



## DAMAGE TO REPUTATION VS. FREEDOM OF OPINION – WHAT TO DO ABOUT BAD REVIEWS ON THE INTERNET?

Reviews from other customers and product owners often play an important role in the way potential customers make purchasing decisions, especially in online shopping. Reviews are often both a blessing and a curse for companies. On the one hand, a product or service can be better sold if the overall review is high and many good five-star reviews are given. On the other hand, many fake reviews, negative one-star reviews by competitors, aggressive reviews, abuse and insults and reviews based on untrue information are also doing the rounds on the Internet with false statements that give many an entrepreneur sleepless nights and have a negative impact on sales and competitiveness.

As a rule, review platforms are provided to disclose information about experiences with the evaluated products or services. Whether reviews are covered by the fundamental right to freedom of expression and freedom of information and may be published or are unlawful depends primarily on the content of the review. Untruthful facts or libel towards employees of a company may not be included in reviews, for example.

If a company receives an unlawful review, there is the possibility of initiating legal action against the person who has written or published the review and/or against the operator of the review platform.

In the past, entrepreneurs have also increasingly taken successful legal action against illegal reviews, which were published on review platforms such as Google and Jameda, and were able to achieve, among other things, the deletion of the illegal reviews.

### **Is the purchase of positive fake reviews permitted?**

In the provisions of the Directive (EU) 2019/2161 (= Omnibus Directive), which has been adopted by the EU and is to be applied in the Member States no later than May 2022, specify, among other things, that falsified customer reviews that were initiated by the entrepreneur himself (= purchase of fake reviews) constitute a blacklist contravention of competition law. In the event of a contravention, there is a risk of high fines of up to 4% of the annual turnover or EUR 2 million, warnings and legal actions.

The purchase of fake reviews will therefore become expensive for companies (in the future) and must now be refrained from in most member states of the EU as well as in China and in all other EU member states by May 2022 at the latest.



## AUSTRIA

### **When is a negative company review in Austria to be classified as unlawful?**

Reviews are unlawful if they are no longer covered by the fundamental right to free expression of opinion, but claim untrue or defamatory facts or contain a derogatory, defamatory value judgment within the meaning of Section 1330 of the General Civil Code or a criminal offence (such as slander in accordance with Section 111 of the Criminal Code) is fulfilled. Examples of statements made on review platforms or in forums that have been assessed by courts as defamation of character or damage to reputation are “corrupt oaf”, “The worst publican in Austria - Unfriendly, expensive, zero service, zero motivation” or “bankrupt”. Furthermore, reviews may contravene competition law, data protection law and media law provisions.

### **What measures can be taken against unlawful reviews?**

In principle, a company has a claim to injunction, elimination or deletion, compensation for damages and revocation if false (professionally damaging) facts are asserted in a review, or they contain a defamatory value judgement or were unlawfully published by a competitor. As a first step, it is often advisable to assert these claims against the author of the review (if known) and/or the operator of the review platform by means of a letter of request. If they do not respond satisfactorily, these claims can be enforced in court by means of a complaint and an application for the issuance of a temporary injunction. In addition, criminal or data protection measures may be taken, among other things. The package of legislation against “hate on the Internet”, which was published on 1 January 2021, provides for various measures to combat hate on the Internet. Accordingly, an employer can now also assert a claim for injunctive relief

and elimination if an employee’s reputation is harmed by assertions in a review.

### **Can you buy positive fake reviews as a company?**

Reviews that are written for a fee, although no experience exists at all with the evaluated products or services, are considered as unfair. Accordingly, the purchase of positive fake reviews by an entrepreneur represents an act of unfair competition and contravenes the UWG (Gesetz gegen den unlauteren Wettbewerb [Law on Unfair Competition]). Moreover, an author of reviews who writes his/her reviews on the basis of experience but in exchange for a non-cash benefit must point out the commercial background of his/her actions; otherwise, the review is to be regarded as misleading in the sense of the UWG.

## CHINA

### **When is a negative corporate review in China to be classified as illegal?**

According to Chinese competition law, a negative corporate review in China is classified as unfair competition if the review unreasonably damages a competitor's creditworthiness or the good reputation of its products. In addition, the unlawful impairment of the business reputation is also treated as a criminal offence. With regard to negative company reviews on the Internet, Article 36 of the Chinese tort law and the regulations on the protection of rights on the Internet also stipulate the liability of authors and Internet service providers for inappropriate company reviews, inappropriate remarks about products as well as insults and defamation of employees.

### **What measures can be taken against unlawful reviews?**

Firstly, the company concerned can assert claims against the author for revocation and compensation. In addition, the company may also request that the Internet service provider



takes the necessary measures to eliminate the unlawful review (removal of the infringing content). If the Internet service provider refuses to take the necessary measures, a complaint can be submitted against it to the competent administrative authority and a complaint can be brought before the civil courts.

