

# Trustmark, Responsibility and Alternative Dispute Resolution Trusted Shops as an interdisciplinary system to establish trust in B2C transactions

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## **I. Introduction**

Trust in Internet trade cannot simply be established by legal or technical security. That is why it is insufficient for an online retailer, who operates a business system based on trust, simply to open up towards and adopt the conventional set of instruments of the offline world. He has to analyse the situation of his customers in the internet medium, and find new forms, that surely have things in common with traditional methods like seals of approval or certification, but are way beyond those.

The Working Group “Consumer Confidence” established by the „Global Business Dialogue on Electronic Commerce“ (GBDe)<sup>1</sup> conference has therefore been further divided into the three task forces Trustmark, ADR<sup>2</sup>, and Privacy to develop recommendations for this complex issue.

That makes it obvious, that Trustmarks in e-commerce stand for confidence and not only for security. It makes no sense for a certification body to only distribute a Trustmark without following up on problem cases in the services. It seems obligatory to deal with both topics of certification, which can include privacy, and dispute resolution at the same time, and to develop complex concepts that exceed those in the so called off-line world.

Trusted Shops offers such a concept in the sphere of the B2C<sup>3</sup> transactions for delivery of goods (even such “goods” as concert tickets). The scheme is supported by the European Commission<sup>4</sup> and is available in Germany, Austria, Switzerland, as well in the United Kingdom and France. This means that online retailers in these markets can become members of Trusted Shops. With the awareness that e-commerce is international, Trusted Shops will offer a uniform standard in almost every European country in the near future, and address retailers outside the EU in the long term.

In the following essay, the Trusted Shops scheme will be described and categorised with relevant legal, technical and economical implications.

## **II. The Problem: „Lack of (Consumer) Confidence“**

The starting point of the TS project was the question of how a third party can provide a reliable service for both parties of a B2C internet transaction which minimizes both the online retailer’s and the online consumer’s risks and insecurity.

### **A. The Situation of the Online Retailer**

#### **1. Gaining and Maintaining Trust**

Online retailers, especially small or medium shops, who do not have a well-known name, have great difficulties in ensuring trust from their potential customers. The reasons are multifaceted, but the common problem is that the personal contact is the key factor for establishing trust in conventional trade, is missing. This has created an unsatisfactory situation

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<sup>1</sup> <http://consumerconfidence.gbde.org/>.

<sup>2</sup> ADR stands for „Alternative Dispute Resolution“.

<sup>3</sup> B2C stands for „business to consumer“.

<sup>4</sup> Trusted Shops co-ordinates the project „COSEAG“ (Consumer Protection Seal – Assurance and Money-back-Guarantee, <http://www.coseag.org/>), which includes various European institutes and companies. The project focuses on the rollout of the “Trusted Shops Scheme” in certain member states of the European Union. The project is supported within the scope of TEN-Telecom initiative of the EU directorate “Information Society and Enterprise” (<http://156.54.253.12/tentelecom/>).

where the development of certain market segments, which are defined by certain products or a region, has failed due to various worries of consumers that discourage purchases.

Further risks may occur even after the consumer's trust had been established, that is, the consumer has decided to proceed with an online purchase. In addition to the increasing "problem" of insolvency, it is difficult for a newly founded enterprise to rapidly set up a customer care centre, that would promote long term customer loyalty. Minor misunderstandings, often due to the lack of personal contact during the performance phase, can also lead to the loss of the previously committed consumer.

Lastly, according to the experience of Trusted Shops, it is exactly these entrepreneurs of small- and medium-sized businesses cannot cope with the flood of regulations<sup>5</sup> that has occurred in the last few years. There is uncertainty about the relevant norms and as well as about exactly how they should be interpreted and to adopted to an online business.

## **2. Improving Marketing, Customer Care and Failure Rate**

Consequently, the retailer has to strive to convince his customers of his trustworthiness, and at least at the beginning of the venture he shall leave customer care in the hands of an experienced customer service centre. Ideally, this latter one can inform him of the newest legal developments to prevent unexpected demands or loss claims. The online retailer's security against failures arising from expensive and lengthy dispute procedures must not be underestimated<sup>6</sup>, especially in the business of cross-border transactions. This has led Trusted Shops to the offer of a number of optional extra services<sup>7</sup> beyond the original service, that enables the retailer a measurable and profitable business.

## **3. The Price Model**

The question of affordability of a certification is often neglected in discussions of improving consumer confidence. As a marketing instrument, it only makes sense if it is paid by the retailer, not the consumer. If a certification is so costly, that the price is not proportional to the benefit<sup>8</sup>, will the retailer reluctantly invest in such a product which has distinct but immeasurable advantages.

On one hand, if only a few retailers are certified, the certifying entity will not be able to reach the high profile level of a "Trademark" that would be required in the B2C commerce. Then on

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<sup>5</sup> In addition to the regulations of the European Union, and their implementation in national laws, there are other significant lobbies of consumers and retailers also issuing self- and co-regulating norms. For example: GBDe, FEDMA, TrustUK, D 21, etc.

<sup>6</sup> *European Commission*: Jurisdiction and applicable law in cross-border consumer complaints - Socio-legal remarks on an ongoing dilemma concerning effective legal protection for consumer-citizens in the European Union (ECLG/157/98 - 29/04/98): "The total cost of pursuing a cross-border consumer claim with a value of 2,000 ECU varies, depending on the combination of Member States, from 980 ECU to 6,600 ECU and amounts to 2,489 ECU for a proceeding at the defendant's residence on average. [...] In addition, consumers will take the duration of the legal action into account. [...] The average duration of a cross-border civil law suit in Europe is almost 2 years at the defendant's residence and six months more at the plaintiff's residence, where service of process under the Hague Service Convention and the procedure for recognition and enforcement add to the duration." ([http://europa.eu.int/comm/consumers/policy/eclg/rep01\\_en.html](http://europa.eu.int/comm/consumers/policy/eclg/rep01_en.html)).

<sup>7</sup> For instance, at this time Trusted Shops offers, in co-operation with Citibank®, low priced payment methods for credit card payments, as well as insurance policies to compensate typical damages caused by hacker attacks or viruses.

<sup>8</sup> Beyond customer-commitment and guarantee effects the certified retailers report to Trusted Shops on an increase in sales of around 10-30%.

the other hand, a consumer can only choose from a limited amount of retailers who provide for security.

