effect that he will assume liability for all defects occurring within the period of guarantee which are not attributable to the buyer's fault[184]. The subject matter and scope of guarantee are thus regulated differently from what is provided by law. If the guarantee is given under a standard form contract, the mandatory provisions of the AGBG must be observed. In particular an overall evaluation of the guarantee must not show that the seller's performance falls short of the minimum requirements under Art. 11, item 10 AGBG. More common than the seller's guarantee of durability is the producer's guarantee of durability or, simply speaking, the *producer's guarantee*. Such a guarantee exists if the manufacturer of a product

warrants to perform certain services and repair jobs which are handled not by the seller but by the producer's service department. In that way the consumer is tied down to the producer as regards his rights of redhibition or abatement. In practice the producer's guarantee is given in such a way that upon conclusion of the contract the seller fills in and stamps the producer's guarantee certificates. For legal purposes these are two independent contracts: a guarantee contract between producer and customer and a contract of sale between seller and buyer[185]. From the independence of the contracts it follows that the rights of redhibition or abatement under the two contracts cumulate[186]. Producers and sellers try to evade this situation, which is favourable to the buyer, by the seller excluding warranty in his standard form contract and thus referring the buyer to the producer. Basically, such splitting of the contractual liability fails on account of the independence of the two contracts[187]. If non-guarantee is achieved, though, by the provisions of the guarantee contract being linked with those of the contract of sale, the effectiveness of an exemption clause is determined by Art. 11, item 10 AGBG. The arrangement made is then to be judged by the prohibition of the vicarious liability clause. Accordingly, the buyer may be bound to seek enforcement of his claims from the producer before advancing claims against the seller (No. 224).

Special problems emerge both regarding guarantees of durability and producer's guarantees if the guarantee period provided for in the standard form contract exceeds the statutory minimum period of limitation with respect to claims under a warranty (six months), for example the guarantee period for brand-new cars which has just been extended to one year. If the contents of the guarantee period has not been specified in the standard form contract, which is often the case, an extension may be of importance from three points of view[188]:

- the period of limitation under Art. 477, para. 1 Civil Code shall be extended by contract;
- the statutory period of limitation shall begin to run only after the expiry of the guarantee period;
- the statutory period of limitation shall begin to run only after the buyer has discovered the defect.

In a decision dating from 1979, the Federal High Court followed the view taken by the majority of legal writers, who basically hold that a guarantee extending the statutory period of limitation means that that period begins to run at the time the buyer discovers the defect[189].

The giving of a guarantee of durability which puts the buyer in a position more favourable than that provided by law does not permit the seller to deviate from the list of prohibitions under Art. 11, item 10 AGBG[190], for that is the typical incidence of circumvention under Art. 7 AGBG. By contrast, if the seller has planned the guarantee of durability to cover a period longer than that provided for in Art. 11, item 10f AGBG, he must not infringe the list of prohibitions under Art. 11, item 10 AGBG within such a period. After the expiry of that period he may restrict his performance further than would be admissible under Art. 11, item 10 AGBG.

(c) *Right to exchange*

238 This is the consumer's right to exchange defective goods for goods free from defects. Inherently the right to exchange is a right that applies only to contracts of sale. In the case of contracts to manufacture, the consumer has a right to performance of a work free from defects until acceptance of the work. He may therefore refuse to accept the defective work and may demand that it be produced again. From that point of view one cannot speak of exchange in contracts to manufacture. To be distinguished from the right to exchange is the right of redhibition. That right provides for the possibility of returning the defective commodity and of getting the money refunded. Standard form contracts usually exclude the buyer's right of redhibition. The buyer merely has a claim for repair of defects. Standard form contracts that are still more favourable to the consumer provide for a right of redhibition or abatement only if the seller is unable to remedy the defects. Since the coming into force of the AGBG users of standard form contracts are, however, obliged to adjust their contracts to the minimum requirements under Art. 11, item 10 AGBG.

The buyer has a right to exchange in the case of everyday cash purchases made without standard form contracts if the subject matter of the contract is a mass-produced, but defective — unascertained — product. If the buyer is on his guard and returns the product in flawless condition, an exchange will be made. Usually sellers exclude the right to exchange in the case of seasonal sales, special offers, clearance and jubilee sales.

In standard form contracts the buyer as a final consumer is not basically granted a right to exchange. However, there are indications that there will be a change as developments emerge. The terms recommendations (Konditionenempfehlung) negotiated between the ADAC and the trade associations of the motor-car industry grant the consumer a 'right to exchange', if serious defects cannot be remedied within a week[191].

The reverse is the case in contracts of sale between businessmen. Here standard form contracts usually provide for a right to exchange[192]; in some trades this is even the rule[193].

6 Liability for advertising promises

239 The consumer's expectations as regards the quality of the goods purchased is essentially determined by the seller's and producer's advertising statements. The same is true of the services sector, the sole difference being that here advertising statements concern not the quality of goods but the performance of services. The aim and purpose of advertising is to create in the consumer the desire and idea that the advertised commodity/service has the qualities described. If quite contrary thereto the Federal High Court takes the view[194] that the consumer does not link an advertising statement with the qualities actually existing, it fails to see the economic objective and function of advertising[195]. Advertising not only serves to publicise and describe goods, but in many cases also takes the place of the seller's advice.

The question of liability raises a great number of problems. Advertising statements relate to the quality of a product or the performance of a service.

Therefore liability may arise only under the law of contract, so under contracts of sale the seller may even have to accept liability for advertising statements made by the manufacturer on which he has no influence whatsoever, but on which he often has to rely for lack of expert knowledge. Apart from some exceptions, the producer is not liable to the consumer under the law of contract. The principles developed by the courts regarding the manufacturer's liability concern only *safety aspects*. As a rule, liability for advertising promises concerns only the seller who under the provisions of the Civil Code and under the AGBG has to answer for advertising statements.

The consumer's position is planned to be somewhat improved by the reform of the UWG (No. 188).

(*a*) *Liability in the law of sales*

240 Art. 459 Civil Code, which is of importance solely in the law of sales, lays down in para. 1 the seller's liability for defects in the thing bought. Apart from the fact that not every incorrect advertising statement constitutes a defect, claims against the seller under Art. 459, para. 1 as a rule fail, because the seller may exclude his liability. This does not apply to Art. 459, para. 2 Civil Code, which provides for the seller's liability in the absence of a warranted quality (zugesicherte Eigenschaft). As here non-warranty on the part of the seller is impossible under Art. 11, item 11 AGBG, consumer claims may arise under Art. 459, para. 2 Civil Code. This presupposes that the seller warranted the buyer/consumer the existence of certain qualities. Deviations from advertising statements entitle the buyer to advance claims against the seller only, if the advertising measure had been agreed by contract. If an express agreement or even an agreement in writing were required, a buyer would hardly ever raise any claims. As there may also be an implied warranty many problems of definition arise as to when (and, if so, whether) a statement has actually been warranted[196]. According to court practice, statements made merely for the sake of publicity are not to give rise to legal liability[197]. The courts extended the exclusion of such a type of legal liability to include quality standards which find expression in trademarks, test and quality labels and particularly in provisions under German Industrial Standards[198]. By way of exception, an accompanying trademark gives rise to liability from the point of view of a warranted quality (zugesicherte Eigenschaft). In the Trevira decision, the Federal High Court ruled that the processor of a Trevira product is liable to his customers under Art. 459, para. 2 Civil Code to the effect that if Trevira is processed according to his directions the finished product will have certain qualities (for instance, crease-resistance)[199]. The basically negative attitude of the courts towards the treatment of quality standards as warranted qualities in many cases has met with opposition from legal writers[200]. The Federal High Court fails to see that the use of quality standards indicates the seller's willingness to answer for deviations from such standards. This does not conflict with the fact that standards such as German Industrial Standards merely constitute recommendations made by certain associations, i.e. are not presumptions of law[201]. For at least concerning legal reality, German Industrial Standards are so important that, as regards liability, it is justified to equate them with statutory provisions[202]. Since,

basically, the courts do not treat advertising statements as warranted qualities (zugesicherte Eigenschaften), it has to be decided in a particular case whether, by way of exception, an advertising statement gives rise to liability all the same. The courts have developed certain criteria of definition which makes it possible to group the various types of cases[203].

241 (*aa*) Thus a certain *trade usage* permits the drawing of conclusions as to the seller's contractual declarations[204]. These facts relate predominantly to disputes between businessmen, which is why the problems will not be dealt with here.

242 (*bb*) Of importance to the consumer are those cases where a buyer relies on the *seller's proficiency and expert knowledge* and believes his statements as to quality. The typical situation here is that the experienced, skilful seller and the inexperienced consumer who is unsure of himself as regards business matters confront each other[205]. The Federal High Court[206] emphasised this point of view in a recent decision by concluding an implied warranty from the display of a sales ticket showing miles travelled. The Federal High Court emphasised the same point of view in a case which concerned the relationship between a manufacturer of window frames and a producer of lacquer[207]. Here belong also various decisions from the area of trade in second-hand and new cars[208]. It is interesting to note the reasons given by the Higher Regional Court of Cologne[209] for the step from advertisement to contractual warranty. There it says: 'Advertising by a warranty of the qualities of a thing inducing a purchase, negotiations with an interested party attracted by such advertising and the conclusion of a contract of sale must form an integrated whole'.

243 (*cc*) The third group of cases are those where the buyer attaches special importance to *certain advertised qualities* of a thing. Two decisions by Higher Regional Courts should be mentioned here. In the first case[210], it was the question of whether the seller's statement that 'the wine was estate-bottled' amounted to a warranty; in the second case, it had to be decided[211] whether the seller's statement regarding petrol consumption of the car bought was significant within the meaning of Art. 459, para. 2 Civil Code. The courts decided both cases in favour of the consumer, because the qualities in question were of decisive importance in the purchase decision.

244 (*dd*) Closely related to the aforementioned group of cases are those where a certain quality of the object of purchase is the prerequisite for the buyer *to use it for his purposes*. Accordingly, the Federal High Court set forth that the fact that the intended use known to both parties was incorporated in the contract might be interpreted as an implied warranty of quality (stillschweigend zugesicherte Eigenschaft)[212]. However, it does not suffice that the buyer only knew of the intended use. Another factor must be appropriate statements by the seller indicating warranty of fitness for a particular purpose[213].

(*b*) *Liability in the law of contracts to manufacture*

245 Basically, the principles established on the basis of the law of sales also apply

to the law of contracts for work[214]. However, it should be noted that the consumer has a claim for damages under Art. 635 Civil Code for a warranted quality (zugesicherte Eigenschaft) only if the contractor is at fault. Actually the cases decided by the courts concerned primarily contracts of sale. The reason why there is a disequilibrium is the different measure of industrialisation in the field of goods production and the services sector. Advertising and marketing developed only in the course of the industrialisation of goods production. In the services sector the consumer's contracting party is often the minor trader or industrialist who has not yet mechanised his firm in a way similar to the production of goods. Personal talks and advice given by the proprietor play a greater part here than in the case of contracts of sale.

(c) *Evaluation*

246 From the grouping of cases decided by the courts it might be gathered that the courts decide in a more or less standard manner. Quite the reverse should be the case. For either contracting party it is difficult to predict how the matter will be decided. The dilemma is not least attributable to the fact that the courts decide conflicts of interests between buyer and seller without taking into account at which stage of the chain of supply the contracts are made. To the Federal High Court it does not make any difference whether the buyer is a dealer or a consumer. The interest of the consumer as a buyer in purchasing a commodity that is free from defects differs widely from the interest of a dealer. The latter is interested in freedom from defects only in so far as his interest in selling the goods is concerned, while to the consumer freedom from defects is what matters[215]. The uncertainty is even increased by the fact that from the parties' statements the courts often draw conclusions of which the parties could have had no idea at the time the contract was made. Thus the courts break away from implied warranty, which presupposes declarations of intent by either party, in favour of a sort of liability based on the consumer's confidence (Vertrauenshaftung)[216].

The cause of that development should be that the courts often decide on the basis of equity aspects. On the other hand, they also show how inadequate the statutory instruments are.

That is why legal writers come out increasingly in favour of the advertiser's liability for expectations he created in the consumer[217]. If such a type of liability of the seller could be achieved *de lege lata*, the liability of the manufacturer who shares in advertising to a much greater extent would require an amendment of the law. Logically one author suggests that seller and manufacturer should be jointly and severally liable, which ought to be achieved by an amendment to Art. 463 Civil Code. Simultaneously, Art. 459, para. 2 Civil Code shall be supplemented by a sentence running as follows: 'Advertising statements about the condition of a thing also qualify as warranties'. So far, the legislator has not taken up such proposals to amend the Civil Code. An enhancement of consumer protection to the effect that the seller has to answer for qualities described in the advertisement is still very remote.

7 Special rules concerning certain services

(a) *Travel contracts*[218]

247 To an ever-increasing part of the population, travelling has become a natural thing of our world of consumption. In 1978, 56.8% of the population above the age of 14 made one or several holiday trips[219]. In addition to the travel agency, the travel boom has given rise to a further activity: that of the travel organiser. The organiser relieves the individual traveller of all the arrangements of his trip and offers the tourist transportation, board and lodging for a lump sum. The law followed that development in actual fact by creating Arts. 651 a–k Civil Code. Since 1 October 1979, the Civil Code has provided for a type of contract regulating the legal relationship between travel organiser and consumer. It is the stated aim of this new legislation to protect the consumer against overcharging by a travel organiser. As a means of enforcement, the legislator created mandatory statutory provisions from which the travel organiser may not deviate to the detriment of the consumer.

The new law of the travel contract has gone through a most varied history[220]. As early as 1973 the Federal Ministry of Justice submitted an officials' draft concerning the travel contract to counteract abuses by travel organisers[221]. The proposal was then introduced into parliament in the seventh legislative period, but was not debated[222]. Only during the eighth legislative period did parliament deal with the law of travel contracts[223]. From the start the regulation designed as a special act met with opposition from the Reisebüroverband (Association of Travel Agencies), which wanted to stop statutory regulation at any cost. To that end it reported to the Federal Cartel Office on 27 October 1976 a recommendation of general travel conditions for all-inclusive tours[224] which in some respects improved the customer's position compared with previous practice. However, it was only possible to recommend the new general travel conditions to the members of the DRV — not to mention non-members. Travel brochures for the 1978 summer season confirmed the view taken by the Federal Ministry of Justice that contractual relations regarding all-inclusive tours required statutory regulation[225]. When looking through 28 brochures of major and minor travel organisers, the Ministry established that only one organiser observed the model conditions correctly. In all the other cases the standard form contracts used more or less deviated from the recommended model conditions to the detriment of the consumer. The aim of improving the consumer's legal position in relation to travel organisers was now to be achieved through other legislative measures. In derogation of the first bill of 6 May 1976, the second bill of 4 December 1978[226] provided for the incorporation of special protective provisions in the law of contracts to manufacture included in the Civil Code. The second bill passed the legislative organs in its present version[227].

The Act has solved a great many problems, but at the same time has raised a number of new questions. In the following not only the Act will be discussed: rather, the solutions offered by the law of travel contracts, the AGBG and the General Travel Conditions will be shown on the basis of the questions most important to the consumer.

248 (*aa*) In Art. 651a, para. 1, the Act regulates only travel contracts consisting of 'an aggregate of services'. It is thus limited to all-inclusive tours, in the case of which the travel organiser in addition to transportation to the holiday place offers accommodation for a lump sum. A single travel service, for instance the booking of a charter flight or reservation of a holiday apartment, does not come within the scope of the new law of travel contracts[228]. The law of travel contracts therefore applies only to a minority of travellers; of the 26.1 million citizens of the Federal Republic who in 1978 made a holiday trip, only 24.1% booked an all-inclusive tour[229].

Art. 651a, para. 2 makes it clear that a travel organiser cannot escape the application of the Reisevertragsgesetz by declaring that he merely arranges contracts with individual hotels and carriers. If 'according to the other circumstances' he gave the impression that he intends to effect performance on his own responsibility, any statement to the contrary in his standard form contract is irrelevant. Here the law takes up the Federal High Court's practice concerning intermediary clauses[230]. As early as 1973, in a decision of which great notice was taken, the Federal High Court had declared the intermediary clause to be ineffective. In that judgment the Federal High Court took as a criterion an evaluation from the point of view of the traveller; that is, how the latter could and should interpret the travel organiser's statement, taking into account the latter's conduct on the whole and the accompanying circumstances. That sum and substance continues to be decisive for a close definition of 'other circumstances' as mentioned in the Act[231]. Intermediary clauses may also be admissible under the travel contract if despite the fact that there are several travel services there is no link as to substance between them joining them together in an all-inclusive tour.

It is open to question how the legal admissibility of intermediary clauses is to be judged if the subject matter of the contract is only one travel service. The statutory regulation is apparently unequivocal: it is a matter of a travel contract which basically forbids intermediary clauses if no less than two travel services were promised. All the same, the question is whether or not by way of exception a travel contract — consequently the exclusion in principle of an intermediary clause — may be presumed. This question is of great importance in practice, since in 1978 of the 6.4 million all-inclusive tours, 1.7 million concerned a holiday apartment or a charter flight[232]. In the judgment mentioned above, the Federal High Court has declared the intermediary clause to be inadmissible precisely in respect of a contract for the renting of a holiday house. Consequently, the courts interpreted the travel contract in a broader sense than the legislator[233]. Art. 1, para. 3 of the government bill declared intermediary clauses in the performance of a single travel service to be void if the travel organiser renders the travel service on his own responsibility. The Legal Committee of the Bundestag deleted that paragraph without giving any reasons therefor. The only passage that may be considered for the purpose of interpretation is not clear[234]. It does not therefore conflict with the statutory regulation to declare an intermediary clause to be inadmissible also in the case of a single travel service if the travel organiser to all appearances offers such a single travel service on his own responsibility[235].

The Allgemeine Reisebedingungen (ARB, travel organisers' standard form

contracts) include only travel contracts under which an aggregate of travel services is rendered. This follows from the preamble. As to substance, the travel organisers' standard form contracts therefore coincide with Art. 651a, para. 1 Civil Code. The intermediary clause declared to be inadmissible by the courts was replaced by the provision in No. 9, item 1 and No. 9, item 5 of the recommendation. Under No. 9, item 1 the organiser is liable under the duty to take businesslike care for reliable preparation of the trip, careful selection and supervision of hotels and carriers, correct description of services and due performance of the travel services agreed by contract in accordance with the local customs of the country or place of destination. Under the heading liability, the travel organiser's duty is put into concrete terms. The purpose is to limit one's own obligations and to pass responsibility for defects on to hotels and carriers. In that form the clause meets with a great many objections[236].

No. 9, item 5 lays down that the organiser is not liable for services rendered by third parties. Two types of case are mentioned: third-party services expressly termed as such (e.g. sporting events) and transportation by regular service. Even more definitely than under No. 9, item 1, the old objective of the intermediary clause is pursued under the heading third-party services. The admissibility of the third-party services clause must be judged on the basis of Art. 651a, paras. 1 and 2 Civil Code. If from the circumstances it follows that the travel organiser arranges the whole trip on his own responsibility, he cannot exempt himself from liability for 'third-party services'[237].

249 (*bb*) The consumer is under an obligation *to effect prepayment.* In derogation of the other provisions of the law of contracts to manufacture, he pays in advance. That derogation from the law in force is not taken exception to by the courts, nor does the new Act alter the practice[238]. Some legal writers object to the traveller's obligation to effect prepayment[239]. They argue that such an obligation should be forbidden *de lege ferenda* to protect the socially weak customer.

It is precisely in the law of travel contracts that it would have suggested itself to make allowance for the fact that the travel organiser is able to enforce the obligation to effect prepayment only on account of his economic position, which is superior in relation to the consumer. In the case of individual trips the consumer effects a down payment only. If the consumer is not then satisfied with the performance effected, his starting position is much more favourable, since he may withhold part of the price.

250 (*cc*) Travel conditions are as a rule subject to certain *reservations* regarding individual travel services (terms, dates, etc.). In contrast to the first bill[240], the Reisevertragsgesetz includes no provision relating to reservations. The admissibility of reservation clauses regarding trips must therefore be judged on the basis of the AGBG. Under Art. 10, item 4 AGBG there are no objections to such clauses if the performance offered and performance effected do not differ unreasonably[241]. Admissible changes must be distinguished from organisational defects which render the organiser concerned liable for damages[242].

In the event of changes in performance, No. 4 of the terms recommendation

takes as a criterion whether the customer can reasonably be expected to accept them. In the event of unreasonable changes, the consumer is granted a right of cancellation.

251 (*dd*) *Reservations as to price and alterations* are to be found in almost all travel conditions. Unlike the officials' draft, the Act does not include any regulation. In that respect Art. 11, item 1 AGBG takes effect, under which the consideration cannot be changed if the trip commences within four months, unless an increase in price within the meaning of Art. 99, para. 2, item 1 GWB is concerned[243]. No. 4, para. 4 of the recommendation includes a disguised price index clause, under which the consumer is granted a right of cancellation if the change in price exceeds a percentage rate that the customer may reasonably be expected to accept. The clause infringes Art. 11, item 1 AGBG, because the travel organiser is not bound by the price of the trip[244]. Extra charges for oil price increases are therefore admissible only after the expiry of the four-month period. However, even then a possibility of control is left on the basis of Art. 9 AGBG[245]. Inadmissibility is not remedied by the granting of a right of cancellation. All the same it is to be welcomed that in the 1978 summer brochures travel organisers observed the absolute limit of 10% provided for in the first bill[246].

252 (*ee*) Travel organisers' standard form contracts oblige the consumer to notify *without delay defects discovered* at the destination. The law of travel contracts remains silent about such duties to notify. All the same, there is no reason why there should not be such a duty to cooperate. Under Art. 254 Civil Code the consumer is obliged to do all in his power to keep the damage as small as possible.

The legal position becomes involved, though, where No. 13 of the terms recommendation greatly formalises that duty. Thus the consumer shall inform the travel organiser or the hotel or carrier provided that the local tour manager is not available or cannot remedy the irregularity in performance. First of all, the traveller is under an obligation to notify only as far as he can reasonably be expected to do so without any personal difficulties. In addition, the consumer is not obliged to notify the defect to the travel organiser if the local travel manager is unable to remedy the defect. Such sources of defect come exclusively within the travel organiser's responsibility.

Lastly, the clause under which the consumer is denied claims if he fails to comply with those obligations infringes Art. 651d, para. 2; an exclusion of abatement is admissible only if the traveller has *culpably* failed to comply with his duty to notify defects[247].

Some travel organisers in their standard form contracts require that a record be drawn up with the travel manager involved, the existence of which is then prerequisite to the assertion of a claim for damages. The law of travel contracts includes no direct provision on that circumstance. However, from the provisions on the request for remedial measures it follows that writing is not required, Art. 651c, para. 2 Civil Code. As far as that goes, previous court practice is confirmed[248]. All the same, a record may be useful to the consumer in terms of evidence in litigation. The terms recommendation does not provide for such a formalised duty to cooperate.

While the law of travel contracts does not regulate the consumer's duty to cooperate, it does regulate the rights he may derive from the defect once it has been discovered, Art. 651c, paras. 2 and 3 Civil Code. The consumer may claim remedial measures if they do not involve a disproportionately high expenditure. Of importance is that under para. 3 the consumer is granted a right of self-help in the event of the organiser's failure to take remedial measures within a reasonable period. In some exceptional cases even the requirement of appointment of a time limit is not applicable.

The recommendation fails to meet the requirements of the Act. There is no reference to the customer's right of self-help. The present travel organisers' standard form contracts give the impression that the customer is meant to be misled as to the scope of his rights[249].

253 (*ff*) As a rule, standard form travel contract conditions oblige the consumer *to make a complaint within a certain period after the end of the trip*, although the period within which the consumer is required to report differs (between 3 and 4 weeks). The argument about admissibility or scope of admissibility has now been settled by the unequivocal statutory regulation[250]. Art. 651g, para. 1 Civil Code, just as No. 14 of the recommendation, provides for a four-week time limit. Accordingly, the traveller may assert claims after the expiry of the time limit only if he was prevented from observing that limit through no fault of his own. Here the Act uses a legal conception which comes within the purview of procedural law (cf., for instance, Arts. 230 *et seq.* Code of Civil Procedure). Characteristically enough as regards the questions of law in Arts. 230 *et seq.* (restoration to the original position) it is always a matter of whether or not a loss of rights occurs. In actual fact the four-week period results in a curtailment of the consumer's rights.

Of great importance therefore are types of cases where the travel organiser must be denied pleading of the four-week time limit from the point of view of the inadmissible exercise of a right. Such facts exist if upon commencement of the trip the travel organiser knew about the defects through reports by the local tour manager[251].

254 (*gg*) Travel organisers have at all times had it in view to limit *their liability* as far as possible through *exemption clauses*.

(1) As far as statutory rights under a warranty — redhibition, repair of defects, and abatement — are concerned, the AGBG had greatly improved the consumer's legal position. Now the rights under a warranty of the consumer who has concluded a travel contract follow from Art. 651 Civil Code. Para. 1 adopts unchanged the concept of defect under the law of contracts to manufacture. It merely differs linguistically in that the term 'use' was replaced by the term 'benefit'. In the government bill the legal remedies were to be made contingent upon whether performance 'was not effected or not effected as provided by contract'. That was a purposeful break with the system of impediments to performance provided for in the Civil Code and an attempt to continue the system of a uniform law on international purchases of movable things[252]. The regulation, which has since become law, gives rise to the most intricate problems of differentiation between the legal remedies for delay or impossibility under the

law of travel contracts and under the general part of the law of contract[253].

In the event of a defect or the absence of a promised quality, the traveller may claim remedial action in principle under Art. 651c, para. 2. To the consumer it is of importance that statements in a brochure may become a warranted quality (zugesicherte Eigenschaft)[254].

Lastly, Art. 651d provides for a reduction in the price of a trip during the period when there is a defect. In addition, under Art. 651e the traveller has a right of cancellation if the defect results — by objective standards — in a *considerable* impairment of the trip or the traveller concerned cannot reasonably be expected to make the trip for any sound reason recognisable by the travel organiser. Usually an unsuccessful request for remedial action limited in time (Art. 651e, para. 2) must precede cancellation. The legal consequences of cancellation are regulated in para. 3. It should be of importance that even after cancellation of the contract legal obligations are placed upon the travel organiser, particularly obligations to transport the traveller back home. Additional costs incurred are for the account of the travel organiser, para. 4. There is no deviating from the rights mentioned to the detriment of the consumer, Art. 651k. The provisions mentioned reflect a design of rights under a warranty tailored to the travel contract which improves the consumer's legal position.

(2) Travel organisers have tried persistently to exclude and limit claims for damages. The *sedes materiae* is now Art. 651f and Art. 651h Civil Code. Art. 651f, para. 1 lays down the travel organiser's obligation which cannot be contracted out to pay damages if the loss-entailing events are within his sphere of responsibility.

Art. 651f, para. 2 puts the provision of para. 1 on damages into more concrete terms to the effect that damages will be awarded also for holiday time spent to no avail. The legislator let himself be guided by the Federal High Court's judgment of 10 October 1974 in which such damage was acknowledged to have occurred[255]. The controversial question as to whether holiday time spent to no avail constitutes a non-material loss and thus a loss to be made good only within the limits of Art. 253 Civil Code has thus been settled[256].

Of the utmost importance to the consumer is Art. 651h Civil Code, which allows the organiser by way of contractual agreement to limit in terms of amount the claim for damages provided for in Art. 651f to three times the price of the trip. Art. 651h, para. 1 distinguishes between two cases: according to item 1, exclusion of liability is possible only if the damage suffered by the traveller was caused neither wilfully nor by gross negligence, i.e. in the event of ordinary negligence. Item 1 adopts the regulation of Art. 11, item 7 AGBG. However, Art. 651h, para. 1, item 1 extends the ineffectiveness of exemptions in travel contracts to include also exemptions under individual contracts[257].

If the damaging circumstances at the same time constitute a tort, Art. 651h, para. 1, item 1 does not apply. Liability for a tort committed even by slight negligence cannot be contracted out in standard form contracts[258].

Pursuant to item 2, a limitation of liability is admissible if the travel organiser is responsible for the damage suffered by a traveller only owing to fault on the part of a hotel or carrier. In contrast to Art. 11, item 7 AGBG, a limitation of liability is possible even in the event of intent and gross negligence. That

regulation is of great importance in practice, since in the final analysis often the hotel or carrier is the one who is responsible. However, it must be examined whether the travel organiser actually fulfilled his organisational obligations.

The question remains how the different regulations in the AGBG and in the law of travel contracts is to be judged. It would be defensible only as far as the AGBG does not take effect, that is in individual agreements[259].

Art. 651h, para. 2 provides for a further limitation of liability which applies by operation of *law*: The travel organiser may plead statutory limitations of liability in relation to the traveller, applicable to an individual hotel or carrier. Consequently, the organiser cannot plead limitations of liability by contract. Statutory provisions are to be found partly under national law, but often also under international agreements (Warsaw Convention; Additional Agreement of Guadalajara; Athenian Convention of 1974)[260].

The limitation applies only to a travel service to be rendered by a hotel or carrier. If the source of error is within the organiser's scope, he is liable within the limits of Art. 651h, para. 1 Civil Code.

The regulation of limitation of liability in ARB item 9 and ARB item 12 meets with a great many objections.

Under item 9, No. 2 gross negligence and intent on the part of the hotel or carrier is to be judged according to the regulations in force at the place of performance. Such a limitation is possible only within the limits of Art. 651h, para. 2 Civil Code[261].

Under item 9, No. 3 it is intended to limit liability for transportation services to the extent provided for in 'the officially approved regulations in the national and international spheres'. Here also, the limits of Art. 651h, para. 2 were not taken into account[262].

Item 9, No. 4 aims at excluding any liability for adventure trips. This is an obvious infringement of Art. 11, item 7 AGBG and Art. 651h Civil Code[263].

Item 12, No. 1, para. 1 provides for a limitation of liability to twice and, in the case of bodily injury, four times the price of the trip. Within the limits of Art. 651h, para. 1 the law permits limitation to three times the price of the trip. Any differentiation is impossible. If bodily injuries constitute a tort, any limitation of liability is inadmissible anyhow[264].

255 (*hh*) Travel organisers' standard form contracts include throughout clauses imposing charges on the traveller if he cancels the contract: *cancellation and damage clauses*. These are usually given in percentage rates of the price of the trip and are the higher, the nearer the travel date draws. Also in the currently applicable standard form contracts, lump-sum claims vary between 10% and 50%, 75% or the full price of the trip being claimed very rarely[265].

The officials' draft of 1973 aimed at solving the problem of cancellation charges in a concrete way by providing for maximum rates for lump-sum damages, graded by the time of cancellation[266]. This regulation has not become law. Art. 651i, para. 2 regulates what has to be done if the parties failed to agree upon lump-sum damages in the travel contract. Accordingly, the travel organiser may claim adequate compensation if the customer withdraws from the travel contract, Art. 651i, para. 2, sentence 2. The amount of compensation is determined by the price of the trip less the value of the organiser's saved

expenditure and what he might otherwise gain from the use of the travel service. The burden of proof as to the amount of damage is on the travel organiser, since he is the one who wants to assert a claim[267]. Art. 651i, para. 2 should not be of great practical importance, since standard form contracts of travel organisers usually provide for lump-sum damages. This type of case is regulated in Art. 651i, para. 3. Accordingly, the travel organiser may fix a percentage rate of the price of the trip as damages in his standard form contract. In computing the amount he must take into consideration the expenditure usually saved and the gain usually possible through use of the travel service. The statutory regulation requires of the travel organiser that he should make due allowance for the type of journey involved (by rail, ship or air). Depending on the type of journey, the travel organiser must then set forth and prove the typical course of the journey from experience[268].

As lump-sum damages constitute contractual agreements, Art. 11, item 5b AGBG applies in addition to Art. 651c, para. 3 Civil Code. Therefore the consumer has the possibility of proving that in a concrete case damage did not occur or was substantially less than the lump sum[269]. A passage to that effect must be incorporated in the travel organiser's standard form contract[270].

Item 5, No. 1 ARB requires of the consumer a written declaration of cancellation. This infringes Art. 651i, para. 1 Civil Code which also admits of verbal cancellation[271].

Item 5, No. 3 ARB regulates the settlement of claims in a lump sum. A sophisticated system is planned, distinguishing by modes of travel and within the modes of travel by time of cancellation. The amount of cancellation charges is not fixed in the ARB, so that judgment is out of the question.

256 (*ii*) Recently, clauses excluding the travel organiser's liability in the event of a strike on the part of hotels or carriers have gained great importance.

The starting point is Art. 651j, which grants both the travel organiser and the consumer a right of cancellation if the trip is seriously impeded, jeopardised or impaired by force majeure not foreseeable at the time the contract was made. The term force majeure does not include strikes, so that it is quite clear that strikes on the part of hotels or carriers come within the organiser's sphere of responsibility[272].

Art. 651j, para. 2 Civil Code regulates the legal consequences of cancellation. The organiser loses his claim for the price of the trip; instead he has a claim for compensation to be determined under Arts. 651j, para. 2, 651e, para. 3, sentence 2 in such a way that the *pro rata* price of the trip up to the occurrence of force majeure and the return trip must be borne by the traveller.

Difficulties are encountered if the parties want to cancel the contract *before the commencement of the trip* pleading force majeure. Art. 651j Civil Code does not expressly provide for such a type of case. As regards its legal consequences, para. 2 is tailored to cases where the consumer had already commenced the trip. Only interpretation to the effect that both parties have a right of cancellation for force majeure before the commencement of the trip seems to be fair regarding the interest of either party[273].

257 (*jj*) Since the coming into force of the amendment of the Code of Civil Proce-

dure, Art. 38 Code of Civil Procedure, *jurisdiction clauses* have ceased to play a part. Against this a more recent decision[274] should be noted according to which the place of business of the travel organiser's agency is the place of jurisdiction of the branch. Here the internal relations to the central agency do not matter, but only whether in relation to third parties the impression is created that it is an independent branch. If court practice were continued consistently, law enforcement would be facilitated substantially for the consumer if he made reservations at his domicile[275].

257a (*kk*) The enactment of the law of travel contracts means a further step towards improved consumer protection. The consumer's rights that cannot be contracted out have now been laid down. It is to be regretted, though, that the Act enables the travel organiser within certain limits to refer the consumer to the hotel or carrier concerning possible claims for damages. Difficulties regarding the question of whether the admissible exclusion of liability also includes claims in tort likewise seem pre-programmed. Not at all convincing from the consumer's point of view is the regulation of cancellation charges. It would have been desirable if during the debates at least the possibility of whether or not the problem of lump-sum damages could have been solved in favour of the traveller by an appropriate duty placed on the organiser to take out insurance against the risk of loss of travel expenses[276] had been discussed.

(*b*) *Correspondence course contracts*

258 The FernUSG, which was passed by the German Bundestag on 24 August 1976, comprises two areas of regulation. To begin with, certain correspondence courses are subjected to the *requirement of licensing*. The provisions concerned have already been discussed[277]. In addition, the Act comprises numerous provisions relating to the contract itself which will be examined now.

259 (*aa*) Art. 2, para. 1 FernUSG lays down the organiser's obligation to supply teaching material, inclusive of the envisaged learning aids, at the intervals agreed upon and to supervise progress by correcting papers sent in within a reasonable period of time and by giving the participant in the correspondence course the instructions he seems to require. In view of the many general clauses in the definition of the scope of the duty of supervision, disputes at law are to be expected. Of special importance will be whether the organiser must offer assistance in the event of a participant's failure to send in exercises over a longer period of time[278], or whether he may treat the participant as a filing card which is out of date until the latter cancels the contract, when the organiser may claim payment. The point at issue should be judged on the basis of pedagogical standards to be set for correspondence courses. Under Art. 2, para. 2 FernUSG, payment of the course must be spread evenly over the entire term of the course. Certain exceptions are admissible, such as in the case of the payment of movable things which do not form part of the teaching material and also if the parties at the participant's request negotiated terms of delivery other than those stipulated in Art. 3, para. 3, item 1 FernUSG, Art. 2, para. 3 FernUSG.

260 (*bb*) The form and subject matter of the contract is regulated under Art. 3 FernUSG. Accordingly, the contract must be in writing, i.e. must at least be signed in the participant's own hand. Any infringement of that requirement results in nullity, Art. 126 Civil Code. As regards the subject matter, Art. 3 FernUSG distinguishes between facts that must be included and facts that should be included. Among the former are: (1) the name and address of the parties; (2) the object, goal, commencement, duration, and type and recognition of the final examination of the course; (3) the total amount of payment, the amount apportionable to movable things being stated separately; (4) the amount, number and due dates of instalments payable towards the fee of the course; (5) typographically clear instruction as to the right of cancellation; (6) terms of cancellation. The contract shall include: (1) the construction of the correspondence course, statements as to the intervals at which the material will be supplied and the nature and frequency of the accompanying material; (2) statements as to additionally required learning aids; (3) an indication of the required educational background and, if necessary, the terms of admission to a public-law or other examination; (4) jurisdiction by act of law; (5) if necessary, provable references to the licence granted.

Infringements of the mandatory subject matter result in ineffectiveness, but the desired subject matter is also fixed within relatively narrow limits in that under Art. 4, para. 2 FernUSG the commencement of the period allowed for cancellation is contingent thereon. The same legal position exists with respect to the transmission of a clearly legible copy of the contract. The instruction as to the right of cancellation shall be signed separately by the participant. For no intelligible reason the Act does not provide for any direct sanction if the instruction has not been signed. While Art. 3 FernUSG lays down positively what must be included in the contract, Art. 2, para. 5 provides for agreements that cannot be made. Accordingly, agreements on contractual penalties, settlement of claims in a lump sum, exclusion or limitation of claims for damages and waiver by the participant of defences in the event of assignment by the organiser to a third party are all ineffective. As far as the FernUSG forbids settlement of claims in a lump sum and limitation of liability, it exceeds the scope of the AGBG, cf. Art. 11, item 5 and Art. 11, item 7 of the AGBG. The FernUSG not only deals with the subject matter of the contract, but also with the formation of a contract. Arts. 16 and 17 FernUSG aim at forbidding the organiser to use certain advertising methods in order to guarantee the participant's freedom of contract[279].

261 (*cc*) The correspondence course contract may be cancelled in writing within two weeks of receipt of the first instalment of teaching material, Art. 4, para. 1 FernUSG. Writing is only a means for perpetuating evidence, so verbal cancellation is also effective[280]. Irrespective of the receipt of teaching material, the period begins to run only if: (1) the organiser has delivered to the participant a copy of the contract; (2) the copy includes the statements required under Art. 3 and an instruction as to the right of cancellation. If it is a point at issue whether and, if so, when the first instalment is deemed to have been received, the burden of proof is on the organiser, Art. 4, para. 1 FernUSG. If the contract is cancelled within the prescribed time, the performance under the contractual relationship

is re-exchanged concurrently, Art. 4, para. 4 FernUSG. Destruction, deterioration or any other impossibility of return of the teaching material does not preclude the right of cancellation. In the event of fault on the part of the participant, the latter has to compensate the organiser for the value or loss in value concerned, Art. 4, para. 4, sentence 3 FernUSG.

In addition to the right of cancellation the participant has a right of notice to be exercised for the first time six months after conclusion of the contract (period of notice: 6 weeks), Art. 5, para. 1 FernUSG. After the expiry of the first six months the period of notice is three months. Notice must be given in writing to be effective, Art. 5, para. 2 FernUSG. Upon notice by the participant, the latter has to effect payment only in respect of the portion of the consideration corresponding to the value of the organiser's performance during the term of the contract, Art. 5, para. 3 FernUSG. As in the case of other long-term contracts, a contract may be cancelled for serious cause, Art. 626 Civil Code. Art. 6 FernUSG provides for a special regulation in respect of linked contracts for the supply of an article. If a participant cancelled the correspondence course within the prescribed period, he may two weeks after his notice takes effect withdraw from the accessory contract within two weeks provided the article supplied is no longer of interest to him on account of his having given notice of the correspondence course contract.

We regret to note that the participant has such a right only in the event of notice, but not in the event of cancellation of the correspondence course contract. It would be worth considering whether Art. 6 FernUSG should be applied *mutatis mutandis* in view of the same situation as to where the interests lie[281]. To the right of rescission on the part of the organiser the provisions of the AbzG apply *mutatis mutandis*, Art. 6, para. 4 FernUSG.

261a (*dd*) The FernUSG includes only courses in which instructor and student are for the most part or exclusively at separate locations (Nos. 197, 200). Thus it does not apply to the entire field of direct teaching, although the problems encountered in direct teaching may well be compared with those encountered in correspondence instruction[282]. A participant in direct teaching can be protected only through recourse to several systems of standards, the AGBG, incidentally the AbzG, and possibly through the application *mutatis mutandis* of some provisions of the FernUSG. Details cannot be dealt with here[283]. Meanwhile it should be noted that the consumer is protected inadequately as regards wide areas of private teaching, i.e. direct teaching. Only the legislator is able to take remedial action. For the time being an ever-increasing number of educational institutions will switch over to direct teaching in order to escape the provisions of the FernUSG.

8 Evaluation

262 The AGBG for the most part establishes court practice with respect to exemption clauses. The codification of court practice improves the consumer's legal position in that on account of the limits set by statute he is now better able to calculate his own risk. In addition, legislation extends the consumer's protection in some vital areas which were dealt with separately. But at the same time

the above statements have shown that an improvement in consumer protection in part was possible only through the extensive/supplementary interpretation of the law. The siding with the consumer's interests advocated throughout this study finds little support in court practice and jurisprudence. The reason for this attitude seems to lie in the fact that the protective purpose of the AGBG is largely ignored in the scientific discussion (No. 264).

In addition to its weak points, which may be offset by extensive interpretation, the AGBG is also characterised by some significant loopholes. Thus used goods come within the scope of the Act just as little as standard form contracts under public law. The promising statements made by politicians have not nearly brought about an approximation of the limits of admissible exemption clauses.

In addition to the AGBG as an instrument designed to check the use of exemption clauses, the legislator is increasingly trying to regulate certain contracts in a mandatory way by special legislation. The idea of freedom of contract is partially abandoned in favour of the necessary consumer protection. Characteristically enough, special legislation — FernUSG and Reisevertragsgesetz — is to be found in the field of contracts for the supply of services where freedom of contract has resulted in a hardly surveyable number of types of contract for which the statute law of the Civil Code merely functions as a model (No. 265). Obviously it is no longer possible in view of such variety to check the abuses of differences in power by the legislator limiting freedom of contract. For that reason legislation that lays down the subject matter of the contract in a mandatory way is required.

For the effort which in itself is positive the FernUSG is a bad example in that the Act is very complicated. Even a complaisant organiser may make mistakes in drafting a contract.

NOTES

1. Bericht des BKA [1977], BT-Drucks. 8, 1925 of 16 June 1978, p. 16ff.
2. Cf. on the subject Schmidt, *HdVR*, group 70; Röper, *Gibt es einen geplanten Verschleiß — Kommission für wirtschaftlichen und sozialen Wandel*, Vol. 137; on this Hillmann, ZVP [1977], p. 48ff; criticised by Röper, ZVP [1977], p. 185ff; also Bodenstein/Leuer, in rororo 4007, *Technik und Politik aktuell*, p. 204ff.
3. Schmidt, WuW [1971], p. 868ff (p. 868).
4. Schmidt, WuW, p. 869 with references.
5. Brinkmann, *Verbraucherorganisation in der BRD und ihre Tätigkeit bei der überbetrieblichen technischen Normung*, p. 57.
6. In general v.Hippel, *Verbraucherschutz*, p. 200ff; Heinemann, *HdVR*, item 140.
7. On the above see the Begründung der Regierung zum Gesetzentwurf, BT-Drucks. 7/4245, II, p. 12 und zu §10, pp. 16/17.
8. Heinemann, *op. cit.* (note 6), ref. 62.
9. Begründung des Regierungsentwurfs, §10, para. 2, No. 1, p. 17 of BT-Drucksache.

