

The Quasi-Cartel Approach

Hans-W. Micklitz Three Instances of Negotiation Procedures in the Federal Republic of Germany

ABSTRACT. The report deals with three types of negotiation procedures: the product information system, the voluntary right of rescission in direct selling contracts, and the widespread phenomenon of standard form recommendations. In order to facilitate a comparison each analysis is structured in an identical way: (a) presentation of the contents in their relation to legal rules; (b) motives behind their establishment; (c) description of the procedure; (d) evaluation of the monitoring of the codes and of the sanctions for non-compliance.

The product information system is an example of the common initiative of business interests, consumer organizations, and the German government in developing a scheme which enables the consumer to compare the quality of products. The system may be characterized by the absence of legal rules, self-administration of the negotiation procedure, and equal bargaining power of business and consumer organizations. The voluntary right of rescission represents the unilateral initiative of the direct selling organizations in the light of foreseeable regulation. Consumer organizations are integrated in the process of implementation to legitimate the voluntary code. Standard form recommendations represent a type of negotiation where the bargaining power of the consumer organization and of the administrative control authority may be regarded as a product of legal intervention. Negotiation between the parties involved takes place to implement the Standard Form Contracts Act.

In its conclusion the report supports the position of those who are rather sceptical as to whether negotiation is an appropriate means to improve consumer protection. On the other hand the somewhat negative experiences can be used to delineate a set of conditions required for negotiations to be a useful tool in consumer protection.

AREAS OF NEGOTIATIONS

This report deals exclusively with collective negotiations between representatives of consumer and supplier organizations. Three areas have been chosen from the multiple types of negotiations touching on the varying sectors of consumer law and policy. The choice, however, is not representative: it is rather ad hoc, given that the purpose is to focus on negotiation methods which either are not well known to the public or, on the contrary, have attracted a lot of attention. We choose to report on three experiences: *the product information system* belongs to the first category, aiming at the development of criteria for measuring quality and use, giving the consumer a basis for comparison with the non-price related features of a product; *the right of rescission in direct selling* is part of the

EEC-wide discussion on legal control of door-to-door sales; *standard form recommendations* have given rise to a special practice in the Federal Republic of Germany.

The following analyses are based on an identical pattern so as to facilitate a comparison of the varying forms of negotiation.

THE PRODUCT INFORMATION SYSTEM

The power behind the product information system is the German Association for Product Information (Deutsche Gesellschaft für Produktinformation, DPGI), the setting up of which, in 1978, stemmed from the collective initiative of consumers and suppliers with cooperation from the Minister for Trade and Industry. The aim of the DPGI is contained in "The Directive on Product Information in the Federal Republic of Germany (DPGI 10001)":

Product information should be of assistance to the consumer in making his purchase decision: It should inform in a uniform manner about important, objectively verifiable and controllable features of the goods, thereby helping comparative judgements.

The other participants are the German Standards Institute (Deutsches Institut für Normung, DIN) and the Committee on Terms of Delivery and Quality Control (Ausschuß für Lieferbedingungen und Gütesicherung, RAL). The DPGI Office has been amalgamated with the DIN. Since work commenced on 12th February 1977 twenty leaflets have been prepared and a further twelve are in the process of being drafted. At present all brochures and drafts can be divided into six groups:

- Heating pumps
- Solar energy commutators
- Photographic, cinematographic, and projection equipment
- Electrical household equipment (white equipment)
- Entertainment electronics (brown equipment)
- Gas, oil, and coal household equipment.

Content of Leaflets and Their Relation to Legal Regulation

All leaflets are drafted on an identical pattern. The central section shows a table with additional comments, the most part of which will also appear on the product information label for the consumer. From the table can be seen the measurements and description of the equipment, electrical supply properties, the consumption of energy, and reference to documents such as the instructions for use. The addressee of the leaflet is the product manufacturer as well as the importer. The information label, which has till now been put on the

product by the dealer, contains a shortened version of the important quality attributes, properties, and applied testing standards as well as a reference to more detailed product information in the supplier's leaflet. The latter is necessary as, on its own, the product information label, being filled with technical data, is not always comprehensible (e.g., in the case of solar energy commutators). From the consumer point of view the quality of information is improved through the explanation of various properties and data about the consumption of energy. The supplier wishing to use the system for his product must purchase the leaflets consisting of the specimen table and comments, as well as the product information label. The price varies from about DM 25 to DM 50 depending on the leaflet.