Taking these factors into consideration, the price for the Trusted Shops services is based on the annual turnover. It is especially important that the well-known companies with big budgets have already gained a level of trust (due mainly to their long time existence in offline trade) and are not so dependent on an enhanced trust as are the small or medium entrepreneurs that strive to grow exclusively online.

With this background, it is rather critical, that on this new market of certifying entities there are price models that differ greatly<sup>9</sup>.

## **B. The Situation of the Consumer**

### **1. The Measure of the Consumer Interest**

Even if the online retailer bears the costs of the certification, the consumer stands at the centre of the economic analyses on the side of the certifying entity, as well at the centre of political discussions. A Trustmark makes sense as a marketing measure, if it adresses all uncertainties of the consumer. As mentioned at the beginning, these misgivings of insecurity are not only of technical, legal or financial nature. Therefore, only a complex combination of various mechanisms is able to win and maintain complete trust of a consumer who is willing to purchase via the internet.

### **2. Purchase Interest and the Structure of Trust**

An interested consumer who is willing to shop online will first of all look for specific products rather than for certain retailers. In the meantime, there are plenty of search engines<sup>10</sup>, that enable a precise price and quality comparison. Products can be found easily and directly from producers and retailers from all regions of Europe, because the retailers themselves can be found through a keyword.

If a customer runs across the Website of an unknown retailer, he can be convinced of the products, but without any type of verification the consumer is not able to decide, whether the retailer is trustworthy or not. Moreover, he cannot determine whether the retailer actually exists or it is just a paper company, which only wants to make a profit, but has no intention of providing the goods or services.

In this phase of the shopping process, a Trustmark can provide a valuable orientation. Most of the certification mechanisms enable a more or less safe validation of their authenticity. So for instance, by clicking on the Trusted Shops Logo on the Website of a certified retailer, which establishes a secure<sup>11</sup> link to the Trusted Shops server, a consumer can determine whether the certificate is real and valid, and the identity of the retailer resides behind the shop.

This first orientation provides the consumer with the security, so that he will not abort the purchase at this phase in the shopping process, but rather put products into his virtual shopping cart.

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<sup>9</sup> In Germany the costs of a certification lie between the three and six figure area, because the certifying entities use very different methods and standards for evaluating an online-retailer.

<sup>10</sup> General search engines, catalogues, specific shopping portals etc.

<sup>11</sup> The consumer knows that the address in the window that pops up by clicking on the logo, has to begin with <https://www.trustedshops.de> and it has to be activated. This is indicated by the lock or key symbol at the bottom of the browser window, as well the validity of the SSL-certificate (issued for [www.trustedshops.com](https://www.trustedshops.com) or [www.trustedshops.de](https://www.trustedshops.de)).

### 3. Resolution of Purchase and Maintenance of Trust

After selecting products, all online consumers “have to show their colours”, that is, they have to decide either to order the goods or simply leave the site of the retailer. Completing a purchase requires entering such data as name, address, etc., and more importantly, also sensitive payment information, such as credit card number. That drives potential customers to abort the purchase during this phase due to fear of data or credit card abuse.

This is would be referred to in the offline world as, “leaving the full packed shopping cart at the cashier’s desk”, and is one of the most common phenomena in e-commerce<sup>12</sup>. Although the potential consumer is convinced by the offer and about the seriousness of the retailer, the fear of unsecured data transmission outweighs the desire for the product. No wonder, as this medium is world wide, it is far easier to “tap” on the keyboard than make a telephone call. It is no coincidence online retailers complain more about the frequency of abuse than those in the offline trade<sup>13</sup>.

The second phase offers a Trustmark to assure the consumer that all transmitted data is encrypted and so the danger of misuse is minimized. Moreover, a consumer may make a claim of credit card abuse to Trusted Shops.

### 4. Fulfilment, Customer Care and Reassurance of Trust

The online purchase is not yet complete after the second phase. After concluding a contract, the crucial phase of purchase starts for the customer, that is the phase of the fulfilment. In an online purchase, the contract and its terms and conditions are of no importance for the consumer, however, it is the actual fulfilment of the order, the smooth delivery and the appropriate service that matter.

If someone buys a piece of bread at a bakery, he does not want to know the general terms and conditions, but wants to hold a faultless product in his hands, and would like to have a contact person in the event of non-performance of delivery or non compliance of the product.

Consider a medium-sized online retailer, for whom the temporal separation of deal of obligation and actual fulfilment is typical, in contrast to offline trade, where it is rather unusual, there can be plenty of disturbances that are able to destroy the consumer’s trust in a particular shop, in online-shopping on the whole, or even in e-commerce in general.

#### a) The Relevant Rules

In the following section, some of the relevant rules that pertain to the online retailers and consumers are presented. According to the Distance Selling Act<sup>14</sup> (Fernabsatzgesetz) in effect in Germany since the 30<sup>th</sup> June 2000, there is a 14-day right of cancellation of the contract at

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<sup>12</sup> The US market research company *Datamonitor* has explained in a study that American online shoppers abort shopping purchases four times more often than closing them successfully. According to the estimation of the analysts the online shops could “save” about 7.8 % of the aborted transactions – and a revenue of 6.1 M dollars – through better service (<http://www.datamonitor.com/>).

*The German Society for Consume Research (GfK)* even states that “about 90 % of the surfers” abort online transactions (quoted from: *Computerwoche*, Young Professional, March 2001, Nr. 2, p. 54).

<sup>13</sup> A study of the *Gartner Group* has revealed that online shoppers suffer from credit card abuse twelve times more than their offline counterparts (<http://gartner6/gartnerweb.com/>).

<sup>14</sup> In Germany the Distance Selling Directive (97/7/EG) of the European Parliament and Commission on consumer protection in distance sales contracts from the 20<sup>th</sup> May 1997 was implemented in the Distance Selling Act.

the consumers' disposal from receipt of goods on, that is, he can withdraw from the contract through a declaration, without having to simultaneously return the goods. Should the consumer return the goods, he may be liable for the return costs of the goods up to 40 Euro (§ 3 Sec. 1 Distance Selling Act; § 361a German Civil Code).

The right of contract cancellation may be replaced by an unrestricted right of returning goods ("Rückgaberecht") of the same duration. The difference lies therein, that the consumer in the latter case has to return the delivered goods, and cannot use this right by simply declaring it to dissolve the contract (§ 3 Sec. 3 Distance Selling Act; § 361b German Civil Code). As the retailer's certainty is granted for the goods are in his possession, in this case of right of returning the goods the return costs cannot be placed on the consumer, independent of value of order<sup>15</sup>.

