

‘Business and human rights: promoting environmental protection through enforcement of consumer rights’

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1. Introduction

Please provide a brief outline of the desk research and expert consultations, and describe any difficulties or specific situations encountered during the research. This outline should include:

- Sources consulted: 6
- Number of individual consultations: 9 (includes interviews and answers to written questions)
- Breakdown of consultations:
 - Professional group: consumer CSO I (3 consultations)¹, consumer CSO II (1 consultation)², environmental protection CSO (2 consultations)³, consumer attorney/business (1 consultation)⁴, human rights institution (1 consultation)⁵, business organisation (1 consultation)⁶
 - Method of conducting the interview (e.g. face to face): The interviews were conducted either by phone or video-call, additional information and documents were requested and provided in electronic form.

The desk researched was carried out in parallel to identifying and recruiting interview partners, setting up interviews and following up on documents and information provided by the experts. Sources consulted as part of the desk research included websites, studies, and reports issued or commissioned by federal and state ministries, relevant government agencies such as the Federal Environment Agency, environmental and consumer protection organisations, as well as publications and case law from legal databases. The scope of the research made it difficult to discuss all the questions and aspects raised by FRA with the experts, in most cases only one or more sections of the research agenda was relevant and could be discussed in more detail, such as practical challenges with collective action in Germany. Some of the organisations approached were reluctant to engage in the consultations because of to the scope of the research. More than one consumer organisation had to be consulted, and more than one expert had to be consulted at some of the organisations

¹ Interviews on 15 September 2022, 23 September 2022, additional written information provided on 15 October 2022.

² Interview on 4 October 2022.

³ Interview on 6 October 2022, additional written information provided on 11 October 2022.

⁴ Interview on 27 September 2022.

⁵ Interview on 1 November 2022.

⁶ Interview on 1 November 2022.

to access the relevant experience and expertise. Follow-up questions to additional experts at the relevant organisations were asked via e-mail and clarified where necessary.

2. Scope of consumer protection laws and environmental laws

This section should provide assessment of the scope and potential interlinks between consumer protection and environment protection laws, in particular as regards empowering consumers to influence the behaviour of business to become more environmentally sustainable).

As noted by one of the consumer organisations during the consultations, the fields of consumer protection and environmental protection have “to date not been considered together in Germany, but instead treated as distinct problem areas”⁷. Environmental protection in Germany is mainly governed by administrative law and includes specialized laws on various aspects of the environment that may impact consumers and the availability of sustainable choices, such as packaging and waste laws⁸. Private citizens do play a role in enforcing environmental law, but they generally do not do so in their role as consumers. In administrative law matters, plaintiffs, whether they are individuals or civil society organisations, can only bring legal action when they are affected in their individual rights according to Section 42 (2) of the Code of Administrative Procedure (*Verwaltungsgerichtsordnung*)⁹. Certain environmental and nature conservation organisations have standing to bring representative actions (*Verbandsklagen*) in environmental matters in the public interest¹⁰.

Except for product and food safety, consumer protection law in Germany is private law at its core¹¹. Enforcement of consumer rights is largely delegated to private actors. Outside of a particular sale of goods or services, enforcement of consumer rights is driven by competitors, various private institutions and organisations representing consumer, business, or environmental interests¹², and to a smaller but increasing extent regulatory agencies¹³ - but not consumers themselves.¹⁴

⁷ Interview with consumer organisation on 4 October 4. All hyperlinks were accessed on 17 November 2022.

⁸ See Meller-Hannich, C., Krausbeck, E., ‘Sustainability, the Circular Economy and Consumer Law in Germany’, EuCML 2020, 168, p. 168 f.

⁹ Bunge, T., ‘Representative action in environmental law’ (*Die Verbandsklage im Umweltrecht*), Jus 2020, 740.

¹⁰ See below in s. 3. 1) (ii).

¹¹ Rott, P., GIZ (2020), *Study on the collective enforcement of claims by consumers in Germany (Studie zur kollektiven Durchsetzung von Ansprüchen von Verbrauchern in Deutschland)* (2020), in *Instruments of enforcement of rights in consumer protection (Instrumente der Rechtsdurchsetzung im Verbraucherschutz)*, Study Commissioned by the Federal Ministry of Justice and Consumer Protection, p. 4, available at: www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/Rechtsdurchsetzung-Verbraucherschutz.pdf?__blob=publicationFile&v=4.

¹² For a current overview see Research Services of the German Bundestag, (2022), *Responsibilities in the area of consumer protection (Zuständigkeiten im Bereich des Verbraucherschutzes)*, p.6-9, available at:

www.bundestag.de/resource/blob/881494/c2b602b4ddceb3e3aadb1e4b1b165250/WD-5-001-22-pdf-data.pdf.

¹³ Poelzig, D., *Enforcement of consumer rights by civil courts and the Federal Financial Supervisory Authority (Durchsetzung von Verbraucherrechten durch Zivilgerichte und die BaFin)*, BKR 2021, 589, p. 590, Rott, P., GIZ (2020), *Study on the collective enforcement of claims by consumers in Germany (Studie zur kollektiven Durchsetzung von Ansprüchen von Verbrauchern in Deutschland)* (2020), in *Instruments of enforcement of rights in consumer protection (Instrumente der Rechtsdurchsetzung im Verbraucherschutz)*, Study Commissioned by the Federal Ministry of Justice and Consumer Protection, p. 4, available at: www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/Rechtsdurchsetzung-Verbraucherschutz.pdf?__blob=publicationFile&v=4.

¹⁴ Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., *Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb)*, 40th edition (2022), Introduction, para. 7.40.

While individual and representative enforcement of consumer rights have been established in German law and practice for decades, environmental and consumer protection are relatively young fields that evolved in parallel,¹⁵ often shaped by secondary European law. Not until 2004 was consumer protection recognized as a stated goal¹⁶ of the *Act against Unfair Competition* (*Gesetz gegen den unlauteren Wettbewerb*), which in practice has evolved into the central norm to enforce consumer rights and interests in Germany. The Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) follows an “integrated model”, protecting both consumers and competitors against unfair trade practices as “two sides of the same coin”, in addition to the public’s interest in functioning competition more broadly¹⁷.

Environmental protection is not a formal goal of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), and only is protected reflexively when an unfair commercial practice also touches on such common interests.¹⁸ Consumer protection law has traditionally focused on protecting the economic interests of consumers¹⁹, except for areas such as food and product safety. The chosen approach is information-centric, to enable consumers to make informed (purchasing) decisions, a key challenge in moving towards more sustainable consumption and fostering sustainable production by companies²⁰.

Where consumer damage claims under civil law are concerned, the continuing discussion around the difficulty in recovering small and dispersed damages, either individually or through collective action, is highly relevant for promoting environmental protection through consumer rights.

Attempts have been made to “square the circle”²¹, to analyse and propose modifications of German consumer protection, civil, and administrative law with a view to strengthening sustainable consumption²², but according to the literature and one of the consumer organisations, suggested reforms have not yet

¹⁵ Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft), *Vur* 2022, 323, p. 332.

¹⁶ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 10, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁷ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 53, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁸ Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., *Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb)*, 40th edition (2022), Introduction, para. 2.17.

¹⁹ See e.g. Art. 1 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005.

²⁰ Tonner criticizes the transfer of the information model from the Unfair Commercial Practices Directive into the Commission’s circular economy initiatives. See Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (*Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft*), *Vur* 2022, 323, p. 331.

²¹ Micklitz, H.-W.: ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’, *EuCML* 2019, 229.

²² See Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staeckung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf; Abel, G., Prakash, S., Verbraucherinitiative e.V., Berlin, Öko-Institut e.V., Freiburg, (2018), ‘Extending product usage and service life through the enforcement of consumer rights (*Verlängerung der Produktnutzungs- und -lebensdauer mittels Durchsetzung von Verbraucherrechten*)’, UBA Texte, No. 76/2019, Federal Environment Agency, pp. 49-53, available at: www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2019-07-17_texte_76-2019_verbraucherrechte.pdf.

resulted in any corresponding (national) legislative initiatives²³. According to one of the consumer CSOs, the implementation of the Non-Financial Reporting Directive (NFRD) of the European Parliament and of the Council [2014/95/EU](#) into German law, as well as the 2021 Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*) have been the only major legislative efforts in the area of sustainable production and consumption, including environmental sustainability, in recent years²⁴.

This situation has led some voices in the literature to demand a fundamental rethink of German consumer protection law, away from “privileging consumption” and towards to limiting consumption to a sustainable level²⁵. Approaches also differ with regard to the role of European laws and institutions: While some go so far as to argue in favour of a national “go-it-alone” approach²⁶, one of the consumer organisations actually saw the current initiatives under the European Green Deal, and not national initiatives, as the key driver for embedding environmental protection more deeply into German consumer protection law²⁷. The coalition agreement of the German government at least mentions a number of planned projects, from introducing the “right to repair”, to ensuring access to spare parts, to the obligation to provide (software) updates, and the introduction of a longer warranty, tied to the lifespan determined by the producer²⁸. However, according to one of the consumer organisations, it is unclear what level of priority these initiatives will enjoy²⁹.

- 1) What kind of claims (ex. judicial or non-judicial, civil, administrative) can be submitted under existing consumer protection or environmental laws to enforce:
 - a) access to reliable information regarding a product and its environmental impact;

Enforceable claims to protect access to reliable information about a product, including information relating to environmental or sustainability impacts, are understood here as claims protecting consumers’ ability to make informed choices before purchasing a product or service. These can be found in the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), the Consumer Information Act (*Verbraucherinformationsgesetz*), and the various Environmental Information and Freedom of Information Acts (see also 2.4)) below). A clear distinction may not be possible in some cases, as with the consumer claim for damages pursuant to Section 9 (2) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*). This, as well as other consumer rights can also have an indirect information dimension, for example remedies relating to agreed or implied product characteristics, but these issues generally manifest themselves after the consumers have made their decision and will be addressed below under b).

²³ Meller-Hannich, C., Krausbeck, E., ‘Sustainability, the Circular Economy and Consumer Law in Germany’, *EuCML* 2020, 168, p. 171; Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft), *VuR* 2022, 323, p. 329. Interview with consumer organisation on 4 October 2022.

²⁴ Interview with consumer organisation on 4 October 2022.

²⁵ Halfmeier, A., ‘Goodbye to consumption protection law’ (*Abschied vom Konsumschutzrecht*), *VuR* 2022, 3, p. 7; Micklitz, H.-W.: ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’, *EuCML* 2019, 229, p. 237.

²⁶ Micklitz, H.-W., ‘Circular economy and consumer law – A plea for a national go it alone approach’ (*Kreislaufwirtschaft und Verbraucherrecht – Plädoyer für einen nationalen Alleingang*), *VuR* 2019, 281, p. 282.

²⁷ Interview with consumer organisation on 4 October 2022.

²⁸ Coalition Agreement between SPD, Coalition90/TheGreens, and FDP, ‘Daring more progress, Coalition for Freedom, Justice, and Sustainability’ (*Mehr Fortschritt wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*), p. 112, available at: www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1.

²⁹ Interview with consumer organisation on 4 October 2022.

(i) Section 8 (1) of the Act against Unfair Competition

In practice, the most important claims to protect reliable information regarding the environmental characteristics of a product are civil law claims seeking injunctive relief in connection with unfair trade practices pursuant to Section 8 (1) in connection with Section 3 of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*). Injunctive relief includes “elimination” (*Beseitigung*) of the illegal practice and cease and desist obligations (*Unterlassung*) where there is a risk of (re-)occurrence³⁰. The Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) implements Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market³¹, which the Commission has proposed to amend in order to empower consumers for the green transition³², and the proposal will leave little room for regulation at the national level³³. The following provisions of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) concerning unfair practices seem particularly relevant with regard to protecting reliable environmental information³⁴:

Unfair Practices	Directive 2005/29/EC	Act Against Unfair Competition
“per se” practices	Article 5 (5)	Section 3 (3)
breach of law	n.a. (see Article 3 (3))	Section 3a
misleading practices	Article 6 (1) lit. b.	Section 5 (1)
misleading omissions	Article 7 (1) and (2)	Sections 5a (1)

Section 5a of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) was amended in 2022 and split into Sections 5a and 5b, whereby Section 5b now includes the invitation to purchase (see Article 7(4) of Directive 2005/29/EC)³⁵ and only protects consumers, whereas Section 5a (1) is the general norm protecting both consumers and other market participants against misleading omissions³⁶.

³⁰ Bornkamm, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), s. 8, para. 1.101 f.

³¹ Amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019, see Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 3.56.

³² EU Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM (2022) 143 final, Brussels, 30 March 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0143>.

³³ Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (*Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft*), *Vur* 2022, 323, p. 325.

³⁴ See e.g. Lamy, C., Ludwig, J., ‘Advertising with Climate Neutrality’ (*Die Werbung mit Klimaneutralität*), *KlimR* 2022, 142, p. 143 f. Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, pp. 22 f., available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staeckung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf.

³⁵ Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), s. 5a, para. 4.10.

³⁶ Ritlewski, K., in Fritzsche/Münker/Stollwerck Beck Online Commentary Act Against Unfair Competition, 18th Edition, 1 October 2022, s. 5b Introduction, s. 5a paras. 15 ff.

Section 5b (4) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) stipulates that information obligations on the basis of European law (for example relating to energy efficiency) are considered material in the meaning of Section 5a (1). Whether Section 5a or Section 5b applies will depend on the conclusive nature of the information obligation in question³⁷.

A 2018 study commissioned by the Federal Ministry for Economic Affairs and Energy evaluating the enforcement of consumer law concluded that the existing norms protecting consumers and fair competition are flexible enough to cover new business models and practices³⁸. Environmental claims are actively policed under the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) both by the Centre for the Protection against Unfair Competition (*Wettbewerbszentrale*)³⁹, an independent centre established by German business and funded through membership fees⁴⁰, and environmental organisations⁴¹. The publicly funded Consumer Protection Organisations (*Verbraucherzentralen*)⁴², as well as competitors in the same sector⁴³ also take on misleading green claims by businesses. In a recent brief on the Commission's proposal to better protect consumers against greenwashing, the Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*) argued that: "*unsubstantiated statements relating to the environment can already be subject to injunctive relief on the basis of misleading advertising. Case law already recognizes that missing information relating to environmental statements can be considered material information and therefore misleading by omission.*"⁴⁴

Section 3 (3) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) in connection with no. 2 of Annex to Section 3 (3), protects trust marks, quality marks or equivalent marks (see Annex I (1) of Directive 2005/29/EC). Such marks must be awarded by a neutral institution – public or private – based on a formal verification procedure based on objective criteria and consumers must understand these marks as denoting a particular level of quality⁴⁵.

³⁷ Ritlewski, K., in Fritzsche/Münker/Stollwerck Beck Online Commentary Act Against Unfair Competition, 18th Edition, 1 October 2022, s. 5b paras. 11, 12, 15.

³⁸ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 184, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

³⁹ Centre for the Protection against Unfair Competition, 'Centre contests different ads in connection with the statement "climate neutral" as misleading and intransparent' (*Wettbewerbszentrale beanstandet verschiedene Werbungen im Zusammenhang mit der Aussage „klimaneutral“ als irreführend und intransparent*) 19 May 2021, Bad Homburg, available at: www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=38894.

⁴⁰ Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 2.45.

⁴¹ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 33, fn. 103, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

⁴² Consumer Protection Organisation of Baden-Württemberg, Press release dated 24 October 2022, 'Lawsuit against DWS because of Greenwashing' (*Klage gegen DWS wegen Greenwashing*), available at: <http://verbraucherzentrale-bawue.de/pressemeldungen/presse-bw/klage-gegen-dws-wegen-greenwashing-78104>

⁴³ Interview with business organisation on 1 November 2022.

⁴⁴ Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*), 'Washing green not greenwashing' (*Grün waschen statt grünwaschen*) 16 August 2022, p. 14, available at [www.vzbv.de/sites/default/files/2022-08/22-08-](http://www.vzbv.de/sites/default/files/2022-08/22-08-16)

[16](http://www.vzbv.de/sites/default/files/2022-08/22-08-16) Stn Green%20transition Gr%C3%BCn%20waschen%20statt%20Gr%C3%BCnwaschen aktualisiert final%20%286%29.pdf.

⁴⁵ Fritzsche, Eisenhut, in Fritzsche/Münker/Stollwerck, Beck Online Commentary to the Act against Unfair Competition, 17th edition, 1 July 2022, Annex to s. 3 (3) Nr. 2, paras. 12 ff.

Case law: “Environmental Angel” (Umweltengel): The Federal Court of Justice (Bundesgerichtshof) first dealt with environmental claims in advertising in its 1988 “Environmental Angel” (Umweltengel) decision, in which a seller had fixed signs with the Blue Angel (Blauer Engel) environmental seal, which includes the words “environmentally friendly” (umweltfreundlich) and which is awarded to qualifying products according to guidelines elaborated by a multi-stakeholder jury⁴⁶, to its shelves without noting the particular aspect to which the designation “environmentally friendly” related. The court decided that environmental labels must be evaluated according to strict criteria. Like health claims, environmental labels are particularly suited to speak to consumers’ emotions. These can range from concern for one’s own health to a responsibility towards future generations. Environmental labels therefore carry an increased risk of misleading consumers. Not only must the conditions for awarding the label be met, but the producer must also indicate when a product is only “environmentally friendly” in certain regards⁴⁷, such as when a label covers multiple dimensions of sustainability.

Case law: Consumer expectations when an existing label is not being used

The Hanseatic Higher Regional Court had to decide a case in which defendant had distributed a hydraulic lubricant with the claim “rapidly biologically degradable” (schnell biologisch abbaubar). The product did not use an existing label for the relevant product class (e.g. the “Environmental Angel”), nor did the product meet the requirements the label establishes for this particular product class. The court nevertheless decided that without further explanation, the claim was misleading to the average consumer, as the defendant would have had to indicate that the tests underlying the claim did not correspond to those usually applied for awarding widely used environmental labels⁴⁸.

According to the 2018 study by the Federal Ministry of Economic Affairs and Energy, environmental CSOs focus their efforts on Section 3a of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), enforcing consumer protection laws with and environmental dimensions that can be qualified as market conduct rules⁴⁹. The literature sees Section 3a and its predecessor norm Section 4 No. 11⁵⁰ as an “important transmission belt”, connecting the enforcement of consumer rights under competition law to administrative laws governing product safety and establishing information and labelling requirements, including aspects relevant to environmental performance such as energy efficiency and emissions⁵¹. Section 3a of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) is also a means

⁴⁶ Ral gGmbH, ‘The Environmental Label Jury’, available at www.blauer-engel.de/en/blue-angel/actors/environmental-label-jury.