Product information features comprise two components which have to satisfy different demands. On the one hand, one has to examine which characteristics are suited for the determination of quality and fitness for use. At the same time the chosen features must be suitable for examination in a test scheme. It is one of the main aims of product information systems to use only those criteria which can at any time be examined by an independent authority. The technical data of quality features as well as testing methods are supplied by the German standard institutions. Although technical data are regularly to be found in technical standards and thus the choice of relevant information criteria is facilitated, there is still a lack of testing methods which provide for an objective measurement of quality features. The relevant standard institutions only started to develop their measurement procedures systematically in the '70s. The numerous test schemes developed by the Stiftung Warentest (the German consumer product-testing organization) are not appropriate to fill the gaps, as this organization pursues another aim. The Stiftung Warentest tries to develop test methods for comparable products from different manufacturers. Those test schemes have to fulfill the commonly accepted requirements laid down by the Council of the Stiftung Warentest, but they are not required to allow a repetition of the results whenever it is felt necessary. It is sufficient that all products of the test programme are examined under the same conditions. That is why test methods of the Stiftung Warentest may influence the work of the Association of Product Information but may not substitute it.

There are no national rules of law, apart from special provisions in food law, which aim at laying down the contents of product information. General standards on a specific subject matter are contained in the EEC Directive of 14 May 1979 on Information on Energy Consumption of Household Equipment by Means of

Labelling.¹ The general standards are still to be concretised in individual directives, as has been the case with electric cookers and is the case with washing machines, dish washers, refrigerators, and freezers; these directives have been in draft form since 21 May 1980.² Since then, negotiations in the EEC Commission and Council have broken down. The Community initiative nevertheless has impeded national legal development. The suppliers have in the course of the negotiations repeatedly referred to the Guideline Directive or to the failed draft of 21 May 1980, which made sense only as long as it was likely that the Guideline Directive would be implemented.

Motives Behind the Creation of the Product Information System

On conclusion of the 1st Consumer Programme in 1975, labelling became, as a means of consumer information, officially part of economic policy. The suppliers used this situation to combine plans for improvement of consumer information, by means of labelling, with the reorganization of technical standards, a theme which was at that time quite topical. In this way the position became entrenched. Integration with technical standards, a domain of industrial self-administration, would only be possible if there was no state control of labelling. Moreover, the German household equipment industry did not agree to setting up a universal system of labelling independent of product. This refusal was the reason for the development of the above outlined product-specific leaflets. It would be tempting to examine the relation of the product information system to the test methods of Stiftung Warentest. It is, however, sufficient for this report to indicate the aim of the German household equipment industry: it wanted to establish a counter-balance, using its own quality features, to the test standards of Stiftung Warentest.

Procedure in Drafting Leaflets

The procedure to be followed is carefully set out in the Directive on Product Information. The organs of the DPGI involved in the procedure are presently the six specialist committees for product information, sitting as the six product groups, as well as the joint panel. The actual work is carried out by the specialist committees, which meet twice or four times a year. The results of the committee work are intimated to the joint panel, which can send the proposal back to the specialist committee. This was the case with solar energy commutators. Where the specialist committee stands by the proposal, the joint panel can no longer veto it. In practice, there are informal

meetings between the committees in order to avoid any confrontation. Both committees comprise five representatives from suppliers' side (trade and industry), five consumer representatives (from the German Consumer Association – AGV, or Stiftung Warentest), one representative from the Federal Institution of Material Testing (Bundesanstalt für Materialprüfung), and one representative from DIN. In addition thereto, one representative from the Federal Ministry of Trade and Industry acts as guest of the joint panel as well as of the specialist committee. The committees in their proceedings work on the basis of consensus. Decisions must be made with a 4/5 majority at both levels. The joint panel and the specialist committees can, in cases of disagreement, independent of one another or together, call upon their self-created arbitration panel; this panel does not, however, take any majority decisions. The arbitration panel has not yet been called upon. The need for consensus led in the past to extreme tension between consumers and suppliers. At present, the supplier representatives in the special committee on electrical household equipment are refusing to participate. More than a year has passed without work being done on the drafts.

Monitoring and Sanctions for Non-Compliance

Use of the leaflets differs from one industry to another. The leaflets are almost generally accepted in the area of household equipment, Quelle, a large German mail order company, being an exception, however. The development of the solar energy commutators industry is itself quite illuminating. Enterprises first hoped to profit from a certain marketing effect but lost all interest as their turnover stagnated. The same may be shown in the photographic equipment sector. The Japanese producers were willing to accept the product information system so long as the proposed label to be put on the camera could be compared with a quality design – normally worked out by a firm or a trade association to promote the distribution. Rather disappointing is the situation on the market of entertainment electronics. The powerful trade association has refused its support. Contrary to the official view of the trade association, AEG Telefunken, a German electrical appliance company, has introduced the main texts of the leaflet concerned in its instructions for use. But AEG Telefunken did not work as a forerunner, even though the AGV expected this. The reason for the insufficient use is to be found in the dependence of the product information system on the marketing interests of the engaged industry.

