

European Court of Justice: Do Prize Games on Television Constitute “Teleshopping” or “Television Advertising”?

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In its Judgment of 18 October 2007 in case C-195/06, *KommAustria v. ORF*, the Court of Justice laid down a number of criteria for the purposes of determining whether a prize game organised during the broadcast of a television programme can be classified as “teleshopping” or “television advertising” within the meaning of Article 1 of the Directive 89/552/EEC (Television Without Frontiers Directive).

The present judgment originates from a reference for a preliminary ruling submitted by the Austrian *Bundeskommunikationssenat* in the proceedings between the Austrian Communications Authority, *KommAustria*, and the Austrian public service broadcaster, ORF, concerning a prize game broadcast by the latter during a programme called “Quiz-Express”. In the course of that programme, the presenter would make an offer to the public to participate in a prize game by dialling a premium rate telephone number displayed on the screen. Some of the callers would then be asked to answer a question on the programme, others, who were not put through to the programme, would participate in a “weekly prize” draw. Seeing that the applicable national provisions transposed Directive 89/552/EEC, the *Bundeskommunikationssenat* decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling: (1) whether the notion of “teleshopping” under Article 1(f) of Directive 89/552/EEC must be interpreted so as to include broadcasts, or parts of broadcasts, in which the television broadcaster offers viewers the opportunity to participate in the broadcaster’s prize games by means of immediately dialling premium rate telephone numbers, and thus in return for payment; and (2) whether announcements made in broadcasts, or parts of broadcasts, such as the ones above constitute “television advertising” within the meaning of Article 1(c) of the aforesaid Directive.

As a preliminary point, the Court observed that the definitions of “television advertising” and “teleshopping” must be given an autonomous and uniform interpretation throughout the Community, having regard to the objective pursued by Directive 89/552/EEC. Drawing on its ruling in the *RTLcase*, the ECJ averred that an essential aspect of the objective of that Directive is “the protection of consumers, as viewers, from excessive advertising”, thus substantially departing from its earlier opinion in the case of *ARD*, whereby it held that “when a provision of Directive 89/552/EEC imposes a restriction on broadcasting and on the

distribution of television broadcasting services, and the Community legislature has not drafted that provision in clear and unequivocal terms, it must be given a restrictive interpretation” (the so-called *in dubio pro libertate* principle).

As regards the first question submitted by the Austrian court, the notion of “teleshopping” is defined in Article 1(f) of Directive 89/552/EEC as “direct offers broadcast to the public with a view to the supply of goods or services, [...] in return for payment”. In this respect, the Court first suggested that, in the present case, ORF may in fact be making a service available to the viewer in return for payment by allowing him to participate in a prize game. Indeed, by dialling the premium rate telephone number displayed on the screen, the viewer participated in the activity offered by the broadcaster in return for payment, and it is well-established in the Community Courts’ case-law that an activity which enables users, in return for payment, to participate in a prize game may constitute a supply of services. However, the Court pointed out that the categorisation of the game at issue as “teleshopping” called for a factual assessment, to be carried out by the national court, as to whether that broadcast or part of the broadcast constituted “a real offer of services”. For instance, this would not be the case if it were established, as in *Familiapress*, that the game constitutes a mere offer of entertainment within the broadcast. The ECJ further ruled that, in the context of that assessment, the national court must take account of the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast as a whole in terms of time and of anticipated economic effects in relation to the economic benefits that are expected in respect of that broadcast, and also the type of questions that the candidates are asked.

The ECJ followed a similar reasoning in respect of the second question referred by the Austrian court as to whether the invitation to viewers to dial a premium rate telephone number in order to participate, in return for payment, in a prize game constituted either a form of announcement broadcast or a broadcast for self-promotional purposes by an undertaking in connection with a trade in order to promote the supply of goods or services, and could thus be regarded as “television advertising”. In that regard, the Court noted that, indisputably, the television broadcaster sought, through that announcement and the attendant prize game, to promote its broadcast by encouraging viewers to watch it. In the ECJ’s view it did not follow, however, that any form of announcement seeking to make the broadcast more attractive constituted television advertising.

Conversely, the ECJ observed that the game may consist in indirectly promoting the merits of the broadcaster’s programmes in general, hence the announcement made by that broadcast could be regarded as “television advertising” in the form of self-promotion. This would particularly be the case if the questions given to the candidate related to his knowledge of other broadcasts by that body or if the prizes to be won consisted of derivative goods serving to promote those programmes, such as video recordings and so on. Hence, the ECJ concluded that it

is once again for the national court to determine whether the game at issue is covered by the definition given by Article 1(c) of “television advertising”. This would hold true, in particular, if, on the basis of the purpose and content of that game and the circumstances in which the prizes to be won are presented, it were established that the game consists of an announcement that seeks to encourage viewers to buy the goods and services presented as prizes to be won or seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self-promotion.

Judgment of the Court (Fourth Chamber) of 18 October 2007, Case C-195/06, Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF)

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