10. Begründung des Regierungsentwurfs, §10, para. 2, No. 2, p. 17 of BT-Drucksache.
11. Begründung des Regierungsentwurfs, §10, para. 2, No. 3, p. 17 of BT-Drucksache.
12. Begründung des Regierungsentwurfs, §10, para. 2, No. 4, p. 17 of BT-Drucksache.
13. Cf. Begründung des Regierungsentwurfs, §10, para. 3, pp. 17/18 of BT-Drucksache.
14. Gesetz und Verordnungsblatt des Landes Nordrhein-Westfalen [1974], p. 158.
15. Haagmann, *Fernunterricht*, Fischer-Taschenbuch 2027, p. 70.
16. Reich/Tonner, JuS [1976], p. 576ff (578).
17. Tonner, in: Reich/Tonner/Wegener, p. 138.
18. Regarding exemption clauses in individual contracts, Chapter 6 Nos. 201 and 202.
19. Tonner, in: Reich/Tonner/Wegener, p. 139.
20. On this Tonner, in: Reich/Tonner/Wegener, p. 139ff.
21. Regarding the protective purpose, Chapter 7, items 264, 317.
22. BGHZ 50, 200ff (207) — Kontact-Kleber.
23. BGHZ, *op. cit.* (note 22), and BGH WM [1974], p. 843 in 3, cf. in addition Chapter 6, No. 218.
24. BGHZ 22, p. 90ff.
25. Westphalen, §11 No. 10b, ref. 2 with reference to the Regierungsentwurf, BT-Drucksache 7/3919, p. 34.
26. Cf. on this in general Palandt/Putzo, preliminary remark 4f preceding §459.
27. So Schmidt-Salzer NJW [1969], p. 718 (720); on this also Reich/Tonner/Wegener, p. 141, footnote 5.
28. Hensen, §11 No. 10, ref. 28.
29. On this Reich/Tonner/Wegener, pp. 143, 144.
30. Last BGHZ 63, p. 323ff. (325); Erman/H.H. Seiler, §637, ref. 8; Soergel/Ballerstedt, §633, ref. 27; Palandt/Thomas, §637, note 1 and Schmidt-Salzer, NJW [1969], p. 718 (723).
31. BGHZ 63, p. 323ff. (325).
32. BGHZ 48, p. 264ff. (266).
33. BGHZ 62, p. 83ff, so also BGH NJW [1970], p. 383 (384).
34. Cf. BGH NJW [1963], p. 1148 (1149) and BGH WM [1974], p. 843.
35. BGHZ 54, p. 236 (243); BGH WM [1974], p. 843, in a misleading way Erman/H.H. Seiler, §637, ref. No. 9.
36. All cases cited in bb of the footnotes belong here, cf. also Eith NJW [1974], p. 16 (17) footnote 12: 'of the 69 decisions concerning standard form contracts that were examined, 32 related to businessmen, 23 to consumers, 9 to other tradesmen and industrialists, and in 5 cases the status was not clear'.
37. Bibliography about the AGBG, commentaries: Dietlein/Rebmann [1976]; Löwe/Graf von Westphalen/Trinkner [1977]; Schlosser/Coester — Waltjen/Graba [1977]; Ulmer/Brandner/Hensen, ed. 3 [1978]; Koch/Stübing [1977]; Stein [1977].
38. Hensen, §11, No. 10, ref. 4.

39. Cf. on this also LG Berlin NJW [1976], p. 151, OLG Köln OLGZ [1971], p. 15ff, OLG Frankfurt OLGZ [1970], p. 409ff and KG in NJW [1969], p. 2145ff; LG Augsburg MDR [1979], p. 56ff., BGH DB [1980], p. 780ff.
40. Cf. Hensen, §11, No. 10, ref. 13.
41. Hensen, §11, No. 10, ref. 15.
42. Cf. Hensen, §11, No. 10, ref. 39.
43. As here Hensen, §11, No. 10, ref. 47, differently Koch/Stübing, §11, No. 10, ref. 34; Westphalen, §11, No. 10b, ref. 10.
44. As here OLG Hamm, NJW [1977], p. 809 and Dörner, NJW [1977], p. 1970, differently LG Bonn, NJW [1977], p. 1456.
45. So Palandt/Heinrichs, §11, note 8a, cf. on the controversial history of §11, No. 7, refs. 2–5.
46. Cf. the detailed treatment in Hensen, §11, No. 7, refs. 7–13.
47. Cf. the references in Hensen, §11, No. 7, refs. 10, 11.
48. Westphalen, §11, No. 7, ref. 12; Hensen, §11 No. 7 refs. 17–19; Koch/Stübing, §11, No. 7, ref. 3.
49. Westphalen, §11, No. 7, ref. 5; Hensen, §11, No. 7, ref. 16; Koch/Stübing, §11, No. 7, ref. 2.
50. References in Palandt/Putzo, §477, note 1d dd.
51. BGH NJW [1977], p. 379ff (381); cf. Chapter 5, No. 166.
52. For a direct application of §11, No. 7, cf.: Westphalen, §11, No. 7, ref. 11; Coester-Waltjen, §11, No. 7, ref. 37; Koch/Stübing, §11, No. 7, ref. 5; for an analogous application: Hensen, §11, No. 7, ref. 20.
53. BGH NJW [1977], p. 379ff (381); BGH BB [1979], p. 698ff (699) with a supporting note by Schmidt-Salzer, p. 700ff.
54. BGB BB [1979], p. 698ff.
55. A very discerning reply depending on the group of defects is given by Westphalen NJW [1979], p. 838ff (841ff) regarding the relationship between traders.
56. Cf. Hensen, §11, No. 10, ref. 55 (ed. 1) and BGH NJW [1976], p. 234.
57. On this Löwe/Westphalen, §9, ref. 46.
58. Cf. on this also BGHZ 48, p. 264ff (268).
59. A different view is taken by Westphalen, §11, No. 10e, who bases his considerations on a limited duty to examine in the case of gross negligence.
60. By contrast, claims for damages on account of positive breach of contract become statute-barred after 30 years, Palandt/Thomas, §638, note 1b.
61. Regarding the efforts of travel organisers to shorten the period of limitation by introducing the four-week term, see Chapter 6, No. 253.
62. Cf. the extensive references to the state of the discussion BGH NJW [1978], p. 2241; the BGH itself has not yet commented thereon; cf. also in addition Peters VersR [1979], p. 103ff, according to whom claims for *culpa in contrahendo* and positive breach of contract should become statute-barred analogously to §852 BGB.
63. Brandner, §10, No. 4, ref. 7.
64. Palandt/Heinrichs, AGBG §10, note 4a.
65. BGHZ 22, p. 80 (99); BGHZ 37, p. 94 (98); BGH NJW [1966], p. 1070; NJW 70, p. 29 (31); extensive references in Hager, NJW [1975], p. 2276, footnote 5.

66. NJW [1977], p. 766 and NJW [1977], p. 1543; against it BGH NJW [1977], p. 1055.
67. Hager, NJW [1975], p. 2276ff (2279) and Heinze, JZ [1975], p. 506.
68. Hager, *op. cit.* (note 67), p. 2278.
69. Cf. Semler, NJW [1976], p. 406ff.
70. So to the same effect Eggert, in NJW [1977], p. 2268 as a note to the regional court decisions cited.
71. BGH BB [1979], p. 1061ff with notes by Löwe, p. 1063ff; Rudolf, BB [1979], p. 1317ff on the reply of Löwe to Rudolf, BB [1979], p. 1318ff.
72. Cf. on this ADAC *Motorwelt* [1979], No. 10, p. 15.
73. On this and the following, see BGH NJW [1975], p. 642 (644); BGHZ 22, p. 123.
74. BGH BB (1967), p. 311ff.
75. OLG Celle NdsRpfl. [1974], p. 83, so emphatically BGH NJW [1979], p. 1707.
76. BGH NJW [1973], p. 643ff (645); Hager, NJW [1975], p. 2278.
77. BGH DB [1977], p. 951ff (952); last BGH BB [1979], p. 1061ff (1062).
78. OLG Nürnberg DAR [1963], p. 300 (301); cf. also BGH DB [1977], p. 951ff (952).
79. On this also Hager, NJW [1975], p. 2276; cf. in addition also BGH NJW [1979], p. 1707ff.
80. So BGH NJW [1973], p. 1234ff; cf. in addition Schaumburg, MDR [1975], p. 105ff.
81. Schaumburg, *op. cit.* (note 80), p. 107, footnotes 25–27.
82. OLG Nürnberg, DAR [1963], p. 300 (301); OLG Oldenburg VersR [1978], p. 1027ff.
83. BGB DB [1969], p. 2082; OLG Düsseldorf VersR [1978], p. 745ff.
84. OLG Köln NJW [1972], p. 162; OLG Hamm VRS [1979], p. 6 'werkstattgeprüft'; differently LG Dortmund DAR [1978], p. 165 'tip-top in Ordnung'.
85. BGH NJW [1975], p. 1693ff with comments by Reich/Tonner JuS [1976], p. 576ff.
86. Koch/Stübing, §11, No. 11, ref. 2.
87. Hensen, §11, No. 11, ref. 6.
88. Hensen, §11, No. 11, ref. 18.
89. Hensen, §11, No. 11, ref. 23.
90. Hensen, §11, No. 11, ref. 15; Westphalen, §11, No. 11, ref. 3; Koch/Stübing, §11, No. 11, refs. 3/4.
91. BGH NJW [1975], p. 1693ff (1695); on this Reich/Tonner, JuS [1976], p. 580 and Hager, NJW [1975], p. 2276 (2277).
92. Cf. BGH NJW [1968], p. 32; WM [1976], p. 740.
93. BGH BB [1977], p. 61.
94. Brandner, appendix §§9–11, ref. 628.
95. Cf. BGH NJW [1965], p. 293; BGH WM [1968], p. 1100; BGH WM [1974], p. 105.
96. BGH NJW [1975], p. 1693ff (1695); on this Reich/Tonner, JuS [1976], p. 580 and Hager, NJW [1975], p. 2276 (2277).
97. On this Brandner, §9, refs. 93, 94; as well as BGH WM [1976], p. 740,

where the BGH's reasoning is more guarded.

97a. So BGH BB [1979], p. 1789 (1790) with express reference to BGH WM [1976], p. 740, footnote 97.

98. Trinkner, §4, ref. 29; so now also Brandner appendix 9–11, ref. 628.

99. Differently in addition Brandner in ed. 1, §9, refs. 93, 94.

100. BGH NJW [1977], p. 37ff.

101. BGH NJW [1975], p. 642ff.

102. Trinkner, §4, ref. 31; Koch/Stübing, §4, ref. 16 — somewhat unclear who is meant to be a user, supplier or private seller.

103. BGH NJW [1978], p. 1482ff; OLG Hamburg DAR [1978], p. 336ff.

104. BGH NJW [1975], p. 970ff, confirmed in BGH BB (1980), p. 805ff, (807).

105. On this Locher, JZ [1975], pp. 419, 420.

106. Cf. Palandt/Putzo, Introduction 4 preceding §535.

107. Cf. Flume, *Leasing in zivilrechtlicher und steuerrechtlicher Sicht* [1972], p. 11 and Book, in: Hagenmüller, *Leasing Handbuch* [1968], p. 178ff with a representation of typical clauses.

108. Book, *op. cit.* (note 107), p. 236.

109. Book, *op. cit.* (note 107), p. 212.

110. Cf. Palandt/Putzo, Introduction 3a preceding §535.

111. For the applicability of the AbzG to the leasing contract, cf. Palandt/Putzo, §6 AbzG, note 2b bb and Ostler-Weidner, Abzahlungsgesetz, ed. 6, §6, note 42a, and on hire-purchase Palandt/Putzo, §6 AbzG, note 2b aa.

112. In favour Westphalen, §11, No. 10, ref. 4; Hensen, §11, No. 10, ref. 5; Palandt/Heinrichs, §11, note 10a; against it Rebmann, §11, No. 10, ref. 2; Coester-Waltjen, §11, No. 10, ref. 25; Koch/Stübing, §11, No. 10, ref. 14, unless elements of the law of sale prevail; undecided BGH NJW [1977], p. 848 (849).

113. Koch/Stübing, §11, No. 10, ref. 14 with reference to BGH NJW [1977], p. 848 (849).

114. Cf. BGH NJW [1977], p. 848; Reich in: *Vahlens Rechtsbücher Reihe Zivilrecht*, Vol. 3, p. 72ff (p. 75).

115. Westphalen, §11, No. 10a, ref. 9.

116. Hensen, §11, No. 10a, ref. 22.

117. Cf. references in Westphalen, §11, No. 10a, ref. 9.

118. So Soergel/Ballerstedt, ref. 17 preceding §433, Palandt/Putzo, §433, note 1a, Erman/Westermann, IV, 1 to §433, differently Larenz, SchuldR BT §62 III (ed. 10), who assumes a mixed type of contract combining elements of the contract of sale and the contract to manufacture; cf. also Esser, §61 III 4, Vol. 2, ed. 4, who comes out in favour of an independent type of contract; basically, on the legal nature of the energy supply contract see Hose, *Der Energieversorgungsvertrag* [1961], p. 67ff.

119. Allgemeine Bedingungen für die Versorgung mit elektrischer Arbeit aus dem Niederspannungsnetz des Elektrizitätsversorgungsunternehmens (BGBl III 752-1-7), printed in Scheuten/Tegethoff, *Das Recht der öffentlichen Energieversorgung*, commentary in AVB IV 2.

120. Allgemeine Bedingungen für die Versorgung mit Gas aus dem Versorgungsunternehmen der/des AVB Gas (BGBl III 752-1-7), printed in

op. cit. (note 119), in AVB IV 3.

121 Cf. die Anordnung über die Verbindlicherklärung der allgemeinen Bedingungen der Energieversorgungsunternehmen AVB of 27 January 1942 (Reichsanzeiger [1972], Nos. 39 and 46, BfGl III 752-1-7), printed in *op. cit.* (note 119) in AVB IV 1.

122. Cf. Kolb. *Die Wasserversorgung und der Gewässerschutz im neuen Bundes- und Landesrecht* [1968], p. 149ff.

123. Printed in Kolb, *op. cit.* (note 122), p. 343ff.

124. Cf. on this Riedel, *Haftungsausschluß und Energieversorgung* [1972].

125. Cf. Brandner, §9, ref. 25.

126. Westphalen, §23, para. 2, No. 2, ref. 1.

127. BGBl [1979], Part I, p. 676ff; on this Börner, DB [1978] supplement 27/28 to No. 51/52 and Ebel, DB [1979], p. 1829ff; Danner, BB [1979], p. 76ff.

128. Schulz, Bericht aus Bonn, ZRP [1978], p. 197.

129. References in Hensen, §11, No. 5, ref. 5 and Palandt/Heinrichs, §11 AGBG note 5a.

130. Cf. BGH BB [1976], p. 571.

131. BGH NJW [1970], p. 29ff (32); NJW [1976], p. 1886ff (1887).

132. Cf. Reich, NJW [1978], p. 1570 (1571).

133. BGH BB [1976], p. 571; on this Reich, NJW [1978], p. 1570 (1571).

134. BGH NJW [1970], p. 29ff (32) and NJW [1970], p. 2017; BAG NJW [1967], p. 751.

135. Reich, NJW [1978], p. 1571.

136. Palandt/Heinrichs. §11, note 5a; Hensen, §11, No. 5, note 13; Koch/Stübing, §11, No. 4, note 13; Schlosser, §11, No. 5, note 38; a different view is taken by Löwe, §11, No. 5, note 13.

137. BGH NJW [1977], p. 381 (382); on this also Weyer, NJW [1977], p. 2237 and Hensen, DB [1977], p. 1689.

138. Hensen, §11, No. 5, ref. 20; Löwe, §11, No. 5, ref. 14.

139. Regarding motor vehicles 39/77 BAnz No. 83 of 3 May 1977; regarding radio and TV sets 99/77 BAnz No. 188 of 6 October 1977; regarding textile cleaning 61/77 BAnz No. 124 of 8 July 1977; and below Chapter 7, No. 276.

140. In this sense the introductory sentence must be read; cf. Palandt/Heinrichs, §11, note 10.

141. For an affirmative view, see LG Bochum VersR [1962], p. 968 with notes. Wintersteig VersR [1962], p. 1162; AG Erlangen decision of 17 February 1976 — 1 C 565/75 and 18 May 1976 — 1 C 112/76; for a negative view, see OLG Köln VersR [1969], p. 764, AG Nürnberg NJW [1977], p. 1200; LG Ansbach NJW [1979], p. 769.

142. So AG Nürnberg NJW [1977], p. 1200 (1201).

143. On this Beise, DB [1979], p. 1214ff.

144. Differently, Beise, *op. cit.* (note 143), p. 1215.

145. In most cases it is a contract of service providing for the care of certain matters, Soergel/Mühl, §675, ref. 11.

146. Cf. on this Rehbein, DB [1976], p. 997ff; reference to this is also made in the comments of Westphalen, §9, ref. 35.

147. Cf. Rehbein, DB [1977]; p. 1349ff; Kümpel, WM [1977], p. 694.
148. Differently, Dirichs, WM [1978], p. 626ff (627).
149. Cf. on this for a full treatment Bruck/Möller, *Kommentar zum VVG und zu den AVB*, ed. 8, Vol. 1, introduction 16ff [1961]; Schmidt-Salzer, *Das Recht der Allgemeinen Geschäftsbedingungen und Versicherungsbedingungen* [1966].
150. Cf. Prölss-Martin, VVG ed. 21 [1977], preliminary remark 1, note I 6 Ca; cf. for the relationship between standard form contracts and general conditions of insurance Helm, NJW [1978], p. 129ff and Sieg, VersR [1977], p. 489ff.
151. Cf. Helm, *op. cit.* (note 150), p. 130.
152. Cf. on the state of the discussion in detail Helm, *op. cit.* (note 150), pp. 130/131.
153. On marriage brokerage contracts and the problems resulting from the fact that wages are not actionable, see Löwe/Westphalen, §9, ref. 42; on the state of the reform discussion Brandt, ZRP [1978], p. 157ff, in general Gilles, *Gewerbsmäßige Ehevermittlung* [1977]; cf. the bill BT-Drucks. 8/3212.
154. The following types of contract of carriage are all contracts to manufacture, cf. Erman/H.H. Seiler, §631, refs. 31, 33, with the exception of the relationship between the post office and the consumer which does not constitute a contract, since according to the dominant view contracts under public law can exist only where there is an option for the design of the legal relationship.
155. BGBl [1970], I, p. 230ff, printed also in Bidinger, *Personenbeförderungsrecht* in K 351.
156. Printed in Hein/Eichhoff/Pukall/Krien, *Güterkraftverkehrsrecht*, Vol. 1 in C 510.
157. RGBl [1938], II, p. 663, printed in Goltermann, *Eisenbahnverkehrsordnung*, commentary.
158. On this Hofmann, *Luftverkehrsrecht*, commentary [1971], §21, ref. , p. 19ff and Böckstiegel, NJW [1974], p. 1017ff.
159. Cf. Ohnheiser, *Postrecht* [1974], §7.
160. Cf. on the exclusion of supply contracts from the AGBG, Brandner, §9, ref. 25.
161. Cf. Ulmer, §23, ref. 40.
162. Printed in Krien and Hay, *Die allgemeinen deutschen Spediteurbedingungen*, commentary [1959], p. 15ff.
163. Hensen, §25, ref. 2; Löwe, §25, ref. 1.
164. Kötz, Gutachten A 82, A 83.
165. So says also Hensen, §25, ref. 11 when he considers the field of application of §476 and §11, No. 10c to be largely identical.
166. On this Hensen, §25, ref. 3.
167. Löwe, §25, ref. 6.
168. Cf. Löwe, §25, ref. 1.
169. Hensen, §11, No. 10, ref. 58.
170. BGH NJW [1963], pp. 805, 811, and BGH NJW [1973], pp. 46, 47.
171. On this in addition Hensen, §25, ref. 7.

172. So Hensen, §25, ref. 14.
173. Hensen, §25, ref. 13.
174. Hensen, §11, No. 10, refs. 22, 23.
175. Löwe, §25, ref. 8.
176. Hensen, §25, refs. 15, 21.
177. Palandt/Thomas, §765 note 3c (35 A).
178. RGZ 146, p. 120ff (124).
179. Cf. on the marking off Tengelmann, NJW [1966], p. 2195ff (p. 2197) with reference to Enneccerus/Lehmann, §197 II, p. 808.
180. On this Loebell, BB [1973], p. 1237ff.
181. Cf. Lieferbedingungen für Bosch Hausgeräte — Inland — Ausgabe Januar [1969]; printed in Rehbinder, *Das Kaufrecht in den allgemeinen Geschäftsbedingungen der deutschen Wirtschaft* [1969] in V, p. 29ff (p. 30).
182. Cf. the different standard form contracts used by the Volkswagenwerk, Rehbinder, p. 78ff in VIII No. 2, p. 82; by the BMW, Rehbinder, p. 83ff in VII, pp. 87, 88; by Daimler Benz AG, Rehbinder, p. 93ff in VI, p. 97; by Adam Opel AG, Rehbinder, p. 107ff in VII, p. 111; in the second-hand car trade once in a while guarantees are also given, OLG Bamberg DAR 74, p. 188, in this connection difficulties of interpretation are encountered, cf. Hager, NJW [1975], p. 2276ff (2278 footnote 29).
183. Cf. on this Löwe/Westphalen, appendix to §11, No. 10, ref. 4 with further references.
184. So Loebell, *op. cit.* (note 180), p. 1238.
185. Westphalen, §11, No. 10a, ref. 13.
186. So Westphalen, §11, No. 10a, ref. 15; differently Hensen, §11, No. 10, ref. 21; Bader, NJW [1976], p. 209ff (213); as here also Koch/Stübing, §11, No. 10, ref. 22.
187. Westphalen, §11, No. 10a, ref. 17.
188. On this Loebell, *op. cit.* (note 180), p. 1239 and Westphalen, appendix §11, No. 10, ref. 1.
189. On this Westphalen, *op. cit.* (note 187), ref. 2 with further references; BGH NJW [1979], p. 645.
190. On this Westphalen, *op. cit.* (note 187), ref. 5.
191. KFZ-Empfehlungen für den Verkauf von KFZ 51/77 printed in BAnz No. 108 of 14 June 1977.
192. Cf. the examples in Rehbinder: BASF AG No. 4, p. 42; Schering AG, Abteilung Industrie-Chemikalien, item 7, p. 49; Abteilung Pharma-Chemikalien, p. 52; Abteilung Arzneimittelspezialitäten, item 8, p. 55; Abteilung Pflanzenschutz, item 7, p. 66; Allgemeine Leistungsbedingungen des Elektro-Rundfunk-Fernseh-Großhandels, item 8, p. 222; Bosch AG Lieferbedingungen V 4, p. 31; Linde AG VIII No. 1, p. 147; Anker Werke AG, item 1 (2), p. 157.
193. In so far as the examples in Rehbinder are representative, this would apply to the manufacture of chemicals and products.
194. BGHZ 51, p. 91ff (100).
195. On this Reich/Tonner, JuS [1976], p. 576ff (578, 579).
196. In lieu of all Palandt/Putzo, §459, note 7.

197. Westphalen, §11, No. 11, ref. 6.
198. In the Dieselöl decision, BGH NJW [1968], p. 2238, the BGH rejected liability although it had been agreed in the contract that oil according to German Industrial Standards would be supplied. Likewise test and quality labels do not come into question if it is a matter of recognising a warranted quality, BGH NJW [1974], p. 1503.
199. BGHZ 48, p. 118ff.
200. Cf. Henseler, BB [1969], p. 24 following the Dieselöl decision; perhaps also Westphalen, §11, No. 11, ref. 6 with further references.
201. Special reference to this point of view is made by Henseler, *op. cit.* (note 200).
202. On this in addition Brinkmann, p. 58ff, especially p. 63ff.
203. As per Semler, NJW [1976], p. 406ff.
204. Cf. the references in Semler, *op. cit.* (note 203), p. 406.
205. See on this group of cases also Reich/Tonner in JuS [1976], p. 576ff (579).
206. BGH NJW [1975], p. 1693ff; on this see the note of Reich/Tonner, JuS [1976], p. 576ff and Heinze, JR [1975], p. 504ff (506).
207. BGHZ 59, p. 158ff.
208. On this Reich/Tonner, *op. cit.* (note 206), p. 577 with references from court practice and also Westphalen, §11, No. 11, ref. 5.
209. OLG Köln NJW [1972], p. 162ff with a strongly negative note by Henseler, NJW [1972], p. 829ff.
210. OLG Frankfurt NJW [1966], p. 1621.
211. OLG Hamburg VRS 2, p. 273.
212. BGH WM [1971], p. 797.
213. Cf. Westphalen, §11, No. 11, ref. 6.
214. On this Westphalen, §11, No. 11, ref. 7 with references from literature and court practice.
215. Reich/Tonner, JuS [1976], p. 576ff (578).
216. Heinze, JR [1975], p. 506.
217. Mertens, ZHR 139 [1975], p. 438ff; Trinkner, BB [1975], p. 1493ff; also v.Hippel, p. 76ff on the international reform endeavours; on the Amendment to the UWG see above Chapter 4, note 119ff.
218. See on this Erkelenz HdVR Group 150; Bartl, *Reiserecht*; Tonner, *Reisevertrag* [1980]; Bartl, NJW [1979], p. 1384ff; Löwe, BB [1979], p. 1357ff; Eberle, DB [1979], p. 341ff.
219. See Tonner, Introduction ref. 3.
220. Cf. in detail Tonner, Introduction refs. 25–45; Bartl, ref. 1.
221. Cf. the report by Schulz ZRP [1973], p. 273ff; on this Tonner, Introduction ref. 25ff.
222. Entwurf eines Reiseveranstaltungsvertrages of 6 May 1976, BT-Drucksache 7/5141 mit Begründung.
223. BT-Drucksache 8/786.
224. Bundesanzeiger No. 210 of 5 November 1976.
225. FAZ of 23 March 1978.
226. Bundestagsdrucksache 8/2343 mit Begründung.
227. Published in Bundesgesetzblatt [1979], I, p. 509ff.
228. Tonner, §651a ref. 12.

229. Tonner, Introduction refs. 3 and 6.
230. In detail Tonner, §651a, refs. 14ff.
231. So Tonner, §651a, ref. 18; Bartl, ref. 8.
232. Reiseanalyse [1978], p. 9.
233. On this Eberle DB [1979], 341, 342.
234. BT-Drucksache 8/2343, p. 7, printed in Tonner, §651a, ref. 25.
235. So to the same effect Tonner, §651a, ref. 28; against it Bartl, ref. 8; Bartl, NJW [1979], p. 1384, 1385; Eberle, DB [1979], pp. 341, 342.
236. See Bartl, refs. 227–232; Tonner, §651a, refs. 23, 24.
237. On this Tonner, §651a, refs. 38–41; Bartl, refs. 236, 237.
238. Löwe/Westphalen, §9, ref. 63.
239. Jüttner ZRP [1974], p. 181ff (182, 183); Löwe BB [1979], p. 1357ff (1360) on the law of travel contracts.
240. Cf. Begründung zu §13, p. 23 of BT-Drucksache 7/5141.
241. Brandner, §10, No. 4, refs. 7, 10.
242. Cf. Bartl, BB [1973], supplement 10, p. 8 with references footnote 99.
243. Cf. above Chapter 7, note 268.
244. Tonner, preliminary remark, ref. 9; Bartl, ref. 200.
245. Tonner, preliminary remark, ref. 7; Bartl, ref. 201.
246. Begründung zu §14, pp. 24/25 of BT-Drucksache 7/5141.
247. Bartl, ref. 249.
248. LG Frankfurt NJW [1979], p. 2165; so also Bartl, BB [1979], p. 9; Arndt, *Der Reiseveranstaltungsvertrag*, p. 129, footnote 7.
249. Tonner, §651c, ref. 28.
250. Reference in Löwe/Westphalen, §9, ref. 58.
251. LG Frankfurt NJW [1978], p. 1008.
252. On this Tonner, §651c, ref. 1.
253. On this Teichmann, JZ [1979], p. 737ff.
254. Tonner, §651e, ref. 4; Bartl, NJW [1979], p. 1384ff (1386).
255. BGHZ 63, 98.
256. Tonner, §651f, refs. 12ff; Bartl, ref. 92ff.
257. Tonner, §651h, ref. 2.
258. See on this above Chapter 6, note 210, differently Bartl, refs. 119, 137, 138.
259. So Tonner, §651h, ref. 9; differently Bartl, ref. 125.
260. Erman/Seiler, note 31 preceding §631 BGB; Warsaw Convention BGBl [1958], II, p. 313; Additional Agreement of Guadalajara BGBl [1963], II, p. 1159.
261. So Bartl, ref. 232; prior to the coming into force of the new law of travel contracts this clause was void under §11, item 7 AGBG, so Bartl, NJW [1978], p. 735.
262. Bartl, ref. 234; Tonner, §651h, ref. 25.
263. Bartl, ref. 235; Tonner, §651h, ref. 26.
264. Tonner, §651h, ref. 27.
265. Petev, JZ [1976], p. 632ff (634).
266. Tonner, §651i, ref. 2.
267. Bericht des Rechtsausschusses des Bundestages, BT-Drucksache 8/2343, p. 12.

268. Bartl, ref. 142.
269. Tonner, §651i, ref. 18; Bartl, ref. 143.
270. As here Schlosser/Coester — Waltjen/Graba, §11, No. 5, ref. 33; OLG Stuttgart BB [1979], p. 1468; differently Hensen, §11, No. 5, ref. 18.
271. Tonner, §651i, ref. 21.
272. Bartl, ref. 148 with references from literature in footnote 308; Tonner, §651j, ref. 2.
273. Tonner, §651j, ref. 18.
274. AG Freiburg NJW [1979], p. 2319; on the whole subject see Chapter 9, No. 369.
275. On this see, in addition Bartl, 78, p. 736, who takes a sceptical view of the prospects.
276. Petev, *op. cit.* (note 265), p. 634.
277. Cf. Chapter 6, note 197ff and Bartl NJW [1976], p. 1993ff.
278. Heinemann, *HdVR* Group 140, ref. 64.
279. Cf. regarding §16: Chapter 3, No. 61; regarding §17: Chapter 4, note 113.
280. Bartl, NJW [1976], p. 1996.
281. Bartl, NJW [1976], p. 1996.
282. On this Dörner, NJW [1979], p. 241ff (241/242).
283. On this Dörner, NJW [1979], p. 242ff.

CHAPTER 7

Unfair Contract Terms

I INTRODUCTION

263 The rights of the consumer as a contracting party of traders and suppliers throughout are not determined by the statutory provisions of the Civil Code. The rights and duties of the contracting parties are either unilaterally forced upon the consumer by his contracting party in the form of the latter's standard form contract conditions or are negotiated in each case between the contracting parties. The latter instance is of little importance to the relationship consumer/trader or supplier, for basically contract terms can be negotiated only where there is a balance of power between the parties. Only there is it possible at all to speak of give and take and a just spreading of contractual risks. However, as a rule the consumer is inferior to his contracting party in terms of economic power[1]. Contract terms are dictated to him. He can choose only from several similar types of preformulated contracts and has no influence on how the subject matter of the contract is designed. The consumer can be deprived of his rights by standard form contracts, because the entire law of contract comprises non-cogent law according to the maxim of freedom of contract. The consumer's contracting party who is superior to him in terms of economic power uses that power to upset the balance of the contracting parties' rights and duties established in the Civil Code. The consumer is not only saddled with all the risks that may result from possible difficulties *prior* to the purchase of a thing — for instance problems of supply, changes in performance, terms of delivery — but through various exemption clauses is also robbed of the possibility of having recourse to his contracting party for inferior quality *after* receipt of the thing. The customarily uneven distribution of contractual risks results in the contracting party incurring few or no commitments, while the consumer is bound by the contract. The trader's economic superiority, which has been increasing for years, has enabled him to dictate more and more onerous terms to the consumer. Unfair contract terms are the inevitable result of this development. It was the task of legal writers and the courts to see to it that unfair contract terms were corrected, since the legislator failed to take remedial measures. The discussion focussed and continues to focus on the control of unfair clauses forming part of standard form contracts. The AGBG, which was promulgated in late 1976, is the logical consequence of that development, comprising as it does only contract clauses forming part of standard form contracts.

II UNFAIR CONTRACT TERMS IN STANDARD FORM CONTRACTS[2]

1 Control by the AGBG

264 The Act marks the end for the time being of many years of discussion about the recording of unilaterally preformulated standard contract terms[3]. In part it adopts the Federal High Court's practice, regarding for instance the prohibition of surprise clauses (Art. 3 AGBG), construction (Art. 5 AGBG), control of the content by the standard of good faith, and the essential purpose of the contract and the principal duties of the contracting parties (Art. 9 AGBG). Apart from that it goes beyond previous court practice in that it introduces the collective action (Art. 13 AGBG) and lays down special provisions to protect the consumer, viz. the incorporation into the contract of standard form contract conditions (Art. 2 AGBG) and what are known as prohibition clauses (black-lists) (Arts. 10 and 11 AGBG).

The AGBG applies irrespective of whether the contracting party of a user of standard form contracts is a consumer or a trader. For that reason the AGBG is not a true consumer protection act. Efforts to influence the process of legislation in that direction failed to win favour. However, from this the conclusion cannot be drawn that the AGBG's underlying idea is that it constitutes legislation which does not take into account the personal status of customers subject to such legislation[4]. This interpretation ignores the history of the Act just as it disregards its sophisticated design. According to the study group's proposal[5] and the officials' draft[6], full traders should be excluded altogether from the scope of the Act. However, that restriction met with strong resistance, particularly on the occasion of the 50th German Lawyers' Assembly in Hamburg in 1974, and the result was that full traders were included in the scope of protection of the Act[7]. The amendment does not negate the legislator's primary aim, which was an improvement in the protection of the ultimate consumer against standard form contracts[8]. Considering this, the AGBG today serves a dual protective purpose[9]. The general scope of protection is designed to protect against unfair standard form contracts: it extends equally to consumers, traders and to those rendering professional services. Additionally, the Act affords increased protection extending solely to the consumer. That dual purpose has manifested itself in the Act in that the AGBG contains special protective provisions only for the consumer, viz. regarding the incorporation of standard form contract conditions (Art. 2 AGBG) and regarding what are known as prohibition clauses (Arts. 10 and 11 AGBG).

(a) *General clause of Art. 9 AGBG*

265 The general clause of Art. 9 AGBG is composed of two paragraphs based on different requirements as to content. In view of its significance the provision is quoted here in full:

— Provisions in standard form contracts are ineffective if, contrary to the principles of good faith, they unreasonably prejudice the user's contracting party.
— In case of doubt, an unreasonable injury must be assumed if a provision

(1) is incompatible with the essential basic ideas of the statutory regulation from which it deviates, or
(2) restricts essential rights or duties arising from the nature of the contract so as to jeopardise the purpose of the contract.

In line with its function, the general clause expresses the basis direction of impact of the Act. To that end the legislator has used the criterion of 'unreasonable prejudice'. In the course of the legislative process it had initially been suggested that the effectiveness of standard form contracts should be made contingent upon a fair balance of mutual interests[10]. The requirement of a fair balance of interests was not incorporated into the wording of the Act, because it was feared that such a requirement would not make due allowance for the need for unequivocal and advance judgment of standard form contracts felt by those involved in legal relations[11].

The criterion of unfair prejudice applicable now presupposes a thorough analysis of the conflicting interests and a weighing of such interests. In ascertaining the interests of the contracting parties, the court must examine the nature and subject matter of the legal transaction, the requirements the contracting parties must satisfy in terms of persons protected, and the economic reasons underlying the drafting of the standard form contract[12]. The nature and subject matter of the legal transaction involved here and its underlying economic reasons are characterised by such diversity that it is impossible to go into details. As far as the personal characteristics of the contracting parties permit comment on their interests, it may be said quite clearly that in the case of contracts with final consumers the latter must basically be conceded a strong need for protection owing to their inferior business experience[13].

Art. 9, para. 2 AGBG serves the purpose of making the vague wording, offering little guidance as to how to put it into practice, more obvious. Para. 2, says the preamble, shall 'facilitate the control of the content by indicating typical legal criteria'[14]. This is done in the form of a presumption. The Act places two factors side by side: the essential basic ideas of the statutory regulation and essential rights or duties that result from the nature of the contract. Thus Art. 9, para. 2 AGBG assigns the non-cogent statutory provision a *model function* even if the term itself is not used[15]. This legislative statement raises the question of how far the non-cogent provisions of the Civil Code continue to have a model function at all. The two principal types of contract of the Civil Code, namely the contract of sale and the contract to manufacture, have been amended in so many ways in legal reality that we can talk neither of *the* contract of sale nor of *the* contract to manufacture[16]. Instead, a large variety of types has developed which supersede the traditional model contracts and which consider the statutory provisions applicable to the respective contract at best to perform the function of a skeleton. In construing Art. 9, para. 2 AGBG, this development must be taken into account. The legislator's reference to the models of the Civil Code cannot mean that the effectiveness of those provisions shall be renewed[17]. Rather, the courts must continue standardising contracts in order to then bring out the individual rights and duties that are so important to each type of contract as to prevail over any amendment in standard form[18]. Art. 9, para. 2 AGBG now lays down that *in case of doubt* in the event of any deviation from the model so developed an unfair injury should be assumed. From the view taken here it

follows that the rule of presumption does not constitute a rule as to the burden of proof for procedural purposes[19]. Those opinions in legal literature that are based on a procedural rule of the burden of proof ignore that the facts of standard form contract cases are usually indisputable or easy to clarify. The determination of reasonableness or unreasonableness remains a question of law[20]. Art. 9, para. 2 AGBG shall offer assistance as a standard of judgment in cases of doubt. This concept is based on the understanding that the judge may still entertain doubts regarding not only questions of fact but also questions of law. In the case of Art. 9 AGBG, it is a matter of the grey zone between definite reasonableness on the one hand, and definite unreasonableness on the other, with which the judge has to cope in coming to a conclusion. The argument about the decision in principle of Art. 9, para. 1 AGBG concerns the assignment of that grey zone to the advantage or disadvantage of the two parties and here in the final analysis the interests of the user of standard form contracts prevail. By comparison, from the recognition of a standardised model or minimum standard, Art. 9, para. 2 draws the consequence in favour of the contracting party that in the event of deviation from that model, the 'burden of proof' is on the party deviating from the model. However, especially in the event of deviation from item 2 an unreasonable injury is usually deemed to exist[21].

(b) Inadmissible clauses, Arts. 10 and 11 AGBG[22]

266 The prohibition of clauses in Arts. 10 and 11 AGBG lists examples of violations of the general clause.

In terms of systematic arrangement, Art. 9 AGBG should actually follow the regulation of Art. 11 AGBG and precede the regulation of Art. 10, because Art. 10 AGBG presents merely concrete cases of application of the general clause where the general standards laid down therein are applicable 'in particular'[23]. In contrast to this, Art. 11 AGBG contains a list of 'prohibited clauses' without any possibility of judgment. The court merely has to examine whether the requirements as to the facts listed are satisfied in the case of the standard form contract to be examined. In principle, there is no examination of reasonableness. Still the legislator has not handled the classification he chose in a uniform way. In isolated cases the list of prohibitions also contains provisions in the case of which in addition to grouping judgment is also required. In such cases the dividing line between mere grouping and an examination as to reasonableness is at least fluid, cf. Art. 11, item 5 AGBG (settlement of claims in a lump sum), Art. 11, item 10a (prior suing) and Art. 11, item 10b (disproportionately large part). Arts. 10 and 11 are not special provisions in the sense that they supersede Art. 9 AGBG even if in a particular case the requirements of Arts. 10 and 11 AGBG have not been satisfied. Art. 9 AGBG therefore has the function of a provision yet to be examined even if the lists of prohibited clauses provide no answer[24].

Whether a clause is ineffective under Art. 10 AGBG depends on the circumstances of a particular case. Therefore the court must examine the matter in a similar way, as in the case of Art. 9 AGBG. This manifests itself in the indefinite legal terms (unreasonable, reasonable, for no practical reason) contained in the various clauses. These indefinite legal terms can be given a definite meaning

only if the concrete circumstances of the contract in question are taken into account. By comparison, the prohibited clauses of Art. 11 AGBG are applicable irrespective of the circumstances in a particular case. In the event of any violation the standard form contract provision involved is ineffective *ipso jure*.

Chapter 6 deals extensively with prohibited clauses, which are closely connected with the limitation of the law of warranty (i.e. exemption clauses).

267 (*aa*) The list of prohibitions of Art. 10 AGBG starts out with a prohibition in respect of those cases where a user reserves for himself unreasonably long or insufficiently specified terms for accepting or declining an offer or effecting performance, Art. 10, item 1 AGBG. Standard form contracts often include clauses through which the user's contracting party who is bound by his offer is left in the air for a long time as to whether the user has accepted or declined the offer. Strictly speaking, it is not a matter of contract terms, but of a clause governing the formation of a contract.

Art. 10, para. 2 AGBG forbids provisions under which the user contrary to Art. 326, para. 1 Civil Code reserves for himself an unreasonably long or insufficiently specified grace period in conjunction with the performance to be effected by him. Art. 10, item 2, supplements item 1, for here as well as there reservations made by the user aim at postponing or avoiding as far as possible the consequences of default.

Art. 10, item 3 AGBG forbids the user to free himself from his liability to perform without a justified reason stipulated in the contract; this does not apply to long-term contracts, though. The provision is of the utmost importance in travel contracts (No. 250).

Under Art. 10, item 5 AGBG, with certain qualifications, provisions are ineffective pursuant to which upon the performance or omission of a certain act a statement by the user's contracting party is deemed to have or have not been made. For the purposes of legal terminology, fictitious statements are irrebuttable presumptions, that is proof to the effect that the consequence in question was not intended is ruled out. The great danger of fictitious statements in standard form contracts is that possibly far-reaching consequences are linked with an act or omission of which the party concerned is not aware, particularly since he may not, a relatively long time after the conclusion of the contract, remember the fiction laid down in standard form. From previous court practice in this connection, the prior knowledge clause in brokerage contracts or tacit approval in the banking business should be recalled[25]. Lastly, the prohibition clause of Art. 10, item 6 AGBG concerns provisions under which the receipt of a statement of special importance by the user is simulated. In terms of its significance and function Art. 10, item 6 AGBG is therefore closely connected with Art. 10, item 5 AGBG. The detailed regulation of receipt in Art. 4 of the FernUSG shows that consumer protection is needed especially in this area (No. 258ff).

Under Art. 10, item 7 AGBG, provisions are ineffective pursuant to which, in the event of withdrawal from or termination of the contract by either party, the user may demand (a) an unreasonably high compensation for the benefit or use of a thing or a right, or for services rendered, or (b) unreasonably high

reimbursement of expenses. Since in a concrete case it is difficult to compute the compensation or expenses, users of standard form contracts have switched over to fixing rates in standard form upon conclusion of the contract. In addition to the clear overreaching of the user, such clauses above all serve the purpose of obliging the consumer to perform the contract.

Art. 10, item 7 AGBG must be differentiated from the prohibition of claims for lump-sum damages. In this connection the claim for lump-sum compensation (item 7a) must be distinguished from the claim for reimbursement of expenses in a lump sum (item 7b). Art. 10, item 7a AGBG was introduced for fear that the limited prohibition of Art. 11, item 5 AGBG might be circumvented by agreement of a specially high compensation. It must be clarified in how far the provisions coincide or supplement each other. To begin with, it should be noted that Art. 11, item 5 AGBG takes effect also if the contractual relationship continues to exist and is to be performed. Composition agreements which a user of standard form contracts uses to provide for withdrawal or cancellation must therefore be judged by Art. 10, item 7 AGBG. As far as that goes, Art. 10, item 7 AGBG is more specific than Art. 11, item 5 AGBG and therefore has priority over the latter[26]. In contrast to that, it is difficult to decide when a claim for compensation constitutes a disguised claim for damages underlying Art. 11, item 5 AGBG. The legal nature or purpose of the claim asserted in each case is not helpful in this connection. However, a dividing line may be drawn in such a way that Art. 10, item 7 AGBG is applicable to lump-sum claims based on an actual assessment in a concrete case, while Art. 11, item 5 AGBG concerns the case where damage is computed in a lump sum, that is irrespective of the damage that actually occurred[27]. The discrimination of Art. 10, item 7b AGBG from Art. 11, item 5 AGBG presents the same problems. Here also Art. 10, item 7b AGBG takes effect only in so far as it is a matter of reimbursement of the expenses actually incurred[28].

Art. 10, item 8 AGBG restricts the possibility for a user of standard form contracts of arbitrarily declaring in such contracts that foreign law shall be applicable.

