UNOFFICIAL TRANSLATION

Court:	VG Munich
File number:	M 18 S 13.4834
Subject area no.	540

Legal sources:

§ 80 Para. 5 VwGO (Rules of the Administrative Courts; hereinafter: VwGO);
§ 22 Para. 2 Section 1 No. 1 b) VTabakG (Draft Tobacco Regulation; hereinafter: VTabakG)

Main points:

Advertising for tobacco products;

Particular suitability for and to encourage adolescents to start smoking

Guiding principles:

Resolution of the Chamber from December 11, 2013

Bavarian Administrative Court in Munich

In the administrative dispute

Philip Morris GmbH
represented by their Managing Director
Am Haag 14, 82166 Gräfing

- Applicant -

Authorized:
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versus

Land of Bavaria

represented by:
Landratsamt München (Munich Courthouse)
Commercial law, Health law, Veterinary
Law, Food law
Mariahilfplatz 17, 81541 Munich

- Respondent -

concerning

Ban on tobacco advertising
here: Application pursuant to § 80 Para. 5 VwGO

The Bavarian Administrative Court in Munich, Chamber 18,
through the presiding judges of the Administrative Court in Ettlingen,
Judge Hueber of the Administrative Court,
Judge Dr. Robl

without oral proceedings

on December 11, 2013

has adopted the following

Decision:

I. The suspensory effect of the appeal of October 17, 2013 against Section 1 a) of the decision of October 8, 2013 is restored.

II. The suspensory effect of the appeal against Section 1 b) of the decision of October 8, 2013 is restored as long as this Section adopts a regulation for pictures and texts of the so-called "MAYBE" campaign that were no longer used at the time of the official notification and also forbids the use of picture and text motifs of the so-called "MAYBE" campaign for a future, not yet known advertising that takes place at the time of the notification of the decision.
Apart from that (ban of the picture and text motifs of the "MAYBE" campaign), the request for the restoration of the suspensory effect of the appeal against Section 1 b) shall be rejected.

The request for the restoration of the suspensory effect of the appeal against Section 2 of the decision of October 8, 2013 shall be rejected.

The appeal against Section 5 of the decision of October 8, 2013 shall have a suspensory effect.

Of the costs arising from the proceedings, both the applicant and the respondent

shall each pay half.

The value of the dispute is set to 1,100,000 Euro.

Reasons:

I.

The Applicant is the German headquarters of the American tobacco company, Philip Morris, one of the world's largest producers of tobacco products with its head office in Gräfelfing. It's most famous cigarette brands include Marlboro, L&M and Chesterfield.

In December 2011, the Applicant started a new advertising campaign in Germany for the Marlboro product, which according to the company, is the top-selling cigarette in the world. To date, the so-called "MAYBE" campaign has been carried out in several stages, some with only single words or slogans, some also with pictures. The advertising was done as outdoor advertising with posters, Litfaß or City light pillars and posters, also with money or counter trays, posters, videos in sales outlets and restaurants, with ads in movie theaters and with flyers.

With a letter dated June 12, 2012, the Bavarian Health and Food Safety Authority (LGL) sent, for reasons of competence, a complaint to the Munich Courthouse from Prof. Dr. A. and Dr. E. from the University of Hamburg, Faculty of Economics and Social Sciences. In the letter of complaint of May 23, 2012, sent to the Bavarian State Ministry for Environment and Health, the Complainant stated that the Applicant has been running an advertising campaign for approx. a half year with outdoor advertising in six forms, which, according to many years of research on the topic of "child marketing", encourages youths and adolescents to start smoking and is therefore illegal. The campaign is based on the play on words: (Don't be a)"MAYBE (but a) BE".
They tried to represent the objective of the campaign in the external advertising.

In a letter dated June 21, 2012, the District Office in Munich requested a statement from the Applicant regarding the allegations and announced a legal assessment of the tobacco by the Bavarian Health and Food Safety Authority (LGL).

In an additional letter dated June 23, 2012, Prof. A. and Dr. E. sent the Ministry scientific justification for their assessment that the advertising conveys to the youths the idea that they will certainly never have certain experiences of success as “MAYBE”, so as Zauderer, in contrast to a determined, cool “Maker” as a “BE”. The campaign focuses on situations and values, which are particularly important and typical for youths and adolescents (e.g. independence, coolness, adventurism, glamour, being a rebel, freedom) and in this way, especially encourages youths and adolescents to smoke. Statements from the Chemical and Veterinary Investigation Office (CVUA) in Sigmaringen, the Institute for Therapy Research (IFT) in Munich, the Institute for Smoker's Consultation and Smoking Cessation in Munich and the Institute for Hygiene and the Environment in Hamburg, who share this opinion, were included.

A further complaint about the campaign was sent by the District Office in Berlin, from Mr. S. from the Smoke-Free Forum in Berlin.

In light of the fact that several federal states were occupied with the verification of the campaign, the Applicant informed the Federal Ministry of Consumer Protection, Food and Agriculture (BMELV) in a letter dated July 24, 2012 that in the interest of having an open dialog, the outdoor advertising of the campaign was suspended throughout Germany.