### **Can you buy positive fake reviews as a company?**

In China, the purchase of positive fake reviews on the Internet is regarded as misleading/false advertising because the consumer is thereby deceived about the quality and/or the characteristics of the product. According to the law on the protection of consumer rights as well as competition law and advertising law, this conduct is therefore unlawful. A contract between companies and service providers for positive fake reviews is void.

## **FRANCE**

### **When is a negative company review in France to be classified as unlawful?**

A negative review that is directed against the company or an employee is considered defamation if it contains the following: (1) an assertion of a specific fact, (2) a violation of honour or reputation (and not a mere criticism), (3) of a specific or easily identifiable person.

If the criticism is directed against the product or service, the notification may constitute a case of defamation on the basis of liability under general law [Code civil, Art. 1240], if it impairs the products or services or the brand image and thereby has a negative influence on the customers. If the comment lacks care and objectivity or if the comment does not state precise facts, it is considered to be defamation.

### **What measures can be taken against unlawful reviews?**

The criminal law defamation action, based on the Press Act of 1881 (Loi sur la Liberté de la presse de 1881), follows a very strict evidence regime, in which the *exceptio veritatis* is asserted, and with a very short limitation period of three months from the date of publication. Therefore, it is very difficult for a company to receive compensation on this basis.

The action for defamation, which is based on the general law of civil liability (Art. 1240 of the French Civil Code) and benefits from a limitation period of five years from the date of publication of the comment, makes it possible to sanction and compensate a reputational damage of a company more easily on the Internet than is possible with the action for defamation.

### **Can you buy positive fake reviews as a company?**

This practice is prohibited under French law, since it constitutes a misleading business practice (Art. L. 121-2 of the French Consumer Protection Act). It is indeed a practice that harms consumers (whose choices are distorted) and competing companies (whose products suffer from unfair competition).

Misleading business practices are punished with a prison sentence of two years and a fine of EURO 300,000 (Art. L. 132-2 of the French Consumer Protection Act).

## **GERMANY**

### **When is a negative company review in Germany to be classified as unlawful?**

Negative company reviews are unlawful and therefore impermissible if the review is either an untrue assertion of facts or its content is no longer covered by freedom of expression. The question of differentiation is often difficult. If the focus of the statement made is on a core of facts that can be proven, it is an assertion of facts. For example, a “single-star review” without accompanying text was last classified as an



implicit assertion of facts in Google Maps (Nuremberg Higher Regional Court, judgment dated 17 July 2019, 3 W 1470/19). If, however, the review is significantly characterised by elements of comment, view or opinion, it represents a statement that falls within the scope of the protection of freedom of expression in accordance with to Art. 5 GG (Grundgesetz, [German Basic Law]). Insults, abusive criticism and credit-endangering claims are not permitted, for example.

### **What measures can be taken against unlawful reviews?**

The data subject is entitled to a claim for injunctive relief. This is first asserted via a legal warning. In this case, the review portal is requested to remove the unlawful review and sign a cease-and-desist declaration. In the cease-and-desist declaration, the party who has been warned undertakes to no longer use the review. Any breach of this obligation shall be subject to a contractual penalty. This can be determined on a flat-rate basis or placed at the discretion of the person concerned. If the person warned does not agree with the amount in the latter case, he or she can have this reviewed by the court for its appropriateness. If the person concerned refuses to submit the cease-and-desist declaration, an urgent procedure can be initiated in court regarding an application for a temporary injunction and/or an action for a cease-and-desist can be filed. Claims for compensation by the data subject are also possible. However, it is difficult to prove that the damage incurred is based on the unlawful review.

### **Can you buy positive fake reviews as a company?**

Yes. However, the decisive factor is the question of whether and how it may be advertised. According to the case law of the Federal Court of Justice (BGH, judgment dated 20 February 2020, I ZR 193/18), the provider is liable for falsified customer reviews for which it pays or

which can be attributed to it for other reasons. Such reviews must be identified as “paid” reviews, as the Higher Regional Court of Frankfurt am Main recently decided (decision of 22 February 2019, 6 W 9/19). If this is not done, companies that write fake reviews for a fee can also be liable as accessories. In addition, most online trading platforms prohibit customers from using purchased reviews through their T&Cs.

## **HUNGARY**

### **When is a negative company review in Hungary classified as illegal?**

A negative review of a company can constitute a violation of the right to privacy, including the right to reputation. This right to privacy is granted not only to natural persons, but also to legal entities. Damage to reputation is deemed to exist in particular if someone makes or spreads false claims relating to another person and injures this person or causes true facts to appear in a false light.