268 (*bb*) Price increase clauses that provide for increases in the prices of goods and services within four months of the conclusion of the contract are inadmissible, Art. 11, item 1 AGBG[29]. As to content, the provision is shaped to accord with Art. 1, paras. 1 and 5 of the Preisangabenverordnung (Price Marking Order)[30]. The Preisangabenverordnung (No. 41ff) was also issued to enable information to the customer of the price of a service. As the relevance of the Preisangabenverordnung in terms of civil law was and continues to be a matter of argument[31], Art. 11, item 1 AGBG aims at creating an equivalent in terms of civil law under Art. 1, paras. 1 and 5 Preisangabenverordnung to the effect that reservations as to price changes are ineffective[32] (No. 32).

The Act includes all price change clauses, price reservation clauses, reservations as to price determination, price escalator clauses and index clauses. Such clauses are to be found especially in the area of building contracts, transactions by public utilities, travel contracts and contracts of sale in certain trades, particularly in the furniture and car trades[33]. While according to the wording 'increase' the provision is based on the assumption that a certain price had been

agreed upon, it also applies if there is only an agreement leaving the price open but permitting determination at the due date according to the indicated reference standards. Such cases must be regarded as circumventions within the meaning of Art. 7 AGBG[34].

The prohibition does not apply to goods or services supplied under long-term contracts (insurance contracts — premium adjustment clauses, loan and credit agreements — interest adjustment clauses — contracts of loan for use — lease (Miete/Pacht))[35]. Lastly, the prohibition does not apply to the rates of the carriers (shipping companies and air corporations) specified in Art. 99, para. 2, item 1 GWB owing to the international interdependence in this field. To maintain uniformity of price structure, the government-approved transport charges specified in Art. 99, para. 1 GWB have been excluded. The question of whether changes in the VAT rate justify appropriate price adjustments had been a matter of argument. The Federal Supreme Court has made it clear that this is not possible by a standard form contract clause[36].

Pursuant to Art. 11, item 2 AGBG, a provision is ineffective through which the right to refuse performance under Art. 320 Civil Code or the right of lien under Art. 273 Civil Code, as far as they result from the same contractual relationship, is excluded or restricted. Until the AGBG came into force, the courts and legal writers in most cases considered an exclusion in standard form of the right to refuse performance and the right of lien to be admissible[37]. The pleading of an exclusion clause was inadmissible only if the user had grossly contravened the contract. Here belongs the case where a user made the exercise of the right to demand repair of the defects contingent upon prior payment in full[38]. By comparison, Art. 11, item 2 AGBG constitutes a considerable improvement of legal protection, since rights to refuse performance and rights of lien definitely cannot be restricted. To the protected rights to refuse performance also belong the claim to demand repair of defects, if any, and the claim for subsequent delivery[39]. Furthermore, it should be noted that Art. 11, item 2 AGBG is not always inapplicable as soon as an obligation on the consumer to pay in advance has been agreed upon. For the right to refuse performance may accrue if the obligation to pay in advance is inapplicable according to the principles of good faith[40]. The relation of Art. 11, item 2 to Art. 11, item 10d AGBG has already been dealt with (No. 212).

Under Art. 11, item 3 AGBG it is forbidden to deny the user's contracting party the right to offset against an uncontested or legally valid claim. The Act essentially remains within the limits set by legal writers and the courts. It is striking, though, that restriction of the possibility of offsetting to the disadvantage of the consumer under Art. 11, item 3 AGBG is permitted to a larger extent than restriction of the right of lien, since offsetting may be restricted to uncontested or legally valid claims. This seems to be problematical in that in the past the courts[41] have based their considerations on the assumption that in the event of an exclusion of the right to offset, a right of lien is also excluded if the exercise of the latter would have a result similar to that achieved by offsetting which is excluded[42].

Ineffective under Art. 11, item 4 AGBG is a provision releasing a user from the statutory obligation to dun the other contracting party or to give him a grace period. So far the courts have not yet decided the question as to whether a

reminder as a precondition of default may be waived[43]. In contrast to that, the courts have permitted users of standard form contracts to waive the grace period[44]. The AGBG now forbids any contracting out in standard form of a grace period required by law, because the legislator also considered the statutory duty to give a grace period a measure protecting the customer which was taken for considerations of justice. The grace period can be waived, though, if expressly provided for in the Civil Code and also in the cases developed by the courts[45].

Art. 11, item 6 AGBG forbids penal bonds in standard form in four cases; namely, in the event of non-acceptance of performance, delayed acceptance, default in payment and withdrawal from the contract. The first three cases regulated by the Act are not very common[46]. As regards the remaining case it must be clarified what is to be understood by conventional penalty within the meaning of Art. 11, item 6 AGBG. The Civil Code enables the contracting party to stipulate the payment of a sum of money to provide for the case when the debtor fails to or does not perform in the proper manner, Art. 339 Civil Code. This so-called dependent penal bond (unselbständiges Strafversprechen) must be distinguished from the independent penal bond (Strafgedinge). The independent penal bond gives rise to the obligation to pay a penal sum, without an underlying obligation to do or omit an act existing or to be secured. According to the dominant view, this instrument is not regarded as a contractual penalty[47].

The AGBG first of all includes what are known as dependent penal bonds. Whether an independent penal bond should also be treated pursuant to Art. 11, item 6 AGBG is an open question[48]. At least it is not expressly stated. Much more important than this question is the problem of distinguishing a contractual penalty from lump-sum damages, which has already been dealt with[49]. The much discussed problem of the possibility of applying a contractual penalty against possible damages is now clarified. In contrast to Art. 340, para. 2 Civil Code, it will no longer be possible in standard form contracts effectively to exclude the possibility of application. While this does not follow from Art. 11, item 6 AGBG, it does follow from Art. 9, para. 2, item 1 AGBG, considering the judgments made in Art. 340, para. 2 Civil Code[50].

Art. 11, item 8a AGBG forbids exclusion and restriction in standard form of the right to withdraw from the contract, if such a right exists under Arts. 325, 326 and 636 Civil Code. Under Art. 11, item 8b AGBG it is absolutely inadmissible to deny the customer the claim for compensation if the impossibility of performance within the meaning of Art. 325 Civil Code or default in performance within the meaning of Art. 326 Civil Code is brought about wilfully or by gross negligence. Through Art. 11, item 8 AGBG the legislator gives new effect to the regulative standards of the general law of obligations which had been thrown out of joint. Users of standard form contracts always provided for the exclusion of any claims for compensation in the event of default in performance or impossibility of performance on their part[53]. Art. 11, item 9 AGBG supplements the preceding item 8 by a regulation to provide for partial impossibility, or default in respect of a part of the performance due from the user. Also in this regard the regulation of the Civil Code will again be applicable.

Art. 11, item 12 AGBG declares to be ineffective provisions in long-term contracts that provide for a term of contract binding the consumer for more

than two years, for a tacit renewal of the contractual relationship by more than one year in each case or a period of notice of more than three months prior to the expiry of the initially planned or tacitly renewed term of contract. Despite the restrictive regulation — typical long-term contracts such as leases, leasing agreements, insurance contracts, contracts of employment and contracts for the installation of vending machines do not come within the scope of the Act — Art. 11, item 12 AGBG is one of those provisions that met with the fiercest opposition from users. The underlying reason may be that the regulation is a typically consumer-related one in that it aims at keeping the consumer from concluding contracts binding him financially for a long term and in a manner the implications of which are difficult for him to judge. Art. 11, item 12 AGBG includes contracts for the supply of services and contracts to manufacture occurring in everyday life, including subscriptions to newspapers and magazines, memberships in book and record clubs, marriage agencies, correspondence courses, and upkeep and maintenance contracts. The prohibition does not apply to contracts for the supply of things sold that belong together, Art. 23, para. 2, item 6, first instance AGBG. The reasons given list as an example the purchase of a dictionary comprising several volumes and considers the difference compared with contracts coming under Art. 11, item 12 to lie in the fact that in cases like this the customer incurs a commitment to purchase several things right from the start[52]. Furthermore insurance contracts and contracts with exploitation corporations for industrial property rights are excluded, Art. 23, para. 2, item 6 AGBG.

In the first part of sentence 1, Art. 11, item 13 AGBG forbids a user to assign his contractual obligations to third parties; however, this prohibition is largely restricted in the second part of the sentence. The prohibition applies to contracts of sale, contracts of employment, contracts to manufacture and contracts for the delivery of work where such clauses used to be common.

The provision of Art. 11, item 14 AGBG puts an end primarily to those clauses in standard form contracts by which users tried to secure themselves a further debtor of their contractual claims. Item 14a contains a prohibition of joint liability in standard form, item 14b forbids the contracting out of Art. 179 Civil Code. Clauses of the type coming within the scope of item 14 were found in the standard form contract conditions of contracts of sale, contracts to manufacture, loan agreements and brokerage contracts[53].

Art. 11, item 15 AGBG forbids burden of proof clauses under which the user shifts the burden of proof to the detriment of the consumer. Items 15a and b indicate two important cases as to subject matter. Except in the case of separately signed acknowledgements of receipt Art. 11, item 15 forbids shifting the burden of proof in standard form contracts to the detriment of the other contracting party. The strict prohibition of Art. 11, item 15 does not include fictions of declarations and fictions of delivery; these are found in the list of prohibitions of Art. 10, items 5 and 6 AGBG. Here in addition to the prohibition an independent judgment related to the case is required. Furthermore, Art. 11, item 5 AGBG should also be noted. As far as clauses are admissible under that provision, they do not fail on account of Art. 11, item 15 AGBG, because the Act in Art. 11, item 5 AGBG sanctions shifts in the burden of proof connected with the respective clauses.

The last provision of Art. 11 AGBG, i.e. item 16, forbids the use of clauses through which notices or statements to be made to the user or a third party are required to be made in a form stricter than the written form and are subject to special requirements of delivery. This provision was necessitated by the fact that in their standard form contracts users often stipulated that statements and notices were to be effective only if made in registered form. The aim of such regulations was to make it as difficult as possible for the customer to enforce his rights[54].

(c) *Scope of application of the Act*

269 The clauses prohibited under the AGBG afford the consumer protection only if the contract concluded by him comes within the scope of that Act. The legislator has set up numerous obstacles which must be overcome before the Act has the desired effect for the consumer. The clause injuring the consumer must form part of a standard form contract. In respect of such a clause, Art. 1 of the Act includes the following legal definition:

(1) Standard form contract conditions are all preformulated contractual conditions applying to a variety of contracts that one contracting party (user) imposes on the other contracting party upon conclusion of a contract. It does not matter whether the provisions form a separate part of the contract or are incorporated into the written instrument itself, nor does it matter what scope they embrace, in what type they are set and in which form the contract is made.
(2) It is not a matter of standard form contracts if the individual terms of a contract were negotiated between the contracting parties.

If it is a matter of standard form contract conditions within the meaning of Art. 1, they must be incorporated into the contract by an agreement to that effect, Art. 2 AGBG:

(1) Standard form contract conditions become part of a contract only if upon conclusion of the contract the user
  (a) expressly refers the other contracting party to them or, if such express reference is extremely difficult owing to the manner in which the contract is made, displays them in a clearly visible manner in the place where the contract is made; and
  (b) enables the other party to duly take note of them and provided the other party agrees to their validity.
(2) . . .

As a last limitation, Art. 24 AGBG restricts the group of persons protected:

The provisions of Arts. 2, 10, 11 and 12 do not apply to standard form contracts that
(1) are used in relation to a trader if the contract pertains to the operation of his commercial enterprise;
(2) are used in relation to a public-law entity.
Art. 9 is also to be applied in cases provided for in sentence one in that this

makes the contractual provisions mentioned in Arts. 10 and 11 ineffective; due regard shall be paid to the established customs.

270 (*aa*) Prior to the enactment of the AGBG, the *legal concept* of standard form contracts played only a minor role in the discussion. In the process of legislation, though, the concept of standard form contracts has increasingly shifted to the focus of interest. Actually, it constitutes the juristic eye of the needle through which legal control instruments must be forced[55]. The practical significance of the definition becomes obvious if one considers that the closer the definition, the sooner will the AGBG fail as a means of control. The construction of the features mentioned in the Act must therefore take into account the objectives and the protective purpose of the AGBG.

To begin with, standard form contract conditions are only those provisions whose validity is based on an agreement in the form of a *transaction producing legal effect*. This requirement does not exist in the case of legal rules, which lay down the subject matter of the contractual relationship in advance without an appropriate agreement[56]. Among such legal rules[57] are the Allgemeinen Strom- und Gasversorgungsbedingungen, in the field of carriage of goods the KVO pursuant to Arts. 20a, 106 Güterkraftverkehrsgesetz, and in that of passenger traffic by trolley bus or regular service by motor vehicles the Verordnung über die Allgemeinen Beförderungsbedingungen (General Conditions of Carriage) of 27 February 1970. The Act applies without restriction to all standard form contracts that require official approval[58].

Standard form contracts within the meaning of the legal concept of the AGBG are present only if the terms of the contract have been preformulated for a *great number* of contracts. Legal writers are relatively agreed that use in no less than three cases suffices[59]. Some of them even require only two[60]. If standard form contracts are used for the first time for a specific stipulated purpose, it is decisive whether they have been preformulated for a great number of contracts[61]. In the case of certain techniques of duplication this may as a rule be assumed. By comparison, the construction of the feature of *preformulation* and *imposition* is controversial. The controversy is stirred up by the question of which criterion should be taken as the central feature of a definition. Those who make the feature of preformulation the central element of the discussion make a merely *formal* criterion the pivotal point of a definition[62]. Such a view makes it possible to define standard form contracts in a seemingly neutral way irrespective of the imbalance in power between the contracting parties. The dual protective purpose of the AGBG and the double objective are thus eliminated. All the more must attempts be rejected that aim at considering the criterion of preformulation to be satisfied only if the contracting party concerned is able to recognise such a preformulation[62]. Accordingly, in the case of typing word processing machines it would be impossible to identify standard form contracts, because they cannot be recognised as such by an individual[63].

The criterion proper in terms of substantive law of the AGBG is that known as the *imposition* of conditions. This feature expresses the decisive reason why standard form contracts are treated in a special way. The imposition of standard form contracts means that the user unilaterally dictates preformulated contract terms to the other party[64]. However, quite a number of attempts have been made

to negate or modify the rank of that feature[65]. The significance of the feature can be grasped only if the structures of economic power in the contractual relationships involved are analysed. If contracts are concerned where one of the parties is a final consumer, the feature of imposition is generally considered to exist, since here the differences in economic power are due to structural causes. In these patterns the contracting parties do not meet on a par basis[66]. The situation is different in those cases where both parties to the contract are enterprises. Here we cannot speak of a structural difference in power although among the enterprises medium-sized enterprises are in greater need of protection than large firms[67]. We cannot go into details here. The view taken in this connection also allows a decision on the burden of proof. Basically, the person pleading ineffectiveness of individual contract clauses must prove that it is a matter of a standard form contract[68]. The final consumer is, however, helped by a great number of *prima facie* evidences. The feature of 'imposition' follows from the difference in power, preformulation may follow from the type of duplication, and lastly use in a plurality of cases is indicated in the case of preformulated contracts.

271 (*bb*) *Individual agreements* under Art. 1, para. 2 which do not come within the scope of the AGBG must be distinguished from standard form contracts within the meaning of Art. 1, para. 1 AGBG. The question as to how standard form contracts may be differentiated from individual agreements has given rise to an animated controversy among the courts and legal writers[69]. As to substance, the question is whether individual agreements exist as soon as there is a *possibility* of influencing control or whether the mutual willingness to negotiate must *manifest* itself in true negotiation. The significance is obvious. If the mere possibility of influencing control suffices for the assumption of individual agreements, the scope of the Act is greatly narrowed. In its decision of 15 December 1976[70], the Federal High Court explained itself to the effect that it is a matter of an individual agreement if 'a user of standard form contracts or contract forms is willing to amend his terms and his business partner is aware thereof while the contract is being negotiated'. Legal writers refuse to accept such court practice. They criticise the departure from previous court practice without any reasons for such departure having been given, they criticise the lack of interpretation of the feature 'negotiate', the selective presentation of the history of the Act and lastly the failure duly to consider the legislative purpose. The Higher Regional Court of Celle has adopted the view held by legal writers and likewise demands the manifestation of influencing control[71].

Apparently, a decision by the joint divisions of the Court shall be endeavoured, Arts. 136 *et seq.* Gerichtsverfassungsgesetz (GVG, Administration of Justice Act). A striking thing is that the problems of delimitation are discussed among legal writers without a connection being established between para. 1 and para. 2. Precisely that connection must be taken into consideration in determining the significance of para. 2. If contract terms are negotiated individually, they are not imposed. The AGBG does not apply. Accordingly, Art. 1, para. 2 is important only as a burden of proof rule. Basically, the final consumer must prove that a standard form contract is concerned in which case he may use *prima facie* evidence; the user has the opportunity of proving that in a particular

case the standard form contract had been negotiated. The extraordinary significance of that controversy cannot be stressed too often. As early as two and a half years after the coming into force of the Act an interface developed whereby it will become apparent how seriously the courts take an improvement in consumer protection under the AGBG.

Certain standard form contracts do *not* come under the Act, although in terms of substance they answer the definition given in Art. 1, para. 1 AGBG. These include price agreements and descriptions of performance in standard form which pursuant to Art. 8 AGBG escape the judicial control of the content[72]. Furthermore excluded are all standard form contract conditions that are made the subject of contracts in the field of labour law, the law of succession, family law and company law, Art. 23, para. 1 AGBG. Art. 23, para. 2 AGBG contains a number of quite heterogeneous exceptional provisions, distinguished by their requirements and legal consequences. They restrict the scope of application of prohibition clauses. As these are for the most part exemption clauses, their subject matter has already been dealt with in Chapter 6 (No. 201ff, 207ff).

272 (*cc*) If it is a matter of standard form contract conditions within the meaning of Art. 1, para. 1, they can be controlled by the AGBG only if such standard form contract conditions are incorporated into the contract by an *agreement to that effect*, Art. 2 AGBG. Art. 2, para. 1 AGBG deviates from the previous legal position on two points: implied reference to standard form contracts now suffices just as little as the mere possibility of information[73]. Rather, the user must *expressly* communicate the standard form contract to the consumer and must give him the opportunity of *reasonably* informing himself. With this in mind, one might think that the legislator has decisively increased the requirements of incorporation. This impression is wrong, though. The requirements to be satisfied in a cumulative way are decisively restricted by the wording of the Act: express communication may be omitted and replaced by a clearly visible display if any express reference is *unreasonably* difficult. Lastly, the consumer need not know the standard form contract, but must merely have had an opportunity of *reasonable* information. The wordings chosen open the door wide to attempts at restrictive or extensive interpretation[74]. It is for the courts to settle controversial questions. Any judgment must be based on the consideration that Art. 2 AGBG applies only to contracts with consumers, and for this reason the purpose of the Act requires extensive interpretation of the duties incumbent on the user and not the adoption of previous court practice without prior examination.

Subject matters excepted from Art. 2 AGBG, apart from those generally excepted matters of labour law, the law of succession, family law and company law, Art. 23, para. 1, are to be found in Art. 23, para. 2, item 1, pursuant to which certain rates and implementing regulations of the railways and transport conditions of regular service by tramcar, trolleybus and motor vehicle, either officially approved or issued under statutory orders, do not require express incorporation into the contract to be effective.

273 (*dd*) The requirements in terms of persons protected for the applicability of

the Act differ depending on whether general protection against standard form contracts concerning all those affected by standard form contracts, or special protection existing only in relation to consumers, is concerned. The dividing lines between the two fields of application are marked by Art. 24 AGBG. However, this standard does not define positively who is a consumer. Rather, it declares the principal items of the Act, namely the lists of prohibitions in Arts. 10 and 11 and the provision on incorporation of contracts, Art. 2 AGBG to be inapplicable in case the standard form contract is used in relation to a trader. Basically, registered traders are equated with unregistered traders. In any case, the standard contract term must be imposed on traders in the operation of their business. Here the presumption of Art. 344, para. 1 Code of Commercial Law applies, under which legal transactions entered into by a trader in case of doubt occur in the course of operation of their business. The same exceptional regulation applies to standard form contracts used in relation to a public-law entity or a separate accounting entity under public law[75]. This double scope of application must now be considered in the control of the content of standard form contracts. Thus the statutory regulation deviates from the previous practice followed by the Federal High Court which expressly made it clear that the control of the content must be exercised irrespective of whether traders, non-traders or consumers are concerned[76].

2 General prior control by the state

(a) On the basis of the AGBG

274 The Federal Government could not decide to introduce the official prior control of standard form contracts under the AGBG. Therefore there is still no general official prior control of standard form contracts in German law. All relevant efforts and discussions[77] during the process of legislation failed because general official prior control was allegedly incompatible with our liberal economic and private law system. The legislator, in accordance with the view held by most legal writers, was of the opinion that he had sufficiently counteracted the inadequacy of the present legal situation in terms of procedural law by introducing the collective action under Art. 13 AGBG. This question will be dealt with in detail later.

(b) On account of the GWB

275 *(aa)* To a certain extent the Federal Cartel Office is also able to afford administrative protection against unfair business conditions, particularly if several enterprises have agreed to use standard conditions of business, delivery and payment. Such *terms cartels* must be reported to the Federal Cartel Office. As far as contracts with final consumers are concerned, a comment by the AGV or another consumer organisation must be attached to the notification[78]. The Cartel Office may oppose the cartel if the cartel agreements constitute an abuse of the market position gained thereby, Art. 12, para. 1 GWB. In this connection the Office must take into account cogent law, for instance the provisions of the AGBG[79]. Under Art. 22, para. 4 GWB, the Federal Cartel Office has a similar power regarding market-dominating enterprises which has been used very rarely

because of the well known difficulties encountered in proving a market-dominating position. It is completely different in the case of supervision to prevent abuse under Art. 12, para. 1 GWB, although the majority of terms cartels examined and under objection did not concern consumers. Only in the case of the terms cartel formed by dry cleaners are consumer interests directly affected. Here the Federal Cartel Office succeeded in enforcing in favour of the consumer an increase in the limitation of liability in terms of amount, an increase in the time limit for claims for defects caused by a dry cleaner from three to five days and contemporaneously refused to accept a reversal of the burden of proof regarding exemption from fault caused by persons employed in performing obligations[80]. This example of an isolated case also goes to show that the Federal Cartel Office's supervision to prevent abuse is of importance to the consumer only here and there[81].

276 (*bb*) Associations are not only allowed to form terms cartels but may also *recommend* the uniform application of standard conditions of business, delivery and payment. They were granted that power by the Second Amendment under the GWB[82]. The difference compared with terms cartels lies in the fact that those are created by a binding contract stipulating the contracting parties' actionable duties, while terms recommendations are non-binding and leave it to the discretion of the members of the vocational association concerned whether or not they wish to adopt the recommendation. The Amendment promotes the use of standard form contracts and their central recommendation. The new regulation closely follows the law of terms cartels. The subject matter is the 'uniform use' of standard conditions of business, delivery and payment inclusive of discounts within the meaning of Art. 2, para. 1 GWB. The main difficulty of qualification and interpretation lies in the fact that recommended standard form contracts must not refer to prices or price elements. The association must report the recommendation to the cartel authority and in so doing must submit the comment of the industrial and vocational associations involved, Art. 38, para. 2, item 3 in combination with para. 2, items 1b and 2b GWB. As far as in the course of the notification procedure or supervision to prevent abuse under Art. 12, para. 1 GWB obvious infringements of cogent private law, particularly of the AGBG, are noted, the Federal Cartel Office must eliminate such inadmissible clauses[83]. This is often done as early as in the course of the notification procedure or in the preliminary talks with the Federal Cartel Office preceding that procedure[84]. Terms recommendations of importance to the consumer exist with respect to travel contracts and contracts for repairs to and sale of motor vehicles; of late also in respect of repairs to and sales of radio and television sets as well as of furniture[85]. A recommendation concerning the purchase of second-hand cars has been submitted to the Federal Cartel Office (No. 216).

In 1977 there was a precipitous rise in the number of terms recommendations, the greater part of them relating to contracts between traders[86].

3 Special prior control by the state

(a) Control of insurance companies' general conditions

277 Allgemeine Versicherungsbedingungen (AVB, general conditions of insurance) are subject to the control of the Bundesaufsichtsamt für das Versicherungswesen (BAV, Federal Supervisory Office for Insurance Companies)[87]. Insurance law in force offers the BAV numerous possibilities of influencing the design of general conditions of insurance of private insurance companies supervised by the BAV. Here measures aiming at *indirect influencing control* through the refusal of permits required by law can be distinguished from those aiming at *direct* intervention. The objective and limits of all measures taken by the BAV to influence the subject matter or form of general conditions of insurance either indirectly or directly can be paraphrased 'adequate protection of the interests of the insured'. All constituent facts for the purpose of approval of general conditions of insurance and official intervention in approved general conditions of insurance may be reduced to that heading. The BAV may enforce corrections by freedom-restricting administration. Much more often, though, disputes between the BAV and insurance companies are settled by way of negotiation.

278 *(aa)* To operate, insurers require a *licence* by the supervisory authority, Art. 5, para. 1 VAG. Together with the application for a licence, the business programme must be submitted. That programme forms part of the general conditions of insurance on which the insurer plans to base future insurance contracts to be made. The licence to operate may be refused only if the requirements of Art. 8, para. 1 VAG are satisfied. Above all, the general conditions of insurance as a part of the business programme must satisfy certain requirements. Hence it follows that the licence to operate includes in particular the approval of general conditions of insurance. In practice, though, the approval is given even expressly in addition to a licence.

A licence to operate may be refused only if according to the business programme, particularly the general conditions of insurance, the interests of the insured are not sufficiently protected or the obligations under insurance policies have not been adequately shown to be capable of being fulfilled on a permanent basis, Art. 8, para. 1, item 2 VAG. Art. 8 VAG contains a conclusive enumeration of reasons justifying the refusal of a licence[88]. After a licence to operate has been granted, domestic and foreign insurance companies are subject to the same degree of current supervision by the BAV. This means that amendments to general conditions of insurance also require approval, Arts. 8, 13 VAG.

279 *(bb)* Numerous provisions under the VAG empower the BAV to exercise *direct influencing control* over the design of general conditions of insurance.

It is within the BAV's due discretion 'to issue orders apt to keep the operation of a business in harmony with the statutory regulations or to remedy grievances that jeopardise the interests of the insured or set the operation of a business at variance with public policy', Art. 81, para. 2, sentence 1 VAG. Pursuant to that provision, an order may be issued if the state of affairs is apt considerably to impair the interests of the insured, i.e. a state of affairs involving the possibility

or danger of such an impairment[89]. Art. 81 VAG is a general clause of sorts in the law of insurance supervision as it is the underlying basis for most cases of intervention in the operations of insurance companies[90].

The supervisory authority may also require that a business programme (and along with it the general conditions of insurance) be changed prior to the conclusion of new insurance contracts, Art. 81a, sentence 1 VAG. According to its wording this power is not subject to special requirements. It serves to extend the rights stemming from Art. 81, para. 2, sentence 1 VAG. The supervisory authority shall also take preventive measures exceeding the scope of Art. 81, para. 2, sentence 1 VAG if there have not yet been any grievances that might jeopardise the interests of the insured. The admissible scope of measures under Art. 81a, sentence 1 VAG follows exclusively from the object, subject matter and purpose of the measures[91].

Lastly 'the supervisory authority may amend or cancel a business programme affecting existing relationships or relationships not yet settled', Art. 81a, sentence 2 VAG. The supervisory authority itself may without the enterprise's cooperation and against the latter's will amend or cancel altogether previously approved general conditions of insurance. If an amendment has become legally effective, the general conditions of insurance in their new wording apply equally to existing contracts and contracts not yet performed or made thereafter[92]. An order under Art. 81a, sentence 2 VAG has an effect under public as well as civil law. The business programme is amended directly for the future and existing contracts are redesigned. The only prerequisite to such an order is that 'it appears necessary to safeguard the interests of the insured', Art. 81a, sentence 2 VAG.

To avoid bankruptcy, the authority is empowered in addition to order 'what is necessary in this connection' if upon examination of the management and financial situation of an enterprise it turns out that in the long run it will no longer be able to meet its liabilities. All methods of payment may then be forbidden temporarily, Art. 89 VAG.

Outside the VAG, above all the Verordnung über die Anwendung Allgemeiner Versicherungsbedingungen (Order concerning the Use of General Conditions of Insurance) of 29 November 1940 allows direct influencing control to be exerted over the design of general conditions of insurance[93]. The Order, which continues in force today[94], invests the BAV with the power to issue statutory orders if this appears necessary to protect the interests of the insured[95]. The Order of 1940 enables the supervisory authority to issue the same orders; that is, subject to the same requirements as those of Art. 81a, sentence 2 VAG. The decisive difference between the two regulations lies in their different legal nature: orders under Art. 81a, sentence 2 VAG may be issued only by way of administrative action, while the Order empowers the BAV to issue statutory orders.

280 (*cc*) In any and all measures, the BAV must always protect the interests of the insured. The concept is put into concrete terms under the VAG, but other provisions under private law are also embodied in the definition.

In addition to the basic regulation in Art. 8, para. 1, item 2, first alternative VAG, there are currently four provisions under supervisory law which either

exclusively or in addition to other provisions concern the subject matter of general conditions of insurance submitted for approval, i.e. Art. 8, para. 1, item 2, second alternative VAG, Art. 10, para. 1 VAG, Art. 21, para. 1 VAG, and Art. 4, para. 1, sentences 2 to 4 PflichtversG. While Art. 8, para. 1, item 2, first alternative expressly refers to the interests of the insured to be protected, the second alternative puts the matter into somewhat more concrete terms, to ensure that obligations under insurance policies can be fulfilled on a permanent basis. However, the productive efficiency of an enterprise is contingent upon circumstances that are not connected directly with the subject matter of the general conditions of insurance used; here the decisive factors are capital equipment, type of investment of free assets and moreover, whether, by whom and to what extent the company is taken over in reinsurance, whether business alien to the insurance business is transacted and whether several insurance lines are operated at the same time[96]. The economic situation also has an indirect effect on general conditions of insurance, which after all reflect the insurer's willingness to pay.

Pursuant to Art. 10, para. 1 VAG, general conditions of insurance must include provisions on the objects specified. Here again it is a matter of a provision under supervisory law. Art. 10, para. 1 VAG is a directory provision, even if the supervisory authority is under no obligation to take into consideration the directions issued to it. However, an indirect compulsion to apply the provision follows from the fact that the authority may refuse to approve the business programme as long as the requirements of the rule have not been satisfied. It should be pointed out, however, that Art. 10, para. 1 VAG has largely lost its significance as a result of the fact that the VVG includes a statutory regulation concerning those sets of questions to be incorporated into general conditions of insurance[97].

Finally, Art. 21, para. 1 VAG is also of importance. It peremptorily provides that, in the case of mutual insurance companies, membership dues and benefits to members must be assessed by identical standards, provided the requirements are identical. Art. 21, para. 1 VAG is also a provision under supervisory law, although it is not uncontested[98].

A particular special regulation under supervisory law is contained in Art. 4, para. 1, sentence 2 PflichtversG. Pursuant thereto, the BAV has to examine whether the general conditions of insurance submitted for approval are in keeping with the statutory regulations. Among these are all regulations under private and public law that affect the companies in their capacity as insurance companies.

The interests of the insured are not sufficiently protected if the general conditions of insurance submitted to the BAV for approval infringe *mandatory provisions under private law*. General conditions of insurance may above all be contrary to mandatory[99], and semi-mandatory[100] provisions under the VVG. As a rule, any deviation prejudices the insured's legal position[101]. The legal position is more difficult if general conditions of insurance infringe non-cogent provisions under insurance law[102], precisely because the non-cogent law is intended to give insurance companies room for manoeuvre. From the administrative practice of the Reich or Federal Supervisory Office it may be gathered, though, that in particular cases approval was withheld for insufficient protection of the

interests of the insured if the terms deviated from the non-cogent provisions under the VVG and even if the terms were in keeping with such non-cogent provisions[103].

The provisions of the VVG apply *mutatis mutandis* also to civil-law provisions. As far as general conditions of insurance infringe cogent civil law (Arts. 134, 138 Civil Code) the clauses involved are void. By contrast, if general conditions of insurance deviate from non-cogent civil law, the BAV in deciding upon their approval in recent years had to take into account the extensive Federal High Court practice concerning the lawfulness of general conditions of insurance[104]. With the coming into force of the AGBG, the legal position has changed considerably. Now the relationship between civil law and general conditions of insurance is governed by the relevant provisions of the AGBG[105]. Efforts to exclude general conditions of insurance from the scope of the Act were not successful. For that reason above all, Arts. 9–11 AGBG are decisive, with the list of prohibitions in Art. 11, except for item 12, and Art. 23, item 6 AGBG even being numbered among the cogent provisions. We cannot go into the details of the relationship between general conditions of insurance and provisions in standard form contracts[106].

The standards of examination for newly reported general conditions of insurance apply to the same extent to general conditions of insurance already approved, Art. 13 VAG, for the supervisory authority can take action against approved general conditions of insurance only if it would not approve conditions identical in substance in the event of a new notification. This applies also to the applicability of the AGBG. Officially approved general conditions of insurance are not privileged on account of Arts. 9–11 AGBG regarding the control of their content. The fact that the Act does not make any exception regarding its area of application in terms of things protected speaks against any privileged treatment. Official standard form contracts are even subject without restriction to the abstract action for injunction and retraction which follows from Art. 16 AGBG[107].

281 (*dd*) The extensive powers in terms of substantive law to take official action and the relevant requirements having been described, it has now to be examined which possibilities *of enforcement* the BAV has and above all whether it exercises its rights.

Basically, it can be said that the BAV uses its *powers to take official action* only very rarely. Under Art. 81, para. 2, sentence 1 VAG and Art. 89 VAG the BAV has not so far become active at all and under Art. 81a VAG only the Zonal Office of the Reich Supervisory Office has been active on one occasion[108]. A somewhat more important role has been played by the Order dating from 1940. The BAV has applied that Order in some cases[109].

Of much greater importance in practice is what is known as the BAV's *simply administrative activity*[110]. This includes suggestions, recommendations, requests and legal opinions. The BAV performs administrative acts which do come within the scope of public law, but do not constitute acts of sovereignty as against third parties.

Within the framework of its simply administrative activity, the publication of the general principles of supervision must primarily be emphasised. Pursuant to

Art. 103, para. 1 VAG, the BAV is under an obligation to publish once a year special notices regarding its observations in the field of insurance, and pursuant to para. 2 its principles of administration on a current basis. In practice, the BAV influences the design of general conditions of insurance most importantly when new sets of conditions are fixed. Here the BAV is involved as early as at the stage of law making, before the set of rules is officially submitted for approval. In this way the insurance companies ensure that the provisions drafted jointly with the BAV will be approved without objection.

The model conditions printed from time to time in the monthly publications of the BAV are also of importance. These serve as a model for insurance companies and guarantee that identically worded general conditions of insurance will be approved. On the other hand, insurance companies are not forced actually to adopt such model conditions.

(b) Control of credit institutions' standard form contracts (KWG)

282 Credit institutions within the meaning of the KWG are subject to the supervision of the Bundesaufsichtsamt für das Kreditwesen (BAK, Federal Banking Supervisory Office), Art. 6, para. 1 KWG. The BAK's supervisory activity aims at ensuring if possible that the structural and regulative provisions of the KWG and its implementing regulations are observed and creditors of credit institutions are protected against losses. To fulfil this function, Art. 6, para. 1 KWG includes a general power enabling administrative orders to be made. In addition to that general power a great number of provisions of the Act contain special powers (e.g. Art. 1, paras. 2, 4, 10, 11, 13–16, etc.)[111] which form the legal basis of the BAK's special supervisory activities.

The supervisory activity of the Office embraces the supervision of individual credit institutions. The activity is performed in line with the provisions of this Act. This must not be understood to mean that the BAK's sole function is to observe compliance with the KWG. Rather, it must comply with all the legislation that is inseparably linked with the provisions of the KWG and other supervisory acts[112], i.e. particularly commercial and company law.

The KWG does not contain special powers to take official action for the purpose of controlling standard form contracts. Also, the general clause of Art. 6, para. 1 KWG does not permit the conclusion that the BAK shall be granted powers to take official action concerning the control of standard form contracts. Neither does the AGBG belong to the provisions that are inseparably linked with the regulations of the KWG, nor can it be said that unfair standard form contract conditions are bound to conflict with the objective of the KWG. As far as that is concerned there is no reference in legal literature[113].

Beyond bank supervision proper, which concerns the behaviour of the various credit institutions, under Art. 6, para. 2 KWG the BAK is charged with the additional task of taking steps against grievances in the credit system that jeopardise the security of assets entrusted to credit institutions, impair the proper handling of banking transactions or bring considerable disadvantages to the whole economy. Para. 2 means grievances affecting the country's economy as a whole[114]. Whether any grievance affecting the economy as a whole may occur at all in the case of unfair contract terms — apart from extreme cases

(possibly Art. 46 KWG) — is very doubtful. For that reason reference may be made to what has been said regarding Art. 6, para. 1 KWG. Beyond that, Art. 6, para. 2 KWG as regards its legal nature is no rule of intervention, which is why the BAK in taking steps against grievances is restricted to instruction or information requests[115]. So far the BAK has not yet based any measure on Art. 6, para. 2 KWG[116].

Therefore there is no official control of credit institutions' standard form contracts within the meaning of the KWG.

(c) *Control of building societies' standard form contracts*

283 The official control of building societies' standard form contracts is regulated in the Bausparkassengesetz (BSpKG, Act on Building Societies) of 18 November 1972[117]. According to its legislative structure, the BSpKG is a supervisory act. It was the legislator's intent to regulate the substantive supervisory law for private households and public authorities in standard form and to establish a uniform specialised supervision of private and public building societies through the BAK[118]. Pursuant to Art. 1, para. 1 BSpKG, building societies are credit institutions whose operations consist in the acceptance of deposits from building society savers (credit balances on savings account) and the granting of loans for housing measures (saver's building loan) to building society savers from their accumulated holdings (building society business). Pursuant to para. 2, a building society saver is any person who concludes a contract with a building society under which he acquires a legal claim to a building loan by effecting savings inpayments.

The BSpKG offers the BAK numerous possibilities of exerting an influence on the design of the Allgemeine Bausparkassenbedingungen (ABB, general building society savings contracts) of public and private building societies under its supervision. As regards the powers to take official action, they are throughout very much like those of the BAV. This is explained by the fact that until the coming into force of the BSpKG the BAV was responsible for the supervision of building societies. The supervisory powers over building societies were largely adjusted to those over insurance companies under the VAG, Arts. 112 *et seq.* Therefore the following presentation will be based on the same structure as in the case of official control in the insurance sector.

284 (*aa*) To operate, building societies require a *licence* from the BAK. This can be inferred indirectly from Art. 8 BSpKG. A licence may be granted only if the applicant in addition to his general business principles (corresponding to the business programme under the VAG) submits the general building society savings contract. Pursuant to Art. 8, para. 1, items 1–3 BSpKG, general building society savings contracts must in addition be drafted in such a way that they appear capable of being performed, and must provide for interest on savings deposits and redemption interest (Tilgungszinsen) that do not unduly defer the repayment of savings deposits plus the loan granted to the saver, as well as expressly protect the other interests of building society savers, for instance, by refraining from providing for unduly high charges or unjustified means for the society to recall savers' building loans.

After a licence has been granted, building societies continue to be subject to the supervision of the BAK. This manifests itself in the fact that amendments to general building society savings contracts also require approval, Art. 9, para. 1 BSpKG.

285 (*bb*) The *general clause* on governmental supervisory activity is contained in Art. 3, para. 1, sentence 3 BSpKG. It authorises the BAK to issue all orders 'necessary to keep the operations of a building society in agreement with the general business principles and standard conditions of building society savings contracts'. The provision constitutes a general power to issue administrative orders within the limits set to the BAK's supervisory authority by this provision[119]. Power is granted under Art. 3 BSpKG for the observance of all provisions of the BSpKG and KWG. Thus the BAK's power of supervision falls considerably short of the universal right of supervision comprising 'all the operations' of private building societies which belonged to the BAV under Art. 112 VAG in combination with Art. 81 VAG[120]. The restriction also applies to the powers of control regarding general building society savings contracts. Art. 3, para. 1, sentence 2 BSpKG expressly mentions only orders 'to keep the operations in agreement with the general building society savings contracts'. This means only that the BAK may take only those measures required to observe the general building society savings contracts[121].

A special power to take official action includes Art. 9, para. 2, sentence 1 BSpKG under which the BAK may demand that general building society savings contracts be amended if the performance of the obligations assumed seems no longer guaranteed. The provision concerns only new contracts; thus, unlike the BAV under Art. 81a, sentence 2 VAG, the BAK cannot intervene in existing contracts by redesigning the parties' rights and duties. Apart from that the provision corresponds to Art. 81a, sentence 1 VAG. The Act gives no clues as to when a sufficient reason for impairment exists. However, an emergency is not required, as Art. 15 BSpKG is known to provide[122]. Art. 9, para. 2, sentence 2 BSpKG entitles the BAK to forbid the conclusion of new contracts if the requirements of sentence 1 are satisfied. This power existing in addition to Art. 46, para. 1 KWG may be exercised only by way of a transitory provisional measure. As a request pursuant to sentence 1 already amounts to the temporary refusal to conclude new contracts, sentence 2 may become important only in those cases where the BAK considers it necessary to forbid the conclusion of new contracts as an immediate measure before it comes to a decision whether a request for an amendment should be made or to what effect it should be[123]. Art. 11 BSpKG contains the noteworthy power enabling the BAK to recall a manager if he culpably infringes the provisions of the general building society savings contracts specified in Art. 5, para. 3. Art. 15 BSpKG, like Art. 89 VAG, includes the possibility of forbidding all kinds of payments temporarily if the performance of a building society's obligations is endangered. While insolvency is not required, there must be considerable financial difficulties that may result in a concrete danger to creditors[124].

286 (*cc*) The BSpKG and private-law regulations determine the subject matter of general building society savings contracts. The decisive provisions are regulated

in Art. 5, para. 3 and Art. 8, para. 1 BSpKG. Art. 5, para. 3 BSpKG merely prescribes which subjects must be regulated in general building society savings contracts. The provision is silent on the subject matter of general building society saving contracts in terms of substantive law. All the same it is of importance inasmuch as only general building society savings contracts under Art. 5, para. 3 BSpKG are subject to the approval of the BAK, Art. 8, para. 1, Art. 9, para. 1, sentences 1 and 2, Art. 18, para. 5 BSpKG. General building society savings contract provisions exceeding that scope only have to be reported to the BAK, Art. 9, para. 1, sentence 3 BSpKG.

Therefore the decisive provision by which building societies must let themselves be guided in designing their general savings contracts is Art. 8, para. 1, item 1 BSpKG alone, while item 2 as well as the examples of item 3 in the final analysis put into more concrete terms the concept of protection of building society savers' interests. The construction of that indefinite legal concept should present the most difficulties in practice. However, the decisive factor is not only where the interests of the individual building society saver lie, but rather building society savers as a whole who by virtue of their collective commitment have a special relationship to each other which in the consideration of their interests should be judged in a special way or against which the individual's interest must be much less important[125]. Even if the interests of building society savers are the criterion by which building societies must act, compared with insurance law there is an important qualification. While in the latter field it is important that the interests of the insured are protected in line with the business programme, which comprises all aspects of the insurance companies operations Art. 8, para. 1, item 3 BSpKG takes as a criterion only whether general building society savings contracts sufficiently protect savers' interests other than those mentioned in items 1 and 2. Thus there is no reason for refusal under item 3 if in a building society's activities that are not regulated in general building society savings contracts, because they do not belong to the statutory minimum subject matter, the savers' interests are not sufficiently protected[126].

Neither are the interests of building society savers sufficiently protected if the general building society savings contracts submitted for approval infringe mandatory private-law provisions. In addition to Arts. 134, 138 Civil Code, building societies and the BAK must above all comply with the provisions of the AGBG[127].

287 (*dd*) The type of the BAK's controlling influence corresponds to the situation prevailing in the insurance business. Powers to take official action are used very rarely if at all, because the main emphasis is on a simply administrative activity (No. 281).

(*d*) *Control of mortgage banks' standard form contracts*

288 The control of mortgage banks' standard form contracts is possible to a limited extent under the Hypothekenbankengesetz (HBG, Private Mortgage Banks Act) of 5 February 1963.