The Applicant made a clear statement to the Munich District Office in a letter dated July 27, 2012, that she takes youth protection very seriously and strictly adheres to the legal requirements. Advertising for tobacco products are generally not suitable for encouraging youths and adolescents to begin smoking. With reference to an enclosed expert opinion of Prof. Dr. K., she showed that the campaign is specifically targeted to adult smokers whose central values such as love, joy of life and freedom were addressed. These appealing situations for adults were used exclusively from over 30-year old models. Also other advertising, which was explicitly directed at adults, used the central concept of the campaign "MAYBE". The objective of the campaign was to encourage adult smokers to switch to the Marlboro brand.

In a letter dated August 1, 2012, Prof. A. and Dr. E. of the Bavarian Ministry for Environment and Health pointed out that new motifs for the campaign were on the way and the campaign should be stopped. The Applicant informed the Respondent on August 9, 2012 by telephone, as agreed with the Ministry, that next to the outdoor advertising, the cinema advertising has also been suspended.

In a conversation between the Applicant and the Respondent on September 20, 2012, the Applicant stated her willingness to no longer use the motifs that have been used thus far. She presented new motifs, which are not initially objectionable from the Respondent's perspective, primarily portrayals of older people and the existing advertising messages consisting of brief sentences. The Applicant offered to present each new motif to the German Agency to Combat Unfair Competition (Wettbewerbszentrale) first and shall only include it in the advertising after their approval. For this purpose, the Respondent explained that the assessment of the German Agency to Combat Unfair Competition is not binding, but is taken into consideration in the event of consumer complaints.
In conclusion, the Applicant stated that a discussion with the Ministry with respect to a voluntary no advertising policy for tobacco producers was unsuccessful due to the rejection of other competitors.

In November 2012, the Applicant continued to use poster advertising in outdoor areas, first with text and then also with new picture motifs.

In the letter from Prof. A. and Dr. E. dated November 12, 2012, which states that the continuation of the campaign is illegal, the Bavarian Ministry for Environment and Health responded in a letter dated November 22, 2012 that in the examples presented using the terms "change" and "freedom", no particular reference is made to adolescents. The Bavarian Health and Food Safety Authority also found that the new picture motifs were an improvement with regard to the protection of youths and adolescents. Findings on the effects of the new campaign on adolescents were not available since an objective assessment of the effect would be difficult, as shown by the conflicting expert reports.

Prof. A and Dr. E. sent the Respondent, in a letter dated December 3, 2012, an assessment of the continuation of the campaign, which they also considered to be illegal, since it would remind the youths of previous slogans, and would thereby encourage youths to both start smoking and to switch to Marlboro. One representative survey of 1000 youths was conducted on the "MAYBE" campaign by the German Consumer Research Association (GfK) on behalf of the Mennekes Umweltstiftung (Environmental Foundation) and confirmed the effect on youths.

At the request of the Respondent, Prof. A. and Dr. E. commented in letters dated February 4 and February 14, 2013 on the costs of the campaign, among other things (conservative

estimate of 73,738 million Euros) and made a statement in a letter dated April 10, 2013 on the expert assessment from Prof. K., presented by the Applicant.

In a letter dated May 27, 2013, the Respondent heard the Applicant with regard to the enclosed draft of an intended prohibition notice. After the repeated request by the Applicant for an extension of the time period for comments, which was granted by the Respondent and during which time a round table discussion was even held at the Bavarian Ministry for Environment and Health without success, the Applicant made a statement in a letter dated July 31, 2013. She expressed her disappointment that the Respondent had moved away from the agreement of another joint action with the involvement of the German Agency to Combat Unfair Competition. The advertising motifs from the fourth stage were no longer used. The new motifs were endorsed by the Competition Agency, as shown in the enclosed statement. The experts, who the Respondent relied on, were outright opponents of tobacco.
An immediate enforcement would lead to serious competitive disadvantages for the main competitors. It is expected that at least this would not be ordered, since the Respondent looked at the new campaign for a long time without giving any indication that this too could be legally problematic. The removal of the advertising materials could not be carried out within the prescribed period of time.

With the decision of October 8, 2013, the Respondent forbid the Applicant from using both the words “MAYBE” and “BE” (Sect. 1a) as well as the picture and text motifs (Sect. 1b) used until now within the framework of the “MAYBE” campaign.
The prohibition referred to all forms of advertising, in particular posters, money or counter trays, videos and poster in sales outlets and restaurants, cinema advertising and flyers.
Section 2 stipulates that the media still used in public areas be removed at the latest one month after the decision has been served, at which time cinema advertising and flyers must also be discontinued.
Excluded from the ban was advertising in printed publications, which is intended exclusively for persons employed in the tobacco trade or which, in their editorial content, predominantly refer to tobacco products or products which serve their use or are intended for a specific audience in information society services within the meaning of Sect. 2d of the Directive 2003/33/EC.
The immediate execution of Clauses 1 and 2 of this decision were ordered (Clause 4) and in the event of contravention to the obligations from Clauses 1 and 2 of the decision, a penalty payment in the amount of 20,000.00 Euros per violation is threatened (Clause 5).

In the event of the order or restoration of the suspensory effect of a legal remedy against the decision, the deadline has been extended for execution of the obligation up to the expiry of 14 days after annulation of this decision or of the legal force of the basic order.

In the justification, the stages of the campaign were discussed individually using the pictures enclosed with the decision as examples. Overall, the campaign is well suited for fulfilling the circumstances of § 22 Sect. 1 Clause 1 b) of the VTabakG (Draft Tobacco Regulation), which prohibits the use of advertising for tobacco products, which are particularly suitable for encouraging youths and adolescents to begin smoking. Under consideration of the smoking behavior of this group and the subject areas mentioned in the advertising of the Applicant, the University of Hamburg assumes, especially after their evaluation, that the campaign as a whole is primarily targeted to youths and adolescent smokers.

