

JUDGMENT OF THE COURT
26 June 1997

In Case C-368/95,

REFERENCE to the Court under [Article 267 TFEU] by the
Handelsgericht Wien, for a preliminary ruling in the proceedings pending
before that court between

Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH

and

Heinrich Bauer Verlag

on the interpretation of [Article 34 TFEU],

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C.
Moitinho de Almeida and L. Sevón (Presidents of Chambers), C. N.
Kakouris, P. J. G. Kapteyn, C. Gulmann, P. Jann, H. Ragnemalm, M. Wathelet
(Rapporteur) and R. Schintgen, Judges,

Advocate General: G. Tesauro,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Heinrich Bauer Verlag, by Michael Winischhofer, Rechtsanwalt, Vienna,
- the Austrian Government, by Franz Cede, Botschafter in the Federal Ministry of Foreign Affairs, acting as Agent,
- the German Government, by Ernst Roder, Ministerialrat in the Federal Ministry of Economic Affairs, and Sabine Maass, Regierungsratin z. A. in the same Ministry, acting as Agents,
- the Belgian Government, by Jan Devadder, Director of Administration in the Legal Department of the Ministry of Foreign Affairs, acting as Agent,
- the Netherlands Government, by J. G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- the Portuguese Government, by Luis Fernandes, Director of the Legal Department in the European [Union] General Directorate of the Ministry of Foreign Affairs, Antonio Silva Ferreira, Inspector Geral de Jogos in the Ministry of Economic Affairs, and Angelo Cortesao Seia Neves, Lawyer in the European [Union] General Directorate of the Ministry of Foreign Affairs, acting as Agents,

— the Commission of the European [Union], by Claudia Schmidt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Heinrich Bauer Verlag, represented by Michael Winischhofer, Harald Koppehele, Rechtsanwalt, Hamburg, and Torsten Stein, Professor in the University of Saarbrücken; the Austrian Government, represented by Christine Stix-Hackl, Legationsrätin in the Federal Ministry of Foreign Affairs, acting as Agent; the German Government, represented by Bernd Klope, Oberregierungsrat in the Federal Ministry of Economic Affairs, acting as Agent; the Netherlands Government, represented by J. S. van den Oosterkamp, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Portuguese Government, represented by Angelo Cortesao Seia Neves, and the Commission, represented by Claudia Schmidt, at the hearing on 12 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1997,

gives the following

Judgment

- 1 By order of 15 September 1995, received at the Court on 29 November 1995, the Handelsgericht Wien (Commercial Court,

Vienna), referred to the Court for a preliminary ruling under [Article 267 TFEU] a question on the interpretation of [Article 34 TFEU].

- 2 That question was raised in proceedings brought by Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH ('Familiapress'), an Austrian newspaper publisher, against Heinrich Bauer Verlag, a newspaper publisher established in Germany, for an order that the latter should cease to sell in Austria publications offering readers the chance to take part in games for prizes, in breach of the Gesetz über unlauteren Wettbewerb 1992 (Austrian Law on Unfair Competition; 'the UWG').
- 3 Heinrich Bauer Verlag publishes the weekly magazine 'Laura' in Germany, which it also distributes in Austria. The 22 February 1995 issue contained a crossword puzzle. Readers sending in the correct solution were entitled to be entered in a draw for two prizes of DM 500. There were two other puzzles in the same issue, for prizes of DM 1 000 and DM 5 000 respectively, which were also to be awarded by drawing lots among the persons sending in the correct answers. The following issues invited readers to play similar games. Each issue indicated that there would be more puzzles the following week.
- 4 According to the order for reference, that practice is contrary to Austrian law. Paragraph 9a(1)(1) of the UWG contains a general prohibition on offering consumers free gifts linked to the sale of goods or the supply of services. Paragraph 9a(2)(8) of the UWG authorizes prize competitions and draws for which 'the value of the potential individual entries, obtained by dividing the total number of prizes at stake by the number of entry vouchers (lots) distributed, does not exceed 5 schillings and the total value of the prizes competed for does not exceed 300 000 schillings', this, however, was declared inapplicable to the press by an amending law of 1993. Consequently, there has, since then, no longer been any exception to the prohibition on publishers of periodicals inviting consumers to take part in draws.

- 5 Since there is no provision to the same effect in the German Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition), the Handelsgericht Wien took the view that the prohibition of the sale of periodicals under the UWG potentially affected intra-[Union] trade. It therefore stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is [Article 34 TFEU] to be interpreted as precluding application of legislation of Member State A prohibiting an undertaking established in Member State B from selling in Member State A a periodical produced in Member State B, where that periodical contains prize puzzle competitions or games which are law- fully organized in Member State B?'

- 6 Under [Article 34 TFEU], quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.
- 7 The Court has consistently held that any measure capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade constitutes a measure having an effect equivalent to a quantitative restriction (Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5).
- 8 It should also be borne in mind that, in accordance with the case-law beginning with *Cassis de Dijon* (Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649), in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition,

Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of [Article 34 TFEU].