Pursuant to Art. 1 HBG, mortgage banks are private-law credit institutions whose operations aim at mortgaging domestic properties and issuing bonds on

account of such mortgages or at granting loans to domestic public-law entities or institutions, or municipal loans to such entities or institutions against assumption of full liability, and issuing bonds (municipal bonds) on account of the claims acquired.

The BAK supervises mortgage banks in accordance with the provisions of the HBG and KWG, Art. 3 HBG. Lastly, Art. 4 HBG regulates the supervisory authority's powers. It may issue all orders necessary to keep the operations of a bank in agreement with legislation, its by-laws and other binding provisions. Like Art. 3, para. 1, sentence 1 BSpKG and Art. 81 VAG, Art. 4 HBG is the general clause of the supervisory law. Its scope is much wider than Art. 3 KWG and even than Art. 3 BSpKG[128]. Orders pursuant to Art. 4 HBG are necessary to keep the operations of a bank in agreement with the law: here belong, in addition to the KWG and HBG, the Aktiengesetz (Stock Corporation Act), UWG and HGB, the bank's by-laws and other binding provisions, e.g. above all the basic features of mortgage terms under Art. 15 HBG[129]. As in the building society system, the BAK may only issue orders that are required for *compliance* with standard form contracts. However, control of the content of mortgage banks' standard form contracts by the BAK is possible under Art. 15 HBG. Art. 15 HBG obliges the bank to design the basic features of the terms of mortgage loans and reserves the supervisory authority the right to approve those basic features. The Act does not say anything about the content of such basic features. For all that, sentence 2 shows that it is considered essential and always necessary to determine what drawbacks a debtor may suffer in the event of notice of repayment not in due time and on what conditions a bank is authorised to demand anticipated repayment of the loan. In addition, Arts. 14 and 17–21 HBG contain provisions that set limits to the banks' freedom of design. All the other clauses must be negotiated between the bank and the supervisory authority, without the HBG offering any clues[130]. As in the insurance and building society business, here also the provisions of the AGBG must be complied with.

(e) Control of investment companies' standard form contracts

289 Pursuant to Art. 1 Gesetz über Kapitalanlagegesellschaften (KAGG, Act on Investment Companies), investment companies are enterprises whose operations aim at investing money deposited with them in their own name, separate from their own assets, for the joint account of depositors, according to the principle of the spreading of risk, in securities or properties and heritable rights of erecting and maintaining a building, and issuing instruments (investment certificates) in respect of the rights of depositors (holders of an investment certificate) arising therefrom.

In addition to the KAGG, investment companies are also subject to the statutory provisions governing credit institutions. Accordingly, the BAK is the decisive supervisory authority whose powers are determined by Art. 6, para. 1 KWG[131]. Hence it follows that as in the case of banks there are no special powers to take official action against unfair standard form contracts.

Pursuant to Art. 15, para. 2, sentence 1 KAGG, the contract terms determining the legal relationship between investment companies and holders of

investment certificates must be approved by the BAK. This approval is given only if the list of requirements in Art. 15, para. 3 KAGG has been satisfied. Para. 3 enumerates the provisions that must be included in standard form contracts. The precise content of such provisions is not fixed; it is only made clear on what subjects something must be said. The Act does not offer any further clues as to the definition of contract terms. Meanwhile the BAK has drafted model terms[132], which, among other things, provide that amendments of contract terms also require the BAK's approval, another nexus of problems on which the Act is silent[133].

Owing to the lack of legislative clues, the BAK's possibility of exerting influence on the design of standard form contracts must be considered small.

(f) Control of standard form contracts used by organisers of correspondence courses

290 Correspondence course contracts must be licensed by the ZFU[197]. The ZFU's main function consists in examining the teaching material submitted as to whether a student will be able to achieve the indicated learning objective with the aid of the existing material. Such an examination includes a review of the contract terms the organiser intends to use. In particular, the ZFU must examine whether the standard form contracts include the mandatory contractual provisions provided by law.

(g) Liability of the government for breaches of duty by employees and officials of the BAV, BAK and ZFU

291 The state, here the Federal Republic of Germany, is liable pursuant to Art. 839 Civil Code, Art. 34 Basic Law for culpable violation of official duties by its employees and officials. As the BAK and BAV are federal authorities, liability may theoretically arise if the authorities mentioned fail duly to fulfil their numerous supervisory duties. Government liability pursuant to Art. 839 Civil Code, Art. 34 Basic Law presupposes that the performance of supervisory duties exists as against bank customers and insurants. While the courts up to 1978 had proceeded from the assumption that supervisory functions exist in the interest of the general public and do not give rise to any official duty as against an individual insurant — bank customer[134] — the Federal High Court in two decisions dating from 1979 has recognised for the field of the credit business that basically the consumer may hold the government liable for breaches of official duty by employees of the BAK[135]. It remains to be seen what effect such court practice will have on the insurance business.

It is still undecided whether the courts will prevail in the case of breaches of official duty by officials or employees of the ZFU. As far as could be ascertained, the question has not yet been dealt with. As the FernUSG is a distinct consumer protection act, the assumption suggests itself that the duties incumbent upon the ZFU also exist in particular as against an individual consumer.

(h) Critical evaluation

292 A thoroughly organised system of government control exists only in the insurance business and as regards building societies. In all the other areas the list of measures is so fragmentary that we cannot speak seriously of any *control* at all.

That the VAG and BSpKG are not consumer protection acts[136] may be shown consistently by their history. In essence, the VAG of 1901 made allowance for endeavours that aimed not at protecting the interests of the insured but at promoting trends of development in an industry. The insurance industry itself was interested in the enactment of a law because it brought the insurers freedom of trade in the then area of the German Reich. The many small states in the area of insurance supervision had been abolished, and there was a central admitting and supervisory agency. Contemporaneously the Act established the requirements to be satisfied in the operation of insurance business in future[137]. Thus it is not surprising that the Act at that time included what influential insurance companies considered necessary and reasonable. The insurance industry did not oppose the amendments of the Act either; it even worked towards additional government supervision[138]. Despite this easily recognisable historical background, authors of scientific papers and commentaries as a rule emphasise that it was the main object of the Act to protect the interests of the insured. It would be wrong to claim that the Act did not pursue such objectives as well, but the emphasis was on the area just described. The judgment of the legislative purpose by legal writers in the field of insurance cannot even be confirmed by the practice the BAV has been following now for almost 80 years. The BAV has hardly made any use of the numerous powers to take official action granted under the Act. It may be that this was prevented by the involved and undifferentiated general clauses. At any event, they prevented the development of precise principles of supervisory law[139]. Where there are no concrete powers, it suggests itself to enter into negotiations. This is why conditions are not supervised by way of freedom-restricting administration, but in sound harmony between insurance supervisory authority and supervised enterprises. As a rule, further developments are subject to mutual consent. For practical purposes consumer protection in terms of supervisory law extends as far as is acceptable to the enterprises[140]. Thus the enterprises themselves become advocates of consumer protection. Hence to draw the conclusion that in the insurance business comprehensive consumer protection is ensured seems superficial. Rather, the consumer's interests are least protected where the degree of protection is determined by industry alone (No. 130). As regards this principle, the insurance industry is not an exception. Two examples may serve to corroborate the view expressed here. If consumer protection had been realised in the insurance industry to the extent claimed by that industry, it cannot be explained why it offered such fierce resistance to the incorporation of general conditions of insurance into the AGBG[141]. Today legal writers close to the insurance industry still try to justify the incompatibility of the lists of prohibitions under Arts. 10 and 11 AGBG with the special circumstances prevailing in the insurance business. Furthermore, from the point of view of effective consumer protection the supervisory authority's attitude towards the uniformity of standard form

contracts is open to doubt. The BAV is known to consider uniform general conditions of insurance desirable, which is justified by enhanced market transparency. At the same time, though, uniform general conditions of insurance result in a far-reaching cartel formation, since insurers offer almost identical benefits in their general conditions of insurance. It is open to question whether or not in practice people infringe Art. 102 GWB under which the formation of terms cartels is permitted but which was not designed to completely exempt general conditions of insurance from any control under the GWB (No. 35). With this attitude the supervisory authority gets entangled in its own contradictions, for to the advocates of free market economy workable competition is a pillar of consumer protection. Precisely such competition is restricted, however, by uniform general conditions of insurance. Even if it is assumed that despite standardised general conditions of insurance there is competition in the insurance business, the question arises whether such competition actually serves the consumer's interests. After all, through premiums the consumer must pay for the heavy expenditure incurred by these enterprises for the purpose of competition (advertising, commission agents). From the consumer's point of view it is necessary for him to include such considerations in his deliberations[142]. In actual fact, the BAV interprets the supervisory provisions as a basically adequate principle. Suggestions for improvement always remain within the limits of the statutory regulations and the existing market system (No. 36). While a change of the entire insurance system with a view to bringing about more effective consumer protection is theoretically possible, since the provisions regulating the power to take official action are all of a general clause nature and offer wide scope for manoeuvre, implementation in practice would require a redetermination of the functions of the BAV which would also have to be reflected in legislation.

The participation of consumer representatives in the activities of supervisory board bodies has not so far brought about any change in the practice described. By and large what has been said also applies to the control of building societies. In 1931 building societies were largely submitted to the supervisory regulations under the VAG. The reason given was the essentially identical starting position in the building society system[143]. The special legislation enacted in 1972 did not result in a fundamental change of the legislative purpose. A judgment of the FernUSG was given earlier (No. 200).

4 Collective action pursuant to Art. 13 AGBG

293 Under Art. 13 the AGBG introduced the collective action, the purpose of which is to enable the control of unfair standard form contracts to be exercised. Under previous law, the control of standard form contracts was possible only by an action instituted by an individual (Individualprozeß). Any decision in favour of the consumer on the effectiveness of an unfair clause in a standard form contract was effective only between the parties to the lawsuit. Users of standard form contracts were able to continue using the clause in question even where there was danger that in a new lawsuit they would be defeated. The collective action now grants consumer associations an abstract power of control separated from a particular case. If the court declares a clause taken exception to by

consumer associations to be unlawful, its decision has a certain broad effect in that it influences all individual actions brought thereafter. This is achieved by a restrictive injunction granted by a court, having effects on the defeated user of standard form contracts and individual consumers if the consumers concerned plead the affirmative judgment in a collective action cause. The legislator hopes that this regulation will free legal relations as far as possible from unlawful standard form contracts[144]. That goal would have been achieved much more easily and much better by an official power of control, for such a power would have been exercised officially, while in the case of control by collective action it will in the final analysis be decisive to what extent consumer associations avail themselves of their rights. As a result, though, the degree of control in most cases is shifted to an extra-judicial area. Whether consumer associations become active is not determined just by the degree of rights granted to them. These rights are merely prerequisite to the associations becoming active in the first place. Rather, personal and capital equipment, the qualifications and employment of personnel and the organisation's conception of itself are of eminent importance here. We regret to say that the legislator has rejected other proposals to introduce official control[145], so that it is now the task of consumer protection associations to make optimum use of the new legal position. It is all the same striking that the legislator has paid so little attention to the procedural regulation. This not only manifests itself in the present regulation which was negotiated shortly before the enactment of the law after a hectic discussion of the pros and cons[146]. As early as during the process of legislation the procedural complex was neglected dreadfully despite the jurisprudential discussions on the occasion of the 50th German Lawyers' Assembly[147]. Not even the experience gained in the law of the collective action under Art. 13 UWG could be turned to account, since the expert opinion commissioned[148] was completed only much later than would have been necessary for a meaningful evaluation. The reason may be that the circles concerned had a great aversion to tackling this hot problem at all.

(*a*) *Associations' capacity to sue*

294 (*aa*) Art. 13, para. 12, item 1 AGBG grants *consumer associations* a right of action if they satisfy the requirements provided by law. Accordingly, it must first of all be an association capable of acting as a legal entity which means nothing else but an incorporated association. As follows from the second part of sentence 1 of para. 2, item 1, that association may also consist of natural persons as members. Furthermore, 'it must be one of the association's functions according to its by-laws to protect the consumer's interests through education and guidance'. Since this wording is identical with the wording of Art. 13 UWG, the Federal High Court's leading decision passed on Art. 13 UWG must be consulted on interpretation[149]. Pursuant thereto, only an association that has not incorporated consumer education and guidance into its by-laws just for the look of it, but actually performs such activities has the capacity to sue. This includes the association's not confining itself merely to the protection of the consumer interests of its members. Rather, it must take pains to guide and educate any private final consumer[150]. For that reason associations whose

objective according to their by-laws is to exercise the right of action under Art. 13 UWG and Art. 13 AGBG have no right of action. The legal position is problematic as regards trade unions that are members of the DGB[151].

Trade unions, although not capable of acting as a legal entity, are capable of being a party to a lawsuit[152]. The trade union's main function is the safeguarding of employees' interests. Through a recent amendment of their by-laws, trade unions have included therein as a subsidiary function the safeguarding of consumer interests. As trade unions actually protect consumer interests in certain sectors, they must be conceded a right of action[153]. A consumer association may confine itself merely to certain sectors of consumer protection without thereby losing its right of action[154].

The second part of sentence 1 of para. 2, item 1 makes it clear that a consumer association may be organised as an umbrella organisation or may comprise 75 natural persons as members. This requirement is to ensure that the association is backed by a sizeable number of consumers. In the event of any dispute as to whether the association satisfies the requirements of Art. 13, para. 2, item 1 AGBG, the court must clear up doubts *ex officio*[155].

A restriction of the consumer association's right of action follows from Art. 13, para. 3 AGBG. Pursuant thereto, the right of action is inapplicable if the standard form contracts in question are used only in relation to traders and the contract is made within the framework of the operations of a trading enterprise or if standard form contracts are recommended for exclusive use between traders.

295 (*bb*) Item 2 of Art. 13, para. 2 AGBG is almost literally identical with Art. 13, para. 1 UWG. Pursuant thereto, '*all incorporated associations for the promotion of trade interests*' have a right of action. The decisions issued under Art. 13 UWG and the legal literature in that respect may therefore be used in interpreting Art. 13 AGBG[156]. Accordingly, an industrial association need not necessarily intend to promote the full extent of trade and vocational interests of persons. Also, associations that apply themselves especially and exclusively to the task of fighting unfair competition[157] or, more specifically, unfair business conditions[158], are entitled to bring an action. Unlike a consumer association, an industrial association may protect only the interests of its members[159]. The promotion of trade interests need not be the sole or the characteristic feature either[160]. After all, industrial associations may take exception to all the violations of the AGBG that concern both the sphere of interests of a consumer association and areas outside that sphere. They merely have to occur within the sphere of interests defined in the by-laws[161]. Only regarding the requirements of capability of acting as a legal entity, of the functions defined in the by-laws in consequence of which the right of action is actually exercised[162], and of the restriction of functions as defined in the by-laws to problems of standard form contracts does what has been said about consumer associations apply also to industrial associations[163]. If the statutory regulations of para. 2, item 1 and item 2 are compared, it is striking that detailed requirements to be satisfied by consumer associations compare with some lax requirements to be satisfied by industrial associations. This statutory regulation may be based on the view that

it is much more the business of trade and industry and its self-regulatory institutions to remedy grievances.

296 (*cc*) Para. 2, item 3 expressly mentions *chambers of industry and commerce* only for the sake of clarity[164]. Item 3 enumerates just examples of the associations mentioned in item 2[165]. In addition to chambers of industry and commerce, bar and medical associations are also entitled to bring an action[166].

297 (*dd*) According to its wording, the AGBG does *not* entitle *individuals to bring an action*. By comparison, the bill prepared by the CDU/CSU parliamentary group did grant the individual consumer such a right of action. The adoption of a statutory regulation to that effect was rejected with reference to the fact that the consumer had no interest warranting protection in an isolated action, because he could plead ineffectiveness under his contractual rights[167]. Because of the history of legislation, the majority of legal writers deny the individual consumer a right of action[168]. A judicial progressive development of the law is not excluded, though. A starting point could be the legal nature of the right of action pursuant to Art. 13 AGBG. In terms of substance, the law approximates the collective action to a tort. In that case, though, it suggests itself to grant the individual consumer a right of action[169].

(*b*) *Claim for retraction and for injunction pursuant to Art. 13, para. 1 AGBG*

298 Pursuant to Art. 13, para. 1 AGBG, any person who in standard form contracts *uses* provisions that are ineffective under Arts. 9–11 AGBG or *recommends* them for use in legal relations may be sued for an injunction and, in the case of a recommendation, for retraction. The law distinguishes between a claim for retraction and a claim for injunction. The crucial question of the collective action under Art. 13 AGBG is what the object of the claim for injunction or retraction is and which concrete requirements must be satisfied in the reasoning of the suing association[170]. The majority of authoritative writers base their views on the assumption that the concept of standard form contracts is the same for the purposes of the collective action as for the formulation of the question in terms of substantive law[171]. In the final analysis, the consequence of such a view would be that, irrespective of whether standard form contracts were used or only recommended, an action can be brought only if it can be proved that three consumers have been injured. Here it is overlooked that the concept of standard form contracts under Art. 13 differs from that under Arts. 1–12 AGBG in that action may also be taken against a person who only recommends but does not use standard form contracts. The feature 'recommend' gains importance independently only where legal protection is afforded even before standard form contracts are used in legal relations. The interpretation of the concept of standard form contracts advocated by the majority of legal writers may, if at all, apply only to the element of use. But in that respect also there are objections, because the preventive function attributed to the collective action would thereby be reduced to absurdity. For that reason several commentators consider threatening use to be sufficient[172], because only thus may unfair

standard form contracts be kept away from legal relations that are the object of protection of the collective action. This is the precise reason why it is advocated to let the concept of standard form contracts hold true even if they have not yet been used in a contract, but if the person drafting them gives to understand that he or a third party has such a use in mind[173]. Only the last-mentioned view makes allowance for the purpose of collective action.

According to the wording of the Act, only the use of those standard form contract clauses that are ineffective 'pursuant to Arts. 9–11 thereof' gives rise to an obligation to refrain from doing something or to retract something. This, for one thing, makes it clear that individual clauses may already occasion the bringing of an action. It is not necessary that the entire standard form contract is unfair[174]. For another thing, standard form contracts within the meaning of Art. 13 AGBG shall thereby be distinguished from those that do not become part of the contract, Arts. 2–4 AGBG. However, as the fields of application of Arts. 3 and 4 AGBG, on the one hand, and Arts. 9–11 AGBG, on the other, overlap, the judgments contained in Arts. 3 and 4 AGBG may well be included under a collective action[175]. The protective purpose of the procedural regulations, which is the avoidance as far as possible of the interference with and disturbance of legal relations, requires also that other cogent law be used as a criterion, for instance the AbzG, FernUSG, the regulations governing travel contracts and Arts. 134, 242 Civil Code[176]. At any rate, we do not see why a passage to that effect was not expressly incorporated in the Act[177].

299 *(aa)* A person infringes the obligation to *refrain* from using unfair standard form contracts if he uses them all the same not only by concluding contracts, but in any form in which he appears on the market using such contracts[178]. The same applies to any person who does not use standard form contracts himself but recommends their use.

The duty to refrain from doing something must be distinguished from the duty to remove something. In the law of competition it is understood as a principle that a claim for injunction also includes a claim for removal if any violation of the law of competition results in continual disturbances[179]. This principle cannot be applied to the law of standard form contracts, though, for the AGBG has specifically regulated the claim for removal of disturbances and gives rise to such a claim in the form of a claim for retraction directed against the person recommending standard form contracts. A user of standard form contracts is obliged only to refrain from continued use, but need not inform customers of his own accord of the fact that the standard form contracts under objection are ineffective. This principle includes a certain restriction in the case of permanent acts[180]. Such a permanent act should be assumed if a user employs technical means to inform the public about his standard form contracts, for instance displays them on his business premises. Here a perpetual injunction may oblige him to remove such standard form contracts. As a prerequisite to the arisal of a claim for injunction, the legislator states only the use of ineffective standard form contracts, but not in addition the danger of repetition. All the same, the danger of repetition is prerequisite to the existence of a claim. Therefore, it remains to be seen whether the danger of repetition is the substantive basis of a claim[181] or an element of the legitimate interest to take legal action[182].

It is agreed that the use of certain standard form contract clauses for the first time renders the danger of repetition so likely that further facts are not required to give rise to a claim.

Basically, a user may avoid the danger of repetition only by making a statement that he will refrain from continued use and will incur a penalty if he fails to do so. By no means can the danger of repetition be considered avoided if a user affirms that he has discontinued the use of the standard form contracts in question. Such affirmations offer no grounds for punishing fresh infringements in the manner intended by the legislator[183].

300 (*bb*) A user is only a person in whose name contracts are made or are to be made, with standard form contract conditions being incorporated. It is the enterprise that is responsible if any of its employees uses standard form contracts without the management's knowledge. As far as that goes the enterprise may exculpate itself pursuant to Art. 831, para. 1, sentence 2 Civil Code[184]. The only prerequisite is that the employee's activity consists in the initiation of negotiations for a contract or in the conclusion of contracts.

301 (*cc*) *The duty to retract* ineffective standard form contracts is only placed upon a person *recommending* standard form contracts. That person need not be identical with the user, for a person recommending ineffective conditions does not necessarily use them himself. The claim for retraction arises in connection with a recommendation. It is merely necessary that a statement suggesting the use of certain conditions has reached the person to whom it was directed[185]. This is sensible because a recommendation can often be a non-recurrent act. The substance of the duty to retract is laid down in Art. 17, item 4 AGBG. Pursuant thereto, the person on whom that duty is imposed must publish the judgment in the same manner as the recommendation was spread.

302 (*dd*) While it is relatively unequivocal who is to be considered a user of standard form contracts, a definition of the person recommending them is much more difficult. The Act offers a clue inasmuch as only a person recommending standard form contracts 'for use in legal relations' is responsible. However, as standard form contracts are recommended in principle for use in legal relations, this criterion seems to be useless for legal purposes. Within the meaning of that provision authors of sets of clauses, even if they were lawyers and notaries, would not therefore be excluded right from the start as persons capable of being sued. That may even be true of jurists[186]. Of course such a wide wording cannot be accepted. To begin with, only a person approaching users in his own name can be regarded as a person recommending standard form contracts. In addition, such a person must for commercial or vocational reasons be interested in certain clauses being used. After all, the legislator intended to embrace only those clauses that apply to a great number of persons. If these criteria are taken as a basis, jurists, lawyers and notaries should hardly number among the persons capable of being sued[187].

A problem is whether those recommending standard form contracts may also be public-law entities which through their authorities, such as the BAV and BAK, have model conditions drafted[188]. The main objection to the applicability

of the collective action to governmental approving authorities is that the AGBG regards as persons recommending standard form contracts only those that act at a level of coordination without having powers to take forcible measures (Zwangsbefugnisse). The Act does not offer any clues as to such a restrictive interpretation, largely because the procedural part was enacted in great haste and without adequate debate.

(c) *Warning (Abmahnung)*

303 Claims for injunction in regard to the use and recommendation of ineffective standard form contracts and the claim for retraction may be asserted by way of action or interlocutory injunction without the user or person recommending standard form contracts having to be threatened with such action or interlocutory injunction beforehand. The action cannot be dismissed for want of a legitimate interest to take legal action, because the user of standard form contracts had not previously been asked by the suing association to stop using or recommending certain standard form contracts[190].

Although a warning is not prerequisite to an admissible action, commentators base their considerations on the assumption that in the case of the collective action under Art. 13 AGBG a warning is also called for. The principles developed under Art. 13 UWG are applied throughout to the AGBG. As a rule no reasons are given[191]. Apparently, the implicit assumption is made that the similarity of the actions necessitates the application of principles developed under the law of competition. Admittedly, the authors are correct in that Art. 13 AGBG is modelled on Art. 13 UWG. This is not to say, however, that the situation in the law of standard form contracts resembles that in the UWG, for there is a decisive difference in the effect the actions have. Under the UWG, disputes are settled if the enterprise involved need not bring an action because of a successful warning. In the case of an action under the AGBG, the associations entitled to bring an action are bound to be interested in obtaining a judgment in order that an effect on third parties may be produced (No. 293). It is only the effect of the judgment on third parties that affords the consumer effective legal protection. There is no comparable situation in the area covered by the UWG. The application of the principles of warning cannot be justified by reference to the fact that under Art. 93 Code of Civil Procedure the successful association may be ordered to pay the costs of the proceedings provided the defendant had not occasioned the action, for Art. 93 Code of Civil Procedure contains only a general procedural principle. When a consumer association has to bear the costs of a successful action concerning standard form contracts can be determined only on the basis of criteria tailored to the peculiarity of the action. The strongly formalistic principles of warning are not suitable for this[191a].

(d) *Interlocutory proceedings (einstweilige Verfügung)*

304 The AGBG includes no provision similar to Art. 25 UWG, so the admissibility of an interlocutory injunction against unfair standard form contract clauses must be judged solely on the basis of Arts. 935 *et seq.* Code of Civil Procedure.

The application for an interlocutory injunction presents itself especially in two cases: the majority of ineffective clauses pursuant to Art. 13 AGBG could be eliminated by way of summary proceedings, and provisions finally declared to be ineffective in a control procedure could be removed promptly from standard form contracts of third-party users in the same trade[192]. The claim for an injunction within the meaning of Arts. 935, 940, 936 and 916, para. 1 Code of Civil Procedure can comprise only the claim for injunction granted to associations under Art. 13, para. 2 AGBG. The claim for retraction is excluded *a priori*[193].

On the admissibility of an interlocutory injunction alone, opinions are divided. While the majority of authoritative writers concede consumer associations the possibility[194] of having the unlawfulness of standard form contracts decided by way of summary proceedings, the Higher Regional Court of Düsseldorf has denied these associations that possibility in a much-noted decision[195]. The existence of a claim for an interlocutory injunction as well as the question of whether such a claim has merit is a matter of argument.

A *claim for an interlocutory injunction* would exist only if the suing association were able to show satisfactorily that the challenged clauses actually infringe Arts. 9–11 AGBG or other mandatory regulations. The Higher Regional Court of Düsseldorf sees the way of the interlocutory injunction barred because this type of injunction has no merit. Hence it follows from the crucial passages of the decision that the court rather objects to the existence of a claim[196]:

> As a rule the interest of the general public is served better by a judgment given in general contentious proceedings (ordentliches Erkenntnisverfahren) because it offers the possibility of more thorough clarification of the facts of the case. Against this, the issuance of an interlocutory injunction cannot be justified by the consideration that the consumer's interests might be jeopardised if a user of standard form contracts continues to use them despite pending litigation in general contentious proceedings. A factor to be considered here is that customers who feel aggrieved by such standard form contracts may themselves at any time take action against the user. What speaks above all against the issuance of an interlocutory injunction, though, is the fact that such an injunction issued as between an association and a user has no legal effect as against customers and therefore is of no use to them[197].

The reasons given are not convincing. It remains unclear why the general public should be better served by general contentious proceedings. Trial and summary proceedings are distinguished precisely by the extent and accuracy of the finding of facts. The general public — more precisely consumers — are very much interested in unlawful standard form contracts being removed from legal relations as quickly as possible. Only thus can damage be avoided, which is the very purpose of the collective action regarding standard form contracts, and it is not contrary to that declared legislative purpose if the court refers consumers to their option of going to court as individuals. It is the very purpose of the collective action to relieve him of that burden[198]. Lastly, it is not clear why the lack of binding force under Art. 21 AGBG and on top of it 'above all' may result in the dismissal of an application for an interlocutory injunction. Even if it is assumed that the binding effect of Art. 21 concerns only decisions given in a

trial[199], the lack of binding effect does not alter the fact that consumers are served substantially if a user is forbidden to continue using the ineffective clauses under penalty of Ordnungsmittel (judicial measures serving the purpose of forcing a certain act, default or sufferance from persons or of punishing disobedience or contempt of court). In view of the sanctions he is threatened with in the event of contravention, the user concerned will refrain from continued use immediately, whereby he helps all future customers who will not be exposed to the ineffective clause under objection. It is striking that the extension of legal force introduced in favour of the consumer serves as a means of reasoning in the curtailment of his rights.

In the examination of a claim for an interlocutory injunction, difficult questions of law may arise if the court has to construe the general clause or the list of prohibitions of Art. 10 AGBG. Since, in the past, actions were brought as a rule for violations of Art. 11 AGBG[200], the view the courts will take cannot be predicted yet. The courts may dismiss an application for an interlocutory injunction if a summary examination has shown that an infringement cannot be assumed with the probability required for a decision. In addition to the infringement of Arts. 9–11 AGBG, it must be shown satisfactorily that the standard form contracts in question would be used further unless an interlocutory injunction were granted. Usually, the mere fact that standard form contracts are being used sufficiently proves the danger of repetition[201].

An interlocutory injunction has *merit* only if an arrangement by way of such an injunction seems necessary because 'significant' difficulties in law enforcement would otherwise be encountered (Art. 935 Code of Civil Procedure) or a 'significant' drawback would be suffered (Art. 940 Code of Civil Procedure). Consumer associations must substantiate the urgency, because the AGBG does not include a provision similar to Art. 25 UWG. The conflicting viewpoints are also reflected in the construction of the requirement of proof of urgency. In some cases it is claimed that an interlocutory injunction is destitute of merits[202], while in others it is demanded that standard form contracts should include particularly gross inequities or particularly far-reaching and involved effects[203]. Both views must be rejected. They go beyond the wording of Arts. 935 and 940 Code of Civil Procedure without giving convincing reasons. It is not clear why standards other than those applicable to the collective action regarding the UWG should apply to the collective action regarding standard form contracts. An interlocutory injunction has merits as soon as the associations are able to show satisfactorily that there is a claim for an interlocutory injunction[204].

The interlocutory injunction merely aims at the preliminary settlement of a lawsuit. Basically, the suing associations must not be finally satisfied by the granting of an interlocutory injunction. For that reason, basically the claim for injunction must not aim at a user discontinuing the use of certain clauses. For the purpose of a preliminary settlement it suffices that he be instructed to draw the contracting party's attention to the fact that certain clauses are currently being reviewed by the court.

(e) Substance of Arts. 14–21 AGBG

305 Art. 14 AGBG contains a special regulation on jurisdiction over the subject

matter and on territorial jurisdiction. A regional court has jurisdiction over the subject matter irrespective of the value in dispute. The regional court in whose district the defendant has his place of business has territorial jurisdiction. By way of statutory order, the governments of the German Länder may refer lawsuits to one regional court for the districts of several regional courts. Art. 15 AGBG contains provisions on the exact wording of the motion for judgment. Pursuant to Art. 16 AGBG, the court is obliged to hear the BAV and BAK if the objects of the action are the standard form contracts of building societies, investment companies, mortgage banks and ship mortgage banks listed in Art. 16, para. 2 AGBG[205]. Thus the foregoing procedure of approval is geared to the subsequent court proceedings. Art. 17 AGBG prescribes the wording of the sentence to ensure that the tenor in the case of interlocutory injunctions satisfies certain requirements for the sake of safety and clarity[206]. Art. 18 AGBG enables the plaintiff to publish the wording of the sentence in the Bundesanzeiger at the expense of the defendant, giving the name of the condemned user or person having recommended the standard form contracts. This possibility has no effect in terms of consumer protection: it would occur neither to consumers nor to businessmen to protect themselves by studying the Bundesanzeiger regularly[207]. As far as the legislator intended thereby to enhance the broad effect of ineffective standard form contracts, he has chosen an unsuitable means. Of far greater importance is Art. 20 AGBG, which provides that all pending proceedings and final decisions must be registered at the BKartA. Pursuant to Art. 20, para. 4 AGBG the BKartA must inform anybody upon request about whether an entry has been made. *Anybody* has a right to obtain information without having to give reasons[208]. The purpose of this provision is to provide an association entitled to bring an action, or a customer of the user, with speedy and reliable information as to whether certain clauses have already been challenged in a supervisory procedure and whether the procedure has yet been completed. Art. 20 AGBG thus creates at least the theoretical basis for consumer associations to gather the information they need. The right to information is largely undermined, though, by the fact that the BKA charges DM 1 for each page copied.

Much more serious is the fact that the information furnished on the data recorded in the register pursuant to Art. 20, para. 4 AGBG does not explain pursuant to which statutory provisions the use of standard form contract clauses had been forbidden in each case, as the grounds of the decision are not entered in the register, so the recording of a judgment under a certain item of the AGBG does not necessarily mean that the court based its decision exclusively on that item. The gap of information created through legislation reduces the practical use of the register substantially[209]. The purpose of Art. 19 AGBG is to enable the condemned user in the event of subsequent changes in the practice of the highest court to avoid further enforcement under a perpetual injunction. This is an important exception to the law of enforcement, where it is recognised that any change in court practice is not prerequisite to the bringing of an action to avert execution (Zwangsvollstreckungsgegenklage) under Art. 767 Code of Civil Procedure[210].

Pursuant to Art. 22 AGBG, the value in dispute must not exceed DM 500 000. The limitation of the value in dispute is of no importance to a reduction of the risk of liability and the risk of the costs of the proceedings[211]. Here the amount

would have had to be reduced to no less than DM 100 000 as suggested by the study group commissioned by the Federal Minister of Justice[212] if the limitation of the value in dispute were to be considered a suitable means at all. It would certainly be a step forward if the suggestion made by one author[213], namely to assume a value in dispute of DM 5000 in the case of a claim for injunction and of DM 10 000 in the case of a claim for retraction, gained acceptance. However, this is only a suggestion, the effects of which on court practice remain to be seen.

In actual fact the risk of the costs of proceedings prevents consumer associations from exercising their right of action. The present regulation makes actions appear possible only if it is practically certain before the action is brought that it will be successful[214]. After all, under the Gesetz über Prozeßkostenhilfe (Act on Aid Concerning Costs of Litigation, see No. 370), consumer associations may receive aid if they cannot defray the costs and if the omission of prosecution would be contrary to the 'public' interest (Art. 116, item 2 Code of Civil Procedure, new version).

The legal position could be improved by the application *mutatis mutandis* of Art. 23a UWG, which permits reduction of the value in dispute[215].

During the process of legislation the Bundesrat (Federal Diet) had tried to incorporate a provision to that effect in the AGBG[216]. It remains to be seen whether — in contrast to a warning — a comparable situation exists with respect to the reduction of the value in dispute which permits application *mutatis mutandis*: also concerning the UWG practical experience has shown that the reduction of the value in dispute is a suitable means of reducing the risk of the costs of proceedings to a very limited extent only. The amendment to the UWG is to remedy the situation for the benefit of the consumer (No. 118).

5 Subsequent governmental control

306 Institutions eligible to exercise subsequent measures of control are the courts and special supervisory authorities. A detailed account of the powers to take official action has already been given with respect to the relative offices in the insurance and banking businesses. In that connection the powers provided by law were regarded throughout as powers to take preventive measures. As far as the right of original approval in the granting of a licence to operate is concerned (possibilities of indirect controlling influence) the state of facts is unequivocal. By comparison, problems arise if, as is the case primarily in the insurance business, the BAV also has the possibility of intervening in current operations provided the interests of the insured are impaired (possibilities of direct controlling influence). Powers to take official action such as these are of a double nature. They are retrospective, because they require the existence of unfair standard form contracts; at the same time, they are also preventive, because the competent supervisory authority need not wait until consumers have suffered a *loss* but may intervene as soon as there is *merely an abstract danger* which, however, must manifest itself in facts that can be pinpointed[217]. The consequence of this double nature is that some powers to take official action are mentioned once again in connection with the measures of subsequent control.

(*a*) *Prohibitions*

307 Within the scope of their powers, the BAV and BAK may forbid the further use of certain clauses. Contracts made despite that prohibition are not void by virtue of special statutory regulations. However, their ineffectiveness should as a rule follow from Art. 134 Civil Code. In addition to the prohibition of continued use, the authorities mentioned may even demand that standard form contract conditions be amended before new insurance contracts are made. This power includes the right to forbid the conclusion of new contracts for the time being, i.e. pending approval of the amended standard form contract conditions, Art. 81a, sentence 1 VAG, and Art. 9, para. 2, sentence 1 BSpKG. Contracts made in contravention of the prohibition are likewise void under Art. 134. But the BAV may also — and this is the most rigorous means — intervene in existing insurance contracts by reshaping the rights and duties thereunder and is thus able generally to eliminate the relative clauses, Art. 81, sentence 2 VAG.

In the event of the threatening bankruptcy of credit institutions or insurance companies the BAV and BAK may furthermore impose a *prohibition on effecting any payments*. With respect to the insurance business, this right follows from Art. 89 VAG; with respect to credit institutions Art. 46, para. 1, item 1 KWG applies in general and Art. 15 BSpKG in particular. The prohibition on-effecting payments temporarily sets aside the parties' entire set of contracts.

If an association entitled to bring an action has been successful with a collective action pursuant to Art. 13 AGBG, the court either forbids further use or obliges the person who recommended the use of standard form contracts to retract them. If the condemned user acts in contravention of the duty to refrain, according to the general rules of civil procedure that duty would not affect contracts concluded between the sued user and other individual consumers who are not parties to the lawsuit, for judgments are effective only as between the parties. Another customer involved could at best draw the court's attention to the judgment in order to induce it to interpret the matter in a certain way. In Art. 21 the AGBG extends the effects of a judgment. If the further consumer involved expressly pleads a perpetual injunction, the respective standard form contract clause must be considered void. In this way a perpetual injunction in derogation of the general rules will have a somewhat broad effect. However, the legislator was unable to decide to design the broad effect in such a way that in a lawsuit between a consumer and a user of standard form contracts the court had to examine officially whether it is a matter of a perpetual injunction.

(*b*) *Administrative and penal sanctions*

308 *Administrative sanctions* exist only in the insurance business and the building society system. The BAV and BAK may legally enforce all orders, i.e. also prohibitions to use unfair standard form contract clauses. The provisions of the Verwaltungsverfahrensgesetz (VwVG, Act on Agencies' Procedure of Administration) are decisive. Of the sanctions available under Art. 19, para. 2 VwVG (substitute performance, administrative fine, direct compulsion) in reality only

an administrative fine is eligible in both industries[218]. While Art. 46, para. 1 KWG, which also applies *mutatis mutandis* to building societies[219], expressly refers to the VwVG, there is no such provision in the VAG[220], HGB[221] and KAGG[222]. This does not alter the fact that the VwVG is applicable, but the difference has an effect in that pursuant to Art. 50, para. 2 KWG an administrative fine up to DM 50 000 may be imposed, while the VwVG under Art. 11, para. 2 provides only for DM 2000 as a maximum amount.

Insurance companies that act in contravention of the prohibitions to use standard form contracts imposed by the BAV make themselves *liable to a penalty* (fine or imprisonment up to three months), since as far as that goes they operate an insurance business without the necessary licence[223]. Fault is not necessary. Likewise punishable are contraventions of prohibitions on effecting payments, Art. 56, para. 1, item 7 KWG and Art. 144, para. 1, item 4 VAG. The KWG, Art. 56, and the VAG, Art. 144, para. 2 provide for an administrative fine of up to DM 100 000. A *user of standard form contracts* who acts in contravention of a perpetual injunction *does not incur a punishment*. Provisions to that effect are not included in the AGBG. It must be taken into account, though, that via Art. 15 AGBG, Arts. 889 and 890 Code of Civil Procedure are applicable. If the condemned defendant acts in contravention of the legally enforceable obligation to refrain from an act — use or recommendation — forbidden thereunder, he must be fined (Ordnungsgeld, fine imposed by a court) or imprisoned (Ordnungshaft, arrest for disobedience to court order) for any contravention at the request of the suing association. The individual fine must not exceed the amount of DM 500 000 and the term of imprisonment must not exceed two years[224].

All the sanctions and prohibitions that may be imposed under the VAG, KWG or BSpKG are of little practical importance. This does not apply to the various means provided for in the AGBG. It will be decisive primarily to what extent consumer associations will make use of their right of action.

6 Control of collectively negotiated standard form contract conditions

309 The subject of examination is standard form contract conditions which have been drafted jointly by suppliers and consumers or their representatives. Participation of consumers in the drafting of standard form contracts can be imagined in the formation of terms cartels or terms recommendations.

The BKartA has certain powers of control regarding terms cartels and terms recommendations which have already been dealt with (No. 276). Here we shall examine the influence consumers have actually exerted in the formation of the Dry Cleaners' terms cartel and the two terms recommendations by the German Travel Offices Association and the motor vehicle trade. We can refer to the participation of consumer organisations in the case of terms recommendations concerning conditions of repair of motor vehicles. Here the ADAC conducted the negotiations on behalf of the consumers concerned. However, doubts as to whether the ADAC is a consumer organisation are certainly called for (No. 8). After all, the ADAC was a negotiating party on a par basis beside the Zentralverband des Kraftfahrzeughandwerks (ZDK, Central Association of the Motor Vehicle Trade), the Verband der Automobilindustrie (VDA, Association of the

Car Industry) and the Verband der Importeure von Kraftfahrzeugen (VDK, Association of Importers of Motor Vehicles). The associations of the car industry and the ADAC agreed on a uniform text of conditions under the short title of Conditions of Motor Vehicle Repairs 1974. Those conditions were reported to the BKartA as terms recommendations and after completion of the reporting procedure were recommended for use by the ZDK in March 1975. In early 1977 the conditions were adjusted to the provisions of the AGBG, which came into force on 1 April 1977, and as from 1 April 1977 have been recommended for use as Conditions of Motor Vehicle Repairs 1977 as amended. As regards their substance, the conditions satisfy throughout the minimum requirements of the AGBG. It must certainly be considered a success if in the motor vehicle trade the provisions of the AGBG are complied with at least in certain sectors. But the ADAC was also given a test of the limits to its power when it tried to force acceptance of conditions concerning new cars which favoured customers to a greater degree and which by far exceeded the requirements of the AGBG[225].

As regards terms recommendations concerning the purchase of used cars, the ADAC has succeeded in making second-hand car dealers subject to a limited warranty although the courts permit the exclusion of any warranty (No. 216).

7 Control of standard form contracts within the framework of individual actions

310 After the codification of the AGBG this form of control should be by far the most important to the consumer, for the collective action is little suited to lastingly enhancing the consumer's legal position. Therefore the control of standard form contracts will continue to be exercised within the framework of individual actions in which the issue of the action will be contingent upon the effectiveness of a standard form contract clause.

(*a*) *Method of control*

311 Under the AGBG roughly three stages of control can be distinguished:

- — standard form contract conditions as part of the contract pursuant to Art. 2 AGBG;
- — construction of the AGBG pursuant to Art. 5 AGBG;
- — control of the content of contracts pursuant to Arts. 9–11 AGBG.

Under previous law, 'disguised control' of the content of contracts was often exercised in the first and second stages. Not only in the case of incorporation — i.e. through restrictive interpretation of a tacit submission to standard form contracts which does not apply to unreasonable and unfair clauses which the person submitting himself could not reasonably be prepared for — but also in the case of interpretation have the courts often avoided exercising overt control of the content[226]. The disguised control of the content of contracts was exercised primarily through restrictive interpretation in the case of exemption clauses, limitations of liability and restrictions of warranty, as well as the exclusion of rights to offset and of liens[227]. Another important field of

application of disguised control of the content of contracts is officially approved standard form contracts. Apparently the courts are reluctant openly to reject officially examined standard form contracts[228]. The same may also be said about court practice concerning banks' standard form contracts.

The AGBG rejects disguised control of the content[229]. That follows not only from the three-stage system of control, but also from the legislative purpose: disguised control of the content of contracts does not afford effective protection if by way of alleged interpretation of highly objectionable standard form contract clauses only restrictions are being made instead of the clause being rejected altogether and the statutory regulation being applied[230]. Disguised control of the content via incorporation or interpretation would also be inadmissible because this would restrict the field of application of the collective action which requires overt control of the content pursuant to Arts. 9–11 AGBG[231].

312 (*aa*) *Standard form contract conditions become part of a contract only* if the user upon conclusion of a contract expressly draws the customer's attention to them and enables him to take reasonable note of their subject matter, and 'provided the other party to the contract agrees to their application'. Accordingly, two declarations of intent are required, one by the user and one by the consumer. The declarations of intent concern the question of whether both parties want to incorporate standard form contract conditions into the contract. For that reason the general principles of interpretation of declarations of intent apply, Arts. 133, 157 and 242 Civil Code. Consequently, the user's and the consumer's comprehension is of vital importance. This is modified only in that the contracting party concerned must accept circumstances to be put forward against him which he might reasonably have been prepared for. Objective standards do not apply, as within the framework of the examination under Art. 2 AGBG it is not a matter of interpretation of standard form contracts themselves, but only a matter of whether standard form contracts have been *stipulated.*

313 (*bb*) According to the dominant view[232] *standard form contracts are interpreted* (Art. 5 AGBG) by *objective standards.* According to the Federal High Court's established practice[233] any objective interpretation must be based on the understanding of the average customer and the typical meaning of standard form contracts must then be determined. Basically, the will of the parties and the circumstances of an individual case do not play a part[234].

