

Full title	The Centre for Protection against Unfair Competition (WBZ - <i>Wettbewerbszentrale</i>) Annual Report 2016 https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=35674
Title of relevant section	Chapter VI: Case Processing Reports - Reports by Industry Point 10. Beverage Industry: c) wine; d) beer; e) spirits
Wine	<p>In the wine sector, there is the dilemma that the common market regulation (EU) No 1308/2013 in Art. 119¹ prescribes other food information on labels than the general provisions of the LMIV (Food Information Regulation 1169/2011) in Articles 9, 10. In distance selling, it now applies that mandatory food information must be specified, pursuant to Art. 14 para. 1 lit. a) LMIV². This leads to uncertainty that has repeatedly been problematized in member inquiries. It is clear from recital 27 LMIV³ that, of course, the distance-selling of food should be subject to the same requirements as food sold in the store. It follows, according to the WBZ, that the information at a distance must correspond to the information on the labels (see Arts 2(2a) and 2(2c) LMIV), which must follow the Lex specialis requirements of the common market regulation (see Art. 118 Reg. 1308/2013) and thus, for example, bottler information and not food business information must be provided. The entrepreneur often only has the label as a source of information, which makes obtaining other information difficult.</p> <p>The obligation to provide information at a distance was also the subject of a case in which an online retailer offered to buy a wine surprise package in which various wines were put together. In order not to anticipate the surprise, there was no indication of food information except for the allergen labelling. Since this is incompatible with the LMIV, the WBZ challenged this successfully (M 4 300/16).</p> <p>Another case from the wine trade concerned the staggered/ graded price advertising of a supplier, who advertised his wines simultaneously on Google Shopping. The single bottle was set in the portal at the lowest possible price, which was granted to the customer only with a purchase quantity of 36 bottles. This was not disclosed on the platform. The price got the offer ten places further up on the first search ranking, in price ascending order. Since the supplier did not want action the cease and desist order given after warning, the District Court of Frankfurt prohibited this behaviour by default judgment of 17.08.2016 (File ref. 2-06 O 114/16; M 4 0021/15).</p>
Beer	<p>The brewing industry which celebrated the 500th anniversary of the German Purity Law, the oldest existing food law in the world, provided a vivid picture of the consumer's return to regionality and home-boundness (i.e. attachment to their home region).</p> <p>Thus the Higher Regional Court of Munich held that for a beer, which is brewed in Rosenheim outside the Chiemgau (a historical-cultural landscape in Southeast Upper Bavaria) 16 kilometers away from Lake Chiemsee (a freshwater lake in Bavaria – often called the “Bavarian Sea”) that the designation “Chiemseer” is prohibited in the packaging distributed until the end of May. (Judgment of 17.03.2016, Ref. 29 U 3187/15, M 2 361/14 see News from</p>

¹ Art. 119 lists the compulsory particulars that must be included in the labelling and presentation of wine (the types referred to in points 1 to 11, 13, 15 and 16 of Part II of Annex VII) marketed in the EU or for export. Art. 117(b): “presentation” means any information conveyed to consumers by virtue of the packaging of the product concerned, including the form and type of bottles.

² Art. 14 (Distance Selling); 1. Without prejudice to the information requirements laid down in Article 9, in the case of prepacked foods offered for sale by means of distance communication:

(a) mandatory food information, except the particulars provided in point (f) of Article 9(1), shall be available before the purchase is concluded and shall appear on the material supporting the distance selling or be provided through other appropriate means clearly identified by the food business operator. When other appropriate means are used, the mandatory food information shall be provided without the food business operator charging consumers supplementary costs;

³ In order to ensure the provision of food information, it is necessary to consider all ways of supplying food to consumers, including selling food by means of distance communication. Although it is clear that any food supplied through distance selling should meet the same information requirements as food sold in shops, it is necessary to clarify that in such cases the relevant mandatory food information should also be available before the purchase is concluded.

