Unofficial Translation

Court:	Stuttgart Higher Regional Court 2nd Civil Senate
Decision date:	AUG 1, 2024
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Headnote

1. On the requirements for injunctive relief under Section 2 UKlaG [Injunctions Act] in conjunction with Section 20a sentence 1 TabakerzG [Tobacco Products Act].
2. The decisive factor for the presence of outdoor advertising within the meaning of Section 2 No. 9 TabakerzG is the place where the advertising is perceived as intended or can be expected.
3. On the requirements of the exception pursuant to Section 20a sentence 2 TabakerzG, in particular the concept of specialized trade.

Operative provisions

I. The injunction defendant is ordered to refrain from outside advertising of tobacco products, e-cigarettes and refill containers in the course of trade if this is done as described in the warning letter of the injunction plaintiff dated March 16, 2024 (injunction plaintiff's reference: VRS-2024/011/AB (H-BW)) attached to this judgment.

II. The injunction defendant is threatened with a fine of up to € 250,000 for each case of infringement, or alternatively imprisonment for up to 6 months.

III. The injunction defendant is ordered to bear the costs of the legal dispute.

Value in dispute: € 7,500.

Facts of the case

1 **Without facts pursuant to Section 313a (1) sentence 1 ZPO [Code of Civil Procedure]**

Reasons for the decision

A

2 As a consumer protection association, the injunction plaintiff seeks from the Senate at first instance injunctive relief from advertising of tobacco products at a gas station.

3 In summary, with reference to a specific violation the injunction plaintiff asserts that the injunction defendant advertised two cigarette brands on February 23, 2024, at 4:31 p.m. at the gas station in F. operated by it via a screen mounted behind the outer pane, and that the advertising was visible outside the sales area without obstruction. The parties are essentially in dispute about the legal admissibility of this advertising under the Tobacco Products Act,

with the injunction defendant considering its gas station to be a tobacco retailer, and about whether the statutory presumption of urgency no longer applies.

4 With regard to the parties' submissions and motions, the Senate refers to the pleadings submitted by the parties and the session transcript of July 18, 2024.

B

5 The application for an injunction is admissible (see I.) and well-founded (see II.).

I.

6 The application for an injunction is admissible.

1.

7 The general procedural requirements for class action proceedings to be brought before the higher regional court in the first instance pursuant to Section 6 (1) UKlaG (see Cologne Higher Regional Court, decision of March 7, 2024 - 6 UKl 1/24; Büscher, WRP 2024, 1 et seq.) are met. In particular, the injunction plaintiff is entitled to file an application and the new class action proceedings also allow it to proceed by way of interim legal protection (see Cologne Higher Regional Court, loc. cit.; Düsseldorf Higher Regional Court, judgment of February 8, 2024 - 20 UKl 4/23, juris).

8 There is also no doubt that the Stuttgart Higher Regional Court has jurisdiction in view of the place of business of the injunction defendant (Fellbach).

2.

9 The presumption of urgency from Section 5 UKlaG in conjunction with Section 12 (1) UWG [Unfair Competition Act] is not rebutted, contrary to the opinion of the injunction defendant.

a)

10 It can be refuted by the injunction plaintiff's own conduct, and is not applicable in particular if the plaintiff waits too long to take legal action or does not behave in the court proceedings in a manner to be expected of a party seeking the fastest possible enforcement (see BGH [Federal Supreme Court], decision of July 1, 1999 - I ZB 7/99, juris paras. 10 f.).

11 What is decisive for the start of the assessment is the time at which the injunction plaintiff became aware of the relevant facts from which a claim for injunctive relief to be asserted by it arose objectively. If it was aware of the competitive action, it is irrelevant whether it drew the correct legal conclusions from this (Hamburg Higher Regional Court, decision of February 12, 2007 - 5 U 189/06, juris para. 18). If it becomes aware of a competitive action, it has an obligation on its own behalf (or on behalf of the person it represents by law) to clarify the legal situation and to decide whether it wishes to take action against the competitive action of which it is aware. If it fails to obtain this legal clarification, if it fails, or if the claimant refrains from pursuing the cessation of the specific competitive action although it could do so for whatever legal reason, it loses the urgency for legal

proceedings against this specific competitive action after the expiration of the reasonable statute of limitations period regardless of fault (Stuttgart Higher Regional Court, judgment of August 6, 2020 - 2 U 95/19, with further references).