As a further maxim of interpretation, the principle of restrictive interpretation is common notably with respect to exemption clauses and clauses on limitation of liability. However, that is a dependent factor of interpretation which according to how matters stand may be of importance within the framework of objective interpretation of the will of the parties[235]. Application of the principle of restriction must not result in disguised control of the content of contracts, though[236]. In view of this danger restrictive interpretation is rejected in principle in some cases[237].

314 (*cc*) Prior to the AGBG coming into force, the *control of the content of standard form contracts* was exercised on the basis of objective criteria in a

similar way as in the case of interpretation. The courts and legal writers have pronounced themselves, though not as distinctly as in the interpretation of standard form contracts, for an approach above the individual level; that is, separated from the circumstances of an individual case. The reason given for such attitude is that standard form contracts are the object and outgrowth of an act related to the collective. Use in a concrete case is only part of a continued act typically repeating itself[238].

As under Art. 11 AGBG there is only limited scope for judgment, the question of how to look at the matter arises primarily under Arts. 9 and 10 AGBG. All are in agreement that basically the control of the content of contracts pursuant to Arts. 9 and 10 AGBG must be based on considerations extending beyond the individual. However, previous court practice cannot be fully applied to the AGBG without hesitation: even the AGBG itself distinguishes between consumers and traders as target groups. But these groups have different interests which has to be taken into account on interpretation[239].

(*b*) *Legal consequences of ambiguous standard form contracts*

315 If on interpretation pursuant to Art. 5 AGBG it turns out that the standard form contract clause in question is not unequivocal, but unclear, ambiguous or incomplete, the consequence is that where the clause was meant to put the user in a position more favourable than the statutory position that clause is inapplicable wholly or in part and the legal position is determined solely in the way more favourable to the consumer. This does not follow, though, from Art. 6 AGBG, for this article is not applicable, because it presupposes lack of incorporation or nullity, that is to say facts which cannot be present in the absence *right from the start* of any regulation in the standard form contract providing for a certain conflict situation[240].

(*c*) *Legal consequences of ineffective standard form contracts*

316 If standard form contract conditions infringe Arts. 9–11 AGBG, they are ineffective. So say the respective articles. The legal consequences of ineffectiveness follow from Art. 6, paras. 1–3 AGBG. Pursuant to Art. 6, para. 1, the contract remains in force with the exception of the ineffective clauses. The will of the parties, particularly the frequently found continued validity clause, is not what matters. The gap created through ineffectiveness is filled pursuant to Art. 6, para. 2 AGBG by the superseded statute law. This regulation is in line with previous court practice[241].

This supposedly clear legislative regulation has given rise to a great number of doubts. In legal literature it is a highly debatable point how a judge should proceed if a standard form contract clause is only partially compatible with the provisions of Arts. 10 and 11 AGBG. Many authors are of the opinion that in such cases the complete ineffectiveness of the debatable standard form contract clause should always be assumed[242]. To reduce the debatable clause to its legally admissible contents is impossible, it is claimed, because Art. 6, para. 2 AGBG provides for the method of filling gaps. However, a minority of authors basically consider it admissible to uphold the effective part of a clause[243]. Here

the authors plead the protective purpose of the AGBG to which such interpretation is at least not in contrast. Besides, the courts would have recognised such reductions prior to the coming into force of the AGBG. Art. 6, para. 2, they claim, does not say whether ineffectiveness is to be assumed *at all* and, if so, to what extent. The Act only provides for what has to be done in case a clause is *ineffective*. Some authors also take middle-of-the-road views, according to which a partially ineffective clause will be completely ineffective only if as matters stand the suspicion suggests itself that the user knew that the clause was partially incompatible with the law[244]. As far as could be ascertained, the courts have not so far taken a view on that problem.

Once ineffectiveness pursuant to Art. 6, para. 1 AGBG has been established, it remains to be clarified how Art. 6, para. 2 is to be understood. If the type of case where the statutory regulation filling the gap is unequivocal is disregarded, the problems repeat themselves if it is a matter of what has to be done where the non-cogent regulations then taking effect are ambiguous or where there is no regulation. Some people try to tackle this problem by way of interpretation[245], while others leave it at the incompleteness of the contract[246].

Pursuant to Art. 6, para. 3 AGBG, all standard form contract conditions are ineffective by way of exception if the continuation of the contract amended pursuant to para. 2 would constitute an unreasonable hardship to one of the parties. Unreasonableness should not have to be assumed as soon as individual clauses are ineffective, for Art. 6, para. 3 AGBG is an exceptional provision which takes effect only if there are special reasons[247]. As a criterion of unreasonableness previous court practice may be relied on. Accordingly, the entire contract is void if such a number of clauses is void that should they cease to exist or be replaced by statutory provisions this would alter the sum and substance of the contract[248].

2 Critical evaluation

317 The enactment of the AGBG constitutes an important step towards enhanced consumer protection against unfair standard form contract conditions. While the Act in its substantive law section largely takes up and establishes previous court practice, it contemporaneously goes beyond it, with the most important amendment being that the scope of application of the Act is different depending on whether consumers or traders are concerned. For with this the legislator has recognised that the consumer is in need of greater protection. The dual protective purpose of the Act (No. 263) permits the solution in a fairly satisfactory way of the many questions that arose during the process of legislation from the conflicting interests and objectives[249] — on the one hand advocates of a true consumer protection law, on the other hand advocates of the preservation of the unity of private law through general application irrespective of any requirements as to persons covered. No doubt, from the point of view of a committed advocate of consumer protection it would have been desirable if the AGBG had entered into force as a true consumer protection law. Many controversies and questions could have been avoided.

However, the significance of the AGBG is not exhausted in some improvements of the consumer's legal position in terms of substantive law. Rather, the

AGBG makes allowance for the development of the law, namely for the fact that the Civil Code has not succeeded in adequately balancing the interests of consumers and traders/craftsmen. The Act respects the imbalance in power between the parties and thus partially breaks away from the premise of equality of legal subjects underlying the Civil Code[250]. The Act corrects this state of affairs by partially restricting freedom of contract, which is inseparably linked with the idea of equality of legal subjects. Freedom of contract is not re-established, though, as some authors claim, as the means the legislator uses are precisely those the Civil Code repudiates on the basis of its premise[251]. This consequence is overlooked by those who aim at a reintegration in the Civil Code[252]. The premise of the Civil Code will be partially ignored should a reintegration take place. However, more than merely a matter of form is hidden beneath the controversy; namely, the problem of a special civil law governing the relationship between consumers and entrepreneurs[253]. Through the AGBG alone the legislator has not yet taken any view. He has enacted special legislation, but he has not limited its scope to consumers. The dual protective purpose makes it clear that the AGBG leaves that question undecided.

The procedural provisions of the AGBG — specifically the collective action — do not make for the desired progress, though: there are too many obstacles in the way of effective control. Doubts arise as early as in the design of the right of action which is tailored to consumer organisations based on representation (No. 6), although those are authorised by consumers to a limited extent only. The licensing or exclusion of organised interests that do not fit in with the existing notion of consumer organisations checks the development of new types of consumer organisation[254]. Another point to be criticised is the regulation of jurisdiction. The original jurisdiction of regional courts (instead of higher regional courts) prevents speedy decisions which might receive wide notice. The consequence of the general applicability of the provisions contained in the Code of Civil Procedure is that the court may review only those clauses that the parties allow it to review (Parteidisposition). Efforts to abandon this principle and to grant the judge a more comprehensive right of review in respect of the entire set of clauses failed during the process of legislation[255]. Consumer organisations especially feel the risk of the costs of the proceedings with which they are burdened to be an insurmountable obstacle. On the whole, the design of the action for standard form contract conditions gives the impression that failure was preprogrammed. Its creation is essentially due to the fact that the legislator wanted to avoid more stringent means of control. By no means has the system of the collective action been thought out sufficiently or the experience gained with the collective action in the UWG been digested[256]. However, the serious deficiencies in the procedural provisions should not obscure the fact that the development reported in respect of the Civil Code through the introduction of the collective action has now also been introduced in the law of civil procedure. The law of civil procedure comprises the consistent transformation of the basic principles of the Civil Code. The private law system is upheld by the possibilities of law enforcement granted to the individual. Beneath that is hidden the liberal conception of the state: the sum total of individual interests reflects the interest of the general public[257]. The introduction of the collective action goes to show that public welfare can (no longer) be ensured by the action of individuals, as

conflict situations experienced by the collective cannot be settled by individuals[258]. Even if the collective action — in the same way as the provisions of substantive law — undermines the principles, here the Code of Civil Procedure completely, and thus definitely, influences the development of the law, the present poor design of the collective action involves the great danger that it is opposed to more effective types of control. The legislator and jurists will for the time being have to concern themselves with solving the problems of the collective action which they themselves created. The controversy about the admission of an interlocutory injunction or about the requirements of the danger of repetition are a meaningful example.

III UNFAIR CLAUSES IN INDIVIDUAL AGREEMENTS

1 Generalities

318 Unfair clauses in individual agreements have hardly become evident so far in jurisprudential discussion and court practice[259]. Problems of legal admissibility always concerned clauses which at the same time formed part of standard form contract conditions. The AGBG is the consistent further development of this historical trend in that it limits the scope of application of unfair clauses in standard form contracts. As far as there are special means of state control they relate but to such clauses. However, the previous legal position may be changed by the legal concept provided for in Art. 1 AGBG (No. 270), which is known to distinguish between individual agreements and standard form contracts. If the courts interpret the legal concept in a narrow sense, unfair clauses in individual agreements will increasingly shift to the focal point of interest. There have not been any court decisions yet from which to judge the development, but there are trade practices in the offing which indicate growing importance. Recently the Stiftung Warentest has reported on contracts of sale concerning radios and television sets in which the seller confronted the buyer with the choice of getting the commodity cheaper but without any guarantee or at a higher price but subject to the relative guarantee[260]. Thus suppliers' attempted evasion of the mandatory provisions on guarantee under the AGBG. Art. 7 AGBG, which aims at opposing these efforts, does not apply to such cases since according to unanimous opinion the prohibition of circumvention shall not serve to influence the definition of standard form contract conditions pursuant to Art. 1 AGBG and their discrimination from individual agreements pursuant to Art. 1, para. 2 AGBG[261]. According to the legislator's intent, circumventions by way of individual agreements are admissible. Therefore control can be exercised only in accordance with the general rules of the Civil Code.

2 Possibilities of control

319 Clauses concerning liability for the quality of products are limited by the principles developed by the courts under Art. 459, para. 2 and Art. 633, para. 2 Civil Code (liability for warranted qualities) and under Arts. 476 and 637 Civil Code (no exclusion of warranties in the event of fraud, Nos. 204, 205). In the event of fraud, rescission of the entire contract pursuant to Art. 123 Civil Code can also

be imagined. As the prohibition to exclude all warranties concerned only exclusions of warranties in standard form contracts, the admissibility of such exemption clauses must be reviewed solely on the basis of Arts. 138 and 242 Civil Code. Here it is of decisive importance whether there is such a disproportion between the contractual obligations of the parties that a correction via Arts. 138 and 242 Civil Code is possible in the first place. In order that the disproportion may be determined, criteria are required that put the general clause into more concrete terms. The question arises whether or not the judgments included in the AGBG may exert an influence on individual agreements, as Art. 9 AGBG is nothing but a special version of Art. 242 Civil Code tailored to the use of standard form contracts[262]. Arts. 10 and 11 AGBG in turn put the general clause into more concrete terms. Therefore it can be imagined that the judgments contained in the AGBG are taken into account if the consumer does not get an equivalent for the exclusion of all warranties — to continue with the example mentioned. With such cases the list of clauses in the AGBG may be said to have a *general* effect extending beyond the scope of application of the Act which might be used as a criterion of judgment[263]. Here it must not be disregarded, though, that when reviewing the admissibility of the content of individual agreements the subjective will of the contracting parties must be taken into account to quite a different degree than when judicially controlling standard form contracts[264].

3 Outlook

320 It is too early yet to predict whether unfair clauses in individual agreements will become a problem similar to that of standard form contract clauses. A decisive factor against such a development is that the rationalising effect enterprises want to achieve by using standard form contracts would be lost completely if the respective sales organisations were to switch over to making nothing but individual agreements. By comparison, such contracts should gain greater significance in the retail trade. The consequence of the retailer's inferior economic starting position may be that the example described above will find followers in one way or another.

NOTES

1. Damm, JZ [1978], p. 173ff (178).
2. Chapter 6, note 37.
3. Cf. on this last Reich, ZVP [1978], No. 3, p. 236ff.
4. Brandner, §24, ref. 4; on a contradictory reasoning cf. Damm, JZ [1978], p. 173ff (178).
5. Arbeitsgruppe [1974], *Vorschläge zur Verbesserung des Schutzes der Verbraucher gegenüber AGB. Erster Teilbericht der Arbeitsgruppe beim BJM*, p. 99ff.
6. Referentenentwurf [1974], supplement 18/74, *Der Betrieb*, p. 23ff.
7. Ulmer P., *Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutz der Endverbraucher gegenüber AGB* [1974], p. 21ff.
8. Dietlein/Rebmann [1976], p. 300.

9. Reich, in ZVP [1978], No. 3, p. 237.
10. Brandner, §9, ref. 9.
11. Brandner, §9, ref. 9.
12. For instance if exemption of liability is justified by low prices, in which case the authors of the report would hardly have had an opportunity of gaining an insight into pricing.
13. Brandner, §9, ref. 9.
14. Begründung zum Regierungsentwurf — BR-Drucks. 360/75, p. 23.
15. Weick, NJW [1978], p. 11ff; Schapp, DB [1978], p. 621ff.
16. Cf. above and Weick, *op. cit.* (note 15), p. 14.
17. Weick, *op. cit.* (note 15), pp. 11/12 and Schapp, *op. cit.* (note 15), pp. 623/624.
18. Weick, *op. cit.* (note 15), p. 15; similarly Schapp, p. 624 'Wesentliche Grundgedanken'.
19. Löwe, §§8–11, refs. 28 and 19, and §9, ref. 19.
20. Graba, §9, ref. 60.
21. Löwe, §9, ref. 33, cf. also Günther NJW [1977], p. 2063.
22. A survey of court practice concerning the individual clauses may be found in Creutzig, DB [1979], p. 151ff; Hardieck, BB [1979], p. 708ff.
23. Löwe, preliminary remark §§8–11, ref. 17.
24. Löwe, preliminary remark §§8–11, ref. 18.
25. Coester-Waltjen, §10, No. 5, refs. 5 and 6.
26. Westphalen, §11, No. 5, ref. 19.
27. Coester-Waltjen, §10, No. 7, ref. 11.
28. Coester-Waltjen, §10, No. 7, ref. 12 and §11, No. 5, ref. 36.
29. Cf. Chapter 2, note 32; in general on the admissibility of price clauses in standard form contracts Bilda MDR [1979], p. 89ff.
30. Verordnung PR No. 3/73 of 10 May 1973 (BGBl I 461).
31. Löwe/Westphalen, §11, No. 1, ref. 2.
32. Hensen, §11, No. 1, ref. 3.
33. Coester-Waltjen, §11, No. 1, ref. 8.
34. Löwe/Westphalen, §11, No. 1, ref. 4.
35. Löwe/Westphalen, §11, No. 1, ref. 6.
36. BGH BB [1980], p. 906.
37. Coester-Waltjen, §11, No. 2, ref. 6.
38. Coester-Waltjen, §11, No. 2, refs. 9 and 10.
39. Coester-Waltjen, §11, No. 2, ref. 2 with references in footnote 6 and Hensen, §11, No. 2, ref. 7.
40. Coester-Waltjen, §11, No. 2, ref. 15.
41. BGHZ 38, p. 122 (129); BGH DB [1974], p. 379ff [380].
42. On this see in detail Coester-Waltjen, §11, No. 2, refs. 25–27.
43. Not resolved by BGH NJW [1970], p. 29 (31).
44. Coester-Waltjen, §11, No. 4, ref. 15 with references.
45. Coester-Waltjen, §11, No. 4, ref. 17; also Löwe/Westphalen, §11, No. 4, ref. 5.
46. Hensen, §11, No. 6, ref. 8.
47. The distinction is still made by the dominant view, cf. Ballhaus in RGRK-BGB §338, note 2; Soergel/Siebert/Reimer Schmidt, §339, note 2;

differently Lindacher, p. 66ff.

48. Coester-Waltjen is in favour of inclusion, §11, No. 6, ref. 10; against it, Westphalen, §11, No. 6, ref. 9, however, without considering this to be a problem.
49. Coester-Waltjen, §11, No. 5, ref. 15; Westphalen, §11, No. 5, refs. 5 and 6; Hensen, §11, No. 5, refs. 6 and 7; cf. Chapter 6, note 226.
50. Coester-Waltjen, §11, No. 6, ref. 19 and Westphalen, §11, No. 5, ref. 6.
51. Hensen, §11, No. 8, ref. 3.
52. Ulmer, §23, ref. 48.
53. Cf. examples in Hensen, §11, No. 14, ref. 2.
54. Dürr, BB [1978], p. 1546ff.
55. Reich, ZVP [1978], No. 3, p. 239.
56. Cf. Brandner, §9, ref. 25.
57. Cf. Brandner, §9, ref. 25.
58. See on the exclusion of supply contracts from the AGBG, Brandner, §9, ref. 26.
59. Trinkner, §1, ref. 8; Palandt/Heinrichs, §1 AGBG.
60. Stein, §1, ref. 14.
61. So Heinrichs, NJW [1977], p. 1505ff (1506).
62. Ulmer, §1, ref. 14; Tilmann ZHR [1978], p. 52ff (59).
63. So Schmidt-Salzer, NJW [1977], p. 129ff (130, 131).
64. So Schmidt-Salzer, *op. cit.* (note 63), p. 132.
65. Reich, ZVP [1978], No. 3, p. 241.
66. Ulmer, §1, ref. 18ff; Koch-Stübing, §1, ref. 27; Jäger, NJW [1979], p. 1569ff (1571, 1572).
67. Reich, *Markt und Recht*, p. 181ff.
68. Reich, ZVP [1978], No. 3, p. 242.
69. Westphalen, DB [1977], p. 943ff; Löwe, NJW [1977], p. 1328ff; Heinrichs, NJW [1977], p. 1505f; Wolf, NJW [1977], p. 1937ff; BGH NJW [1977], p. 624ff; OLG Celle NJW [1978], p. 326ff (not final); AG Passau BB [1978], p. 121ff; Braun BB [1979], p. 689ff.
70. BGH NJW [1977], p. 624, for a confirming view, see Jäger, NJW [1979], p. 1569ff (1572–1575).
71. OLG Celle NJW [1978], p. 326; with its decision on appeal the BGH has left the question in dispute undecided, BGH NJW [1979], p. 367ff.
72. Brandner, §8, refs. 1 and 5.
73. Ulmer, §2, refs. 6 and 7.
74. Cf. the survey and examples of conflicts in Tilmann, *op. cit.* (note 62), p. 60.
75. Enumeration in Brandner, §24, ref. 17.
76. BGH WM [1976], p. 960ff; cf. on this Brandner, §24, refs. 6–11.
77. Cf. on this Ulmer, Introduction refs. 42–46; Löwe, preliminary remark preceding §§13–22, refs. 1–9.
78. Bekanntmachung No. 39/73 of the BKA of 23 August 1973; BAnz No. 167 of 6 September 1973.
79. Cf. Löwe, preliminary remark §§8–11, ref. 45; Graba, preliminary remark regarding §§9–11, ref. 16; Hensen, §13, ref. 7; Brandner, §9, ref. 49; differently Reuthe/Rink, *Kommentar zum GWB*, ed. 3, §2, ref. 41.

80. Rinck, WuW 74, p. 291ff (298, 299); Konditionenkartell deutscher Färbereien und Chemisch-Reinigungsbetriebe, Bundeskartellamt — TB [1959], p. 20.
81. In practice the terms cartel has largely been replaced by the newly adopted terms recommendation of the German Textile Dry Cleaners; on this, see Chapter 6, Nos. 227 and 229.
82. Version of 3 August 1973 BGB I, p. 917, 925.
83. Bericht des BKA [1977], BT-Drucksache 8/1925, pp. 15/16.
84. Cf. Wronka, BB [1976], p. 1581 (1582).
85. Reiseveranstaltungsverträge 94/76 BAnz No. 210 of 5 November 1976; Reparatur von Kfz 39/77 BAnz No. 83 of 3 May 1977; Verkauf von Kfz 51/77 BAnz No. 108 of 14 June 1977; Reparatur von Radio und Fernsehen 99/77 BAnz No. 188 of 6 October 1977; Verkauf von Radio und Fernsehen 111/77 BAnz No. 218 of 23 November 1977; Verkauf von Möbeln 33/77 BAnz No. 71 of 15 April 1977.
86. Cf. Bericht des BKA 77, *op. cit.* (note 83), p. 15 and pp. 181–183; reproduction of the recommendations approved in 1977.
87. Cf. in general Vassel, *Einflußnahme des Staates auf die Ausgestaltung von AVB* [1971].
88. Prölss/Schmidt/Sasse, *Kommentar zum VAG*, ed. 7 [1974], note 4 to §8.
89. Prölss/Schmidt/Sasse, VAG, note 9c to §81.
90. Vassel, p. 31 with further references.
91. Cf. BVerfGE 8, p. 274ff (327).
92. Prölss/Schmidt/Sasse, VAG, note 2 to §81a.
93. RGBl [1940], I, p. 1543.
94. On this in detail Weber, ZVersWiss [1963], p. 79ff.
95. So Weber, *op. cit.* (note 94), p. 83; cf. also Vassel, *op. cit.* (note 87), pp. 42–45.
96. Prölss/Schmidt/Sasse, note 12 to §8 VAG.
97. Cf. in detail Fromm/Goldberg, VAG, *Kommentar* [1966], note 2 to §10 VAG: Berliner/Fromm, *Kommentar*, ed. 4 [1932], notes 3–10 to §10 VAG.
98. So Koenige/Peterson, ref. 1 to §21 VAG, *Kommentar zum Gesetz über die privaten Versicherungsunternehmen* of 12 May 1901, ed. 3 [1927]; differently Prölss/Schmidt/Sasse, VAG, preliminary remark III 2; cf. also in detail on the problem Vassel, pp. 72/73.
99. Cf. the summary in Bruck/Möller, *VVG Kommentar*, ed. 8 [1961], Vol. 1, Introduction note 46 and Prölss/Martin, *VVG Kommentar*, ed. 21 [1977], preliminary remark I 1a; in detail Vassel, p. 79ff.
100. For instance, §§15a, 34a, 42 VVG.
101. Cf. Vassel, p. 79 on the mandatory and p. 82 on the semi-mandatory provisions of the VVG.
102. In detail Vassel, p. 87ff.
103. Cf. the examples in Prölss, §8 VAG, note 11 Cc.
104. Cf. on this Vassel, p. 95ff.
105. Brandner, §9, ref. 47.
106. Cf. on this last Helm, NJW [1978], p. 129ff.
107. Brandner, §9, ref. 47; Huffner VersR [1974], p. 617ff (622); for a guarded

attitude, see BGHZ 52, 86ff and BGH MDR [1973], p. 999 (1001).
108. Vassel, pp. 53/54.
109. Vassel, p. 54ff with a treatment of the pertinent cases.
110. Vassel, p. 57ff.
111. For an exhaustive enumeration see Szagunn/Neumann/Wohlschieß, *Kommentar zum KWG*, ed. 3 [1976], §6, ref. 2.
112. Reischauer/Kleinhans, *Kommentar zum KWG*, as of 38th instalment of November [1977], §6, ref. 4 and Schork, *Kommentar zum KWG* [1965], §6, ref. 6.
113. Differently, no doubt, Möhring, NJW [1974], p. 1689ff (1690) with reference to Reischauer/Kleinhans, §6, note 5, who does not make any statement with respect to this.
114. Schork, §6, ref. 17.
115. Bähre/Schneider, *KWG Kommentar*, ed. 2 [1976], §6, note 3.
116. Reischauer/Kleinhans, §6, ref. 14.
117. BGBl [1972], I, p. 2097ff.
118. On this Lehmann/Schäfer, *Kommentar zum Bausparkassengesetz*, ed. 2 [1977], Introduction II, p. 36ff.
119. Lehmann/Schäfer, §3, note 3.
120. Lehmann/Schäfer, §3, note 6.
121. Cf. Lehmann/Schäfer, §3, note 6.
122. Lehmann/Schäfer, §9, note 4 with a list of possible dangers.
123. Lehmann/Schäfer, §9, note 5.
124. Cf. on this Bähre/Schneider, note 2 to §46 KWG; Szagunn/Neumann/Wohlschieß, note 3 to §46 KWG.
125. Lehmann/Schäfer, §5, note 4.
126. Cf. on this Lehmann/Schäfer, §8, note 6.
127. Cf. also Lehmann/Schäfer, §5, note 4.
128. Lehmann/Schäfer, §3, note 6.
129. Barlet/Karding/Fleischmann, *Hypothekenbankgesetz*, Kommentar, ed. 2 [1964], §15, note 2.
130. Barlet/Karding/Fleischmann, §4, note 6c; Hofmann, *Hypothekenbankengesetz* [1964], §15, note 2.
131. Baur, *Investmentgesetze*, Kommentar [1970], note 2c to §2 KAAG, p. 101.
132. Printed in Baur, p. 629ff, as of 1970.
133. Cf. Baur, §15, VI, p. 209.
134. On the credit business cf. Bähre/Schneider, §6, note 4 with references from court practice with respect to the insurance business; Prölss/Schmidt/Sasse, VAG note 4 preceding §10 BAG with references from court practice; cf. Chapter 5, item 188.
135. In detail on this Chapter 5, item 188.
136. Cf. Gärtner, *Privatversicherungsrecht* [1976], pp. 26, 27, 257.
137. Gärtner, *op. cit.* (note 136), p. 23.
138. Gärtner, *op. cit.* (note 136), p. 25.
139. Gärtner, *op. cit.* (note 136), p. 244.
140. Gärtner, *op. cit.* (note 136), p. 260.
141. Gärtner, *op. cit.* (note 136), 252 and Chapter 6, item 232.

142. Gärtner, *op. cit.* (note 136), pp. 250, 260.
143. Prölss/Schmidt/Sasse, preliminary remark IV, 1.
144. Hensen, §13, ref. 1.
145. Cf. details in Hensen, introduction preceding §13, refs. 7–12.
146. Hensen, Introduction preceding §13, ref. no. 17.
147. On the course of the legislative procedure, Hensen, Introduction §13, refs. 13–15; Löwe, preliminary remark preceding §§13–22, refs. 6–9.
148. Roland von Falckenstein: *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* (1977); abridged version published in ZVP [1977], p. 172ff.
149. BGH of 30 June 1972 GRUR [1973], 78 (79).
150. BGH, *op. cit.* (note 149); Palandt-Heinrichs, note 4a bb to §13.
151. Cf. on this Schlosser, §13, ref. 23; Löwe, §13, ref. 68; Baumbach/Hefermehl, §13 UWG, ref. 18; Pastor, *Wettbewerbsprozeß*, ed. 2 [1973], p. 415ff (417, 418).
152. BGHZ 42, 210ff and BGHZ 50, 325ff.
153. Schlosser, §13, ref. 23; differently Baumbach/Hefermehl, §13 UWG, ref. 18, who believes that the protection of consumer interests as an additional task is not sufficient.
154. Schlosser, §13, ref. 24, also counts among those the tenants association and the ADAC, where the status of a consumer association may be doubted at least in the case of the ADAC.
155. So BGH GRUR [1973], 78 (79); Baumbach/Hefermehl, §13 UWG, ref. 16; Pastor, p. 404ff; likewise Palandt/Heinrichs, note 4a dd to §13; Hensen, §15 ref. 2; differently Schlosser, §13 ref. 19.
156. So Schlosser, §13, ref. 29.
157. BGH of 12 July 1957 GRUR [1957], p. 606ff (607).
158. So Palandt/Heinrichs, note 4b bb to §13; Löwe, §13, ref. 79.
159. Baumbach/Hefermehl, §13, ref. 14.
160. BGH GRUR [1965], p. 485ff (486).
161. So Palandt/Heinrichs, note 4b bb to §13.
162. On this in addition Löwe, §13, refs. 78 and 79.
163. Schlosser, §13, ref. 29.
164. Schlosser, §13, ref. 31.
165. Cf. Bericht des Rechtsausschusses in BT-Drucksache 7/5422, p. 11 on §13.
166. So Schlosser, §13, ref. 13 and Löwe, §13, refs. 83, 85.
167. Tilmann, ZHR [1978], p. 55.
168. Schlosser, §13, ref. 32; Löwe, §13, ref. 57; Hensen, §13, ref. 23.
169. Cf. Tilmann, *op. cit.* (note 167), pp. 55, 67.
170. Reich, in ZVP [1978], No. 3, p. 245.
171. Hensen, §13, ref. 4; Koch/Stübing, §13, ref. 13.
172. Löwe, §13, ref. 5; Koch/Stübing, §13, ref. 12, contradictory in so far as, on the one hand, he wants to apply the concept of standard form contracts under §1 AGBG, and on the other hand he considers threatening use to be sufficient.
173. Schlosser, §13, ref. 33; also Reich, ZVP 78, No. 3, pp. 245, 246.
174. Hensen, §13, ref. 3.

175. Schlosser, §13, ref. 34.
176. Löwe, §13, refs. 20 and 21; cf. also Schlosser, §13, ref. 34 Palandt/Heinrichs, note 2b to §13; differently, no doubt, Hensen, §13, ref. 14.
177. Cf. on the history Löwe, §13, ref. 20.
178. Schlosser, §13, ref. 35.
179. Baumbach/Hefermehl, UWG, §13, ref. 4.
180. Schlosser, §13, ref. 35; cf. also Löwe, §13, ref. 2.
181. Löwe, §13, ref. 9 with reference to the UWG and §1004 BGB.
182. Schlosser, §13, refs. 36 and 56.
183. OLG Saarbrücken, Landgericht Bückeburg, AG München BB [1979], 705ff, with critical note by Löwe, pp. 707/708.
184. Schlosser, §13, ref. 41; Löwe, §13, refs. 36 and 37; Palandt/Heinrichs, §13, note 2c.
185. Schlosser, §13, ref. 38; differently Löwe, §13, ref. 11 and Palandt/Heinrichs, note 2d to §13.
186. Schlosser, §13, ref. 44; differently Hensen, §13, ref. 12ff.
187. Cf. Schlosser, §13, refs. 45–49, Löwe, §13, refs. 7 and 8.
188. See above and Schlosser, §13, ref. 44.
189. Löwe, §13, ref. 6 and Sieg, VersR [1977], p. 492ff; for a sceptical view see Helm, NJW [1978], p. 129ff (p. 133, footnote 42); cf. also Schaefer, VersR [1978], p. 4ff.
190. Schlosser, §13, ref. 59; Hensen, §13, ref. 45.
191. Hensen, §13, ref. 48; Löwe, §15, ref. 11; unclear Koch/Stübing, §13, ref. 32.
191a. As here LG Berlin of 12 July 1979 AZ 26 0 153/79.
192. Hensen, §15, ref. 13.
193. Hensen, §15; Löwe, §15, ref. 19.
194. Schlosser, §13, ref. 10; Hensen, §15, ref. 12; Löwe, §15, refs. 19ff.
195. OLG Düsseldorf BB [1978], p. 1433 with note by Löwe; on this in addition Koch BB [1978], p. 1638 and Hensen DB [1978], p. 2207ff.
196. Hensen DB [1978], p. 2208.
197. OLG Düsseldorf BB [1978], p. 1433.
198. Hensen, DB [1978], p. 2208 and Löwe, BB [1978], p. 1434.
199. Löwe §17, refs. 33ff and §21, refs. 20ff; Schlosser, §13, ref. 35 and §21, ref. 6; differently Gerlach, *Münchener Kommentar*, Allgem. Teil des BGB §13, AGBG ref. 23; Koch/Stübing, §13, ref. 19 and §21, ref. 15; Hensen, §13, ref. 58 and §21, ref. 4; Palandt/Heinrichs, §21 AGBG, note 3c.
200. BJM Dr. Vogel in his speech of 15 September 1978 on the occasion of the opening of the Verbraucherforum in Darmstadt-Wixhausen.
201. Schlosser, §13, ref. 14.
202. Koch, BB [1978], p. 1639.
203. Gerlach, *Münchener Kommentar*, §15, ref. 22; OLG Stuttgart 2 W 33/78 of 15 November 1978.
204. Schlosser, §13, refs. 12 and 15; Hensen, §15, ref. 4.
205. Schlosser, §16, refs. 1, 2 wants to extend the field of application to all instances of conditions approved under public law.
206. Löwe, §17, ref. 1.
207. Schlosser, §18, ref. 1; Löwe, §18, ref. 1.

208. Schlosser, §20, ref. 2; Hensen, §20, ref. 9; Löwe, §20, ref. 11.
209. Cf. basically Creutzig, NJW [1979], pp. 20, 21; also Hardieck, BB [1979], p. 708.
210. On this Löwe, §19, ref. 1.
211. On this Damn ZRP [1978], p. 167ff (170).
212. Löwe, §22, ref. 1.
213. Hensen, §22, ref. 6ff.
214. According to the information given by the VZ of Baden-Württemberg all lawsuits under §13 AGBG have been won (as of late 1979).
215. For a guarded attitude as far as that goes Löwe, §22, ref. 2.
216. Hensen, §22, ref. 22.
217. Below 5, items 131, 132; LVG Hamburg VersR [1953], p. 313ff.
218. So Prölss/Schmidt/Sasse for the insurance business, §81 VAG note 14 III.
219. Thus the amtliche Begründung zu §3 BSpKG cited in Lehmann/Schäfer, §3, p. 70.
220. Prölss/Schmidt/Sasse, §81 VAG note 14 III; the special powers of the VAG §81, para. 3, §81a, sentence 3, §83, para. 2, sentence 3, §87, para. 2, sentence 2 are repealed by §20 VwVG.
221. Barlet/Karding/Fleischmann, §3, note 2, where it remains doubtful whether §50 KWG is to be applicable subsidiarily.
222. Baur, note 2c to §2 KAAG, p. 102.
223. Prölss/Schmidt/Sasse, §81a VAG, note 1.
224. Löwe, §17, ref. 29.
225. Cf. Schmitz DAR [1975], p. 141ff and Nachricht der ADAC Pressestelle ND 18/77 of 17 February 1977.
226. Löwe, §5, ref. 2.
227. Löwe, §5, ref. 6.
228. Löwe, §5, ref. 7.
229. Löwe, §5, ref. 2; cf. also Brandner, §9, ref. 33; Ulmer, §5, refs. 2, 13, 18.
230. Löwe, §5, ref. 6.
231. Löwe, §5, ref. 6.
232. Löwe, §5, ref. 4; Ulmer, §5, ref. 6.
233. BGHZ 7, p. 365ff (368); BGHZ 17, p. 1ff (3) and BGHZ 22, p. 109ff (113); BGHZ 33, p. 216ff (219); BGH WM [1974], p. 515ff.
234. Löwe, §5, refs. 4, 5; Ulmer, §5, ref. 7.
235. Ulmer, §5, ref. 12.
236. Ulmer, §5, ref. 13.
237. Löwe, §5, ref. 6.
238. References from literature and court practice in Brandner, §9, ref. 63.
239. Brandner, §9, ref. 66.
240. Löwe, §5, ref. 10.
241. Löwe, §6, ref. 6 with reference to BGH BB [1972], p. 856.
242. Schlosser, §6, ref. 9; Löwe, §6, ref. 2; Koch/Stübing, §9, ref. 36; Stein, §5, ref. 12; Palandt/Heinrichs (ed. 38), preliminary remark, §8 AGBG note 36.
243. Ulmer, §6, ref. 20; §9, ref. 93; but Hensen, §11, No. 5, ref. 22; §11, No. 7, ref. 30; §17, ref. 16.
244. On this Götz, NJW [1978], p. 2223; so expressly Kötz, NJW [1979],

p. 785ff (789).
245. Schlosser, §6, ref. 11; Löwe, §6, ref. 7 in exceptional cases; Stein, §6, ref. 9 in atypical contracts.
246. Löwe, §6, ref. 6; Ulmer, §6, refs. 22 and 23.
247. Löwe, §6, ref. 10; Ulmer, §6, ref. 28.
248. Löwe, §6, refs. 13 and 14; Ulmer, §6, ref. 32.
249. On this for a full treatment Ulmer, Introduction, refs. 33ff.
250. Damm, JZ [1978], p. 176.
251. Damm, JZ [1978], p. 177; Braun, BB [1979], p. 689ff (690).
252. Tilmann, ZHR [1978], pp. 53–57.
253. For a negative view, see Ulmer, *Gutachten* [1974], p. 21ff; Westermann, ACP [1978], p. 150ff (168); Lieb, AcP [1978], p. 179; Tillmann, ZHR [1978], p. 53; for a supporting view, see Reich, ZRP [1974], p. 189ff; *id.*, *Markt und Recht*, p. 190ff; Damm, JZ [1978], p. 176.
254. Cf. Damm, ZRP [1978], p. 167ff (169).
255. Schlosser/Coester-Waltjen/Graba, *Verbraucherschutz, ein Modellversuch* [1975], p. 269ff.
256. Cf. Damm, ZRP [1978], pp. 167/168.
257. Habermas, *Strukturwandel der Öffentlichkeit*, p. 145ff.
258. Damm, ZRP [1978], p. 169.
259. Lieb, ACP [1978], p. 179ff (220ff).
260. Zeitschrift Test, 1978, No. 4, p. 11.
261. Löwe, §7, ref. 5.
262. Löwe, preliminary remark §§8–11, ref. 23.
263. Cf. on this also Lieb, *op. cit.* (note 259), p. 224.
264. See also Lieb, *op. cit.* (note 259), p. 223.

CHAPTER 8

Consumer Credit

I INTRODUCTION TO THE PROBLEMS

321 Consumer credit or loan for consumption is winning growing popularity in the Federal Republic of Germany. In 1974, consumer credits totalled about DM 50 billion, practically double the amount in the same period of 1969. In late 1976, the aggregate of consumer credits was DM 69 billion as compared with about DM 106 billion in mid-1979. The average debt of households was DM 800 *per capita* in late 1974, while in 1976 it increased to DM 1000. In the United States it runs to double that amount. In 1979, the average debt of households was reported at DM 5500. The net increase in the debt rate was for the first time higher than the net increase in savings. The reasons for the great expansion of consumer credit are primarily the general expansion of economic activity after the Second World War. Specifically, it is attributable to three causes. First of all manufacturers and traders, as well as suppliers of services (particularly more expensive services), try to facilitate the sale of their products by offering financing. Certain consumer goods, for instance motor vehicles and furniture, may be sold only through borrowing, since the customer is unable otherwise to acquire the object in question for lack of sufficient cash funds. Another reason is the strong drive for expansion of commercial banks and savings banks. While the consumer credit business was formerly handled mainly by instalment credit institutions, in the 1960s most commercial banks, credit cooperatives and savings banks joined the consumer credit business on a considerable scale. As early as 1974 consumer credit business accounted for 10% of total business in banking (excluding housing). Through higher credit lines, simple forms of credit and cashless transfers, as well as through the introduction of cheque cards, consumer credit expanded even further. Lastly, the consumer's altered behaviour with respect to credit should be mentioned. While in the past credit was asked for only in exceptional cases, for instance to finance the construction of a house, consumers nowadays are getting used to acquiring all types of goods of higher value with the aid of credit. Increasing incomes seemed to make the repayment of debts incurred by consumers easy. However, in view of stagnant real incomes and job insecurity this trend has been declining over the past few years.

The credit behaviour of consumers also has consequences affecting the business cycle and the distribution of wealth, particularly in periods of recession: the

loss of a job, for instance, often means that the consumer will be unable to repay the debts incurred by him and as a result will suffer social hardship even more than would otherwise have been the case[1]. From the point of view of *social policy*, consumer credit has obvious drawbacks. A low income often runs parallel with a high debt rate and 'tough' credit terms, for instance in the case of foreigners, elderly people and socially marginal groups[2]. Here even special types of credit developed, for instance credit brokerage (No. 342).

There is a variety of types of consumer credit. In terms of its economic significance, *credit by banks for unrestricted use* plays a dominant part. This credit may be granted by way of an overdraft on a wage or salary account or by way of a special credit contract repayable in instalments. It is characteristic of this type of credit that the customer may dispose freely of the loan amount. The delivery of cheque forms and cheque cards constitutes an indirect form of consumer credit, although a cheque presupposes appropriate funds on an account (No. 340). Consumer credit by banks meanwhile accounts for about nine tenths of all forms of consumer credit. In addition there are still other types of credit which will be dealt with under legal aspects in the course of this study, e.g. instalment transactions, debtor-creditor-supplier agreements, sales of services, and what is known as credit brokerage.

With respect to the legal regulation of consumer credit in the Federal Republic of Germany it is important that there is no *uniform law* governing consumer credit unlike, for instance, in Great Britain or in the respective EC draft directives on consumer credit. Rather, depending on the legal form of the credit, there are different legal regulations that make allowance for the protective interests of the consumer in very different ways. This fragmentation of the law of consumer credit has lent itself to numerous abuses and has given rise particularly to various forms of evasion. It may be noted that in practice those types of credit regulated more strictly for the sake of protecting the consumer are avoided by creditors in favour of types regulated less strictly which appear to be 'more favourable' from both the economic and the legal point of view[3]. So far, only the first step towards a reform has been taken in the Federal Republic of Germany. Therefore the following statements essentially reflect the legal *status quo* in legislation and court practice.

II TYPES OF CONSUMER CREDIT IN LEGISLATION (REGULATED AGREEMENTS)

1 Instalment transactions

(*a*) *Concept of the instalment transaction*

322 Since 1894 there has been a special statutory regulation that tries to introduce into the law of contract considerations of consumer protection. The AbzG is the first consumer protection act in Germany and apart from amendments it has survived time and continues in force today[4].

To apply the provisions on consumer protection included in the AbzG there must be an *instalment transaction*. According to court practice, for an

instalment transaction pursuant to Art. 1 AbzG only two things are required: a *contract of sale* for a movable thing and an agreement on payment of the purchase price in *instalments*. The other features mentioned in the Act, namely delivery and reservation of the right of rescission, do not belong to the legal concept of an instalment transaction[5].

From this it may be deduced that in the first instance an instalment transaction is a *bilateral* relationship between seller and buyer. In what way 'trilateral' relationships through the involvement of an instalment credit institution (debtor-creditor-supplier agreements) also come under the AbzG will be investigated later (No. 328ff). Lastly, the AbzG applies only to contracts of sale in the strict sense, and not to contracts for the supply of services, contracts to manufacture, brokerage agreements and contracts for professional services. As will be demonstrated later (No. 335), it is here that there are considerable gaps in consumer protection. There are certain exceptions with respect to mixed-type contracts which will be dealt with later. The contract must have been concluded for a *movable thing*, so that real property transactions and related financing agreements do not come under the AbzG. The sale must concern movable things, including *aggregates of things* (Sachgesamtheit)[6]. Payment of the purchase price in *instalments* must clearly be distinguished from *cash transactions*, which do not come under the AbzG. In individual cases differentiation is difficult. It is a cash transaction and not an instalment agreement if a down payment is made and the balance will be paid on delivery, either in cash or otherwise, or if a cheque or bill of exchange is issued for the sum total of the purchase price or for a down payment and the residual amount[7]. Under German law, an instalment payment is deemed to exist if the purchase price is paid in two or more instalments. If the customer effects a down payment and pays the rest later, the courts do not consider this to be an instalment transaction[8]. How far the successive delivery of aggregates of things like an encyclopedia constitutes an agreement to pay in instalments is still highly controversial[9]. In the case of delivery of a book in several volumes or several sets of bed linen at intervals against payment on delivery, the Federal High Court assumes that this does not constitute an instalment transaction, because each volume and each set can be acquired separately[10]. With respect to the purchase of an encyclopedia which is delivered and paid for volume by volume, there is no established court practice[11].