Some practical experience in the operation of the *control* pro-

cedure can be gained from the field of heating pumps, where the enterprises control themselves. Nevertheless, it is not yet clear what kind of procedures have to be set up. The Directive itself provides for a random test to be carried out by an independent test institute. All companies which agree to use the leaflet must also consent in writing to allow a control to be carried out at their own expense. In practice, suppliers obstruct any further work on control procedures in the individual specialist committees. The manufacturers of electrical household equipment are supported in their arguments by the EEC Labelling Directive which does not contain such a clause. Those applying the product information system might be discriminated against through higher testing costs in comparison to foreign competitors.

Where defects are discovered during the random tests, the appropriate specialist committee through the DPGI demands that these be corrected. Where the defects are not removed within the time limit set, the specialist committee can prevent the company in question from further using any product information. In case of dispute, the company must, in terms of its contract with the DPGI, commence arbitration proceedings to determine the outcome. There has as yet been no resort to this procedure.

THE RIGHT OF RESCISSION IN DIRECT SELLING CONTRACTS

The Association "Good Advice – Buy at Home" (Arbeitskreis "Gut Beraten – zu Hause gekauft") was founded in 1967 by fourteen companies which sell their products through agents or part-time employees on a door-to-door basis. In 1982, the member firms had a turnover of 3.5 thousand million DM, and the products on sale comprised almost all articles of daily use, excepting food. The most important members, which sell their products worldwide, are Amway, Vorwerk, Bertelsmann, and Tupperware, having together a turnover of more than 300 million DM. Direct sales firms have customers in all segments of the population. In 1976, the Arbeitskreis introduced a customer's right of rescission (consisting either of a right of withdrawal or return), the control of which falls to a specially appointed commission.

The Right of Rescission and Its Relation to Legal Rules

The right of rescission forms part of the code of conduct established by the direct selling firms. The Code contains – in 9 articles – rules of conduct which member firms are to have regard to in the sale of

their products. We shall concentrate on the right of rescission. Article 8 reads as follows:

The companies will, beyond the rules of hire purchase legislation, also in the case of cash purchases, allow consumers placing orders from home or at home the right to withdraw their consent within one week from conclusion of the contract. They will further inform the consumers of this right, its ambit and consequences, and the means of exercising it in the ways set out in para. 1 b AbzG (Hire Purchase Act).

The right of rescission in the case of cash purchases can be substituted by allowing consumers the right to return their goods within at least one week of their delivery. The provision of a written statement indicating a right to return the ordered goods is sufficient information.

Direct selling firms use identical forms for hire purchase and cash purchase in which information on the right of rescission is given either for both types of contract together (e.g., AMC) or separately in different columns (e.g., Vorwerk). In practice — as we can see from the analysis of complaints lodged at the Verbraucherzentrale (Consumer Advice Centre) in Hamburg since 1 January 1982 — the matter is somewhat different. The examples referred to here do not have a representative character, but serve only as an illustration of consumer complaints. In contracts with AMC, the advice note in cash purchases is often not signed. According to the rules of the Hire Purchase Act the time limit will then not begin to run, i.e., rescission will be possible at any time. The difference between a right of rescission and a right of return has itself far-reaching effects. Direct selling firms such as AMC send out representatives who do not carry any goods. There is then often an attempt to erode the one week long right of recall by resorting to extremely long periods of waiting; often there is more than half a year between conclusion of the contract and delivery date. Amway, Jafra, and Avon use the right of return. The representative leaves the product with the consumer and collects the full sum at the consumer's home. There may thus be psychological pressure in the event where he should wish to return the often already used product. Even non-acceptance (the right to refuse to accept delivery) does not solve the problem, as the consumer's interest has already been aroused once the postman appears on the doorstep with the product.

Motives Behind Introduction of Right of Rescission

It was and is the aim of the Arbeitskreis, by means of voluntary regulation to avoid contravening national or European legislation. Any legal regulation of door-to-door sales, in the opinion of the Arbeitskreis, unjustly discriminates against direct selling. The key to understanding the policy of the Arbeitskreis lies in the relation

between voluntary regulation, on the one hand, and proposals for legal regulation, on the other. The by-laws of the Arbeitskreis, like its code of conduct, show the desire to erase a bad image with the help of consumer-orientated rights of rescission and return. The Arbeitskreis claims that this has been successful. Nevertheless, Verbraucherzentralen and the AGV are just as sceptical as before as to the seriousness of direct selling firms; such scepticism is reinforced by cases met in the daily practice of giving legal advice. Several complaints lodged at the Verbraucherzentrale Hamburg against the firm AMC were initiated by immigrant Germans (Aussiedler) on whom sales representatives had forced sets of pans at 645 to 1995 DM. In article 7 of the code of conduct, the text reads as follows:

The firm or its marketing representatives shall, in cases of contact with the so-called socially deprived, or foreigners, have regard to their financial means and their ability to properly examine the articles and to communicate, and in particular, refrain from taking all orders which such people cannot possibly afford.

