

G-Regs™The Centre for Protection against Unfair Competition
(Wettbewerbszentrale) – Review of Beverage Industry

Full title: Beverage Industry

Overview

Beverage industry. The legal problems in the area of the beverage industry should now be assessed predominantly in accordance with food law requirements. In addition, the classic UWG (Unfair Competition Law) problems are still something that concern the *Wettbewerbszentrale*. For traditional reasons, the beverage industry is looked after by our office in Munich. The spectrum of cases dealt with ranges from incorrect basic price information to inadequate labelling and misleading product packaging or advertising campaign.

- **General legal provisions**
- *Mineral water*
- *Juice and Soft Drinks*
- **Beer**
- **Wine and sparkling wine**
- **Spirits**
- *Beverage Trade*

General Legal Provisions

The legal framework is also made up of elements of s. 4(11) UWG (Breach of law – now s. 3a UWG¹), in conjunction with Regulation (EU) No 1169/2011² of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers – with its misleading and labelling requirements (cf. see also the detailed food industry review). There are also special and product specific European and national regulations such as the Fruit Juice and Soft Drinks Regulation, the provisional beer law and the wine law.

In addition, there are guidelines in the German Food Book (*Deutschen Lebensmittelbuch* DLMB) for various drinks. The guidelines provide help with misleading issues. In accordance with s. 15(1) LFGB³, the German Food Book (DMBK⁴) is a collection of

¹ Section 4(11): “Unfairness shall have occurred in particular where a person... infringes a statutory provision that is also intended to regulate market behaviour in the interest of market participants”. Replaced by s. 3a (entitled: “Breach/ infringement of the law”): “Acting unfairly is where a person infringes a statutory provision that is also intended to regulate market behaviour in the interest of market participants and the violation is liable to noticeably affect the interests of consumers, other market participants or competitors.

² <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011R1169>

³ Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuch, LFGB – known as the German Food and Feed Code; <https://www.gesetze-im-internet.de/lfgb/BJNR261810005.html> Section 15: German Food Book; (1) The German Food Book is a set of guidelines describing the manufacture, nature or other characteristics of foodstuffs that are relevant to the marketability of food.

(2) The Guidelines are adopted by the German Food Book Commission, taking into account the international food standards recognized by the Federal Government. (3) The Guidelines are published by the Federal Ministry in agreement with the Federal Ministry for Economic Affairs and Energy. The publication of guidelines may be rejected or reversed for legal or professional reasons.

⁴ Das Deutsche Lebensmittelbuch - The Guidelines of the German Food Book describe what consumers expect from the name of a particular food. They are not legally binding.

URL of source: <https://www.wettbewerbszentrale.de/de/branchen/getr%C3%A4nkewirtschaft/ueberblick/>

guidelines in which manufacture, properties and other features of foodstuffs, which are important to the marketability of food, are described. The author/ drafter is the German Food Code Commission (Deutsche Lebensmittelbuch-Kommission – DLMBK⁵) – which is composed in a numerically equal proportion at the Federal Ministry of Food and Agriculture (BmEL) by the Scientific Community, the Food Control Administration, the Consumer Industry and Food Industry. The guiding principles take the form of objectified expert opinions.

Other provisions are Regulation (EC) No 1334/2008⁶ of the European Parliament and of The Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods (*Aromenverordnung* – Flavouring Regulation) – c.f. also refer to the database – EU Commission list of permitted flavourings⁷, Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (Health Claims Regulation) – more details in the article/segment on the food industry. C.f. refer to the database – EU Commission on nutrition and health claims⁸ and Regulation (EC) no. 834/2007⁹ of 28 June 2007 on organic production and labelling of organic products (EC Eco-Regulation). In addition to the specific statutory requirements, the assessment of the fairness / sincerity of food packaging and advertising is also based on the provisions of the UWG.

Beer

Beer is the most popular alcoholic beverage throughout Europe. According to the introductory description, European and national food legislation accordingly plays a major role in advertising and labelling in the area of beer and beer-based drinks.