(*b*) *Requirements as to form and information*

323 The AbzG in its original version did not initially include any provisions on the form of the contract and on the information the seller must give to the buyer upon conclusion of an instalment sale. However, since instalment transactions involve a special risk to the consumer, tie up his funds for a long time and involve specific costs, reform acts of 1969 and 1974 appropriately amended Art. 1a of the AbzG[12]. This is in conformity with the reform proposals submitted to the German Bundestag, for instance by the parliamentary group of the Social Democrats in 1964. The buyer's declaration to enter into a contract must now be in writing, i.e. it must be signed by him. The written instrument must include the following information to be furnished by the seller: cash price,

instalment price, instalment plan and total charge for credit. What is of special importance is that since 1974 it has been made a contractual obligation to state the total charge for credit, so as to enable the buyer (consumer) to ascertain the actual interest payable by him. The total charge for credit shall not only be computed from the normal monthly rates of interest charged by banks, but shall also comprise costs, commissions and insurance incidental to the instalment agreement[13]. These statements are intended to enable the buyer to reconsider his decision to enter into the contract and, if necessary, to look for more favourable credit terms.

The legal consequences of infringements of the formal requirements and of omitted, misleading or false statements stem from Art. 1a of the Act. The contract does not take effect immediately, but the consumer has the possibility of concluding a new contract without interest charges if he wants to keep the thing delivered to him[14]. The buyer continues to have a right to pay by instalments, but the instalments are reduced corresponding to the cash price.

Art. 1a, paras. 4 and 5 of the AbzG contain exceptions to the applicability of this provision, particularly in the case of mail-order transactions and that of sellers engaged exclusively in instalment sales.

(c) *The right of cancellation of the consumer buying on the instalment system*

324 One of the central issues of consumer policy was the introduction of a right of cancellation (Widerrufsrecht) in instalment transactions, related transactions and door-to-door sales[15]. Door-to-door sales have already been dealt with (Nos. 111ff). Here only the *right of cancellation specific to instalment sales*, which the legislator introduced by the Act of 15 May 1974, will be mentioned.

Pursuant to the amended version of Art. 1b AbzG, the buyer's declaration to enter into a contract becomes effective only if he does not cancel it in writing within one week. The Act then regulates in detail the requirements for the right of cancellation, the observance of the cooling-off period , the seller's duty to instruct the buyer as to his right of cancellation and questions of the burden of proof. The purpose of the statutory provisions is as follows.

The right of cancellation first of all applies only to *instalment transactions* in the sense described above, to circumventing agreements (Umgehungsgeschäfte) that will be dealt with below, for instance debtor-creditor-supplier agreements, and to contracts for successive delivery, e.g. contracts for dictionaries, membership in a book-of-the-month club, and magazine subscriptions[16]. It *does not apply to debtor-creditor-supplier agreements for services* and not to *personal credits by banks*. There is no right of cancellation in credit brokerage. It does not matter whether the transaction is entered into on the doorstep or at the seller's business premises.

The cooling-off period is *one week*. It begins to run only after the written instrument with the instruction as to the right of cancellation has been submitted and signed by the consumer. The instruction must be unequivocal, which is not the case if it is combined with a waiver of the right of cancellation[17]. If there has been no instruction, the right of cancellation lapses only after delivery of the article bought and full payment of the purchase price.

Cancellation must be in writting; it has not yet been decided whether an *implied* act of cancellation is also possible, for instance by return of the thing purchased[18].

The Act likewise regulates in detail the onus of proof as to instruction and observance of the cooling-off period. The seller must furnish proof as to the time at which he delivered a copy to the buyer. The buyer must furnish proof as to the timely posting of the declaration of cancellation.

Special regulations apply to the mail-order trade, since here the right to return a thing is 'offset' against the right of cancellation. This presupposes that *no* verbal contract negotiations were conducted between the seller and the buyer, not even through so-called 'omnibus orderers'.

Under current German law the problem is how to prevent *circumvention of the right of cancellation*[19]. Some typical features are as follows. First of all it is claimed that a transaction does not constitute an instalment transaction or related transaction. Here the customer may be helped in so far as the burden of proving that the transaction is not an instalment sale is on the seller[20]. Under the law of unfair competition, it is meanwhile possible to prohibit such declarations by the seller as unfair and misleading acts of competition[21]. A second possible case of circumvention is that the seller effects delivery only after the cooling-off period has *elapsed*. In this case the customer cannot do anything, since the cooling-off period runs irrespective of the delivery of the thing, but is contingent upon the delivery of the written instrument and instruction[22]. The right of cancellation does not entitle the customer to use the thing so to speak gratuitously for one week. A third case of circumvention is *manipulation concerning the date*, e.g. omitting the date, dating forward or dating back. In this case the customer is helped by the regulation on the burden of proof, which does not take effect though if the written instrument was dated forward and the customer subsequently claims that this had been done unlawfully. The outward appearance of the instrument speaks against the buyer; often he will be unable to prove manipulation. A fourth case of circumvention may occur owing to the fact that the seller uses the services of a *credit broker* and concludes the contract through him. In such a case the customer may be helped by the presumption of a circumventing agreement within the meaning of Art. 6 AbzG. A fifth case exists if a customer is forced to *waive* his right of cancellation. Such an arrangement is not permissible pursuant to Art. 1b, para. 6 AbzG, but applies only to the case prior to the conclusion of the contract. Subsequent waiver is, of course, possible. However, if it is combined with the conclusion of a contract, it must be assumed in agreement with the regional court of Berlin[23] that the buyer was not duly instructed as to his right of cancellation. Lastly, a sixth case exists if the seller claims that he did not receive the declaration of cancellation in time. Here is should be pointed out that the cooling-off period is deemed to have been kept if the declaration of cancellation was posted in time (which the customer has to prove), for instance by registered letter[24]. The letter must have been received by the seller.

The law cannot help the consumer where he fails to make use of his right of cancellation because of inactivity, ignorance of the law or other forms of indolence. Then the contract remains in force, unless other conditions of avoidance or nullity exist.

By laying down the conditions of return of objects in Art. 1d, the Act tries to ensure that the buyer is not restrained indirectly from exercising his right of cancellation because of high compensation and replacement obligations. After having exercised his right of cancellation he is only liable to return the thing; he is not liable to make good a depreciation in value, he is merely liable to pay for the value derived from use.

(*d*) *Duties of the parties to return*

325 The AbzG in its original version regulated primarily the legal circumstances that prevailed if the seller terminated the contract by rescission or by any other means, particularly in consequence of default in payment on the part of the buyer. To this end Arts. 1, 2, 5 AbzG contain detailed regulations based on the fundamental idea that the buyer should not continue paying the purchase price if the article of purchase is taken away from him through rescission or otherwise, i.e. that the article of purchase is not taken away on conditions less favourable than those permitted under the AbzG[25]. We shall not go into the details of these provisions here, since they are hardly important in practice and in particular may be evaded through other means of providing security, e.g. by assignment of wages. For the buyer, another drawback of the regulation under the AbzG is that he cannot enforce his theoretically existing claim for refund of the down payment and the instalment payments already effected as that claim conflicts with the seller's claim for compensation and decrease in value for use of the thing. Also, after withdrawal from the contract, the buyer as a rule remains liable for payment of arrears[25a].

(*e*) *Jurisdiction*

326 Arts. 6a and 6b of the AbzG as amended in 1969 and 1974 forbid jurisdiction clauses and provide for jurisdiction at the buyer's domicile for disputes arising out of instalment transactions. This is to preclude that the buyer, in the case of disputes arising out of the contract or disputes about whether or not a right of cancellation exists or the contract is void, may be sued at the seller's domicile, which in actual fact would prejudice the buyer's rights. The jurisdiction regulation also applies to summary procedures on bills of exchange[26].

(*f*) *Scope of protection*

327 Art. 8 AbzG lays down the scope of protection to the effect that buyers who are registered as traders are not protected. This has several consequences. Art. 8 in the first instance formulates the principle of consumer protection, i.e. of putting the consumer (buyer) in a more favourable position. The concrete need for protection is not taken as a criterion, though, so that any person who carries on a trade or business or performs professional services and is not or cannot be registered in the commercial register is also given the protection of the AbzG[27]. Furthermore, the AbzG *does not include special regulations* taking into account the position of the *seller*. It applies no matter whether the seller offers instalment transactions by way of business or on a private basis — a questionable provision

(No. 18) from the point of view of consumer protection, and its practical consequences particularly in transactions between private parties[28].

2 Debtor-creditor-supplier agreements

(a) *Economic significance and types of transaction*

328 A debtor-creditor-supplier agreement in terms of its economic purpose involves an instalment credit institution to finance the purchase price. The seller does not himself grant the buyer credit, as is usually the case in the instalment transactions described above, but uses an instalment credit institution that will pay the purchase price directly to him and obtain repayment from the buyer. Such an institution may be involved in different schemes. According to the historic development of instalment credit in Germany, the following types may be distinguished[29].

In the so-called 'A' scheme, the instalment credit institution gives out Kaufschecks (an early type of cheque card) which the buyer may exchange for goods to sellers who have joined the system. This type of financing of the purchase price was very common between the two world wars, but is very rare now, so it need not be described any further. In the so-called 'B' scheme, the financing of a contract of sale through an instalment credit institution is arranged by the seller with two alternatives of repayment. In the case of the so-called *assignment scheme*, the seller assigns to the instalment credit institution his claim for payment of the purchase price excluding defences under the law of sales, for instance lack of merchantability, so that the instalment credit institution may then have recourse to the buyer under the assigned right. This pattern is no longer common either, at least not with regard to private consumers, and therefore need not be described here. More common is the so-called *loan scheme*: an instalment credit institution grants the buyer a loan, but transfers the value directly to the seller. The claim for payment under the contract of sale is satisfied, so that the buyer need no longer pay the purchase price to the seller. Rather, he remains liable for payment to the instalment credit institution under the legally independent loan agreement. Generally speaking, such a scheme of financing presupposes that the instalment credit institution and the seller cooperate in a certain way and that the seller should assume joint liability to the bank for repayment of the loan. Instead of the single contract between the seller and the buyer customary in regular instalment transactions, here *three* contracts should be distinguished from a formal point of view of contract law: a contract of sale between the seller and the buyer, a loan agreement between the instalment credit institution and the buyer and a skeleton agreement between the instalment credit institution and the seller. The last scheme is that known as the 'C' scheme, in which the buyer, to secure the claim for repayment, issues bills of exchange to the bank which the bank may then use for purposes of its own refinancing. This scheme is found less in instalment transactions with private consumers, but more often in commercial transactions.

Regarding the economic significance and frequency of debtor-creditor-supplier agreements, in particular the 'B' loan scheme, no accurate data are available. It may initially be assumed that debtor-creditor-supplier agreements,

which were very popular in the Federal Republic in the 1950s and accounted for the main business of instalment credit institutions, have since lost much of their significance[30]. Much more common is credit by banks and credit obtained through credit brokerage. On the other hand, debtor-creditor-supplier agreements continue to play a significant role with respect to the purchase of certain consumer goods of high value, for instance motor vehicles and furniture, and for this reason regulation in terms of consumer protection especially by the courts will be dealt with here.

(*b*) *The legal concept of debtor-creditor-supplier agreements*

329 The legal concept of debtor-creditor-supplier agreements is determined by the question of how far the AbzG applies *mutatis mutandis* to this type of contract under Art. 6, which covers forms of circumvention. Here the courts are guided by economic considerations[31]. The legally independent contracts between buyer and seller and between buyer and instalment credit institution must constitute an *economic unity*; that is, there is no sense in concluding one contract without the other. Definite criteria of delimitation of debtor-creditor-supplier agreement from what is known as cash credit or personal loan have not been developed by the courts, but each case is assessed according to its particular circumstances. According to the German courts, the following circumstances are evidence of a debtor-creditor-supplier agreement, without their non-existence contemporaneously suggesting that no debtor-creditor-supplier agreement is involved: transfer of ownership in the article of purchase to the instalment credit institution[32], transfer of the value directly to the seller[33], disposition by the seller of blanks of the credit contract (without the seller having to be the bank's agent). A permanent business connection between the seller and the instalment credit institution is not required for the purposes of a debtor-creditor-supplier agreement as the courts used to assume in the past[34]. Furthermore, there need not be any joint liability by the seller for repayment of the credit. According to more recent court practice, the thing purchased no longer needs to be transferred as security to the bank[35].

If a buyer acts 'on his own initiative' in obtaining credit, this does not constitute a debtor-creditor-supplier agreement[36]. The courts have not yet clarified borderline cases where the bank knows about the use of the credit for buying purposes, either through its own knowledge or by employing a credit broker. In this context a distinction must be made depending on how the buyer informs the bank of the purpose of the credit: the more clearly the buyer points out to the bank that he intends to use the credit for a particular purpose and the more the bank accepts this intention, the sooner the courts will apply the law of debtor-creditor-supplier agreements in contrast to that of personal loans[37]. However, this is always a question of the individual case and cannot be clarified in advance. The bank must accept that the credit broker's knowledge is considered to be the bank's knowledge pursuant to Art. 278 of the Civil Code.

(*c*) *Application of the AbzG*

330 If it is a debtor-creditor-supplier agreement and not a personal loan, Art. 6

AbzG as a legal consequence provides for the application of its protective provisions in favour of the buyer. Such an analogous application is similar to that described above with respect to instalment sales. However, because of the so-called trilateral relationship, there are some peculiarities.

A debtor-creditor-supplier agreement is also subject to the formal requirements of Art. 1a AbzG. In the agreement the instalment buyer must be informed about the cash price, the instalment price, the instalment plan and the total charge for credit[37]. In this connection, a question that has not yet been decided in detail is on whom the obligations as to information are placed, the seller or the instalment credit institution. It may be assumed that these obligations are placed on the instalment credit institution, since through its involvement the normal contract of sale becomes a debtor-creditor-supplier agreement[39].

Furthermore, pursuant to Art. 1b, debtor-creditor-supplier agreements are cancellable. Here, too, there are open points regarding the details of cancellation, since the Act does not expressly provide for this case. Basically, any cancellation must be made known to the person indicated in the written instrument. In the absence of such an instruction, the instalment credit institution is the correct recipient. The seller and the instalment credit institution must notify each other of any cancellation, no additional obligations to notify being placed on the customer. Cancellation voids the entire transaction, i.e. both the loan agreement and the contract of sale[40].

Finally, rescission of the contract on the part of the seller or the instalment credit institution results in the special duties to return pursuant to Arts. 1 and 2 AbzG. For the purposes of protecting the buyer, the Federal High Court has ruled that in assessing the duties to return between bank and buyer, the buyer's down payment to the seller must be taken into account, but not the value transferred to the seller by the instalment credit institution[41].

(*d*) *The consumer's defences against an instalment credit institution under a contract of sale (Einwendungsdurchgriff)*

331 It is a highly controversial issue both in theory and in practice to what extent defences in the relationship between the seller and the buyer, for instance for non-delivery, inferior performance, non-merchantability of the goods, delay in performance, non-performance, fraudulent misrepresentation, etc., affect the credit agreement between the buyer and the instalment credit institution. If the contracts were assumed to be separate agreements as is in line with the wording of the bank's standard form contract, there would be no room for such defences by the buyer against the instalment credit institution: both contracts, the contract of sale and the credit agreement, would legally be separate agreements. Defects in one contract do not affect the other contract. This theory of strict separation is indeed advocated by some legal writers[42]. It is extremely hostile to buyers, though, and does not take into account that through the splitting of a uniform debtor-creditor-supplier agreement the buyer would be in a much worse position than in the case of a bilateral instalment transaction. That is why the courts have developed what is known as a 'modified theory of separation'. According to this theory, it is assumed that the contracts between

the buyer and the instalment credit institution and between the buyer and the seller are separate agreements, but because of their economic purpose and according to the rule of *good faith* should in special cases be treated as a unit. In particular, the courts developed the rule that the buyer must not be deprived of his rights nor be discriminated against[43]. However, they modify the results of the theory of separation, which is hostile to the buyer, not to the buyer's complete satisfaction. In court practice the following principles have evolved.

The instalment credit institution is initially obliged expressly to point out to the buyer in the written instrument the special risks and hazards involved in a debtor-creditor-supplier agreement[44]. It must do so in a conspicuous way, for instance through bold-face type in the instrument, and must simultaneously indicate the legal consequences the buyer may face. This is particularly designed to prevent the buyer from giving the seller a blank receipt prior to delivery of the object and from running the risk of the object not being delivered, yet still having to repay the loan. A second case is that of fraudulent deception of the buyer by the seller; the bank must accept the blame for such a deception, since it cooperates with the seller who becomes active in the interest of the bank and not in the interest of the customer; the bank is not a third party within the meaning of Art. 123, para. 2 Civil Code. The customer may then also avoid the loan agreement[45].

In the case of defective delivery (non-merchantability) the courts differentiate according to the following criteria: normally the buyer must hold the seller liable first of all if he wants to enforce claims under a warranty against the seller. He may not, for instance, refuse to repay the loan if the seller fails to meet his obligations. He must even institute proceedings against the seller[46]. Only in the exceptional case of the seller becoming bankrupt or remaining untraceable may he refuse to repay the loan to the bank; by way of exception the bank then has to bear the risk of the supplier becoming bankrupt. The situation is similar if the bank is at fault[47]. However, in no case may the buyer have his instalments refunded from the bank[48].

Without expressly deviating from its former practice, the Federal High Court has more recently considerably expanded the right of asserting defences against the contracting party. It has developed a test of reasonableness concerning the assertion of defences by the buyer-debtor[49]. If on the basis of good faith a buyer-debtor cannot reasonably be expected to hold the seller liable, for instance because the latter contests his liability under a warranty or unduly delays repair of defects for which he is responsible, this defence may be set against the bank's claim for repayment. In addition, the courts have tightened the duty to inform in such a way that now the mere information about the risks of a split transaction no longer suffices to preclude the right to assert defences against the bank[49a].

More recent court practice thus approaches solutions to the problem that have been suggested by legal writers for some time. These solutions in legal literature are based on the recognition that the credit agreement and the contract of sale *form a legal unit*[50]. Details of the reasoning of legal writers vary and cannot be described here. According to the author's conviction a sensible solution to the problems involved should be based on the law of standard form contracts[51]. For in the event of defective delivery, at least so far as new goods are

concerned, the buyer has certain indefeasible rights against the seller (No. 226). He may, for instance, refuse to continue payment, demand redhibition, or reduce the purchase price, unless he can demand repair of defects. He cannot be deprived of those rights through the involvement of an instalment credit institution. This also means that he must be able to enforce his right to withhold or his defences under the law of sales against the instalment credit institution. In such case the bank must hold liable the seller, who is the party ultimately responsible for defective delivery and who is liable to the bank anyway because of joint assumption of liability. In line with the protective purpose of the Act, such a right of asserting defences against the bank cannot be excluded in standard form contracts, even if the risks involved in the transaction have been pointed out clearly to the buyer.

(e) The 'C' scheme

332 The so-called 'C' scheme differs from the 'B' scheme only in that bills of exchange are negotiated by the buyer to the instalment credit institution. For the bank, negotiation means additional security and another possibility of refinancing. Of course, such contracts are not very common with private consumers although, on the other hand, they are not prohibited — a prohibition which is provided for by the EC Commission in its draft directive on consumer credit. The negotiation of bills involves an additional risk to the consumer: through the 'abstractness' of the bill he may be held liable immediately on the negotiable instrument without the possibility of asserting his rights under the AbzG or his defences against the instalment credit institution. Here the courts are helpful in that they do not make it possible for the instalment credit institution to acquire a bill in good faith, even if the buyer negotiated the bill to the seller. Art. 17 Wechselgesetz (Bills of Exchange Act) is not applicable here, so the buyer may raise defences against the instalment credit institution[52]. In the final analysis, this type of contract involves considerable risks to the consumer, particularly if the bill is negotiated, and should therefore be prohibited. There is no need for any of the parties involved to stipulate besides the normal security additional security by way of a bill.

(f) Proposals for reform

333 Legal writers are unanimous in that the problems mentioned, specifically with respect to defences against the instalment credit institution in the case of debtor-creditor-supplier agreements, should be solved through legislative reform[53]. Important proposals for reform are included in the Federal Government's bill on debtor-creditor-supplier transactions and brokerage contracts[54]. A new Art. 607a Civil Code runs as follows:

(1) If a loan serves to acquire an object, the borrower may raise defences or claims under the contract of sale in as far as they would entitle him to refuse to effect performance to the seller or to claim a refund from him also against the lender if, in the circumstances, the contract for acquisition of the object and the loan agreement are to be considered parts of a uniform business transaction. This does not apply to defences

or claims based on an arrangement entered into by the seller and the buyer following conclusion of the loan agreement. The right to claim a refund may be asserted only up to the amount of repayments on the loan already made.

(2) A uniform economic transaction is to be presumed particularly if a buyer is granted a loan for the purpose of paying the purchase price through the joint effort of the creditor and the seller in a particular case or on account of permanent business relations between the two.

(3) Paras. 1 and 2 do not apply to a loan secured by a mortgage or land charge.

(4) Paras. 1–3 apply *mutatis mutandis* to loans which are granted for the purpose of supplying a service.

(5) Any contrary arrangement to the detriment of the borrower is void.

As a purpose for the bill, the legislator refers to the prohibition of discrimination, which has also been developed by the courts. The proposal does not yet reflect more recent court practice which under the existing law largely permits the right of asserting defences against the creditor. In this connection the concept of the debtor-creditor-supplier transaction is based on the idea of a 'uniform business transaction'. In contrast to court practice, a uniform business transaction is already enough to make the assertion of defences against the creditor possible[54a]. Para. 2 of the new Art. 607a then puts the uniform business transaction into concrete terms when the seller and the creditor cooperate in a particular case or because of permanent business relations. Apparently, it shall not suffice that the creditor (the bank) knows about the intended use of the credit. According to the intention of the bill, the present law will not be changed in that respect, so in this case the buyer-debtor cannot assert defences against the bank based on breach of the contract of sale or on warranty.

It also seems worth mentioning that the bill tries to arrive at a compromise between the different ideas about the right of the debtor to assert defences against the bank. Thus the bill does not endorse the theory of subsidiary quality of the right to assert defences advocated in jurisprudence and previous court practice which is held not to be in line with the principle that, in a purchase transaction involving third-party financing, the buyer must not be put in a less favourable position than in a transaction where he is allowed credit for the purchase price by the seller. On the other hand, the draft does not assume joint and several liability between the creditor and the seller. The consequence is that the claim for refund is limited to the extent of repayments already effected to the bank, so that any further claims, for instance claims for damages, cannot be enforced against the creditor. This proposal seems quite acceptable in terms of legal policy, because there is no reason giving rise to joint and several liability between the bank and the seller, and the buyer-debtor shall not be accorded more favourable treatment through third-party financing than under a normal instalment contract with the seller.

3 Hire-purchase and leasing agreements

334 (*aa*) A need for protection in terms of consumer policy also exists where a buyer acquires something not under a contract of sale, but under a long-term *lease*, and for economic purposes the rent amounts to instalments on the purchase price by reaching the original value of the object including costs and a profit margin of the so-called 'lessor'. Art. 6 of the AbzG always applies to this type of contract if the purposes of an instalment transaction will be achieved by letting the thing out on lease. According to uncontested court practice, a hire-purchase agreement is an instalment transaction[55]; all the protective provisions of the law of instalment transactions apply, but only *mutatis mutandis*. An express right to acquire the thing need not be granted to the 'lessee' (instalment buyer). It is sufficient that payments effected by instalments may at least for economic purposes be regarded as payments towards the purchase price[56]. Here it is also difficult to distinguish a genuine lease, which is not subject to the law of instalment transactions, from a hire-purchase agreement, particularly in the case of long-term agreements.

(*bb*) Another special case to be described here is that known as *leasing*. By leasing we mean a type of contract resembling a lease under which the lessee is usually permitted to use a thing for its useful life, with the leasing instalments being computed to cover the purchase price in full including costs and a profit to the leasing institute. In the event of a leasing institute acquiring the object in its own name and allowing the lessee to use it, we speak of 'finance leasing'[57]. Of course, finance leasing is found mainly in commercial transactions and is not therefore relevant to consumer protection. If leasing agreements are also concluded with private consumers it may be assumed that the rules on hire purchase will apply *mutatis mutandis* and that the application of the AbzG is determined by the question of whether the buyer shall at least become a beneficial owner, for instance in the event of a buyer's option[58]. This, too, must be decided in each individual case.

4 Debtor-creditor-supplier agreements for services

335 While third-party financing of contracts of sale is losing importance, the financing of *services* is winning growing popularity. From an economic point of view this is attributable to a number of reasons: first of all, for the individual consumer many services involve amounts of money as high as in the case of goods, which he is unable to raise all at once and which therefore require the involvement of a financing institution, for example correspondence courses, holiday travels or house repairs. Moreover, certain enterprises try to 'sell' expensive services to the customer by offering appropriate financing, in which case the division of labour between the supplier of services and the bank proves to be particularly profitable to both of them. After all, the involvement of a bank serves at the same time to exclude the recipient's objections to the service[59]. Overall, it must be said that the financing of services, apart from a few isolated cases, shows *a tendency quite hostile to the consumer*, since in contrast to the acquisition of a thing, it ties the consumer for a long term to a service. He is

often unable to judge the implications of the transaction, he may not know that his legal remedies are curtailed and his financial resources will be overtaxed.

From the point of view of consumer policy, there is an urgent need for regulation of debtor-creditor-supplier agreements for services. So far, there is no legal provision similar to the AbzG. Apart from the FUSG of 24 August 1976, there is no statutory regulation whatsoever of such agreements, so that here the courts must rely on the more or less problematic application of general civil-law principles. An additional factor is that such cases attract the attention of the Federal High Court only very rarely, so that legal progress through judge-made law seems difficult and has so far happened to a limited extent only.

The problem at the centre of all debtor-creditor-supplier agreements for services turns out to be the *right to assert defences against the bank (Einwendungsdurchgriff)* originating from the contract for services. The problem in terms of consumer policy is much the same as we have learnt in the case of debtor-creditor-supplier agreements. Through the splitting up of a uniform contract for the supply of services, whether a contract to manufacture, a contract of service, a brokerage agreement or a contract for professional services, into two independent contracts, one of them being a credit agreement with an instalment credit institution, the consumer is denied objections to the financing institution which he would normally be entitled to raise to the supplier of services, particularly in the event of inferior performance, breach of contract and fraudulent misrepresentation to the party obliged to perform services.

With respect to the scope of application of the FUSG (No. 258), Art. 8 provides that Arts. 2–7 of that Act shall apply *mutatis mutandis* to contracts aiming at achieving the purpose of a correspondence course contract in a different legal form. These are in particular the protective provisions on the rights of the participant in a correspondence course, on the form and contents of the contract, on the participant's right of cancellation and his right of notice. Such a form of circumvention would exist specifically if a financing institution were involved. The customer will not lose his right of cancellation pursuant to Art. 4 FUSG (No. 114).

Since other services, apart from some provisions of the AGBG, have not so far been regulated in a mandatory way, rules on the consumer's defences against the bank are also lacking. This applies, for instance, to holiday travels, agreements concerning marriage brokerage, home learning and repairs. Several lower courts put forward the rule of good faith according to which the consumer's legal position should not be weakened by involving a banking institution, which was developed in court practice with regard to debtor-creditor-supplier agreements[59a]. It would be more appropriate here to look for a solution on the basis of the AGBG: what cannot be excluded in standard form contracts cannot be achieved indirectly either through the involvement of a financing bank. Such a rule could curb some, if not all, manipulations at the expense of the customer by service-rendering companies associated with instalment credit institutions. Here the Federal High Court now advances duties to inform and holds the bank liable for fault and malice on the part of its agents[59b].

In this connection the reform bill on contracts involving third-party financing should be mentioned. The Federal Government's proposal to amend Art. 607a Civil Code provides for a para. 4 under which the right to assert defences

against the bank exists in the case of loans granted for obtaining a service. This proposal includes a genuinely novel element, compared with the past unsatisfactory and confused case law, as it completely puts aside the concept of an instalment transaction and protects consumers in the case of services in a similar way to that of contracts of sale. The bill correctly attributes this to the credit element in financed contracts for the supply of services which entice the consumer and make it difficult for him adequately to judge the commitments incurred through longer-term payment obligations. In the Federal Government's view, according to past experience such contracts are in particular financed contracts concerning marriage brokerage, holiday travels and correspondence courses. The question is, though, whether or not the bill should have gone a step further towards a joint and several liability of the bank and the supplier of services to the consumer. Because of the particular nature of services, third-party financing is possible only if, as is usually the case, there is a close business relationship between the supplier and the bank. Such cooperation would usually justify joint and several liability. Both parties pursue the same objective, namely the supply of a service to the customer on the basis of the division of labour. The customer would therefore be entitled to raise claims, for instance for breach of contract or inferior performance, against both the supplier and the creditor, and such claims should not be limited to the amount of payments effected to the bank. This would ensure in particular better control over service companies by banks.

III CREDIT BY BANKS

1 Significance of consumer credit granted by banks

336 Meanwhile the most common form of consumer credit is that granted by banks (including savings banks) without the loan being intended for restricted use only (purchase of goods, etc.). Banks and savings banks have greatly expanded that type of credit and engage in considerable advertising in this field. For the consumer, this type of credit has the advantage that it is easy to obtain and that he is entirely free to use the loan granted as he pleases. This accounts in no small measure for the popularity of this type of credit. The drawback is that the consumer is tied down to a certain bank, for generally this type of credit presupposes a wage or salary account with a bank or savings bank. Deposits and credit transactions are combined by the bank or savings bank. There are, of course, exceptions, for instance through advertising by banks engaging in mail order credit[60].

From the point of view of consumer policy it is worth mentioning that this type of credit has so far been *subject to little or no statutory regulation*; generally speaking the AbzG does not apply for lack of restricted use of the loan. The few civil-law provisions on loan agreements in Arts. 607 *et seq.* Civil Code are at the parties' disposal and are modified by banks in their standard form contracts. In actual fact, standard form contracts of banks form the relevant legal basis of the relationship between the bank and the consumer. The AGBG takes effect only indirectly. In addition, there are provisions of the law of unfair competition or of administrative law, particularly regarding the rate of interest which will be dealt with below (No. 353).

In this context only some problems in terms of consumer protection will be considered which are presented by the existence of standard form contracts of banks and savings banks.

2 Shaping of the contract in standard form contract conditions

337 (*aa*) In the area of consumer credit, standard form contract conditions also become part of the contract only pursuant to the general rule of Art. 2 AGBG (No. 311ff). With respect to consumer credit in a particular case, two stages must be distinguished: *all* banks and savings banks use uniform standard form contract conditions, which are registered with the Federal Cartel Office as terms recommendations (Konditionenempfehlung)[61]. Through the involvement of the Federal Cartel Office it is possible to eliminate illegal clauses through preventive control before they take effect (No. 275). The standard conditions of banks (apart from special cases) are not subject to the approval of a supervisory authority (No. 282). They regulate the business relationship between the bank and the customer only in a general way and are not limited to loans. The relationship in a particular case is then specified by the standard form contract agreed upon under an individual credit contract. This is effected in such a way that the consumer signs the bank's credit application form regulating the most important questions of law concerning the credit arrangement.

These, too, must be verified pursuant to the general principles of control of standard form contracts. As a general rule of law, *individual agreements* between the customer and the bank supersede standard form contracts.

Under neither the statutory provisions nor the standard form contract conditions does a customer enjoy a *right of cancellation* with respect to his application for credit. Upon formation of the credit contract, which need not be in writing, the customer is bound by the contract. He cannot unilaterally free himself therefrom but will usually be obliged to avail himself of the loan. If he does not want to use the loan, i.e. wants to withdraw from the contract, he commits a breach of contract according to present court practice. The bank may then demand reimbursement of its expenses and may claim damages if the customer is at fault. Of course, the amount of damages is determined by the expenses incurred and the losses suffered by the bank. It may not thereby force the customer indirectly to avail himself of the loan, and it may not charge the customer for a consideration in respect of a loan it did not make available to him. Details are a matter of argument in court practice and cannot be discussed extensively here[62]. Clauses for *reimbursement of expenses* in standard form contracts are subject to control pursuant to Art. 10, item 7 AGBG. In particular, *excessive* expenses or unfair lump-sum settlements cannot be asked for[63]. On the other hand, provisions on lump-sum damages by banks are to be found in numerous contracts, for instance by 'agreeing' on a certain minimum interest rate payable in the event of non-use of the loan by the customer. Pursuant to Art. 11, item 5 AGBG, such clauses on lump-sum damages are possible only on certain restrictive conditions; they must not result in excessive lump-sum damages or make it impossible for the customer to prove that in actual fact the damage was smaller.

338 (*bb*) If the credit contract has been concluded in a legally effective way and the

value has been paid to the customer, the latter is liable under the terms of the loan agreement to repay the loan and to pay the interest agreed upon (No. 345). Of special importance to the consumer is what will happen in the event of his *default*. The bank is, of course, interested in the consumer meeting his obligations, while on the customer's part there may be difficulties adversely affecting his repayment obligation (the exceptional case of a 'bad debtor' not being taken into account here). Possible reasons for default might be the consumer's temporary unemployment or disability, a change for the worse in his financial circumstances, problems concerning his family, etc. It is an established principle of German law that difficulties in meeting his repayment obligation neither release the consumer from his obligations nor allow him a temporary defence, Art. 279 Civil Code[64]. Rather, the consumer is obliged by law in any event to fulfil his contractual obligations, regardless of any changes in his financial and other circumstances.

An additional factor is that, in the event of delays in repayment, the bank has a right to *cancel* the contract and to demand immediate repayment of the entire credit including interest. Pursuant to the general principles under civil law, such a right of cancellation exists only for serious cause (Art. 626) and is otherwise subject to special agreement[65]. According to the standard form contracts of banks, such reasons for cancellation are[66].

- incorrect information by the consumer about his financial circumstances (e.g. income, other commitments, value of the security given)[67];
- deterioration of property, specifically in the event of taking a 'poor debtor's oath', bill and cheque protests;
- significant jeopardy to the customer's property, for example through execution by other creditors, transfer of property abroad;
- default in effecting the interest payments and repayments agreed upon.

What is not regulated is the number of loan instalments with which the customer must be in arrears and the sum total of arrears. In this context it is advisable to apply the legal idea of Art. 4, para. 2 AbzG *mutatis mutandis*: accordingly, the entire loan will fall due only if the customer is in default wholly or in part with no less than two consecutive instalments and the sum total of arrears is one tenth of the entire loan including interest[68].

Another question not yet clarified in court practice is whether the bank may exercise its right of cancellation without further requirements or whether it must make an appropriate communication to the consumer beforehand, pointing out the legal consequences (so-called qualified warning pursuant to Art. 326 Civil Code). From the point of view of consumer protection the bank may be required to make use of its right of cancellation only after having warned the customer to that effect beforehand, so that he may ward off the consequences of cancellation. Otherwise such cancellation is void. Under standard form contracts, no other regulation may be agreed upon as is shown by Art. 11, item 4 AGBG[69]. Pursuant to a recent ruling by the Federal High Court[70], which was not made specifically with respect to consumer credit, there is *no general obligation on the bank to give a warning*. This is inferred by the Federal High Court from the application of Art. 626 Civil Code. Pursuant thereto, the loan may be cancelled for serious cause. It is possible, though, that *without* an appropriate warning

there is no serious cause, particularly if the consumer resumed payments following a warning or if he does not even know whether the bank considers his behaviour to be contrary to the contract. This is a matter to be decided in each individual case.

The forms used by banks give still other reasons for cancellation, e.g. failure to provide or increase the security required, substantial threats to the security provided or other material violations of the contract by the customer.

Another drawback for the customer is that in the event of his default he is *not entitled to an extension of credit*. Rather, an extension of credit is entirely within the discretion of the bank, which it must exercise in accordance with good faith. Therefore, in the case of slight default or default for good cause the customer may have a right to an extension of credit on the basis of good faith. Here, too, there is no established court practice protecting the customer.

339 (*cc*) In addition to unrestricted-use credit or personal loan in banking, another type of credit known as *running-account credit* has been developed. As regards its economic nature, it roughly corresponds to the overdraft on current account granted to traders. Credit is granted by way of allowing the consumer to overdraw his wage or salary account up to a certain limit depending upon his income and the discretion of the bank (up to DM 10 000). The bank may at any time reduce or cancel the credit. If the business connection is discontinued, the running-account credit will fall due immediately[71].

3 Granting of credit by means of cheque cards

340 (*aa*) In addition to the 'normal' consumer credit by banks described above, in the Federal Republic of Germany there are various other types of credit granted in accordance with the rules of the law of negotiable instruments. Banks and savings banks have issued so-called *Eurocheque cards*, with the aid of which it is easier for consumers to dispose of their accounts by cheques. The cheque card guarantees the taker of a cheque that the bank will pay the cheque up to a certain amount, currently DM 300. The cheque card system has meanwhile spread to all EC countries; guaranteed cheques are paid reciprocally.

The *cheque card* is not intended in the first place to grant credit, but serves to facilitate disposition of an existing account. It cannot be overlooked though that a cheque card is also used *for the purpose of raising credit*, particularly if the holder of the account and cheque card is allowed to overdraw his account. In such a case the legal relation to the bank is determined by the principles mentioned above. Further details of the cheque card will not be dealt with here, since in terms of the letter of the law it does not relate to a credit transaction, but to a transaction under the law of negotiable instruments, which in view of the stringency of the law of cheques differs from general civil-law and consumer-protection principles. What is known as the right to assert defences against a bank can in this case be imagined even less than in the case of a normal credit by a bank.

341 (*bb*) Special problems have recently been encountered in the event of *loss and forgery of cheques*. Under the standard form contract conditions of banks, the

risk of loss and forgery is imposed on the consumer[72]. Banks are liable only for *grossly negligent* breach of their obligation to verify. Gross negligence is not accepted by the courts if a bank pays a (forged) cheque despite the fact that the cheque card was not produced[73], as the cheque card is merely intended to make it easier for the holder to dispose of his account, but does not impose an obligation to verify on the bank. The same is to apply if the amount of a (forged) cheque substantially exceeds the balance on account or the credit line[74]. Thus a cheque is practically treated as *cash* at the expense of the consumer, although because of the cases mentioned the bank was almost bound to suspect forgery.

While the customer is protected by a special fund created by banks if he loses both his cheques *and* his cheque card, this does not apply if he loses his cheques only. Through the expansion of the Eurocheque system the consumer has been exposed to high risks in the individual case.

4 Credit brokerage

342 (*aa*) In recent years credit brokerage has gained significance in the Federal Republic of Germany in terms of both economic relevance and consumer policy, although this has not always occurred 'to the benefit' of the customer. Here it is not the bank itself that approaches the consumer or vice versa, but a credit broker promises to raise a credit for the consumer from an instalment credit institution with which he usually cooperates. The danger of such a transaction in terms of consumer policy is obvious: first of all, the interest charged is usually much higher than the normal interest rates on consumer credit, since the credit broker's commission must be financed as well. In their advertisements, credit brokers themselves try to give the impression that they are in a position to make available to the customer the requested amounts of money without any difficulty, for instance by using terms such as 'cash credit', 'immediate credit', etc. Generally speaking, advertising by credit brokers in many respects turns out to be unfair and misleading and should therefore be controlled by the general principles of the law of unfair competition[75]. Moreover, the credit terms are usually much 'tougher' than in the case of the normal instalment credit, for instance on account of excessive lump-sum damages, clauses providing for excessive reimbursement of expenses, sanctions for default and the like[76].

Credit brokerage has so far been regulated in the law of the Federal Republic of Germany only in some provisions of the Industrial Code and in the Makler- und Bauträgerverordnung (Order concerning Brokers and Builders) of 11 June 1975. There is *no statutory regulation*[77] concerning the *civil-law relationship* between customer, credit broker and instalment credit institution. In practice, forms are designed in such a way that the credit contract is concluded by means of a special agreement between the instalment credit institution and the customer through the agency of a credit broker. Provisions similar to those described above with respect to the consumer credit by banks apply to this contract. The liability to pay a commission is usually regulated in such a way that the commission charge is 'added to' the total credit and is to be paid from the credit instalments. The bank pays the credit broker his commission in advance. There are no regulations governing the amount of commission; rather

the general prohibition of usury applies, which will be described later (No. 346). Unlike instalment transactions, the contract is not subject to a right of cancellation. Possibly the defence of fraudulent misrepresentation applies, since the broker is not a third party within the meaning of Art. 123 Civil Code[78]. If there is a circumventing agreement within the meaning of Art. 6 AbzG, for instance the credit broker at the same time arranging the sale of goods, the consumer by way of exception has a cooling off period[79]. The lack of a right of cancellation in the event of a dispute may result in the customer being held liable for damages in the amount of the broker's commission if he does not use the loan. So far, there is no established court practice regarding that case[80].

343 (*bb*) A special form of credit brokerage exists in the case of so-called *accident helpers' rings*[81]. An accident helpers' ring is a group of enterprises, for instance a towing company, a rent-a-car service, a service station and a bank, cooperating in the handling of claims for damages arising from a road accident. By assigning his claims arising from the accident to the accident helpers' ring, the customer would be relieved of the settlement procedure and have at his immediate disposal a rented car, etc. At a superficial glance, the institution of an accident helpers' ring seems to favour the consumer, as it relieves him of the often difficult settlement of damages resulting from an accident. In actual fact, though, these are highly dubious types of business. Of particular disadvantage to the consumer was the possibility to hold him liable, if the accident helpers' ring was not repaid in full from the insurance of the party at fault in the accident.

The courts have declared such contracts to be void, since they violated the prohibition of unauthorised legal advice[82]. The instalment credit institution was unable to demand repayment from the consumer[83].

344 (*cc*) The Government's bill on debtor-creditor-supplier transactions and brokerage contracts mentioned earlier strives to regulate partially the law of credit brokerage. Basically, the general provisions of brokerage law, which are now of a mandatory nature, apply to credit brokerage. In addition it is provided that the contract shall be in writing, a requirement well known to us from the law of instalment transactions (No. 323). The written instrument must indicate the broker's commission as a percentage rate of the credit. Moreover, the contract must include the information known from Art. 1a AbzG, particularly the total charge for credit. This is especially designed to achieve congruency of public-law price-marking provisions and private-law duties to inform. The Bundesrat has opposed this proposal, though, because the credit broker often has to look for a lender and might not be in a position to indicate the total charge for credit. This criticism is correct in that the total charge for credit must be indicated in the credit agreement and not in the agreement with the credit broker. As far as that goes, the bill suffers from a substantial weakness by regulating only the law of credit brokerage, but not that of credit granted by banks.

Art. 655b includes additional requirements as to the consumer's duty to pay a commission. It does not suffice that a promise of a loan has been made: the loan must already have been paid. Furthermore, the provision stipulates that advance payments on commissions must not be agreed upon and accepted. Consequently, lump-sum damages and conventional penalties in the event of

non-use of a promised loan are void, unless they come up to 10% of the remuneration as expressly made clear in Art. 655c. The meaning of the last provision is not intelligible though, since thereunder the customer is expected indirectly to effect payments for a service he has not used, a fact that restricts his freedom of decision whether or not to use the loan.

Through these provisions the bill is intended to take steps against grievances that have become known in the field of credit brokerage. However, it disregards other central issues which will be described in connection with the regulation of interest rates and other control measures.

IV REGULATION OF INTEREST RATES

1 Commercial-law issues

345 To the consumer, the interest rate is the main cost factor in the use of a credit. Under German law there is currently no government-fixed interest rate. Pursuant to Art. 23 KWG, it is possible to prescribe maximum interest rates by statutory order; however, since 1967 the Federal Government has not acted on this power[84]. It leaves the parties to agree on the interest rate, strictly speaking allowing it to be determined by '*competition*'. From the point of view of economic policy a principle prevails which is similar to the one we have come to know in price law (No. 23). The extent to which banks and savings banks through cartels, concerted action or recommendations may jointly fix interest rates on consumer credit, for instance by laying down minimum or maximum interest rates charged on consumer credit, is a highly controversial issue among legal writers in conjunction with the construction of Art. 102 GWB[85]. Pursuant thereto, contracts and recommendations by banks in restraint of trade are exempted in so far as they are subject to the supervision of the Federal Banking Supervisory Office. Moreover, since interest agreements are not so supervised, it may initially be assumed that interest agreements, if any, are not exempted. According to a different opinion, interest agreements and interest recommendations do not generally come under the ban on cartels and the Cartel Office is only entrusted with supervision to prevent abuse[86]. In practice, though, this controversial issue is of no relevance, since here there is keen competition and interest agreements or recommendations, unlike the case of interest on savings deposits mentioned above (No. 35), have not been made. Rather, banks, savings banks and other credit institutions court the consumer.

