



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

2 September 2021 *

(Reference for a preliminary ruling – Consumer protection – Directive 2005/29/EC – Unfair commercial practices – Commercial practices deemed to be unfair in all circumstances – Misleading commercial practices – First sentence of point 11 of Annex I – Advertising campaigns – Use of editorial content in the media to promote a product – Promotion financed by the trader itself – Concept of ‘payment’ – Promotion of sales of the products of the media operator company and of the trader – Advertorial)

In Case C-371/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 25 June 2020, received at the Court on 7 August 2020, in the proceedings

Peek & Cloppenburg KG, legally represented by Peek & Cloppenburg Düsseldorf Komplementär BV,

v

Peek & Cloppenburg KG, legally represented by Van Graaf Management GmbH,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, C. Toader (Rapporteur) and M. Safjan, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Peek & Cloppenburg KG, legally represented by Peek & Cloppenburg Düsseldorf Komplementär BV, by A. Auler, Rechtsanwalt,
- Peek & Cloppenburg KG, legally represented by Van Graaf Management GmbH, by A. Renck and M. Petersenn, Rechtsanwälte,

* Language of the case: German.

– the Hungarian Government, by M.Z. Fehér and Z. Biró-Tóth, acting as Agents,
– the European Commission, by B.-R. Killmann and N. Ruiz García, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 24 June 2021,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the first sentence of point 11 of Annex I to 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 ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).
- 2 The request has been made in the context of a dispute between Peek & Cloppenburg KG, legally represented by Peek & Cloppenburg Düsseldorf Komplementär BV ('P&C Düsseldorf'), and Peek & Cloppenburg KG, legally represented by Van Graaf Management GmbH ('P&C Hamburg'), companies that are legally and economically independent, concerning the question of whether an advertising campaign is unfair.

Legal context

EU law

- 3 Recitals 6 and 17 of Directive 2005/29 are worded as follows:

'(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 [EU] law, if they choose to do so. ...

...
(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. This list may be modified only by revision of the Directive.'

4 Article 1 of that 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 Under Article 2(b) of that directive, the term ‘trader’ is defined as ‘any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader’. Article 2(d) of that directive defines ‘business-to-consumer commercial practices’ as ‘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 Article 5(5) of Directive 2005/29 provides:

‘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.’

7 The first sentence of point 11 of Annex I to Directive 2005/29, entitled ‘Commercial practices which are in all circumstances considered unfair’, states that ‘misleading commercial practices’ include ‘using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). ...’

German law

8 The Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) of 3 July 2004 (BGBl. 2004 I, p. 1414), in the version applicable to the dispute in the main proceedings (BGBl. 2010 I, p. 254) (‘the UWG’), is intended, inter alia, to transpose Directive 2005/29 into German law. Paragraph 3 of the UWG and the annex to that law contain a list of commercial practices which are regarded as unfair.

9 Paragraph 3 of the UWG, entitled ‘Prohibition of unfair commercial practices’, provides:

‘1. Unfair commercial practices shall be unlawful.

...

3. The commercial practices directed at consumers listed in the annex to the present law shall always be regarded as unlawful. ...

...’

10 Point 11 of the annex to the UWG mentions ‘the use, paid for by an undertaking, of editorial content in order to promote a product, without that link with that undertaking being clearly identifiable from that content or from the visual or acoustic presentation (advertorial)’.