12 Apart from cases of particular urgency, as will often be the case with trade fair or market cases, for example, it is generally harmless if there is no more than one month between becoming aware of the infringement and asserting it in court. If this period exceeds eight weeks, however, the presumption of urgency is generally rebutted. If the period is between one month and eight weeks, rebuttal depends on the specific circumstances of the individual case (see as representative only Stuttgart Higher Regional Court, judgment of October 12, 2017 - 2 U 162/16; see also Karlsruhe Higher Regional Court, judgment of September 23, 2015 - 6 U 52/15, juris para. 72).

13 In particular, periods of mere waiting are harmful if they can no longer be justified by an expeditious processing of the case for the purpose of quick claim enforcement (more detailed Stuttgart Higher Regional Court, judgment of August 6, 2020 - 2 U 95/19, with further references). On the other hand, within this time frame efforts by the claimant that appear reasonable from the perspective of an objective third party in its place to avoid a legal dispute and to enforce the claim out of court are harmless; this includes, in particular, short extensions of time requested by the warned party to submit a declaration of submission with a penalty clause.

b)

14 Measured against this standard, the presumption of urgency is not rebutted here.

aa)

15 According to its own submission, the injunction plaintiff learned of the infringement at issue on February 29, 2024; the injunction defendant did not claim any earlier knowledge. Since it is obliged to present and substantiate the facts that would remove the presumption of urgency, its denial of the injunction plaintiff's submission on obtaining the knowledge does not help it, nor does the accusation that the injunction plaintiff did not substantiate its submission on obtaining the knowledge (see Stuttgart Higher Regional Court, judgment of May 8, 2024 - 2 U 205/23).

bb)

16 The application for an injunction was filed with the court on April 14, 2024, around six and a half weeks after the knowledge was obtained. Under the given circumstances, which the injunction plaintiff has explained in detail and which remain undisputed, this does not constitute procrastination. On the contrary: the injunction plaintiff proceeded swiftly with the matter and the injunction defendant's objections to this are not valid.

(1)

17 At the request of the injunction defendant, the injunction plaintiff extended the deadline for commenting on the warning by a short period. This, as well as the subsequent short-term (over the Easter holidays) response to the injunction defendant's silence, is an objectively comprehensible effort to secure the injunction request out of court. Even

when viewed in conjunction with the period of time from April 3 to April 14, 2024 that followed the filing of the application, this behavior is still within the scope of what can be considered something that a party seeking quick satisfaction may deem expedient and therefore does not allow the accusation of negligence or a lack of willingness to expedite.

(2)

18 The fact that the injunction plaintiff did not use the interim period to obtain the injunction defendant's contact details from the Internet and issue a warning to it via these a few days earlier than it did does not remove the presumption of urgency when viewed overall. In the time frame to be assessed, the injunction plaintiff cannot be blamed for not wanting to rely on contact data taken from the Internet in order to issue a warning, but instead obtaining official information.

(3)

19 Moreover, the same would apply even if the knowledge of the witness sent by the injunction plaintiff to investigate the infringement were to be already attributed to the injunction plaintiff with effect from February 23, 2024, as represented by the injunction plaintiff. Even then, the injunction plaintiff would still have had less than eight weeks in total to assert its rights in court.

II.

20 The application for an injunction is well-founded. The injunction plaintiff is entitled to the injunctive relief asserted (see 1.), and the injunction defendant's objection that the matter is not suitable for a decision in preliminary injunction proceedings is unfounded (see 2.).

1.

21 The injunction plaintiff, which is entitled to file a request under Sections 2 (1) sentence 1, 3 (1) no. 1 UKlaG, is entitled to the injunctive relief asserted under Section 20a sentence 1 in conjunction with Section 2 no. 9 TabakerzG. Through the disputed act carried out by the injunction defendant (see a), which is to be regarded as a procedural unit (see b), the injunction defendant has engaged in outdoor advertising for tobacco products and e-cigarettes within the meaning of Section 20a para. 1 sentence 1 TabakerzG in conjunction with section 2 No. 9 TabakerzG (see c), and thereby violated the consumer-protecting prohibition in section 20a (1) sentence 1 TabakerzG. The exception in section 20a sentence 2 TabakerzG does not apply in favor of the injunction defendant (see d). Although the advertising measure was limited to cigarettes, the claim for injunctive relief also covers advertising for the other tobacco products mentioned in operative provision 1.

a)

22 The challenged display representations of the injunction defendant are undisputed. Although the injunction defendant disputes that the photographs submitted show its gas station, it does not dispute that it operates an electronic advertising column in its gas station as submitted by the injunction plaintiff, and that on February 23, 2024, at 4:31 p.m. the advertising texts and images alleged by the injunction plaintiff could be seen from outside the building. The injunction defendant's challenge merely refers to the

substantiation. The injunction is silent on the actual accusation. This is therefore undisputed (section 138 ZPO) and thus need not be substantiated, so that the objections to the prima facie evidence submitted in this regard are pointless.