2 Prohibition of usury

346 In German civil law there are two provisions protecting the consumer against excessive interest rates. First of all, Art. 138, para. 2 Civil Code provides for the prohibition of usury which exists in all European laws. The article on usury in the Civil Code was reworded by the first Gesetz zur Bekämpfung der Wirtschaftskriminalität of 29 July 1976. Usurious lending is also a criminal offence, Art. 302a Penal Code. An agreement on usurious interest is void. In such a case the customer is merely liable to repay the loan; he does not have to pay interest[87]. The excessive interest is not reduced to a reasonable level[88]. Usury

presupposes two facts: firstly, there must be an obvious disproportion between the obligations of the parties. In the case of usurious lending, the limit of usury (Wuchergrenze) cannot be fixed once for all. The *total charge for credit* is taken as a yardstick, i.e. all charges, commissions, disagios, etc., must be included[89]. This obvious disproportion must, of course, be determined on the basis of the relative market situation; if the interest level is high, usury must be determined differently than in the case of a low interest level. Currently, a total charge for credit at the rate of 30% will be considered usurious[90]. Of course, in this context the courts make allowance for the risk involved in a loan: interest charged on a little secured loan will be higher than on a loan provided with a normal security[91].

Secondly, the fact of usury presupposes that the usurer exploits the consumer's need, inexperience, lack of judgment or material lack of willpower. This must be ascertained in each individual case and means that particularly little-experienced consumers, for example minors, elderly people, socially weak classes and foreigners, may be protected[92]. A bill which has been introduced by the Bundesrat suggests that the subjective element of usurious lending should be deleted and that only the objective disproportion should be taken as a criterion[93]. Whether this provision will be incorporated in the existing law is still open to question.

While, generally speaking, in the case of normal consumer credit by banks usury does not come into question, it plays a special part in credit brokerage as described above[94]. An additional factor apart from the normal interest agreement is that the credit broker demands a commission which becomes part of the total charge for credit and agrees on a special residual debt insurance. Usury is reached much sooner than in the case of normal instalment credit. It is a controversial question in court practice whether the broker's commission and residual debt insurance should be included in the total charge for credit for determining usury. With respect to residual debt insurance it is assumed that it belongs to the total charge for credit[95]. With respect to the credit broker's commission this has been denied on most questionable grounds under a ruling by the higher regional court of Munich[96]. The Federal High Court in a new decision computes the total charge for credit on the basis of the overall burden on the customer, thus including the broker's commission[97].

According to new court practice the charging of excessive interest is not only measured by the special provision on usury, but also by the standard of unfairness pursuant to Art. 138, para. 1 Civil Code. Generally the Federal High Court assumes unfairness if there is a striking disproportion between the credit value and the total charge for credit and the creditor intentionally or negligently takes advantage of the debtor's situation when fixing the contract terms unilaterally[98].

The yardstick used for determining unfairly excessive interest rates is the average market interest computed by the German Bundesbank. If the services of a credit broker are used, these standards are rightly adhered to, since otherwise unfairly excessive interest rates could never be proved, but would have to be measured by the credit brokers' and instalment credit institutions' behaviour, precisely which must be controlled by law. To the consumer it does not matter whether he applies for credit to a 'normal' bank or to a credit broker affiliated with an instalment credit institution[99].

Recent court practice has created an important additional standard of control, without the standard of unfairness having been laid down in general. The regional court of Stuttgart tried to arrive at such an objective standard in a ruling of 24 April 1979, which received wide attention[100]. The court tried to advance an economic interpretation of unfairness under Art. 138, para. 1 Civil Code. Unfairness is said to exist if the total charge for credit exceeds the average market interest computed by the German Bundesbank by 100%. Accordingly, the court makes a difference between *unfairness*, which it assumes to exist if there is a 'flagrant' disproportion, and usury, which it deems to exist already if there is merely a 'striking' disproportion, but additionally requires a subjective element, i.e. exploitation of a state of distress. Whether such distinctions are in line with the letter of the law is open to question. I would consider more convincing a solution based exclusively on the element of usury and starting from the hypothesis that if the market interest is exceeded by 100% the subjective element of usury exists as well, because it is incomprehensible how such an agreement could be made without a situation of distress having been exploited. Below such a rigid limit, each individual case could be treated separately, so that, for instance, interest exceeding the normal rate by 50% could be usurious where a situation of distress is exploited, for instance in the case of elderly people.

A credit agreement which is null and void owing to usurious interest or because it is against public policy will be handled in accordance with the provisions of the law of unjust enrichment. In German law it is an accepted fact that only an interest agreement, not the granting of a loan, gives rise to an infringement of public policy[101]. The customer is not forced to pay interest as saved expenditure, but has to repay the value in instalments. If the loan is not paid directly to the customer, but to the credit broker or a third party, the courts admit the claim for unjust enrichment only against the recipient, but not against the consumer[102].

3 Consumer's right of notice in case of excessive interest rates

347 Another civil-law provision protecting the consumer is laid down in Art. 247 Civil Code. This provision has recently gained importance and has given rise to intense controversies on legal policy. Pursuant to Art. 247 Civil Code, the debtor may, after the expiry of six months, give a six months' notice if a higher interest rate than 6% per annum is agreed upon. This is of special importance in the case of credit contracted at interest rates higher than those currently obtainable in the market[103]. The German Bundesbank has demanded that Art. 247 be deleted, because the workability of the credit market would otherwise be endangered[104]. Such an initiative should be rejected, since it fails to recognise the protective character of Art. 247 Civil Code against excessive interest rates. Other proposals want to restrict the right of cancellation to true consumer credits, which are characterised by a certain upper limit[104a].

4 Obligation to indicate interest rates

348 Another important provision in terms of consumer protection is the obligation

on a credit institution, an instalment seller or a credit broker to indicate the *total annual charge for credit*. The underlying basis is Art. 1, para. 4 Preisangabenverordnung (No. 40). The obligation to indicate exists above all if the aspect of interest is advertised in the first place. In the case of a mere boosting of credits, there is no such obligation. According to the new practice of the courts, an exception is made only if the lender or credit broker makes offers which, in line with generally accepted standards and the way in which they are made, demonstrate the willingness to conclude a contract; there need not be an offer that is effective under civil law[104b]. The total charge for credit is the percentage rate of the credit for the year arrived at on the basis of the overall term of the loan, the amount paid, the amount repaid, the interest rate, brokerage and other costs. This concept of the total charge for credit is especially designed to enable the customer to get a clear picture of the expenses incidental to a loan, for instance fees payable on conclusion of the contract, commissions and residual debt insurance. In addition, the obligation to indicate the rate of interest enables the customer to compare interest rates.

The civil-law consequences of a violation of the obligation to indicate the total charge for credit are not clear. The legal consequence under the law of instalment transactions has already been dealt with (No. 323): it results in nullity of the contract or in transfer of the object of purchase without any obligation to pay interest. The Preisangabenverordnung does not itself regulate the questions of civil-law effectiveness in the case of violations; most courts assume that a violation of the Preisangabenverordnung does not affect the contract in terms of civil law[105]. The higher regional court of Celle has recently assumed that the idea of Art. 1a, para. 3 AbzG applies *mutatis mutandis* to instalment credit by banks[106], but this decision was not upheld by the Federal High Court. The first decision also guarantees the protective purpose of the Preisangabenverordnung in terms of civil law and should therefore be welcomed in the interest of the consumer.

V PROVISION OF SECURITY

349 Consumer credits, as other credits, are usually granted only against appropriate security. The appropriate statutory regulations of savings banks in any case provide for an express obligation to take security. The law of security for credit is to be found in the general civil law and in the bank's standard terms[107]. Regulations protecting the consumer have so far been issued by legislative act in exceptional cases only. The following examples should be noted.

1 Regulation of assignment of wages

350 The most important type of security for consumer credit today is *the assignment of wages* by the customer to the bank. This assignment is legally permissible, for instance, also in such a way that the customer's claims for wages to which he is entitled in the future will be assigned to the bank. This is known as disguised assignment (stille Abtretung) for the future, which need not be communicated to the debtor of wages or salary, i.e. the employer, to be valid. It

does not restrict the consumer's right of disposition of his salary or wage. However, in the event of default in payment, the bank will communicate the assignment to the consumer's employer and will demand that salary or wages due be paid to it to the extent of the attachable amount (pfändbarer Betrag). As the customer has approved thereof, he is unable to take action against such a measure[108].

For reasons of *social policy*, the legislator has limited the assignable amount in order not to deprive the consumer of a subsistence level. That is why pursuant to Art. 400 Civil Code assignment is permissible only at the rate of the amount attachable at any time which is laid down in Arts. 850a *et seq.* of the Code of Civil Procedure as amended. We shall not go into details here. The legislator's effort to adapt the subsistence level to the relative trend of income is worth mentioning. The 4th Pfändungsfreigrenzengesetz (Act on Attachment Exemption Limits) of 28 February 1978 increased the basic amounts exempt from attachment considerably. The Act also protects bank accounts of consumers in two ways from action on the part of creditors: Art. 835, para. 3, sentence 2 Code of Civil Procedure lays down a *two-week blocking period.* Before the expiry of that period the financial institution may not effect payment to the creditor. Protection until the *next pay day* is afforded under a new Art. 850k Code of Civil Procedure[109].

2 Other security

351 (*aa*) Another instance of security is a *guarantee* (Bürgschaft) or joint liability (Mithaftung) of a member of the family. To make the giving of a guarantee by a non-merchant valid it is necessary, though, that it be given *in writing*, Art. 766 Civil Code. Further protective provisions do not exist under German law, apart from some very minor obligations on the part of the bank to furnish information[110]. In particular, it is possible that the guarantor waives the claim for prior execution against the principal debtor, i.e. can be sued immediately. In the case of consumer credit it is common practice by banks that members of the family are jointly liable for the amount of the loan to the extent of the arrears at any time, i.e. including arrears of interest and costs.

(*bb*) What is known as security by means of movables is provided either through *transfer of ownership by way of security* (Sicherungsübereignung) or, in instalment sales, through reservation of title. There are *no formal* requirements regarding the provision of security which may, as has meanwhile been decided by the courts, also comprise *non-attachable* objects[111]. We shall not go into the details of giving security here.

A certain measure of debtor protection exists in case the consumer defaults and the credit institution proceeds to realise the security. Under the law of instalment transactions and debtor-creditor-supplier agreements, it is not possible for the instalment seller or instalment credit institution to claim the purchase price and at the same time take back the ownership reserved to him/it. In the case of transfer of ownership, the bank may realise the security only to the extent of the secured claim including interest and costs[112]. Banks' standard form contract conditions include appropriate provisions which are designed to allow

the bank almost free play in the realisation of a security. Under the new AGBG these clauses may be unfairly prejudicial to the customer and are therefore void[113].

(*cc*) Banks have secured themselves a special means of security by reserving a lien on all claims and objects of the consumer which come into their possession or power of disposal, for instance securities, cheques and saving accounts[114]. Art. 19 of the standard form contract conditions of banks and the corresponding provision of Art. 21 of the standard form contract conditions of savings banks provide for a comprehensive *right of lien* to which as yet no objections have been raised in court practice[115]. The practical result of this is that the customer's property coming into the bank's power of disposal is subject to a sort of *general lien* created by the bank. However, pursuant to the principles of the law of standard form contracts, such a lien may be inadmissible. There is no established court practice yet.

Meanwhile, trends moving in an opposite direction may be noted. In their new standard form contract conditions, which have been registered as terms recommendations, the banks have waived the so-called blanket liability clause which subjected *all* of a bank's claims against a customer to the lien. Attachment of a salary account and thus the bank's lien on the account kept by it has also been possible since 1 April 1978 pursuant to Art. 850k Code of Civil Procedure subject only to certain restrictions[116].

(*dd*) *Bills of exchange* may also be used in providing security for credit. Under the law of bills there are no restrictions on the provision of security for consumer credit by means of bills. However, this type of providing security is unusual in the case of consumer credit and may in a particular case be *contrary to public policy*. Nevertheless, the consumer's liability on the bill to third parties is unconditional and unlimited; it is this which makes the provision of security by means of bills particularly dangerous, since the consumer is denied the defences he may raise against an instalment credit institution. Therefore it is worth a thought whether in line with the English model and the EC draft a ban on the provision of security by means of bills should be considered. Initiatives in terms of legal policy pointing in that direction are evolving in the Federal Republic of Germany[117].

VI STATE CONTROL OF CONSUMER CREDIT

1 Generalities

352 As outlined above, consumer credit is subject to the general regulations under civil law; there is far-reaching freedom of contract, as regards both the conclusion and the contents of consumer credit agreements. There is practically no state control of consumer credit in the law of the Federal Republic of Germany, regarding the contents of the contract, the regulation of interest rates or the provision of security. Here, *workable* competition and the *consumer's 'prudence'* are relied upon which must be ensured by appropriate legal regulations.

2 Admission to the trade

353 State control exists practically only with respect to admission under trade law and the law of bank supervision of certain institutions to the consumer credit business.

(*aa*) Institutions that operate *in the banking line* require an *appropriate licence by the Federal Banking Supervisory Office*. The granting of credit by way of business is a banking transaction and thus subject to licence. There are, however, two important, though not readily intelligible, exceptions: the credit brokers' business is not subject to the supervision of banks, since credit brokers do not transact credit business themselves but only arrange such business. Leasing institutions (as well as instalment sellers) do not operate in the banking line either, since they lease objects acquired by them and do not provide credit. That is why leasing institutions are not subject to licence under the KWG[118].

(*bb*) With respect to *credit brokers*, Art. 34c of the revised Industrial Code provides for the *obligation to apply for a licence*. A licence may be withheld only for lack of reliability or in the case of financial disorder, Art. 35 Industrial Code. As the burden of proving unreliability or financial disorder is on the local industrial inspection board, the obligation to apply for a licence is hardly of practical importance to credit brokers. Now, as before, practically any person who does not have a previous conviction for fraud or has not been adjudged bankrupt may be admitted. Art. 34c Industrial Code affords effective consumer protection only in some extreme cases. Pursuant to Art. 35 Industrial Code, subsequent prohibition to pursue the trade of a credit broker is possible. It presupposes *unreliability* and is restricted by the principle of reasonableness. Cases of cancellation of a licence happen very rarely[119].

3 Other provisions

354 Other restrictions on the business activity of credit institutions and credit brokers stem from the general provisions under the law of unfair competition and trade law. Advertising by credit institutions and credit brokers must not be misleading (No. 80ff). Unfortunately, deceptive advertising may often be observed in the credit brokerage business (f.i. on the total charge for credit). Here the courts, not always along uniform lines, try to fight abuses in advertising[120]. Under trade law it is prohibited to procure loans through itinerant peddling (No. 112). The civil law consequence of forbidden loan brokerage through itinerant peddling was for a long time a matter of argument, until the Federal High Court in a ruling of 22 May 1978 assumed *nullity* pursuant to Art. 134 Civil Code[121]. In this connection the Federal High Court advances as a reason that the consumer must be protected against incurring any commitments carelessly. Here what matters is not the need for protection in a particular case, because the consumer's difficulty of furnishing proof is otherwise not sufficiently taken into account. The prohibited trade practice is construed widely. It includes any activity of the broker outside his own business premises, for instance on the occasion of an advertising drive by the creditor or a

third party for the purposes of soliciting and counseling the customer as well as preparing the ground for the conclusion of a credit agreement. The trade practice is not prohibited if a sales transaction is linked with a loan agreement (No. 112); this exception is interpreted by the Federal High Court in a narrow sense. The borrower's duty to return is determined by the law of unjust enrichment (No. 346). Through court practice, far-reaching effective protection of the customer against door-to-door transactions arranged through credit brokers, which is known to exist in other countries and which is demanded by the EC directive on consumer credit, has been achieved.

Credit institutions are subject to a certain supervision by the Federal Banking Supervisory Office, which essentially aims at protecting the depositor and saver, but not the debtor, even less the consumer. The Federal Supervisory Office sees to it that the obligation to indicate the total charge for credit is complied with by the credit institutions. It also tries to encourage banks to be more consumer-minded in cooperating with credit brokers.

Pursuant to Art. 23, para. 3 KWG, the Federal Supervisory Office may raise objections to abusive advertising by credit institutions, for instance in the case of aggressive consumer credit advertising and misleading statements, but has made little use of these powers[122]. Indirectly, the Federal Supervisory Office tries to control credit brokers by charging banks with the task of seeing to it that credit brokers cooperating with them comply with the obligation to indicate interest rates and engage in objective advertising.

VII CREDIT REFERENCE AGENCIES AND COLLECTING AGENCIES

1 Credit reference

355 Often the consumer will receive a promise of credit only after his credit standing has been checked. This may be done by the bank itself, but also by what are known as *credit reference agencies*.

Credit reference agencies are of great practical importance in the area of consumer credit in the Federal Republic of Germany. Banks and savings banks are affiliated with the 'Schufa', a credit reference agency on debtors, including consumers, which stores data on all debtors and supplies them to credit institutions upon request; conversely, the affiliated credit institutions communicate all relevant data on debtors and their credit behaviour to the Schufa. The importance of the Schufa is revealed by the fact that in 1977 it collected data about 24 million people involved in trade and industry and supplied information in 22 million cases. To the consumer wanting to obtain credit it is important that he should know the contents of the stored data on his *credit standing*, so that he may demand that they be erased if incorrect or eventually claim damages.

The law of storage and communication of data by credit agencies has meanwhile been regulated by the Bundesdatenschutzgesetz (BDSG, *Federal Data Protection Act*) which came into force on 1 January 1978. The decisive basis is to be found in Arts. 31 *et seq.* BDSG[123]. Art. 32 BDSG permits in principle the storage of data on credit standing and the like if there is no reason to presume that this will impair the interests warranting protection of those concerned. The communication of such data to credit and similar institutions is permitted if the

recipient has satisfactorily shown his legitimate interest in knowing them; in the case of an application for credit by a consumer this should always be the case.

The regulation in Art. 34 BDSG is important to the consumer. Pursuant thereto an *obligation to notify* exists if data are *transmitted* for the first time; storage need not be notified[124]. The customer may request *information* about his personal data stored, but has to pay a fee, even if the information was useless to him.

Art. 35 BDSG regulates the consumer's claim for *correction* of personal data if these are *incorrect*. The data are *blocked*, if their correctness is contested by the consumer and if neither their correctness nor their incorrectness can be established. After the expiry of five years, there is likewise an obligation to block data and to erase them at the consumer's request. To preclude the exercise of these rights, the Schufa cannot plead that the data were supplied to it incorrectly by credit institutions, for it is 'master' of the data it stores and supplies: otherwise the consumer's rights would be practically ineffective.

In addition to the special claims under the BDSG, there are the provisions of the law of torts on account of which the party concerned may be asked *to refrain* from storage and transmission of data infringing the consumer's personal right or credit, Arts. 823, para. 1, 824 Civil Code. There is also a *claim for damages*, although it is doubtful in how far the consumer can be said to have suffered a loss as a result of his application for credit having been rejected. We shall not go into further details of these provisions which are of little practical importance. The Schufa is not liable in tort for communications with respect to which the affiliated banks failed to check the identity as required[126].

From the point of view of both civil law and data protection, a clause in loan forms of banks permitting them to pass on to the Schufa information originating from the customer's application for a loan has recently been a matter of heated argument[127]. Though the consumer when signing the contract has 'consented' to this clause, since it is included in all loan forms, he has no choice other than to 'accept' the clause in order to get the credit. Often he fails to grasp the importance of the clause, so it is possible to regard it as being unfairly prejudicial to the customer within the meaning of Art. 9, para. 1 AGBG (No. 265). It may also infringe the mandatory provisions of the BDSG which permit transmission of data only in a particular case and only with the interests of those concerned in each case being weighed carefully. Lastly, it should be examined whether or not the clause can be challenged on grounds of antitrust law, since it is used in a uniform way in all loan forms and thus is equivalent to the case of an unreported and consequently forbidden terms recommendation.

2 Debt-collecting businesses

356 In the event of pecuniary difficulties, credits raised by a consumer will often be collected not by the lender himself, but by a *collecting agency*. The regulation underlying the business of such an agency is Art. 1, para. 1 of the Rechtsberatungsgesetz (RBG, Legal Advice Act) of 1935 (No. 358). Pursuant thereto the business of a *collecting agency requires a licence*[128]. This is granted only as *a part licence* and does not include the initiation of court proceedings by way of an action[129]. The debtor need not have collection without permission enforced

against him; in this respect the assignment of debts is ineffective.

The involvement of a collecting agency may entail additional costs to the consumer which are, however, limited by the statutory regulation on compensation for default in Arts. 286 *et seq.* Civil Code. He is not liable to pay a commission for collection to the collecting agency[130], but has to pay costs equivalent to a lawyer's fees[131]. A passing on to the consumer of the overall collection costs by the credit institution in standard form contract conditions infringes Art. 9, para. 2, item 1 AGBG.

VIII REFORM OF THE LAW OF CONSUMER CREDIT

356a The law of consumer credit in the Federal Republic of Germany — unlike the law in many other countries within and outside the EC[132] — is a patchwork of regulations which relate only to certain marginal aspects of consumer-policy problems and besides are easy to evade. In principle, there is unshakeable confidence in the workability of competition and in the well functioning of the doctrine of freedom of contract[133] which only now and then in the case of usurious interest (No. 346) or control under the AGBG (No. 338) results in state intervention. The enforcement of provisions on consumer protection — of which there are only a few — is characterised by special deficiencies particularly where socially weak consumers are concerned[134].

The German legislator encounters difficulties in his attempt to reform the law, because in the law of consumer credit he continues to start from the instalment credit, i.e. from the AbzG. This becomes evident in the amendment of Art. 607a (No. 333), where a detailed regulation of the Einwendungsdurchgriff (defence of the consumer against the bank originating in the contract of sale or contract for services) is proposed, which is hardly important any more[135], while the actually acute problems of regulating the consequences of default or fighting usurious lending are left to the courts.

In an expert opinion delivered by v. Marschall[136] to the German Ministry of Justice, the question of comprehensive regulation of consumer credit is put up for discussion for the first time in German law. Many proposals for reform are based on the existing law, for instance in applying the rule of Art. 1a AbzG (No. 323 above) to all credit agreements. With respect to the right of cancellation, the expert does not favour regulation pursuant to Art. 1b concerning all credit transactions (No. 324 above), but only concerning special provisions applicable to door-to-door sales as exist in English and Belgian laws. Worth mentioning are his considerations concerning reform of the consequences of default. Under the existing law there is freedom of contract (No. 338) — with the exception of the AbzG (No. 325 above) — and thus freedom of prosecution on the part of the creditor. The expert makes a difference between *temporary delays* in repayment and *ultimate failure*. In the case of temporary irregularities he wants to furnish the creditor with additional means to compel the debtor to effect repayment, for instance by temporarily taking the security[137]. He rejects the idea of allowing the consumer a 'délai de grace' — in contrast to many foreign laws. This issue is sure to require further discussion. In the event of ultimate failure he demands settlement of the credit relationship without delay, with the security being

realised, to avoid a decrease in value and an accrual of interest and costs[138]. A period of three months allowed for realisation is to urge the creditor to speed up the matter.

More far-reaching proposals for reform culminating in a bill on consumer credit have been made by Reifner[139], who pleads in particular for the introduction through legislation of a compulsory delay in the event of financial difficulties on the part of the debtor.

An EC draft directive of 27 March 1979[140] aims at regulating consumer credit uniformly within all countries of the EC. Art. 6 provides for writing including comprehensive obligations to furnish information, distinguished by credits for restricted and for unrestricted use, and credit card agreements. There will be no right of cancellation. Bills of exchange may not be signed to provide security or to effect payment. The consumer may enjoy more favourable treatment.

NOTES

1. Reifner, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung*, 1979, p. 123ff; *id.*, E. Weitz und R. Uesseler, *Tatsachen zum Verbraucherschutz im Konsumentenkredit* [1978], p. 216ff.
2. On the general problem, cf. Chapter 1, No. 4.
3. Cf. Scholz, JZ [1975], p. 727, however, without a critical evaluation of these facts; Marschall v. Bieberstein, *Gutachten zur Reform des finanzierten Abzahlungskaufs* [1978], p. 9ff; Reich, ZVP [1979], p. 353.
4. Benöhr, ZHR 138 [1974], p. 492ff.
5. BGHZ 62, 42; KG NJW [1975], p. 1327; Reich, JZ [1975], p. 555; Reich, *Alternativkommentar zum BGB* (AK), §1 AbzG, refs. 5–6.
6. BGH DB [1978], p. 1026.
7. Reich, *Verbraucherkredit*, ed. 2 [1979], (Reich), item 115.
8. BGH NJW [1978], p. 1315; similarly BGH NJW [1979], p. 874.
9. Cf. Reich, JuS [1978], p. 451ff (with references).
10. BGH NJW [1976], p. 1354; [1977], p. 714.
11. LG Hamburg NJW [1973], p. 804; Reich, AK §1 AbzG, ref. 3.
12. Eike v. Hippel, *Verbraucherschutz*, ed. 2 [1979], p. 168ff; Reich/Tonner/Wegener, *Verbraucher und Recht* [1976], p. 185ff; Löwe NJW [1974], p. 2257; Reich, JZ [1975], 550; Reich, NJW [1978], p. 516f; v. Marschall, *op. cit.* (note 3), p. 50ff.
13. Löwe, NJW [1974], p. 2258; Reich, JZ [1975], p. 551; Bachmann, NJW [1978], p. 866; LG Frankfurt DB [1977], p. 672; Canaris, NJW [1978], p. 1891; BGH NJW [1979], p. 2089; Reich, item 59.
14. BGHZ 62, 42, NJW [1977], p. 1632.
15. v. Hippel, *op. cit.* (note 2), p. 164f; Reich, JZ [1975], p. 552ff.
16. Reich, JuS [1978], p. 452ff.
17. LG Berlin, NJW [1977], p. 254.
18. Löwe, NJW [1974], p. 2259; Reich, JZ [1975], p. 552; Reich AK §1b AbzG, ref. 5.

19. Erfahrungsbericht der Bundesregierung, BT-Drucksache 8/234, p. 7; Reich, item 139ff.
20. BGH NJW [1975], p. 206.
21. BGH NJW [1977], p. 713.
22. Palandt/Putzo, Komm. zum BGB, ed. 39 [1980], §1b AbzG, note 1; Reich, AK §1b AbzG, ref. 6.
23. NJW [1977], p. 254.
24. Reich, JZ [1975], p. 552ff; Löwe, NJW [1974], p. 2259.
25. BGHZ 19, 330; Derleder, ZHR 139 [1975], p. 45.
25a. Reich, AK §2 AbzG, ref. 8f.
26. BGH NJW [1974], p. 747; v. Marschall, *op. cit.* (note 3), p. 209ff.
27. BGH NJW [1977], p. 1632; criticised by Heckelmann, FS Bärmann, p. 432ff; Reich, JZ [1975], p. 555; v. Marschall, *op. cit.* (note 3), p. 146ff.
28. Bericht der Bundesregierung, BT-Drucksache 8/234, p. 8.
29. Hörter, *Der finanzierte Abzahlungskauf* [1969]; Müller-Laube, *Teilzahlungskredit und Umsatzgeschäft* [1973], v. Marschall, *op. cit.* (note 3), p. 11ff.
30. Scholz, JZ [1975], p. 727; a different view is taken by Gilles, JZ [1975], pp. 306, 729.
31. BGHZ 47, 241; NJW [1970], p. 702.
32. BGH NJW [1971], p. 2301; OLG Stuttgart NJW [1977], p. 1926.
33. BGH NJW [1970], p. 701.
34. BGH NJW [1971], p. 2301.
35. OLG Stuttgart, NJW [1977], p. 1926; BGH BB [1980], p. 385.
36. BGHZ 47, 253; NJW [1970], p. 701.
37. OLG Stuttgart NJW [1967], p. 2016; [1977], p. 1244.
38. BGHZ 62, 42.
39. Löwe, NJW [1974], p. 2263f; Reich, JZ [1975], p. 554; LG Berlin NJW [1977], p. 254. Also BGH BB [1980], p. 385.
40. Reich, item 158; OLG Köln NJW [1979], p. 726.
41. BGHZ 47, 241; 75, 112. Also BGH BB [1980], p. 385.
42. Müller-Laube, *op. cit.* (note 29); Weitnauer, JZ [1968], p. 201.
43. BGHZ 47, 207; NJW [1973], p. 452; [1975], p. 1317; [1976], p. 1093; DB [1978], p. 1026.
44. BGHZ 33, 293; 47, 207, 217; DB [1978], p. 1026 (1028).
45. BGHZ 47, 224; NJW [1971], p. 2301.
46. BGH NJW [1973], p. 452; p. 611.
47. BGH DB [1978], p. 1026 (1028).
48. OLG Stuttgart NJW [1977], p. 1244. A different view is taken by Bauer, NJW [1975], p. 2009; Joerges AK §812, ref. 34.
49. BGH WM [1978], p. 459; WM [1979], p. 489 = NJW [1979], p. 2194; BB [1980], p. 635.
49a. BGH NJW [1979], p. 2511; [1980], p. 782.
50. Emmerich, JuS [1972], p. 279; Weick, JZ [1974], p. 13; Gilles, JZ [1975], p. 305; v. Marschall, *op. cit.* (note 3), p. 199ff; more exhaustively Reifner (note 1), pp. 226, 233, 244ff. On the whole subject now Reich, JZ [1980], p. 329ff.

51. Reich/Tonner, DB [1974], p. 1149; Chapter 7, No. 265.
52. BGHZ 51, 69; also BGH NJW [1976], p. 1093 (Sicherungsgrundschuld).
53. v. Marschall, *op. cit.* (note 3), p. 199ff (in favour of the admission of a right of lien).
54. BT-Drucksache 8/3212 with (largely affirmative) comments by the Bundesrat.
54a. Reich, JZ [1980], p. 336.
55. BGH NJW [1974], p. 365.
56. Cf. LG Zweibrücken NJW [1974], p. 193.
57. Reich 'Beitrag Leasing', in: *Vahlens-Zivilrechtsbücher*, vol. 3 [1974], p. 50ff; Reich AK §6 AbzG, refs. 22ff. Derleder AK preceding §§535ff, refs. 64ff.
58. BGH NJW [1977], p. 1058; BGH NJW [1978], p. 1382.
59. On this in principle Gilles, JZ [1975], p. 305; v. Marschall, *op. cit.* (note 3), p. 197ff.
59a. OLG Schleswig NJW [1974], p. 648; OLG Hamburg MDR [1977], 403; OLG Düsseldorf NJW [1973], p. 1612; LG Augsburg NJW [1972], p. 637; [1973], pp. 1709 and 1704; similarly now BGH DB [1978], p. 1026; cf. on the whole subject Finger, JZ [1979], p. 583.
59b. BGH NJW [1978], p. 2145.
60. Reich, No. 6; Reifner, *op. cit.* (note 1), p. 30ff.
61. BKA-Bericht [1977], BT-Drucksache 8/1925; p. 81.
62. Reich, No. 77.
63. Ulmer/Brandner/Hensen, *Komm. zum AGBG*, §10, No. 7, ref. 13.
64. On this Reifner, *op. cit.* (note 1), p. 159ff, at the same time with a legal-policy discussion; v. Marschall, *op. cit.* (note 3), p. 181ff; Reich, JZ [1980], p. 334.
65. BGH WM [1969], p. 335; DB [1978], p. 787.
66. Reich, No. 15.
67. OLG Karlsruhe BB [1972], p. 287.
68. Reich, No. 16; v. Marschall, *op. cit.* (note 3), p. 182ff.
69. Cf. OLG Frankfurt BB [1976], p. 857.
70. DB [1978], p. 787.
71. Reich, No. 24.
72. Reich, Nos. 29ff.
73. LG Berlin NJW [1977], p. 586.
74. OLG München of 18 April 1978, 9 U 3987/77.
75. Scholz, MDR [1977], p. 887ff; Reich, No. 88.
76. This may be a ground for nullity, BGH NJW [1979], pp. 805, 808.
77. Reich, No. 102.
78. BGH NJW [1978], p. 2144; NJW [1979], p. 1593.
79. Scholz, MDR [1977], p. 890f BGH TW [1967], p. 155; OLG München WM [1975], p. 1316.
80. Scholz, MDR [1977], p. 892.
81. Reich, No. 101.
82. BGH NJW [1974], p. 50.
83. BGH JZ [1976], 479 with note by Köndgen.
84. Bähre/Schneider, *Komm. zum KWG*, ed. 2 [1977], §23, item 5.

85. Möschel, *Das Wirtschaftsrecht der Banken* [1973], p. 326ff. Rinck, *Wirtschaftsrecht*, ed. 5 [1977], p. 163ff.
86. Bähre/Schneider, *op. cit.* (note 84), item 10.
87. RGZ 161, 55; BGH NJW [1962], p. 1148.
88. Rühle, *Das Wucherverbot — effektiver Schutz des Verbrauchers vor überhöhten Preisen*? [1978], pp. 64, 70; Reich, JZ [1980], p. 334 with a critical view of that interpretation.
89. BGH JR [1976], p. 17; Canaris, NJW [1978], p. 1894; LG Frankfurt/M. NJW [1978], p. 1926; Rühle, *op. cit.* (note 88), p. 21ff; Reich, NJW [1977], p. 636; differently OLG München NJW [1977], p. 152.
90. OLG Hamm NJW [1973], p. 1001; LG Frankfurt/M. NJW [1978], p. 1926.
91. BGH WM [1976], p. 1221.
92. Reich, No. 73.
93. BT-Drucksache 8/456.
94. Reich, No. 98.
95. LG Berlin BB [1978], p. 15, BGH NJW [1979], p. 2089; OLG Stuttgart, BB [1979], p. 1168 (only to 1/2).
96. OLG München NJW [1977], p. 152; Scholz, MDR [1977], p. 892.
97. BGH NJW [1979], pp. 805, 808, 2089; Reich, NJW [1977], p. 636; KG WM [1975], p. 128 (129); differently Canaris, NJW [1978], 1894.
98. BGH NJW [1979], pp. 805, 808.
99. BGH NJW [1979], p. 2089; Reich, No. 98.
100. OLG Stuttgart BB [1979], p. 1168.
101. RGZ 161, 52 (55); BGH NJW [1962], p. 1148; Bachmann, NJW [1979], p. 2082; Reich, JZ 1980, p. 334.
102. BGH NJW [1979], p. 1597.
103. Reich, No. 69; Buß NJW [1977], p. 1520; Scholz, MDR [1977], p. 892.
104. FAZ of 16 June 1978.
104a. VPK of 22 April 1980.
104b. BGH BB (1980), p. 494.
105. BGH NJW [1974], p. 859; OLG Bremen NJW [1977], p. 638 and Chapter 2, No. 41 above.
106. OLG Celle NJW [1978], p. 1268 with negative notes by Ott; similarly Bachmann, NJW [1978], p. 865; differently OLG Celle NJW [1978], p. 1487; BGH NJW [1979], p. 805 (806).
107. Survey in H.J. Weber. *Sicherungsgeschäfte*, ed. 2 [1978]; Reich, Nos. 35ff.
108. On the legal policy problems, cf. v. Marschall, *op. cit.* (note 3), p. 176ff, 195ff. Reifner, *op. cit.* (note 1), p. 314.
109. On this Hartmann, NJW [1978], p. 609; Reich, No. 48.
110. Reich, NJW [1978], p. 516; BGH WM [1974], p. 8; v. Marschall, *op. cit.* (note 3), p. 206ff; Reich, AK preceding §§765ff, refs. 14ff.
111. OLG Frankfurt NJW [1973], p. 104 v. OLG Stuttgart NJW [1971], p. 50.
112. BGH WM [1966], p. 115.
113. BGH WM [1967], p. 290; Reich, No. 51.
114. Canaris, *Bankvertragsrecht* [1973], p. 1257.

115. Cf. BGH BB [1976], p. 577; Reich, No. 47.
116. Hartmann, NJW [1978], p. 610; Reich, No. 48.
117. v. Marschall, *op. cit.* (note 3), p. 211.
118. Bähre/Schneider, *op. cit.* (note 84), p. 41ff.
119. Landmann/Rohmer, *Komm. zur Gewerbeordnung*, ed. 13 [1977], §35, notes 5ff.
120. Scholz, MDR [1977], p. 888f; Reich, No. 88.
121. BGH NJW [1978], p. 1970; NJW [1979], p. 1597.
122. Bähre/Schneider, *Komm. zum KWG*, ed. 2 [1977], §23, item 8.
123. Mallmann, in Simitis et al., *Komm. zum BDSG* [1977], §31, note 15; cf. also *Der Spiegel* 1/1979, p. 24ff.
124. On this Mallmann, *op. cit.* (note 123), §34, note 3.
125. Information given to the author on 16 June 1978 by the Datenschutzbeauftragten (official entrusted with data protection) Prof. Bull.
126. BGH NJW [1978], p. 2151.
127. Cf. Test 8/79, p. 18; also OLG Celle NJW [1980], p. 347.
128. Altenhoff/Busch/Kampmann, *Komm. zum RGB*, ed. 4 [1977], Art. 1, §1, notes 13ff.
129. Altenhoff, *op. cit.* (note 128), note 44.
130. Altenhoff, *op. cit.* (note 128), note 34; on the whole subject see Jäckle, JZ [1978], p. 675.
131. OLG Nürnberg DB [1973], p. 962; OLG Düsseldorf MDR [1974], p. 226.
132. v. Marschall, *op. cit.* (note 3), p. 55ff; v. Hippel, *op. cit.* (note 12), p. 179ff.
133. Cf. BGH NJW [1979], p. 805ff on the nullity of a credit agreement for the badly arranged design of the consequences of default.
134. Cf. the study by Reifner/Weitz/Uesseler, *Tatsachen zum Verbraucherschutz im Konsumentenkredit* [1978].
135. v. Marschall, *op. cit.* (note 3), p. 199ff.
136. v. Marschall, op. cit. (note 3), p. 14ff, p. 135ff; Reich ZVP [1979], p. 353. On the whole subject see the survey by Reich, JZ 1980, p. 195ff.
137. v. Marschall, *op. cit.* (note 3), p. 184ff.
138. v. Marschall, *op. cit.* (note 3), p. 187ff.
139. Reifner, *op. cit.* (note 1), p. 401ff.
140. BT-Drucks. 8/2953; v. Marschall, *op. cit.* (note 3), p. 112ff.

CHAPTER 9

Legal Advice and Law Enforcement in Consumer Law

I THE PROBLEM

357 Our description of consumer law has shown that in recent years a large number of regulations and court decisions have been issued which either directly improve the consumer's position in the market or in law or at least indirectly make a positive contribution in terms of consumer policy to the regulation of market mechanisms. It cannot be overlooked, though, that there are still considerable gaps, that resistence on the part of suppliers has to be overcome, that the structural deficiencies of the market and the law which we have analysed in Chapter 1 have hardly been offset so far by legal regulations and court decisions. Yet it cannot be denied that there are positive developments in consumer law and it remains to be studied here how they are translated into reality.

To begin with, the problem of law enforcement is nothing specific to consumer law, but is a phenomenon concerning all fields of law. However, within the framework of consumer law it is a specific issue precisely because apparently here there are great deficiencies in law enforcement and because often the individual consumer neither knows what his rights are nor is in a position to exercise them. It seems to us that the law certifies the consumer a type of prudence which is often in contrast to social circumstances and with respect to the poor consumer may result in almost a denial of justice. However, so far these are mere hypotheses which have to be verified on the basis of legal measures.

As outlined by us in detail, consumer law in the Federal Republic of Germany is essentially enforced at three levels: by governmental authorities, through the activity of associations (collective action against unfair trade practices and illegal standard form contract conditions), and by individual consumers within the framework of legal relationships under civil law. Another factor on a growing scale is the establishment of so-called organs of self-control, for instance in the area of advertising, which, however, often do not serve the interest of consumers, but are intended to protect suppliers against state intervention (No. 126). Unlike the situation in labour law, the bargaining power of consumer organisations plays hardly any role since there is almost no membership-based organisation of consumers and possible activity on the part of trade unions is characterised by too narrow a conception of themselves and by possible conflicts with their interests proper (No. 7).

Two instruments of consumer policy play hardly any role in the law of the Federal Republic of Germany and may therefore be disregarded: the instruments of criminal law are used only in extreme cases, for instance in that of fraudulent trade practices, and so far operate in a retrospective way only[1], and in the Federal Republic of Germany there is no centralised institution of consumer protection, such as the Consumer Ombudsman in the Scandinavian countries. Whether such a consumer ombudsman would be desirable and admissible under our constitutional law will not concern us any further here, since no initiatives pointing in that direction can be identified[2].

To continue the description, we start from the hypothesis which in many respects is, however, rather doubtful, that the supervisory activity of authorities within their competence and the right to bring a collective action basically work in a positive way. We have already said where we consider the gaps in enforcement to be (No. 117ff; No. 274ff). We shall now turn to the *individual consumer*. How does he know his rights, how can he enforce his rights in as speedy and inexpensive a way as possible and without personal commitments, and how can he refuse to accept unjustified claims of suppliers?

The individual consumer's protection passes through three stages:

— Above all, the consumer must know his rights and duties in the first place. The existing civil law assumes that any subject of rights and duties has complete knowledge of the law and is aware of his contractual obligations for the very reason that they are created only with his intention. However, this liberal model is in contrast to reality, specifically in the case of socially weak consumers. A possible remedy may be for the law to impose on suppliers special duties to furnish information, for instance concerning the right of cancellation in the case of door-to-door sales and instalment transactions or concerning the content of standard form contract conditions if they are incorporated in the contract[3]. In a more general way, the problem for the consumer is where to find opportunities of advice enabling him to know his rights and duties, especially in a conflict situation.

— Knowledge of the law means a first step towards its enforcement, but requires further measures. A decisive step in this direction will be made if in the event of disputes between consumers, of the one part, and traders and craftsmen, of the other part, *proceedings out of court* are available which allow speedy enforcement possibly by amicable agreement and without major formalities and costs.

— Should it be impossible to settle a dispute 'by amicable agreement', under Art. 19 para. 4 Grundgesetz (German Basic Law) an independent court has to decide the matter in the last instance. The question is whether the present *court procedure* suffices or whether it calls for improvement.

II LEGAL ADVICE TO THE CONSUMER

1 The significance of the RBG of 1935

358 (*aa*) In the Federal Republic, there is no act that deals specifically with legal advice to the consumer. Rather, advice to consumers, in so far as it is legal advice, is regulated by the general provisions of the RBG of 1935, which is still in

force, and the compliance of which with constitutional law is not called in question[4].

The Act forbids the handling by way of business of somebody else's legal matters (geschäftsmäßige Besorgung fremder Rechtsangelegenheiten), irrespective of whether for a consideration or gratuitously, by any person who is not licensed to do so. The Act and the two implementing regulations issued thereunder then regulate the basis, procedure and extent of the licence to give legal advice. Section 1, Art. 3 of the Act exempts from its scope legal advice and the handling of legal matters by authorities, public-law entities within the framework of their competence, lawyers and cooperatives. Pursuant to Art. 7, no licence is required if associations or agencies formed on a trade, professional or on any similar basis provide advice and assistance in legal matters to their members within the scope of their functions.

The significance of the Act in terms of legal advice to consumers is revealed only if we take a closer and more critical view of the interpretation of the provisions mentioned above.

The *concept of legal advice* is formulated in very broad terms, the requirement being that the advice should relate to a particular case. According to established practice such particular cases are[5]:

- information on the legal position in a law case of everyday life;
- guidance as to the possibilities of setting up claims in a legal situation;
- advice to the person seeking advice to behave in a certain way;
- assistance in acting on such advice, in so far as the adviser's identity is not disclosed to third parties, hence particularly the preparation of a draft contract, draft dunning letter, letter of request or draft petition to a court or any other authority.

The concept of legal advice is also considered to exist if a newspaper or broadcasting or television corporation within the framework of its freedom of information as protected under constitutional law provides judicial assistance in a particular case by means of so-called question and answer columns[6]. The courts differentiate according to whether the discussion of the legal side of the problem involved is most important, whether the main emphasis of the advice is on the legal side, and whether the important factor is general instruction on juristic issues given to all readers[7]. According to the dominant view of legal writers, unlawful legal advice does not become admissible by the fact that the information is made public. However, this view, as we shall demonstrate, is a matter of argument for constitutional reasons (Art. 5 Basic Law).