⁴⁷ Federal Court of Justice, Judgement of 20 October 1988 (I ZR 219/87), *Environmental Angel (Umweltengel)*, para. 15, available at <https://research.wolterskluwer-online.de/document/1ffb0ac7-ae02-4f8c-b4f5-f35141048eed>.

⁴⁸ Hanseatic Higher Regional Court, Judgment of 2 May 2007 (5 U 85/06) available at: www.judicialis.de/Oberlandesgericht-Hamburg_5-U-85-06_Urteil_02.05.2007.html.

⁴⁹ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 33, fn. 103, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

⁵⁰ Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., *Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb)*, 40th edition (2022), Introduction, para. 2.34.

⁵¹ Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, pp. 103 f., available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staerkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf, Meller-Hannich, C., Krausbeck, E., ‘Sustainability, the Circular Economy and Consumer Law in Germany’, *EuCML* 2020, 168, p. 170;.

to enforce information obligations under Sections 246 (on-premises) and 246a (off-premises) of the Introductory Law to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*)⁵², for example with regard to the existence and content of producer guarantees⁵³. While these are contractual rights accorded to the consumer by Section 312a (for on-premises contracts) and Section 312d (for off-premises contracts) of the German Civil Code (*Bürgerliches Gesetzbuch*)⁵⁴, the consumer rarely suffers any demonstrable damage from a violation of such norms⁵⁵ and is therefore unlikely to attempt individual legal action. These information obligations which have their origin in Articles 5 and 6 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights may relate indirectly to the lifespan and therefore the environmental impact of a product, when requiring information about commercial or aftersales guarantees⁵⁶. Section 2 of the Injunctive Relief Act (*Unterlassungsklagengesetz*) provides a right to injunctive relief for qualified institutions⁵⁷ in case of violation of these norms protecting consumers, which can overlap with Sections 3a, 5, and 5a of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*)⁵⁸.

Environmental claims can relate both to the product and the production process⁵⁹. For at least a decade, German courts have classified certain claims with regard to “climate neutrality” as either misleading (Section 5), for example when consumers would understand such claims to mean that emissions would be fully compensated⁶⁰, or as omitting material information (Sections 5a/5b), for example when it was not clear to what extent climate neutrality was achieved through the purchase of CO2 certificates instead of reductions in the company’s production and distribution⁶¹. As the fact patterns underlying claims pertaining to climate neutrality are product-specific and not the subject to review by the Federal Court of Justice, the exact boundaries of permissible claims have not been clearly defined. Lower courts often come to different results,

⁵² For recommendations to amend the list of essential characteristics to include information relevant to the environmental impact, see Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (*Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht*), UBA Texte, No. 72/2015, Federal Environment Agency, p. 29 available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staerkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf.

⁵³ See e.g. Möller, M., ‘Current developments in the law of unfair competition, (*Die aktuellen Entwicklungen im Lauterkeitsrecht*)’, NJW 2020, 3358, p. 3360.

⁵⁴ Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 7.13.

⁵⁵ Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft), Vur 2022, 323, p. 329.

⁵⁶ Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft), Vur 2022, 323, p. 329.

⁵⁷ See Art. 3 lit (b) of Directive 2009/22/EC and Art. 4 of Directive (EU) 2020/1828, Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, paras. 3.65, 3.66a.

⁵⁸ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 33 f., available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

⁵⁹ Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), s. 3, paras. 9.18f, 9.21.

⁶⁰ Higher Regional Court of Koblenz, Judgment of 10 August 2011 (9 U 163/11), BeckRS 2011, 23895.

⁶¹ See e.g. District Court of Frankfurt am Main (6th Division for Commercial Matters), Judgment of 31 May 2016 (3-06 O 40/15), BeckRS 2016, 141603.

which can make such claims riskier for businesses⁶², but may also lower the value of the information for the consumer. However, according to the business organisation, as a reaction to the evolving case law companies have already begun introducing more nuanced claims when they are relying on CO2 compensation mechanisms, such as “climate neutralized”⁶³.

Case law: “Climate neutral” vs “climate reduced”

In a case related to garbage bags, the Higher Regional Court of Schleswig recently decided that unlike the claim “environmentally friendly”, the claim “climate neutral” contains an unequivocal statement. The claim of climate neutrality was printed on the product and was accompanied by a visible reference that the product supports “gold standard certified” climate protection projects. According to the court, consumers could only understand this claim to mean that the product has a neutral CO2 balance, not that CO2 emissions are avoided altogether in the production process⁶⁴. This aligns with a case decided by the Higher Regional Court of Hamm, in which the claim “climate reduced” was found to be of such generality, that it remained completely open whether the claim related to the production, packaging, or distribution and under which standard the climate reduction was achieved⁶⁵.

Case law: The shopping experience

In a case relating to jam, the Regional Court of Mönchengladbach decided that the claim “climate-neutral product” highlighted on the front of the jar was misleading as the average consumer would understand this to mean climate-neutral production, not subsequent compensation to achieve a neutral CO2 balance. The court appears to have based this argument on the particular wording and design of the claim, which it likened to other product-related claims such as “low sugar” (*zuckerreduziert*) which are part of the consumer’s shopping experience and which are designed to quickly distinguish one product from another, enabling the consumer to make a quick decision⁶⁶.

According to the business organisation cases relating to claims of climate or CO2-neutrality show that more detailed regulation of green claims, including as foreseen in the Commission’s proposals, seem to add little value. Both the available instruments and interpretation by the courts have shown themselves to be flexible and effective to addressing such emerging issues, including the finer details on how additional environmental information can be presented to consumers when referring to internet sources⁶⁷.

With regard to use of recycled products and sustainable packaging, case law recognizes that consumers will assume that a product or its packaging are made entirely out of recycled materials, not just a certain percentage, unless this is clearly expressed. General claims about sustainable packaging may be misleading

⁶² Steuer, “Climate neutral” products and the law of unfair commercial practices’ (*“Klimaneutrale“ Produkte im Lauterkeitsrecht*), GRUR, 2022, 1408, p. 1417.

⁶³ Interview with business organisation on 1 November 2022.

⁶⁴ Higher Regional Court of Schleswig, Judgment of 30 June 2022 (6 U 46/21), para. 37 available at: www.gesetze-rechtsprechung.sh.juris.de/jportal/portal/t/2o3m/page/bsshoprod.psml;jsessionid=C7DDBE0C3F649416A2D2BE582B113F12.jp14?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoc_todoc=yes&doc.id=KORE262102022%3Ajuris-r02&doc.part=L&doc.price=0.0&doc.hl=1.

⁶⁵ Higher Regional Court of Hamm, Judgment of 19 August 2021 (4 U 57/21), para. 156 available at: <https://openjur.de/u/2352194.html>.

⁶⁶ Regional Court of Mönchengladbach (2nd Division for Commercial Matters), Judgment of 25 February 2022 (8 O 17/21), para. 52, available at www.justiz.nrw.de/nrwe/lgs/mgladbach/lg_moenchengladbach/j2022/8_0_17_21_Urteil_20220225.html.

⁶⁷ Interview with business organisation on 1 November 2022.

to consumers⁶⁸. Courts have also recognized labelling requirements for single-use containers under the Packaging Act (*Verpackungsgesetz*) as market conduct rules designed to protect consumers in line with Section 3 (3) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*)⁶⁹. The Packaging Act (*Verpackungsgesetz*) was recently revised to implement Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment and the amended Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste⁷⁰. It includes a duty to offer take-away food in reusable packaging in Section 33 (1) and corresponding information obligations in Section 33 (2), as well as far-reaching registration obligations, which will simplify enforcement, including private enforcement, due to the transparency of the register⁷¹.

Some Higher Regional Courts⁷² have interpreted Section 8 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) to include a right for institutions seeking injunctive relief to provide remedy to affected consumers (*Folgenbeseitigungsanspruch*)⁷³. These cases concerned invalid terms and conditions and banking fees⁷⁴, which the banks were required to return to customers. This interpretation is controversial, as it provides a kind of redress for dispersed damages, which falls under Section 10 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), and goes beyond the relief is available even under the collective mechanism for declaratory relief (*Musterfeststellungsklage*) according to Section 606 of the Code of Civil Procedure (*Zivilprozessordnung*)⁷⁵. Even if the interpretation is upheld, it seems doubtful that it could be applied in practice to one-off transactions like the purchase of household goods on the basis of misleading environmental information, where the identification of the affected consumers would be much more difficult than in an ongoing contractual relationship with a bank or an insurance company.

(ii) Section 9 (2) of the Act against Unfair Competition

Section 9 (2) is a civil law claim which was introduced as part of the implementation of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019, Section 9 (2) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*). It allows consumers to recover the damage they have suffered from an unfair commercial practice, when such a practice results in the consumer

⁶⁸ Rehart, N.K., Isele, J.F., Ruhl, H.J., in Fritzsche, Münker, Stollwerck, Beck Online Commentary Act against Unfair Competition, 17th edition, 1 July 2022, s. (5), paras. 392, 403.

⁶⁹ Smirra, N., 'The new packaging law from an unfair commercial practices perspective', (*Lauterkeitsrechtliche Perspektive auf das neue Verpackungsgesetz*) GRUR-Prax 2020, 504, p. 505.

⁷⁰ Federal Ministry of the Environment, Nature Conservation, Nuclear Safety and Consumer Protection, Draft law to implement the requirements of the single use plastics directive and the waste directive in the Packaging Act and other laws, (*Entwurf eines Gesetzes zur Umsetzung von Vorgaben der Einwegkunststoffrichtlinie und der Abfallrahmenrichtlinie im Verpackungsgesetz und in anderen Gesetzen*), 20 January 2021, available at www.bmuv.de/gesetz/entwurf-eines-gesetzes-zur-umsetzung-von-vorgaben-der-einwegkunststoffrichtlinie-und-der-abfallrahmenrichtlinie-im-verpackungsgesetz-und-in-anderen-gesetzen.

⁷¹ Smirra, N., 'The new packaging law from an unfair commercial practices perspective', (*Lauterkeitsrechtliche Perspektive auf das neue Verpackungsgesetz*) GRUR-Prax 2020, 504, p. 506.

⁷² See e.g. Higher Regional Court Dresden, Judgement of 10 April 2018, (14 U 82/16) paras. 49 f, available at www.verbraucherzentrale-sachsen.de/sites/default/files/2018-06/Urteil%20OLG%20Dresden%20vom%2010.04.2018%2C%20Az.%2014%20U%2082-16.pdf.

⁷³ Bornkamm, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), s. 8, para. 1.107 f.

⁷⁴ Higher Regional Court Celle, Decision of 27 March 2019, (3 U 3/19), available at <https://openjur.de/u/2206026.html>.

⁷⁵ Lühmann, T. Collective action – A current overview, (*Kollektiver Rechtsschutz – Ein aktueller Überblick*), NJW 2020, 1706, p. 1708.

entering into a transaction they otherwise would not have entered into, including practices pursuant to the above mentioned Sections 3 (3), 5 (1) and 5a/5b of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*)⁷⁶. The norm excludes certain types of unfair practices, notably those breaches of law which fall under Section 3a of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), such as violating energy efficiency labelling requirements, where enforcement is left to qualified institutions (see above). However, claims pertaining to misleading environmental information, or the omission of such information where it is material (see above), are covered by the provision and could – in principle – contribute to ensuring access to reliable information for consumers, provided enforcement of the damage claim is effective and has a deterrent effect on companies (see below under 2. 3) (iii) on enforcement challenges facing consumers).

(iii) Section 10 (1) of the Act against Unfair Competition

Section 10 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) gives those institutions entitled to seek injunctive relief a parallel right to confiscate profits arising from unfair practices when those practices result in dispersed damages. Such damages can arise from misleading consumers e.g. about the environmental or climate impacts of household products and could – in principle – incentivise companies to provide accurate and sufficient information to consumers. The right to confiscate profits can be challenging to enforce (see Section 2. 3) (ii) below), and cases tend to focus on unfair terms and conditions in service contracts not one-off transactions, and the link to environmental protection appears weak. In a case where a mobile phone provider had required customers to pay a deposit for their SIM card in its standard terms and conditions, the provider argued that under its agreements with the network providers it was required to either return the SIM cards or ensure “environmentally compatible disposal”. Regardless of any such contractual obligation with its business partners, the court considered the deposit requirement imposed on the consumer a violation of the predecessor norm of Section 3 a of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) in connection with Sections 307 ff. of the German Civil Code (Bürgerliches Gesetzbuch), granted injunctive relief and obliged the phone company to enable the plaintiff to substantiate the confiscation claim⁷⁷.

(iv) Section 32e (5) of the Act against Restraints of Competition

Section 32e of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) empowers the Federal Cartel Office (*Bundeskartellamt*) to start an investigation into certain sectors of the economy or certain types of agreements. The provision was introduced in 2017, when a consumer protection division with was created at the Federal Cartel Office⁷⁸. According to one of the consumer organisations the powers currently granted to the Federal Cartel Office have not and are unlikely to meaningfully impact the enforcement of consumer rights, beyond identifying general issues or practices in a certain sector of the

⁷⁶ Kalbfus, B., Uhlenhut, T., Feilke, M., ‘Upheavals in competition law: ‘Are collective actions and fines next?’ (*Umwälzungen im Wettbewerbsrecht: Kommen jetzt Massenverfahren und Bußgelder?*), CCZ 2022, 99, p. 100.

⁷⁷ Higher Regional Court of Schleswig-Holstein, Judgment of 19 March 2015 (2 U 6/14) available at www.gesetze-rechtsprechung.sh.juris.de/jportal/portal/t/2o3m/page/bsshoprod.psml;jsessionid=C7DDBE0C3F649416A2D2BE582B113E12.jp14?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoc_todoc=yes&doc.id=KORE212372015%3Ajuris-r02&doc.part=L&doc.price=0.0&doc.hl=1.

⁷⁸ Poelzig, D., Enforcement of consumer rights by civil courts and the Federal Financial Supervisory Authority (*Durchsetzung von Verbraucherrechten durch Zivilgerichte und die BaFin*), BKR 2021, 589, p. 589.

economy⁷⁹. The Federal Cartel Office does not have specific investigatory powers with regard to consumer rights violations⁸⁰, as it does when it examines potential antitrust violations. It seems unlikely that this provision will contribute to environmental protection through the enforcement of consumer rights in the near-term.

(vi) Consumer Information Act (*Verbraucherinformationsgesetz*)

The Consumer Information Act (*Verbraucherinformationsgesetz*) went into force in 2008. Unlike much of German consumer protection law it is not based on secondary EU law but was introduced in reaction to scandals in the food sector⁸¹. It grants an administrative law claim to “anyone”, not just consumers, without having to substantiate a legitimate interest in the information, mimicking the structure of other freedom of information acts⁸². Beyond deviations from requirements under food and feed laws, it covers information held by public bodies with regard to consumer products, for example as the result of market surveillance⁸³. Consumer products are defined by reference to Section 2 no. 25 of the Product Safety Act (*Produktsicherheitsgesetz*) to include, new, used and refurbished products meant for or expected to be used by a consumer. Beyond information related to health and safety risks emanating from consumer products in Section 2 (1) No. 2, the Act also covers the composition, condition, physical, chemical and biological characteristics of consumer products (no. 3), as well as their labelling, origin, use, production and treatment (no. 4). Information about the “origin” may include information such as whether eggs are from cage-rearing or free-range production, “treatment” may relate to questions like refrigeration⁸⁴. As the norm has evolved in parallel with environmental information acts and freedom of information acts more broadly, the literature is struggling to delineate the exact boundaries between these types of norms⁸⁵ and constitutes a potential overlap for example between information related to food products (*Erzeugnisse*) accessible under the Consumer Information Act (*Verbraucherinformationsgesetz*) and “environmental elements” (*Umweltbestandteile*), accessible under Environmental Information Acts⁸⁶, but generally consider the federal Environmental Information Act (*Umweltinformationsgesetz*) (see below under 2.4.) to prevail over the Consumer Information Act (*Verbraucherinformationsgesetz*) and the latter to prevail over state freedom of information acts⁸⁷.

⁷⁹ Interview with consumer organisation on 23 September 2022.

⁸⁰ See Kalbfus, B., Uhlenhut, T., Feilke, M., ‘Upheavals in competition law: ‘Are collective actions and fines next?’ (*Umwälzungen im Wettbewerbsrecht: Kommen jetzt Massenverfahren und Bußgelder?*), CCZ 2022, 99, p. 100.

⁸¹ Herrmann, Beck Online Commentary Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), Bader/Ronellenfisch, 56. Edition, 1 July 2022, APA s. 29, Access to information for parties to the proceedings (*Akteneinsicht für Beteiligte*), para. 55.

⁸² Herrmann, Beck Online Commentary Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), Bader/Ronellenfisch, 56. Edition, 1 July 2022, APA s. 29, Access to information for parties to the proceedings (*Akteneinsicht für Beteiligte*), para. 54.

⁸³ Prommer, J., Rossi, M, ‘The new Consumer Information Act’, (*Das neue Verbraucherinformationsgesetz*) GewA 2013, 97, p. 101.

⁸⁴ Rossi, M., Beck Online Commentary Geersdorf/Paal, Information and Media Law (*Informations- und Medienrecht*), 37th edition, 01 May 2022, paras. 26 and 29.

⁸⁵ See e.g Prommer, J., Rossi, M, ‘The new Consumer Information Act’, (*Das neue Verbraucherinformationsgesetz*) GewA 2013, 97, p. 98.

⁸⁶ Rossi, M., Beck Online Commentary Geersdorf/Paal, Information and Media Law (*Informations- und Medienrecht*), 37th edition, 01 May 2022, para. 51.

⁸⁷ Rossi, M., Beck Online Commentary Geersdorf/Paal, Information and Media Law (*Informations- und Medienrecht*), 01 May 2022, paras. 51 and 53.

National practice: “Pot secret” (“topf secret”)

A 2019 initiative by two German NGOs, Open Knowledge Foundation and foodwatch e.V. enabled consumers to select businesses in the food industry such as restaurants and bakeries and request tiered access to the date of the last hygiene inspection, whether issues were identified, and if so, a copy of the relevant report from the competent food safety authority. Tens of thousands of access requests were submitted in a matter of months, double the yearly requests under the Freedom of Information Act (*Informationsfreiheitsgesetz*) in 2018.⁸⁸ Besides raising several issues relating to the publication of information obtained by consumers⁸⁹, the initiative made the Consumer Information Act (*Verbraucherinformationsgesetz*) better known to the public and demonstrated the potential for consumer mobilisation regarding information rights. Considering the mobilising potential of environmental and climate issues, the initiative could potentially set a precedent for requests at the intersection of consumer and environmental protection, provided public bodies or private entities charged with fulfilling governmental duties possess relevant information. However, neither the consumer nor the environmental organisations were aware of any uses in the context of environmental protection to date⁹⁰.

