JUDGMENT OF THE COURT (Fourth Chamber)

18 October 2007 *

In Case C-195/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundeskommunikationssenat (Austria), made by decision of 4 April 2006, received at the Court on 27 April 2006, in the proceedings

Kommunikationsbehörde Austria (KommAustria),

v

Österreichischer Rundfunk (ORF),

THE COURT (Fourth Chamber),

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

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 29 March 2007,

after considering the observations submitted on behalf of:

— the Kommunikationsbehörde Austria (KommAustria), by M. Ogris, acting as Agent,

— the Österreichischer Rundfunk (ORF), by S. Korn, Rechtsanwalt,

— the Italian Government, by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato,

— the Portuguese Government, by L. Fernandes and J. Marques Lopes, acting as Agents,

— the United Kingdom Government, by T. Harris and M. Hoskins, acting as Agents,

— the Commission of the European Communities, by G. Braun and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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 the course of proceedings between the Kommunikationsbehörde Austria (KommAustria) (Austrian Communications Authority, 'KommAustria') and the Österreichischer Rundfunk (ORF) ('ORF') regarding the classification as 'teleshopping' or 'television advertising' of a prize game organised during the broadcast by ORF of a programme called 'Quiz-Express'.

Legal context

Community legislation

3 According to the 13th recital in the preamble to Directive 89/552:

'... this Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting; ...'

4 The 27th recital in the preamble to Directive 89/552 provides:

'... 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;'

5 Article 1 of Directive 89/552 provides:

'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;

...

(f) "teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment'.

6 Article 10 of Directive 89/552 provides:

'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.

2. Isolated advertising and teleshopping spots shall remain the exception.

3. Advertising and teleshopping shall not use subliminal techniques.

4. Surreptitious advertising and teleshopping shall be prohibited.'

7 According to Article 18 of Directive 89/552:

'1. The proportion of transmission time devoted to teleshopping spots, advertising spots and other forms of advertising, with the exception of teleshopping windows within the meaning of Article 18a, shall not exceed 20% of the daily transmission time. The transmission time for advertising spots shall not exceed 15% of the daily transmission time.

2. The proportion of advertising spots and teleshopping spots within a given clock hour shall not exceed 20%.

3. For the purposes of this Article, advertising does not include:

— announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes,

— public service announcements and charity appeals broadcast free of charge.'

National legislation

8 The Federal law on the Austrian Broadcasting Corporation (Bundesgesetz über den Östereichischen Rundfunk, BGBl. I, 83/2001, 'the ORF-Gesetz') transposed Directive 89/552 into the domestic legal system.

9 Paragraph 13(1) to (3) of the ORF-Gesetz provides:

'1. [ORF] may allocate broadcasting time within its radio and television schedule for commercial advertising in return for payment. Commercial advertising is any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes 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.

2. [ORF] is prohibited from allocating broadcasting time for direct offers to the public for the supply of goods or services, including immovable property, rights and obligations, in return for payment (teleshopping).

3. Advertising must be readily recognisable as such. It must be clearly separated from other parts of the programme service by optical and/or acoustic means.'

10 Paragraph 11 of the Federal Act on the establishment of an Austrian Communications Authority and a Federal Communications Board (Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria und eines Bundeskommunikationssenates, BGBl. 32/2001, 'the KOG'), in the version in force at the time of the facts, provides:

'1. A Bundeskommunikationssenat responsible for monitoring the decisions of KommAustria and overseeing [ORF] shall be set up at the Federal Chancellery.

2. The Bundeskommunikationssenat shall decide at last instance:

— on appeals against decisions of KommAustria, with the exception of appeals concerning administrative penalties,

— on complaints and applications, and in proceedings for administrative infringements, under the provisions of the ORF-Gesetz.

3. The decisions of the Bundeskommunikationssenat may not be set aside or varied by administrative action. Appeals against decisions of the Federal Communications Board may be brought before the Verwaltungsgerichtshof [Administrative Court].

...'