This does not only apply for the advertising up to the fourth stage, in which next to the subject areas tailored to youths, models are also placed who were guessed by youths to be considerably younger than 30 years old. Even subsequent stages, which in part only contained text, but also pictures of older people and at first glance, could be assessed as being in accordance with the law, were also illegal in view of the direct link with the previous stage upon which they build. This also applies for cinema advertising, which due to the skateboard commercial also represents a violation of § 22 II No. 1 VTabakG (Draft Tobacco Regulation) and for the other forms of advertising, which were inserted into the overall concept of the campaign.

An order as per Art. 23 GDVG (Public Health Service and Consumer Protection Act) in conjunction with Art. 7 LStVG (State Penal and Administrative Order Act) is under the obligatory discretion of the competent authorities. The issued order is suitable to prevent further violations of the law and necessary in order to assert the interests in the protection of youths and health. Most smoking careers begin, as shown in generally accessible, scientific sources of information, before the 21st year of life. Although one statistic presented by the Applicant showed that the overall number of smokers has decreased, the proportion of younger smokers has increased from 18.3% to 20.2%, whereby the calculations are based on youths up to 24 years of age. The success is considered in-house also to be as a result of the "MAYBE" campaign. Contrary to the economic interests of the tobacco industry, it is the task of the authorities to ensure protection of the groups mentioned within the law in accordance with the legal requirements. Due to the renewal of the campaign including the fourth stage through subsequent stages, it no longer has to do with the unlawfulness of individual motifs but rather more so that the entire campaign had to be suspended in order to

take the protection of youths into account and to prevent further infringements.

In the end, the order was also necessary, since the Applicant gained an unfair advantage over the other law-conforming competition through inadmissible advertising. Public interest also outweighs the interest of the Applicant and justifies the order, which could be viewed as an infringement of the right to the freedom of expression and the freedom to pursue professional activities. The Applicant still had sufficient possibilities, even after the prohibition, to advertise for her product within the scope of the law.

Although immediate enforcement hinders the Applicant from advertising further for the product, thus possibly resulting in financial losses, she has already enjoyed a financial advantage until now through the illegal advertising.

The continuation of the campaign after the filing of the action is not acceptable. The legally protected right of health protection prevails over the pure financial interests of the Applicant. Any imitation by other competitors must also be prevented. Ultimately, immediate enforcement also lies in the interest of the Applicant since she can orient herself in conformity with the law and will not make any more investments in illegal advertising.

The penalty payment appears to be necessary in the amount specified as well as reasonable in order to enforce the advertising ban. It furthermore complies with the significance of the matter as well as with the economic interest of the Applicant in not complying with the order and on the other hand, with public interest in the fulfillment of the measures provided.

By letter dated October 17, 2013, received on the same day, the Applicant filed a complaint through her representative with the Bavarian Administrative Court in Munich against the decision from October 8, 2013 and simultaneously applied for the issue of an order in accordance with § 80 Para. 5 VwGO (Rules of the Administrative Courts),

> to restore the suspensory effect of the action against Clauses 1 and 2 of the decision from October 8, 2013 and to order this in view of Clause 5 as well as to impose the cost of the proceedings on the Respondent.

As justification, it is stated that the order of the immediate enforcement disregards the justification requirements of § 80 Para. 3 Clause 1 VwGO, contradicts it formalistically and does not explain which of the legally protected rights protected under § 22 VTabakG have been violated through continuation of the campaign. With the contested decision, the Respondent is prohibiting not only the current campaign, which has been running since

2011, but rather also a variety of future advertising opportunities and campaigns. The categorical prohibition of the use of the words “MAYBE” and “BE” is out of proportion since they are words used in everyday life, which, neither on their own nor in isolated cases, are especially suitable for encouraging youths to start smoking. The particular suitability would have had to be proven in an isolated case. The legislator made a policy decision for the permissibility of tobacco advertising in certain areas. Exceptions are therefore to be interpreted restrictively. The positive portrayal of a product is no more youth-specific than the use of English expressions or words, which are especially widespread in advertising. Current values studies would contradict the assumption that the values conveyed by the campaign are targeted to youths and adolescents; it deals with universal values. The Respondent presented 33 values in detail, which, if all viewed as being youth-specific, would amount to an advertising ban. The asserted continued effect of the campaign cannot be assumed due to the short duration of the advertising and apart from that, it has not been proven. The Advertising Code of the German Tobacco Association (DZV), of which the Applicant is not a member, cannot be used here for the interpretation of the law. Regarding the GfZ study (Research Center for Geosciences), it must be noted that a comparative study over 20-year duration is lacking.

The requirements of Art. 7 Para. 2 Cl. 1 LStVG were not fulfilled. Discretion of action was not at all exercised; the Respondent abandoned the path of cooperation and violated his obligation for consistent administrative action. With the prohibition of the fourth stage or the cinema, the Respondent omitted to act in order to prevent such violations. The Applicant indicated that these advertising motifs are no longer being used. In this respect, the decision is also disproportionate. Clause 1b) is, after all, vague, since it is not clear which motifs are being referred to. Even in the event of real prospects of success in the main proceedings, it must be considered within the scope of the weighing of interests, that with the enforcement of the advertising ban, accomplished facts are being established which can no longer be reversed. The confidence in a collaborative cooperation with the Respondent, the costs of developing a new campaign and the elimination of the old motifs are substantial. The urgency of the order was also not clear since the Respondent did not intervene for a very long time despite the seemingly incriminating effect.