In both cases, the consumer may unwrap and use the goods, although there are exceptions for certain products<sup>16</sup>. Should the consumer return the unwrapped, used goods after two weeks (or later), the retailer has a right only to demand compensation for the actual usage of goods, but not for the loss of value, that resulted from the conventional usage (i.e. the loss of the product as a failed new product)<sup>17</sup>.

To the author's knowledge, this German regulation of duration and disposal of costs is unique in all of Europe. The European Distance Selling Directive grants a right of cancellation for 7 working days and allows the retailer to optionally impose the costs of returning goods on the consumer independent on the value of order. Furthermore, there is no distinction between the right of cancellation and the right of returning goods<sup>18</sup>. The German legislature has decided to go above and beyond the requirements of minimal harmonisation regarding consumer protection. In the United Kingdom, the directive was implemented nearly one-to-one, and in other countries the rules concerning the right of cancellation, the imposition of costs and dangers are also adjusted differently than in Germany<sup>19</sup>.

Beyond that, there are further questions pertaining to the applicable law in cross-border transactions: the legal rules of trade or competition a retailer has to adjust his offer, or the place of jurisdiction, where a consumer can claim his rights<sup>20</sup>.

## **b) An Example**

To illustrate these rather abstract descriptions, an exemplary case is construed here:

A medium size retailer has been selling bicycles for ages offline, and more recently online. Such products have in fact a high price compared to other goods in retail trade, and are sold usually free of delivery costs. The delivery of a bicycle worth 500 EUR amounts to 50 EUR forwarding and postage costs for the retailer.

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<sup>15</sup> Compare: BT-Drucks. 14/2658, p. 44.

<sup>16</sup> In § 3 Sec. 2 of the Distance Selling Act are these exceptions to be found, that are of major importance in the practice. Legal practice in the groups of exceptions are yet not available due to the newness of the act.

<sup>17</sup> § 3 Sec. 2 of the Distance Selling Act. Should the retailer neglect his duty of informing the consumer on his right to cancel a contract, the consumer is liable only for intent and gross negligence in case of damaging the product.

<sup>18</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, Art. 6.

<sup>19</sup> Compare e.g.: Consumer Protection Regulations 2000, Statutory Instrument 2000 No. 2334 (UK); Loi modifiant la loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur – Moniteur belge du 23.6.99, p. 23670 (BE); Decreto legislativo n° 185 of 22 May 1999, Gazzetta Ufficiale of 21 June 1999 (IT).

<sup>20</sup> See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Now this retailer is shipping a new bicycle in Germany. The customer, whose solvency is not yet known for the retailer, unwraps the bicycle and uses it. After 14 days, he declares the cancellation of the contract, but keeps the bicycle initially.

After another two weeks, the consumer returns the undamaged, but greatly used product, without stamping the package. The retailer again has to pay again 50 EUR for postage costs and a penalty fee for the unstamped package. So he has now a second-hand bicycle, that is saleable for maximum 400 EUR<sup>21</sup>. The retailer can only send an invoice to the consumer for the usage of the product, which would equal approximately the costs of hiring a bicycle for the same period of time.

Apart from the fact that this sum of usage refund is hard to calculate<sup>22</sup>, the consumer would possibly not pay voluntarily. Should the retailer take the risk of entering a legal process, it changes nothing about the fact, that this transaction was a waste of money. The result would be frustration and indignation about the legal valuation. That leads several retailers to a mentality of dishonouring legal rules. They rather take the chance of infringement of law, then to inform consumers about their rights.

Greater discrepancies may occur, if for instance:

- it is revealed, that the consumer was already insolvent at the time of placing the order (fraud)<sup>23</sup>;
- the consumer does not clearly explain his intentions when returning the goods, if he requests cancellation of contract, change or subsequent improvement of the product; and so can it end up at (unnecessary) repairment and anew delivery of product by the retailer, decline of delivery by the consumer, and storage by the retailer - and so additional costs emerge, which is topic of much controversy;
- the retailer declines to accept the returned package, because it is damaged, or he cannot detect, what is actually in the unstamped package;
- parts that have a value less than 40 EUR are returned from a complex order, that originally exceeded 40 EUR, and the returned package is not stamped;
- the retailer, to avoid financial loss arising from expensive returned goods, declares them as goods "specified according to the customer"<sup>24</sup> or "return not suitable because of their nature".

### **c) Consequence: High Potential of Conflicts**

The above list could be continued, but it should just briefly indicate, that the missing practical experience in distance selling poses several questions that are yet to be answered by the legislative or the legal literature. Until then, the actors of an online transaction have to look for the answers and acceptable solutions for both parties. A certifying entity, such as Trusted Shops, that offers mediation in conjunction with the Trustmark would be optimal.

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<sup>21</sup> According to a decision of Germany's Federal Supreme Court, the regular loss of value amounts to at least 20%. BGH WRP 2001, 258, 259.

<sup>22</sup> The value of a second-hand good to a new one is steadily determinable in Germany in the case of cars by the means of the "Küppersbusch/Rädel/Splitter table". But such tables do not exist for bicycles or other goods such as electronic entertainment devices. This would result in uncertainty and dispute of such deviances. As followed the consumer will not pay voluntarily, that is the costs of procedures determining the exact sum would heap.

<sup>23</sup> According to the current data protection law, it is very difficult for a retailer to gain information on his customers' solvency.

<sup>24</sup> For instance by obligatory engraving of initials in a music instrument.

There should be a third party, who mediates between the retailer and the consumer during and after the delivery phase, clears misunderstandings and arbitrates or reconciles. Every certifier should provide this service if they intend to improve consumer trust. A restriction for the interest and shopping phase would lead to crucial, unsolved problems, that would trouble the consumers relentlessly. As shown below, it would not only harm the reputation of the certified retailer but that of the certifying entity as well.

Every consumer, who has purchased from seemingly trustworthy retailer who has been certified, will then question the validity of a certification, because even though their sensitive data had been transmitted securely, but the fulfillment, the most important part of the purchase, was not executed smoothly.

