Dr. Schotthöfer & Steiner, Rechtsanwälte, München

A "revolution" in German advertising laws?

Is the word "revolution" justified in this connection? If we think of a "revolution" as the surprising change of a long-existing condition, we can certainly use this term with regard to the field of legislation. In this sense, German advertising laws have indeed undergone a "revolution".

The German Law Against Unfair Competition dates back to 1909

German advertising legislation as a complete system can look back on nearly a hundred years of history. On 7 June, 1909 [1] the "Law Against Unfair Competition" (UWG) came into force. With its 28 articles it laid down the rules for the legal standard relating to business communication.

This law took effect at a time when planes were still made of wood, wire and fabric, and when the first cars were appearing on the roads, motor vehicles that had to be started with a crank. Albert Einstein began to develop his theory of relativity. Just a few years after the new law had come into force, World War I began, and World War II followed some years later. In 1957 the Treaties of Rome laid the foundation for the European Union.

Supplementing of the "UWG" through the Rebate Law and Ordinance Regulating Free Gifts

In 1932 the so-called "Ordinance Regulating Free Gifts" [2] was added to the Law Against Unfair Competition. This was to prevent consumers from being attracted and misled by free gifts, thus enticing them to buy something. The Ordinance Regulating Free Gifts only allowed such give-aways when their value did not exceed two German marks. A year later, the Rebate Law [3] was also added, which had a similar intention. This prohibited the enticement to buy something by deluding consumers into believing there would be a high discount. Since then the discount has been limited to 3% of the price of the article.

---

1 Gesetz gegen den unlauteren Wettbewerb, vom 7. Juli 1909 (RGBI. S. 499)
2 Verordnung des Reichspräsidenten zum Schutz der Wirtschaft vom 9. März 1932, RGBI.I 121 , shortly „Zugabeverordnung „
3 Gesetz über Preisnachlässe vom 25. November 1933, shortly: Rabattgesetz

.

The Law Against Unfair Competition (UWG Prohibition of comparative advertising by the Reichsgericht in 1938

In 1938 the highest German court for civil litigation made a decision that fundamentally prohibited comparative advertising ("A German businessman does not compare and does not need to have himself compared").[4] After that there was practically no such comparison in German advertising.

Restriction of special sales

In the 50s the chance of carrying out special sales was restricted. Articles could only be offered at a reduced price at fixed times in a year (winter and summer) and on special occasions (termination of a business, a jubilee for every 25 years of business).[5] Regardless of this, differing prices for different consumer groups have remained prohibited.

The "UWG" of 1909 mainly contained two all-purpose clauses: the prohibition of misleading advertising (Article 3, UWG) as well as the prohibition of violation of accepted moral standards through advertising activities.

Article 3 of this law prohibited misleading advertising in all forms. However, the law did not say how to ascertain when a statement was misleading. As a rule, judges based their decisions on their subjective views, but in doubtful cases enlisted the services of independent experts. These established whether a representative cross-section of the public had been misled by a particular claim through a complicated and expensive process with public opinion surveys.

It was assumed that if 10 to 15 percent of those questioned felt misled, the advertising claim was misleading. These strict criteria resulted in some absurd decisions. For example, an organisation in Cologne was forbidden to call its festival tent "Bayernfesthalle" (Bavarian Festival Hall) because there was no beer served there from the German federal state of Bavaria but from North Rhine-Westphalia, in which the city of Cologne is situated. The judges were of the opinion that local consumers naturally expected Bavarian beer in a "Bayernfesthalle".

---

4 Reichsgericht RG 31, 1299
5 Article 7 UWG, old version

The courts proceeded on the assumption that consumers were "superficial, uninformed and uninterested".

Article 1 of the "UWG" prohibited advertising that violated the standard of good morals. [6] The expression "good morals" enabled the courts to prohibit comparative advertising as offending good morals, but also to include new developments in the legal system. With reference to Article 1 of the law, the Federal Supreme Court has for example determined in several cases that the so-called "cold telephone calls", calls for the purpose of advertising that intrude upon people's privacy without their prior consent, are offending good morals and are thus illegal. The prohibition of unwanted advertising by email has also been based on this regulation.