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

- 11 P&C Düsseldorf and P&C Hamburg are two companies that are legally and economically independent of each other and are both active in the retail sale of clothing under the company name 'Peek & Cloppenburg' through various branches. An agreement between those two companies provides for them to divide the German market into two economic areas and that each of them is to operate clothing outlets in one of those two areas. Those companies promote their clothing businesses separately and independently.
- 12 In March 2011, P&C Düsseldorf launched a nationwide advertising campaign in the fashion magazine *Grazia* by means of a double-page article which invited readers, under the heading 'Reader offer', to an evening of private sales under the title 'Grazia StyleNight by Peek & Cloppenburg'.
- 13 Against the background of images in which the designation 'Peek & Cloppenburg' featured in luminous letters above the entrances to the stores there represented, the text stated as follows: 'The night for all Grazia-Girls: Browse around the fashion temple with us after closing! Includes sparkling wine and a personal stylist. How to become a V.I.S. (Very Important Shopper)? Register right away!' It was indicated that there are two independent companies named Peek & Cloppenburg and that, in this instance, the advertisement emanated from P&C Düsseldorf. Those images displayed goods sold by that company in the course of that event.
- 14 P&C Hamburg brought an action before the Landgericht Hamburg (Regional Court, Hamburg, Germany) seeking an injunction prohibiting P&C Düsseldorf from having advertisements published, as a competitor, which are not clearly identifiable as such, and an order requiring the latter company to provide certain information and to make good the damage that P&C Hamburg claimed to have suffered by reason of that advertising campaign. In support of that action, P&C Hamburg submitted that an advertisement such as that published in the magazine *Grazia* was contrary to the prohibition of editorial content provided for in Paragraph 3(3) of the UWG, read in conjunction with point 11 of the annex to that law.
- 15 The Landgericht Hamburg (Regional Court, Hamburg) upheld that action. The appeal against the decision of the Landgericht Hamburg (Regional Court, Hamburg) lodged by P&C Düsseldorf was dismissed by the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany).
- 16 The dispute in the main proceedings was subsequently brought by P&C Düsseldorf in an appeal before the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany). That court observes that the outcome of that dispute depends on the interpretation of the first sentence of point 11 of Annex I to Directive 2005/29, transposed into German law in Paragraph 3(3) of the UWG, read in conjunction with point 11 of the annex to that law.
- 17 According to that court, the question arises as to whether the publication of the editorial content announcing the promotional campaign in question may be regarded as an 'advertorial' within the meaning of Paragraph 3(3) of the UWG inasmuch as P&C Düsseldorf and the company which publishes the magazine *Grazia* shared the costs of that event and inasmuch as P&C Düsseldorf made available to that company, free of charge, the images used in the article published in the corresponding issue of that magazine.

- 18 In that regard, the referring court takes the view that several conditions for the application of the first sentence of point 11 of Annex I to that directive are satisfied. According to its assessment, the article announcing the evening of private sales, entitled ‘Grazia StyleNight by Peek & Cloppenburg’ was indeed a ‘commercial practice’ of P&C Düsseldorf. That article, it finds, contained editorial content. The publication of that editorial content was used to promote sales of the products of P&C Düsseldorf. Lastly, that court takes the view that the link connecting that promotion and its financing with that trader was not evident with sufficient clarity from a reading of that article.
- 19 However, the referring court expresses doubts as to whether the view may be taken, in the present case, that P&C Düsseldorf ‘paid for’ the promotion of the sales of its products through the use of that editorial content within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29.
- 20 In that regard, the referring court notes that P&C Düsseldorf acknowledged that it organised the evenings of private sales in conjunction with the company which publishes the magazine *Grazia* and that the costs and expenses were borne by those two companies. P&C Düsseldorf also made its shops and staff available for the organisation of the promotional campaign in question, and assigned, without payment, to the company which publishes the magazine *Grazia* the rights to use the images published in the article which appeared in the corresponding issue of that magazine.
- 21 In those circumstances, that court is unsure, first, whether P&C Düsseldorf can be regarded as having ‘paid’, within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29, for that promotional campaign or whether such a concept presupposes that the trader in question pays a sum of money as consideration for the use of editorial content in the media in order to promote sales of its products. While, according to that court, several factors support a strict interpretation of the term ‘paid’ within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29, according to which that term covers only monetary consideration, that interpretation is not self-evident.
- 22 A comparison of the various language versions of the first sentence of that point 11 does not make it possible to exclude the possibility that that term also includes the supply of services other than monetary services. The objective of that provision is to allow the consumer to identify the promotional nature of such content, to thus understand the commercial nature of the message in question in order to be able to react appropriately to it, irrespective of whether the promotion has been paid for by the trader in cash or otherwise. That interpretation is also corroborated, in the referring court’s view, by the more general objective of Directive 2005/29, as set out in Article 1 thereof, namely that of ensuring a high level of consumer protection.
- 23 The referring court is also uncertain whether the first sentence of point 11 of Annex I to Directive 2005/29 requires the trader in question to have provided the company acting as media operator with a non-cash benefit as consideration for the use of editorial content and, if so, whether such a condition is satisfied in the case where, as here, the publication in question relates to a joint promotional event organised by that trader and that company acting as media operator with a view to promoting the sale of the products of those companies.

