Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 24 June 2021 [1]

Case C-371/20

Peek & Cloppenburg KG, represented by Peek & Cloppenburg Düsseldorf Komplementär BV
v
Peek & Cloppenburg KG, represented by Van Graaf Management GmbH

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Consumer protection – Unfair commercial practices – Advertising campaign – Promotion of sales of the media operator's and the trader's products)

I. Introduction

1. According to a quotation attributed to H.G. Wells, 'advertising is legalised lying'. Without entering into the debate on the merits of that claim, there is no doubt that, under EU law, an advertisement in the form of editorial content, which does not clearly disclose that it is promotional in nature, has not been 'legalised'.

2. According to point 11 of Annex I to Directive 2005/29/EC, [2] an advertorial is a commercial practice which is in all circumstances considered unfair, without there being any need for a case-by-case assessment against the provisions of Articles 5 to 9 of that directive. Moreover, the Court has held that that directive requires advertising undertakings to indicate clearly that they have financed editorial content in the media where that content is intended to promote a product or service originating from those traders. [3]

3. This reference for a preliminary ruling gives the Court the opportunity to clarify the scope of point 11 of Annex I to Directive 2005/29. The Court is called upon, more specifically, to interpret the words 'paid for', used in that provision to describe the benefit which an advertising undertaking provides to the media operator.

1 Original language: French.

2 Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

3 Judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraph 48).

II. Legal framework

A. EU law

4. Article 5(5) of Directive 2005/29 provides:

'Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

5. Point 11 of Annex I to that directive is worded as follows:

'Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). …'

B. German law

6. The version of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) applicable to the dispute in the main proceedings ('the UWG')[4] transposed Directive 2005/29. Paragraph 3 of the UWG, entitled 'Prohibition of unfair commercial practices', provides in subparagraphs 1 and 3:

'1. Unfair commercial practices shall be unlawful.

…

3. The commercial practices directed at consumers which are listed in the annex to the present law shall always be regarded as unlawful. …

…'

7. Point 11 of the annex to that law, relating to Paragraph 3(3), is worded as follows:

'The use, financed by a trader, of editorial content in order to promote a product, without that link being clearly identifiable from the content or the visual or acoustic presentation (advertorial).'

III. Facts of the case in the main proceedings

8. Peek & Cloppenburg KG, represented by Peek & Cloppenburg Düsseldorf Komplementär BV ('P&C Düsseldorf') and Peek & Cloppenburg, represented by Van Graaf Management GmbH ('P&C Hamburg') are legally and economically separate and independent companies which are both active in the retail sale of clothing under the company name 'Peek & Cloppenburg', through various subsidiaries. They operate in different regions of Germany and, in each region, only one of the two parties operates clothing stores. The parties advertise their clothing businesses separately and independently.

[4] BGBl. 2010 I, p. 254.

9. In March 2011, a double-page article published in the fashion magazine *GRAZIA* invited readers, under the title 'reader offer', to an 'exclusive shopping evening', called the 'GRAZIA StyleNight by Peek & Cloppenburg'.

10. Against the background of images of stores, in which the words 'Peek & Cloppenburg' could be read in illuminated letters above the entrances, the text stated: 'The night for all GRAZIA Girls: Browse around the fashion temple with us after closing! Includes sparkling wine and a personal stylist. How to become a V.I.S. (Very Important Shopper)? Register right away!' The article stated that there are two independent undertakings known as Peek & Cloppenburg and that this was information provided by the company 'Peek & Cloppenburg KG Düsseldorf'.

11. In legal proceedings brought before the Landgericht Hamburg (Regional Court, Hamburg, Germany), P&C Hamburg submitted that such a commercial practice was contrary to the prohibition of editorial advertising contained in Paragraph 3(3) of the UWG, read in conjunction with point 11 of the annex to that law. P&C Hamburg requested that P&C Düsseldorf be prohibited, as a competitor, from having advertisements published which are not clearly identifiable as such, that it be ordered to provide certain information and that it be found liable to pay compensation for the damage caused.

12. The court at first instance upheld P&C Hamburg's claims. P&C Düsseldorf's appeal before the appeal court, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), was dismissed. By its appeal on a point of law, P&C Düsseldorf asks the referring court to dismiss the legal action brought by P&C Hamburg.