The Federal Supreme Court also prohibited the combination of participation in a competition and a purchase, since this was also seen as acting against good morals, thus violating Article 1 of the "UWG". [7] An explicit legal basis for this did not exist.

Article 1 of the "UWG" has also provided the legal basis in other areas for German courts to prohibit behaviour which they feel cannot be tolerated.

The German Federal Republic with probably the strictest advertising laws in the EU

In the course of some decades this jurisdiction based on Articles 1 and 3 of the "UWG" resulted in Germany probably having the strictest legal standard for advertising of all member states in the European Union.

The development within the EU also meant that in several member states advertising methods could be employed that were prohibited in Germany.

Change of the consumer image

In several decisions the European Court of Justice [8] established early on that the criteria for judging misleading advertising were no longer based on the idea that consumers were "superficial, uninformed and uninterested" but that they were "reasonably well informed, reasonably observant and circumspect." For courts in the German Federal Republic

---

6 Article 1 UWG aF: "Wer im geschäftlichen Verkehr zu Zwecken des Wettbewerbs Handlungen vornimmt, die gegen die guten Sitten verstoßen, kann auf Unterlassung und Schadenersatz in Anspruch genommen werden."
7 Z.B. BGH Wettbewerb in Recht und Praxis (WRP) 1976, 100
8 Z.B. EuGH Gewerblicher Rechtschutz und Urheberrecht (GRUR) International 1983, 648 (Osthoek)

this meant that they also had to relax their strict criteria for judging whether advertising was misleading.

In addition, European directives and regulations [9] made it necessary to adjust strict national German regulations to the generally less strict European standard.

The EU Treaty [10] itself prohibited restrictions of commerce between EU member states.

The European Court of Justice thus held for example in the case of Yves Rocher [11] that a regulation in the "UWG" inadmissibly restricted the cosmetic company with regard to its cross-frontier advertising. Based in France, the company had compared some current prices with its previous prices in catalogues that were produced in France. These catalogues had also been sent from France to German consumers. However, the "UWG" in the version existing at the time prohibited in Article 6 the comparison of current prices with a company's previous prices. With reference to this regulation, German courts inevitably prohibited the French company from distributing these catalogues in the German Federal Republic.The European Court of Justice decided that the prohibition of further distribution of the catalogues in Germany violated Article 28 of the EU Treaty, because it prohibited something that was allowed in the country of origin. Owing to the differing legal system in Germany, the company would have had to change its concept especially for Germany, which would have meant extra costs. This was seen as an inadmissible restriction, violating the EU Treaty.

"Native discrimination" resulting in abolition of laws

As a consequence, companies located in a member state of the European Union (country of origin) were able to carry out certain advertising activities in another member state (target country) when this was prohibited in the target country but permissible in the country of origin.

---

9 Z.B. Richtlinie des Rates zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedsstaaten über irreführende Werbung vom 10. September 1984 (84/450/EEC)

Richtlinie des Rates zur Koordinierung bestimmter Rechts- und Verwaltungsvorschriften der Mitgliedsstaaten über die Ausübung der Fernsehtätigkeit (ABI. Nr. L298/23 vom 17.10.1989) 89/552/EEC

Verordnung Nr. 2081/92 des Rates vom 14.7.1992 zum Schutz von geografischen Angaben und Ursprungsbezeichnungen für Agrarerzeugnisse und Lebensmittel

Richtlinie des Rates vom 13.6.1990 über Pauschalreisen (90/314 EEC)

10 Art. 28 UWG, old version

11 EuGH C – 126/91 vom 18.5.1993

This involved the danger of "native discrimination" for companies based in Germany. These had to observe national regulations, whereas this did not apply to companies from another member state of the European Union if the activity in question was permissible in their country. Germany therefore had to decide whether it would maintain its strict advertising laws and thus become an "island of strictness" within the EU or whether it would adapt itself and relax its regulations. The decision was made in favour of adaptation.

Through the so-called E-Commerce Directive [12] this "country of origin principle" became legally binding for the field of electronic communication within the EU.

