

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2010*

In Case C-540/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Oberster Gerichtshof (Austria), made by decision of 18 November 2008, received at the Court on 4 December 2008, in the proceedings

Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG

v

‘Österreich’-Zeitungsverlag GmbH,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Arabadjiev, Presidents of Chambers, E. Juhász, G. Arestis, A. Borg Barthet, P. Lindh and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 19 January 2010,

after considering the observations submitted on behalf of:

- Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, by S. Korn and G. Korn, Rechtsanwälte,

- ‘Österreich’-Zeitungsverlag GmbH, by P. Zöchbauer, Rechtsanwalt, and W. Zekert, Geschäftsführer,

- the Austrian Government, by C. Pesendorfer and A. Posch, acting as Agents,

- the Belgian Government, by T. Materne, acting as Agent,

- the German Government, by M. Lumma, J. Möller, and S. Unzeitig, acting as Agents,

— the European Commission, by F. Erlbacher and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2010,

gives the following

Judgment

- ¹ The reference for a preliminary ruling concerns Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial 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 ('the Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22; 'the Directive').
- ² The reference was made in a dispute between two newspaper publishers, Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG ('Mediaprint') and 'Österreich'-Zeitungsverlag GmbH, concerning the lawfulness or otherwise of a sale with bonuses organised by the defendant in the main proceedings.

Legal context

Union law

3 The sixth, eighth, ninth and seventeenth recitals of the Directive state:

‘(6) This Directive ... approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. ...

...

- (8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. ...
- (9) This Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorisation regimes, including those rules which, in conformity with Community law, relate to gambling activities, and to Community competition rules and the national provisions implementing them. The Member States will thus be able to retain or introduce restrictions and prohibitions of commercial practices on grounds of the protection of the health and safety of consumers in their territory wherever the trader is based, for example in relation to alcohol, tobacco or pharmaceuticals. ...
- ...
- (17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.'

4 Article 1 of the Directive provides:

‘The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests.’

5 Article 2(d) of the Directive provides:

‘For the purposes of this Directive:

...

(d) “business-to-consumer commercial practices” (hereinafter also referred to as “commercial practices”) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.’

6 According to Article 3 of the Directive:

‘(1) This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

(2) This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

(3) This Directive is without prejudice to Community or national rules relating to the health and safety aspects of products.

...'

7 Article 4 of the Directive provides:

'Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.'

8 Article 5 of the Directive, headed 'Prohibition of unfair commercial practices', reads:

'(1) Unfair commercial practices shall be prohibited.

(2) A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

...

(4) In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

(5) Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

National law

- 9 Paragraph 9a of the Federal Law on Unfair Competition of 1984 (Bundesgesetz gegen den unlauteren Wettbewerb 1984) (BGBl. I, 448/1984), as amended by BGBl. I, 136/2001 ('the UWG'), reads:

'(1) Any person who, in carrying on a competitive commercial activity,

1. announces, in public advertisements or other communications destined for a large number of persons, that he is granting to consumers free advantages (bonuses) associated with products or services, or offers, announces or grants to consumers free advantages (bonuses) linked to periodicals or

2. proposes, announces or grants to undertakings free advantages (bonuses) associated with products or services,

may be subject to an action for an injunction and damages. That also applies where the gratuitous nature of that advantage is concealed by overall prices for the products or services, by fictitious prices for a bonus or in any other manner.

(2) Subparagraph 1 above shall not apply where the advantage consists in:

1. an accessory currently used in association with the product or accessory services that are usual practice;
2. samples;
3. advertising objects characterised by a very visible and durable designation of the undertaking which makes the advertising;
4. advantages of low value (bonuses) or minor objects of low value, provided the latter are not designed to form a collection the value of which exceeds the sum of the values of the various individual objects given;

5. a given sum of money, or a sum to be calculated in a given manner, which does not accompany the product;

6. a given quantity — or a quantity simply to be calculated by fraction — of the same product;

7. the supply of information or advice or

8. the granting of a right to participate in a competition (promotional game) in which the value of the individual participation ticket (calculated by dividing the total value of the prizes at stake by the number of participation tickets distributed) does not exceed EUR 0.36 and the total value of the prize at stake does not exceed EUR 21 600; that may be done only by means of the advertiser's own participation tickets. Point 8 does not apply to advantages accompanying periodicals.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

¹⁰ From 25 November to 6 December 2007, the daily newspaper 'Österreich', belonging to the defendant in the main proceedings, organised the election of the 'footballer of

the year' and invited the public to join in that competition, by internet or by means of a voting slip appearing in the newspaper. Participation in that competition carried the prize of dinner with the footballer chosen.