Legal advice also embraces the handling of legal matters. This will be any activity through which another person's legal affairs are promoted directly[8]. Such activity may also concern the drafting of contracts, e.g. the wording of a contract of sale, lease, credit agreement, contract of service or contract to manufacture, or the modification of a certain contractual relationship, for instance by the drafting of a notice of termination. Activity directed at the handling of legal matters is also to comprise law enforcement, namely the clarification of existing legal relationships and the safeguarding and enforcement of existing rights and claims. This is expressly laid down in the Act regarding the collection of claims.

Legal advice and the handling of legal matters must be distinguished from general advice, specifically with respect to economic relations[9]. The boundaries are hard to fix in a particular case. The courts take as a criterion whether the emphasis of the activity is on the field of economics or of law[10]. Legal commentaries define legal advice in a wider sense and assume it to exist as soon as the advice initially concerning economic issues also gives rise to legal consequences[11]. This opinion will have to be reviewed from the point of view of constitutional law.

Legal advice and the handling of legal matters are subject to a licence irrespective of whether they are provided for a consideration or not, whether they are egoistic or altruistic, and whether or not they are provided by persons qualified in the profession[12]. The activity must be carried on only *by way of business* (geschäftsmäßig), be it full-time or part-time. The Act does not cover occasional legal advice. For instance, if a professor of law occasionally gives legal advice, he does not infringe the RBG. However, if the activity is characterised by some duration and regularity, this constitutes an infringement of the RBG[13].

This wide interpretation of the concepts of 'legal advice or the handling of legal matters' and 'by way of business' entails severe restrictions on legal advice to consumers. Legal advice to consumers is practically a monopoly held by lawyers, unless a licence has been granted or the exceptions to the Act are applicable. If, by contrast, it is maintained that the Act serves the purpose of consumer protection[14], this is nothing but a superficial justification of the monopoly of the Bar exclusively to furnish legal advice, which was created by that Act. In this context it is not taken into consideration that consumer protection is required only in so far as persons insufficiently familiar with legal matters should not be allowed to give legal advice. Conversely, it must be assumed that any person who completed law studies inclusive of practical training is qualified to give legal advice as laid down in the Act with respect to the lawyer.

359 (*bb*) As regards the handling of consumer affairs in practice, the Act has extremely adverse consequences. In principle there are three alternatives to avoid the restrictions under the Act on legal advice to consumers:

(1) It is initially assumed that the general advice given by Consumer Advice Centres (Verbraucherzentralen — No. 6) does not constitute legal advice but merely economic advice and assistance in deciding matters relating to everyday life, housekeeping and the like[15]. Thus the regular consultative activity of consumer advice centres comes within the law. Cases including both economic and legal elements, specifically in the case of services and credit, are problematic. Sensible economic advice is impossible without discussing the legal aspects, without considering the legal alternatives and referring to the legal consequences. For instance, if a consumer wants to know which life insurance or which credit is most favourable to him, not only the 'economic value', but also the contract terms and the possibilities of termination are of decisive importance to him. Here it is impossible to follow legal commentaries assuming legal advice whenever the advice also involves legal consequences. Rather, in keeping with court practice it must be assumed that the emphasis of the advice is on the economic side. In view of the fact that many consumer problems involve legal aspects, economic advice connected with legal advice

does not infringe Section 1, Art. 1 of the RBG.

Neither is it a matter of legal advice if a consumer advice centre participates in complaints or conciliation boards as will be described below. In this case it is not a matter of legal advice or the handling of legal matters, but of participation in a procedure aiming at the speedy enforcement of consumer complaints[16].

(2) Pursuant to Art. 7, consumer organisations on a membership basis may within the scope of their functions provide advice and assistance to their members in legal matters. Since German consumer organisations are not organisations on a membership basis[17], this possibility does not come into question, particularly not in the case of regional or local consumer advice centres. At best it can be imagined whether or not it would be possible in view of the structure of consumer advice centres, whose members are usually only corporate bodies, to give legal advice to members of such corporate bodies and thus to indirect members of the consumer advice centre. As far as can be ascertained, this case has not so far occurred in practice. It depends on the definition of the term 'member'. It can be imagined quite easily that *indirect membership* also suffices[18].

On the other hand, legal advice to members may already be given by consumer-oriented organisations which safeguard consumer interests in specific areas[19], particularly tenants' organisations and associations of motorists. Tenants' organisations actively furnish legal advice to their members, while associations of motorists seeing themselves less as consumer organisations than as a 'motorist lobby', as indicated in Chapter 1, do not make use thereof, but at best offer their members legal expenses insurance. The extent to which trade unions may give their members legal advice in consumer affairs is a matter of their position in general as consumer organisations (No. 7). As far as can be ascertained, they have not yet made use of this opportunity.

360 (3) In the most common model of advice by consumer advice centres a licence pursuant to Art. 1 of the RBG is required. Most of the consumer advice centres have meanwhile applied for such licences and following resistance by local bar associations have in most cases been granted licences. In its Second Consumer Report, the Federal Government has held the following view: 'Consumer advice centres, provided they are sufficiently staffed and qualified, should therefore be permitted to handle legal matters. The grant of licences to give legal advice comes within the German Länder Governments' competence, though[20]'. A licence, usually granted to a person versed in law employed in the consumer advice centre, is restricted to the field of activity of the consumer advice centre and is usually limited to three years[21].

On account of such a licence, the consumer advice centre of Lower Saxony, for instance, in 1976 gave advice in 2100 cases, in Bavaria in 750 cases. In Hamburg an increase by about one third to a total of 4000 cases was recorded in 1977. Legal advice shows a clear upward movement[22]. In view of the many cases of conflict the consumer faces in business and legal transactions, this number is extremely small related to the area served by the consumer advice centres concerned. It has proved a particular impediment in practice that pursuant to Art. 1, para. 1 of the second implementing regulation concerning the RBG of 3 April 1936, consumer advice centres are subject to a ban on advertising, i.e. that

they are forbidden to make reference in public notices and communications to their giving legal advice[23].

361 (*cc*) The analysis of the construction of and practical experience with the RBG is not satisfactory from the point of view of consumer policy. There is an urgent need for its modification. The AgV and the Verbraucherbeirat attached to the Federal Minister of Economics have therefore demanded that, through an amendment of the RBG, consumer associations be granted the statutory power to give legal advice[24]. Against this the Federal Government has given to understand that it desires the present legal situation to be retained and that only in individual cases will a licence to give legal advice be granted to consumer advice centres[25].

Present practical experience with the RBG must be critically evaluated from the point of view of *constitutional law*[26]. Here a distinction must first be made between legal advice for a consideration and gratuitous legal advice. As far as it is a matter of legal advice for a consideration, the basic right of freedom to choose a profession as laid down in Art. 12 Basic Law is concerned. Here it has for a long time been established practice that for reasons of public interest the pursuit of a profession may be limited[27]. It is therefore constitutionally possible that lawyers should monopolise legal advice and the handling of legal matters for a consideration and that apart therefrom such an activity, for instance by debt collecting agencies, is subject to licence. A construction such as this also satisfies the interests of consumer protection since unqualified persons or 'profiteers' are to be kept away from legal advice.

The situation is different in the case of *gratuitous legal advice*. Here the constitutional freedom of action as laid down in Art. 2 Basic Law, and freedom of opinion, freedom of information and of the press as laid down in Art. 5 Basic Law are concerned. According to general constitutional principles, intervention must be within the scope of reasonableness[28]. The requirement of reasonableness is no doubt satisfied if unqualified persons are to be kept away from gratuitous legal advice. This, however, does not apply to gratuitous legal advice given by qualified persons, specifically trained jurists. It is admissible to introduce a licencing procedure, so that unqualified or unreliable persons are kept away from gratuitous legal advice by way of business. On the other hand, if a person is reliable and qualified, a *claim* to be granted a licence belongs to him pursuant to Section 1, Art. 1 RBG[29]. The present practice, according to which a licence is granted by the presiding judges of district and regional courts, which creates restrictive conditions in this area, is not tenable under the Constitution. In particular, arguments of competition with existing lawyers even in disguised form must not be introduced nor should any considerations of professional ethics of lawyers be made an element of the licence. The licence is merely to ensure that legal advice is duly given, so that, for instance, it may be demanded that a liability insurance be taken out. This point of view is apparently also winning favour with the legislative bodies. In a draft amendment of the RBG of 20 June 1980 (BT-Drucks. 8/4277) Art. 1 §3 is planned to be supplemented by item 8. Pursuant thereto the extrajudicial handling of legal matters involving consumers by consumer advice centres is exempted by statute from the requirement of a licence.

The *ban on advertising* of legal advice for a consideration may be tenable under the Constitution as a regulation on the pursuit of a profession, because it is known to apply equally to lawyers and to other professions concerned with legal advice and legal representation. As regards gratuitous legal advice, there is no reason for a ban on advertising. Rather, the constitutionally protected freedom of action implies the possibility to advertise a lawful, constitutionally protected activity. Advertising is merely subject to the general limitations under the law of unfair competition (No. 79). It is impossible to put the same limits of professional ethics on gratuitous authorised legal advice as on legal advice for a consideration.

A special problem emerges with respect to legal advice given in the press or over the radio by way of question and answer columns and the like, which according to present practice is said to infringe the RBG. It is true that the constitutionally protected freedom of opinion may be restricted through general legislation, but the Federal Constitutional Court has also pointed out that statutory restrictions have to be interpreted in the light and within the meaning of the constitutional guaranty of freedom of opinion and of the press[30]. This results in a much narrower interpretation of prohibited legal advice than is the current practice. Thus newspapers must be entitled to instruct and inform about cases of everyday life as this is one aspect of their constitutional mandate. In this context it does not matter whether this is done by means of general explanations or in the light of a particular case. In what way this particular case must be treated anonymously is but a matter of protection of the individual and not of the RBG. According to the view held here, there is no reason why newspapers or radio and television corporations should not advise and assist consumers in legal matters by taking up a particular case, describing possible solutions and indicating legal consequences. Special permission is not required, since it is not a matter of legal advice subject to a licence in the first place (No. 358).

Finally, a last aspect of the view held here may be mentioned: gratuitous legal advice is generally interpreted as being a function of the *welfare state* (Sozialstaat), as laid down in Art. 20 of the Basic Law. Schoreit, for instance, has taken this view in several publications[31]. The Federal Constitutional Court has taken a similar view with respect to legal aid[32]; there is no reason why this should not be extended to gratuitous legal advice preceding the actual proceedings. The welfare state idea gains importance in the construction of acts in compliance with constitutional law which considerably restrict or even monopolise a function the welfare state is required to perform. To the extent outlined here, these restrictions on legal advice do not correspond to the conception of the welfare state and are therefore either directly contrary to the constitution or by way of construction in line with the constitution have to be reduced to a level appropriate to the welfare state.

2 Reform endeavours

362 For the above-mentioned considerations of the welfare state, legal advice in the Federal Republic of Germany in recent years has become a highly controversial matter[33]. The discussion relates not only to consumer protection, but generally speaking to legal advice to the poor, for instance concerning family

and probate law, matters of landlord and tenant, and problems of labour and social law. We shall describe this discussion only so far as matters relevant to legal advice to consumers are concerned.

363 (*aa*) There have been in existence for some time various legal advice institutions which also, even if not primarily, give information and legal advice on consumer matters, for instance in conjunction with instalment transactions. In Hamburg a public legal advice bureau has been in existence since about 1947, which in 1974 furnished advice in more than 11 000 civil cases[34]. Similar bureaux have been established in Elmshorn and Lübeck[35]. The objections to these bureaux raised by lawyers under the RBG are not convincing, since public corporations, particularly local authorities, have a comprehensive duty to provide social assistance and under Sect. 1, Art. 3 RBG are therefore also empowered to give general legal advice.

Other German Länder opted either for mixed-type models or model experiments. In Berlin, for instance, legal advice is given by bar agencies (legal advice centres of the bar association) and by legal advice centres attached to district offices. According to the empirical investigations of legal advice conducted in West Berlin, the benefits of public legal advice are taken mostly by the poor, while advice by bar associations is rather geared to the middle classes[36]. A person seeking advice incurs no costs, or costs to only a modest extent. Lawyers are usually called upon to give advice in order to institute or conduct litigation, while this is not so in the case of public legal advice. About one fifth of all cases handled by public advice centres or by bar associations are consumer protection cases.

In Hesse, three models have been tested[37]. In the case of model 1, local bar associations in cooperation with the judicature established legal advice centres in the district courts (Amtsgerichte). These centres are staffed by lawyers during certain consultation hours. In the case of model 2, the advice centres are staffed by retired judges as advisers. In the case of model 3, persons seeking advice may obtain from the application office of the district court a warrant for advice by a lawyer. By means of this warrant, the person seeking advice may call on a lawyer of his choice who, if necessary, will also undertake legal representation. All models have in common that they include an agency for preliminary examination. In the case of advice by lawyers, a small charge is payable by the person seeking advice. Past experience has shown that three fifths of all cases originate from the area of consumer protection. These figures reveal that there is apparently a great need for legal advice to consumers, which is not furnished satisfactorily by the existing institutions. However, the figures ascertained to date are far too few for a probability analysis.

There are still other model experiments and alternatives of legal advice to the consumer which have not so far produced any exact figures concerning their activity and therefore provide hardly any indications of the need for and intensity of advice. The consumer often does not even know of the advice centres unless, as in Hamburg, they are long-standing institutions.

364 (*bb*) The reform discussion in the Federal Republic of Germany has soon focused on the issue of whether gratuitous legal advice should be provided by

lawyers or public advice centres. Various models have been submitted. The German Bar Association has suggested extrajudicial legal aid[38]. According to that model, legal advice is to be furnished exclusively by lawyers. Persons of moderate means are free to use it and may upon presentation of a warrant obtain legal advice from a lawyer of their choice. Legal fees are paid by the state. The test of whether the applicant needs advice is performed by a lawyer. Advice is then given in central information bureaux of lawyers (in big cities) or in law firms.

According to other proposals the existing public advice centres should be extended throughout the Federal Republic. These advice centres are planned to be set up and paid for by local authorities. Advice may be given by people working in an honorary capacity, which reduces the cost. Public legal advice aims more at offsetting social inequities[39]. Its intention is not the preparation of a lawsuit and representation, but social assistance to the person seeking advice.

365 (*cc*) Meanwhile a bill by the Christian Democratic Union concerning extrajudicial legal advice and representation of low-income citizens and a government bill on Legal Advice have been submitted to the Federal Parliament[40]. It is worth mentioning that both bills are based on a model of advice by lawyers, so that here the professional interest of lawyers prevailed over the concern of public advice centres to offset social inequities.

The government bill of 17 August 1979 on a *Beratungshilfegesetz* (Legal Advice Act) tries to summarise the present discussion[42]. The bill defines extrajudicial advice as a task of the welfare state. Legal advice is not limited to matters of consumer protection. Institutionally it shall be provided by governmental agencies (district courts) in cooperation with lawyers. Legal advice is usually to be given by lawyers, unless the district court is able to handle the matter. The public advice centres of the city states of Hamburg, Berlin and Bremen will be retained. Usually governmental agencies, namely the clerk of the district court, will decide whether or not to grant gratuitous legal advice. The person seeking advice receives a warrant with which he may call on a lawyer of his choice. He has to pay a lump sum of DM 10, while the other costs will be refunded to the lawyer by the state according to a scale of fees. The standard lawyer's fee is DM 50, which serves to facilitate accounting. In urgent cases the lawyer himself may establish the entitlement.

Art. 2 of the bill defines 'Beratungshilfe' as advice to a person seeking help and, so far as this is necessary for appropriate assistance, representation. Representation includes all fields of civil law, i.e. also the civil-law provisions on consumer protection and, in addition, the law of unfair competition which, in line with the ideas about reform, is to be revised to afford better consumer protection (No. 123). Moreover, Beratungshilfe is granted in matters relating to administrative law which also comprise many areas of consumer protection. Beratungshilfe may be claimed only by such private persons as owing to their financial circumstances cannot reasonably be expected to use their own funds in paying for the services of a lawyer. Art. 3 then specifies the basis of computation applicable to Beratungshilfe (double the standard rate of social assistance plus surcharges).

The bill must be criticised in that it conforms too much to the model of advice

by lawyers and puts too great an emphasis on the consideration due for legal advice. Legal advice aiming at offsetting social inequities is not intended[43]. The *status quo* of the present public legal advice centres is not affected, but other models of public legal advice are contemporaneously rendered impossible thereby. We regret to say that gratuitous altruistic legal advice is not dealt with in the bill at all, but remains subject to a licence within the narrow limits of the RBG.

The bill was passed on 18 June 1980 (BGBl I 689) with minor amendments (the lump-sum consideration was raised to DM 20). It came into force on 1 January 1981.

III CONSUMER COMPLAINTS

1 Generalities

366 If a consumer wants to make a complaint connected with the purchase of a product or the use of a service, he may of course turn to his contracting party asking him to remedy the cause of the complaint. The more he is advised and experienced in legal matters, the greater the emphasis with which he will assert his claim and the greater his chances of success. Whether the entrepreneur will accept the complaint, take notice of it in the first place, cooperate with the consumer, and offer or refuse to settle the matter at his expense is entirely within his discretion. In a conflict situation (such is the logic of German law) it is the consumer who has to enforce his rights in court. Generally speaking, he cannot use the services of a governmental authority to safeguard his interests.

However, this liberal model of law enforcement in practice amounts to the consumer *de facto* being deprived of his rights[44], for two reasons. The consumer is isolated as regards his problems and complaints and is usually faced with an entrepreneur who commands expert knowledge and is versed in law and who in addition can take the advice of and may be represented by his associations, chambers and other organisations. The alleged equality of rights results in an inequality and asymmetry of law enforcement. On the other hand, it is a legal fiction in Germany that all conflicts have to be taken to court and be finally decided in court. A result similar to that may be achieved through complaints procedures and conciliation schemes, as have been in existence for the settlement of disputes for a long time in the area of trade and industry.

Consumer complaints outside court proceedings — which as an ultimate measure must of course be retained — can be dealt with effectively only if the consumer is freed from his role as an isolated individual, if representatives of his interests participate in procedures for the settlement of a dispute, and if a speedy, low-cost and effective procedure out of court is made available. Thus the effective handling of consumer complaints requires a developed complaints and conciliation system with consumer representation on the principle of parity. In its Second Consumer Report the Federal Government says: 'The Federal Government welcomes this establishment (complaints and conciliation boards) helping the consumer in many cases to enforce his claims without subjecting him to the risk of court fees. In its view the most expedient model of such conciliation boards is that comprising one representative each of the suppliers' and

consumers' part and one neutral chairman'[45]. It is regrettable, though, that the Federal Government should consider the staffing of these boards on the principle of parity to be only expedient, but not a prime necessity of consumer protection.

2 Practical significance of complaints and conciliation boards

367 There are a large number of conciliation and complaints boards in the Federal Republic, whose activities have not so far been studied systematically[46]. Chambers of industry and commerce have set up these complaints boards for their districts. A similar thing has happened in the area of chambers of handicrafts (Handwerkskammern), for instance in the case of dry cleaning and the motor vehicle craft. Schoreit reports that in February 1976 there were 42 complaints boards attached to 36 chambers of industry and commerce[47]. According to the statements of von Falckenstein in mid-1977, there were 46 such boards in 40 districts served by chambers[48]. The German Industrial and Trade Association in mid-1978 reported that in 1977 20 000 consumer complaints had been handled by these complaints boards[49].

The organisation of these institutions varies. To standardise their structure, the German Industrial and Trade Association developed some models which provide for an institutionalisation of complaints boards in various patterns. They range from the assignment of a clerk to handle complaints including unilateral negotiation with the trader and the consumer, to a talk with both contracting parties present, to a stronger institutionalisation by a three-member conciliation board. These conciliation boards often, though not imperatively, include consumer representatives as advisory members. Reportedly, these boards achieved amicable settlements in 70% of all cases. Complaints relate primarily to questions of quality, warranties and liability.

In the services sector, the associations or chambers and guilds concerned have set up complaints boards. The German Länder associations of the Association of Dry Cleaners together with consumer advice centres have set up in the majority of the German Länder 'Complaints Boards for Dry Cleaning Complaints', which are for the most part staffed by representatives of consumer advice centres and dry cleaners and by one sworn expert. They are able to handle complaints in a speedy and expert way. The consumer may be given his right without having to obtain an expensive laboratory opinion. Such complaints boards exist, for instance, in Hamburg, Berlin, Bavaria and Hesse (the latter handles 2500 complaints annually).

Another system of complaints boards exists in the motor vehicle craft[50]. Apparently most of the regional guilds have set up such complaints boards. Following unsuccessful negotiations between consumer and trader, negotiations are conducted before a commission of five which consists of one chairman, one representative each of the ADAC, DAT, KfZ-Innung and the TÜV. The awards are binding upon guild members. However, not all workshops are members of the guild. The extent to which the awards imply a binding decision at the expense of the consumer has not yet been clarified. In the standard form contract conditions (No. 228) of the motor vehicle craft it is assumed that complaints boards may take a binding decision on the existence or

absence of defects. Thus the complaints board practically acts as an arbiter. Such a clause curtails the customer's possibility of enforcing his rights under contract law and may be ineffective under the AGBG (No. 264)[51]. This legal issue has not so far been clarified.

Lastly, we may refer to reform endeavours within the framework of the law of unfair competition. The bill to amend the UWG (No. 123) is intended to introduce a new Art. 27a providing for the set-up of conciliation boards attached to chambers of industry and commerce for the settlement of infringements of the law of unfair competition[52]. If a consumer or consumer association appeals to a conciliation board, it shall be staffed by one chairman who must be a qualified lawyer, while the other members must be appointed from among traders and consumers on a par basis. In the Federal Government's view this initiative is based on the positive experience gained with conciliation boards attached to chambers of industry and commerce[53]. As, under the law of unfair competition, in future an individual consumer shall also be entitled to make a claim for damages (No. 123), the Federal Government deems it necessary to allow also consumers and their associations access to conciliation boards. At the same time this is intended to back up the boards in recognition of their successful activity. This initiative is certainly a step in the right direction, although in a very confined sector of consumer law. For the bulk of consumer complaints this initiative is of no practical consequence.

Overall, it may be noted that in the Federal Republic the handling of consumer complaints in accordance with more recent trends of consumer protection is characterised by very wide gaps, lack of uniformity and fragmentation. In many areas there are no institutionalised conciliation schemes at all. Existing complaints and conciliation boards are staffed on a genuine par basis in very few areas only, for instance in the dry cleaning trade. Often the consumer is not familiar with the activities of complaints and conciliation boards and, moreover, these boards are locally and functionally separated. Under the existing law they lack jurisdiction anyhow, unless they act as arbitrators which, however, results in a curtailment of the consumer's legal position.

Overall, it seems necessary to check the disorderly development of complaint procedures and conciliation boards and to strive for a unification of the boards staffed on a par basis. Moreover, it seems necessary that the state gives appropriate financial support to these conciliation boards. This is the only way they can be independent as institutions.

IV JUDICIAL ENFORCEMENT OF CONSUMER CLAIMS

1 Principles

368 We have seen that a consumer is compelled to enforce his claims in court if he has no other way to get his right or to achieve a satisfactory compromise with the entrepreneur. Formally, any consumer has access to the civil courts having jurisdiction in these matters, provided that his rights are affected. In the case of breach of contract, claims under a guaranty, questions of the law of torts and similar problems he may go to court. As the value in dispute in consumer complaints usually does not exceed DM 3000, the consumer must bring an

action in the district court (Amtsgericht) where there is no compulsion to be represented by a lawyer.

This formal protection of legal rights has a very different effect in practice if we follow sociological studies of the actual working of the civil procedure[54]. To begin with, a striking fact is that in matters relating to consumer law consumers practically never act as plaintiffs, but in about 95% of all cases as defendants. Suppliers obviously use court proceedings as an instrument to enforce their justified or unjustified claims against the consumer. While in the proceedings a consumer may plead his rights and may, for instance, set up defective delivery or breach of contract as a bar to an action for payment, we have already seen that these rights are often denied to him or restricted by means of exemption clauses (No. 203) or specific types of financing (Nos. 331, 335). Practically, the courts are used as debt collecting agencies by suppliers who naturally may bring their superior economic power and better legal 'know-how' to bear on the consumer who is isolated here.

Furthermore, for the consumer law enforcement and prosecution is complicated by a number of legal and factual problems. One such bar is the risk of litigation costs[55]. It is a principle under German procedural law that the losing party in addition to his own costs has to bear all the costs incurred by the opposing party, for instance such party's lawyer's fees. If the services of an expert are engaged and the case is taken to a lower as well as to a higher court, it is very likely that the litigation costs the consumer will have to bear will be approximately equal to the claim prosecuted. Only if he is successful is he not liable for costs, and even then he has to bear the risk of collection; if the condemned debtor fails to pay, the consumer is not only unable to enforce his claim, but is also left to settle his costs. Even if he is successful in the first instance, for example before the district court, he may also against his will be forced to be a party to proceedings before the court of appeal. If he loses the case then, he has to bear all costs inclusive of those of the lawsuit he won in the first instance, unless it is an exceptional case as provided for in Art. 97, para. 2 Code of Civil Procedure, which is applied in practice very rarely.

As was mentioned before, the consumer need not consult a lawyer before the district court, but will require a lawyer's assistance precisely if he is not himself versed in law or if the other party is represented by a lawyer. Before taking the case, the lawyer will usually request a fee, which he is entitled to do under the existing law. Initially, the conduct of litigation is entirely at the consumer's risk.

This selective effect of the liability to pay the costs practically means that the consumer will not only refrain from instituting proceedings himself, but will often not enter into proceedings instituted against him and therefore will give in of his own 'free will', particularly in cases of doubt which cannot be resolved through legal advice. Thus, the existing law of civil procedure bars consumers, especially poor consumers, from access to the courts, which is in sharp contrast to the idea of social justice[56]. We may be inclined to interpret the introduction of *legal aid* (Armenrecht) as a certain correction. And so it happened that the Federal Constitutional Court emphasised that legal aid is an expression of the care of the welfare state for the socially weak plaintiff or defendant[57]. In reality, the practical handling of legal aid intensifies and aggravates social discrimination in civil proceedings. Such legal aid is available only to poor persons who

are unable without detriment to their own and their family's subsistence to bear the costs of the proceedings. Before legal aid is granted, the chances of success of an action are examined. If they are denied, legal aid will not be granted and prosecution is practically impossible. Legal aid means only that the assisted is exempted from his costs and that a lawyer is assigned to him for provisional gratuitous safeguarding of his rights. As such a lawyer, the so-called Armenanwalt (poor men's lawyer), is paid a lower fee than the normal lawyer representing a party in proceedings, successful and experienced lawyers are, of course, not interested in taking such a case. Pursuant to Art. 116a, law students having passed the first state examination may be assigned. The grant of legal aid does not affect the liability to reimburse the costs, so that if the poor man loses his case he has to bear the costs incurred by the opposing party, Art. 117 Code of Civil Procedure. A reform has taken effect as from 1 January 1981 (No. 370).

On the whole, a consumer seeking advice or being in need of legal protection is in a very disadvantageous situation: on a true assessment of the cost situation and the risk of having to pay them, he must generally be advised against legal proceedings. Adequate complaints and conciliation boards are available to him in exceptional cases only. He may obtain legal advice only on restrictive conditions. The most serious gap in consumer protection in the Federal Republic of Germany seems to be in this area and is apparently not attributable to the lack of consumer protection acts. The reform movement has tried to remedy some of the most flagrant grievances without any striking success so far.

2 Prohibition of jurisdiction clauses

369 In the past, prosecution had been rendered difficult for consumers on account of the use of so-called jurisdiction clauses (Gerichtsstandsklauseln). In civil proceedings as in the general law of contract the principle of freedom of contract applied concerning the agreement of local jurisdiction. In standard form contracts, companies used to agree that the courts at their place of business should have jurisdiction even if the consumer's domicile was elsewhere or the contract had been concluded or had to be performed in a different place. Owing to the grievances that occurred and the actual curtailment of the consumer's possibilities of enforcing his rights, the legislator issued a prohibition of jurisdiction clauses under Art. 38 Code of Civil Procedure effective 1 April 1974[58]. Provisions similar thereto are included in Arts. 6a and b AbzG with respect to instalment sales and contracts coming under the law of instalment transactions (No. 326). Jurisdiction agreements are no longer admissible unless one of the parties is a trader or a public-law entity. Thus, according to the consumer protection concept we have developed above, all consumers are protected against such jurisdiction clauses (No. 18). In addition, small traders (Minderkaufleute) also come under the protection of the law. Thus the general provisions on local jurisdiction which cannot be changed by contract remain in force for the benefit of the consumer. If the consumer is sued, the action must be brought either at his domicile or at the place of performance of the contract, Arts. 13 and 29 Code of Civil Procedure. In the case of torts, the law of unfair competition or product liability, the court in whose district the act was committed has jurisdiction, Art. 32 Code of Civil Procedure, Art. 24 UWG. If a

consumer is the plaintiff, the court at the contractual place of performance has jurisdiction. A contractual arrangement concerning the place of performance to the detriment of the consumer is not possible. However, the law itself does not designate the place of performance. Rather, this follows from the type of contractual obligation[59]. Contracts of sale usually have to be performed at the buyer's domicile, unless fulfilment of the debt at the seller's address has been agreed upon by way of exception. Hence, in the case of mail-order purchases the place of performance is the consumer's domicile. In the case of services the place of performance is the place where the service is to be performed, for instance motor vehicle repairs in the place where the motor vehicle is repaired, also if this is not at the consumer's domicile, and in the case of travel contracts in the travel organiser's place of business (No. 257), because this is where the travel services are to be performed. In the case of instalment transactions the situation is more favourable to the consumer, since the consumer's domicile is always the place of jurisdiction irrespective of the place of performance. In the case of other types of consumer credit, there is no uniformity[60]. Assuming that the credit is to be repaid at the bank's location, the place of jurisdiction for such actions will be the bank's place of business, not the borrower's domicile. By contrast, assuming that pursuant to Art. 269 Civil Code the place of performance is usually the debtor's domicile, that is in this case the consumer's domicile, and that Art. 270 only speaks of payment but not place of performance, the court at the debtor's domicile has jurisdiction. With respect to insurance contracts, Art. 36 of the VVG includes a special provision. The place of performance for the premium is the insured's domicile, so that he must be sued for payment of overdue premiums in that place. The insurance payment, however, must be effected at the insurance company's place of business.

On the whole, the prohibition of jurisdiction clauses has resulted in an improvement of the consumer's rights, particularly since the courts must *ex officio* pay attention to this prohibition in debt enforcement proceedings and in the main procedure. However, the legal position is not completely satisfactory, since in view of the regulation on the place of performance a consumer may be compelled to prosecute a claim, be it as a plaintiff or as a defendant, also in places other than his domicile.

3 Other reform endeavours

370 Under procedural law there are some reform endeavours that are not directed at consumers. The intention of the so-called Vereinfachungsnovelle (Amendment to Speed Up Civil Procedures), which will not be dealt with in detail here, was primarily to speed up court proceedings and to make hearings a central issue again[61]. Such speeding up of procedure also, of course, benefits the consumer's interest in law enforcement. Debt enforcement proceedings (Mahnverfahren) which in the past were handled by suppliers mostly for debt collection have been mitigated in that the former term 'order for payment' (Zahlungsbefehl) was changed into 'dunning note' (Mahnbescheid) whereby the misleading impression is avoided that the debtor (the consumer) is bound by law to effect such payment. Moreover, the instruction as to the right to object has been

worded more clearly and a form to exercise such a right has been attached[62].

Another reform is beginning to appear in outline in the law of unfair competition (Chapter 4, No. 123). In line therewith, consumer associations shall be enabled to judicially enforce combined claims for damages in competition litigation. The proceeds — expenses deducted — shall be distributed to those concerned who assigned their claims. Pursuant to Art. 13c UWG bill, the association does not require special permission under the RBG (No. 358), but is subject to supervision to prevent abuses and may advertise the possibility of assignment of claims only to a limited extent.

Interested circles have severely criticised this type of collective action for the sake of improving law enforcement by individuals[63]. It is feared that it will denature legal proceedings, invite abuse by dubious associations and have a denouncing effect as a result of the advertising of collective enforcement by assignment. Such criticism is not convincing, though. It disregards that consumer claims are often not asserted owing to the insignificance of the loss or the lack of knowledge of those concerned. That is why there is a *need for collective enforcement*. Rather, it is feared that the proposals of the bill are little practicable, for instance because of the requirement of written assignment, the difficulty of ascertaining the damage and the problems involved in the burden of proof[64]. Also, collective enforcement fails in the most important loss-entailing event, namely damage resulting from entering into a contract (No. 119). Here the association should be able collectively to enforce claims for rescission of contract and for repayment. That would be a genuine reform of law enforcement.

Further reforms, the outlines of which have meanwhile become quite clear, relate to the matter of who is to pay the costs. There is agreement among those discussing legal policy to the effect that the present legal aid should be improved by *procedural assistance*[65]. Precisely how this claim is to be designed is still uncertain. Moreover, it is being considered whether the bars to access to the courts originating particularly from liability to pay the costs should be abolished. Thus, it is being discussed whether to carry on legal proceedings at a 'free-fare tariff' or to introduce a legal expenses insurance[66]. Both proposals were rejected, though, because of the cost avalanche that it is feared would be caused, and have no chance of being realised. The German Lawyers' Association in 1976 examined possible alternatives and suggested only very few amendments[67]. While it suggested some changes of the law regulating litigation costs in the interest of more effective law enforcement, a free-fare tariff and comprehensive legal expenses insurance were rejected. The present system of legal aid is to be replaced by a system of Verfahrenshilfe (aid in proceedings including financial assistance).

A bill by the Federal Government of mid-1979 on an Act on Aid concerning Costs of Litigation (Prozeßkostenhilfe)[68] puts the present legal aid system on a new basis. For one thing, access to legal protection will be facilitated. Financial assistance in bringing actions is put on a broader basis. Also persons earning a higher income will be entitled to claim aid concerning costs of litigation in accordance with their means. If they are unable to defray the costs of litigation incurred from their income or property, they will be granted aid concerning

costs of litigation concurrently with an order for payment by reasonable instalments (right to pay by instalments). Another point is that the risk of litigation costs is to be reduced to a reasonable measure if the case is lost. Regardless of the amount of deferred or advanced fees, the obligation to pay by instalments is limited to 48 months. Overall, everyone will enjoy legal protection irrespective of the value in dispute and without the need to exercise undue restraint by a thrifty though appropriate way of life.

Overall, the bill is a step in the right direction even if it concerns only to a limited extent problems of consumer protection; all civil-law disputes come under the bill. However, in two instances the bill is open to doubts. The old regulation is retained (No. 368) according to which, if a case is lost, the person entitled to claim aid concerning costs of litigation as the losing party has to refund the winning party's full costs. This can involve a considerable risk to the consumer, particularly in disputed legal issues. Also, the assigned lawyer receives lower than normal fees. In actual fact this amounts to discrimination against the 'poor' party to the litigation. The competent parliamentary bodies have meanwhile passed the bill; the Act was promulgated on 13 June 1980 (BGBL I 677) and took effect as from 1 January 1981. Judicial examination of the chances of success of an action will be continued, which practically results in a curtailment of legal rights.

4 Further considerations regarding consumer protection in court proceedings

371 The present reform discussion has still taken too little account of the special interests of consumer protection. Here new ideas are necessary which are known to us from the Anglo-Saxon and Scandinavian countries. As these matters are hardly being discussed at all yet, we can note down a few key words only.

— It should be considered whether or not consumer complaints can be dealt with in simplified legal proceedings without appeal[69]. It should not be prohibited to consult a lawyer but, as in labour law, there should be no reimbursement of lawyer's fees. This would mean the introduction of a *small-claims procedure* into German law which does not exist so far.

— It should be considered how far the staffing of a district court in consumer matters could be extended similarly to that of a labour court to include one member each of traders and consumers. This would ensure equal representation of consumers in the procedure[70].

— The procedure should be preceded by conciliation proceedings to enable settlement out of court. If conciliation boards staffed on a par basis do exist, the court should of its own initiative refer the dispute to such boards.

— In the case of intricate technical questions, it should be possible to consult an expert at the expense of the state and not at the expense of the losing party.

— It should be considered how far consumer associations are able to take up consumer actions[71]. This has been impossible so far because of the provisions of the RBG[72]. If debt-collecting agencies may obtain licences for the benefit of traders, a similar possibility should be considered for the sake of legal symmetry with respect to the prosecution of consumer complaints. This concerns in particular more intricate cases of basic significance to legal progress. Collective

law enforcement under the law of unfair competition and under the law of standard form contract conditions could be supplemented in a meaningful way at the level of individual law enforcement which often involves matters of a similarly complex nature.

NOTES

1. Cf. on this especially concerning the UWG Schricker, GRUR Int. [1973], p. 694ff, as well as the legal facts in v. Falckenstein, *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* [1977], pp. 50ff, 99ff, and in the Entwurf einer UWG-Novelle, BT-Drucksache 3/2145, p. 9ff.
2. Simitis, *Verbraucherschutz — Schlagwort oder Rechtsprinzip*? [1976], p. 301; Hummel-Liljegren, 'Der Bundestag sollte einen Verbraucherbeauftragten haben', in *Aus Politik und Zeitgeschichte*, B 24/78, p. 24ff; Reich/Tonner/Wegener, *Verbraucher und Recht* [1976], p. 210 (sceptically); Däubler, 'Konsumentenombudsmann und Verbraucherselbsthilfe', in Duden, *Gerechtigkeit in der Industriegesellschaft* [1972], p. 57ff.
3. Reich, NJW [1978], p. 513ff.
4. Schoreit, *Rechtsberatung unentgeltlich*, ed. 2 [1976], p. 67ff; Reich/Tonner/Wegener, *op. cit.* (note 2), p. 232ff; Altenhoff/Busch/Kampmann, *Kommentar zum Rechtsberatungsgesetz*, ed. 4 [1978], p. 7f and below item 361. Reifner JZ [1976], 509ff.
5. Altenhoff, *op. cit.* (note 4), p. 11.
6. Altenhoff, *op. cit.* (note 4), p. 13.
7. BGH NJW [1956], p. 591.
8. Altenhoff, *op. cit.* (note 4), p. 15.
9. Schoreit, ZVP [1977], p. 117.
10. BGH NJW [1956], p. 591; Bayr OLG AnwBl [1964], p. 143.
11. Altenhoff, *op. cit.* (note 4), footnote 7, p. 16f.
12. Altenhoff, *op. cit.* (note 4), p. 27.
13. Altenhoff, *op. cit.* (note 4), p. 26.
14. Altenhoff, *op. cit.* (note 4), p. 8.
15. Cf. Schoreit, ZVP [1977], p. 117f.
16. Cf. Schoreit, ZVP [1977], p. 114.
17. Cf. above No. 6 as well as Schoreit, ZVP [1977], p. 119.
18. Objections are raised by Altenhoff, *op. cit.* (note 4), footnote 7, p. 155f.
19. Objections are raised by Altenhoff, *op. cit.* (note 4), p. 158 with reference to the feature of an association established 'on the basis of professional interests'; against this Schoreit ZVP [1977], p. 120.
20. BT-Drucksache 7/4181, item III 5.9.
21. Cf. Schoreit, ZVP [1977], p. 120.
22. Schoreit, ZVP [1977], p. 118.
23. Altenhoff, *op. cit.* (note 4), p. 261f.
24. Schoreit, ZVP [1977], p. 121.
25. 2. Verbraucherbericht, BT-Drucksache 7/4181, item III 5.9.

26. Cf. Schneider, MDR [1976], p. 1ff; Reifner, JZ [1976], p. 509.
27. Cf. Reich, *Markt und Recht* [1977], p. 94ff.
28. Reich, *op. cit.* (note 27), p. 110ff.
29. Undecided Altenhoff, *op. cit.* (note 4), p. 61f.
30. BVerfGE 7, 198; 12, 113; 25, 256.
31. Schoreit, *op. cit.* (note 4), p. 88ff.
32. BVerfG NJW [1974], p. 229ff; Eike Schmidt, JZ [1972], p. 681.
33. On this Baumgärtel, *Gleicher Zugang zum Recht für alle* [1976]; Rasehorn (ed.), *Rechtsberatung als Lebenshilfe* [1979]; Schoreit (note 4), throughout; Reifner/Gorges, *Alternativen zur Rechtsberatung* [1978], unpublished manuscript of the Wissenschaftszentrum Berlin from a general viewpoint.
34. Schoreit, *op. cit.* (note 24), p. 113ff.
35. Schoreit, *op. cit.* (note 24), p. 131f.
36. Reifner, 'Unentgeltliche Rechtsberatung in West-Berlin', in: *Rechtsbedürfnis und Rechtshilfe*, ed. by E. Blankenburg [1978], p. 43ff; Schoreit, *op. cit.* (note 24), p. 118ff.
37. On this Löber, ZRP [1977], p. 44ff.
38. In Baumgärtel, *op. cit.* (note 33), p. 35.
39. Cf. Schoreit, *op. cit.* (note 4), p. 107.
40. BT-Drucksache 8/1713.
41. BR-Drucks. 404/79; on this Baumgärtel, ZRP [1979], p. 302ff.
42. A critical evaluation showing an alternative proposal is included in: Blankenburg et al., *Beratungshilfegesetz* (Kritik am Gesetzentwurf der Bundesregierung und Alternativentwurf mit Begründung) [1980].
43. On this Reifner/Gorges, *op. cit.* (note 33).
44. On this Wassermann, *Der soziale Zivilprozeß* [1978].
45. BT-Drucksache 7/4181, item II 3.10.
46. On this in general v. Hippel, *Verbraucherschutz*, ed. 2 [1979], p. 130ff; *id.*, RabelsZ [1976], p. 531f; a sceptical view is taken by Simitis, *Verbraucherschutz* [1975], p. 167f.
47. Schoreit, ZVP [1977], p. 413f.
48. v. Falckenstein, *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* [1977], p. 169ff.
49. FAZ of 19 September 1978.
50. v. Falckenstein, *op. cit.* (note 48), p. 175, cf. also the report by Nöthe/Nordwig, 'Die Arbeit der Schiedsstellen des Kfz-Handels und Gewerbes', Mitt. der VBZ/NRW 5–6 [1978], p. 10ff.
51. Ulmer/Brandner/Hensen, *Komm. z. AGBG, ed.* 3 [1978], appendix §§9–11, ref. 615; Schoreit, ZVP [1977], p. 114.
52. BT-Drucksache 8/2145, p. 30.
53. *op. cit.* (note 52).
54. Wassermann *et al.*, *Menschen vor Gericht* [1979].
55. Grunsky, Gutachten A zum 51. DJT [1976], p. A 7ff; Baumgärtel, *op. cit.* (note 33), p. 121ff.
56. Rasehorn, *Recht und Klassen* [1974]; Wassermann, *Der soziale Zivilprozeß* [1978]; Bender/Schumacher, *Erfolgsbarrieren vor Gericht* [1980].
57. BVerfG NJW [1974], p. 229; NJW [1979], p. 2608 (2609).

58. Löwe, NJW [1974], p. 473.
59. On this in detail the legal commentaries.
60. v. Marschall, *Gutachten zur Reform des finanzierten Abzahlungskaufes* [1978], p. 209ff — including an evaluation under legal policy aspects.
61. Hartmann, NJW [1978], p. 1457. Cf. also the criticism of Blankenburg under legal sociology aspects, JZ [1979], p. 216ff.
62. Franszki, NJW [1979], p. 9 (14). Büchel, NJW [1979], p. 945.
63. Michaeli, GRUR [1979], p. 8ff.
64. Reich, ZRP [1978], p. 100ff; Stein, ZVP [1979], p. 29ff.
65. Trocker (note 55), p. B 67ff.
66. Cf. Gutachten Grunsky, 51. DJT [1976], pp. A 22ff, 51ff.
67. NJW [1976], p. 2004.
68. BT-Drucksache 8/3068; on this Kollhosser, ZRP [1979], p. 297ff.
69. v. Hippel, *op. cit.* (note 46), p. 105ff.
70. Cf. Reich/Tonner/Wegener (note 7), p. 255.
71. Cf. in the UWG the reform endeavours, Nos. 119ff, 370 which do not apply, though, in relation to the majority of cases.
72. Stürner, JZ [1978], p. 699.

List of Important Acts and Orders

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