- b) consumers’ right to be provided with sustainable and affordable choices when purchasing a product or service (for example to have the possibility to buy products in environmentally friendly packaging, or to be able to choose a product that is affordable and sustainable, confirmed by verifiable labels, etc.).

Consumer rights to sustainable choices are understood broadly in this context, including consumer education and best practices at the national level. In terms of potentially enforceable consumer rights to a sustainable product which may incentivise businesses to increase the share of sustainable products, the law of sales plays a key role. It was recently revised to implement the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods⁹¹. Other areas like tenancy law impact consumers rights and sustainability, for example regarding the energy efficiency of buildings⁹², but will not be examined here.

(i) Sale of goods: Product characteristics and defects

According to the revised definition in Section 434 (1) of the German Civil Code (*Bürgerliches Gesetzbuch*) a product is now free of defects when it corresponds to “subjective” and “objective” requirements. These are new concepts in German sales law, both of which may relate to sustainability characteristics of a product. However, the Federal Court of Justice had already adopted a wide definition of product characteristics, which included not only physical aspects of the product but also any factor that was relevant to the value of the

⁸⁸ Lück, D., Penski, F., ‘For reasons of “Pot Secret”: Request-based access to information and state information activity’ (*Aus Anlass von „Topf Secret“: Antragsbezogener Informationszugang als staatliches Informationshandeln?*) DÖV 2020, 507, fn. 9.

⁸⁹ Lück, D., Penski, F., ‘For reasons of “Pot Secret”: Request-based access to information and state information activity’ (*Aus Anlass von „Topf Secret“: Antragsbezogener Informationszugang als staatliches Informationshandeln?*) DÖV 2020, 506 f.

⁹⁰ Interview with consumer organisation on 4 October 2022, interview with environmental organisation on 6 October 2022.

⁹¹ Lorenz, S., ‘The Implementation of the on certain aspects concerning contracts for the sale of goods’ (*Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht*), NJW 2021, p. 2065.

⁹² See Meller-Hannich, C., Krausbeck, E., ‘Sustainability, the Circular Economy and Consumer Law in Germany’, EuCML 2020, 168, p. 170 f.

object in the eyes of the public (*Umweltbeziehungen*⁹³) and this opened a door to integrate sustainability considerations⁹⁴. In the case where the Court adopted the widest definition prior to the revision of Section 434 of the German Civil Code (*Bürgerliches Gesetzbuch*), the court considered that the existence of a guarantee by a car manufacturer constituted such a relevant factor in relation to the car. As the guarantee had been voided prior to the sale, the lack of a guarantee constituted a defect⁹⁵.

According to the revised Section 434 (3) Sentence 1 No. 2 of the German Civil Code (*Bürgerliches Gesetzbuch*) a product will now not conform to objective requirements, when the product is not of a quality normal for goods of the same type and which the consumer may reasonably expect (*übliche und zu erwartende Beschaffenheit*). Examples cited in the literature are the violations of environmental norms, such as the use of prohibited substance or non-conformity with European minimum energy efficiency requirements, or emissions standards⁹⁶. As with information obligations relevant to environmental aspects and enforced through the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) (see above), the law of sales may import and serve to enforce environmental requirements laid down in administrative law⁹⁷. As stipulated in Article 7 (1) (d) of Directive (EU) 2019/771, durability is considered an aspect of the normal quality of goods in Section 434 (3) Sentence 2 of the German Civil Code (*Bürgerliches Gesetzbuch*). Under the previous definition of a defect, the ability of the goods to maintain their required functions and performance through normal use was already considered part of the product characteristics that could give rise to a defect. However, courts have struggled to determine the normal durability of similar goods, when (a) no indication is given by the producer and (b) no legal minimum durability requirement exists⁹⁸, as they do for certain household appliances⁹⁹ pursuant to ecodesign directive implementation regulations¹⁰⁰. Case law appears to relate mostly to cars, where an automotive association has compiled a detailed list of relevant jurisprudence¹⁰¹. However, there does not appear to be any practice comparable to the Netherlands, where

⁹³ Please note that the terms “Umweltbeziehungen” or “Beziehungen zur Umwelt” can be easily misunderstood, as they do not refer to environmental matters or the environment in the ecological sense of the word, but instead to the relationship between an object and its “surroundings”.

⁹⁴ See Grunewald, B., ‘The Seller’s liability for incorrect CSR-reports by the producer’, (*Verkäuferhaftung für unrichtige CSR-Berichte des Herstellers*), NJW 2021, 1777, p. 1778.

⁹⁵ Federal Court of Justice, Judgment of 15 June 2016 (VIII ZR 134/15), para. 15, available at

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=75430&pos=0&anz=1>.

⁹⁶ Croon-Gestefeld, J., ‘The Sustainable quality of a product’, (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, p. 499.

⁹⁷ On this function of the law of unfair competition see Meller-Hannich, C., Krausbeck, E., ‘Sustainability, the Circular Economy and Consumer Law in Germany’, EuCML 2020, 168, p. 170 f.

⁹⁸ Croon-Gestefeld, J., ‘The sustainable quality of a product’, (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, p. 501.

⁹⁹ Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft), VuR 2022, 323, p. 332, Stadermann, M., Legal regulation of the product life span (*Rechtliche Regulierung der Produktlebensdauer*), 2019, p. 300, fn. 972.

¹⁰⁰ See e.g. Commission Regulation (EU) No 666/2013 of 8 July 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for vacuum cleaners, which requires in Annex II that the hose must still be useable after 40.000 oscillations.

¹⁰¹ Bach, I., Wöbbeking, M., ‘The durability requirement of the sale of goods directive as a lever for more sustainability’, (*Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit*) NJW 2020, 2672, p. 2674, available at www.uni-goettingen.de/de/document/download/53e6121ca6b08f6ff34f61346ccc817a.pdf/2020%20-%20Bach,%20W%C3%83%C2%B6bbeking%20-%20Das%20Haltbarkeitserfordernis%20der%20Warenkauf-RL%20als%20neuer%20Hebel%20f%C3%83%C2%BCr%20mehr%20Nachhaltigkeit%20-%20NJW%202020,%202672-2678.pdf, Tonner, K., Gawel, E., Schlacke, S., Alt, M., Bretschneider, W., ‘Warranty and guarantee as instruments of sustainable product treatment’ (*Gewährleistung und Garantie als Instrumente zur Durchsetzung eines nachhaltigen Produktumgangs*), VuR, 2017, 3, p. 6, which refers in footnote 37 to the (outdated) list of cases compiled by the German Automotive Club (ADAC), 20 August 2014, available at www.adac.de/-/media/adac/pdf/jze/mangel-verschleiss-liste.pdf.

trade associations compile product (group) lists indicating durability based on price-based quality levels¹⁰². Product tests by neutral bodies may provide guidance, an example cited are brand name washing machines where a lifespan of 10 years is commonly expected given average use¹⁰³. Similar difficulties arise with regard to reparability, when no corresponding claims have been made by the producer and reparability is not a common characteristic, at least for products in the same price range¹⁰⁴.

As for subjective requirements, environmental labels and claims made by the producer about environmental aspects can constitute a defect, when the product does not fulfil the requirements stipulated by the environmental label. Both under the revised and previous definition of a defect, there would have been an explicit or at least an implied agreement between the consumer and the seller that standards underlying the label must be met pursuant to Section 434 (2) Sentence 1 Nos. 1 and 2 of the German Civil Code (*Bürgerliches Gesetzbuch*)¹⁰⁵. The relevance of statements and disclosures under non-financial reporting obligations will be discussed under 4) below. If environmental labels remain voluntary however, and businesses are not required to make statements about the environmental impact of their products, the law of sales is unlikely to meaningfully impact the overall share of sustainable products in the economy.

(ii) Sale of goods: Limitation period and burden of proof

The limitation period for defects in Section 438 (1) No. 3 the German Civil Code (*Bürgerliches Gesetzbuch*) has remained unchanged and ends two years after the delivery of the goods, which is much shorter than the expected lifespan of many durable consumer goods.¹⁰⁶ An exception was made for goods with digital elements in Section 475e (2) of the German Civil Code (*Bürgerliches Gesetzbuch*), where the limitation period does not begin until one year after the duty to provide updates has ended¹⁰⁷. This may help ensure that long-lived IoT-devices, such as household appliances, will remain usable throughout their ordinary lifespan.

It should be noted that the German legislator did not make use of the possibility to extend the presumption in Article 11 (2) Directive (EU) 2019/771 that a defect already existed at the time delivery, when a defect

¹⁰² See Bach, I., Wöbbeking, M., 'The durability requirement of the sale of goods directive as a lever for more sustainability', (*Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit*) NJW 2020, 2672, p. 2674, available at www.uni-goettingen.de/de/document/download/53e6121ca6b08f6ff34f61346ccc817a.pdf/2020%20-%20Bach,%20W%C3%83%C2%B6bbeking%20-%20Das%20Haltbarkeitserfordernis%20der%20Warenkauf-RL%20als%20neuer%20Hebel%20f%C3%83%C2%BCr%20mehr%20Nachhaltigkeit%20-%20NJW%202020,%202672-2678.pdf.

¹⁰³ Oehme, I., Jacob, A., Cerny, L., Fabian, M., Golde, M., Krause, S., Löwe, C., Unnerstall, H., (*Strategien gegen Obsoleszenz: Sicherung einer Produktmindestlebensdauer sowie Verbesserung der Produktnutzungsdauer und der Verbraucherinformation*), Federal Environment Agency, November 2017, p. 12, available at: www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2017_11_17_uba_position_obsoleszenz_dt_bf.pdf.

¹⁰⁴ Croon-Gestefeld, J., 'The sustainable quality of a product', (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, p. 500.

¹⁰⁵ Croon-Gestefeld, J., 'The sustainable quality of a product', (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, p. 500.

¹⁰⁶ Bach, I., Wöbbeking, M., 'The durability requirement of the sale of goods directive as a lever for more sustainability', (*Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit*) NJW 2020, 2672, p. 2675, available at www.uni-goettingen.de/de/document/download/53e6121ca6b08f6ff34f61346ccc817a.pdf/2020%20-%20Bach,%20W%C3%83%C2%B6bbeking%20-%20Das%20Haltbarkeitserfordernis%20der%20Warenkauf-RL%20als%20neuer%20Hebel%20f%C3%83%C2%BCr%20mehr%20Nachhaltigkeit%20-%20NJW%202020,%202672-2678.pdf.

¹⁰⁷ Lorenz, S., 'The Implementation of the on certain aspects concerning contracts for the sale of goods' (*Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht*), NJW 2021, 2065, p. 2072.

becomes apparent within two years. Instead, it only extended the previous presumption from six months to one year in Section 477 (1) of German Civil Code (*Bürgerliches Gesetzbuch*)¹⁰⁸. With regard to products where the consumer expects a longer lifespan, such as appliances and consumer electronics, this short period will make it difficult for consumers to enforce rights to sustainable products at least for those categories and is unlikely to incentivise producers to increase the supply of durable consumer goods¹⁰⁹.

National practice: Proliferation of sustainability initiatives – excellence in isolation

Several federal ministries have introduced sustainability initiatives emphasizing different aspects of sustainability and employing different strategies, from consumer education and information to supply chain due diligence through verifiable labels. One of the consumer organisations noted that all the information and transparency initiatives tend to put the burden of sustainable consumption on consumers, who cannot alter what has already happened in the production process through their purchasing decision¹¹⁰.

The “Blue Angel”, a voluntary environmental label awarded based on product group specific environmental criteria, was introduced in 1978 and is now owned by the Federal Ministry of the Environment¹¹¹.

The Federal Ministry for Economic Cooperation and Development developed the “Green Button” specifically for the textile sector in 2019, which has undergone a comprehensive review and has been revised as the “Green Button 2.0” in 2022.¹¹² As a label accredited by a governmental body, it provides an opportunity to increase trust and transparency on sustainability aspects according to one of the consumer organisations. However, simply adding another label to an already crowded field will do little to let the consumer know which labels can be trusted¹¹³. The Green Button was the first certification mark to be registered¹¹⁴, it includes measures to protect human rights, especially labour rights, and environmental protection. An advantage of the label is the combination of production-related and company-related CSR criteria according to one of the consumer protection organisations¹¹⁵. While not a company certification, participating companies must fulfil certain requirements with regard to supply management in attaining ESG goals¹¹⁶.

The German Council for Sustainable Development, which advises the Chancellor, introduced the “Sustainable Shopping Cart” in 2003, a platform offering guidance on sustainable consumption and “independent information on labels and product marking¹¹⁷. First developed by a consumer initiative in 2000 with support

¹⁰⁸ Lorenz, S., ‘The Implementation of the on certain aspects concerning contracts for the sale of goods’ (*Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht*), NJW 2021, 2065, p. 2072.

¹⁰⁹ See Artz, M., in Staudinger, A., Artz, M., *New Sales Law and Contracts for the purchase of digital products* (*Neues Kaufrecht und Verträge über digitale Produkte*), 1st edition (2022), paras. 56, 57.

¹¹⁰ Written information provided by consumer organisation on 15 October 2022.

¹¹¹ RAL gGmbH, ‘Ecolabel with history’, available at: www.blauer-engel.de/en/blue-angel/our-label-environment/ecolabel-history.

¹¹² GIZ, ‘The Green Button is in development’, available at: <https://gruener-knopf.de/en/development>.

¹¹³ Written information provided by consumer organisation on 15 October 2022.

¹¹⁴ German Patent and Trademark Office, ‘First certification mark registered’, (*Erste Gewährleistungsmarke eingetragen*), available at: www.dpma.de/dpma/veroeffentlichungen/hintergrund/ausderweltdermarken/erste_gewaehrleistungsmarke/index.html.

¹¹⁵ Interview with consumer organisation on 4 October 2022.

¹¹⁶ Recommendation of the Advisory Council on the development from Green Button to Green Button 2.0, (*Beschlussempfehlung des Beirats zur Weiterentwicklung des Grünen Knopfs zum Grünen Knopf 2.0*), 18 December 2020, Berlin, p. 4, available at www.gruener-knopf.de/sites/default/files/file/2020-12/2020%2012%2018%20Beiratsempfehlung%20Unternehmenskriterien%20GK%202.0.pdf.

¹¹⁷ German Council for Sustainable Development, ‘The Sustainable Shopping Cart’ (*Der Nachhaltige Warenkorb*) www.nachhaltiger-warenkorb.de/der-nachhaltige-warenkorb-2/.

from the Federal Ministry of the Environment, the Federal Ministry of Justice has supported the platform “label-online.de” since 2016, which covers everything from regional labels to quality marks¹¹⁸.

In 2021 the German Government updated its platform “siegeklarheit.de” (“label clarity”) financed by the Federal Ministry for Economic Cooperation and Development and run by the German Agency for International Cooperation GmbH (GIZ)¹¹⁹, a platform and app helping consumers navigate sustainability labels and providing an assessment according to its own methodology¹²⁰. One of the consumer organisations noted that the bodies awarding the labels can decide whether they want the results of assessments to be listed or not, which means that negative results can rarely be found on the platform. This contributes to the lack of an authoritative overview of trustworthy labels¹²¹ for consumers.

Lastly, the Federal Environmental Agency offers a consumer platform offering advice on environmentally conscious consumption¹²².

In addition to these governmental initiatives at the federal level, there exists a large network of public and private organisations providing advice and consumer education in Germany. A 2019 study estimated there were 9.670 institutions providing environmental advice (including nutrition) to consumers, with an estimated 13.362 individual advisors¹²³. The Consumer Protection Organisations (Verbraucherzentralen) provide information on their websites¹²⁴ and in-person through a network of information centres¹²⁵. As “independent, largely publicly funded, non-profit organisations”¹²⁶, they are seen as credible and trustworthy. The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V.) provides educational materials, including on sustainability matters on its website¹²⁷. Germany’s public broadcasting channels also host consumer shows with significant reach, e.g. ZDF Wiso¹²⁸ or WDR Markt¹²⁹. Stiftung Warentest, perhaps the most well-known consumer publication, was founded by the German government in 1964 and is funded partly through a public endowment and contributions, partly through sales and licensing

¹¹⁸ Federation Consumer Initiative (Bundesverband Verbraucherinitiative e.V.), About label-online (Über Label-online), available at: <https://label-online.de/ueber-label-online/>.

¹¹⁹ GIZ, ‘What is label clarity? And who is behind it?’ (Was ist Siegelklarheit? Und wer steht dahinter?) available at: www.siegelklarheit.de/faq.

¹²⁰ GIZ, About label clarity (‘Über Siegelklarheit’), www.siegelklarheit.de/ueber-siegelklarheit.

¹²¹ Written information provided by consumer organisation on 15 October 2022.

¹²² Federal Environmental Agency, ‘Consumer’ (Verbraucher/in), available at: www.umweltbundesamt.de/mein-uba/verbraucherin.

¹²³ Antony, F., Fischer, C. (Ökoinstitut e.V.), Gaumnitz, S., Göttlicher, S. (Wertsicht GmbH), Ried, M. (bfub e.V.) ‘Consumer education as a building block of successful resource policy’ (Verbraucherberatung als Baustein einer erfolgreichen Ressourcenpolitik Abschlussbericht), UBA Texte, No. 139/2020, Federal Environment Agency, p. 15 (Table 1), available at www.umweltbundesamt.de/publikationen/verbraucherberatung-als-baustein-einer.

¹²⁴ See e.g. Consumer Protection Organisation Berlin, ‘Advice/Sustainability’ (Beratung/Nachhaltigkeit) available at: www.verbraucherzentrale-berlin.de/wissen/umwelt-haushalt/nachhaltigkeit.

¹²⁵ Federation of German Consumer Organisations, ‘Information centres of the consumer protection organisations’ (Die Beratungsstellen der Verbraucherzentralen), available at: www.vzbv.de/verbraucher/beraten-lassen.

¹²⁶ Research Services of the German Bundestag, (2022), *Responsibilities in the area of consumer protection (Zuständigkeiten im Bereich des Verbraucherschutzes)*, p. 9, available at: www.bundestag.de/resource/blob/881494/c2b602b4ddceb3e3aad1e4b1b165250/WD-5-001-22-pdf-data.pdf.

¹²⁷ Federation of German Consumer Organisations, ‘Service Portal for consumer education: sustainable consumption and globalisation’ (Das Serviceportal für Verbraucherbildung: Nachhaltiger Konsum und Globalisierung im Unterricht) (2022), available at: www.verbraucherbildung.de/nachhaltiger-konsum-und-globalisierung-im-unterricht.

