# Liberalisation of German Advertising Standards?

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German Advertising Law – known for its tough standards – is coming more and more under the influence of European legislation, which is resulting in a slow but steady liberalisation. This is not so much as a result of the efforts of the German legislator to implement EU Directives but more because of the influence of precedents set by the highest German Court competent for Civil Law, the *Bundesgerichtshof* and the Court of Appeals (*Oberlandesgerichte*).

Unlike most areas of law in Germany (which is a civil law jurisdiction), advertising law consists of case law based on some rudimentary statutory rules in the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* – UWG), as interpreted by the courts. German courts and especially the *Bundesgerichtshof* tended to be very restrictive in the past. The best known example of this tendency is the '10 per cent test' for misleading advertising: An advertising is already considered to be misleading by German courts, if only 10 to 15 per cent of the addressed average passing consumers would be mislead. In most cases the courts decide this question without an opinion poll or other expert opinion, because the sitting judges consider themselves to be part of the class of addressed consumers. In the past this has led to judgments such as the one in which the claim 'the most sold shaver brand in Europe' has been considered to be misleading, because a relevant group of the addressed consumers would believe that the leading brand in Europe would also be the leading brand in Germany (BGH NJW 1972, 104).

However, in 1998 the *Bundesgerichtshof* made several judgments which give hope to those who would welcome the loosening of the currently tight German standards:

## Comparative advertising

In February 1998 the *Bundesgerichtshof* decided a case where a dealer in tennis rackets advertised his products with the statement 'We do not expect you to buy cheap Composite Rackets.' (BGH 5.2.1998 GRUR 1998, 824 – 'Testpreis-Angebot').

The court considered this statement as comparative advertising along the lines of its own precedents. Until this decision the court had always decided that comparative advertising in principle violated § 1 UWG, which provides generally that whoever commits 'acts contrary to honest practices' may be enjoined from these acts and held liable for damages.

The *Bundesgerichtshof* decided to overrule its own precedents and to implement the EU-Directive on Comparative Advertising (97/55/EC) itself by interpreting the general clause of § 1 UWG on the basis of the standards and requirements laid down by the Directive.

In this case this did not lead to a different result because the general discrediting of composite rackets was also a violation of Art 3a Sec 1 lit (e) of

Directive 84/450/EEC concerning misleading advertising as amended by the Comparative Advertising Directive. However, a new principle of the admissibility of comparative advertising was established.

The fact that the Court did not wait for the legislator demonstrates its determination to draw consequences from legal developments at the European level. It is interesting to see how the Court justified its decision to implement the Comparative Advertising Directive itself:

According to Art 5 EC Treaty it is not only legislative authorities which are obliged to implement EC Directives, but all public authorities, including the courts. However, according to Art 189 Sec 3 EC Treaty, it is within the discretion of the member states, and therefore their legislative bodies, how to implement a Directive. As a consequence, in principle, the courts may only implement a Directive by applying it directly, if and when it has not been implemented within the implementation period. Though this period had not run out for the Comparative Advertising Directive when the *Bundesgerichtshof* reached its decision, it nevertheless felt authorised to implement the Directive by applying it directly. One reason given was that the 'open' character of the general clause of § 1 UWG enables the courts to take into account changes in 'honest practices'. This also applies to changes on the European level. The Court held that: 'behaviour which the European legislator has described as permissible in principle cannot – irrespective of the implementation period – be considered a violation of honest practices' (by the German courts).

According to the jurisdiction of the European Court of Justice, even before formal implementation, member-states have to refrain from any actions which would not be in accordance with a Directive (see Art 191 Sec 2 EC Treaty and ECJ WRP 1998, 290). A judgment which did not take into account the contents of an (as yet) unimplemented Directive might not be in accordance with such a Directive. In the case of the Comparative Advertising Directive and the contrary German precedents, the *Bundesgerichtshof* held that only the direct application of the Directive ensured that its goals were achieved in time.

Although the Comparative Advertising Directive is rather restrictive itself and will therefore not have a revolutionary effect on German Advertising Law, the judgment reveals the influence of European legislation on this area of German law.

## Misleading advertising

This is even more important against the background that the European Court of Justice recently confirmed that its standard for misleading material is the 'attentive reasonable average consumer' (ECJ 16 July 1998 C-210/96). The feature 'attentive' differs in particular from the 'passing' German consumer (10 per cent test). Although the Court has not confirmed that this standard is compulsory for national courts, it will examine decisions of national courts on the basis of this standard.

