JUDGMENT OF THE COURT (Third Chamber)

9 June 2011 *

In Case C-52/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Simvoulio tis Epikratias (Greece), made by decision of 23 December 2009, received at the Court on 1 February 2010, in the proceedings

Eleftheri tileorasi AE 'ALTER CHANNEL',

Konstantinos Giannikos

v

Ipourgos Tipou kai Meson Mazikis Enimerosis,

Ethniko Simvoulio Radiotileorasis,

* Language of the case: Greek.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 March 2011,

after considering the observations submitted on behalf of:

— Eleftheri tileorasi AE 'ALTER CHANNEL' and Mr Giannikos, by D. Sarafianos, dikigoros,

— the Greek Government, by A. Samoni-Rantou, E.-M. Mamouna and N. Marioli, acting as Agents,

— the Latvian Government, by K. Drēviņa and M. Borkoveca, acting as Agents,

— the Swedish Government, by C. Meyer-Seitz and S. Johannesson, acting as Agents,

— the European Commission, by C. Vrignon and D. Triantafyllou, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(d) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552').

2 The reference has been made in proceedings between, on the one hand, Eleftheri tileorasi AE 'ALTER CHANNEL' ('Eleftheri tileorasi') and Mr Giannikos and, on the other, the Ipourgos Tipou kai Meson Mazikis Enimerosis (Minister for the Press and the Mass Media) and the Ethniko Simvoulio Radiotileorasis (National Council for Radio and Television) ('ESR') concerning the decision of the ESR imposing a fine on Eleftheri tileorasi and Mr Giannikos for infringement of provisions of national law relating to surreptitious advertising.

Legal context

European Union ('EU') law

3 The 27th recital in the preamble to Directive 89/552 states:

'… in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.'

4 Under Article 1(c) and (d) of Directive 89/552:

'For the purpose of this Directive:

…

(c) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(d) "surreptitious advertising" means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.'

5 Under Article 10(1) and (4) of Directive 89/552:

'1. Television advertising and teleshopping shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.

…

4. Surreptitious advertising and teleshopping shall be prohibited.'

National legislation

6 Article 1(d) of Directive 89/552 has been transposed into Greek law by Presidential Decree 100/2000 concerning surreptitious advertising (FEK A' 98).

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

7 Eleftheri tileorasi is a company which owns and operates a private television channel called 'ALTER CHANNEL'.

8 Mr Giannikos is the chairman and managing director of that company.

9 During a programme broadcast on that television channel on 12 November 2003, three sequences were given over to the presentation of a cosmetic dental treatment.

10 During the first sequence, throughout which the caption 'she's changing her smile' appeared at the bottom of the screen, the presenter of the programme spoke with a dentist who, in front of one of her patients, stated that that treatment was a global innovation and that she would demonstrate its effects on the teeth of the patient, who would acquire a perfect natural smile within two hours. The dentist gave some explanations about the efficacy of the method and emphasised that it gave a perfect natural smile. In response to a question from the presenter of the programme, she also provided information about the cost of the treatment in question.

11 During the programme, photographs were shown of the patient before the treatment, so that viewers could make a comparison.

12 During the second sequence, the patient appeared with corrections to two upper incisors and, in the third sequence, the patient was filmed after completion of the treatment.

13 The television presenter then stated that the treatment for obtaining a natural smile had indeed been completed in two hours.

14 Someone present on the television set of the programme in question told the presenter that she, too, wanted such a smile. The dentist asked her to show her teeth via the television screen, and then made an appointment with the person over the telephone.

15 By decision No 63/10.3.2004, the ESR imposed a fine of EUR 25 000 on Eleftheri tileorasi and Mr Giannikos, on the ground that the television programme in question contained surreptitious advertising.

16 Eleftheri tileorasi and Mr Giannikos lodged an action for annulment of that decision before the referring court.

17 In those circumstances, the Simvoulio tis Epikratias (Council of State) (Greece) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 1(d) of Directive [89/552] to be interpreted as meaning that, in the context of "surreptitious advertising", the provision of payment or of consideration of another kind is a necessary defining element of the intention to advertise?'