The new "UWG"

As a result of the changes originating from Brussels people realised that a new law against unfair competition was needed in Germany to solve existing problems. At first the Rebate Law and the Ordinance Regulating Free Gifts were abolished without substitution, and on 8 July 2004 a new version of the "UWG" came into force. This involved changing several definitions, forming principles developed from court decisions into a law and undertaking the necessary adaptation of the German regulations to the standard requirements from Brussels.

Further contributions to the "revolution" in German advertising laws were made by the Federal Constitutional Court, which several times protected commercial communication, in other words advertising, on the basis of Article 5 of the Basic Law. The sensational advertising by Benetton in the early 90s was the subject of a lengthy litigation process which began at the Superior Court in Frankfurt, continued at Frankfurt's Supreme Court and ended provisionally at the Federal Supreme Court. The court of each instance regarded, for example, the picture of a dying person with aids and cancer in advertising for Benetton products as offending good morals and prohibited it. However, the Federal Constitutional Court [13] - the final court of appeal - repealed the decision of the Federal Supreme Court and referred the litigation back to the previous instance. Yet the Federal Supreme Court [14] was still not convinced that its standpoint was wrong and upheld the injunction. Finally and in the last instance, the Federal Constitutional Court confirmed the permissibility of this advertising, emphasising that even "extraordinary" advertising was protected by the Basic Law.

---

12 E-Commerce Directive 2000/31/EC
13 BVerfG vom 12.12.2000 Az. BvR 1762/95
14 BVerfG vom 12.12.2000 Az. BvR 1787/95

This point of view reinforced the Federal Constitutional Court with further decisions. It thus repealed the injunction that had lasted for decades in connection with a woman lawyer's advertising for her services with the membership of a national sports team, because this membership could be interesting for potential clients with a sporting background.[15]

As a consequence the Federal Supreme Court then changed its strict jurisdiction and allowed, for example, advertising with a call for helpfulness, sympathy and environment-consciousness, which had hitherto been prohibited. This decision was made on the basis of a case in which a pharmacy advertised with its support for the preservation of animal species in danger of extinction. Here too, the advertising was at first prohibited by the Regional Superior Court in Frankfurt and in further instances in 1994 because it violated good moral standards, but in 2005 the Federal Supreme Court attested its competitive admissibility.

General framework of European legislation

A number of advertising standards which have to be observed in Germany (regulations) or had to be translated into national law have come from Brussels.

In 1984 the regulations regarding misleading advertising came into force (84/450/EEC)[16], with which all member states were to be forced to fight against misleading advertising. Owing to Article 3 of Germany's "UWG", however, Germany saw hardly any need to take action.

The directive for introducing the admissibility of comparative advertising took effect in 1997, and this led to considerable retraining on German advertising legislation, as this had remained prohibited on principle since the decision made by the Supreme Court of the German Reich in 1938.

---

15 BVerfG, Beschluss vom 4. August 2003, AZ: 1 BvR 2108/02
16 Directive 84/450/EEC of 10 September 1984 on the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising

Finally, in 2006 the so-called "Health Claim Regulation"[17] came into force, which regulated the information given on foods.

The latest directive concerning advertising deals with unfair commercial practice [18] and contains a list of modes of behaviour that must be regarded as inadmissible and are binding for all member states. This directive must be transformed into German national law and will lead to slight changes in the current "UWG".

Summary

In conclusion, we can say that the development of European advertising legislation has had a decisive influence on the German system in the past decade. The compulsion to adapt German laws to European standards at first led to the abolition of numerous regulations, which were possibly contradictory to European laws, and led up to the complete abolition of the Law Against Unfair Competition from 1909.

The pressure created by Germany's membership of the European Union has thus led to an "upheaval", to a "revolution". As a result, the strict German advertising laws have been liberalised and relaxed.

Dr. Schotthöfer&Steiner
Attorneys-of-Law
Grillparzerstrasse 38
81675 München
Tel. 089 – 890416010
Fax. 089 – 47 32 71
eMail: pwsjur@schotthoefer.de
HP: www.schotthoefer.de

---

17 Corrigendum to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 404, 30.12.2006
18 DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCILof 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council directive 84/450/EEC,

Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair commercial practices Directive")