



SANCTIONS

Penalties for offences committed under legal metrology regulations in Germany

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The regulations governing legal metrology in the Federal Republic of Germany concern both regulatory law (to which trade and industry are subject), and protective rights of the consumer. The former regulates the correctness of measurements in commercial transactions, the latter the movement of goods between enterprises and the sale of goods to consumers. Of prime importance is the fairness of legal transactions, and thus of competition; the objective is to ensure that neither of the parties involved in commercial transactions (buyer and seller) suffers financial prejudice or other losses due to inaccurate measuring instruments or as a result of inadequate or excessive filling of prepackages.

These concerns are of particular significance in the age of market globalization. The underlying intention is that the buyer of goods and measuring instruments can be totally sure that any products bought have the specified characteristics and will thus serve the purpose for which they were bought, irrespective of the country of origin. In particular in trade within free trade areas (such as the European Union), a structured exchange of goods without special border control measures is conceivable, but is only possible if the relevant regulations are effectively complied with in the producing country.

In some fields (e.g. in-plant verification of weighing instruments, prepackages) where regulations have been harmonized within the European Union, confidence in the controls of the producing country is sufficiently high that checks are only carried out in the receiving countries if there are reasonable grounds to suspect that an offence under the relevant provisions has been committed. This means that barriers to trade have been removed.

A prerequisite for such a degree of confidence has been that the level which the producing countries have reached in the implementation of the relevant regulations and their control is comparable to that reached in the country where the product is brought to market.

It is thus the task of the competent authority to check whether the desired level has in fact been reached by all those involved in commercial transactions and whether the relevant regulations are observed.

In Germany the legislator has given the competent authorities two tools to exercise these controls: preventive measures (e.g. verification of the measuring instruments) and a repressive system (including, for example, inspection of prepackages).

This means that, within the scope of market surveillance, the verification officers carry out *in situ* tests of measuring instruments (subsequent verification) and supervise compliance with other regulations (e.g. regulations governing contents quantities).

Market surveillance and the detection of offences has made it necessary for the competent authorities to be in possession of the legal means that make it possible for them to fulfil their tasks correctly.

Regulations governing supervisory measures

Under German verification law regulations, this has been ensured by the provisions of section 16 of the Verification Act. Both the body to which supervisory powers have been transferred and those subject to supervision have been given the rights and obligations described below:

Rights:

- to enter property, operational premises and businesses. This right is restricted in that it is limited to regular operating and working hours;
- to carry out examinations and inspections;
- to take samples; and
- to inspect business records.

Obligations:

- to furnish information;
- to accept supervisory measures;
- to support the supervisory bodies by indicating the rooms in which work subject to supervision is carried out, to present documents, to open rooms and containers, and to make sampling possible; and
- the importer of prepackages and containers must accept examinations and fulfil his obligation to furnish information.

Transfer of the above rights has enabled the competent authorities to ensure efficient supervision of the entire market and to detect offences.

The detection of market irregularities is not, however, sufficient to ensure compliance with the relevant regulations as is desirable on the market. To achieve this, the competent authorities must be given the required regulatory tools. This requirement has been met by classifying offences under the verification law regulations as administrative offences.

Penalties

As a result of the above classification, the bodies concerned are in a position to instigate proceedings for administrative offences against companies and individuals who infringe regulations under verification law.

Every administrative offence uncovered on site on the territory of a Federal state is recorded on a form and reported to the verification board concerned, which initiates and follows through proceedings. These proceedings can be concluded by the imposition of a cautionary fine or by fixing an administrative fine. They are not, however, penalties: their purpose is to enforce certain regulations, and they are thus a warning to those concerned to observe the relevant rules and prohibitions - an appeal which involves the imposition of sanctions and whose effects are, therefore, felt.

Cautionary fines (which range from 10 DM to 75 DM) may be imposed only in the case of minor administrative offences; more severe offences are punished by an administrative fine.

The amount of the administrative fine (which depends on the nature and seriousness of the offence) is taken from one of the lists of offences punishable by fines, which have been drawn up by the verification boards of the Federal states and which are applied nationwide. The stated amount is imposed only in cases of negligence and in the case of deliberate acts the amount is doubled.

The highest individual administrative fine is 20 000 DM, but this amount may be exceeded if the individual concerned derived economic benefit from the offence: the fine must be at least equal to the "profit", even if the upper limit fine is exceeded. These sanctions therefore aim to ensure that unlawful acts do not generate benefit.

Incidental consequences

Parallel to fixing the administrative fine, the authority may order incidental consequences. These are independent of the seriousness of the offence and serve to discourage future offences. The following measures are concerned:

Forfeiture

Within the framework of forfeiture, the instrument owner forfeits his or her ownership interests in the objects (e.g. measuring instruments) or the title interests (e.g. claims, bank balances). Return of the objects and restoration of the title is not possible: the ownership interests permanently pass into the hands of the State.

Wreckage

Objects are destroyed so that future offences are rendered impossible.

Transfer of the excess proceeds

The enterprise must transfer the proceeds gained even if the offence was committed by a staff member without the enterprise's knowledge.