11 According to Paragraph 11a of the KOG:

'1. The Bundeskommunikationssenat shall rule on reports by KommAustria of infringements of the provisions of Paragraphs 13 to 17 of the ORF-Gesetz, and of Paragraph 9(4) and Paragraph 18 of the ORF-Gesetz in so far as the latter two provisions refer to individual provisions of Paragraphs 13 to 17 of the ORF-Gesetz. To this end it may hear KommAustria.

...'

12 Paragraph 12 of the KOG provides:

'1. The Bundeskommunikationssenat shall consist of five members, of whom three must belong to the judiciary. The members of the Bundeskommunikationssenat shall perform their duties independently and are not bound by any directions or instructions. The Bundeskommunikationssenat shall elect a chairperson and a deputy chairperson from the members who belong to the judiciary.

2. The members of the Bundeskommunikationssenat shall be appointed by the Federal President upon proposal of the Federal Government for a term of six years. For each member a substitute member shall be appointed to take the place of a member prevented from fulfilling his obligations.

...'

13 According to Article 20(2) of the Law on the Federal Constitution (Bundesverfassungsgesetz):

'Where, by means of Federal law or the law of a Land, a collegiate authority comprising at least one member of the judiciary is established to decide matters at last instance and it is provided by law that its decisions may not be set aside or varied by administrative action, the other members of the authority are also not bound by any directions in the performance of their duties.'

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

14 By letter of 20 May 2005, KommAustria, after a prior procedure, lodged a complaint with the Bundeskommunikationssenat for infringement, by ORF, of Paragraph 13(2) of the ORF-Gesetz. KommAustria submitted that in the programme 'Quiz-Express', which was broadcast by ORF, time was allocated to teleshopping in infringement of the provisions of that paragraph.

15 In that programme, an offer is made to the public through the presenter, in conjunction with the display of a premium rate telephone number, to participate in a prize game by dialling that number in return for the payment of EUR 0.70 to the telephone provider, which is bound to ORF by an agreement. The game falls into two parts: the first involves an element of chance, namely that, in order to be put through to the programme, the caller has to reach a particular telephone line; in the second part, the selected caller has to answer a question on the programme. Callers who are not put through to the programme participate in a 'weekly prize' draw.

16 After examination of the arguments submitted by KommAustria, the Bundeskommunikationssenat took the view that it is possible to categorise such a type of programme as 'teleshopping'. It was of the opinion that it was its task, in the exercise of its unlimited jurisdiction, to assess whether the announcements transmitted in that broadcast or part of that broadcast infringed other provisions of the ORF-Gesetz, in particular those relating to advertising. However, it also took the view that since the applicable national provisions transpose Directive 89/552 they had to be interpreted by reference to that directive.

17 In those circumstances, the Bundeskommunikationssenat decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 1(f) of Council Directive 89/552 ... be interpreted to the effect that "teleshopping" includes 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?

(2) In the event that the answer to that question is no: should Article 1(c) of Council Directive 89/552 ... be interpreted to the effect that "television advertising" includes announcements in broadcasts or parts of broadcasts where 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?'

The admissibility of the questions referred for a preliminary ruling

18 As a preliminary point, it must be established whether the Bundeskommunikationssenat is a court or tribunal for the purposes of Article 234 EC and, therefore, whether its questions are admissible.

19 According to settled case-law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29, and the case-law cited, and Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16).

20 In that regard, it must be pointed out, first, that it is indisputably clear from the provisions of Paragraphs 11, 11a and 12 of the KOG that the Bundeskommunikationssenat meets the criteria relating to whether it is established by law, whether it is permanent and its jurisdiction is compulsory, whether its procedure is inter partes and whether it applies rules of law.

21 Secondly, it must be stated that the provisions of Paragraph 12 of the KOG, read in conjunction with those of Article 20(2) of the Bundesverfassungsgesetz ensure the independence of the Bundeskommunikationssenat.

22 It is apparent from the foregoing that the Bundeskommunikationssenat has to be considered to be a court or tribunal for the purposes of Article 234 EC with the result that its questions are admissible.

Substance

23 By its questions, which must be examined together, the national court essentially asks whether Article 1 of Directive 89/552 is to be interpreted as meaning that the definition which it gives of teleshopping or, as the case may be, that which it gives of television advertising covers a broadcast or part of a broadcast in the course of which the television broadcaster itself offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment.