- 24 On the one hand, the view could be taken that any services provided by the trader concerned related solely to the organisation of the promotional event in itself, and not to the advertisement published in the magazine of which that event is the subject. On the other hand, the existence of such a link between those services and that advertisement could be acknowledged, considering that that advertising campaign and that advertisement form an inseparable whole.
- 25 In any event, according to the referring court, the provision by P&C Düsseldorf, without cost, to the company acting as media operator of rights to use the images reproduced in the editorial content in question could represent non-cash consideration in actual connection with the same advertisement.
- 26 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is there a “payment” for product promotion within the meaning of the first sentence of point 11 of Annex I to Directive [2005/29] only in the case where monetary consideration is provided for the use of editorial content in the media to promote a product, or does the term “payment” cover every kind of consideration, irrespective of whether this consists of money, goods, services or assets of any other kind?
- (2) Does the first sentence of point 11 of Annex I to Directive [2005/29] presuppose that the trader provides the company acting as media operator with a non-cash benefit as consideration for the use of editorial content and, if so, must such consideration also be assumed to be present in the case where the company acting as media operator reports on an advertisement organised in conjunction with a trader, where that trader has made image rights available to the company acting as media operator for the purposes of that report, both undertakings have contributed towards the costs and effort associated with that advertisement and the advertisement serves to promote sales of the products of both undertakings?’

Consideration of the questions referred

- 27 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether the first sentence of point 11 of Annex I to Directive 2005/29 must be interpreted as meaning that the condition of payment laid down in that provision encompasses any form of service and any economic advantage provided by the trader for the purposes of publication of an article and, if so, whether such a service must be provided as consideration for that publication.
- 28 In the first place, it should be noted that the fact that the two parties in the dispute in the main proceedings, P&C Düsseldorf and P&C Hamburg, two clothing retailers, are traders does not preclude the application, in the present case, of Directive 2005/29. As may be seen from recital 6 of that directive, it is solely national legislation relating to unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders that is excluded from the scope of that directive (judgment of 17 January 2013, *Köck*, C-206/11, EU:C:2013:14, paragraph 30 and the case-law cited).