(b)

23 The challenged screen advertisements constitute a uniform subject matter of the dispute in terms of the proceedings. Here, the injunction plaintiff has made use of the possibility to attack the specific violation as a unit and to rely cumulatively on two advertising displays contained in it for different cigarette brands (see BGHZ 194, 314, juris paras. 19 et seq. – *Biomineralwasser*) that were broadcast by the injunction defendant. From a natural point of view there is a uniform act (see for differentiation Hofmann, NJW 2019, 2126). This is because the presentations on the screen - indisputably – changed automatically according to a presetting (programming), so that no further action by the injunction defendant was required to switch from one display to another.

c)

24 With these broadcasts, the injunction defendant has carried out outdoor advertising for tobacco products and e-cigarettes within the meaning of Section 20a (1) sentence 1 TabakerzG in conjunction with Section 2 no. 9 TabakerzG.

aa)

25 There is no dispute between the parties that these are commercial communications with the aim of promoting the sale of a product, i.e. advertising within the meaning of Section 2 No. 5 TabakerzG.

bb)

26 This advertising is outdoor advertising within the meaning of Section 2 No. 9 TabakerzG. The term "outdoor advertising" in this standard includes any advertising outside enclosed spaces. While the wording is not clear in this respect (see Boch, in: TabakerzG, 2nd online edition, 2022, para. 11 on Section 2 TabakerzG), the meaning and purpose of the standard indicate that the focus is not on the place where the announcement is made but on the place where the advertising is perceived as intended or to be expected.

27 The purpose of the tobacco advertising ban is to protect consumers outside of stores from the inducements by tobacco advertising intended to encourage them to purchase and consume tobacco products. For the inducement to consume, it does not matter whether the advertising message is produced and sent inside or outside a building. The decisive factor for the effect is whether it is perceived in the "protected" space.

28 This concept is also reflected in the clarifying reference that shop window advertising is considered outdoor advertising. It too is produced inside the store, but is typically viewed from outside.

29 The legislative materials point in the same direction. German Bundestag document 19/19495, pp. 10 f. states:

30 "The bans on outdoor advertising and the further restriction of movie advertising, as well as a ban on free distribution in combination with the existing advertising bans, are considered to be effective means of achieving a further reduction in the smoking rate. Outdoor advertising for tobacco products is generally present."

31 and

32 "With regard to the ban on outdoor advertising, the protection of minors must also be cited as a further justification since young people cannot avoid this generally present form of advertising."

33 and

34 "This channels the advertising measures for the particularly important reasons of health and youth protection in such a way that they primarily reach people who are already in a relevant sales environment with product presentation and possibly advertising sales talks."

35 The injunction defendant's argument that those who perceive the advertising are already in the sales environment in which the legislator did not intend to impose an advertising ban is not convincing. Anyone who is still outside the gas station premises is generally not yet approached by sales staff about tobacco products and has also not yet entered an area that deals - exclusively or primarily - with tobacco products.

36 If, on the other hand, one were to focus on the location of the communication act, the distinction would appear arbitrary. It would then make a difference whether an advertisement was placed on the inside of a windowpane or on the outside of the same pane. This would not be a relevant differentiation.

37 In addition to the use of advertising materials outside the store, advertising inside the store is therefore also covered if it is perceived outside.

d)

38 The injunction plaintiff violated the consumer protection prohibition from section 20a (1) sentence 1 TabakerzG through its advertising at issue, as can be seen from the above citations. This is because the exception in the following sentence 2 does not apply in its favor.

aa)

39 According to sentence 2 of this standard, the ban on operation of outdoor advertising does not apply to advertising on outdoor surfaces, including the associated window surfaces of specialist retail premises.

bb)

40 According to the official explanatory memorandum (German Bundestag document 19/19495), the relevant specialized trade is privileged here, i.e. the specialized trade for tobacco products, e-cigarettes and refill containers.

41 This exception is clearly intended to protect the advertising ban from the verdict of illegality due to a violation of Art. 12 para. 1 of the Constitution and the prohibition of excessiveness. If the advertising ban had a stifling effect on "traditional" tobacco retailers, this would constitute a violation of the constitutional protection barriers. An advertising ban would have a far more serious impact on the existence of this established profession than on companies with a mixed range of goods. It would impair them in the core area of their economic activity because it would make it impossible for them to advertise their range of goods to the outside world and thus largely cut them off from walk-in customers.