- 11 Considering that that possibility of gain, subject to the purchase of the newspaper, constituted an unlawful bonus for the purposes of Paragraph 9a(1)(1) of the UWG, Mediaprint applied to the Handelsgericht Wien (Commercial Court, Vienna) for an injunction against the defendant in the main proceeding to bring that practice to an end. Whereas that court upheld the application, the Oberlandesgericht Wien (Higher Regional Court, Vienna), to which the case was referred on appeal, held that the prohibition on sales with bonuses could apply only if the gain announced was capable of encouraging the public to buy the newspaper. In the view of the appeal court, such an 'attraction effect' was not produced in this case, taking account of the fact, in particular, that the public could also participate in the competition via the internet.

- 12 Mediaprint then appealed on a point of law ('Revision') against that decision before the Oberster Gerichtshof. In its order for reference, that court begins by observing that Paragraph 9a(1)(1) of the UWG lays down a general prohibition on sales with bonuses, which is aimed at ensuring both the protection of consumers and the maintenance of effective competition. That having been stated, it is uncertain whether the Directive, which by contrast has as its objective the protection of consumers and exclusively governs relations between the latter and undertakings, precludes such a provision.

13 Taking the view that the decision to be adopted depended on the interpretation of the Directive, the Oberster Gerichtshof decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- ‘1. Do Articles 3(1) and 5(5) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial 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 (the Unfair Commercial Practices Directive) or other provisions of that Directive preclude a national provision which makes it illegal to announce, offer or give bonuses, free of charge, with periodicals and newspapers, and to announce bonuses, free of charge, with other goods or services, apart from exhaustively specified exceptions, without it being necessary in any particular case to consider whether such a commercial practice is misleading, aggressive or otherwise unfair, even where that provision serves not only to protect consumers, but also serves other purposes which are not covered by the material scope of the Directive, for example, the maintenance of media diversity or the protection of weaker competitors?

2. If the first question is answered in the affirmative, is the chance of taking part in a prize competition, which is acquired with the purchase of a newspaper, an unfair commercial practice within the meaning of Article 5(2) of the Unfair Commercial Practices Directive merely because that chance is, for at least some of those to whom the offer is addressed, not the only, but the decisive reason for purchasing the newspaper?’

14 By letter lodged at the Registry of the Court of Justice on 27 July 2009, the Austrian Government applied, on the basis of Article 44(3) of the Rules of Procedure of the Court of Justice, for the matter to be determined in the Grand Chamber.

The questions referred

The first question

- 15 By its first question, the referring court asks, in essence, whether the Directive must be interpreted as precluding a national provision which lays down a general prohibition on sales with bonuses and is designed not only to protect consumers but also pursues other objectives, such as, for example, the safeguarding of pluralism of the press and protection of the weakest competitors.
- 16 In order to reply to the question referred, it is necessary first of all to determine whether sales with bonuses, which are the subject of the prohibition at issue in the main proceedings, constitute commercial practices within the meaning of Article 2(d) of the Directive and are therefore subject to the rules laid down by that directive.
- 17 In that regard, it should be borne in mind that Article 2(d) of the Directive gives a particularly wide definition to the concept of commercial practices: ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.’
- 18 Promotional campaigns, such as those at issue in the main proceedings, which enable consumers to take part free of charge in a lottery subject to their purchasing a certain quantity of goods or services, clearly form part of an operator’s commercial strategy and relate directly to the promotion thereof and its sales development. It follows that

they constitute commercial practices within the meaning of Article 2(d) of the Directive and, consequently, come within its scope (Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraph 37 and case-law cited).

