National Reports

Germany

COMPETITION

Environment bonus

In offering an environment bonus to end users for converting to natural gas central heating, a public authority does not contravene Article 1 of the German Act Against Unfair Competition

Federal Supreme Court
March 26, 1998
RdE 1999 at 36

Facts: The plaintiff is a trader in combustibles and sells heating oil to end users. The territorial authority of P, which is a public utility in the town P, the defendant party, distributes natural gas to end users within its territory of supply. In March 1994 the public utility sent advertising letters to the inhabitants of houses which were connected to the distribution system but were not making use of it. The letter stated: "Should you modify your heating installations to natural gas which safeguards the environment, or should you construct a central heating installation for the use of natural gas, the public utility will support your efforts to protect the environment with an environment bonus of DM 1,000."

In the plaintiff's view the advertising action constituted an act of unfair competition which is prohibited by Article 1 of the German Act Against Unfair Competition. The plaintiff argued that the advertising fell into the category of excessive enticement developed by jurisprudence with regard to Article 1 of the Act, and was unfair for this reason. The District Court rejected the claim. The Court of Appeal of Karlsruhe (RdE 1996/113) ordered an injunction holding that the defendant had to refrain from such advertising "for purposes of competition".

Held: "The offering and the grant of an 'environment bonus' of DM 1,000 by the public utility of a territorial authority for the modification of an existing heating installation to the use of natural gas or the construction of a new central heating installation does not violate the principle of good morals constituting an act of prohibited unfair competition in the sense of Article 1 of the German Act Against Unfair Competition, neither for the reason of being excessive enticement nor an unfair obstruction of a competitor in the sector of heating energy."

In its reasoning the German Federal Supreme Court indicated, against the view of the Court of Appeal of Karlsruhe, that the lawfulness of the advertising action had to be assessed by taking into account its general nature resulting from its content, its purpose and the reasons for the activity, and possibly also the public interests which were additionally pursued. The court could not find any circumstances in the defendant's conduct which would have violated good morals. In particular the court rejected the view that the mere fact that the defendant (the town) competed in the energy market through its public utility did not in itself lead to the violation of good morals through its conduct. The defendant took lawful part in the private economy as envisaged by the German Act Against Restraints of Competition which provides particular rules applicable to public utilities in Articles 102 and 103.[1] The court rejected the plaintiff's assertion that the advertising activity constituted an unfair hindrance to suppliers of heating oil such as the plaintiff. In the market free donations do not generally violate the principle of fair competition. If such an assumption should be made, there must be particular circumstances in the individual case which justify the prohibition of acts of unfair competition according to Article 1 of the German Act Against Unfair Competition.

The assessment of the conduct which allegedly constitutes a violation of the duty of fairness in competition depends upon the individual appearance of the offer of the performance, the intensity and the effect of the free donation on competition. There will be such circumstances if the kind and the scope of the free donations induce the receiver in a subjective manner to the conclusion of a contract with a consideration or if they determine his conduct in such a manner that he refrains from examining the offers of other competitors with regard to soundness and profitability. Such effects are not related to the advertising activity complained of. The modification of an existing heating system or the construction of new central heating which is fed with natural gas will require approximately an investment of DM 14,000 to 16,000. Thus it can be assumed that the end user will make use of the public utility's offer only after due examination of alternatives with regard to other energy carriers and technologies and their advantages and disadvantages. Accordingly, the Federal Supreme Court found the plaintiff's view that the end user would be irresistibly attracted by the public utility's offer was not justified here.

1 See for example, Arnold Vahrenwald, "Gas Supply in Germany and Anti-trust Law", (1993) O.G.L.T.R. 173–183.

Finally, the court rejected the view that the advertising action by the defendant as a territorial authority which enjoyed a monopoly for the supply of gas to end users and which could bind its customers as long as it wanted for the time such customers used natural gas for heating, established the particular unfairness of the activity as such. The court explained: "Also, public utilities may advertise in the market; however, the more dominant the market position of the public undertaking is, the more its conduct in the market will have to [be] examined whether it corresponds with the increased responsibility which is due to its market position (. . .). Whether the conduct of the defendant was economically reasonable with regard to the principles of effective competition thus has to be analysed by assessing whether the conduct has an anti-competitive effect to the detriment of the competitors, whether the measure of advertising safeguards also the public interest and whether the measure of advertising is susceptible according to experience to serve the realisation of such public interests."

The court continued to analyse the possibilities for the competing heating oil industry to react to the advertising activities complained of. The court observed: "The fact that the challenged advertising concept of the defendant would not be attractive for the trade with heating oil and led to a non-similarity of chances for advertising does not cause a factor upon which unfairness could be based. The law of competition is not oriented towards the maintenance of determined structures, but it is the direct purpose of the regulation of competition, to let the powers of the market freely work the competition within the legal framework, which means also that the successful concepts of advertising may lead to a change of customers of the competitors. It is not the task of the law of competition to object to economic developments only for the reason that they question existing concepts."

The court thus emphatically voted in favour of the freedom of advertising for public utilities engaged in the distribution of gas. In principle, public utilities may choose such measures of advertising like any other undertakings. However, advertising strategies of public utilities will be measured on a standard of responsibility which increases according to market dominance. This standard will be established by analysing the impact of the advertising measure on competitors, verifying whether the advertising measure serves the public interest and deciding whether the advertising measure is susceptible to achieve this aim.

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COMPETITION
SNAM SpA antitrust case
Tribunal of Latium grants interim suspension of the fine imposed by the Italian antitrust authority

SNAM and Italian Antitrust Authority
Tribunal of Latium

The Italian Antitrust Authority fined SNAM SpA on February 25, 1999 and imposed a penalty of L3.58 billion for violating the Italian antitrust laws (see *European Counsel*, May 1999, page 71, where, however, the penalty amount was reported as being of L3584 billion).

SNAM SpA is part of the ENI group and maintains a dominant position in the Italian gas market. The Antitrust Authority found that SNAM had abused its dominant position by unfairly restricting access to the Italian gas distribution grid (of which SNAM owns or controls nearly 100 per cent) to some of its competitors.

SNAM appealed against the decision to the administrative Tribunal of Latium and requested an interim suspension of the fine. The Tribunal granted the suspension, thus marking a substantial point in favour of SNAM. In citing the reasons for its decision, the Tribunal found that the Antitrust Authority had failed to consider properly the answers that SNAM gave to the Authority's requests during the enquiry procedure that resulted in the fine. Moreover, according to the Tribunal, the Authority's decision suggests that the Italian gas market is already fully liberalised, an extension which goes beyond the present scope of the Italian legislation on the subject and perhaps, in the Tribunal's opinion, even beyond the scope of Directive 98/30 of June 22, 1998, which has not yet been implemented in Italy.

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OIL AND GAS SECTORS
Proposed legislation
Extraction Bill

Last year this journal[1] reported the presentation to Parliament of the Extraction Bill in September 1998. In December a hearing took place on the initiative of the Committee for Economic Affairs of the Lower House. In this session groups of society could voice their support or objections to the Bill. In a two-hour session many different groups were invited, including oil and gas industry representatives as well as a group of private persons who suffered damage caused by earthquakes due to the extractive activities within a certain region of the country.

1 [1998] O.G.L.T.R. N–104.