The Respondent applied by letter dated November 20, 2013 to have the request rejected.

The prohibited campaign is illegal and this opinion is also now also shared by the advertising

industry. The prohibition of the terms "MAYBE" and "BE" are proportionate and essential since they were used specifically and were designed to be the core of the advertising message. The effect of the campaign has been shown in various journalistic pieces as well as through the statistics on the development of smoking behavior. The Applicant still assumes that the advertising ban applies to youths up to 18 years of age.

The group of youths is heterogeneous and the advertising specifically targets risk-taking, rebellious youths. Even youths who are already smokers must still be protected. The statement by the Applicant that the purpose of her advertising is to encourage adult smokers to switch to the Marlboro brand is not credible since there is already a high degree of brand loyalty in this group of persons. The Applicant's argument implies that it is no longer possible to exercise an enforcement of the law. The motifs of the campaign are to be seen in the context of the entire campaign. Advertising for tobacco products is prohibited in general or in isolated cases if it is especially suitable for encouraging youths and adolescents to smoke. Prohibition of the terms "MAYBE" and "BE" is legitimate since these words appeared on all advertising mediums. Without the ban, additional illegal variations of the campaign would be possible. The Applicant could also not disapprove of the continuation of the campaign. Discretion has been appropriately exercised. It no longer depends on the assessment of individual motifs since the entire campaign has been evaluated as illegal. The Respondent was in contact with the Applicant in order to discuss the respective stage of the proceedings and the legal concept. Consent was not given on the part of the Respondent with regard to the procedure under inclusion of the German Agency to Combat Unfair Competition. The order under Cl. 1b) is also given since it is clearly recognizable that the order refers to all of the motifs within the scope of the motifs used. Public interest is given through the top-priority of the protection of youths and adolescents. On the other hand, the right of the Applicant to the freedom of expression is not affected since it only affects her during the distribution of her goods. The freedom to practice a profession can also be restricted by a law.

The Applicant can advertise through another campaign. Furthermore, the interests of the Applicant are only of an economic nature. Since October, the Applicant has also been using other posters. In as much as the Applicant contests the long wait for a decision by the Respondent; he apparently was checking the legal position with regard to the effects in an intensive and time-consuming manner.

By letter dated December 4, 2013, the representative of the Applicant responded to this letter by specifically stating that the order issued is vague and disproportionate and does not

pose any concrete threat for the common good, which would otherwise justify immediate enforcement.

Concerning further details, reference is made to the contents of the court record and the associated official files.

II.

The request of the Applicant, in accordance with § 80 Para. 5 VwGO, for the restoration or order of the suspensory effect of the action filed by letter of October 17, 2013 against the decision of the Munich Courthouse from October 8, 2013 is permitted but only partially justified.

1. According to § 80, Para. 5 VwGO, the court can order the suspensory effect entirely or partly in cases as specified in Paragraph 2 Clause 3, if the suspensory effect is not applicable in cases prescribed by the federal state law, among others.

   Currently, the suspensory effect is not applicable when penalty payments are threatened in accordance with Art. 21a Clause 2 BayVwVZG (Bavarian General Administrative Law Act; Cl. 5 of the decision from October 8, 2013) since in this respect, it concerned a measure of the administrative enforcement.
   If the immediate enforcement of the decision, in accordance with § 80 Para. 2 Cl. 4 VwGO has been ordered in public interest (Cl. 4 of the decision), the court can restore the suspensory effect entirely or in part.

   Within the scope of the proceedings as per § 80 Para. 5 VwGO, the court verifies whether the formal requirements have been met for the order of immediate enforcement and apart from that makes an independent discretionary decision in which the interests of the Applicant in the suspensory effect must be weighed against public interest in the immediate enforcement of the order.
   The point of departure of the discretionary decision is the chances of success of the legal remedy in the main issue, whereby in the interim proceedings, the verification of the factual and legal situation is only performed summarily.

   According to the tier-system developed in practice, there is no public interest in immediate enforcement in the event of an obvious illegality of the contested order and a resulting violation of the rights of the Applicant, whereas on the other hand, in the event of the legitimacy of the decision, the Applicant's private interest in the suspensory effect cannot be protected. If the question of the legality of an order cannot be clearly determined after a summary assessment, but there are strong indications of

legality or illegality, these must be taken into consideration when weighing the interests. If the chances of success of in the principal proceedings are completely open, because it is not possible to clear up difficult factual and legal situations in the summary proceedings, the court shall make a decision based purely on interests, in which it must also take into account whether accomplished facts have been established (cf. on this tier-system, Eyermann, 13th edition, § 80, Rn. 72 pp.).

After a summary assessment, it is very likely that the decision is not legal in all respects and therefore will not materialize to the full extent.

2. The objection of the Applicant that the order of immediate enforcement of Clauses 1 and 2 of the decision from October 8, 2013 does not fulfill the requirements of § 80 Para. 3 VwGO cannot be accepted. The obligation to state reasons in accordance with § 80 Para. 3 VwGO should make it clear to the authorities that as a general rule, the suspension of a right of appeal takes effect and they should inform the decision addressees of the motivations of the authorities. Thus the justification of immediate enforcement may not be exhausted or stereotyped by merely repeating the word of the law. On the other hand, not too many requirements can be made on the contents of the justification (Eyermann, a.a.O., Rn. 43).