### **What measures can be taken against unlawful reviews?**

The Hungarian Civil Code lists a series of objective sanctions for the violation of the right to privacy, such as, for example, the judicial determination of the violation, the prohibition for the infringing party to carry out further violations, or the restoration of the situation before the violation. In addition, however, the injured party, in some cases the company, can also demand compensation for pain and suffering or compensation from damages.

### **Can you buy positive fake reviews as a company?**

If someone buys a positive fake review, this could fall under unlawful unfair market behaviour. In Hungary, the law on unfair market behaviour determines that it is prohibited to carry out an unfair economic activity - in particular in



a form or manner that infringes or jeopardises the legal interests of the clients or the customers, buyers, service recipients and users or the competitors or in breach of the requirements of business ethics.

## ITALY

### **When is a negative company review in Italy to be classified as unlawful?**

There is an unlawful review if it damages the reputation, image and credibility of the company discussed in an untrue manner. The online publication of a review is an expression of the right to criticism, a constitutionally protected right as an expression of free speech. Taking this into account, criticism using strong or harsh expressions is also lawful, which can fall under the term polemic and strongly negative criticism. The review published online, which is directed at a large and potentially unlimited number of recipients, goes beyond the right to express an opinion and is therefore unlawful if it reports and/or uses untrue facts and/or phrases that are unnecessarily offensive and aggressive against the dignity and image of the company being reviewed.

### **What measures can be taken against unlawful reviews?**

The most direct means of defence is to request the website operator to remove the contested review. Most websites that invite you to publish reviews have an easily accessible system for reporting of “abuse”. Anyone who feels unjustifiably harmed by an offensive or untrue review can demand that this be removed so that its visibility is immediately terminated. If the site operator does not comply with the request, this can be ordered by a court order by way of the temporary injunction pursuant to Art. 700 of the Code of Civil Procedure. Criticism expressed online, which harms the reputation and credibility of a company without reason, also constitutes the criminal offence of defamation: It can

be reported to the authorities and prosecuted. Finally, anyone who feels harmed by a false or illegal review can demand financial compensation.

### **Can you buy positive fake reviews as a company?**

Due to the weighting of reviews in the selection of products and in consumption, a “review market” has emerged with positive reviews for the company itself but also negative reviews from competitors. The legal classification is still under discussion; under civil law, one could speak of unfair competition that influences the market by controlling the perception of the users and thus triggers a liability for damages. In order to halt the phenomenon, the courts are increasingly evaluating such conduct as fraud or the false pretences of another person, also from a criminal point of view.

## POLAND

### **When is a negative company review in Poland classified as unlawful?**

It is difficult to draw a clear boundary between a review that represents permissible criticism and an unlawful review. Each case must therefore be assessed individually. According to Polish law, the illegality of a review in the light of the StGB (Strafgesetzbuch [Criminal Code]) (criminal offence of the slander), the ZGB (Zivilgesetzbuch [Civil Code]) (violation of personality rights) and often the provisions of the law on combating unfair competition must be assessed. For example, the offence of defamation is defined as conduct that consists of giving another person (including a legal person) a bad reputation based on their conduct or their characteristics in such a way that they are degraded in public opinion or, for example, are exposed to a loss of trust required for a certain type of activity. An unlawful review is an untrue or insulting review.



### **What measures can be taken against unlawful reviews?**

A company that is affected by illegal reviews can assert civil law claims but can also take criminal action. The criminal offence of defamation is punished with a fine or imprisonment, e.g. if the perpetrator uses mass media (e.g. posting reviews on Internet forums or social media), the scale of punishments provides for a prison sentence of up to one year. In criminal proceedings, the court may also order the payment of a fine to the injured party or to a social purpose determined by the injured party. In civil proceedings, the company may demand the cease and desist of the action, the elimination of its effects and, in the event of material damage, the payment of compensation for damages in connection with the violation of personal rights (of reputation) by publishing an unlawful review. The dissemination of false or misleading information about another company also constitutes an act of unfair competition that leads to liability under civil and criminal law.

### **Can you buy positive fake reviews as a company?**

The purchase of positive fake reviews by an entrepreneur represents an act of unfair competition. The publication of positive fake reviews leads to a potential customer being given the misleading impression that the quality of the services or goods offered by a company is highly rated. As a consequence of such actions, the President of the Office for Competition and Consumer Protection (Polish abbreviation UOKiK) can impose a fine of up to 10% of the turnover against the company, which was achieved in the financial year before the year in which the penalty was imposed. The entrepreneur can also be held liable under criminal law.

## **ROMANIA**

### **When is a negative company review in Romania classified as illegal?**

There are no explicit statutory regulations as to when a negative company review is to be classified as unlawful. The generally applicable principles apply, according to which reviews that have a criminal relevance or that are false or likely to discredit a person or a company or are capable of having a negative effect on the image of the company in public, such as in the case of false allegations or abuse, are prohibited.