Some bad experiences may be reported from consumers who came into contact with Electrolux and Vorwerk. When the consumer calls for a servicing agent where an article (mostly a vacuum cleaner) no longer works, a sales representative of the firm arrives to discover that the machine can no longer be repaired, as the motor has rusted. The consumer is advised to trade in his old machine for a new one. In fact, the "diagnosis" is wrong. Although these cases may not be representative, such practices are, however, not such as would in any way alter the existing negative image of direct selling firms.

By allowing the consumer a right of rescission, his behaviour in cases of complaint is somewhat channelled. The direct selling firms then always have the possibility of taking voluntary measures. The limited number of rescissions – in 1982, out of 35 million completed sales 630,000 were revoked on a voluntary basis – is, in the eyes of the Arbeitskreis, a good argument when calling attention to the seriousness of direct selling. On the other hand, it would not be correct to judge the introduction of rights of rescission only in a negative manner. Presumably the consumer is not interested in why the supplier has improved his legal standing. The main thing is that in practice, this standing is not undermined.

Procedure in Dealing with Complaints

The basic complaints procedure was developed by the Arbeitskreis without any participation of the consumer organizations. Attempts at inviting AGV to become involved in the process failed at an early stage. The Arbeitskreis set up a commission of control in 1982 which was to process independently complaints made by

individual consumers or consumer organizations against members or non-members. The commission is composed of three persons, with an increase to five planned for the future. The Director of Avon sits as representative of suppliers' organizations. The chair is taken by the Director of the Central Association for the Control of Unfair Competition (Zentrale zur Bekämpfung des unlauteren Wettbewerbs). The latter is practically the most important and powerful group which can initiate proceedings under § 13 of the Act Prohibiting Unfair Competition (UWG). The consumers are represented by an academic who is involved in the consumer scene. The commission is regarded by the Arbeitskreis as being composed of equal interests from consumers and suppliers. The actual procedure to be followed is decided by the commission of control itself. The commission does not have its own offices. Incoming complaints go directly to the Arbeitskreis which tries to find an amicable solution without involving the commission. Furthermore the incoming complaints are presented to the commission independently of whether or not the enterprise has responded to the complaint. The commission is not empowered to impose any sanctions. It merely makes suggestions to the Board, "measures which are appropriate in reducing unfair business practices of direct selling firms." The only sanction which the commission can impose is by printing its orders, opinions or decisions in the Bulletin of Direct Selling (Bulletin des Direktvertriebs), which appears unregularly – possibly against the will of the Board.

From summer 1982 up to the end of 1983 the Arbeitskreis as well as the control commission received 32 complaints, 14 requests for help, and (in 1983) only 149 inquiries about the activities of Arbeitskreis members or of the Arbeitskreis itself. In the commission's only meeting to-date, complaints against firms dealing with newspaper subscriptions were dealt with. The cause behind the relatively low number of complaints is the necessity for consumers to effect their rights of rescission and return with the relevant contracting party. Only when the member firms refuse to rescind the contract can the Arbeitskreis be called upon. Where the Verbraucherzentrale becomes involved in the case, direct selling firms generally cancel almost all contracts, irrespective of the actual legal position, especially where the consumer organization persists in taking its stance. However, there is no systematic briefing of the Arbeitskreis or the commission of control by the Verbraucherzentrale.

Monitoring the Right of Rescission

The Arbeitskreis does not check whether or not members and non-members follow the code of conduct. Nor does it undertake

any studies as to the application of the right of rescission. It tries to redress complaints against member firms in so far as the problems are brought to its attention. One main activity seems to be finding out those direct selling practices of non-members which may further damage the image of direct selling. For example, in 1983, the Arbeitskreis carried out a campaign against the fraudulent creation and dissolution of companies which left the consumer with no remedy. Where the Arbeitskreis is presented with the question of how to cope with violations of unfair competition rules (e.g., aggressive sales techniques by AMC vis-à-vis foreigners, or infringements of the voluntary right of rescission), its powers are in fact very limited. The only direct sanction the Arbeitskreis has is to exclude from membership a firm with a bad complaint record. No firm has yet been excluded from the group.