   The reasons given by the Respondent for immediate enforcement, protection of health, fair competitive conditions and role model effect of the, in his opinion, illegal advertising show that he was aware of the exceptional nature of the immediate enforcement and indicates which reasons motivated him to order immediate enforcement. It is also clear that he also took into account the resulting consequences for the Applicant. Therefore, the reasoning meets the formal requirements of § 80 Para. 3 VwGO. Whether the reasons given provide a basis for immediate enforcement, is not decisive within the scope of § 80 Para. 3 VwGO (BayVGH, B.v. 10.7.08.19 CS 08.1231).

3. Furthermore, sections of the order raise legal concerns.

a) The legal basis for the order is Art. 23 of the GDVG (Public Health Service and Consumer Protection Act) in conjunction with Art. 7 Para. 2 Cl. 1 of the LStVG (State Penal and Administrative Order Act). After that, the safety services can only give instructions for such eventuality in order to realize, protect or prevent among other things, illegal acts or the factual situation of an infringement. The order could be founded on the legal foundations specified.

   In an order for the aversion of a danger according to this regulation, both the “if” as

well as the “how” of the intervention are at the discretion of the authorities.

Basically, youth protection justifies a statutory intervention of safety authorities. In selecting the measures, the principle of proportionality of the means is to be considered, that is, the means with the least impact is to be selected (Art. 8 LStVG).

b) Pursuant to § 22 Para. 2 Cl. 1b) of the VTabakG, it is prohibited to use descriptions, information, presentations, portrayals or other statements in the marketing of tobacco products or in the advertising for tobacco products in general or in the individual case, which by their nature are especially suitable for encouraging youths or adolescents to smoke.

Anyone who violates this advertising ban is committing an offence pursuant to § 53 Para. 2 Cl. 1 VTabakG.

Advertising is considered to be any kind of commercial communication with the objective or the direct or indirect effect of promoting sales of a tobacco product, in accordance with the definition in Art. 2b) of the Directive 2003/33/EC to approximate the regulations and administrative provisions of the member states concerning advertising and sponsoring for the benefit of tobacco products.

In Germany, advertising for tobacco products is permitted with restrictions. It is prohibited in specific media, e.g. television, radio and in print media, as long as this does not mean trade journals, in the Internet, in the product placement path and as sponsorship of cross-border events.

Apart from that, advertising for tobacco products is allowed, in particular outdoors, i.e. with posters and neon signs, as cinema advertising after 6:00 p.m., as advertising at the point of sale and in the form of various promotions to promote sales.

The advertising permitted for tobacco products is banned for, among other things, reasons of youth protection, which are particularly suitable for encouraging youths and adolescents to smoke. The group of people included in the protective purpose of the law does not only apply to youths until they reach the age of maturity but rather also beyond that to young people already of adult age up until the end of their 21st year.

For the “special suitability” required by law, it is not enough that the tobacco advertising also appeals to youths who are a desired target group on the advertising market, and that the concrete advertising is also or could also be suitable for encouraging youths and adolescents to smoke. This is because on the one hand, it is the objective of all tobacco advertising to convince as large of a group as possible to

smoke the advertised brand and to build up an image that bonds the smoker to the brand. Cigarettes are always sold as being “cool”, independent of a specific target group, and portray smoking in situations which should convey enjoyment, relaxation, simplicity, etc. On the other hand, it can be deemed certain that youths and adolescents are particularly receptive for advertising.

The special suitability for youths and adolescents pretty much implies that the advertising appeals to this group of persons more than to others and that their main target group consists of people younger than 21 years of age (KG Berlin, U.v. 7.4.1989, 5 U 70/89). This is the case if youth-specific characteristics are used, which could for example be the case if youths and adolescents are present in the advertising, in the use of youth-typical situations and environments, possibly also youth-typical clothing and expressions, which would be found in a typical vocabulary of youths and adolescents. Forbidden according to these standards is also advertising with celebrities, with whom youths and adolescents particularly identify (cf. in the individual case of Zipfel/Rathke, Food law, comment on VTabakG (Draft Tobacco Regulation), C 900, § 22, Rn. 16).Thereby is does not depend on the subjective purpose of the advertising from the perspective of the tobacco company, nor on the fact that the desired advertising effect actually occurs and can be measured. More decisive is the fact that this effect can be achieved using advertising that is particularly appealing to youths and adolescents. That is why in the sense of the protection of youths, the German Tobacco Association (DZV) is obligated to comply with certain rules, which should prevent children and youths from being (particularly) targeted by marketing activities, such as abstaining from using youths and adolescents as models, from naming and portraying celebrities and from other youth-typical references. The Applicant is not a member of this association.

4. Taking these principles as a basis, in relation to Clause 1a) of the contested decision, the suspensory effect of the action is to be restored, since this regulation is in any case disporportionate and in this respect, the decision was illegal in the eyes of the court.

The order prohibits the Applicant from continuing to use the words “MAYBE” and “BE” within the scope of her advertising.