- ¹⁹ That conclusion cannot be called into question by the observations by Mediaprint and by the Austrian and Belgian Governments according to which Directive 2005/29 does not apply to the sales promotion practices at issue in the main proceedings, on the ground that they were expressly covered by a Commission proposal for a European Parliament and Council regulation (COM(2001) 546 final), amended (COM(2002) 585 final). Suffice it to note that that circumstance cannot, by itself, preclude the possibility, particularly in view of the fact that that proposal was withdrawn in 2006 and did not therefore lead to the adoption of a regulation, that such practices may constitute, in the current state of Union law, unfair commercial practices within the terms of that directive and come within its scope (*Plus Warenhandelsgesellschaft*, paragraph 33).
- ²⁰ That having been determined, it also needs to be examined whether a national provision such as Paragraph 9a(1)(1) of the UWG may fall within the scope of the Directive notwithstanding the fact that, as the referring court states, it has a more extensive purpose than that of the Directive since it is not only designed to protect consumers but also pursues other objectives.
- ²¹ As has been stated at paragraph 17 of the present judgment, the Directive is characterised by a particularly wide scope *ratione materiae* which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers. As is evident from recital 6 in the preamble to the Directive, only national legislation relating to unfair commercial practices which harm ‘only’ competitors’

economic interests or which relate to a transaction between traders is thus excluded from that scope.

- 22 That is clearly not the case with the national provision at issue in the main proceedings.
- 23 As the referring court has stated, Paragraph 9a(1)(1) of the UWG refers expressly to the protection of consumers and not only to that of competitors and other market participants.
- 24 In addition, the documents before the Court show that the UWG, which constitutes the national law on unfair competition, was amended by the Law of 13 December 2007 (BGBl. I, 79/2007), without the said Paragraph 9a being modified, precisely in order to ensure transposition of the Directive in Austria. Consequently, the national legislature took the view that that law was capable of ensuring conformity of national law with the Directive and thus, as the eighth recital thereof provides, permitted the direct protection of consumer economic interests from unfair business-to-consumer commercial practices and the ensuring, as stated in particular in Article 1 of the latter, of a 'high level of consumer protection'.
- 25 In that context, it should be recalled that, at the hearing, the Austrian Government argued that the national provision at issue in the main proceedings did not fall within the scope of the Directive in that it essentially pursues the maintenance of pluralism of the press in Austria. It thus distanced itself from the assessment of the objectives of that provision carried out by the referring court, as that assessment is apparent from paragraphs 12 and 20 of this judgment.

- 26 Even if the national provision at issue in the main proceedings does essentially pursue the maintenance of pluralism of the press in Austria, it is important to note that the possibility of Member States maintaining or establishing in their territory measures which have as their aim or effect the classification of commercial practices as unfair on grounds relating to maintenance of the pluralism of the press does not appear amongst the derogations from the scope of the Directive set out in the sixth and ninth recitals and in Article 3 thereof.
- 27 In that regard, it should be emphasised that the Directive carries out a complete harmonisation of the rules concerning unfair commercial practices of undertakings vis-à-vis consumers.
- 28 Therefore, the Austrian Government cannot validly argue that Paragraph 9a(1)(1) of the UWG falls outside the scope of the Directive in that it essentially envisages objectives relating to maintenance of the pluralism of the press.
- 29 That having been established, it is necessary to verify whether the Directive precludes a prohibition on sales with bonuses, such as that laid down in Paragraph 9a(1)(1) of the UWG.
- 30 In that regard, it should be borne in mind, first, that, since Directive 2005/29 fully harmonises the rules relating to unfair business-to-consumer commercial practices, as Article 4 of the Directive expressly provides, Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection (*Plus Warenhandelsgesellschaft*, paragraph 41 and case-law cited).

- 31 In addition, Article 5 of Directive 2005/29 provides that unfair commercial practices are to be prohibited and sets out the criteria on the basis of which practices may be classified as being unfair.
- 32 Thus, in accordance with Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts, or is likely materially to distort, the economic behaviour of the average consumer with regard to the product.
- 33 Moreover, Article 5(4) of the Directive defines two precise categories of unfair commercial practices, that is to say, ‘misleading’ practices and ‘aggressive’ practices corresponding to the criteria set out in Articles 6 and 7 and in Articles 8 and 9 of Directive 2005/29 respectively.
- 34 Lastly, Annex I to Directive 2005/29 establishes an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the Directive, are regarded as unfair ‘in all circumstances’. Consequently, as recital 17 in the preamble to Directive 2005/29 expressly states, those commercial practices alone can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the Directive.
- 35 As regards the national legislation at issue in the main proceedings, it is undisputed that practices consisting in offering consumers bonuses associated with the purchase of products or services do not appear in Annex I to the Directive. Therefore, they cannot be prohibited in all circumstances, but can be prohibited only following a specific assessment allowing the unfairness of those practices to be established.