24 It must be borne in mind that it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-170/03 *Feron* [2005] ECR I-2299, paragraph 26; and Case C-316/05 *Nokia* [2006] ECR I-12083, paragraph 21).

25 The purport which the Community legislature sought to give to the definitions of 'television advertising' and 'teleshopping' within the meaning of Article 1 of Directive 89/552 must thus be examined in the light of the context of that provision and the objective pursued by the legislation in question.

26 As is apparent from the 27th recital in the preamble to Directive 89/552, the Community legislature intended to ensure that the interests of consumers as television viewers were fully and properly protected, by making the different forms of promotion such as television advertising, teleshopping and sponsorship subject to a certain number of minimum rules and standards.

27 From that point of view, the provisions of Chapter IV of Directive 89/552, which define those rules and standards, express the intention of the Community legislature, as pointed out by Advocate General Ruiz-Jarabo Colomer at point 76 of his Opinion, to keep those promotional activities separate from those covered by the other parts of the programmes broadcast, to make them unambiguously identifiable to television viewers and to restrict the transmission time thereof. Thus the protection of consumers, as viewers, from excessive advertising is an essential aspect of the objective of Directive 89/552 (see to that effect, Case C-245/01 *RTL Television* [2003] ECR I-12489, paragraph 64).

28 It is with a view to attaining that objective that Article 1 of Directive 89/552 establishes inter alia the definitions of 'television advertising' and 'teleshopping'. The meaning of those definitions must thus be assessed with regard to that objective.

29 It is therefore important for the Court, for the purpose of replying to the questions of the national court, to ascertain whether a broadcast such as that at issue in the main proceedings satisfies the criteria which the Community legislature employed to establish those definitions.

30 As regards, first, the application of the criteria used in Article 1(f) of Directive 89/552 to define teleshopping, it must be stated that, in the programme at issue, described in paragraph 15 of this judgment, the television broadcaster transmits

directly to the public an offer which makes it possible for that public to participate in a type of prize game in return for payment of a telephone call.

31 It is common ground that, in the present case, the cost of that call is higher than the normal rate. Furthermore, it is not disputed that part of the price thereof is passed on by the telephone company to the television broadcaster which broadcasts the game. Thus, by dialling the premium rate telephone number displayed on the screen, the viewer, who contributes to the financing of that game and thus to the revenue of that broadcaster, participates in the activity offered by the broadcaster in return for payment.

32 Furthermore, an activity which enables users, in return for payment, to participate in a prize game may constitute a supply of services (see, to that effect, in respect of the organisation of lotteries, Case 275/92 *Schindler* [1994] ECR I-1039, paragraph 25; in respect of the making available of slot machines, Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 27; and in respect of the operation of games of chance or gambling, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 56).

33 In the present case, a direct offer to participate in a game of chance is made to television viewers during the broadcast by providing them with the necessary information to contact the programme's presenter and be on air, or, if they are unsuccessful in that regard, to enter the weekly draw. Invited by the presenter to participate in the programme's competition, the television viewer accepts the invitation by dialling the premium rate telephone number displayed on the screen. From the moment that ORF's staff answers him, the payment process is initiated and the increased cost of the call is added to the telephone bill of the viewer who, at that moment, chooses to play the game on air or, as the case may be, qualifies to take part in the draw with the other unsuccessful callers.

34 The viewer concerned thus accepts an offer to participate in a game in the hope of winning. In those circumstances, the television broadcaster may appear, in return for payment, to be making a service available to the viewer by allowing him to participate in a prize game.

35 That having been said, the categorisation of the game at issue as 'teleshopping' within the meaning of Article 1(f) of Directive 89/552 nevertheless still calls for an investigation as to whether, in view of its particular characteristics, that broadcast or part of the broadcast constitutes a real offer of services. In that regard, it is for the national court to carry out an assessment of all the factual circumstances of the case in the main proceedings.

36 Therefore, it is for the national court, in the context of that assessment, to 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 which are expected in respect of that broadcast, and also the type of questions which the candidates are asked.