At European level, this currently concerns, in particular, Regulation (EC) no. 178/2002¹⁰ laying down the general principles and requirements of food law, the first regulation already referred to above (i.e. Regulation (EU) No 1169/2011), Regulation (EC) no. 1925/2006 on the addition of vitamins and minerals and of certain other substances to food, and Regulation (EC) no. 834/2007 on organic production and labelling of organic products. (*note*: Beer is subject to the general provisions of Food law)

In the area of national food law, these are the following statutory provisions: the Food Information Regulation (*Lebensmittelinformationsverordnung* – LMIV – which is: Regulation (EU) 1169/2011); the Additive Authorisation Regulation (*Zusatzstoff-Zulassungsverordnung* – ZzulV¹¹); and the Pre-packaging Regulation (*Fertigpackungsverordnung*¹²).

The German Beer Purity Law (*Reinheitsgebot*¹³) as a special legal regulation for beer is governed by the Provisional Beer Law¹⁴ (*Vorläufiges Biergesetz*¹⁵) as part of the Food Code

⁵ <https://www.deutsche-lebensmittelbuch-kommission.de/>

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:354:0034:0050:en:PDF>

⁷ http://ec.europa.eu/food/safety/food_improvement_agents/flavourings/eu_lists_flavourings/index_en.htm

⁸ http://ec.europa.eu/food/safety/labelling_nutrition/claims/index_en.htm

⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007R0834>

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:031:0001:0024:en:PDF>

¹¹ http://www.gesetze-im-internet.de/bundesrecht/zzulv_1998/gesamt.pdf

¹² http://www.gesetze-im-internet.de/bundesrecht/fertigpackv_1981/gesamt.pdf

¹³An English translation here from Eden, Karl J. (1993). "History of German Brewing": <http://www.brewery.org/library/ReinHeit.html>; key phrase: "the only ingredients used for the brewing of beer must be Barley, Hops and Water"

¹⁴ Vorläufiges Biergesetz (Provisional Beer Law) of 1993, is a slightly expanded version of the Bavarian Purity Law Reinheitsgebot (1516) – see s.9 Prov. Beer Law - stipulating that only water, malted barley, hops and yeast be used for any bottom-fermented beer brewed in Germany. In addition, the law allows the use of powdered or ground hops and hops extracts, as well as stabilization and fining agents such as PVPP. Top fermented beer is subject to the same rules with the addition that a wider variety of malt can be used as well as pure sugars for flavour and colouring.

There is also [Ordinance on the Implementation of the Provisional beer law](#)

¹⁵ <http://archiv.jura.uni-saarland.de/BGBl/TEIL1/1993/19931400.1.HTML>

URL of source: <https://www.wettbewerbszentrale.de/de/branchen/getr%C3%A4nkewirtschaft/ueberblick/>

(*Lebensmittelgesetzbuch*) and the Beer Regulation (*Bierverordnung*¹⁶). *Note:* The Provisional Beer Law is all but repealed and no longer part of the LFGB; the Beer Regulation is still valid.

The market behaviour of food law repeatedly occupies the *Wettbewerbszentrale* with issues such as the purity law, e.g. currently with regard to an assessment whether this is violated by the bringing of so-called home-brew kits onto the market or the use of non-authorised health claims, e.g. by professional associations (cf. Upper Regional Court of Berlin, judgement of 10.05.2011, ref. 16 O 259/10).

A perennial issue in the brewing sector also concerns the misleading information about geographical and/or commercial origin as well as tradition claims. Over the past few years, there is also evidence of a trend towards advertising with one or many awards. Here, too, there is corresponding potential for deception (misleadingness)

Major sporting events like the Olympics and the Football World Championships often give rise to a need for advice and prosecution as these are regularly associated with sponsorship items or accompanying discount, collection and competition campaigns that do not always comply with competition rules.

Wine and sparkling wine

Following the general trend, the provisions for the wine and sparkling wine segment are now also strongly based on European law. Relevant for the legal assessment are, in particular: **Regulation (EC) no. 1308/2013**¹⁷ of the European Parliament and Council dated 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) no. 922/72, (EEC) no. 234/79, (EC) no. 1037/2001 and (EC) no. 1234/2007 >> (especially Art. 90 ff. in this case); **Commission Regulation (EC) no. 606/2009**¹⁸ of 10 July 2009 laying down detailed rules for the implementation of Council Regulation (EC) no. 479/2008 regarding the categories of grapevine products, oenological practices and the applicable restrictions; and **Commission Regulation (EC) no. 607/2009**¹⁹ of 14 July 2009 laying down detailed rules for the implementation of Council Regulation (EC) no. 479/2008 regarding protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products. National provisions on wine are found, in particular, in the Wine Law (*Weingesetz*²⁰) and the Wine Regulation (*Weinverordnung*²¹).