- 13 The Austrian Government and the Commission argue, however, that the aim of the national legislation in question is to maintain press diversity, which is capable of constituting an overriding requirement for the purposes of [Article 34 TFEU].
- 14 They point out that shortly after the Gesetz über die Deregulierung des Wettbewerbs (Law on the Deregulation of Competition) entered into force in Austria in 1992 and liberalized *inter alia* the organization of prize competitions, fierce competition set in between periodicals publishers, as a result of their offering larger and larger gifts, in particular the chance to take part in prize competitions.
- 15 Fearing that small publishers might not be able to resist that cut-throat competition in the long term, in 1993 the Austrian legislature excluded the press from the application of Paragraph 9a(2)(8) of the UWG which, as mentioned in paragraph 4 of this judgment, authorizes to a certain extent the organization of prize competitions and draws linked to the sale of products or the supply of services.
- 16 In the explanatory memorandum of the relevant bill, the Austrian Government pointed out in particular that, given the relatively low selling price of periodicals, especially of daily newspapers, there was a risk, in spite of the limits to prizes set by Article 9a(2)(8) of the UWG, that consumers would attach more importance to the chance of winning than to the quality of the publication (explanatory memorandum of the Government bill, RV 365 Blg No 18. GP).
- 17 The Austrian Government and the Commission also point to the

very high degree of concentration of the press in Austria. The Austrian Government states that in the early 1990s the market share of the largest press group was 54.5% in Austria, as compared with only 34.7% in the United Kingdom and 23.9% in Germany.

- 18 Maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the [Union] legal order (see Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraph 30, and Case C-148/91 *Vereiniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, paragraph 10).

- 19 However, the Court has also consistently held (*Cassis de Dijon*, cited above; Case C-238/89 *Pall* [1990] ECR I-4827, paragraph 12, and Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 15) that the provisions of national law in question must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-[Union] trade.

- 20 Admittedly, in Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 61, concerning freedom to provide services, the Court held that the special features of lotteries justify allowing national authorities a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. The Court therefore considered that it was for the national authorities to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

- 21 Games such as those at issue in the main proceedings are not, however, comparable to the lotteries the features of which were considered in *Schindler*.
- 22 The facts on which that judgment was based were concerned exclusively, as the Court expressly pointed out, with large-scale lotteries in respect of which the discretion enjoyed by national authorities was justified because of the high risk of crime or fraud, given the amounts which could be staked and the winnings which could be held out to players (paragraphs 50, 51 and 60).
- 23 By contrast, such concerns for the maintenance of order in society are not present in this case. The draws in question are organized on a small scale and less is at stake; they do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine; and under Austrian legislation, draws are prohibited only in the press.
- 24 Furthermore, it is to be noted that where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights (see Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43).
- 25 Those fundamental rights include freedom of expression, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*ERT*, paragraph 44).
- 26 A prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does,

however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society (see the judgment of the European Court of Human Rights of 24 November 1993 in *Informationsverein Lentia and Others v Austria* Series A No 276).

- 27 In the light of the considerations set out in paragraphs 19 to 26 of this judgment, it must therefore be determined whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-[Union] trade and freedom of expression.
- 28 To that end, it should be determined, first, whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand.
- 29 It is for the national court to determine whether those conditions are satisfied on the basis of a study of the Austrian press market.
- 30 In carrying out that study, it will have to define the market for the product in question and to have regard to the market shares of individual publishers or press groups and the trend thereof.
- 31 Moreover, the national court will also have to assess the extent to which, from the consumer's standpoint, the product concerned can be replaced by papers which do not offer prizes, taking into account all the circumstances which may influence the decision to purchase, such as the presence of advertising on the title page referring to the

chance of winning a prize, the likelihood of winning, the value of the prize or the extent to which winning depends on a test calling for a measure of ingenuity; skill or knowledge.

- 32 The Belgian and Netherlands Governments consider that the Austrian legislature could have adopted measures less restrictive of free movement of goods than an outright prohibition on the distribution of newspapers which afford the chance of winning a prize, such as blacking out or removing the page on which the prize competition appears in copies intended for Austria or a statement that readers in Austria do not qualify for the chance to win a prize.
- 33 The documents before the Court suggest that the prohibition in question would not constitute a barrier to the marketing of newspapers where one of the above measures had been taken. If the national court were nevertheless to find that this was the case, the prohibition would be disproportionate.
- 34 In the light of the foregoing considerations, the answer to be given to the national court's question must be that [Article 34 TFEU] is to be interpreted as not precluding application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions which are lawfully organized in that State, provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means. This assumes, *inter alia*, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand. Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It

is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

Costs

- 35 The costs incurred by the Austrian, German, Belgian, Netherlands and Portuguese Governments and the Commission of the European [Union], which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Handelsgericht Wien, by order of 15 September 1995, hereby rules:

[Article 34 TFEU] is to be interpreted as not precluding application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions which are lawfully organized in that State, provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means. This assumes, *inter alia*, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition

with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand. Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

Rodriguez Iglesias
Sevon

Mancini
Kakouris

Moitinho de Almeida
Kapteyn

Gulmann

Jann

Ragnemalm Wathelet Schintgen

Delivered in open court in Luxembourg on 26 June 1997.

R. Grass

G. C. Rodriguez Iglesias

Registrar

President