There is still considerable doubt that this order satisfies the requirements of Art. 37 Para. 1 BayVwVfG. According to this regulation, an administrative decision must be sufficiently specified. From the decision, the intention of the authority must be fully expressed and that of the parties involved expressed without a doubt, so that

addressee can adjust his behavior to the specifications in the tenor expressed in connection with the reasons and on the other hand, it must be apparent to the authorities, which enforcement measures can be taken (BayVGH, B.v. 28.6.10, 10 AS 10.1074).

This is not the case here. It is not clearly identifiable whether the Applicant is only prohibited from using these two words in connection with each other, whether these words are only prohibited in this spelling or whether any use of these words within the framework of advertising from the Applicant is prohibited. However, the latter is supported by the fact that the word play with these two words is the leitmotif throughout the campaign and the Respondent expressed again in the response to the request that he wanted to prevent a continuation of the campaign through a ban on the use of the central words.

The absolute ban of the use of these two words is also disproportionate in the view of the court within the meaning of Art. 8 LStVG. The Respondent is interfering in the Applicant's freedom of expression and freedom to choose a profession in that he forbids her from any future advertising, of which he cannot possibly know whether she, through the use of one of the two or even both words, conveys an impression that even remotely reminds of the "MAYBE" campaign. A use of the words is not only forbidden within the framework of this campaign but rather also in general for every kind of advertising campaign, even if they use motifs and key concepts, which are completely detached from previous campaigns and place other values in the spotlight.

Such a significant violation through the prohibition of the use of two generally used English words, which can be used in a variety of ways and in non-foreseeable connections, no longer corresponds to the proportionality of the means used.

5. With respect to Cl. 1b) of the decision, there are some concerns regarding the legality of the order, so that the suspensory effect of the action was to be restored in parts accordingly.

This applies as long as the order refers to the advertising, which the Applicant used up to the cessation of the advertising campaign in the summer of 2012. According to a summary assessment, there is no reason for a ban, since this advertising, which in the view of the court definitely uses youth-typical motifs, is no longer used after the uncontested pleading of the Applicant. The "continued effect" presented by the Respondent can occur at best as of the date the campaign is continued with the fifth stage.

The suspensory effect was also to be restored as long as the ban applied to future, not yet known advertising of the Applicant. In Cl. 1b), it is not clear from the disposition clause, what is included in the prohibition when directed at future advertising. With regard to text motifs, it is clear from the reasons for the decision, which is to be used for determinability purposes, that all of the text motifs from the “MAYBE” campaign and their overall appearance are included in the order. Not clear is the rule concerning the picture motifs, since it is ambiguously asserted here, whether the picture motifs may not be used in future by themselves only, so without text, or also with another text.

As in Cl. 1a), the difficulty is shown in establishing regulations for advertising when it is not even known what it will look like. The assumption that future advertising, which uses individual elements of the campaigns to date, is definitely in violation of § 22 Para. 2 Sect. 1 Cl. 1b VTabakG, does not justify such an extensive ban after a preliminary examination.

Even under the inclusion of the reasons for the decision, the extent of the ban cannot be sufficiently determined. Using the advertising described in the decision, the purpose of the order is to ban the future creation of similar posters, whereby in the view of the Respondent, the ban of individual motifs was not promising. This view, which falls on the overall impression of the campaign, is fundamentally comprehensible, but does not take into consideration the fact that individual motifs (e.g. red sports car) can also be used in advertising with a completely different intention and target course. Thus, insofar as the order is directed towards the future at non-specific or specific advertising, it has not been sufficiently determined or is disproportionate.

c) Insofar as the order issued in Cl. 1 b) of the decision refers to the forms of advertising, which are being or were used after continuation of the campaign in November 2012 or until the decision was issued, the request for the restoration of the suspensory effect is to be rejected since as long as the chances of success of the main proceedings are open after a summary assessment and after the weighing of interests by the court, the public interest in the protection of youths and health outweighs the economic interests of the Applicant in continuing the campaign.

aa) There are no concerns with determinability since it is known to the Applicant, which motifs and forms of advertising she has been using within the scope of the “MAYBE” campaign since November 2012 and since the order not only applies to parts of the

campaign, but rather to the entire campaign.

There is a lot to be said for the fact that the "MAYBE" campaign violates, at least in part, § 22 Para. 2 Cl. 1b VTabakG and thus corresponds to the activity of an administrative offence in the overall impression. In view of the court, the Applicant came very close to the permissible limits within the scope of the campaign and even partially went past them.

The court does not see any youth-specific effect alone in the use of the English language. At the minimum, persons around 60 years and younger have learned English in school and grew up with the English language, e.g. through music. In the last 20 years, Anglicisms have been increasingly found (e.g. shop, public viewing, service hotline or to out yourself), the use of which comes natural to those over 21 years of age. English is also used in advertising not only for products, which are targeted to young people. In general, advertising uses about 25% English (www.wuv.de/marketing/auto-werbung_englische_werbebotschaften_erreichen_kunden_nicht from 4.16.13).

However, certain motifs and forms of advertising of the disputed campaign are especially suitable, through the presentation and statements of this kind, to encourage youths and adolescents to smoke.

Included in this are motifs from the fourth stage such as stagediving, climbing-over a fence or jumping-in-a-stream, which refer to the so-called "parcouring" (all from the fourth stage) as well as the flyers (fifth stage) included in the files and the cinema advertising, which uses the motifs used on the posters and the design of which is especially appealing to youths and adolescents. Here, youth-typical situations and youth-typical behavior is portrayed, with which the protected group of persons can identify strongly, which serve as an image for this age group and which could motivate youths and adolescents to smoke. The fact that other persons could also identify with this, does not say much about the particular suitability for youths and adolescents, since particular suitability for a certain target group is not only given if it only targets this specific group of persons. The motifs mentioned are specifically targeted to youths and adolescents, who, since smoking begins between the ages of 14 and 18 years, are an especially important target group for the tobacco industry.