Specific labelling obligations also exist in this area regulating, for example, the geographical origin, alcohol content and the legally prescribed nominal quantities. It is also stipulated when a winery may use the words "Schloss" (castle), "Burg" (castle), "Weingut" (vineyard) or "Kloster" (monastery). Protected geographical designations of origin such as "Portwein" (port wine), "Frankenwein" (Franconian wine) or "Champagne", protected geographical indications like "badischer Landwein" (Baden local wine) and protected traditional terms such as "Federweisser" for wine products are listed by the European Commission in the online database E-Bacchus²² - pursuant to Art. 104 of Regulation EC 1308/2013 (Footnote 14). The Wine Regulation contains special provisions for the use of certain traditional terms, such as "Qualitätswein (Q.b.a.)" (quality wine) or "Landwein" (local wine).

¹⁶ <http://www.gesetze-im-internet.de/bierv/>

¹⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0671:0854:EN:PDF>

¹⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:193:0001:0059:EN:PDF>

¹⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:193:0060:0139:EN:PDF>

²⁰ https://www.gesetze-im-internet.de/weing_1994/BJNR146710994.html

²¹ https://www.gesetze-im-internet.de/weinv_1995/BJNR063010995.html

²² <http://ec.europa.eu/agriculture/markets/wine/e-bacchus/index.cfm?language=EN>

Like spirits and beer, wine may not be advertised with health claims on account of it normally having an alcohol content higher than 1.2 percent by volume (cf. Article 4, Paragraph 3 and Recital 12 of the Health Claims Regulation - Regulation (EC) No 1924/2006 and the food industry report²³). The “Bekömmlich” (easily digestible) ruling handed down by the ECJ (judgement of 06.09.2012, ref. C-544/10²⁴) is now well-known in this context. In this decision, the ECJ advocated a broad interpretation of the term “health claim”.

Spirits

Spirits are alcoholic beverages intended for human consumption, have special sensory properties, have a minimum alcohol content of 15 percent by volume and are obtained, for example, directly by distillation, maceration or mixing ethyl alcohol with additives. One of the main sources of law for the assessment of these under unfair competition law is Regulation (EC) no. 110/2008²⁵ - (Spirits Regulation) of the European Parliament and Council dated 15 January 2008 on the definition, description, presentation, labelling and protection of geographical indications of spirit drinks. This defines, among other things, 46 different categories of spirits, the respective requirements of which must be met so that a spirit may bear a trade description like “Rum”, “Vodka” or “Gin”. A further source of law is the regulation on certain spirituous/ alcoholic beverages (*Alkoholhaltige Getränke-Verordnung* – AgeV²⁶). Spirits are, like wines, included in the exceptions under which the regulation still specifies mandatory nominal quantities for pre-packaged goods.

In principle, spirits may not carry any nutrition claims under the Health Claims Regulation (Regulation (EC) no. 1924/2006 – Art. 4(3)) on account of their alcohol content of at least 15 percent by volume. “Energy” in “Energy & Vodka” for an alcoholic mixed drink (not a spirit on account of being only 10 percent by volume) does not, according to the case law of the Federal Court of Justice (judgement of 09.10.2014, ref. I ZR 167/12, cf. *Wettbewerbszentrale News* of 10.10.2014²⁷), represent a nutrition claim because the product name does not refer directly or indirectly to special properties within the context of the Health Claims Regulation. The name is merely a reference to the type/ category. In the case of doubt, it follows from the list of ingredients that the “energy” effect is the one that is generally present in energy drinks. In addition, neither does the designation infringe the provisions of the Spirits Regulation. Although the alcohol content does not correspond to that of vodka, this does not rule out an energy drink mixed with vodka being able to bear a reference to the spirit in the designation.

²³ <https://www.wettbewerbszentrale.de/de/branchen/lebensmittel/ueberblick/>

²⁴ <http://curia.europa.eu/juris/document/document.jsf?docid=126435&doclang=DE>

²⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:039:0016:0054:EN:PDF>

²⁶ <https://www.gesetze-im-internet.de/spiritv/BJNR031000998.html>

²⁷ https://www.wettbewerbszentrale.de/de/branchen/Getr%C3%A4nkewirtschaft/aktuelles/_news/?id=1460

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