- 29 In the present case, the prohibition of ‘advertorials’ laid down in Directive 2005/29 and transposed in the German legislation is intended to preserve consumer confidence in the neutrality of editorial content and to avoid covert advertising, both in the interests of the consumer and in that of potential competitors.
- 30 Consequently, as the Advocate General observed in points 32 and 33 of his Opinion, that directive does not, where the conditions for an unfair commercial practice are met, preclude the possibility for a competing trader to challenge such a practice before a national court.
- 31 In the second place, in order to come within the scope of Directive 2005/29, the conduct concerned must constitute commercial practices within the meaning of Article 2(d) of that directive. That will be the case where the practices in question are performed by a trader, form part of its commercial strategy and are directly connected with the promotion and sale of its products or services to consumers (judgment of 17 October 2013, *RLvS*, C-391/12, EU:C:2013:669, paragraphs 35 and 36).
- 32 In the present case, it is apparent from the order for reference that the publication of the article in question concerned an announcement of an advertisement forming part of the strategy for the sale of clothing and for ensuring customer loyalty to the retail clothing sales company P&C Düsseldorf. In those circumstances, as the Advocate General observed in points 23 and 24 of his Opinion, the fact that the publication concerned a promotional event organised in cooperation with the company acting as media operator, which also sought to promote that operator’s sales, cannot call into question the nature of that action as a ‘commercial practice’, within the meaning of Article 2(d) of that directive, attributable to the company P&C Düsseldorf.
- 33 However, the referring court has doubts as to the classification as an ‘advertorial’, within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29, of a publication concerning such a promotional event in the fashion magazine of the partner company acting as media operator, since it is common ground that P&C Düsseldorf did not pay any sum of money to that company acting as media operator in return for that publication. More specifically, that court is uncertain whether the concept of ‘payment’ within the meaning of that provision must be understood as covering only payments of sums of money, or whether that concept does in fact cover any benefit with an asset value granted by the advertising trader to the company acting as media operator concerned.
- 34 In that regard, it should be recalled that Directive 2005/29 carries out a complete harmonisation at EU level of the rules relating to unfair commercial practices of undertakings vis-à-vis consumers and establishes, in Annex I thereto, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of that directive, are regarded as unfair ‘in all circumstances’. Consequently, as recital 17 of that directive expressly states, these commercial practices alone can be deemed to be unfair in themselves without a case-by-case assessment pursuant to the provisions of Articles 5 to 9 of that directive (see, to that effect, judgment of 10 July 2014, *Commission v Belgium*, C-421/12, EU:C:2014:2064, paragraphs 55 and 56 and the case-law cited).
- 35 Thus, pursuant to the first sentence of point 11 of Annex I to Directive 2005/29, the term ‘unfair commercial practice’ covers in all circumstances the use of editorial content in the media to promote a product where a trader has paid for the editorial content, without making that clear in the content or by images or sounds clearly identifiable by the consumer, a practice commonly known as an ‘advertorial’.

- 36 It should be noted, as regards the wording of that provision, that, although certain language versions of that directive, such as Spanish (*'pagando'*), German (*'bezahlt'*), English (*'paid for'*), Dutch (*'betaald'*) or even Polish (*'zapłać'*), use concepts which suggest '*payments*' in the sense of the payment of a sum of money, other language versions, such as French (*'financer'*) or Italian (*'i costi di tale promozione siano stati sostenuti'*), use broader terms, which may include within the concept of '*payment*', within the meaning of that provision, any form of consideration having an asset value.
- 37 Nevertheless, it is settled case-law that the need for uniform application and uniform interpretation of an act of EU law makes it impossible to consider one language version of the text in isolation. (see, to that effect, judgment of 3 April 2014, *4finance*, C-515/12, EU:C:2014:211, paragraph 19). It is necessary to take into account not only the terms of a provision, but also its context and the objectives pursued by the legislation of which it forms part (judgment of 10 June 2021, *KRONE – Verlag*, C-65/20, EU:C:2021:471, paragraph 25 and the case-law cited).
- 38 As regards Directive 2005/29, the Court has held that that directive is characterised by a particularly broad scope *ratione materiae*, extending to any commercial practice which is directly connected to the promotion, sale or supply of a product to consumers and which is part of a trader's commercial strategy (judgment of 14 January 2010, *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2010:12, paragraph 39).
- 39 Thus, the objective pursued by that directive is, inter alia, to achieve a high level of protection for consumers against unfair commercial practices and is based on the assumption that, in relation to a trader, the consumer is in a weaker position, particularly with regard to the level of information, it being pointed out that it cannot be denied that there is a major imbalance of information and expertise between those parties (see, to that effect, judgments of 18 October 2012, *Purely Creative and Others*, C-428/11, EU:C:2012:651, paragraph 48, and of 12 June 2019, *Orange Polska*, C-628/17, EU:C:2019:480, paragraph 36 and the case-law cited).
- 40 In the context of the first sentence of point 11 of Annex I to that directive, that protection is given concrete expression in the field of the press and other media, in that that point requires advertising undertakings to indicate clearly that they have paid for editorial content in the media where that content is intended to promote a product or service originating from those traders (see, to that effect, judgment of 17 October 2013, *RLvS*, C-391/12, EU:C:2013:669, paragraph 48).
- 41 It follows that the first sentence of point 11 of Annex I to Directive 2005/29 was designed, inter alia, to guarantee that any publication over which the trader concerned has exercised influence in its commercial interests is indicated clearly and is understood as such by the consumer. In that context, the specific form of financing, whether by payment of a sum of money or by means of any other consideration having an asset value, has no bearing from the point of view of consumer protection or on the confidence of readers in the neutrality of the press.
- 42 As the Advocate General observed in point 60 of his Opinion, to interpret the concept of '*payment*', within the meaning of that provision, as meaning that it requires the payment of a sum of money does not reflect the reality of journalistic and advertising practice and would in large measure deprive that provision of its effectiveness.