- 36 However, Paragraph 9a(1)(1) of the UWG prohibits any commercial transaction which links the offer of bonuses with the purchase of goods or services. In other words, that type of practice is prohibited generally, without it being necessary to determine, having regard to the facts of each particular case, whether the commercial transaction at issue is 'unfair' in the light of the criteria set out in Articles 5 to 9 of the Directive.
- 37 Second, such national legislation, laying down measures which are more restrictive than those envisaged by the Directive, runs counter to the content of Article 4 of Directive 2005/29, which expressly prohibits Member States from maintaining or adopting more restrictive national measures, even where such measures are designed to ensure a higher level of consumer protection.
- 38 In those circumstances, it must be held that Directive 2005/29 precludes a prohibition, such as that provided for by the national legislation at issue in the main proceedings, of commercial offers which link the purchase of goods or services to the offer of bonuses.
- 39 The fact that Paragraph 9a(2) of the UWG lays down a certain number of exceptions to that prohibition of sales with bonuses does nothing to call such a conclusion into question.
- 40 As the Court of Justice has already held, even if those exceptions are liable to restrict the scope of the prohibition of commercial practices consisting in the linking of an offer of bonuses with the purchase of goods or services, the fact remains that, because of its limited and pre-defined nature, such an exception cannot take the place of the analysis, which must of necessity be undertaken having regard to the facts of each particular case, of the 'unfairness' of a commercial practice in the light of the criteria set out in Articles 5 to 9 of the Directive, where, as here in the main proceedings, that

practice is not listed in Annex I thereto (see *Plus Warenhandelsgesellschaft*, paragraph 53 and case-law cited).

- 41 In the light of the whole of the above, the answer to the first question must be that the Directive must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition on sales with bonuses and is not only designed to protect consumers but also pursues other objectives.

The second question

- 42 By its second question, the national court asks, in the event of an affirmative answer to the first question, whether sales with bonuses must be regarded as unfair commercial practices within the meaning of Article 5(2) of the Directive, merely on the ground that the possibility of gain represents, for at least part of the public concerned, the deciding factor which causes it to buy the main product.
- 43 As indicated in paragraph 35 of this judgment, where a commercial practice falling within the scope of the Directive does not appear in Annex I to the latter, that practice can be regarded as unfair, and thus prohibited, only after a specific assessment, particularly in the light of the criteria set out in Articles 5 to 9 of the Directive.
- 44 The fact that, for at least part of the public concerned, the possibility of participating in a competition represents the factor which determines the purchase of a newspaper constitutes one of the factors which the national court may take into account when making such an assessment.

- 45 That fact may lead the national court to consider that the commercial practice in question materially distorts or is likely materially to distort the economic behaviour of the consumer, within the meaning of Article 5(2)(b) of the Directive.
- 46 However, that fact does not in any way lead in itself to the conclusion that a sale with a bonus constitutes an unfair commercial practice within the meaning of the Directive. For that purpose, it must also be verified whether the practice in question is contrary to the requirements of professional diligence within the meaning of Article 5(2)(a) of the Directive.
- 47 In those circumstances, the answer to the second question must be that the possibility of participating in a prize competition, linked to the purchase of a newspaper, does not constitute an unfair commercial practice within the meaning of Article 5(2) of the Directive, simply on the ground that, for at least some of the consumers concerned, that possibility of participating in a competition represents the factor which determines them to buy that newspaper.

Costs

- 48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial 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 ('the Unfair Commercial Practices Directive') must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition on sales with bonuses and is not only designed to protect consumers but also pursues other objectives;**
- 2. The possibility of participating in a prize competition, linked to the purchase of a newspaper, does not constitute an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29, simply on the ground that, for at least some of the consumers concerned, that possibility of participating in a competition represents the factor which determines them to buy that newspaper.**

[Signatures]