### **III. The Solution: Trustmark, Responsibility and Dispute Resolution**

In the following section will describe the method that may provide solution to the above mentioned problems. The Trusted Shops scheme emerged within one year as a market leader<sup>25</sup>. 18 month after the launch, more than 170 retailers have registered, and a total value of 50 Million EUR<sup>26</sup> of the transactions has been guaranteed. Only about 1% of all transactions have been unsatisfactory, most of which were settled by Trusted Shops in fast and unbureaucratic manner.

Calling the Trusted Shops product a “Trustmark” would be insufficient. The scheme is very complex, and it also operates with components of a Trustmark, but only this feature would not be able to establish and maintain trust in all the described phases of an online purchase.

#### **A. The Trustmark**

For the consumer, the first visible feature of the Trusted Shops system is the logo on the Website of a certified retailer. That provides the first verification of the retailer’s trustworthiness for the consumer during the phase of shopping interest. By clicking on this logo, its validity can be verified<sup>27</sup>, as the retailer’s site is securely linked through the logo to the Trusted Shops server. This prevents unauthorised usage by simply copying and placing the graphic data on a third-party site.

The Trustmark testifies, what may other certifiers lay claim to: that the Website was examined on the basis of a comprehensive test, with the help of a catalogue of criteria, that were developed and refined under close co-operation with Consumer Associations<sup>28</sup>. Amendments to the criteria were required, for example, due to implementation of the Distance Selling Directive, or to provide for compatibility when co-operating with another “Codes of Conduct”<sup>29</sup>. The latest version of the list of criteria (the Trusted Shops Obligations) are accessible at the Trusted Shops Website<sup>30</sup>.

This list allows for an examination online or on the spot as long as all the criteria have been met by the retailer. Therefore, the certification process can last, depending on the readiness and

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<sup>25</sup> *Brankamp/Tobias*, „Safer Shops“, in: Handelsblatt from the 4th December 2000 (Mondays-Extra).

<sup>26</sup> Total 2000: 15 M EUR; 1. half-year 2001: 35 M EUR (rounded sums).

<sup>27</sup> Compare above (Fn 11). Infringements of trademark law are strictly retraced by Trusted Shops with the help of search engines.

<sup>28</sup> AgV: Syndicate of Consumers’ Societies (<http://www.agv.de/>).

<sup>29</sup> Code of Conduct stands for the code of behaviour. There are such regulatory works on national and supranational level. Trusted Shops is compatible to the recommendations of the Initiative D 21, TrustUK (and with that Trusted Shops is to this day the only foreign seal provider officially accredited in the United Kingdom), as well to the codes of Global Business Dialog on E-Commerce (GBDe).

<sup>30</sup> <http://www.trustedshops.com/>

on the technical possibilities of the retailer, between 5 days and half a year. This phase is defined by the constant exchange of information between the retailer and Certification Department, that is not bound by instructions.

In parallel, the solvency of the retailer, which is required by Trusted Shops, is checked by the Gerling Insurance Group. There are several instruments for this purpose, beginning with information from banks, up to the disclosure and explanation of balance sheets.

If the retailer complies with all the criteria, he has the right to use the registered trademark of the “Trusted Shops Guarantee”, and can display the logo on his Website for one year as long the retailer meets the criteria of logo usage. This consists to comply with the code of conduct (requirements), and to provide his customers the optional and free “money-back guarantee” after each transaction. The logo proves to the consumer that the Gerling Insurance Group has verified the retailer’s solvency, and in the event of breach of certain contractual duties, the Gerling Insurance Group is liable. To date, this feature from a certifying entity is unique in Europe<sup>31</sup>.

The compliance with the criteria is rigorously monitored. Since Trusted Shops itself handles complaints from consumers about the certified retailers, it is nearly impossible not to overlook a breach of duty on the side of the retailer. Beyond random and warranted examinations of the compliance to each criterion, there is a general examination of all criteria undertaken every year.

The Trusted Shops certified retailers are obliged to announce the changes in their Website without delay. Various sanctions are available for Trusted Shops in case of a breach of a duty. First, the status of the Trusted Shops logo is set as “invalid” in the Trusted Shops Online System so that the customer can always determine by the click of his mouse whether a certain displayed logo is authorised. Parallel to this, the retailer is addressed to explain whether he wants to continue using the Trustmark in the future and observe the conditions of use, or to obtain from using the logo (dissuasion). Depending on the retailer’s decision, the changes are examined, or if necessary even with legal action, the retailer is forced to give up displaying the logo. As an intermediary step, a penalty fee may be imposed on the retailer and then donated to a consumer protection society.

During the certification phase, all retailers are extensively informed on the legal and technical requirements for complying with the Trusted Shops Requirements, and how to meet the general legal criteria. The experience is that there is a huge need on information and education because neither the Distance Selling Law, nor other relevant legal rules are all known. So the question is whether a retailer of medium size is capable of understanding, accepting and meeting the complex rules of the B2C online trade without the educational assistance of a certifying entity. A third party like Trusted Shops not only provides trust, but also advises the retailers on how to comply with the legal rules.

## **B. The Responsibility**

### **1. The Contractual Liability (money-back guarantee)**

Possibly the most important feature of the Trusted Shops scheme is the money-back guarantee. Every retailer is obliged to offer his customers the optional purchase guarantee through Gerling Insurance Company after each transaction. Structurally it is a contract for the benefit of a third party: the retailer bears the costs of the guarantee, and so the beneficiary, the consumer, does not have to cope with additional expenses.

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<sup>31</sup> In the United States, WebAssured offers a similar model, but the responsibility of the certifying entity presumes the installation of a plug-in, and is limited to 200\$ a transaction. <http://www.webassured.com>.

The guarantee<sup>32</sup> provides security in three cases:

- refund of the purchase price in the case of non-delivery of the ordered product;
- refund of the price after returning the goods according to the retailer's return policy; and
- reimbursement up to the sum of 50 EUR in the event of a credit card abuse in connection with online shopping at a certified retailer.

Beyond the risks of the increasingly occurring insolvency in the New Economy<sup>33</sup> the consumer is protected from practically all financial loss that may arise in accordance with online shopping.

The registration for the money-back guarantee is optional for the consumer. Even if he does not mistrust the retailer, he is not bound to make use of this additional service. The rate of the registration is between 10-30% of all online transactions. This data shows that these registered consumers would not have purchased anything online or would have left the full shopping cart behind without the Trusted Shops certification.

All data supplied by customers who register for the guarantee is transferred and saved using encryption methods and can be deleted on demand. The consumer's data is not transmitted to third parties (nor within the Gerling Concern) and is deleted after six months.