STANDARD FORM RECOMMENDATIONS

Since 1973, trade organizations have been able to draw up texts of standard terms of trade, delivery and payment for members and to recommend their application (Bohle & Micklitz, 1983). Such standard form recommendations in fact extend over wide areas of economic life. Out of 155 standard form recommendations, approx. 25 relate to business with consumers. There are three main areas of terms relevant to consumers:

1. Problem areas of consumer policy: sale of furniture, repair of electrical appliances, travel contracts, and dry cleaning;
2. Cars: standard terms for new cars, standard terms for the sale of second-hand cars, terms for repair work;
3. House construction: these recommendations relate mostly to professional groups which are involved in the construction of a house.

The content and procedure of negotiations is marked by parallel administrative and judicial interventions. The first is monitored by the Federal Cartel Office where the recommendations have to be registered under the Act against Restraints of Competition. The second is vested in the German Consumer Protection Association (Verbraucherschutzverein) under its right of action in the Standard Form Contracts Act. We draw some conclusions from other studies of the relevant files of both institutions.

Contents of Standard Form Recommendations and Their Control by the Act Against Restraints of Competition and the Standard Form Contracts Act

In general, standard terms issued by trade organizations improve the

consumer's legal position more than those developed by individual companies. But there may be a weakening of legal rights which might give rise to administrative or judicial action.

Trade organizations lay down in their standard form recommendations how they define the contents and scope of the contract in question. They take full advantage of possible different interpretations of the Act. Administrative and judicial control is *negative* control. The Federal Cartel Office and the Verbraucherschutzverein have the right to remove clauses in standard form recommendations or to demand alterations in so far as the Act against Restraints of Competition (GWB) and the Standard Form Contracts Act (AGBG) provide clear guidelines. The Act against Restraints of Competition empowers the Federal Cartel Office to check standard term clauses which have an effect on the price setting. Thus, in one case, the Federal Cartel Office forced the Central Association of Electricians (ZVEH) in registration proceedings to remove a clause providing for the payment of estimates. The Standard Form Contracts Act, on the other hand, contains a black list of forbidden clauses on which the Federal Cartel Office can base its control. If administrative control is not satisfactory, the Verbraucherschutzverein may bring a judicial action to implement the Standard Form Contracts Act, notably its general clause forbidding unfair terms. Such negative control has nevertheless the effect of developing the Standard Form Contracts Act, which, in all groups of clauses examined, has led to a continuous strengthening of the consumers' position. The thus realized standard of consumer protection represents fundamentally the limit of improvement which can possibly be realized under the existing law.

Negative control relates only to clauses which the trade associations have drafted themselves. The Federal Cartel Office and the Verbraucherschutzverein have no power whatsoever to impose clauses improving consumer rights on to traders' standard form recommendations. The concept of negative control is, however, abolished where, prior to registration of the standard form recommendations, *negotiations* take place between the trade organization and consumer associations. Thus, many standard form recommendations in the automobile sector were preceded by extensive negotiations between the German Automobile Association (ADAC) and the trade organizations. At the same time, negotiations may produce negative effects. Due to negotiations the ADAC had to accept certain clauses, which did not meet the general standards of the law, e.g., clauses allowing a unilateral increase of the sales price by the seller. On the other hand, the ADAC succeeded in negotiating a clause in the standard terms of repair contracts which improved the civil law rules. The clause provided that price estimates in the

contract might be exceeded by only 20% or 15% respectively depending on the value of the repair work.

The chances of the Verbraucherschutzverein escaping the limitations of the concept of negative control are restrained. The Verbraucherschutzverein can exercise its influence over the contents of standard form contracts where the trade association is weak, as happened in the discussions of standard form recommendations with the Association of Furniture Producers (Möbelfachverband). An example of improving consumer rights by negotiation can be seen from the clause on price alterations in standard form contracts for travel, which is more restrictive towards the travel company than a Federal High Court decision (for further references, Bohle & Micklitz, 1983).

Motives Behind the Drafting of Standard Form Recommendations

The rapid rise of standard form recommendations after the introduction of the Standard Form Contracts Act indicates that trade associations must have precise prototypes in order to be able to work the standard form recommendations into the structure of the contract. The dominance of medium and small business is striking. Trade associations obviously use the standard form recommendations as a means of reinforcing solidarity.