Compensation

If, for legal reasons, the authority refrains from issuing an administrative order or imposing a fine although it has been established that the act constitutes an offence, orders can be given to the effect that the offender has to pay an amount of compensation.

Appeal against penalties

The party concerned has the right of appeal against the regulatory measures imposed (administrative order imposing a fine or order of incidental consequences). An appeal against the measure taken lodged with the authority obliges the latter to recheck the matter. If the appeal is disallowed, the files are submitted to a court and the case is heard in open court. The proceedings are then concluded by a sentence.

Types of offence and penalties

Despite the great variety of offences, the majority fall under six fields, defined by the respective protection aim of the regulation and the seriousness of the offence. The offences concerned are the following:

1 Offences under regulations governing the putting into circulation of measuring instruments

These are offences under regulations that guarantee to the buyer (or user) of the measuring instrument that its characteristics comply with those specified in the approval certificate issued by the PTB, Braunschweig, and that the instrument can thus be verified, because use in, and holding in readiness for, commercial transactions are permitted only in that case.

In the case of measuring instruments which, on the basis of the relevant regulations, may be put on the market after having been verified by the manufacturer, the buyer is to be guaranteed that the former has taken all necessary measures to fulfil the legal requirements for its use in commercial transactions.

The number of offences in this area is small. However as these offences are of fundamental importance, the fines imposed are in the upper range.

2 Offences with respect to the use and holding in readiness of measuring instruments

This area is of great significance for various reasons. Many of these measuring instruments are used in commercial transactions to directly measure goods for the customer (for example in shops, at petrol stations and for the delivery of domestic heating fuel oil).

In the field of prepackages, measuring instruments are used both during production and as control instruments for the supervision of correct filling. Measurement of goods here is indirect, since the customer is not present at the place where the measuring instrument is used.

In addition, measuring instruments are used in environmental protection (for example exhaust gas analyzers for CO and diesel) and for traffic safety (for example tyre gauges).

As the measurement results are of economic importance and also have a protective function, the legislator and German ordinance issuing bodies oblige measuring instrument owners to submit them to the verification office for a metrological test prior to the expiry of the validity of the verification. If those responsible for this fail to meet their obligations, they accept that the measurement results do not reflect the actual conditions and that a loss can be incurred either by their customers or by themselves.

This means that, just in this field, the situation may arise that the measuring instrument owner derives unjustified economic benefit because of non-compliance with the regulations under verification law. This benefit is to be "skimmed off" within the scope of the administrative offence proceedings.

The Verification Authority of Rhineland-Palatinate recently followed such an administrative offence procedure against certain public utility companies, who had omitted to remove a large number of water, electricity and gas meters from the supply network in due time prior to the expiry of the validity of the verification. These companies would have saved verification fees and meter removal/new installation costs of up to 32 000 DM, but this benefit was confiscated by the Verification Authority by the imposition of an administrative fine in excess of that amount, thus ensuring that the companies concerned did not gain any advantage over competitors who had removed their meters in time.

In the case of minor offences committed by small companies (e.g. market traders), the fine must, of course, be at the lower level of the range (for example, 100 DM to 200 DM).

3 Offences as regards observance of the regulations governing the net contents of prepackages, and

4 Offences as regards observance of the regulations governing prepackage labeling

These two areas can be dealt with jointly, as they have much in common.

European Union regulations protect the consumer (who can neither observe nor check the production process of prepackages) against inadmissible inadequate filling and - to maintain market transparency - against inaccurate labeling.

Inspections by the verification authorities at the manufacturer's and in trade are, therefore, possible and prepackages from both domestic and foreign production may be checked. Both foreign and domestic producers are thus protected against competitors who do not comply with the provisions and thus gain a financial (or other) advantage.

As inadequate filling directly affects the consumer, the fines imposed for this offence must be higher. However, offences under the labeling regulations can also be punished by high fines, in particular when the EEC mark "e" has been applied to the prepackages.

5 Offences under regulations governing the installation and use of measuring instruments

The relevant regulations directly concern the instrument user, who may cause the customer or him/herself considerable damage if the instrument is not properly installed and used.

An offence will, of course, be punished only if the customer suffers losses. The administrative fines imposed in this area decisively depend on the damage to the third party.

6 Offences under the prohibition to weigh loose goods "gross for net"

In a large number of cases the verification authorities note that when loose goods are sold, the mass of the wrapper is added to the quantity of the goods sold when the value of the goods is determined with the aid of a measuring instrument.

Despite the fact that the weight of the wrapper is usually negligible, the global loss borne by the consumer is not insignificant: a figure of 15 000 000 DM is put forward for Germany.

It is therefore important that compliance with these regulations is supervised and offences are consistently proceeded against. An administrative fine of DM 500 has therefore been fixed for first offenders.

Conclusion

The above shows that regular market surveillance and a consistent line of action are required to protect both the consumer and companies against unfair practices and unfair competition. Only then will it be possible to offer all national and foreign competitors conditions and chances that are equal from the verification law point of view.

From the verification authorities' position, the system of preventive and repressive measures has proved its worth and will continue to be applied in the future, in the hope that the number of offences will decrease and that free global trade will be possible with as few State interventions as possible. ■

The author will be pleased to answer any questions:

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