The concluded guarantee is confirmed by e-mail and includes a transaction number for reference. Moreover, the customer is reminded in an automatic e-mail 30 days after the purchase date that he may file a claim against the Gerling Insurance Group in the event of non-delivery. This is done via the Trusted Shops Online System on a secured site of the Website, or in a formless e-mail. The consumer may also inform Trusted Shops that he has returned the goods to the retailer. Then the Service Centre, with the help of the Trusted Shops system, contacts the retailer to clarify the circumstances of fulfilment. Should the retailer then not reimburse the customer for the returned products voluntarily, Trusted Shops itself refunds the customer in the name and on behalf of the Gerling Insurance Company, and then follows up on the claim with the retailer.

## **2. The Statutory Liability (§ 5 Sec. 2 German Telediensteegesetz, TDG)**

The money-back guarantee between the consumer and Trusted Shops anticipates a development that is currently emerging in the ongoing research<sup>34</sup>:

In Germany, according to § 5 Sec. 2 TDG, service providers are liable for external content, if they have knowledge of the content, and they are technically and reasonably capable of preventing misuse. Considering the references to the certified retailers displayed on the Websites of certifying entities, the legal regulation of § 5 Sec. 2 TDG applies. And of course for the certifiers, it is technically and reasonably possible to avoid the accessibility of false information, as this is actually their task, beyond other services to consumers.

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<sup>32</sup> The exact conditions of the guarantee can be downloaded from <http://www.trustedshops.com/>, and are sent to the consumers who have concluded such a guarantee per e-mail.

<sup>33</sup> For the first half of the year 2000, the *Statistische Bundesamt* (Federal Statistical Office) stated that around 19,500 cases of insolvency, 25 % more than in the same time period last year. (Quote: Tagesspiegel online, 5th October 2000, (<http://195.170.124.152/archiv/2000/10/04/ak-wi-ma-9020.html>)).

<sup>34</sup> It is the responsibility of the Trustmark provider established because of "misleading information" (*Pouillet*) or because of the rules of "contracts with protective effect towards third parties" (*Cavanillas*). Compare with the results of the 6th ECLIP II Workshop on Codes of Conduct and Labels as Tools for Consumer Protection in E-Commerce (<http://www.eclip.org/workshop/6th/consumerprotection.htm>).

If a Trustmark provider declares the exceptional trustworthiness of a trader, and it turns out to be false, the provider itself shall also be liable. It is evident in the case of insolvency. If an insolvent online retailer continues to display the Trustmark, and a consumer relies on this places an order, transfer payment, but then never receives the goods delivered, the consumer shall have the right to file a claim against the Trustmark provider.

The enormous responsibility of a certifying entity should not be limited to examination and provision of a seal. The certifier shall be responsible for certain declarations and cover financial damages arising from them.

If Trusted Shops claims that a certified retailer is solvent and is distinguished in consumer care, but the retailer is actually insolvent or does not react to consumers' questions, and Trusted Shops can not detect this or does not take action for the immediate removal of the logo, the consumer must be able to claim his damages directly against Trusted Shops. The money-back guarantee shapes an explicit liability, that is incidental according to the German TDG.

## **C. The Dispute Resolution**

### **1. The Matters in Dispute**

As described above<sup>35</sup>, a lot of various problems regarding trust can occur between placing an order and the actual fulfilment, and afterwards as well.

Concerning this the experience is, that on one hand there is a huge need in answering consumers' questions, and solving their problems, and on the other hand, it is of great interest of the certifying entity to avoid judicial procedures to maintain its reputation.

The requirement for dispute resolution is even higher, when talking about cross-border transactions. Despite the EU-harmonization, there are significant differences between national legal systems, which creates a massive uncertainty about the norms. Furthermore, the costs of translations, legal fees and lawsuits do not correspond to the the amount involved in an actual case, that is usually rather small.

Beyond the financial reasons, there is also a time factor. The consumer places an order online because of his lack of time to purchase the same product offline, but also because he prefers the comfort of the home delivery to a crowded non-virtual shopping mall. And should a legal dispute unfold in more than two years<sup>36</sup>, the advantage of dealing with an online shop instead of an offline shop has been diminished.

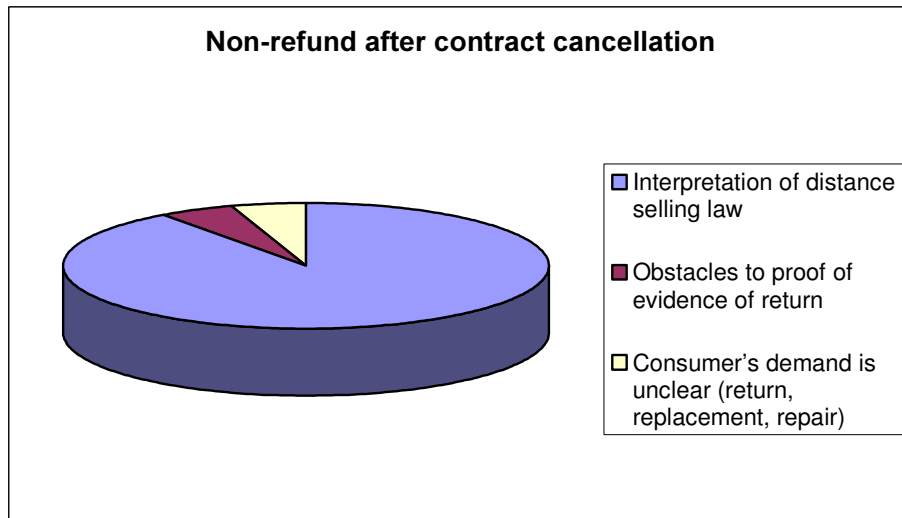
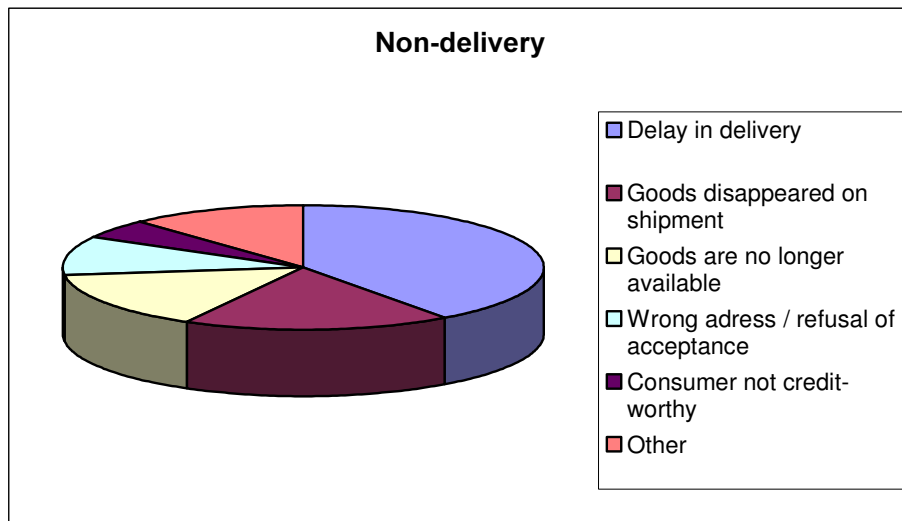
Due to the exhaustive check up of shops, approximately 1% of all transactions guaranteed by Trusted Shops were disputed in 2000. This is a very good result considering the volume of guaranteed purchases, that totalled 50 M EUR. Most complaints were not of complicated legal nature, but were due to misunderstandings, uncertainty about the intention of relevant rules, or due to time delays of third parties. In these cases, the mediation by the certifier resulted a quick, low-priced solution with a satisfactory result for both parties.