¹²⁸ ZDF, ‘Your life our topics’ (Ihr Leben unsere Themen), available at: www.zdf.de/verbraucher/wiso.

¹²⁹ WDR, ‘Market’ (Markt), available at: www1.wdr.de/fernsehen/markt/index.html.

of its logo¹³⁰. The magazine tests products, including with regard to durability e.g. of household goods¹³¹ and tests serve as a means for companies to distinguish their products. The competitor magazine Ökotest has historically focused e.g. on harmful substances in consumer products (e.g. foods and cosmetics) but also tests products in terms of durability and repairability¹³². The online portal “utopia.de” provides leaderboards for sustainable products and labels as well as background information on environmental and labour aspects¹³³.

One of the consumer organisations summarised the main issues with current government sustainability initiatives as follows: (1) Reliable sustainability logos like the Green Button have a very low market share, they represent the sustainable exceptions in an unsustainable world. (2) The duplication of government efforts and sources of information will at best overwhelm consumers in search of environmental information, and at worst come to conflicting results¹³⁴. Both the environmental and one of the consumer organisations mentioned that labels which enjoy high levels of trust like the “Blue Angel” would benefit from raising the frequency of recertification, relying on independent third parties for analyses, and moving away from funding label initiatives through licensing fees¹³⁵. One of the consumer organisations suggested that all sustainability labels should be based on accredited standards, which fulfil legal minimum requirements and are audited by independent third parties¹³⁶.

- 2) What are the material and procedural requirements for enforcing consumer/environmental rights? For example: what are the requirements for proving the existence of harm/damage? is it possible to submit claims “in the general interest” without reference to individual damage? Is it necessary to challenge a particular administrative decision, etc.

Three main categories of rights that are of interest here, (i) injunctive relief and associated claims which can be enforced by institutions representing either the interests of consumers (representative action) or fair competition, (ii) individual rights which consumers may either enforce themselves (individual action) or assign to a third party (possibilities for collective action are addressed in Section 3 below), and (iii) general information claims relating to consumer products or the environment which can be made and enforced by anybody, regardless of whether they are acting as a consumer or not.

In the German conception, the enforcement of public environmental law by private individuals does not have a consumer focus as such. Rights holders generally act as citizens, and not in their capacity as consumers (e.g. when fighting an operating permit for a nearby polluting industrial site). Furthermore as the plaintiff or

¹³⁰ Stiftung Warentest, ‘Figures, history, and structure’ (*Zahlen, Geschichte und Struktur*), 23 March 2022, available at www.test.de/unternehmen/stiftung-5017075-0/.

¹³¹ Oehme, I., Jacob, A., Cerny, L., Fabian, M., Golde, M., Krause, S., Löwe, C., Unnerstall, H., (*Strategien gegen Obsoleszenz: Sicherung einer Produktmindestlebensdauer sowie Verbesserung der Produktnutzungsdauer und der Verbraucher-information*), Federal Environment Agency, November 2017, p. 12, available at: www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2017_11_17_uba_position_obsoleszenz_dt_bf.pdf.

¹³² Ökotest, ‘About us’, (*Wir über uns*), available at: www.oekotest.de/oekotest/Wir-ueber-uns_400.html#fragen and ‘Testing 95 non-repairable products’ (*95 Nicht reparierbare Produkte im Test*) available at: www.oekotest.de/freizeit-technik/95-Nicht-reparierbare-Produkte-im-Test_108639_1.html.

¹³³ Utopia.de, Utopia Leaderboard: ‘Overview over sustainable products’ (*Utopia-Bestenlisten: Nachhaltige Produkte im Überblick*), available at: <https://utopia.de/bestenlisten/>.

¹³⁴ Interview with consumer organisation on 4 October 2022.

¹³⁵ Interview with consumer organisation on 4 October 2022, interview with environmental organisation on 6 October 2022.

¹³⁶ Written information provided by consumer organisation on 15 October 2022.

petitioning party they must allege that the administrative measure violates their individual rights according to the (analogous application of) Section 42 (2) of the Code of Administrative Procedure (*Verwaltungsgerichtsordnung*). The diesel emissions scandal illustrated how consumers interests and environmental protection can come into conflict, for example when consumers who had refused to participate in a recall challenged the administrative decisions requiring them to either correct the defects or take their cars out of circulation¹³⁷. Consumers are generally bound by valid product authorisations (such as type approvals) during civil proceedings unless these were granted on the basis of fraudulent representations¹³⁸. Since environmental law mainly serves the public interest (e.g. when it comes to nature and water conservation laws¹³⁹), it does not normally protect individual rights that can be enforced by a consumer. The enforcement of environmental law in the public interest is left to qualified environmental and nature conservation groups, including where it may have an impact on consumers (see 3. 1) (ii) below), for example regarding product approvals. The environmental organisation noted however, that “members of the public” in Art. 9 (3) of the Aarhus Convention also includes individuals, which must also be put in a position to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment¹⁴⁰.

(i) Injunctive relief and associated claims

Consumers may not bring claims for injunctive relief under Section 8 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), and are limited to seeking redress under civil law and contractual claims¹⁴¹. Only entities listed in Section 8 (3) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) may seek injunctive relief. This includes (a) competitors, (b) qualified trade associations according to Section 8b¹⁴², (c) qualified institutions protecting consumer interests as referred to in Section 4 of the Injunctive Relief Act (*Unterlassungsklagengesetz*)¹⁴³ and those from other Member States of the European Union included in the list kept by the European Commission as referred to in Article 4 (3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009, and (d) chambers of industry and commerce, organisations established under the Trade and Crafts Code (*Handwerksordnung*) and other professional corporations and trade unions¹⁴⁴.

¹³⁷ Bavarian Administrative Court of Appeal, Decision of 21 January 2022, (11 CS 21.2750) available at <https://openjur.de/u/2385510.html>.

¹³⁸ Higher Regional Court of Nuremberg, Decision of 27 July 2020, (5 U 4765/19), para. 17, available at: www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2020-N-17693?hl=true.

¹³⁹ Bunge, T., ‘Representative action in environmental law’ (*Die Verbandsklage im Umweltrecht*), Jus 2020, 740.

¹⁴⁰ Additional written information provided by the environmental organisation on 11 October 2022.

¹⁴¹ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), Public enforcement of consumer law? (*Behördliche Durchsetzung des Verbraucherrechts*), Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 34, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoeerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁴² Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 7.40.

¹⁴³ Federal Office of Justice, List of qualified trade associations according to s. 8b of the Act against Unfair Competition (*Liste qualifizierter Wirtschaftsverbände gemäß § 8a des Gesetzes gegen den unlauteren Wettbewerb*), 23 September 2022, available at:

www.bundesjustizamt.de/SharedDocs/Downloads/DE/Verbraucherschutz/Liste_qualifizierter_Wirtschaftsverbände_UWG.pdf?__blob=publicationFile&v=15.

¹⁴⁴ Federal Office of Justice, List of qualified institutions according to s. 4 of the Injunctive Relief Act according (*Liste qualifizierter Einrichtungen gemäß § 4 des Unterlassungsklagengesetzes (UKlaG)*), 28 September 2022, available at www.bundesjustizamt.de/SharedDocs/Downloads/DE/Verbraucherschutz/Liste_qualifizierter_Einrichtungen.pdf?__blob=publicationFile&v=13.

¹⁴⁵ Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 2.44 ff.

In practice, injunctive relief pursuant to Section 8 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) is first sought out of court¹⁴⁵. According to Section 13 (1) of the Act against Unfair Competition the offending party shall be given the opportunity to prevent a potential dispute by signing a cease-and-desist letter, which includes an appropriate contractual penalty in case of breach. If the party seeking relief does not first take this route, it risks paying the cost of the court proceedings in line with Section 93 of the Code of Civil Procedure (*Zivilprozessordnung*) should the offending party acknowledge the unfair practice right away. This procedure is considered both fast and cost-effective for the parties involved. It is estimated that cease-and-desist letters conclude between 80-95 % of all disputes arising out of unfair commercial practices¹⁴⁶. The business organisation mentioned that in some cases simply informing and educating a business that a claim may be misleading, can already be sufficient to end the practice, even without the threat of a cease-and-desist letter¹⁴⁷. The low threshold for asserting an unfair practice are bolstered by the ready availability of interim relief under Section 12 (1) Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) and Sections 935 and 940 of the Code of Civil Procedure (*Zivilprozessordnung*), stopping the offending practice quickly and providing further incentive for the parties to settle out of court¹⁴⁸. According to the business organisation interim relief can be realized within ten days, including the time-period set for agreeing to the cease-and-desist letter¹⁴⁹.

The right to seek injunctive relief does not require culpability by the offending party or even awareness that the practice in question was unfair¹⁵⁰. Unlike the right to confiscate profits in Section 10 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) or the right to claim damages under Section 9 (2), the harm of the offending commercial practice must neither be quantified nor must a profit arising out of the offense be proven or even argued¹⁵¹. Where an unfair practice has been committed the party seeking relief may rely on the presumption that there is a risk of reoccurrence. Where the practice has not yet occurred, the party seeking relief must demonstrate that there is a significant and immediate danger of the practice occurring. In both cases the burden of proof lies with the party seeking injunctive relief¹⁵². When seeking interim relief, it is sufficient to make a prima facie case that the claimant's case is more likely

¹⁴⁵ Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 2.41.

¹⁴⁶ Sosnitza, O., in Ohly, A., Sosnitza, O., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 7th edition (2016), s. 12, para. 2

¹⁴⁷ Interview with business organisation on 1 November 2022.

¹⁴⁸ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 24, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁴⁹ Interview with business organisation on 1 November 2022.

¹⁵⁰ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, pp. 24, 31, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁵¹ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 24, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁵² Bornkamm, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), s. 8, para. 1.18.

than not¹⁵³. The law of unfair competition follows general civil procedure principles that the party alleging disputed factual claims carries the burden of proof, with certain exceptions when facts are purely within the sphere of influence of the other party¹⁵⁴. According to the business organisation the German private enforcement model does not fit neatly into the world envisioned by secondary European law, which is geared more towards public enforcement, and unlike supervisory authorities, competitors and qualified institutions cannot compel companies to provide evidence¹⁵⁵. When it comes to evaluating misleading claims or material omissions, the courts generally do not need to take evidence to ascertain consumer perceptions and judges, being consumers themselves, can effectively rely on their own assessment¹⁵⁶.

According to Section 8 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) in connection with Section 3 (1) and (2), the practice in question must be unfair and targeted at or reaching consumers. Under the provisions with the most relevance for access to environmental information listed above, meaning Section 3 (3) in connection with the Annex, Section 3a, Section 5 (1), Sections 5a/5b, unfairness is “deemed to have occurred”. Section 3a of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) requires that the breach of law is suited to appreciably harm the interests of consumers or other market participants and competitors. Regarding Sections 5 (1)¹⁵⁷ and 5a (1)¹⁵⁸ of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) it is sufficient that the misleading or missing information has the potential to influence the purchasing decision of consumers or other market participants, they would otherwise not have taken.

Companies who have suffered damages from an unfair practices by a competitor have a damage claim under Section 9 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) against that competitor in theory. As companies usually cannot prove that - absent the unfair practice - consumers would have entered into transactions with them instead of the competitor, the norm is of little practical relevance despite it protecting the interests of consumers¹⁵⁹.

¹⁵³ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), Public enforcement of consumer law? (*Behördliche Durchsetzung des Verbraucherrechts*), Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 36, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁵⁴ Rehart, N.K., Isele, J.F., Ruhl., H.J., in Fritzsche/Münker/Stollwerck, Beck Online Commentary Act Against Unfair Competition, 18th Edition, 1 October 2022, s. 5 para. 258, Podszun, R., Busch, C., Henning-Bodewig, F., (2018), Public enforcement of consumer law? (*Behördliche Durchsetzung des Verbraucherrechts*), Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 37, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13

¹⁵⁵ Interview with business organisation on 1 November 2022, see Recital 21 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005.

¹⁵⁶ Federal Court of Justice, Judgment of 18 September 2014 (I ZR 34/12) Illegal invitation to purchase targeting children - Runes of Magic II, (*Unzulässige an Kinder gerichtete Kaufaufforderung - Runes of Magic II*), para. 33, available at <https://openjur.de/u/743439.html>.

¹⁵⁷ Sosnitza, O., in Ohly, A., Sosnitza, O., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 7th edition (2016), s. 5, para. 208, Rehart, N.K., Isele, J.F., Ruhl., H.J., in Fritzsche/Münker/Stollwerck, Beck Online Commentary Act Against Unfair Competition, 18th Edition, 1 October 2022, s. 5 para. 1.

¹⁵⁸ Sosnitza, O., in Ohly, A., Sosnitza, O., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 7th edition (2016), s. 5a, para. 67 -referring to the predecessor norm s. 5a (2).

¹⁵⁹ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), Public enforcement of consumer law? (*Behördliche Durchsetzung des Verbraucherrechts*), Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 24, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

When a market participant intentionally engages in an illegal commercial practice and makes corresponding profits to the detriment of numerous purchasers, they can be sued to surrender such profits under Section 10 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*). Only qualified trade associations, qualified institutions (e.g. Consumer Protection Organisations (*Verbraucherzentralen*)), and chambers of commerce or industry etc. listed in Section 10 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) may bring this civil law claim. The provision was introduced to deal with the issue of dispersed damages, where the individual damage is low, and the damaged party – usually a consumer – has little incentive to enforce the claim given the associated costs and litigation risks (“rational apathy”).

As with the damage claim under Section 9 (1) the confiscation pursuant to Section 10 (1) has had little practical relevance. One of the chief difficulties is proving intent, which is challenging if no previous cease-and-desist letter or court order has been breached¹⁶⁰. Another one of the reasons cited is the need to surrender any confiscated profits to the federal budget, disincentivising Consumer Protection Organisations (*Verbraucherzentralen*). However, according to one of the consumer organisations, the difficulty in estimating the litigation cost¹⁶¹ and measuring the associated risk is the more important obstacle, as it is impossible to determine by an outside party what the profit was before deciding whether to bring legal action, and therefore what the court and attorney fees would be under the “loser pays” principle¹⁶². The cost of a single proceeding could strain the annual litigation budget of a Consumer Protection Organisation (*Verbraucherzentrale*)¹⁶³. Federal case law has further limited the ability of consumer protection organisations to outsource the risk to litigation funders, presumably motivated by the oft-cited fear of encouraging a “litigation industry” in Germany¹⁶⁴. The offending market participant therefore has an economic interest to engage in deliberate, illegal behaviour¹⁶⁵.

Injunctive relief and associated claims, like the confiscation of profits, must be sought before the regional court (*Landgericht*), in accordance with Section 14 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*).¹⁶⁶ In proceedings before the regional court (*Landgericht*) parties must be represented by an attorney according to Section 78 (1) of the Code of Civil Procedure (*Zivilprozessordnung*).

(ii) Consumer claims

¹⁶⁰ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 44, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

¹⁶¹ Harnos, R., ‘Third-party funded confiscatory actions’ (*Drittfinanzierte Abschöpfungsklagen*), GRUR 2020, 1034.

¹⁶² Interview with consumer organisation on 23 September 2022.

¹⁶³ See Hoof, K., ‘Abusing the abuse of rights to the detriment of consumers?’ (*Missbrauch des Rechtsmissbrauchs zu Lasten des Verbraucherschutzes?*) *Vur*, 2021, 163, p. 164 and Federation of German Consumer Organisations, ‘Enforcing the law – strengthening consumers’, (2015) (*Recht durchsetzen – Verbraucher stärken*), p. 7, available at: www.vzbv.de/sites/default/files/downloads/Recht-durchsetzen-Verbraucher-staerken-Broschuere_vzbv.pdf.

¹⁶⁴ See Hoof, K., ‘Abusing the abuse of rights to the detriment of consumers?’ (*Missbrauch des Rechtsmissbrauchs zu Lasten des Verbraucherschutzes?*) *Vur*, 2021, 163, p. 168.

¹⁶⁵ Hoof, K., ‘Abusing the abuse of rights to the detriment of consumers?’ (*Missbrauch des Rechtsmissbrauchs zu Lasten des Verbraucherschutzes?*) *Vur*, 2021, p. 163.

¹⁶⁶ Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 2.42.

Section 9 (2) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) gives the individual consumer a damage claim under civil law, against market participants who intentionally or through negligence cause them to make a commercial decision. The consumer must prove causality, though they may be helped by presumptions or the burden to substantiate claims may be shifted to the respondent in cases of severe violations¹⁶⁷. The damage would be calculated under general civil law rules in Sections 249 ff. of the German Civil Code (*Bürgerliches Gesetzbuch*). The claim may compete with other rights under German sales law, but this was anticipated by Article 11a (2) of the Directive (EU) 2019/2161. Regarding environmental information the provision could prove significant, if the consumer is given a direct claim against the producers for statements made in relation to the product, even under simple negligence¹⁶⁸. In terms of enforcement there are no differences to other civil law claims directly enforceable by consumers. The provision was however created with current and future mechanisms on collective redress in mind and is unlikely to be enforced individually due to the “rational apathy” of the consumer and the prevalence of dispersed, low-value damages¹⁶⁹. Unlike the claims pursuant to Section 8 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) and associated claims by institutional actors, Section 14 (4) provides that the competent court is determined through the general rules. For damage claims below 5.000 Euros, the district courts would be the competent, which lack specialized divisions that have expertise in unfair competition matters, but where representation by an attorney is optional¹⁷⁰.

With the introduction of the 2016 Consumer Dispute Resolution Act (*Verbraucherstreitbeilegungsgesetz*) implementing Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, and the Universal Arbitration Board Regulation (*Universalschlichtungsstellenverordnung*) consumers can attempt to solve disputes arising out of consumer contracts before the federal Universal Arbitration Board (*Universalschlichtungsstelle*). The cost of the dispute resolution proceedings is borne by the company, provided it agrees to participate, and is significantly lower than regular court fees, particularly for small claims¹⁷¹.

While several sector-specific arbitration boards exist that are competent if the dispute falls within the relevant scope, the Universal Arbitration Board is competent to hear disputes about consumer goods from food, to textiles, to household appliances, to cars, among others¹⁷². 860 out of 2.350 arbitration requests in 2021 related to consumer goods¹⁷³. Disputes relating to environmental aspects of products or services could in theory be solved in a fast and cost-effective manner. One of the consumer organisations confirmed that the arbitration boards can be an effective dispute resolution mechanism, provided acceptance of the

¹⁶⁷ Kalbfus, B., Uhlenhut, T., Feilke, M., ‘Upheavals in competition law: ‘Are collective actions and fines next?’ (*Umwälzungen im Wettbewerbsrecht: Kommen jetzt Massenverfahren und Bußgelder?*), CCZ 2022, 99, p. 101.