Although the majority of the motifs, which according to the court were in violation of the

law, were no longer used after the fourth stage, they were still used in flyers and in cinema advertising, partially modified (e.g. older version of stagediving).

In addition, there is an undeniable possibility of the continued effect of these pictures, since the campaign was designed as an overall concept and its overall effect must be taken into account. Both parties involved presented different expert opinions for this purpose, which spoke for or against a continued effect of the disputes motifs. These cannot be used as the basis for a justified opinion of the court.

The proceedings were initially initiated by the experts, Prof. A. and Dr. E., engaged by the Respondent, in such a way that the distance required by an expert from the matter is not granted.

The survey conducted for the Mennekes Foundation by the GfK with 1000 youths also cannot be used to make an informed assessment, since, as justifiably criticized by the Applicant, it was not presented in the original and in full, but rather was only quoted. The court also cannot rely on the expert commissioned by the Applicant for an objective assessment of the general effect of the campaign on youths and in particular, the continued effect.

Thus in the main proceedings, the complete survey by the GfK shall be requested on the one hand (if necessary, also any corresponding questionnaires conducted by the Applicant of an older group of persons), and possibly an expert report shall be obtained from an appraiser ordered by the court. This is not usually offered in summary proceedings (Kopp, VwGO,
16. ed., § 80, Rn. 158).

bb) Since the chances of success of the action in this respect cannot currently be foreseen, the court only has to make a decision based purely on interests, whereby public interests and the effects of the intervention on the interests of the Applicant as well as the possibility of establishing accomplished facts was to be weighed and a prohibited pre-emption of the main proceedings was to be considered. The legal protection of the citizens carries more weight the greater the impact is and the more the administrative measures have an irrevocable effect (BVerfG, B.v. 20.12.2012, 1 BvR 2794/10 to the freedom of assembly).

After that, the public interest of youth protection and protection of health takes precedence over the (economic) interests of the Applicant in the continuation of the campaign. For orders on the prevention of danger, urgency is usually asserted if it concerns a high legally protected right and if there is justified cause to believe that the

danger trying to be prevented could manifest itself before a court decision has been made (cf. Kopp. A.a.O., Rn. 96 with further references). The last requirement could be seen as given; if the campaign is continued up until a decision is made in the main proceedings with the hearing of evidence, there is a danger that additional youths and adolescents will be encouraged by the Applicant's advertising to start smoking.

The protection of the health of youths and adolescents from the dangers caused by the consumption of tobacco products is of high value. In this way, recital 3 of the Directive 2003/33/EC points out that

according to Art. 114 Para. 3 AEUV (Treaty on the Functioning of the European Union), the commission takes a high level of protection as a basis in their recommendations in the areas of health, safety, environmental protection and consumer protection. It also states that: "With the legislation of the member states to be approximated, public health should be protected through the regulations for the sales promotion of tobacco, a product that is addictive and causes more than a half million deaths in the community, and it should be avoided that young people are encouraged by sales promotions to smoke early on in life."

On the contrary, the interference in the rights of the Applicant through the rejection of the restoration of the suspensory effect of the action does not carry that much weight, that it would put an unreasonable burden on the Applicant and would cause the interests of the Applicant to outweigh public interests

(see also BGH, U.v. 4.11.2010, I ZR 139/09). The Applicant can continue to make advertising for her product, which complies with the legal provisions and thus bridges the time until a decision is resolved in the main proceedings.

Insofar as the Applicant objects to the behavior of the Respondent, who waited so long with the order and did not inform her about the renewed concerns, which arose after the discussion on September 20, 2012 regarding the continuation of the "MAYBE" campaign, this does not lead to an assessment of the urgency. Although it makes sense to continue the dialog, there is no obligation on the part of the authority. Due to the sufficient hearing period provided, the Applicant was granted enough time to adjust and react to the new situation.

6. With regard to Cl. 2 of the decision, the request for restoration of the suspensory effect of the action was also to be rejected. This rule applies to any advertising used as of November 2012. Since the court, as stated above, also saw clear indications that

this advertising violates § 22 Para. 2 Sect. 1 Cl. 1 b) VTabakG and in this respect, has given the public interest in enforcement priority, the order was to remove or stop this advertising after a summary assessment, lawfully. It is necessary and suitable to ensure the success being aspired for.

Unlike the cessation or removal of the advertising, a ban on the continuation of the campaign cannot be achieved.

The deadline set by the Respondent corresponded to the recommendations by the Applicant and in this respect, is viewed as being reasonable. However, the deadline for removing the advertising media in outdoor areas has meanwhile expired due to the commitment by the Respondent not to enforce, and apart from that, the deadline for removal and cessation was reduced due to the proceedings so much that a new, reasonable deadline is to be set, as explained below.

7. With regard to the threat of a penalty payment in Cl. 5 of the decision from October 8, 2013, the suspensory effect of the action was to be arranged since the threat of a penalty payment is illegal. The Applicant was threatened with a penalty payment in the amount of 20,000.00 Euros per violation in the event that she should act contrary to the obligations from Nos. 1 and 2 of the decision.