The number of reimbursements via the Gerling Insurance Group and recourse taken toward the retailer were minimal, because Trusted Shops could convince the retailer to fulfil or reimburse the customer himself. Cases of reimbursements undertaken by Trusted Shops have occurred mainly due to financial incapacity of the retailer (insolvency), who was no longer able to refund the purchase price of the returned products.

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<sup>35</sup> Compare with above II B 4.

<sup>36</sup> Compare with above Fn 6.



## 2. The Type of Dispute Resolution

### a) Scope

The dispute resolution takes place first of all via e-mail between the customer and the Trusted Shops Service Centre. When the circumstances of the case are cleared, it is followed by a parallel communication via telephone. Every registered consumer has the possibility to check the status of his transaction round the clock online through a secured Online System.

Because Trusted Shops is multilingual and its standards are uniform in all of Europe, Trusted Shops is capable of solving problems arising out of cross-border transactions in a quick and unbureaucratic manner. Meanwhile, the system has been expanded to other European member states. Due to these features and to the added value of an effective distance selling, Trusted Shops is being supported by the European Commission<sup>37</sup>. In the official explanation it is stated that the dispute resolution system in particular is what provides effective consumer

<sup>37</sup> Compare with above Fn 4.

protection, and therefore makes it easier for small- and medium-sized retailers to enter this market. The opportunities and work places that emerge as a result, and the support of the multinational exchange of goods is of interest of all member states.

The European Commission has expressed the importance of supporting such resolution systems. Originally, the draft text of the provisions of the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters intended the possibility of stipulating an alternative dispute resolution instead of state jurisdiction<sup>38</sup>. This intention was then postponed due to the young history of such dispute resolution providers<sup>39</sup>.

It also shall be noted that there are other problems beyond non-delivery, non-reimbursement or credit card abuse. The cases of product liability and other liabilities for faulty goods are also part of the problem groups.

In these latter cases Trusted Shops yet is not directly liable. In the mentioned cases, that have rarely occurred as of this date, all consumer complaints are taken into consideration and solutions to the problems are recommended, because of course Trusted Shops intends to maintain the credibility of the certified retailers, as well as its own reputation. This process of mediation resulted the satisfactory closing of all past cases without having to resort the legal action.

At this point, the talk is about an online “second instance” for the cases where the Trusted Shops mediation fails. Trusted Shops works in conjunction with certain scientific projects<sup>40</sup>, and leads negotiations with co-operation partners, who have been researching and developing solutions for a so called „legally binding arbitration”<sup>41</sup> in the B2C business. Still, the number of actual cases, that require such a settlement process, is minimal.

This planned “second instance” would be based on the Trusted Shops dispute settlement options. Commonly online seal providers also offer the service of dispute resolution. This may occur online, but also during hearings (this latter one is more typical for major ADR-providers who do not provide a seal). Among the recommended dispute settlement processes are mediation, arbitration, conciliation, binding settlement, direct negotiation, etc., to find. The demarcation of these terms, especially the latter ones, is not clear, the main distinguishing feature is that some are legally binding, and others are not.

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<sup>38</sup> The draft of Council Regulation (EC) No 44/2001 of Article 17a was discussed as followed: “Regardless of the stipulations of Art. 16 and 17, the consumer and the retailer can agree, in the case of contract conclusion by the means of electronics via the internet by a consumer and a person, who follows a trade or a profession, that every dispute shall be submitted to an amicable Dispute Resolution post, that had been admitted through a by the Commission approved regulation (“admitted alternative dispute resolution post”) and which post was displayed on the site of the retailer [...]”.

<sup>39</sup> The final version of the original reasoning explains it this way: “The Commission observes that Parliament has not amended Article 16, laying down rules as to jurisdiction in consumer-protection matters. It also did not wish to authorise contract clauses allowing consumer contracts to refer consumer disputes to courts other than those for the place where the consumer is domiciled, thus derogating from the protection principle of Article 16 (jurisdiction at the place where the consumer is domiciled). On this point the Commission is attentive to the debates which took place in Parliament. It will review the system as soon as the Regulation has come into force on the basis of a stock-taking of alternative dispute-settlement schemes. The Commission is inserting a new recital 14a to that effect.”

Recital 14a: “With particular regard to choice-of-jurisdiction clauses in consumer contracts, a review of the planned system will be conducted after the entry into force of this Regulation in the light of developments in non-judicial dispute-settlement schemes, which should be speeded up.”

<sup>40</sup> Trusted Shops is a member of the Advisory Board of the ECODIR Project, that is being co-ordinated by the University of Namur, Belgium. The acronym stands for “Electronic Consumer Dispute Resolution”.

<http://www.ecodir.org>.

<sup>41</sup> Such a legally binding resolution with consumers and its enforcement is not admitted in the all European member states to this date, and requires a written form in most countries.

## **b) Negotiation**

When a consumer enters into a relationship with a certified retailer and with Trusted Shops (through ordering a product and registering for the money-back guarantee), his transactions are registered and securely dealt with in the Trusted shops online- system.