37 It is important to add that a game, such as that at issue in the main proceedings, can constitute 'teleshopping' within the meaning of Article 1(f) of Directive 89/552 only if that game constituted an actual economic activity in its own right involving the supply of services and was not restricted to a mere offer of entertainment within the broadcast (see, by analogy, in respect of a prize game inserted in a publication, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 23).

38 It is not inconceivable that the television broadcaster simply had the intention, taking into account the purpose of the broadcast of which the game forms part, of making that broadcast interactive without thereby making an actual offer of services in the gambling sector, particularly if that game represents only a minimal part of

the content and the time of the entertainment broadcast and, therefore, does not change the nature of that broadcast, and if the questions which the candidates are asked are unconnected with the promotion of goods or of services in connection with a trade, business, craft or profession. The same is true if the economic interest expected from that game proves to be quite incidental in relation to that of the broadcast as a whole.

39 As regards, secondly, the application of the criteria used in Article 1(c) of Directive 89/552 to define television advertising, it must be considered whether, in a broadcast such as that at issue in the main proceedings, the invitation to viewers to dial a premium rate telephone number in order to participate, in return for payment, in a prize game constitutes 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.

40 The national court raises the question whether the announcement contained in the broadcast or part of the broadcast at issue in the main proceedings may be categorised as 'television advertising' only in the event that it is not teleshopping. Having regard to the views expounded in paragraphs 35 to 38 of this judgment, from which it is apparent that there can be no teleshopping in the absence of an actual offer of services, it must be accepted that the announcement which has to be examined is part of an entertainment broadcast.

41 Article 1(c) of Directive 89/552 covering any form of announcement broadcast, it must also be accepted that the answer to the question referred by the national court requires that all the aspects of the broadcast or of the part of the broadcast must be taken into account in order to establish whether they show that there is an intention of broadcasting television advertising to viewers. There is thus no need to restrict that assessment solely to the form of announcement which is constituted by the appearance on the screen of a premium rate telephone number which allows him to participate in the game.

42 In that regard, it cannot be denied that the television broadcaster seeks, through that announcement, to promote that broadcast by encouraging viewers to watch it, making it more attractive due to the prospect of participating in a game which it is possible to win. However, generally, each broadcaster seeks to make attractive any television broadcast which it has the freedom to broadcast. It cannot be deduced from this that any form of announcement seeking to make the broadcast more attractive constitutes television advertising.

43 It is therefore important to know whether that particular form of announcement constituted by an invitation to participate in a prize game has any inherent characteristic capable of giving it the nature of television advertising.

44 It must be stated that the announcement and the game to which it may give access seek to make the viewer participate directly in the content of the broadcast. The announcement is an integral part of the broadcast and does not, a priori, in itself have the purpose of extolling the interest thereof.

45 However, by its content, the game may consist in indirectly promoting the merits of the broadcaster's programmes, in particular if the questions given to the candidate relate to his knowledge of other broadcasts by that body and are thus capable of encouraging potential candidates to watch them. The same would be true if the prizes to be won consisted of derivative goods serving to promote those programmes, such as video recordings. In such circumstances, the announcement made by that broadcast or part of a broadcast could be regarded as television advertising in the form of self-promotion. The announcement could also be regarded as television advertising if the goods and services offered as prizes to be won were the subject of representations or promotions intended to encourage viewers to buy those goods and services.

46 It must be stated that the pieces of information which the Court has at its disposal do not make it possible for it to assess whether that is true of a broadcast or part of a broadcast, such as that at issue in the main proceedings. It is for the national court to make that assessment.

47 In the light of the foregoing, the answer to the questions referred is that on a proper construction of Article 1 of Directive 89/552, a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment,

— is covered by the definition given by Article 1(f) of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked;

— is covered by the definition given by Article 1(c) of television advertising if, on the basis of the purpose and content of that game and the circumstances in which the prizes to be won are presented, the game consists of an announcement which 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.

Costs

48 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 (Fourth Chamber) hereby rules:

On a proper construction of Article 1 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, a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment,

— **is covered by the definition given by Article 1(f) of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked;**

— **is covered by the definition given by Article 1(c) of television advertising if, on the basis of the purpose and content of that game and the circumstances in which the prizes to be won are presented, the game consists of an announcement which 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.**

[Signatures]