The standard form recommendations can hardly be seen as an instrument of marketing. An exception thereto is the automobile repair standard form contract which is closely linked to a study of the quality of car repair workshops conducted by the *Stern* magazine. The negative results of the study brought considerable damage to the automobile repair business and helped the ADAC in its intention to reformulate the repair conditions. There are some other examples: the German Travel Association developed its first standard form recommendations with the hope of impeding a pending regulation of the Travel Contracts Act, but failed. In the automobile trade, second-hand car business, dry cleaning, repair and sale of electrical goods (marginally) and travel industry (temporarily), an important goal of the promotion of standard form recommendations was to create a conciliation scheme as a means of controlling consumer action in cases of complaint. The general conditions of repair even compel the consumer to call upon the conciliation panel in cases of dispute with the workshop. The standard terms for second-hand cars and dry cleaning do not go that far although a well developed system of panels in fact exists. The attitude of the German Travel Association and the Central Association of Electricians is somewhat ambivalent. The latter has no conciliation panel of its own, as these are operated

through local suborganizations of the Chamber of Craft Guilds (Handwerkskammer), and is somewhat restrained as it fears negative effects on the branch. The situation in the travel sector is even more complex. The Verbraucherschutzverein was prepared to withdraw its complaint against the clause on prepayment, had the German Travel Association been prepared to build up a net of conciliation panels as a means of affording consumers a better opportunity of exercising their rights. However, negotiations failed as the trade association altered its position.

Procedure in Drafting and Amending Standard Form Recommendations

Whenever the Verbraucherschutzverein brings standard form recommendations under systematic control, the negotiation process alters dramatically. The Federal Cartel Office checks the standard form recommendations *before* they become effective, whereas the Verbraucherschutzverein can only subject *registered* standard form recommendations to the association's public interest action (Verbandsklage). The time difference was not originally part of the legislator's intent. Only in 1977 did the Federal Cartel Office rule that interested trade associations could provide the Office with their draft standard form recommendations *prior* to registration, which would then be examined in informal proceedings. The concept of the parallel administrative and judicial control has been transformed into a *sequential* procedure as the administrative control precedes the judicial.

The Federal Cartel Office has considerably professionalized its control system. After receipt of the draft standard form recommendation, interested parties must be given a right to submit comments. The Federal Cartel Office not only requires the views of the AGV — which in some cases the interested trade associations have already approached themselves — but tries to give all associations, whose interests may be affected by the standard form recommendations, the right to submit comments. Over the years, the AGV's opinions have become more professional due to cooperation with the Verbraucherschutzverein. On the basis of the opinions lodged, the Federal Cartel Office prepares an internal memorandum from which can be seen which association disapproved of which clause, and which position the Federal Cartel Office should take in relation to the individual points of criticism. After an internal discussion, the basic contents will be notified to the trade association potentially applying for registration.

The Federal Cartel Office has not always taken pains to deliver its

own opinion. When, in 1977, work was being done on the standard terms of repair for automobiles, the Office forwent a control of its own, given the participation of the ADAC. In 1980, the situation had fundamentally altered. The Central Association of Automobile Mechanics wanted, as in 1977, to apply for the registration of an alteration. This time, the Federal Cartel Office did enter into the subject matter and carried out a control, its attitude being far removed from that in 1977. In fact, the participation of the Federal Cartel Office led to a total revision of the automobile standard terms of repair, which the ADAC itself had attempted to achieve but could not in the face of the Association of Automobile Mechanics. As a consequence, the Association of Automobile Mechanics must consider this as a diminution of ADAC's importance in future negotiations.

Subsequent to the first voluminous opinion of the Federal Cartel Office, a legal battle begins between the Office and the trade associations, the culmination of which is always a meeting between the parties in the Federal Cartel Office. The Standard Form Contracts Act is, apart from the catalogue of strictly prohibited clauses (black list), of only minor significance as a means of legal control in the regulatory work of the Federal Cartel Office. The Office exercises a control of the competitive effects of the clause.

Unlike the Federal Cartel Office, the Verbraucherschutzverein itself takes the decision as to which standard form recommendation should be subjected to systematic control. The public interest action (*Verbandsklage*) is commenced by a warning. The Verbraucherschutzverein is excluded from seeing the opinions of the associations in the cartel proceedings, as well as the opinion of the Federal Cartel Office, although the Verbraucherschutzverein has never tried to draw upon previous arguments presented to the Federal Cartel Office. The Verbraucherschutzverein attacks the registered version of the standard form recommendation as it appears in the Federal Gazette (*Bundesanzeiger*), using the Standard Form Contracts Act as its guideline.

A comparison between the Verbraucherschutzverein's first warning letter and the first communication from the Federal Cartel Office shows that the former uses more sophisticated legal argument. This is not negative per se, but may, however, lead to unintentional effects as happened with the automobile standard terms of repair. Following the warning, the Association of Automobile Mechanics struck out the percentage restrictions on price increases, which had been introduced by the ADAC, and which appeared in the work order form (*Auftragsschein*). The same was the case with standard terms regarding the compulsory payment for estimates. Although legal objections could certainly be raised against both clauses, it is

doubtful whether their total omission brought any advantage to the consumer.