The fulfilment of a transaction is guarded by the system, because first, the consumer is reassured whenever he notifies Trusted Shops of an event that is relevant to the guarantee, and second, because an automatic e-mail reminds the consumer of his rights. Should a complaint or a problem arise, the consumer can directly turn to the Service Centre either via the online-system or other standard paths of communication.

The Service Centre backtracks the problem during the fulfillment phase means by contacting to the other party, the retailer. In this phase of Complaint Management, or “conciliation”, the Service Centre helps the transaction partners to communicate by transmitting their opinions, or often simply interconnecting the parties so that they themselves can resolve their dispute informally. Such a Complaint Management system is embedded in the online-system due to the automatic online arrangements and consumer e-mails. Due to the ever present availability of the Service Centre, the disputing parties are automatically part of this dispute management whenever a clash of the opinions occur. It is also the interest of the parties that their dispute is solved in the quickest, least bureaucratic way.

Let’s take the example of a contract cancellation.

If the consumer places an order at a by Trusted Shops certified retailer and registers for the money-back guarantee, he receives an automatic e-mail from the Trusted Shops system which includes a transaction number for the particular purchase. If the consumer receives the ordered goods on time, but decides to return them to the retailer, he must inform Trusted Shops (preferably online). He then receives an automatic confirmation e-mail and his guarantee will be automatically extended. Trusted Shops notifies the retailer via e-mail about the return of the goods, and him that he has 30 days to refund this consumer.

After 30 days, an automatic e-mail asks the consumer to confirm whether he was refunded or not. If not, his guarantee is extended, and the retailer is asked to explain why the consumer has not been refunded, and to prove his point to Trusted Shops. This will then be reported to the consumer. If the Service Centre decides that the retailer’s position is not valid or justifiable, and the consumer is eligible for the refund, Trusted Shops recompensates him, and takes the appropriate action against the retailer.

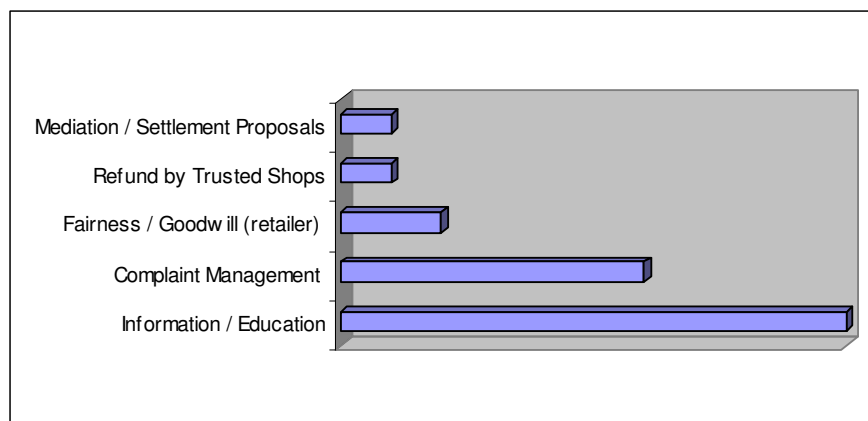
## **c) Mediation**

If the dispute is not settled in the phase of exchanging of opinions, with the agreement of the parties, a neutral third party, a mediator will be involved. This is the actual dispute resolution of Trusted Shops, the “mediation”, is lead by the Legal Department. During the mediation, that is initiated after telephone contact or via e-mail, the mediator clarifies the problems, guides the parties and offers mutually agreeable solutions to the dispute.

As of this date, the Trusted Shops mediation is informal, more a case-by-case process that does not require mutual (online, or via telephone) presence of the parties. This may change in the future, but due to the low number of disputed cases so far, the practice of Trusted Shops in this area has not required major arrangements or rigid procedural structures.

This can be attributed to the extensive education for retailers as the following chart shows. The diagram reveals the relationship between the mass of information and the number of

settlement proposals. This clearly shows that the more education that is provided, the lower the number of problem cases. Based on the experience of Trusted Shops, most of the retailers are not aware of the legal provisions to which they have to adjust their businesses. It is also a general benefit to the state, when the applicant retailers are thoroughly educated during the certification procedure, as they are in the case of Trusted Shops.



#### IV. The Benefits of the System

As previously described, the Trusted Shops system is not unilaterally beneficial only for the consumer or the retailer, but for both parties of an online transaction. Furthermore, a public benefit is generated for the national economy, because the lower the level of governmental control required, the less tax money that must be allocated for such regulation. The number of work places in small- and medium-sized entrepreneurs are secured through the increasing volume of their turnover; and the free trade of goods in Europe is accelerated. According to Researchers in ADR, a certification entity with multiple services is considered more effective than the unidirectional Trustmark providers<sup>42</sup>.

##### A. The Consumers' Benefits

- Trustmark provides initial orientation to trustworthy retailers
- Money-back guarantee in the event of non-delivery, non-refund or credit card abuse
- Automatic reminder e-mail on relevant deadlines
- Multilingual Service Centre and Mediation
- Personal online account with access to the guaranteed transactions
- No additional costs

The bottom line: safe online shopping

##### B. The Online Retailers' Benefits

- Improved consumer trust due to Trustmark

<sup>42</sup> *Salaun*: „Comprehensive analysis of existing codes of conduct and labels on consumer protection”, Results of the 6th ECLIP II Workshop on Codes of Conduct and Labels as Tools for Consumer Protection in E-Commerce (<http://www.eclip.org/workshop/6th/consumerprotection.htm>).

- Consulting and guidance in technical, financial and legal questions regarding e-commerce
- Reduced volume of aborted transactions
- Consumer commitment through improved service
- Prevention of legal action through dispute resolution

The bottom line: sales increase of 10-30%<sup>43</sup>

## **V. Demarcation from Other Systems, and Categorisation**

### **A. Interdisciplinary System**

E-commerce stands for trade in the internet. This trade is not just a question of technical security. The idea of trust is much broader than the term of technical security. Trusted Shops integrates a great deal of technical security on one hand, and on the other, financial responsibility combined with further legal and temporal components. Only through this complexity can trust be established.

As long as a system is limited to providing technical security, it can only cover just a part of a trust system. The equalisation of trust and the above-mentioned security is not only incorrect, but can also mislead the consumer. This is more obvious in the new medium of internet as opposed to the offline trade.

As described above, much of the interference in performance emerges during the fulfilment and service phase of online transactions. These problems have less in common with technical security, than with financial responsibility, legal security and the accompanying dispute resolution.