However, already one of the most important Court of Appeals (*Oberlandesgericht*) as far as unfair competition is concerned, the *Oberlandesgericht* Hamburg has adopted the 'attentive consumer test' as its new standard to examine whether an advertising is misleading or not (OLG Hamburg 28 January 1999 – 3 U 65/98). The Court has even gone so far to compare the ECJ decision of 16 July 1998 with an amendment of the German Act against Unfair Competition and allows parties which have signed a negative covenant on the basis of the tougher 'passing consumer standard' (10 per cent test) to terminate such undertakings with immediate effect. This is even more remarkable as the decision of the European Court of Justice did not set new standards but just confirmed its earlier precedents. It will be interesting to see how other Court of Appeals will decide this question. Hopefully, this question of law will soon be brought before the *Bundesgerichtshof*.

## 'Exaggerated enticement'

A further interesting set of decisions were handed down last year, when the *Bundesgerichtshof* had to decide about two advertisements for mobile phones, where the mobile phone was offered for free in one case (BGH WRP 1999, 90) and for DM 30.00 in another case (BGH WRP 1999, 94), but only in conjunction with a telephone contract.

On the basis of its previous decisions, one would have expected that the *Bundesgerichtshof* would have considered this kind of advertising to be a so-called 'exaggerated enticement' violating § 1 UWG. According to this group of case law the combination of a very cheap or even free product with another is 'exaggerated enticement', if the free/cheap product is only intended to entice customers to buy the other product. Under this rule the issuing of vouchers for free hamburgers has been considered to be a violation of honest practices, because customers

may feel obliged to buy additional goods when cashing in the voucher (Munich WRP 1991, 59).

The *Bundesgerichtshof* denied an exaggerated enticement in the case of the mobile phone advertisements, using the remarkable reasoning that the addressed consumers are aware of the fact that mobile phones of a significant value are usually not just given away. Consumers realise that the mobile phone has to be financed and is therefore subsidised by the telephone contract. Therefore such advertisement is permissible, as long as the conditions of the telephone contract are set out clearly in connection with the offered mobile phone.

Although the court did not refer to any European standards of consumer protection these decisions of the *Bundesgerichtshof* clearly reveal a turnaround in the consumer image of the court: although it was not a misleading advertising case in the first instance the court applied a consumer test which was based on an average informed and attentive consumer. One may look forward with interest to the next decision of the *Bundesgerichtshof* in the area of misleading advertising.

## Act on premiums

In another field of advertising law, premiums law, there is an ongoing dispute between a well-known US mail order house and a German trade association, whch also might result in a more liberalised line. The US retailer Land's End has advertised its lifelong unlimited guarantee for its products in Germany. On 21 October 1998 the Court of Appeal in Saarbrücken (OLG Saarbrücken WRP 1999, 224 – 'Land's End'), upon application of the said trade association. considered this to be a violation of the Act on Premiums ('*Zugabeverordnung*'). Based on existing precedents the Court decided that such a guarantee, which may be triggered at any time for any reason, has a value of its own and is therefore an impermissible addition to the sold goods. Only recently the appeal the US retailer had filed against this decision has not been accepted by the *Bundesgerichtshof* (Order dated 19 August 1999. I ZR 284/98) based on a lack of chances of success. However. as Land's End has announced that as a result it will now not advertise but still exercise its lifelong guarantee and the plaintiff has announced to sue the US retailer again in this case the German Federal Supreme Court may have another chance to reconsider its line on the offer of such guarantees. ■

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## Conclusion

9,000 bankruptcy petitions were filed in Russia in 1998. That is far more than ever before, but many fewer than necessary to help restructure and jump-start Russia's industry and enterprise. The process of implementing the bankruptcy system is, to this day, still very slow, halting and problematic. Having recognised that, it is, nonetheless, a start; a good start.

It is noteworthy to recognise that the law itself and the Commercial Court are reasonably well primed and positioned to impose an effective bankruptcy system in an economy deeply in need of reorganisation. The obstacles are not necessarily the law or the Commercial Court. Rather, the major obstacles are, in good measure, some of the traditional Russian business practices, legal customs, public perceptions, and extra-judicial institutions, like powerful government interests and 'extra-legal' organisations (like the Mafia).

Despite all, the Russian Commercial Court has, considering the circumstances, been successful in inaugurating the new bankruptcy law in the past year. It has struggled to effectively apply the new law despite tremendous obstacles and considerable public and government opposition.

In the face of substantial institutional impediments to carrying out the bankruptcy law's goals and procedures, and in the throes of countering a legal culture and Russian ethic which resists market reform, the Russian Commercial Court is enduring. Perhaps it's not succeeding as much as we would hope – or many Russians would like – but it is advancing the Rule of Law in the marketplace, nonetheless.

And, in the long run, that is what's important! ■

Note

1 The author recently spent two weeks in Russia conducting seminars on bankruptcy law. The seminars were co-sponsored by the Russian Supreme Commercial Court and the United States Agency for International Development. The seminars, conducted with Justices from the Russian Supreme Commercial Court, examined the first year's application of Russia's new bankruptcy law. Since 1991, Judge Brooks has worked with judges and others in drafting and applying insolvency laws in Russia and other emerging market economies throughout Asia and Eastern Europe.