¹⁶⁸ Kalbfus, B., Uhlenhut, T., Feilke, M., ‘Upheavals in competition law: ‘Are collective actions and fines next?’ (*Umwälzungen im Wettbewerbsrecht: Kommen jetzt Massenverfahren und Bußgelder?*), CCZ 2022, 99, p. 101.

¹⁶⁹ Kalbfus, B., Uhlenhut, T., Feilke, M., ‘Upheavals in competition law: ‘Are collective actions and fines next?’ (*Umwälzungen im Wettbewerbsrecht: Kommen jetzt Massenverfahren und Bußgelder?*), CCZ 2022, 99, p. 103.

¹⁷⁰ Kalbfus, B., Uhlenhut, T., Feilke, M., ‘Upheavals in competition law: ‘Are collective actions and fines next?’ (*Umwälzungen im Wettbewerbsrecht: Kommen jetzt Massenverfahren und Bußgelder?*), CCZ 2022, 99, p. 102.

¹⁷¹ See s. 6 of the Universal Arbitration Board Regulation (*Universalschlichtungsstellenverordnung*).

¹⁷² Federal Office of Justice, List of Consumer Arbitration Boards (*Liste der Verbraucherschlichtungsstellen*), 17 June 2022, available at: www.bundesjustizamt.de/SharedDocs/Downloads/DE/Verbraucherschutz/Liste_Verbraucherschlichtungsstellen.pdf?__blob=publicationFile&v=5.

¹⁷³ Federal Arbitration Board, 2021 - Activity Report according to s. 34 of the Consumer Dispute Resolution Act (*Tätigkeitsbericht nach § 34 VSBG*), p. 2 f, available at: www.verbraucher-schlichter.de/media/file/92.Taetigkeitsbericht2021.pdf.

outcome or at least participation in the proceedings by the company is mandatory¹⁷⁴, as is the case for some of the sector-specific boards or where companies have agreed in advance, for example in their terms and conditions. However, companies are generally not required to participate in the proceedings of the Universal Arbitration Board (*Universalschlichtungsstelle*), and active participation by companies remains the exception, with companies participating in 38 % of the claims brought by consumers in 2021¹⁷⁵. The environmental organisation could not confirm, whether the arbitration boards are currently dealing with consumer disputes specifically related to the environment¹⁷⁶.

(iii) Information access rights

Information access rights under Section 3 (1) Sentence 1 of the Environmental Information Act (*Umweltinformationsgesetz*) are available to every person, independent of the existence of an administrative proceeding and without having to demonstrate a legitimate interest in the information¹⁷⁷. The access request must be filed with the public body obliged to provide the information (*informationspflichtige Stelle*) in accordance with Section 4 (1) Sentence 1 and (2) of the Environmental Information Act (*Umweltinformationsgesetz*) and must make it clear what information is being requested. If the request is not precise enough the petitioner must be informed accordingly and given the opportunity to clarify the request¹⁷⁸. According to Section 12 (1) of the Environmental Information Act (*Umweltinformationsgesetz*) the applicant may decide on the method of receiving the information, but may need to bear expenses, including personal costs, except for simple requests¹⁷⁹. If the request is denied, the petitioner first needs to file an appeal with the public body in accordance with Section 6 (2) of the Environmental Information Act (*Umweltinformationsgesetz*), before filing an action to compel (*Verpflichtungsklage*) under Section 42 (1) second alternative of the Code of Administrative Procedure (*Verwaltungsgerichtsordnung*). Where a private entity which has been tasked with fulfilling a public function has access to the requested information, an action to perform (*Leistungsklage*) is required in analogous application of Section 42 of the Code of Administrative Procedure (*Verwaltungsgerichtsordnung*) must be filed. Interim relief is available to the petitioner¹⁸⁰.

Section 4 (1) Sentence 1 of the Consumer Information Act (*Verbraucherinformationsgesetz*) also requires that information request must be sufficiently clear, including the object such as a particular business, the

¹⁷⁴ Interview with consumer organisation on 23 September 2022.

¹⁷⁵ Federal Office of Justice, Consumer Arbitration Report 2022, (*Verbraucherschlichtungsbericht 2022*), 8 July 2022, p. 17, available at www.bundesjustizamt.de/SharedDocs/Downloads/DE/Verbraucherschutz/Verbraucherschlichtungsbericht_2022.pdf?__blob=publicationFile&v=2.

¹⁷⁶ Interview with environmental organisation on 6 October 2022.

¹⁷⁷ Herrmann, Beck Online Commentary Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), Bader/Ronellenfisch, 56. Edition, 1 July 2022, APA s. 29, Access to information for parties to the proceedings (*Akteneinsicht für Beteiligte*), para. 41.

¹⁷⁸ Herrmann, Beck Online Commentary Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), Bader/Ronellenfisch, 56. Edition, 1 July 2022, APA s. 29, Access to information for parties to the proceedings (*Akteneinsicht für Beteiligte*), para. 43.

¹⁷⁹ Herrmann, Beck Online Commentary Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), Bader/Ronellenfisch, 56. Edition, 1 July 2022, APA s. 29, Access to information for parties to the proceedings (*Akteneinsicht für Beteiligte*), para. 43.

¹⁸⁰ Herrmann, Beck Online Commentary Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), Bader/Ronellenfisch, 56. Edition, 1 July 2022, APA s. 29, Access to information for parties to the proceedings (*Akteneinsicht für Beteiligte*), para. 47.

time period, and the type of information¹⁸¹. The petitioner must not necessarily be acting as a consumer¹⁸². According to Section 7 of the Consumer Information Act (*Verbraucherinformationsgesetz*) access is free if the administrative effort involved remains below certain thresholds. Where the information concerns improper deviations from requirements, such as under product or food safety laws listed in Section 2 (1) No. 1 of the Consumer Information Act (*Verbraucherinformationsgesetz*), the relevant public body can forego hearing the third party about which information is requested according to Section 5 (1). According to the environmental organisation, in practice, third party rights, particularly alleged business secrets are often raised by the relevant public body as a barrier to release the information to the petitioner¹⁸³. Section 3 Sentence 1 No. 2 lit. a) of the Consumer Information Act (*Verbraucherinformationsgesetz*) lists examples, such as recipes, construction drawings, information on production methods, or research and development initiatives, but Sentence 2 stipulates that the public interest to disclose may outweigh the business need for secrecy. The mere fact that a violation has occurred (e.g. during a hygiene inspection) and that this may affect competitiveness of the business, does not qualify as a business secret¹⁸⁴.

- 3) Based on your findings, what main intersections or gaps can you identify regarding the links between consumer rights and protection of environment, that is to what extent current consumer law can serve as a tool to enforce environment protection, and which elements of the legal framework should be improved;

(i) Intersections and gaps regarding rights to sustainable products

Intersections exist between (1) the law of sales, particularly as it relates to product characteristics, defects, and warranty claims, (2) parallel information obligations under the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) and at the pre-contractual stage under the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*), as well as (3) administrative laws governing product safety and establishing information and labelling requirements, based for example on the Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products¹⁸⁵.

The existing sales law already allows for the integration of sustainability matters into product characteristics to some extent¹⁸⁶, as well as mechanisms to enforce corresponding information obligations, particularly through injunctive relief under the Act against Unfair Competition (*Gesetz gegen den unlauteren*

¹⁸¹ Herrmann, Beck Online Commentary Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), Bader/Ronellenfitsch, 56. Edition, 1 July 2022, APA s. 29, Access to information for parties to the proceedings (*Akteneinsicht für Beteiligte*), para. 57.

¹⁸² Federal Administrative Court, Access to product information under the Consumer Information Act, (*Zugang zu Produktinformationen nach dem Verbraucherinformationsgesetz*), Judgment of 29 August 2019 -(7 C 29.17), para. 17, available at www.bverwg.de/290819U7C29.17.0.

¹⁸³ Interview with the environmental organisation on 6 October 2022.

¹⁸⁴ Lück, D., Penski, F., 'For reasons of "Pot Secret": Request-based access to information and state information activity' (*Aus Anlass von „Topf Secret“: Antragsbezogener Informationszugang als staatliches Informationshandeln?*) DÖV 2020, 506, 511.

¹⁸⁵ Tonner, K., 'More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy' (Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft), Vur 2022, 323, p. 325.

¹⁸⁶ Croon-Gestefeld, J., 'The Sustainable quality of a product', (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, 502.

Wettbewerb). Lack of repairability and durability may not necessarily constitute a defect under current German law, particularly for cheaper products¹⁸⁷. Gaps may differ depending on the type of product:

Where lower-value consumer packaged goods are concerned, such as food or cleaning supplies, environmental labels appear most relevant. They would either be considered explicit or implied agreements under “subjective requirements” in the revised Section 434 (2) Sentence 1 Nos. 1 and 2 of the German Civil Code (*Bürgerliches Gesetzbuch*) or of at the very least determine the quality that could be reasonably expected by the consumer under “objective requirements” in the revised Section 434 (3) Sentence 1 Nos. 1 and 2 of the German Civil Code (*Bürgerliches Gesetzbuch*) and give rise to consumer claims where requirements of the underlying standards are not met¹⁸⁸. However, most environmental labels remain voluntary. For most lower-value goods, a main gap will likely be found on the enforcement side (see (iii) below). Where a packaged good does not meet the promised requirements of the label for example, damages will generally be both very low and dispersed across many consumers. Individual consumers are unlikely to pursue individual legal action for such low-value claims before a court due to the litigation risk and associated costs and effort (“rational apathy”)¹⁸⁹.

Where goods typically have longer lifespans and higher values, such as household appliances or cars, the limitation periods for claiming defects and the presumptions on whether such defects existed at the time of delivery (*Gefahrenübergang*) are often considered too short and therefore (a) make it difficult for consumers to enforce their rights and (b) give producers little incentive to increase the supply of more reliable and therefore more sustainable goods¹⁹⁰. In exceptional cases, tort law, especially Sections 826 and 852 of the German Civil Code (*Bürgerliches Gesetzbuch*) may provide longer limitation periods for unjust enrichment for intentionally harmful acts¹⁹¹. One possible application cited in the literature is planned obsolescence¹⁹².

According to the literature, under Section 8 of the Product Safety Act (*Produktsicherheitsgesetz*) the competent federal ministries could pass regulations on labelling requirements for minimum lifespan and repairability, albeit with the consent of the Bundesrat and only where these are not covered by an implementation measure under the Directive 2009/125/EC of the European Parliament and of the Council of

¹⁸⁷ See e.g. Croon-Gestefeld, J., ‘The Sustainable quality of a product’, (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, 501 f.

¹⁸⁸ Croon-Gestefeld, J., ‘The Sustainable quality of a product’, (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, 500.

¹⁸⁹ Bach, I., Wöbbeking, M., ‘The durability requirement of the sale of goods directive as a lever for more sustainability’, (*Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit*) NJW 2020, 2672, p. 2673, available at www.uni-goettingen.de/de/document/download/53e6121ca6b08f6ff34f61346ccc817a.pdf/2020%20-%20Bach,%20W%C3%83%C2%B6bbeking%20-%20Das%20Haltbarkeitserfordernis%20der%20Warenkauf-RL%20als%20neuer%20Hebel%20f%C3%83%C2%BCr%20mehr%20Nachhaltigkeit%20-%20NJW%202020,%202672-2678.pdf

¹⁹⁰ Tonner, K., ‘More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy’ (*Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft*), Vur 2022, 323, p. 329.

¹⁹¹ Federal Court of Justice, Judgment of 21 February 2022 (VIa ZR 8/21), ‘Remaining damages after the end of the limitation period for new cars affected by the diesel scandal’ (*Restschadensersatz nach Verjährung für vom Dieselskandal betroffene Neuwagen*), available at: <https://openjur.de/u/2392772.html>.

¹⁹² Abel, G., Prakash, S., Verbraucherinitiative e.V., Berlin, Öko-Institut e.V., Freiburg, (2018), ‘Extending product usage and service life through the enforcement of consumer rights (*Verlängerung der Produktnutzungs- und -lebensdauer mittels Durchsetzung von Verbraucherrechten*)’, UBA Texte, No. 76/2019, Federal Environment Agency, pp. 51, available at: www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2019-07-17_texte_76-2019_verbraucherrechte.pdf.

21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products¹⁹³.

Suggestions have been made in the literature and by consumer protection organisations¹⁹⁴ to better align information obligations and the definition of product characteristics, for example by requiring the producer to make a statement about the minimum lifespan and repairability of their product. This would have the advantages of forcing producers to face and address the issues, avoid the need for determining the lifespans of large numbers of product-groups by the legislator, and the triple enforcement of the information obligation, through representative action, individual warranty claims by consumers, and reputational effects in the marketplace¹⁹⁵.

In many of these cases, the Member States have very little room to legislate, particularly where fully harmonising directives apply, as they do for unfair commercial practices¹⁹⁶ or contracts for the sale of goods¹⁹⁷. When it comes to laws affecting rights to sustainable products, both the initiative and the discussion in Germany seem to have shifted towards the proposals by the Commission under the Green New Deal¹⁹⁸, and away from the national level¹⁹⁹. According to the literature, a key factor in achieving the goal of promoting sustainable products will be the close coordination of consumer law, unfair commercial practices, and ecodesign reform²⁰⁰ at the EU level.

(ii) Institutional intersections and gaps

¹⁹³ Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, p. 23, available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staedkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf;

¹⁹⁴ Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*), 'Washing green not greenwashing' (*Grün waschen statt grünwaschen*) 16 August 2022, pp. 5,7, available at www.vzbv.de/sites/default/files/2022-08/22-08-16_Stn_Green%20transition_Gr%C3%BCn%20waschen%20statt%20Gr%C3%BCnwaschen_aktualisiert_final%20%286%29.pdf.

¹⁹⁵ Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, p. 22 ff., available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staedkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf

¹⁹⁶ Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 3.56.

¹⁹⁷ Lorenz, S., 'The Implementation of the on certain aspects concerning contracts for the sale of goods' (*Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht*), NJW 2021, 2065, p. 2073.

¹⁹⁸ EU Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM (2022) 143 final, Brussels, 30 March 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0143>.

¹⁹⁹ Tonner, K., 'More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy' (*Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft*), Vur 2022, 323, p. 325. See Meller-Hannich, C., Krausbeck, E., 'Sustainability, the Circular Economy and Consumer Law in Germany', EuCML 2020, 168, p. 171.

²⁰⁰ Tonner, K., 'More sustainability in consumer law – Proposals by the EU Commission to implement the action plan for a circular economy' (*Mehr Nachhaltigkeit im Verbraucherrecht – die Vorschläge der EU-Kommission zur Umsetzung des Aktionsplans für die Kreislaufwirtschaft*), Vur 2022, 323, p. 329.

One of the main intersections between enforcing consumer rights and protection of the environment is institutional: Some environmental organisations also pursue consumer protection through an environmental lens, for example through providing consumer education and advice on sustainable consumption²⁰¹, whereas consumer organisations conduct advocacy with a view to increasing the overall sustainability of production and consumption²⁰².

This institutional overlap extends to the enforcement of the law of unfair competition where it concerns environmental information and claims. Both consumer organisations and a handful of environmental organisations are recognized as “qualified institutions” in accordance with Section 8 (3) No. 3 of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) and Section 4 (2) of the Injunctive Relief Act (*Unterlassungsklagengesetz*)²⁰³. One of the main gaps is that few organisations possess expertise in both consumer and environmental matters or the resources to conduct private enforcement. According to one of the consumer organisations, only about four or five out of the 16 state Consumer Protection Organisations (*Verbraucherzentralen*) engage in private enforcement²⁰⁴. Historically, environmental protection has not been a central activity for Consumer Protection Organisations (*Verbraucherzentralen*), however. These organisations focus on and have developed expertise regarding economic consumer protection, with little capacity to engage in representative action on matters relating to sustainability or the environment²⁰⁵. The burden on enforcement at the intersection of consumer and environmental protection largely falls on environmental organisations. The literature has argued that environmental organisations need to play a stronger role, as consumer and environmental interests are not necessarily aligned in all cases²⁰⁶. Few such organisations have the resources and expertise to engage representative action on consumer matters at all. Those who do are adept at identifying unfair commercial practices relating to the environment so that cease-and-desist procedures and subsequent court action have overwhelming chances

²⁰¹ Bund - Friends of the Earth Germany, ‘Eco tips’ (*Ökotipps*), available at www.bund.net/bund-tipps/oekotipps/tip-page/1/?tx_bundpooltip_display%5Btipdata%5D%5BcurrentPage%5D=2&cHash=3c1387e5f9c92f292273b0e0a5e4c6c8.

²⁰² Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*), ‘Washing green not greenwashing’ (*Grün waschen statt grünwaschen*) 16 August 2022, p. 14, available at www.vzbv.de/sites/default/files/2022-08/22-08-16_Stn_Green%20transition_Gr%C3%BCn%20waschen%20statt%20Gr%C3%BCnwaschen_aktualisiert_final%20%286%29.pdf

²⁰³ Federal Office of Justice, List of qualified institutions according to s. 4 of the Injunctive Relief Act according (*Liste qualifizierter Einrichtungen gemäß § 4 des Unterlassungsklagengesetzes (UKlaG)*), 28 September 2022, available at www.bundesjustizamt.de/SharedDocs/Downloads/DE/Verbraucherschutz/Liste_qualifizierter_Einrichtungen.pdf?blob=publicationFile&v=13.

²⁰⁴ Interview with the consumer organisation on 23 September 2022.

²⁰⁵ Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, p. 175 available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staedkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf.

²⁰⁶ Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, p. 27, available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staedkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf

of success. The organisations may even generate surpluses from their market surveillance activity²⁰⁷, despite the activity being limited to spot checks²⁰⁸.

(iii) Intersections and gaps in the private enforcement regime

If consumer rights cannot be effectively enforced, enforcement of consumer rights to promote environmental protection cannot hope to be effective. Germany's private enforcement regime in the area of private law is generally considered effective, one argument being that a significant number of low-value cases actually make it to court²⁰⁹. In 2021 about 29,6% of cases before district courts had a value in dispute lower than 500 Euros²¹⁰, but this percentage does not indicate how many low-value claims are never brought before the courts. Overall case numbers have been falling, and individuals tend to avoid legal action when the value of the claim is below 1.950 Euros²¹¹. Particularly for smaller claims, court and litigation costs can easily exceed the value of the claim²¹². Another reason for falling case numbers may be that alternative dispute resolution mechanisms have gained prominence in recent years²¹³, and the shift to online retailers and return policies may contribute to reducing the number of disputes, if not sustainable consumption. A key factor against legal action cited is that going to court may simply present a significant emotional and psychological burden to consumers²¹⁴.

