

## Fact Sheet on e-commerce between merchants (business-to-business/B2B)

Judicature requires online merchants, who advertise and offer goods in the B2B sector, **to take all reasonable measures to avoid participation of consumers!**

This concerns all stages of a business, thus:

- **Mere advertising** for products;
- **Access** to B2B offers;
- **Conclusion of contracts** and
- **Post-contractual relationship** between the contracting parties

In the so-called “Metro jurisdiction”, the German Federal Court of Justice (Bundesgerichtshof, BGH) formulated **surveillance obligations of merchants** for stationary B2B trade. It is mandatory there:

- **No access without entrance control** (access only with a shopping card and/or on presentation of the trade licence, association or chamber membership certificate) and
- **Carrying out exit controls** (to allow verifying whether the goods chosen by the buyer are attributable to his commercial activity and that there is no “hidden” private purchase).

These principles apply, as far as technically feasible, in e-commerce accordingly. Consumer protection must not be curtailed here either.

This means that **online merchants also** have broad surveillance obligations **in the B2B sector**, the violation of which can entail a **written warning that is subject to a charge for anti-competitive behaviour**.

**Therefore, please observe the following when setting-up and/or creating your B2B shop:**

1. **It is necessary to exclude consumers visually, substantively clear and transparent from visiting the website.**

This means:

- The exclusion **may not be displayed inconspicuously or hidden** in the shop. It should be clearly visible on each page of the shop.
- The exclusion should be formulated in a simple and understandable way. **Formulations and abbreviations that do not mean anything to the average consumer should be avoided.**



- The exclusion of the consumer should be formulated in such a way that the **consumer** can easily recognise that he is **not entitled to conclude a contract**.
- In particular, **no information** may be found on the pages which would **allow the conclusion that consumers are entitled to conclude a contract** (e.g. provided right of withdrawal/return).
- The consumer should be excluded **before the customer can access the products on display** and even more before a contract is concluded.
- Merchants operating both **B2B and B2C should ensure that B2B and B2C areas are clearly and unambiguously separated**. Consumers are not permitted to have access to the commercial sector. It is recommended to set up two independent online shops.

**2. A “virtual entry control” must take place. Consumers are not allowed to place orders.**

In order to implement this in a legally compliant manner, a preceding procedure should be installed to check the merchant status:

- On the one hand, an **authorisation procedure** can be carried out before a customer gains access to the website. Before the customer can enter the website/shop, he shall therefore prove to the merchant that he is a merchant (e.g. by presenting/scanning the trade licence, association or chamber membership certificate). Without proof, no access.
- **In a first step, the shop can be preceded by a web page** that contains a clear and transparent visual and content indication to the consumer's exclusion, which the visitor first must check off in order to access the shop. **In a second step**, the customer must then **prove** to the seller that he is acting as a merchant by presenting and/or submitting a scan/copy of the trade licence etc. Without cooperation, no access.

(Such a check-off box/opt-in box can also be integrated into the ordering process. However, the request should **be made as early as possible**, i.e. before the customer can see the details of the products, items etc.)

- It is also possible to check the merchant in real time using the VAT identification number.
- For B2B trade, the seller can also specifically choose a platform that has already been designed and set up in accordance with the specific monitoring obligations in the B2B sector (e.g. <http://business.ebay.de/>).

**3. In the B2B sector, online merchants should at least randomly check whether the orders placed are attributable to the customer's company.**

In the B2B sector, online merchants should pay particular attention **to excluding consumers from the B2B sector** in their own interest, i.e. to do more than just place indications.

If a written warning is issued, the courts apply **high standards**. The judiciary requires B2B merchants to make **every reasonable effort** to avoid consumer participation in the B2B sector!

#### The following applies:

- Shops and web pages, **which are accessible to everyone without restrictions**, are therefore at least also aimed at consumers.
- Whether the merchant's shop is located in the B2B or B2C sector is largely determined by **the way an unbiased visitor to the shop would understand and classify the offer**.
- The merchant's mere will to want to sell only to merchants is **irrelevant**.

#### Current judiciary:

In its judgment of **11.05.2017, case number: I ZR 60/16**, the German Federal Court of Justice apparently relaxed its requirements for setting up a pure B2B shop. The underlying facts, however, were a test purchase by a lawyer who wanted to invoke the right to order as a consumer. **This is a rare case constellation, so the easing of the requirements setting up the shop is not decisive for every B2B shop.**

The following three arrangements should be sufficient to effectively exclude consumer participation:

- On each page of the shop is a clear indication with the following wording: "A sale is only made to merchants, tradesmen, freelancers, public institutions and not as consumers within the meaning of Section 13 BGB (German Civil Code)."
- There must be no choice between the fields "Private" and "Company" in the order process when entering the address. The company name must be designed as a mandatory entry.
- On the order overview page there is an additional check box with the following wording: "I confirm to place the order as merchant and not as consumer within the meaning of Section 13 BGB. I have read the general terms and conditions/customer information."