

Court of Justice of the EC: Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag

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In Germany the company Heinrich Bauer Verlag publishes a weekly magazine offering its readers the possibility of participating in games and puzzles with prizes ranging from DEM 500 to 5,000. These prizes are awarded by drawing lots among readers who have sent in the correct reply. Heinrich Bauer Verlag also distributes the publication in Austria.

However, Austrian law imposes a total ban on lotteries/draws in the press, activities which are permitted under German law.

An Austrian magazine publisher took legal proceedings against Heinrich Bauer Verlag, with the aim of stopping the sale of such publications on Austrian territory. Confronted with two opposing national legislations, the Austrian courts referred the matter to the Court of Justice for a ruling on the compatibility of Austrian legislation with Article 30 of the EC Treaty.

Article 30 prohibits quantitative restrictions on imports among Member States, as well as all measures of equivalent effect. The Court considered that overriding requirements might, however, prevail over the exigencies of free movement of goods. Such overriding requirements must be interpreted in the light of general legal principles and, in particular, fundamental rights such as freedom of expression (Article 10 of the European Convention on Human Rights).

The Court decided that maintaining press pluralism was likely to constitute an overriding requirement of this kind, since it contributes to safeguarding freedom of expression.

To justify a restriction on the free movement of goods, the provisions of national law that arguably constitute an overriding requirement must be proportionate to the objective pursued, and, moreover, that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade. In its judgement, the Court refers to a previous case (Schindler judgement of 24 March 1994, C-275/92) regarding lottery activities on a large scale in which, for reasons related to the maintenance of order in society, it had been left to the national authorities to assess the need to restrict or ban such activities, on condition that the restrictions were not discriminatory.

The Court did not consider maintenance of order in society an issue in the present case. It stated that the draws in question were organised on a small scale and that less was at stake; they did not constitute an economic activity in their own right but were merely one aspect of a magazine's editorial content. Finally, under Austrian legislation draws were prohibited only in the press.

The Court noted that prohibiting the sale of publications which offered the chance to take part in prize game competitions might detract from freedom of expression. However, on this point it referred to the European Court of Human Rights 1 (Informationsverein Lentia e.a . vs. Austria judgement, Series A vol. 276), which accepts, on the basis of Article 10, that derogations may be made from freedom of expression in order to ensure that press diversity is maintained, on condition that such derogations are prescribed by law and necessary in a democratic society. In conclusion, the Court observed that it should be examined whether Austrian legislation was proportionate to the aim of maintaining press diversity and whether this objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.

It was for the Austrian courts to determine whether periodicals presenting such games, puzzles and competitions, with the possibility of winning prizes, were in competition with the small newspaper publishers, which are deemed to be unable to offer comparable prizes, and whether the prospect of winning was likely to bring about a shift in demand. The Court also invited the national courts to examine the extent to which the product concerned could be replaced by papers which, from the consumer's standpoint, did not offer prizes.

Finally, the Court held that in order to be proportionate to its objective, national legislation should not constitute a barrier to the marketing of periodicals which, whilst containing games, puzzles and competitions offering prizes, do not offer readers living in the Member State concerned the possibility of winning a prize.

Court of Justice of the EC, 26 June 1997, Case C-368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH vs. Heinrich Bauer Verlag

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