42 The exception must be understood and interpreted against this background.

cc)

43 Specialty retail is characterized by a rather narrow, often very deep, self-contained range of products with advice from specially trained sales staff (Gabler Wirtschaftslexikon, Fachgeschäft). This means that retailers that only sell cigarettes (in addition to other products) do not fall under the concept of specialist retail, i.e. retail stores with a mixed assortment (Cologne Higher Regional Court, loc. cit.), especially not grocery stores and gas stations (Horst, in: recht. Die Zeitschrift für europäisches Lebensmittelrecht, 2020, 178; cited with approval by Boch, in: Tabakerzeugnisgesetz, 2nd online edition, 2022, para. 5 on Section 20a TabakerzG). It remains to be seen whether exclusivity is required, which the parties dispute, or whether business areas traditionally associated with the specialist trade in tobacco products, such as in particular distribution of newspapers and magazines and acceptance and sale of lottery tickets, exclude the classification as specialist trade.

dd)

44 Irrespective of this, the gas station of the injunction defendant does not fulfill the requirements of the exception.

(1)

45 A gas station is not generally understood to be a specialist retail outlet for tobacco products. Its primary purpose is to supply the public with vehicle fuels. Over time, the sale of travel supplies (drinks, candy, etc.) and items that may be required on short notice for safe operation of a motor vehicle and that drivers themselves can handle (e.g. motor oil) have been added. This customization allows gas stations to also sell their product range outside the regular, legally restricted store opening hours.

(2)

46 The injunction defendant, obligated to present and substantiate the facts required for the exception, has presented nothing to show that its gas station is specialized as would be expected of a specialist retailer:

47 In large parts, its presentation does not refer to its gas station at all but is of a general and industry-related nature. In addition, the presentation is insubstantial.

48 It only gives an approximate idea of the wall space taken up by tobacco products.

Yet even in this respect it is not clear that the product range corresponds to what would be expected in a specialist store. There is a lack of meaningful information on the relationship of the product range to other product categories (e.g. beverages), and consequently also a substantiation.

49 The injunction defendant completely ignores fuel sales by referring to flat-rate payments. Such contractual arrangements do not change the fact that a gas station is primarily a place for the supply of fuel with ancillary offers that correspond to those of a general retailer and therefore cannot be regarded as a tobacco specialist retailer.

(3)

50 The injunction defendant, which bears the burden of proof and substantiation for the requirements of the exception, also fails to demonstrate that its staff are specially qualified in tobacco products.

2.

51 The injunction defendant argues without success that a decision in preliminary injunction proceedings is excluded in the present case, that the matter is too complicated to be decided in injunction proceedings, and that the economic consequences of a prohibition for the injunction defendant argue against such a decision.

a)

52 The basic decision of the legislator (see Sections 916 et seq., 935 et seq. ZPO, Sections 8, 12 et seq. UWG) is to provide the claimant with a way of securing its rights on an interim basis in order to ensure effective legal protection. The legislator has not restricted this route *de lege lata* even if the legal situation is particularly complicated or has not been clarified by the highest court. Neither of these would provide any objective reason for restricting legal protection. This is because supreme court case law already does not bind the lower courts due to the independence of the judiciary and the fact that the judges are bound solely by the law.

53 The fact that interim legal protection can reach its limits in factually or legally complicated matters is taken into account by the legislator by legal protection involving only a summary examination of the legal situation on the basis of the facts to be provided by the parties, and by the establishment of facts being facilitated by the lower standard of proof under Section 294 ZPO. The resulting structural disadvantages for the injunction defendant are offset by the fact that the decision in the injunction proceedings does not acquire substantive legal force and can be challenged at any time (see Sections 926, 927 ZPO).

b)

54 The injunction defendant does not show that there are very special circumstances in this individual case that would prevent the issuance of a preliminary injunction. In particular, its submission does not even begin to indicate that the requested injunction could threaten it in its economic existence until a decision is reached in the main proceedings. The question of whether a constitutionally compliant, restrictive interpretation could be necessary for it therefore does not arise.

C

55 The threat of an order (Section 890 ZPO) is to be issued in accordance with the application.

D

56 The decision on costs is based on Section 91 ZPO, the decision in the injunction proceedings is inherently provisionally enforceable.

57 The determination of the value in dispute is based on Section 53 GKG [Court Fees Act] in conjunction with Sections 3 et seq. ZPO, where the Senate took into account that the injunction plaintiff represents the interests of all consumers, whereas the violation in question was only very brief and very localized, and could only lead to a potential risk but not yet to any damage for the consumer.

58 For this reason, the value of € 10,000 set by the injunction plaintiff - with only indicative effect - appears appropriate for the main proceedings, from which a discount of - as usual - 25 % is to be applied in the injunction proceedings.

59 The appeal cannot be admitted. It would be inadmissible (Section 542 (2) ZPO).