- 43 That approach is corroborated by the Report of the European Parliament of 19 December 2013 on the application of Directive 2005/29 (2013/2116(INI)) (A 7-0474/2014). In paragraph 16 of that report, the Parliament asked the European Commission and the Member States to ensure the proper application of Directive 2005/29, in particular as regards ‘covert’ advertising on the internet through the dissemination of comments on social networks, forums or blogs, which appear to come from consumers themselves, whereas in fact they are advertising or commercial messages, directly or indirectly created or paid for by economic operators, and insists on the harmful effects of such practices on consumer confidence and on competition law.
- 44 In the case of a publication in a magazine relating to an advertising campaign organised by a trader in collaboration with the company acting as media operator in question, it is for the referring court to ascertain whether that operation itself has, at least in part, been paid for by that trader, in the sense that the latter has granted a benefit, in the form of payment of a sum of money, goods, services or any other advantage having an asset value, for that transaction, which is liable to influence the content of that publication.
- 45 As the Advocate General observed, in essence, in point 72 of his Opinion, it is apparent from the wording of the first sentence of point 11 of Annex I to Directive 2005/29 that the payment, within the meaning of that provision, must relate to the promotion of the product by means of editorial content in the media, which implies a definite link, in the sense of consideration, between the material benefit provided by the trader concerned and that editorial content. Such an interpretation is confirmed by the objective of that provision, which, as is apparent from paragraphs 40 and 41 of the present judgment, is to protect the consumer against covert advertising, that is to say, against editorial content for which the advertising traders provided benefits without indicating that fact, and to protect the confidence of readers in the neutrality of the press.
- 46 In that context, the provision, free of charge, by the trader in question to the company acting as media operator, of images protected by copyright may constitute direct payment for that publication, in so far as those images represented views of the premises and of the products offered for sale by that trader in the advertising campaign in question. That provision has an asset value and is intended to promote the trader’s product sales.
- 47 Moreover, the first sentence of point 11 of Annex I to Directive 2005/29 does not lay down any rule concerning the minimum amount of the value of the payment or the proportion of that payment in the total cost of the advertising campaign concerned, and does not preclude the company acting as media operator from itself bearing part of the publication costs in its own interest.
- 48 Furthermore, it is for the referring court to determine whether the other conditions set out in the first sentence of point 11 of Annex I to Directive 2005/29 are satisfied.
- 49 It follows from all of the foregoing considerations that the answer to the questions referred is that the first sentence of point 11 of Annex I to Directive 2005/29 must be interpreted as meaning that the promotion of a product by the publication of editorial content is ‘paid for’ by a trader, within the meaning of that provision, in the case where that trader provides consideration with an asset value for that publication, whether in the form of payment of a sum of money or in any other form, provided that there is a definite link between the payment thus made by that trader and that

publication. That will, inter alia, be the case where that trader makes available, free of charge, images protected by copyright on which are visible the commercial premises and products which it offers for sale.

Costs

- 50 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 (Sixth Chamber) hereby rules:

The first sentence of point 11 of Annex I to Directive 2005/29/EC of the European Parliament and of the Council on 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 ('Unfair Commercial Practices Directive') must be interpreted as meaning that the promotion of a product by the publication of editorial content is 'paid for' by a trader, within the meaning of that provision, in the case where that trader provides consideration with an asset value for that publication, whether in the form of payment of a sum of money or in any other form, provided that there is a definite link between the payment thus made by that trader and that publication. That will, inter alia, be the case where that trader makes available, free of charge, images protected by copyright on which are visible the commercial premises and products which it offers for sale.

[Signatures]