The legal bases for the threat of a penalty payment are Art. 29, 31 and 36 BayVwZVG. According to Art. 36 Para. 3, a specific penalty payment must be threatened, and in accordance with Art. 36 Para. 5, the amount of the penalty payment is to be set at a certain amount.

Basically, for several necessary actions, permits or omissions, which are to be enforced by means of a penalty payment, a detailed amount is to be specified for each measure (Giehl, Administrative Procedural Law in

Bavaria, VwZVG, Art. 31, Rem. II 1 No. 1). The judgment debtor should be able to identify what he will have to face in the event of a violation.

The threat of a penalty payment is not sufficient for the requirement of certainty. It is not apparent whether the penalty payment of 20,000.00 Euros is already due if e.g. a poster has not been removed from one outdoor area. According to the wording of the threat, the same penalty payment is due for each violation, regardless of whether it refers to the continuation of the campaign, to the untimely removal of a poster in an outdoor area, to cinema advertising or to advertising in a tobacco shop. The same

amount of penalty payment is charged for a number of possible violations. This fails to recognize that the penalty payment, in accordance with Art. 31 Para. 2 BayVwZVG, should satisfy the economic interest of the person obligated. Possible violations against the orders in Clauses 1 and 2 of the decision can vary so greatly in their seriousness and in their economic impact on the Applicant, that the threat of charging the same amount for any type of violation is vague and to charge a penalty payment of 20,000.00 Euros for the most minor of violations is no longer proportional in relation to the purpose of the penalty (Art. 29 Para. 3 Clause 1 BayVwZVG).

Since the threat of a penalty payment must be associated with the setting of a deadline in accordance with Art. 36 Para. 1 Clause 2 BayVwVfG, a new threat of penalty payment requires setting a new deadline. Therefore, it does not matter, whether an expired deadline, through preliminary proceedings prior to the decision of the court, results in a violation of the threat of a penalty payment (BayVGH, B.v. 23.3.1979, BayVBl. 79, 540) or is only to be considered within the framework of Art. 37 Para. 1 Clause 1 BayVwZVG (BayVGH,
B.v. 20.12.2001, 1 ZE 01.2820).

The decision on costs is based on § 155 Para.1 VwGO.
The decision on the amount in litigation ensues from §§ 53 Para. 2 Cl. 2, 52 Para. 3 GKG. The costs for the removal were allocated in full according to the specifications of the representative of the Applicant, which states that the actual advertising of the “MAYBE” campaign must be removed according to a decision of the court in summary proceedings Further costs (production and development costs of the campaign) cannot be taken into consideration to the extent indicated in view of the fact that the campaign has been running since 2011 and the costs incurred by the Applicant have already been paid, at least in part. For this purpose, the standard value of the dispute is set to 5,000.00 in the absence of other criteria. This is notwithstanding in view of the value of the dispute.

Instructions on the right to appeal:

1. The parties concerned have the right to file a complaint with the Bavarian Administrative Court. The complaint is to be filed within two weeks after notification of the decision at the Bavarian Administrative Court in Munich,

Office address: Bayerstraße 30, 80335 Munich, or
Postal address: Po Box 20 05 43, 80005 Munich

in writing or as a record of the clerk of the referring court. The deadline is also granted if the complaint is filed within the deadline at the Bavarian Administrative Court,

Office address in Munich: Ludwigstraße 23, 80539 Munich, or
Postal address in Munich: PO Box 34 01 48, 80098 Munich,
Office address in Ansbach: Montgelasplatz 1, 91522 Ansbach

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Grounds for the complaint must be given within one month after announcement of the decision. The justification must be submitted to the Bavarian Administrative Court, insofar as not otherwise submitted with the complaint. It must contain a specific request, present the reasons from which a decision is to be amended or contested, and must address the disputed decision.

The complaint is not valid in disputes concerning costs, fees and expenses, if the value of the subject of the complaint does not exceed EUR 200.00.

Enclosed with the notice of appeal of one of the persons involved should be transcripts of the other parties involved.

Before the Bavarian Administrative Court, the parties involved must be represented by an Attorney of Record, except in legal aid proceedings. This also applies for procedural actions, through which proceedings have been initiated before the Bavarian Administrative Court. Approved as Attorneys of Record are lawyers and the academic lawyers mentioned in § 67 Para. 2 Clause 1 VwGO qualified to hold the office of a judge as well as the persons and organizations mentioned in § 67 Para. 4 Clauses 4 and 7 VwGO as well as in §§ 3, 5 RDGEG.

2. The parties involved reserve the right to file a complaint with the Bavarian Administrative Court against the fixing of the value of the dispute (Number III of the decision) if the value of the subject of the complaint exceeds EUR 200.00 or if the complaint has been approved.

The complaint is to be filed within six months after the decision becomes final or if the procedure has otherwise been discharged, to the Bavarian Administrative Court in Munich,
Office address: Bayerstraße 30, 80335 Munich, or
Postal address: PO Box 20 05 43, 80005 Munich

in writing or as a record of the clerk of the referring court.

Should the value of the dispute be set later than one month prior to the expiry of this deadline, the complaint may also be filed within one month after notification or informal communication of the determination resolution.

The notice of appeal should include four transcripts.

Representation is not mandatory to file a complaint against the value of the dispute.

Ettlinger | Hueber | Ettlinger

Judge Dr. Robl is hindered in attesting due to holidays and a transfer.