### **What measures can be taken against unlawful reviews?**

Actions may be filed for the deletion and omission of corresponding reviews and, under certain circumstances, also for compensation in the event that these reviews were not deleted after a relevant request. Furthermore, in the event of criminal conduct, a criminal complaint can be filed with the competent investigating authority. There is also the option of requesting a deletion by means of expedited proceedings; however, the relevant requirements set by the courts in Romania are very high and in practice the granting of corresponding expedited applications is the exception. The measures mentioned above can be taken against the person responsible for the review or, if applicable, against the operators of the Internet platform or the review portal on which the review was posted.

### **Can you buy positive fake reviews as a company?**

Although there are no explicit statutory regulations regarding the purchase of fake reviews by companies, the general principles apply according to which a company may not make any misleading or false statements on the Internet. Own fake reviews that basically intend to improve the company's reputation are therefore impermissible and can also be anti-competitive.

In this context, the development of a project has been announced with regard to online retailers. One essential point of this project is to be the



ban on fake reviews. A period for the development of the above-mentioned project is currently not known.

## SPAIN

### **When is a negative company review in Spain to be classified as illegal?**

The definition of illegal in connection with company reviews on the Internet is difficult to evaluate as there is no specific regulation concerning this. A review must then be assessed as unlawful as soon as it violates another (basic) right. A review is usually a subjective assessment of a product and/or service. This is thus protected by the right to freedom of expression. The conflict arises as soon as freedom of expression of the author and personality rights of the person reviewed conflict with one another. However, this must generally constitute an offence under the Spanish Criminal Code (defamation and slander).

There is a difference if these are “purchased” reviews; these must be specifically identified as such.

### **What measures can be taken against unlawful reviews?**

As a first step, the question must be clarified as to whether we are dealing with a matter that may be relevant under criminal law or whether we are still in the area of freedom of opinion of the customer.

The second question is whether we are dealing with misleading, false and/or unfair advertising, in which a positive review is paid and thus no longer represents a review, but rather advertising, but this is not subsequently identified as such.

In the first case, there is no other solution than to go to court and file a suit, which may not be successful in many cases, since there are two fundamental rights in conflict with one another

and a review must have a certain significance in order to be able to justify a criminal offence.

With regard to misleading advertising, the number of complaints and the legal consequences for companies that exploit this in a fraudulent manner has increased significantly in recent years.

### **Can you buy positive fake reviews as a company?**

The difference between fake reviews and advertising is that the purchased reviews must be identified accordingly. Otherwise, these are unlawful and are interpreted as misleading advertising - in accordance with Article 5 of the Law 3/1991, Unfair Competition. In addition, this practice also contravenes law 34/1988, dated 11 November, which in turn regulates advertising.

These offences can be reported by competitors and can involve severe penalties. It must also be noted that the large platforms expressly prohibit this practice in the General Terms and Conditions. As happened last at Amazon – Aukey, the Chinese company was completely banned.

## TURKEY

### **When is a negative company review in Turkey to be classified as unlawful?**

In principle, in accordance with the provisions on unfair competition of the Turkish Commercial Act, misleading or unfair business activities that influence the relationship between the supplier and consumer are unlawful. A misleading or unfair business act exists, in particular, if a company or its brand, products, prices, activities or business acts are defamed by false, misleading or offensive statements. This means that negative company reviews that are not justified, or are untrue, misleading, offensive or defamatory or lead to another person having a competitive advantage or disadvantage over the company in question are unlawful. If the defamation is intentional, then the author of the negative



business review also becomes liable to prosecution.

### **What measures can be taken against unlawful reviews?**

If reviews on Google are negative, you can try to have them deleted by Google for the time being. If the negative company review was published using another medium, then the correction or deletion may be demanded in accordance with the provisions of the Press Act, unless the deletion would violate freedom of expression. For example, if the negative company review is done in an Internet forum, it is not possible just to delete this one review, but all other comments would also have to be deleted. Apart from that, the following steps can be performed to clear a negative business review.

- Action for unfair competition to determine the existence of unfair competition, deletion of the negative company review, compensation for damages and, if necessary, compensation for pain and suffering, if the negative company review has had a negative effect on the applicant's personal rights.
- Application to the chambers for criminal matters of the district courts for cancellation of the negative business review or blocking of access to the review.

### **Can you buy positive fake reviews as a company?**

There is no precedent in this regard so far; these circumstances have not yet been assessed in the literature either. However, the acquisition of positive fake reviews could also be an unfair business act within the meaning of the provisions on unfair competition.

A fake review is viewed as unfair advertising, through which the relationship between the supplier and consumer is influenced or through which a party hopes to obtain a competitive advantage over competitor companies.

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