18.04.2016 - <https://www.wettbewerbszentrale.de/de/aktuelles/news/?id=1694>) The body label showed Fraueninsel island (the 2nd largest of the three islands in Chiemsee) in front of a mountain idyll with a blue and white sky. In addition, the inscription, "Chiemgauer Brauhaus Rosenheim" was included (Chiemgau Brewery Rosenheim). The court affirmed that the geographical origin was misleading in its adjectival form - because the beer is not brewed - as expected by the average consumer - in a lake-side location. The reference to Rosenheim was not likely to dispel the misleadingness, since, because of the national distribution, it is not known to the target public, that Rosenheim is not on Lake Chiemsee. Since it is an inexpensive everyday commodity, it could not be expected that the consumer would take a closer look at the geographical situation.

In another case, the District Court of Magdeburg prohibited a brewing company in Magdeburg from promoting a beer - not made in Magdeburg (Sudenburg district) - on advertising media with textual references to a Magdeburg beer tradition of the company Sudenburger Brauhaus with the phrases like: 'Sudenburger Brauhaus', 'Magdeburger Bier', 'Sudenburger - since 1882', and a 'Magdeburg beer tradition is continued'. (Magdeburg District Court Judgment of 04/05/2016, Ref. 36 O 103/15 - not legally binding; M 2 227/15, - see <https://www.wettbewerbszentrale.de/de/aktuelles/news/?id=1707>). The beer is brewed in the Upper Franconian Verla about 250 km away. Magdeburg does not exist as a brewing town as yet. The court has affirmed deception about the geographical origin. In particular, it was not sufficient that, with the exception of the brewing process, ideas, design and marketing took place in Magdeburg. In addition, media reports on the real brewing conditions for delocalization due to the randomness of the information provided by the circles mentioned are insufficient if the actual presentation of a product is misleading. Partly because the future brewery was financed; in addition, there was a building permit for Magdeburg and it was therefore only a matter of time until beer was actually brewed in Sudenburg, the defendant appealed (OLG Naumburg, 9 U 39/16 (Hs)).

In both cases, the courts saw no legitimate interest in the defendants' use of designations, which exceptionally could justify misleading according to the principle of proportionality.

Just in time for the anniversary year, a case dealt with a violation of the German Purity Law (*Reinheitsgebot*). A beer from Mexico was advertised as "Gluten-free / *glutenfrei*" and "brewed according to the German Purity Law (*nach dem deutschen Reinheitsgebot gebraut*). The latter stipulates that beer may only be made from barley malt, hops, yeast and water. The use of barley prevents a total absence of gluten. The reduction of the allergen can basically only be achieved by enzyme treatment of the barley. Even then, however, it cannot be ruled out that the small amounts still present could lead to a reaction in celiac disease patients. The company used in its advertising a symbol that closely resembled the logo of the European celiac society. In addition, the treatment leads to a change in the ingredients used and thus not a beer brewed in accordance with the purity law. The exception of a gluten-free grown/cultivated barley was not given. The WBZ challenged the advertising because of the logo and the misleadingness over the purity requirement and also the presentation because of various labelling defects. The company was issued with a cease and desist letter on all complaints (M 2 204/16).

Spirits

For this market area, above all, the WBZ received complaints about spirits that were not offered as such, but as "rum" in online trading. Rum is a spirit drink defined in the Spirit Drinks Regulation (EC) No [110/2008](#) Annex II, Category 1, which is derived from sugar cane, which must not be flavoured and must have a minimum alcoholic strength of 37,5% by volume. The complaints often concerned flavoured spirits with an alcohol content of 35% vol., which have the compound term "spiced rum". However, this term may only be used in addition to the actual sales description "spirit drink" and printed in advertising no larger than this. The products are regularly labelled correctly. The infringement was therefore based on the unauthorized change of food information by the retailer in the product offerings (e.g. M 4 0249/16; M 4 0308/16; M 4 243/16). Another case is the misnomer in the trade of the Austrian flavoured spirit "Straw 80". Again, this is not rum, but may carry the geographical indication

for Austria for the category "other spirits" (Article 9 (5)⁴ in conjunction with Annex III to the Spirits Regulation). While the manufacturer correctly advertises and labels the product according to the observations made, the article/ product pages frequently state the misnomer "straw rum", which is misleading in particular because the consumer is unaware that aromatization is present and he therefore expects an "overproof rum" (M 4 0224/16; M 4 0058/16).

⁴ Art. 9(5). Sales denominations may be supplemented or replaced by a geographical indication registered in Annex III and in accordance with Chapter III, or supplemented in accordance with national provisions by another geographical indication, provided that this does not mislead the consumer.