At the end of their first response to the warning letter, the trade associations generally ask for discussions, which are regularly conceded. These take place at the opposition party's premises or on neutral ground. Only the proceedings against the furniture association have been completed. This latter struck out 10 out of 12 clauses and led to a promise of good conduct which could thereafter be relied upon in legal proceedings. Two other proceedings are still pending, although in neither the automobile repair nor the travel sector is an end in sight. Out of 14 relevant clauses in the automobile repair sector, 6 have been settled in response to the warning, and in the travel sector, out of 15 clauses which were originally in question, 8 still remain so. The length of the proceedings is striking, as are the numerous talks between the Verbraucherschutzverein and the suppliers, who succeed in delaying the proceedings.

In regard to applications for amendments to already registered standard form recommendations, two cases are of particular interest. Where the Verbraucherschutzverein, as a result of its warning, reaches agreement with the trade association in response to negotiations, the subsequent alterations do not fall subject to the Federal Cartel Office's control. The trade association adjoins to its application a letter from the Verbraucherschutzverein in which its agreement to the amendments is made clear. The Federal Cartel Office will only of its own motion initiate proceedings for violation where the Federal High Court has issued a judgement relating to a given clause. Even then, the Office proceeds in a very restrictive fashion. Thus the Court declared one clause to be illegal which prevented the consumer during the period of legal warranty from either trying to repair a piece of electrical equipment himself or using a third party. Exactly the same clause in the standard form recommendation of the same association with regard to standard terms of repair was not, however, attacked by the Federal Cartel Office. The Office chose to deal exclusively with the relevant clause in the purchase conditions without taking into account the similarities to repair conditions. This decision shows at the same time the unfortunate effect of prohibiting a clause without formulating an alternative workable solution. Since the decision of the Federal High Court is somewhat unspecific, this led to long protracted negotiations between the associations, the Office and the AGV as to the exact text of the new clause.

Monitoring and Sanctions for Non-Compliance

No exact figures are available covering the extent to which use is

made of standard form recommendations in the individual branches. Pressure to use such standard form recommendations should be greater in well organized than in badly organized branches, in which the applicant association only has a small number of members or in which different associations compete against one another. Members are generally more inclined to adopt the recommendations of the association than non-members.

The trade associations cannot put pressure on their members to apply the standard form recommendations. The theoretically possible unification of standard terms approaches the borderline of cartel law. Legally speaking, the Federal Cartel Office should intervene where the use and extent of the standard form recommendation is so great that it in fact almost has the effect of a cartel type condition. Trade associations must be interested in as broad a use of standard form recommendations as possible. Complaints against association members which apply unlawful standard terms are a welcome means of imposing the application of the standard form recommendation on the member. In this respect, the interests of the trade associations, Verbraucherschutzverein and the ADAC overlap. The Verbraucherschutzverein might be able to help bring about unified application of standard form recommendations, were it in a position to subject individual firms to systematic control. However, the Verbraucherschutzverein is in reality fully engaged in fighting for leading decisions (Grundsatzurteile). Any type of follow-up control is still far from being realized.

CONCLUSION

The product information system may illustrate that an equal number of representatives of consumer associations and of trade associations on a joint body does not mean equal power. There is little hope of taking labour law as a model for solving consumer problems. What is possible and what should be practised is to develop real bargaining power as to a specific consumer problem for a limited period of time. A project presently taking place in the Verbraucherzentrale Hamburg will make a contribution to the investigation of possibilities of organizing a collective activity in specific consumer fields like consumer credits, door-to-door sales of books and newspapers, and problems resulting from the unspecific and misleading character of craftsmen's bills.

The right of rescission in direct selling contracts makes clear that the motives behind a voluntary code are of no importance for consumers. The Arbeitskreis has not yet tried to enforce the code

systematically. But by gathering the complaints and trying to analyze if there is a marketing strategy behind this consumers may be able to use the rights granted as a means of entering into negotiations with the Arbeitskreis in order to abolish those practices which are responsible for the consumers' complaints.

Results of dialogues are not necessarily the best means of law enforcement. The Federal Cartel Office does not implement the Standard Form Contracts Act, so the possibilities of examining the standard form recommendations from legal aspects are not made full use of.

The Verbraucherschutzverein lacks economic know-how. Its control of standard terms is too much based on sophisticated legal arguments. Theoretically the best solution could be to integrate the Verbraucherschutzverein in the negotiations taking place with the Federal Cartel Office prior to registration. But the relevant associations have in fact already had their standard form recommendations registered with the Federal Cartel Office so the activity of the Verbraucherschutzverein is limited to judicial control. The Verbraucherschutzverein must pay heed to the unlimited number of consumer complaints and their relation to specific contract clauses if it wants to get the necessary economic information to push the improvement of consumer protection in this field.

