[DE] Federal Supreme Court Allows Link between Product Sales and Competition in TV Advertisement

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Ingo Beckendorf
Institute of European Media Law (EMR), Saarbrücken/Brussels

In a ruling of 12 December 2013 (case no. I ZR 192/12), the Bundesgerichtshof (Federal Supreme Court - BGH) decided that linking a competition to the sale of sweets in a television advertisement was admissible, provided the diligence requirement set out in Article 3(2)(3) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) did not apply, since the advertisement was aimed not only at minors.

The case concerned a TV commercial for a competition in which customers had to purchase the advertised sweets in order to take part. The advertisement showed the presenter Thomas Gottschalk in a supermarket with two families with children. Customers who purchased five packets of the advertised sweets for around EUR 1 and sent in the till receipts were entered into a draw in which they could win one of 100 “gold bear bars” worth EUR 5,000 each.

The company that instigated the legal proceedings - a manufacturer of fruit gums, like the defendant - considered the advertisement to be anti-competitive because it exploited minors’ commercial inexperience and made participation in the competition dependent on the purchase of goods. It claimed that this was an unfair commercial practice in the sense of Article 4(6) UWG. The plaintiff had been successful before the lower-instance Landgericht Köln (Cologne District Court, 8 February 2012, case no. 84 O 215/11) and Oberlandesgericht Köln (Cologne Appeal Court, 21 February 2012, case no. 6 U 53/12). In the opinion of the lower-instance courts, the advertisement could cause minors to make unnecessary purchases. Therefore, the decision should take into account the need for diligence under Article 3(2)(3) UWG and be based on the perspective of children and young people.

The first civil chamber of the BGH disagreed, overturned the appeal court judgment and dismissed the action. It was true that linking competitions to purchases could, in individual cases, be prohibited as an unfair commercial practice according to Article 4(6) UWG if the necessary professional diligence was not exercised. In this case, however, there was no unfair commercial practice. The diligence requirement under Article 3(2)(3) UWG did not apply because the products were equally popular with both children and adults. A competition linked to the sale of sweets was therefore, in the BGH’s view, also likely to influence the

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purchasing behaviour of adults. The dispute should therefore be resolved on the basis of the average consumer's perspective.

On this basis, the television commercial in question did not breach the requirement for professional diligence. The cost of entering the competition was clearly stated and the defendant did not make misleading claims about participants' chances of winning.

Furthermore, the commercial did not infringe other provisions of competition law specially designed to protect children and young people. It did not contain a direct exhortation to children to purchase the goods in the sense of no. 28 of the Annex to Article 3(3) UWG and was also unlikely to unfairly exploit the commercial inexperience of minors in accordance with Article 4(2) UWG.

Pressemitteilung des BGH vom 12. Dezember 2013

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2013&Sort=3&nr=66194&pos=0&anz=204

BGH press release of 12 December 2013

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