Consideration of the question referred

18 By its question, the referring court asks essentially whether Article 1(d) of Directive 89/552 is to be interpreted as meaning that the provision of payment or of consideration of another kind is a necessary condition for establishing the element of intent in surreptitious advertising.

19 It should be borne in mind that, under Article 1(d) of Directive 89/552, 'surreptitious advertising' means 'the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature'.

20 In that connection, that provision also states that a 'representation is considered to be intentional in particular if it is done in return for payment or for similar consideration'.

21 However, the adverb or adverbial phrase meaning 'in particular', used in the Spanish, German, English and French versions of the second sentence of Article 1(d) of Directive 89/552, does not appear in the Greek version of that provision.

22 In that connection, it should be pointed out that such an adverbial expression was included in the Greek version of the definition of 'surreptitious audiovisual commercial communication' in the second sentence of Article 1(j) of Directive 89/552, as amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 332, p. 27), and reproduced in the Greek version of that definition, set out in the second sentence of Article 1(j) of Directive 2010/13/EU

of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ('Audiovisual Media Services' Directive) (OJ 2010 L 95, p. 1).

23 According to settled case-law, the need for uniform application and accordingly a uniform interpretation of the provisions of EU law makes it impossible for one version of the text of a provision to be considered, in case of doubt, in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages (Case C-63/06 *Profisa* [2007] ECR I-3239, paragraph 13 and the case-law cited).

24 Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (*Profisa*, paragraph 14 and the case-law cited).

25 According to the 27th recital in the preamble thereto, the aim of Directive 89/552 is to ensure that the interests of consumers as television viewers are fully and properly protected.

26 In that regard, that recital specifies that, in order to meet that objective, it is essential for television advertising to be made subject to a certain number of minimum rules and standards.

27 It is in that context that Article 10(4) of Directive 89/552 prohibits surreptitious advertising.

28 The notion of 'surreptitious advertising', as defined in Article 1(d) of Directive 89/552, constitutes in relation to 'television advertising', as defined in Article 1(c) of that directive, a separate notion which meets specific criteria.

29 In particular, Article 1(d) of Directive 89/552 states that surreptitious advertising must be 'intended by [a] broadcaster to serve advertising'.

30 In that context, the second sentence of Article 1(d) of Directive 89/552 establishes a presumption in accordance with which a representation of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes is to be considered to be intentional if that representation is done in return for payment or for similar consideration.

31 However, that provision should not be so narrowly construed that such a representation may be regarded as intentional only if it is done in return for payment or for similar consideration.

32 Neither the wording of the presumption established in Article 1(d) of Directive 89/552 nor the purpose and general scheme of Directive 89/552 support such an interpretation.

33 On the contrary, such an interpretation could undermine the full and proper protection of the interests of television viewers – as sought by Directive 89/552, in particular through the prohibition of surreptitious advertising laid down in Article 10(4) of that directive – and, furthermore, could deprive that prohibition of its effectiveness, given the difficulty, or even the impossibility, in certain cases of proving that there has been provision of payment or of consideration of another kind for advertising

which nevertheless displays all the characteristics, set out in paragraph 19 above, of surreptitious advertising.

34 It follows that, whilst the provision of payment or of consideration of another kind is a criterion indicative of a television broadcasting company's intention to advertise, it is none the less clear from the wording of Article 1(d) of Directive 89/552, and from the purpose and general scheme of that directive, that the lack of such payment or consideration of another kind does not mean that the existence of such an intention can be ruled out.

35 Moreover, it should be borne in mind that, according to the 27th recital in the preamble to Directive 89/552, in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential that the Member States maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.

36 Accordingly, it is open to Member States to provide in their legislation other criteria – in addition to the provision of payment or of consideration of another kind – for establishing the intentional nature of surreptitious advertising.

37 In those circumstances, the answer to the question referred is that Article 1(d) of Directive 89/552 is to be interpreted as meaning that the provision of payment or of consideration of another kind is not a necessary condition for establishing the element of intent in surreptitious advertising.

Costs

38 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 (Third Chamber) hereby rules:

Article 1(d) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, is to be interpreted as meaning that the provision of payment or of consideration of another kind is not a necessary condition for establishing the element of intent in surreptitious advertising.

[Signatures]