Consumer rights enforcement under the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) is generally considered effective, but mostly where it is oriented towards stopping future unfair commercial practices and preventing reoccurrence of offending practices²¹⁵ through injunctive relief and representative action. The fact that consumer organisations (including environmental organisations), trade associations and competitors, frequently seek and receive injunctive relief, in many cases without the need

²⁰⁷Federal Court of Justice, Judgment of 4 July 2019, (Az. I ZR 149/18), 'No abuse of rights through action by DUH against car dealership ad', (*Kein Einwand des Rechtsmissbrauchs bei Klage der DUH gegen Werbung eines Autohauses*), available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%20149/18&nr=97720>.

²⁰⁸Klinger, R., 'Trivial not scandalous: The Federal Court of Justice's Environmental Aid Judgment' (*Banal statt Skandal: Das Umwelthilfe-Urteil des BGH*), VuR 2019, 361.

²⁰⁹Rott, P., GIZ (2020), *Study on the collective enforcement of claims by consumers in Germany (Studie zur kollektiven Durchsetzung von Ansprüchen von Verbrauchern in Deutschland)* (2020), in *Instruments of enforcement of rights in consumer protection (Instrumente der Rechtsdurchsetzung im Verbraucherschutz)*, Study Commissioned by the Federal Ministry of Justice and Consumer Protection, p. 4, available at: www.bmji.de/SharedDocs/Downloads/DE/PDF/Berichte/Rechtsdurchsetzung-Verbraucherschutz.pdf?__blob=publicationFile&v=4.

²¹⁰Federal Statistics Office, *Administration of Justice – Civil courts 2021, (Rechtspflege – Zivilgerichte 2021)*, (2021), p. 11, available at: www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/zivilgerichte-2100210217004.pdf;jsessionid=633EAACF87C6FC6E267722C90904345B.live711?__blob=publicationFile.

²¹¹Weinland, *The new mechanism for declaratory relief (Die neue Musterfeststellungsklage)*, 1st edition (2018), Introduction, para. 6.

²¹²For an example see Wolf, C., Freudenberg, T., *The keys to an efficient law of civil procedure, (Die Schlüssel zu einem effizienten Zivilprozessrecht)*, ZRP 2018, 183, p. 184.

²¹³Wolf, C., Freudenberg, T., *The keys to an efficient law of civil procedure, (Die Schlüssel zu einem effizienten Zivilprozessrecht)*, ZRP 2018, 183, p. 185.

²¹⁴Legner, S., 'Smart Consumer Contracts – The automated processing of consumer contracts', (*Smart Consumer Contracts – Die automatisierte Abwicklung von Verbraucherverträgen*), VuR 2021, 10, p. 16.

²¹⁵Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 1, 55-56, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

for court involvement²¹⁶, means that enforcement of consumer rights works well when it comes to ending unfair practices, including when such practices relate to environmental claims or information obligations. The business organisation noted that enforcement through competitors promotes effective protection of consumer rights including when it comes to environmental claims. Businesses watch their competitors' claims and practices closely - in part because they are evaluating their own product claims, have more detailed knowledge of the relevant sector than other actors, including supervisory authorities, and can use this knowledge effectively and quickly either through injunctive relief or through alerting a qualified institution²¹⁷. The business organisation considered spot checks by private actors with market expertise to be at least as effective as market surveillance by regulators²¹⁸. However, the 2018 study on the effectiveness of private enforcement also noted that issues such as (a) sector-wide lack of interest by competitors to fight unfair practices and consumer organisations not always being able to provide a sufficient counterweight, (b) the effect of a cease-and-desist letter or court ruling being limited to the offending party, with only a signalling effect to other potential offenders, and (c) the complexity of determining the facts and the law, such as unfair practices with an environmental component²¹⁹, can severely limit the effectiveness of injunctive relief.

One solution would be to strengthen public enforcement through the to the Federal Cartel Office, for example by granting specific investigatory powers, the ability to declare injunctive rulings by a court as generally binding in an industry, impose fines, and issue cease-and-desist orders²²⁰ to offending business. Public enforcement has shown to be effective in certain sectors, for example in the area of telecommunications²²¹, including through the threat of fines and naming-and-shaming, and could complement private enforcement where prevention fails or where behaviour harmful to consumers is difficult to detect, or egregiously violates consumer interests²²².

Unlike injunctive relief and stopping the reoccurrence of harm, redress for past harm to consumers remains the exception, be it as a result of unfair practices, or in the event of mass and dispersed damage. These categories of damage will be the norm for many lower value packaged goods, e.g. a cleaning product that is not climate neutral as advertised. Prevention cannot be effective, however, when the offender can

²¹⁶ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 55-56, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

²¹⁷ Interview with business organisation on 1 November 2022, see also Köhler, J., in Köhler, H., Bornkamm, J., Feddersen, J., Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), 40th edition (2022), Introduction, para. 2.44.

²¹⁸ Interview with business organisation on 1 November 2022.

²¹⁹ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 56, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

²²⁰ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 1, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13.

²²¹ Podszun, R., Busch, C., Henning-Bodewig, F., (2018), *Public enforcement of consumer law? (Behördliche Durchsetzung des Verbraucherrechts)*, Study Commissioned by the Federal Ministry for Economic Affairs and Energy, p. 47, available at: www.bmwk.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13

²²² Poelzig, D., *Enforcement of consumer rights by civil courts and the Federal Financial Supervisory Authority (Durchsetzung von Verbraucherrechten durch Zivilgerichte und die BaFin)*, BKR 2021, 589, p. 591, 595.

reasonably expect to keep any earnings and profits from an unfair commercial practice²²³. The many attempts and reforms to address the issue of mass and dispersed damages over the past two decades, be it through confiscation of profits by consumer organisations, introducing damage claims to consumers, and new instruments of representative and collective action, have not been effective to date. Representative action (*Verbandsklage*) by qualified institutions is seen as a purely altruistic construct in Germany and attempts by Consumer Protection Organisations (*Verbraucherzentralen*) to manage otherwise prohibitive litigation risk, for example by using commercial third-party funders who would receive a share of confiscated profits, have been deemed an abuse of rights by the Federal Court of Justice²²⁴ because of the profit motive of the third party, despite a clear benefit to consumers and the lack of a suitable alternative.

Private enforcement by legal service providers could potentially fill some of the gaps and increase access to justice for consumers, at least where such claims can be standardized, and processing automated in a way that is cost-effective for providers. However, with the potential exception of claims relating to diesel emissions, consumer claims with an environmental component do not appear to have been operationalized by legaltechs²²⁵ or collection service providers in Germany to date. With the amendment of the legal services Act (*Rechtsdienstleistungsgesetz*) in 2021 and two recent decisions by the Federal Court of Justice²²⁶ progress has been made with regard to clarifying the ability of some legaltech companies and collection service providers to aggregate consumer claims in exchange for a contingency fee or outright buy claims at a discount²²⁷, a price many consumers are willing to pay in exchange for quicker and easier access to justice²²⁸. However, according to the Consumer Attorney uncertainty remains in practice²²⁹ as courts have in the past declared the assignments of consumer claims to such private providers illegal under Sections 3 and 4 of the Legal Services Act (*Rechtsdienstleistungsgesetz*) due to perceived conflicts of interest arising out of the aggregation of claims or the funding of legal action²³⁰. As a result of the illegality of the assignment, the actions brought by the service providers were ruled inadmissible. However, by that time limitation periods had lapsed, the claims had often become time-barred, and consumers effectively lost their claims²³¹.

²²³ Namysłowska, M., in Micklitz/Namysłowska, s. 10 of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb), Confiscation of Profits (*Gewinnabschöpfung*), Munich Commentary on the Law against unfair competition (Münchener Kommentar zum Lauterkeitsrecht), 3rd edition (2022), para. 4.

²²⁴ Federal Court of Justice, Judgement of 13 September 2018 (I ZR 26/17), paras. 38 ff. available at:

[http://juris.bundesgerichtshof.de/cgi-](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%2026/17&nr=88459)

[bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%2026/17&nr=88459](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%2026/17&nr=88459), Lühmann, T. Collective action – A current overview, (*Kollektiver Rechtsschutz – Ein aktueller Überblick*), NJW 2020, 1706, p. 1708.

²²⁵ “Legaltech” is understood here as companies providing legal services assisted by technology, mostly dealing with large numbers of standardizable claims, through automating data entry, processing, and enforcement of the claims as much as possible to lower the overall transaction cost. Some companies buy claims outright at a discount, others may charge a flat fee or a contingency fee, in exchange for taking on the enforcement and litigation risk.

²²⁶ Federal Court of Justice, Judgement of 13 July 2021 (II ZR 84/20), ‘Air Deal’. available at

[http://juris.bundesgerichtshof.de/cgi-](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=988087d1ccd21eb83d0d35e876892356&nr=120886&pos=0&anz=1)

[bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=988087d1ccd21eb83d0d35e876892356&nr=120886&pos=0&anz=1](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=988087d1ccd21eb83d0d35e876892356&nr=120886&pos=0&anz=1); Federal Court of Justice, Judgement of 27 November 2019 (VIII ZR 285/18), ‘LexFox I’. available at

<https://openjur.de/u/2190777.html>.

²²⁷ Stadler, A., The legality of collection and funding models under the Legal Services Act, (*Zulässigkeit von Inkasso-Bündelungs- und Finanzierungsmodellen nach RDG*), RD 2021, 513.

²²⁸ Interview with consumer attorney on 27 September 2022.

²²⁹ Interview with consumer attorney on 27 September 2022.

²³⁰ See Kalbfus, B., Uhlenhut, T., Feilke, M., ‘Upheavals in competition law: ‘Are collective actions and fines next?’ (*Umwälzungen im Wettbewerbsrecht: Kommen jetzt Massenverfahren und Bußgelder?*), CCZ 2022, 99, p. 100.

²³¹ Stadler, A., The legality of collection and funding models under the Legal Services Act, (*Zulässigkeit von Inkasso-Bündelungs- und Finanzierungsmodellen nach RDG*), RD 2021, 513, p. 514.

Both the consumer attorney²³² and parts of the literature argue that addressing mass and dispersed damages will require significant investments in digital infrastructure, either by private companies, publicly funded consumer organisations, or regulatory agencies, but also by the judiciary²³³ which may need to adopt new case management methods and even change the way it evaluates the performance of judges²³⁴.

Due to Germany's largely privatized consumer protection model, gaps in private enforcement of consumer rights will directly affect the ability to leverage consumer rights for the purpose environmental protection. As the rules and mechanisms governing injunctive relief are generally considered effective, efforts should be directed at enabling more institutions with environmental expertise to enter the field of consumer protection and supporting environmental organisations already active in enforcing consumer rights²³⁵. (On the ability of environmental organisations to represent consumers under the collective mechanism for declaratory relief (*Musterfeststellungsklage*) and the proposed new mechanism for collective redress (*Abhilfeklage*) to represent consumers see 3.2 below).

As consumer claims relating to the environment would likely be of low value, for example in relation to claims of climate neutrality for food or packaged goods, existing mechanisms meant to deter unfair practices and change the economic incentives of companies, like the confiscation of profits pursuant to Section 10 (1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) must become effective in practice. One option would be to allow consumer organisations to minimise and outsource some of the litigation risk for higher value cases, including through third-party funding. Another would be the aggregation of consumer damage claims already foreseen by Section 9 (2) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*). The ability for consumers to effectively enforce their rights should not require them to pursue individual legal action. Consumers should be able to assign or sell their claims to qualified legal service providers for a reasonable (contingency) fee or discount, if they prefer. The consumer attorney suggested that the consumer could be compensated for their time and efforts spent on enforcing their rights by standardizing compensation²³⁶, similar to Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. Strengthening legal service providers will require a cultural shift within the German legal profession that should not be underestimated. Investments into the technical and organisation capacity of the judiciary to effectively deal with mass damage events will need to be made to end exaggerated fears of a "litigation industry" or the spectre of overburdening the court system. Changes may be required outside of consumer law and environmental protection law, for example to the Legal Services Act (*Rechtsdienstleistungsgesetz*) and other laws and professional codes governing the provision of legal advice²³⁷.

²³² Interview with consumer attorney on 27 September 2022.

²³³ Ruschemeier, H., 'Technological access to justice', (*Technischer Zugang zum Recht*), LTZ 2022, 75, p. 80.

²³⁴ Wolf, C., Freudenberg, T., The keys to an efficient law of civil procedure, (*Die Schlüssel zu einem effizienten Zivilprozessrecht*), ZRP 2018, 183, p. 185.

²³⁵ Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (*Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht*), UBA Texte, No. 72/2015, Federal Environment Agency, p. 27 f., available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staerkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf.

²³⁶ Interview with the consumer attorney on 27 September 2022.

²³⁷ Purnhagen, 'Public and private enforcement in food law', (*Public und Private Enforcement im Lebensmittelrecht*), LMuR 2021, 155, p. 160.

In sum, gaps in the area of substantive law relating to sustainable products will mainly need to be addressed at the European level, whereas gaps in private enforcement will require changes at the national level, including cultural changes and investments into the judicial infrastructure to deal with dispersed damages, that will account for a significant share of potential consumer claims relating to environmental protection.

4) What is the practical application of the Aarhus Convention as regards access to information in environmental matters?

The first pillar of the Aarhus Convention governing access to information (Art. 9 (1) of the Aarhus Convention) was implemented by enacting Section 6 (1) of the Environmental Information Act (*Umweltinformationsgesetz*), which came into force at the federal level in 2005. The Act also implements Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information. All 16 German Laender have since passed corresponding environmental information acts or incorporated such information rights into other state laws, which often reference the federal Act²³⁸. In 2020 the Federal Environmental Agency commissioned a study to evaluate the (federal) Environmental Information Act (*Umweltinformationsgesetz*) which concluded that despite the Act having seen more extensive use than its predecessor, the “right to access to environmental information is still widely unknown” and only 52 cases relating to the federal Environmental Information Act had come before administrative courts²³⁹. Environmental associations (9), private persons (16), and business (14) accounted for most of the information requests in those proceedings²⁴⁰. During the diesel emissions scandal, the federal Environmental Information Act (*Umweltinformationsgesetz*) was successfully used to obtain information from federal ministries and agencies²⁴¹.

It should be noted however, that much of the market surveillance activity by supervisory authorities in Germany, such as spot checks according to Section 25 (2) of the Product Safety Act²⁴² (*Produktsicherheitsgesetz*), happens at the level of the Laender or even the district level. The environmental organisation

²³⁸ Bunge, T., ‘Representative action in environmental law’ (Die Verbandsklage im Umweltrecht), *Jus* 2020, 740, p. 741. Stracke, K., Zschesche, M., (Independent Institute for Environmental Questions), Schomerus, T., (Leuphana University Lüneburg), Tews, K. (Free University Berlin) (2020) (*Evaluation des Umweltinformationsgesetzes (UIG) – Analyse der Anwendung der Regelungen des UIG und Erschließung von Optimierungspotentialen für einen ungehinderten und einfachen Zugang zu Umweltinformationen*), UBA Texte, No. 235/2020, Federal Environment Agency, p. 18 available at: www.umweltbundesamt.de/sites/default/files/medien/5750/publikationen/2020_12_14_texte_235-2020_abschlussbericht_evaluation_uig_0.pdf

²³⁹ Stracke, K., Zschesche, M., (Independent Institute for Environmental Questions), Schomerus, T., (Leuphana University Lüneburg), Tews, K. (Free University Berlin) (2020) (*Evaluation des Umweltinformationsgesetzes (UIG) – Analyse der Anwendung der Regelungen des UIG und Erschließung von Optimierungspotentialen für einen ungehinderten und einfachen Zugang zu Umweltinformationen*), UBA Texte, No. 235/2020, Federal Environment Agency, p. 34 f., available at: www.umweltbundesamt.de/sites/default/files/medien/5750/publikationen/2020_12_14_texte_235-2020_abschlussbericht_evaluation_uig_0.pdf.

²⁴⁰ Stracke, K., Zschesche, M., (Independent Institute for Environmental Questions), Schomerus, T., (Leuphana University Lüneburg), Tews, K. (Free University Berlin) (2020) (*Evaluation des Umweltinformationsgesetzes (UIG) – Analyse der Anwendung der Regelungen des UIG und Erschließung von Optimierungspotentialen für einen ungehinderten und einfachen Zugang zu Umweltinformationen*), UBA Texte, No. 235/2020, Federal Environment Agency, p. 130 f., fn. 144. available at: www.umweltbundesamt.de/sites/default/files/medien/5750/publikationen/2020_12_14_texte_235-2020_abschlussbericht_evaluation_uig_0.pdf.

²⁴¹ Administrative Court Berlin (Second Chamber), Judgment of 05 December 2019 – VG 2 K 84.18, available at <https://openjur.de/u/2343776.html>.

²⁴² Federal Agency for Industrial Health (*Bundesanstalt für Arbeitsschutz*), ‘Responsibilities of the Laender’ (*Zuständigkeiten der Länder*), www.baua.de/DE/Themen/Anwendungssichere-Chemikalien-und-Produkte/Produktsicherheit/Marktueberwachung/Zustaendigkeiten.html.

confirmed that the federal and state Environmental Information Acts are important tools to ensure consumer protection in practice²⁴³.

Information requests under environmental information acts can serve a dual purpose, they can uncover unfair trade practices against which qualified institutions can seek injunctive relief and ensure that supervisory authorities carry out their respective market surveillance obligations under environmental and consumer protection laws. However, the environmental organisation noted that, particularly where enforcement is delegated to the district level, the relevant information can be dispersed across a large number of public bodies obliged to provide environmental information. Given limited resources, civil society organisations can only engage in spot checks, making information requests for market surveillance purposes cumbersome²⁴⁴.

The study commissioned by the Federal Environmental Agency noted that consumer organisations were expected to make more use of the Environmental Information Act (*Umweltinformationsgesetz*) and the findings confirmed that consumer organisation indeed fall back on the Act when claims under the Consumer Information Act (*Verbraucherinformationsgesetz*) do not bring the desired result²⁴⁵. According to one of the consumer organisations, information requests have occasionally been made under these laws, but have remained mostly fruitless²⁴⁶. The study saw room for improvement in providing sufficient active product information in line with Article 5 (8) of the Aarhus Convention, which according to the study could require changes to Section 10 of the Environmental Information Act (*Umweltinformationsgesetz*)²⁴⁷.