POSTSCRIPT

Subsequent to the workshop the author received letters from several direct selling firms being members of the Arbeitskreis (AMC, Vorwerk, Electrolux). In essence, two passages in the former version of the paper given in Bremen have given rise to critical comment. The parts attacked concerned the evaluation of a strategy said to be uniformly practiced by Electrolux and Vorwerk as well as the characterization of AMC as a "black sheep" of the Arbeitskreis. In order to give the reader the possibility of judging for himself, the passages contained in the previous version are cited below in full:

1. "From the complaints lodged against Electrolux and Vorwerk, it is also possible to locate a uniform strategy."

2. "No firm has as yet been excluded from the group. On the contrary, in 1981, AMC was afforded membership although from the consumer point of view this was a 'black sheep' organization."

As a researcher the author gladly accepts critical comments on misleading facts and has amended the paper accordingly. The author is opposed, however, to the style employed by the firms criticized, threatening him with court litigation for defamation. It is a pity that industry representatives do not understand the full meaning of the

freedom of social science research. One also wonders how a dialogue can be initiated by threats of court litigation. Finally, should the firms not take the complaints of consumer organizations seriously and improve monitoring of their trade practices? What sense is made by a code of conduct, reported upon by Dr. Seytter in this issue, if complaints are not processed but refuted?

NOTES

¹ Official Journal of the European Communities (O. J.), No. L 145/1 of 13 June 1979.

² O. J. No. C 149/6 of 18 June 1980.

REFERENCE

Bohle, W., & Micklitz, H.-W. (1983). Five and a half year German Standard Terms Act: An interim survey from the point of view of consumer protection. In: T. Bourgoignie (Ed.), *Unfair terms in consumer contracts*, pp. 111–173. Louvain-la-Neuve: Cabay.

ZUSAMMENFASSUNG

Der Bericht beschäftigt sich mit drei Arten von Verhandlungssystemen im deutschen Verbraucherschutz: mit dem Produktinformationssystem, mit dem freiwilligen Widerrufsrecht beim Direktvertrieb, und mit dem weit verbreiteten Phänomen der Konditionenempfehlungen. Um einen Vergleich zu ermöglichen, geht die Untersuchung nach folgenden Schritten vor: (a) Inhaltsanalyse der Initiativen unter Berücksichtigung der relevanten Rechtsvorschriften, (b) Motive für die Initiativen, (c) Beschreibung des Verfahrens, (d) Einschätzung der Überwachung der Verhaltenskodices und eventl. Sanktionen für Nichteinhaltung.

Das Produktinformationssystem ist ein Beispiel für eine gemeinschaftliche Initiative von Anbieterinteressen, Verbraucherorganisationen und der Bundesregierung mit dem Zweck, dem Verbraucher ein System zur Verfügung zu stellen, mit Hilfe dessen er die Produktqualität vergleichen kann. Das System zeichnet sich durch Abwesenheit rechtlicher Regeln, Selbstverwaltung des Verhandlungsprozesses und gleiche Verhandlungsmacht von Anbieter- und Verbraucherorganisationen aus. — Das freiwillige Widerrufsrecht geht auf eine einseitige Initiative des Arbeitskreises "Gut beraten — zu Hause gekauft" zurück, die in Anbetracht bevorstehender gesetzlicher Regelung ergriffen wurde. Verbraucherorganisationen sollen in den Prozeß der Implementation eingeschaltet werden, um den freiwilligen Kodex zu rechtfertigen. — Konditionenempfehlungen bilden ein Beispiel für ein Verhandlungssystem, in dem die Befugnisse der Verbraucherorganisation und der Behörde (Bundeskartellamt) das Ergebnis rechtlicher Regeln sind. Verhandlungen zwischen den betroffenen Parteien finden statt, um das deutsche Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen zu implementieren.

In einer Schlußbemerkung wird die Position derer unterstützt, die Verhandlungssystemen als Mittel zur Verbesserung des Verbraucherschutzes skeptisch gegenüber stehen. Auf der

anderen Seite können die insgesamt enttäuschenden Ergebnisse benutzt werden, um die Voraussetzungen für erfolgreiche und sinnvolle Verhandlungssysteme zu entwickeln.

THE AUTHOR

Hans-W. Micklitz is a Research Assistant at the Centre for European Legal Policy at the University of Bremen, Universitätsallee, GW 1, D—2800 Bremen 33, F. R. G.