If a service entity is unable to provide all these safeguards, and is not willing to accept responsibility, it should not compete with global systems, but only supply them with partial performances. Thus it will be possible to avoid diminishing the consumers' trust at the very beginning of a business relationship. An equalisation of interdisciplinary systems and partial performers that cover only a part of the whole trust building process distorts the competitive positions and is harmful to consumers.

### **B. Consideration of Consumer and Retailer Interest**

Trust, first of all, is an issue for the consumer. Since it is the retailer, who bears the costs of the trust building measures, his interest should also not be neglected. However, an initiative that supports the retailer's interests and deals only with those of the consumer pro forma is inappropriate for establishing the consumers' trust.

It should not be forgotten, that the role of the certifying entity extends to the on-going optimisation of the certified retailer's quality. Should there be fewer offers for service options for the retailers than for the consumers, retailers would not join the scheme. If someone is unable to convince a retailer of the merits of certification, is not useful for the consumer either as the latter will not be able to shop at a certified retailer.

### **C. Internationality**

Even if the number of cross-border transactions to this date is very low, it is beyond dispute that the online retailers' greatest chances and challenges reside in opening up a market abroad.

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<sup>43</sup> The data is based on the declarations of certified retailers.

The European Commission has also pointed this out in the reasoning of the official support of Trusted Shops<sup>44</sup>.

A nationally established system that only considers the provisions of its own country, or operates with different standards of its code of conduct in Europe under the same label<sup>45</sup>, is not only politically questionable - considering the intention of the political and economical unity of Europe -, but is incapable of providing a long-term perspective for consumers or retailers.

Only the experience of Trusted Shops of setting up a uniform standard in four European Union member states<sup>46</sup> (from those three are rather different) and to maintain this standard, has shown how difficult it is to subsequently improve the code of conduct, to adopt the regulatory context in timely manner, and to analyse changes in specific local stipulations. Beyond adapting the new stipulations, the changes (and this is the significant job) have to be explained to the retailers, the incorporation must be monitored and the consumers must be re-educated.

In spite of the European harmonisation, there are differences in the crucial parts of the relevant norms of certain European member states. According to the present research, there are differences concerning the terms for the right of cancellation of contracts and the topic of who shall bear the risk and the costs for the return of goods<sup>47</sup>. These are actually elementary factors for a certifier that takes its role as a principal supporter of problem-free online transactions seriously. These certifying entities should set up an integrated code of conduct based on the variety of the national provisions if they intend to take responsibility towards consumers and retailers.

From the consumer's point of view, it is important to know that if he does encounter a problem, which is not due to insolvency but the unwillingness of a retailer to refund him, he can take legal action against the retailer in Germany. This is more difficult when dealing with a foreign retailer. It is possible that the future role of the certifier will mainly be comprised of conducting negotiations for cross-border disputes.

#### **D. Realising instead of Setting Norms**

In a democratic state, characterising the codes of behaviour is the task of the parliaments, the governments, the consumer and trade societies. Providers of certification services can not invent new criteria or may not disregard the existing regulatory context. Their role can be described with the term 'co-regulation'<sup>48</sup>: a certifying entity has to implement the existing norms.

First, it is the job of a certifier to analyse the existing norms of the national and international online trade, to synthesise the new reforms out of the regulatory mass (optimally something that is comprehensible for the consumer), and to explain the results to the actors of the e-commerce transactions. It is not an easy task, if we consider the diversity of the topics<sup>49</sup>, and how fast new provisions are issued and old ones are changed, not to mention the associated uncertainty and discrepancies.

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<sup>44</sup> Compare above Fn 4.

<sup>45</sup> For instance the Which? Webtrader scheme.

<sup>46</sup> Germany, the United Kingdom, Austria and France.

<sup>47</sup> Compare above II B 4 a).

<sup>48</sup> Others describe the task of a certifier as "self-regulation".

<sup>49</sup> Technical security, data protection, consumer protection, international enforcement and applicability of law, fair competition, etc.

Secondly, it is not enough to just set up codes of conduct. The implementation of the norms means the development of the effective mechanisms, that make those state mechanisms (judiciary, enforcement) dispensable, reducible; that prepare or at least support those state systems. Simply setting up a “code of conduct” is not going to change anything<sup>50</sup>.

### **E. “Independence” of the Certifying Entity**

It is a popular topic, whether a certification provider should remain “independent”, which is principally out of question.

Differences and sometimes polemic opinions try to define the term “independence”. The theme is by the way not new, but has been discussed in the judicature in connection with the term “Stamp of Quality” and its relevance to competition law<sup>51</sup>. Surprisingly the question, if we can actually talk about a “Trustmark” of the competition law, has not been an issue among the relevant providers, due to the different comprehension and hopefully due to the knowledge that a “Trustmark” in the online trade is not comparable to the offline certification.

These entrepreneurs of the private economy, the online providers, are dependent on their customers, i.e. retailers; who on the other hand are more dependant on their good reputation that can be established if the consumers do not have anything to complain about. On the contrary, non-profit societies or organisations are dependant on the will of their members. The question of which system pattern can be considered more independent shall be left open.

There is no debate about the exclusion of the venality of the certifier, which means Trustmarks can not be awarded to retailers who do not deserve them just because of the individual financial interest or ideals of the certifier. The organisational form, in which this “independence” shall exist, is not defined.

It is as questionable if an interest society provides a Trustmark to its own members, as the blending of control and provider roles. How can then an interest society keep representing interests, when it operates on the market of trust establishers, and is compelled economically? A certification service cannot operate without an enormous investment. But placing certification on the costs of the general public is not only anti-competitive, but a questionable use of public means.

### **F. Dialog with and Involvement of Interest Societies**

Establishing trust in e-commerce is an issue of many, and even more important when topics of consumer protection or cross-border transactions are involved. A certifying entity should cooperate with societies, authoritative positions and mixed forms, and regard their requirements. Only this way can a product designed to create trust constantly develop.

On the other hand, a request to the interest groups shall remain so that they are constantly aware of their role, and that they keep monitoring the providers of certification services. Competition between providers and controllers is not only undesirable, but is also harmful for the consumer.

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<sup>50</sup> *Pouillet* puts it ironically this way: “The famous Dutch E-Commerce Code of Conduct and the absence of sanctions”.

<sup>51</sup> Compare for instance OLG Düsseldorf, DB 1986, 165.