Case: Information relating to animal protection is not environmental information

Despite the proliferation of environmental and consumer information acts, access to information relevant to consumers has limits. In a case dealing with the transport of livestock, the Federal Administrative Court (Bundesverwaltungsgericht) denied access to information relating to potential violations of animal welfare provisions, despite the relevance of such violations for consumer decisions and environmental impacts of factory farming. In the opinion of the court the information on farmed animals did not constitute information related to “biological diversity” as defined in Article 2 (a) of the Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 as well as in Article 2 No. 3 (a) of the Aarhus Convention, which is a narrower term compared to “flora” and “fauna” under in Article 2 (a) of the earlier Council Directive 90/313/EEC of 7 June 1990²⁴⁸ that would have covered both farmed animals and wildlife.

²⁴³ Interview with environmental organisation on 6 October 2022.

²⁴⁴ Interview with environmental organisation on 6 October 2022.

²⁴⁵ Stracke, K., Zschesche, M., (Independent Institute for Environmental Questions), Schomerus, T., (Leuphana University Lüneburg), Tews, K. (Free University Berlin) (2020) (*Evaluation des Umweltinformationsgesetzes (UIG) – Analyse der Anwendung der Regelungen des UIG und Erschließung von Optimierungspotentialen für einen ungehinderten und einfachen Zugang zu Umweltinformationen*), UBA Texte, No. 235/2020, Federal Environment Agency, p. 130 f., fn. 144. available at: www.umweltbundesamt.de/sites/default/files/medien/5750/publikationen/2020_12_14_texte_235-2020_abschlussbericht_evaluation_uig_0.pdf.

²⁴⁶ Written information provided by consumer organisation on 15 October 2022.

²⁴⁷ Stracke, K., Zschesche, M., (Independent Institute for Environmental Questions), Schomerus, T., (Leuphana University Lüneburg), Tews, K. (Free University Berlin) (2020) (*Evaluation des Umweltinformationsgesetzes (UIG) – Analyse der Anwendung der Regelungen des UIG und Erschließung von Optimierungspotentialen für einen ungehinderten und einfachen Zugang zu Umweltinformationen*), UBA Texte, No. 235/2020, Federal Environment Agency, p. 167. available at: www.umweltbundesamt.de/sites/default/files/medien/5750/publikationen/2020_12_14_texte_235-2020_abschlussbericht_evaluation_uig_0.pdf.

²⁴⁸ Federal Administrative Court, Judgement of 30 January 2020, (10 C 11.19), NVwZ 2020, 880, p. 882 f. with commentary from Gerhold, M., p. 883, the judgment is publicly available at: www.bverwg.de/300120U10C11.19.0.

3. Possibilities for collective claims by consumers or representations of collective interests.

This section should address the following:

- 1) Does the legal framework and practice on collective/representative action allow claims beyond consumer matters including/for example related to the environment?

The main differentiation between different types of collective and representative action is that between civil law disputes and administrative law disputes. The latter does include instruments for representative action (*Verbandsklage*) specifically related to the environment that may indirectly affect consumer interests.

(i) Civil law disputes

German law recognizes collective action instruments like consolidated action (*Sammelklage* or *Einziehungsklage*) pursuant to Section 79 (2) Sentence 2 No. 3 of the Code of Civil Procedure (*Zivilprozessordnung*) which enables certain consumer organisations to represent consumers in cases where no attorney is required²⁴⁹, for the collection of (lower-value) claims. However, technically the norm only refers to the representation of consumers in court. Consumer claims are assigned to the Consumer Protection Organisations (*Verbraucherzentralen*) for the purposes of collection in accordance with 8 (1) No. 4 of the Legal Services Act (*Rechtsdienstleistungsgesetz*). In practice, the approach is used mostly for test cases²⁵⁰ due to its limited reach and the resource constraints of Consumer Protection Organisations (*Verbraucherzentralen*)²⁵¹. For representative action under the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) see above under 2.1 a). Other collective action instruments relate to civil claims more broadly, this will include the new collective redress mechanism (*Abhilfeklage*), and assignments of civil law claims to legal service providers, such as legaltechs and collection service providers (see below 3.2)).

Whether these enforcement instruments have an environmental dimension is a matter of perspective: For example, the mechanism for declaratory relief (*Musterfeststellungsklage*) was activated against two car companies in connection with diesel emissions. According to one of the consumer organisations there is an element of environmental protection, but it is “reflexive”²⁵². The primary motivation is to recoup the damage suffered by affected consumers, financial or otherwise, for example because of a lower resale value or the limited usability of the car. The enforcement of such civil claims may however affect information about and future compliance with emission standards by car manufacturers and can therefore be said to have an environmental dimension. Recently another action for declaratory relief was brought against an electricity provider that had cancelled fixed-price energy contracts with consumers because of significant increases in overall energy prices²⁵³. Again, the primary effect on consumers is financial as they were pushed into more expensive contracts, but it indirectly affects their rights to choose clean, affordable energy.

²⁴⁹ Weth, S., in Musielak, H.-J., Voit, W., Code of Civil Procedure, Commentary, 19th edition, (2022), s. 79, para. 1.

²⁵⁰ Federation of German Consumer Organisations, Press release 19 December 2017, vzbv sues Volkswagen dealer (*vzbv klagt gegen VW-Händler*), available at: www.vzbv.de/pressemitteilungen/vzbv-klagt-gegen-vw-haendler.

²⁵¹ Federation of German Consumer Organisations, ‘Enforcing the law – strengthening consumers’, (2015) (*Recht durchsetzen – Verbraucher stärken*), p. 14, available at: www.vzbv.de/sites/default/files/downloads/Recht-durchsetzen-Verbraucher-staerken-Broschuere_vzbv.pdf.

²⁵² Interview with consumer organisation on 23 September 2022.

²⁵³ Consumer Protection Organisation of Hesse, ‘Electrified: We are suing Stromio’ (*Unter Strom – Wir klagen gegen Stromio*), 16 May 2022, available at: www.verbraucherzentrale-hessen.de/vertraege-reklamation/unter-strom-wir-klagen-gegen-stromio-70945.

(ii) Administrative law disputes relating to the environment

Section 93a of the Administrative Procedure Act (*Verwaltungsgerichtsordnung*) foresees the possibility of test cases, when an administrative measure affects more than 20 proceedings. However, this requires that citizens are affected in their individual rights according to Section 42 (2) of the Code of Administrative Procedure (*Verwaltungsgerichtsordnung*) and is only listed for completeness' sake.

Art. 9 (3) of the Aarhus Convention on access to justice was implemented by means of the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) which has been in force since 15 December 2006²⁵⁴. Section 2 (1) enables environmental organisations to bring representative action (*Verbandsklage*) if they fulfil the criteria listed in Section 3 (3) Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) and have been recognized as an environmental organisation or at least filed the relevant application according to Section 2 (2). The literature criticizes that the scope of Section 1 (1) Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) is narrower than the Convention and does not include decisions relating to product authorizations²⁵⁵. A dispute is pending before the European Court of Justice whether recognized environmental organisations have the ability to challenge type approvals for cars²⁵⁶.

According to the environmental organisation, the connection between representative action brought under the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) to consumer interests is often indirect, for example where it relates to the conservation of bodies of water and its impact on drinking water. The connection may also be more direct, for example where collective action under environmental laws seeks to curb the use of pesticides in agriculture or demands more ambitious waste reduction programs²⁵⁷. Both the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) in Sections 63 and 64 as well as state nature conservation acts, for example Sections 49 and 50 of the State Nature Conservation Act of Baden-Wuerttemberg (*Naturschutzgesetz*), also provide for representative action instruments.

It should be noted that representative action regarding clean air programs, and the impact on the ability by consumers to use certain cars in inner cities, has led to a significant public and political backlash against enforcement of environmental law in the public interest, with threats being made to the non-profit status and associated tax benefits of environmental organisations²⁵⁸. As noted in the literature, consumer and sustainability interests are not necessarily aligned²⁵⁹, at least where they concern the interests of individual consumers or certain groups of consumers.

²⁵⁴ Bunge, T., 'Representative action in environmental law' (*Die Verbandsklage im Umweltrecht*), *Jus* 2020, 740, p. 741.

²⁵⁵ Schlacke, S., 'The 2017 Environmental Appeals Act', (*Die Novelle des UmwRG 2017*), *NVwZ* 2017, 905, p. 908.

²⁵⁶ ECJ, Request for a preliminary ruling from the Schleswig-Holsteinisches Verwaltungsgericht (Germany) lodged on 29 November 2019 — Deutsche Umwelthilfe e.V. v Bundesrepublik Deutschland, (Case C-873/19) available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=225047&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1>.

²⁵⁷ Additional written information provided by the environmental organisation on 11 October 2022.

²⁵⁸ See Friedrich, L., 'The public good in court: Risks and opportunities of public interest litigation in administrative law' (*Gemeinwohl vor Gericht: Chancen und Risiken öffentlichrechtlicher „Public Interest Litigation“*), *DÖV* 2021, 726, p. 727, Neuerer, D., 'Christian Social Union piles on against Environmental Aid' (*Union legt gegen Umwelthilfe nach*), *Handelsblatt*, 3 March 2019, available at: www.handelsblatt.com/politik/deutschland/gemeinnuetzigkeit-union-legt-gegen-die-umwelthilfe-nach/24060728.html.

²⁵⁹ See Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, p. 27, available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staerkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf

2) Who can represent consumers in such litigation (CSOs, institutions etc.)?

For claims associated with injunctive relief which can be brought by qualified institutions, please see above under 2.1 a). Consumers are not represented directly under the representative instruments foreseen in the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) and nature conservation laws.

(i) The mechanism for declaratory relief (*Musterfeststellungsklage*)

Under the mechanism for declaratory relief (*Musterfeststellungsklage*) according to Section 606 (1) of the Code of Civil Procedure (*Zivilprozessordnung*) in connection with Section 3 (1) sentence 1 Nr. 1 and Section 4 of the Injunctive Relief Act (*Unterlassungsklagengesetz*), only “qualified institutions” (*qualifizierte Einrichtungen*)²⁶⁰ may bring collective action, provided they fulfil the following additional cumulative requirements of

- having at least 10 member associations or 350 natural persons as members,
- being listed as qualified institutions for at least four years,
- mainly pursuing consumer interests through non-commercial consumer education and advice,
- not bringing actions for declaratory relief for the purposes of making a profit, and
- not receiving more than 5 percent of the funding from corporate sources.

These requirements were added to prevent the development of a “commercial litigation industry”²⁶¹. Consumer Protection Organisations (*Verbraucherzentralen*) and consumer associations which are mainly funded from public sources are deemed to fulfil these requirements according to Section 606 (1) sentence 3 Code of Civil Procedure (*Zivilprozessordnung*). Unlike for the requirements that an organisation must meet to become a “qualified institution” (*qualifizierte Einrichtungen*) according to Section 4 of the Injunctive Relief Act (*Unterlassungsklagengesetz*), there is no formal procedure to determine whether an organisation meets the requirements under Section 606 (1) of the Code of Civil Procedure (*Zivilprozessordnung*). The Federal Office of Justice also does not publish a list of institutions that do fulfil the requirements. The requirements would therefore have to be examined on a case-by-case basis during the court proceedings and would have to be maintained throughout the proceedings²⁶². It is not clear that any environmental organisation can currently bring an action under the mechanism for declaratory relief (*Musterfeststellungsklage*). The restrictive handling of legal standing has likely contributed to the fact that between since 2018, only about 20 actions for declaratory relief had been registered, instead of the 450 annual actions originally projected by the legislator²⁶³.

(ii) Consolidated Action (*Sammelklage*)

²⁶⁰Lutz, G., in BeckOK, Code of Civil Procedure, 46th edition, 1 September 2022, s. 606, para. 32.

²⁶¹ See Schlacke, S., Alt, M., Tonner, K., Gawel, E., Bretschneider, W., Institute for Environmental and Planning Law (University Münster) (2015), *Strengthening sustainable consumption in the area of product usage through modifications in civil and administrative law (Stärkung eines nachhaltigen Konsums im Bereich Produktnutzung durch Anpassungen im Zivil- und öffentlichen Recht)*, UBA Texte, No. 72/2015, Federal Environment Agency, p. 27, available at: www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_72_2015_staerkung_eines_nachhaltigen_konsums_im_bereich_produktnutzung_0.pdf

²⁶² Stadler, A., in Musielak, H.-J., Voit, W., *Code of Civil Procedure, Commentary*, 19th edition, (2022), s. 606, para. 5.

²⁶³ Lühmann, T. Collective action – A current overview, (*Kollektiver Rechtsschutz – Ein aktueller Überblick*), NJW 2020, 1706, p. 1708; Horn, A., Rieder, M., ‘Daring more collective action?’ (*Mehr kollektiven Rechtsschutz wagen?*), 3 June 2022, available at <https://anwaltsblatt.anwaltverein.de/de/zpoblog/mehr-kollektiven-rechtsschutz-wagen-rieder-horn>.

According to Section 79 (2) Sentence 2 No. 3 of the Code of Civil Procedure (*Zivilprozessordnung*) Consumer Protection Organisations (*Verbraucherzentralen*) and consumer associations which are mainly funded from public sources may aggregate consumer claims if bringing legal action falls within their mandate²⁶⁴.

(iii) German Capital Markets Test Case Act (*Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten*)

According to Sections 4 (1) and (2) in connection with 6 (1) of German Capital Markets Test Case Act (*Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten*), either the claimant or the respondent can ask the competent court to initiate a test case procedure when (1) ten or more cases relating to capital market investments, for example in connection with faulty investment advice, have been brought and (2) they are based on the same underlying legal and factual questions. The court may then ask the Higher Regional Court to select a test case according to Section 9 (2), where the test claimant and test respondent continue the dispute to solve these questions, while all other disputes are suspended. This procedure may have an impact where green investments are concerned.

(iv) Legal service providers

Consumers may sell or assign their claims to a legal service provider, such as a legaltech company, or ask a collection service provider within the meaning of Section 2 (2) of the Legal Services Act (*Rechtsdienstleistungsgesetz*), to enforce their claims, often in return for a contingency fee. The exact business model varies, but the consumer may be represented by the service provider out of court and an attorney selected by the service provider for judicial enforcement of the claim, with the provider covering the cost of that representation in the event of a loss²⁶⁵.

(v) Arbitration Boards (*Schlichtungsstellen*)

Depending on the applicable rules of procedure, in the event of many similar claims being raised against the same respondent, some of the arbitration boards (*Schlichtungsstellen*) may select one or more of the pending cases to resolve and suspend the others. While the company may have a cost incentive to settle with the other consumers in the event of an unfavourable recommendation by the arbitration board, the other consumers are not technically represented by the “test” claimants²⁶⁶.

²⁶⁴ Rott, P., GIZ (2020), Study on the collective enforcement of claims by consumers in Germany (*Studie zur kollektiven Durchsetzung von Ansprüchen von Verbrauchern in Deutschland*) (2020), in Instruments of enforcement of rights in consumer protection (*Instrumente der Rechtsdurchsetzung im Verbraucherschutz*), Study Commissioned by the Federal Ministry of Justice and Consumer Protection, p. 7, available at: www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/Rechtsdurchsetzung-Verbraucherschutz.pdf?__blob=publicationFile&v=4.

²⁶⁵ Rott, P., GIZ (2020), Study on the collective enforcement of claims by consumers in Germany (*Studie zur kollektiven Durchsetzung von Ansprüchen von Verbrauchern in Deutschland*) (2020), in Instruments of enforcement of rights in consumer protection (*Instrumente der Rechtsdurchsetzung im Verbraucherschutz*), Study Commissioned by the Federal Ministry of Justice and Consumer Protection, p. 22, 29, available at: www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/Rechtsdurchsetzung-Verbraucherschutz.pdf?__blob=publicationFile&v=4.

²⁶⁶ Rott, P., GIZ (2020), Study on the collective enforcement of claims by consumers in Germany (*Studie zur kollektiven Durchsetzung von Ansprüchen von Verbrauchern in Deutschland*) (2020), in Instruments of enforcement of rights in consumer protection (*Instrumente der Rechtsdurchsetzung im Verbraucherschutz*), Study Commissioned by the Federal Ministry of Justice and Consumer Protection, p. 34, available at:

- 3) What is the state of transposition of Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers?

On 24 September 2022 the Federal Ministry of Justice (*Bundesministerium der Justiz*) presented a draft bill implementing of Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers for further consultation²⁶⁷. The draft bill contains the new Consumer Rights Enforcement Act (*Verbraucherrecht durchsetzungsgesetz*) which will incorporate the existing mechanism for declaratory relief (*Musterfeststellungsklage*) currently regulated in Sections 606 through 614 of the Code of Civil Procedure (*Zivilprozessordnung*) and introduce the new collective redress mechanism (*Abhilfeklage*) to provide the redress measures²⁶⁸ required under Article 9 of directive 2020/1828.

The new mechanism will rely on an opt-in system. The consumer must enter their claim into the collective action register no later than the day before the first oral hearing, which was the solution favoured by the expert opinion on behalf of German industry and trade associations²⁶⁹. As with the existing mechanism, the registration is free, does not require an attorney and can be done via e-mail. However, it will now be sufficient that the qualified institution bringing the action can present prima facie evidence that more than 50 consumers are affected²⁷⁰.

The timing of the registration does have implications for limitation periods which are suspended only for registered consumers, meaning consumers cannot wait for the outcome of the proceedings before deciding whether to join the action or not, as had been suggested by the expert opinion on behalf of the consumer organisations with the goal to avoid parallel claims²⁷¹. One key question will be the question of “similarity” (*Gleichartigkeit*) of claims which recital 12 of the directive leaves to Member States. The court must be able to conduct a “formulaic examination of the legal and factual requirements underlying the claim”: Claims would for example not be similar when only certain products in a series had a defect²⁷². The draft extends the mechanism to all disputes between consumers and companies, not just those relating to provisions protecting consumer interests. It also includes claims of small businesses, when a consumer organisation is bringing the action, and business is affected in the same manner as consumers²⁷³.

www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/Rechtsdurchsetzung-Verbraucherschutz.pdf?__blob=publicationFile&v=4.

²⁶⁷ Anger, H., ‘Minster of Justice Buschmann gets class action underway’ (*Justizminister Buschmann bringt Sammelklage auf den Weg*), Handelsblatt, 24 September 2022, available at: www.handelsblatt.com/politik/deutschland/gesetzentwurf-justizminister-buschmann-bringt-sammelklage-auf-den-weg/28703142.html.

²⁶⁸ Röckrath, L, ‘This is how the new one-size-fits-all-action will work’ (*So soll die neue “Eine-für-alle-Klage” funktionieren*), Legal Tribune Online, www.lto.de/recht/hintergruende/h/verbandsklage-abhilfeklage-sammelklage-referentenentwurf/?r=rss.

²⁶⁹ Bruns, A., Expert Opinion – Implementation of the EU directive on representative action into German law (*Rechtsgutachten – Umsetzung der der EU-Verbandsklagerichtlinie in deutsches Recht*), p. 47 f.

²⁷⁰ Röckrath, L, ‘This is how the new one-size-fits-all-action will work’ (*So soll die neue “Eine-für-alle-Klage” funktionieren*), Legal Tribune Online, www.lto.de/recht/hintergruende/h/verbandsklage-abhilfeklage-sammelklage-referentenentwurf/?r=rss.

²⁷¹ Gsell, B., Meller-Hannich, C., The implementation of the new EU directive on representative action - Follow-up expert opinion, (*Die Umsetzung der neuen EU-Verbandsklagerichtlinie - Folgegutachten*), 23 February 2022, p. 53.

²⁷² Röckrath, L, ‘This is how the new one-size-fits-all-action will work’ (*So soll die neue “Eine-für-alle-Klage” funktionieren*), Legal Tribune Online, www.lto.de/recht/hintergruende/h/verbandsklage-abhilfeklage-sammelklage-referentenentwurf/?r=rss.

²⁷³ Röckrath, L, ‘This is how the new one-size-fits-all-action will work’ (*So soll die neue “Eine-für-alle-Klage” funktionieren*), Legal Tribune Online, www.lto.de/recht/hintergruende/h/verbandsklage-abhilfeklage-sammelklage-referentenentwurf/?r=rss.

The mechanism has two main phases, a court phase and a trustee phase. The court first rules on the merits of the claims. If the parties do not agree on a settlement to implement the ruling, it will come to a final “redress ruling” (*Abhilfeurteil*). In the second phase, the court can task a trustee to implement the ruling and may order the defendant to pay a preliminary “collective amount” for the trustee to validate the claims of consumers and distribute the funds accordingly. The draft bill limits the type of institutions who can bring a claim, replicating the requirements under the existing declaratory mechanism (*Musterfeststellungsklage*) in Section 606 of the Code of Civil Procedure (*Zivilprozessordnung*), while ensuring that German Consumer Protection Organisations (*Verbraucher-zentralen*) and other publicly funded consumer organisations can initiate the mechanism. Third-party funding is possible, with certain limitations to prevent abuse²⁷⁴.

4. Due diligence and reporting obligation:

This section should address the following:

- 1) Are there national due diligence laws in your country? If YES: can it be applied in the area of consumer protection as relevant for the protection of the environment?

The 2021 Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*) will enter into force on 1 January 2023, it requires companies which are above a certain size in terms of the number of employees, to comply with due diligence obligations according to Section 3 (1) of the Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*). These extend to both human rights and environmental risks, with the goal of preventing, minimizing or ending violations. Violations of obligations under the Act do not result in civil liability according to 3 (1) of the Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*), but may result in substantial fines under Section 24, and in case of significant violations, companies may be excluded from public procurement for up to three years under Section 22²⁷⁵. According to Section 14 (1) No. 2 the Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*), individuals can ask the competent supervisory authority to take action. However, unlike Art. 19 of the Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937²⁷⁶, where a substantiated “concern” will be sufficient and campaigning for NGOs may therefore be easier²⁷⁷, Section 14 (1) No. 2 the Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*) requires that the complainant substantiate a prima facie violation of their individual rights.

According to one of the consumer organisations, the Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*) has the potential to increase the overall share of sustainable products available to the consumer, because unlike sustainability labels, the Act does not focus on the consumer choice of a

²⁷⁴ Dahmen, D., ‘Collective action: Draft bill presents “collective redress mechanism”’ (*Verbandsklagen: Referentenentwurf stellt „Abhilfeklage“ vor*), *Anwaltsblatt*, 28 September 2022, available at:

<https://anwaltsblatt.anwaltverein.de/de/news/verbandsklagen-referentenentwurf-abhilfeklage>.

²⁷⁵ Cappel, A., Hund, C., ‘The Supply Chain Due Diligence Act – An overview of the scope and central provisions’ (*Das Lieferkettensorgfaltsgesetz - Ein Überblick über den Anwendungsbereich und die zentralen Regelungen*), *IWRZ* 2022, 174, pp. 174, 177.

²⁷⁶ European Commission, Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final, 23 February 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

²⁷⁷ Schmidt, F., ‘The Power of the Supply Chain Due Diligence Act in abeyance – a cautionary tale for rushed legislation’, (*Die Durchschlagskraft des Lieferkettensorgfaltspflichtengesetz (LkSG) in der Schwebe – ein mahndendes Beispiel für zu hektische Gesetzgebung*), *CCZ* 2022, 214, p. 221.

product at the end of the production process, but directly on the companies and how they source the products in the first place²⁷⁸.

One of the consumer organisations noted that membership in a voluntary multistakeholder initiative can have a similar communicative effect as a sustainability label. Such initiatives may lose relevance after the Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*) enters into force, unless the initiative require more demanding due diligence efforts. Otherwise, they may contribute to greenwashing, if consumers are unable to understand whether the member company takes responsibility for its supply chain or not²⁷⁹.

Unlike in the UK²⁸⁰ for example, the German National Contact Point under the OECD Guidelines for multinational enterprises (NCP), does not appear to be an active forum for NGOs seeking to promote environmental protection through raising consumer matters. At least one specific instance has been filed in relation to Article VII.4 (now VIII.4²⁸¹) of the OECD Guidelines, in relation to the construction of new coal plant and the operation of a nuclear plant. The case, originally rejected in 2010, was re-evaluated in 2021, but the NCP did not consider it necessary to engage further on the merits²⁸². According to the human rights organisation NGOs may not have considered engagement before the NCP useful, considering a perceived lack of responsiveness²⁸³, at least prior to the 2018 NCP peer review²⁸⁴. The NCP may also not have been considered as a primary forum for addressing consumer concerns in the Global North, and NGOs may have instead focused their efforts on human rights concerns of rights holders in the Global South²⁸⁵ when considering the specific instance procedure. Another reason may be that NGOs can rely on effective legal and judicial remedies (injunctive relief and cease-and-desist letters) to fight misleading environmental claims, if the NGOs meet the standards for “qualified institutions” or partner with such institutions, and therefore do not rely on the specific instance procedure before the NCP. Nevertheless, parts of the literature have recently highlighted the communicative potential of NCP complaints and associated reputational risks for businesses and see the specific instance procedure as potentially supplementing the Supply Chain Due Diligence Act (*Lieferkettensorgfaltsgesetz*)²⁸⁶.

- 2) Can you identify examples of application of provisions regarding non-financial reporting to enforce consumer rights in your country in respect to Directive 2014/95/EU (Non-Financial Reporting Directive – NFRD) - for example similar to the case submitted by Client Earth against supermarket groups – Ahold Delhaize ([Notification to the Dutch Authority for the Financial Markets \(clientearth.org\); We are taking action against a global supermarket giant on plastics | ClientEarth](#)).

²⁷⁸ Interview with consumer organisation on 4 October 2022.

²⁷⁹ Written information provided by consumer organisation on 15 October 2022.

²⁸⁰ OECD Watch, ‘The Lifescape Project et al. vs. Drax Group plc’, (2022), available at: www.oecdwatch.org/complaint/lifescape-et-al-vs-drax/.

²⁸¹ OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises Comparative table of changes made to the 2000 text (2012)*, p. 63, available at: www.oecd.org/daf/inv/mne/49744860.pdf.

²⁸² Declaration of the German National Contact Point for the OECD Guidelines for multinational enterprises in reaction to a complaint presented by Greenpeace e.V. against Vattenfall (*Erklärung der deutschen Nationalen Kontaktstelle für die OECD-Leitsätze für multinationale Unternehmen zu einer Beschwerde, vorgelegt von - Greenpeace e.V. gegen – Vattenfall*), 17 May 2021, available at: www.bmwk.de/Navigation/DE/Service/NKS-Beschwerdefaelle/beschwerdefaelle.html.

²⁸³ Interview with human rights organisation on 1 November 2021.

²⁸⁴ OECD (2018), OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Germany.

²⁸⁵ Interview with human rights organisation on 1 November 2021.

²⁸⁶ Göpfert, B., Melles, M., ‘Responsible business conduct under the OECD Guidelines’ (*Verantwortungsvolles unternehmerisches Handeln nach den OECD-Leitsätzen*), NJW 2022, 2505, p. 2508 f.

No similar examples to the application of provisions non-financial reporting could be identified as part of the research or as part of the expert consultations. However, misrepresenting the circumstances of the corporation in the non-financial statement carries both criminal and administrative liabilities under Sections 333 (1) and (2) and 334 (1) No. 3 of the Commercial Code (*Handelsgesetzbuch*).²⁸⁷ As far as can be ascertained, with regard to sustainability issues, Germany's Federal Financial Supervisory Authority (*BaFin*) focuses on banks, pension funds, insurance companies, and other financial services providers which are the types of institutions it supervises²⁸⁸, and it is developing strategies against greenwashing investments²⁸⁹. An investigation by the Federal Financial Supervisory Authority (*BaFin*) was launched in the summer of 2022 into an investment fund, which may have exaggerated the ESG characteristics of their green financial products²⁹⁰. On 26 October 2022 the Consumer Protection Organisation of Baden-Württemberg (*Verbraucherzentrale Baden-Württemberg*) announced that it was seeking injunctive relief through the courts against the fund in an effort to fight misleading claims in ads promoting sustainable financial products²⁹¹. According to the environmental organisation, German environmental NGOs may currently not have the capacity or the expertise to bring actions²⁹² like those in the Dutch case. Recent NGO initiatives seem to have focused on strategic litigation before the courts, particularly in the climate field²⁹³.

One of the consumer organisations noted that attempts to directly incorporate “consumer matters” into the CSR-Directive-Implementation Act (*CSR-Richtlinie-Umsetzungsgesetz*) implementing Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups had failed²⁹⁴. A 2021 study commissioned by the Ministry of Justice found it challenging to define consumer matters with regard to CSR-reporting but noted that out of 264 reports examined between 2017 and 2019, “sustainable products and services” were among the most reported (33 times)²⁹⁵.

²⁸⁷ See Schwarz, B., Schiefer, A., Greenwashing – Ermittlung von Greenwashing Vorwürfen, CCZ, 2022, 345, Grottel, B., Hoffmann, Beck Balance Commentary (*Beck'scher Bilanz-Kommentar*) 13th edition, (2022), s. 331, para. 17, s. 334, para. 14.

²⁸⁸ Federal Financial Supervisory Authority (*BaFin*), Guidance on dealing with sustainability risks (*Merkblatt zum Umgang mit Nachhaltigkeitsrisiken*), 13 January 2020, p. 10, available at: www.bafin.de/SharedDocs/Downloads/DE/Merkblatt/dl_mb_Nachhaltigkeitsrisiken.pdf?__blob=publicationFile&v=14.

²⁸⁹ Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*), ‘Federal Financial Supervisory plans rules against greenwashing investments’, (*BaFin plant Regeln gegen Greenwashing bei Geldanlagen*), 3 August 2021, available at: www.vzbv.de/pressemitteilungen/bafin-plant-regeln-gegen-greenwashing-bei-geldanlagen.

²⁹⁰ Schreiber, M., ‘Raid at Deutsche Bank affiliate DWS due to suspicions of greenwashing’ (*Razzia bei Deutsche-Bank-Tochter DWS wegen Greenwashing-Verdachts*), Süddeutsche Zeitung, 31 May 2022, available at www.sueddeutsche.de/wirtschaft/dws-razzia-greenwashing-deutsche-bank-esg-1.5594533.

²⁹¹ Consumer Protection Organisation of Baden-Württemberg, Press release dated 24 October 2022, ‘Lawsuit against DWS because of Greenwashing’ (*Klage gegen DWS wegen Greenwashing*), available at: <http://verbraucherzentrale-bawue.de/pressemitteilungen/presse-bw/klage-gegen-dws-wegen-greenwashing-78104>.

²⁹² Interview with environmental organisation on 6 October 2022.

²⁹³ German Constitutional Court, Order of 24 March 2021 (1 BvR 2656/18), available at: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr265618.html;jsessionid=4D91BC53B81D0E02D5212FE6BB7F5078.2_cid329, Regional Court Stuttgart, ‘Suit against Mercedes-Benz Group AG to cease distribution of cars with internal combustion engine dismissed’ (*Klage gegen die Mercedes-Benz Group AG auf Unterlassung des Vertriebs von Personenkraftwagen mit Verbrennungsmotor abgewiesen*), 13 September 2019, available at: https://landgericht-stuttgart.justiz-bw.de/pb/Lde/Startseite/Aktuelles/Pressemitteilung_Klage+gegen+Mercedes-Benz+auf+Unterlassung+des+Vertriebs+von+Verbrennern+abgewiesen/?LISTPAGE=1195716.

²⁹⁴ See Federation of German Consumer Organisations, ‘CSR-Directive Implementation Act’, (*CSR-Richtlinie Umsetzungsgesetz*), (2015), p. 3, available at: www.vzbv.de/sites/default/files/downloads/2017/03/09/stellungnahme_csr-rl-umsg_vzbv_16-11-09.pdf.

²⁹⁵ Accounting Standards Committee of Germany, CSR-Study (*CSR-Studie*), January 2021, pp. 30, 33, available at: www.drsc.de/app/uploads/2021/06/210128_CSR-Studie_final.pdf.

Whether non-financial reporting may impact the rights to sustainable products (see 2.1 b above) is subject to discussion in the literature. It is assumed that the contents of the non-financial declaration under Section 289b of the Commercial Code (*Handelsgesetzbuch*) are not directed at the consumer. However, they could be considered public statements within the meaning of Section 434 (3) Sentence 1 No. 2 lit. b of the German Civil Code (*Bürgerliches Gesetzbuch*). Statements in the report normally do not concern the product in question, and therefore do not directly impact the purchasing decision. They may however indirectly impact the reputation of company and its products, including its activities relating to environmental protection²⁹⁶. If that is the case, they may affect the value of the product in the eyes of the consumer, which could therefore be defective²⁹⁷. The main issue is in determining the impact of non-financial reporting on the consumer to enforce warranty claims, is whether factors relating to the production or the company in general can be considered “product characteristics” (*Beschaffenheit*), and therefore constitute a defect. A sufficient connection between the non-financial reporting and the product must exist, such as the claim that the company uses only organic cotton or renewable energy in its production²⁹⁸. Labels that include company-related sustainability aspects could further strengthen consumer rights in this regard.

5. Conclusions and ways forward

This section should include brief summary of findings and proposals how to improve environmental protection through consumers’ rights, and how to improve enforcement of consumers’ rights in this context.

What can be done on national level? What could be done at EU level?

Please include:

- Short summary of findings

Interested consumers have relatively simple access to environmental information held by public offices without having to demonstrate a legitimate interest through several complimentary laws, including the Environmental Information Act (*Umweltinformationsgesetz*) and the Consumer Information Act (*Verbraucherinformationsgesetz*), though gaps remain.

Protection of the environment is often “reflexive” under German consumer protection law. The reliability of environmental information for consumers is mainly enforced through representative action (*Verbandsklage*) by qualified institutions under the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*). Misleading statements or missing information about a product’s environmental aspect can be effectively ended through representative action by consumer, environmental, and trade associations, and reoffences can be prevented. Injunctive relief is fast and effective and does not require bringing legal action before a court in most cases. Mechanisms to enforce consumer damage claims and confiscate profits are not always effective in practice, particularly for small and dispersed damages, and prevention must necessarily remain limited when companies can expect to keep profits resulting from unfair commercial practices.

²⁹⁶ Grunewald, B., ‘The Seller’s liability for incorrect CSR-reports by the producer’, (*Verkäuferhaftung für unrichtige CSR-Berichte des Herstellers*), NJW 2021, 1777.

²⁹⁷ Grunewald, B., ‘The Seller’s liability for incorrect CSR-reports by the producer’, (*Verkäuferhaftung für unrichtige CSR-Berichte des Herstellers*), NJW 2021, 1777, 1780.

²⁹⁸ Croon-Gestefeld, J., ‘The Sustainable quality of a product’, (*Die nachhaltige Beschaffenheit der Kaufsache*), NJW 2022, 497, p. 500.

Regarding substantive law and consumer rights sustainable products, the existing law already provides for the integration of sustainability into product characteristics, including through verifiable labels, and this is complemented by the enforcement of information obligations and administrative law requirements on product design. The warranty regime, particularly as it relates to limitation period may need to be adapted for goods which typically have longer life spans. While some reforms may lead to more sustainable, i.e. longer lived products, due diligence laws may play an important role in increasing the share of overall sustainable products in the economy.

- Overarching observations and assessments

The overall momentum on squaring consumer protection and sustainable consumption appears to lie with the European Commission or at the EU level, and it is unclear what priority planned projects in the area of sustainable consumption have, given the limited room at the national level.

Credible sustainability labels exist, but these have low market shares and sustainable products remain the exception.

There is no shortage of government initiatives and (publicly funded) platforms or formats for consumers looking for sustainability information. However, the multiplication of efforts and the potential for conflicting information make it difficult to navigate for the individual consumer.

Germany's private enforcement model provides the opportunity to leverage consumer rights to promote environmental protection in principle but needs to become better at preventing consumer harm and providing effective redress for affected consumers, particularly for small and dispersed damages. Insisting on altruism as a necessary element of consumer protection and exaggerated fears of a "litigation industry" prevent private enforcement from fulfilling its potential and from playing a bigger role in promoting environmental protection.

- Best promising practices

- Green Button 2.0 (sustainability label in the textile sector)
- "topf secret" (access to information, as of yet untested in the environmental field)

- Suggestions for improvements stemming from the research or opinions of experts

Consumer and environmental organisations could be strengthened to better enforce consumer rights at the intersection with environmental interests, for example through capacity building of environmental organisations, extending number of organisations who can bring representative action or claims under the proposed mechanism for collective redress (*Abhilfeklage*) and better ways of managing litigation risk.

The legal infrastructure must develop ways to deal with small and dispersed damages and mass damage events. Legal service providers could potentially increase access to justice by consumers, though this will depend on whether consumer claims with an environmental component can be standardized and automated. Increased public enforcement could supplement private enforcement, for example through increased investigatory powers. Enforcement issues will need to be addressed largely at the national level.

This nexus between consumer law, unfair commercial practices, and ecodesign reform, could be further strengthened, for example through introducing mandatory statements by producers about minimum lifespans and reparability for long-lived goods. Most of the legislative changes will need to be made at the EU level (to the extent they are not already part of initiatives under the Green New Deal) and will need to take a comprehensive view of consumer law, unfair commercial practices law, and ecodesign law.