IV. The questions referred for a preliminary ruling and the procedure before the Court

13. By decision of 25 June 2020, received at the Court on 7 August 2020, the Bundesgerichtshof (Federal Court of Justice, Germany), before which an appeal on a point of law has been brought by P&C Düsseldorf, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is there a "payment" for product promotion within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29 only in the case where monetary consideration is provided for the use of editorial content in the media to promote a product, or does the term "payment" cover every kind of consideration, irrespective of whether this consists of money, goods, services or assets of any other kind?

(2) Does the first sentence of point 11 of Annex I to Directive 2005/29 presuppose that the trader provides the media operator with a non-cash benefit as consideration for the use of editorial content and, if so, must such consideration also be assumed to be present in the case where the media operator reports on an advertisement organised in conjunction with a trader, where that trader has made image rights available to the media operator for the purposes of that report, both undertakings have contributed towards the costs and effort associated with that advertisement and the advertisement serves to promote sales of the products of both undertakings?'

14. Written observations were submitted by P&C Düsseldorf, P&C Hamburg, the Hungarian Government and the European Commission. There was no hearing in the present case.

V. Analysis

15. The referring court explains, in the statement of reasons which led it to refer its two questions for a preliminary ruling, that the success of the appeal brought before it depends on the interpretation to be given to point 11 of Annex 1 to Directive 2005/29. It states that Article 5(5) and point 11 of Annex I to that directive have been transposed into German law in, respectively, Paragraph 3(3) and point 11 of the annex to the UWG, relating to Paragraph 3(3), and that, consequently, those provisions of German law must be interpreted in accordance with that directive.

16. In view of the specific legal and factual framework of the present reference for a preliminary ruling, I consider it appropriate to make some preliminary observations on the scope of Directive 2005/29 before examining the questions referred for a preliminary ruling.

17. More specifically, I shall examine, in the first place, whether the contested practice in the dispute in the main proceedings constitutes a commercial practice within the meaning of Article 2(d) of Directive 2005/29 and is therefore subject to the requirements laid down by that directive and, in the second place, whether the fact that the questions referred for a preliminary ruling were raised in the context of a dispute between two competitors may render that directive inapplicable.

A. The contested practice in the dispute in the main proceedings as a commercial practice

18. Referring to the explanations given by the appeal court, the referring court states that the contested practice in the dispute in the main proceedings does not concern the occurrence of the events announced and described in the article at issue, but the publication of that article. [5]

19. The referring court also states that the appeal court does not appear to have erred in law in its assessment that the publication at issue constitutes a joint commercial practice between P&C Düsseldorf and the magazine *GRAZIA*, intended to promote the sales of both undertakings. P&C Hamburg's action, however, is directed solely against P&C Düsseldorf.

20. In order to fall within the scope of Directive 2005/29, the contested practice in the dispute in the main proceedings must constitute a commercial practice within the meaning of Article 2(d) of that directive.

21. That practice must therefore, first, originate from a 'trader' within the meaning of Article 2(b) of that directive, that is to say it must be carried out by a person who is acting for 'purposes relating to his trade, business, craft or profession' or in the name of, even on behalf of, a trader. [6]

[5] In the statement of reasons for the reference for a preliminary ruling, the referring court states that 'the contested advertising consists only in the publication of the article, not in the organisation of the events announced and described therein' and that 'at issue is a nationwide advertisement by [P&C Düsseldorf] that was published in the fashion magazine'. However, in the wording of the second question referred for a preliminary ruling, and in other passages of the statement of reasons for the reference for a preliminary ruling, the term 'advertisement' is used to describe the events organised in P&C Düsseldorf's stores, which were the subject of the article published in *GRAZIA* magazine. In order to avoid any confusion, I consider that the contested practice in the dispute in the main proceedings concerns the publication of that article and the term 'advertisement' shall be used in this Opinion to describe the events which are announced and described therein.

[6] See judgment of 4 October 2018, *Kamenova* (C-105/17, EU:C:2018:808, paragraph 32). Article 2(b) of Directive 2005/29 defines a trader as 'any natural or legal person who, in commercial practices covered by [that] Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader'.

Secondly, that practice must constitute an act, omission, course of conduct or commercial communication 'directly connected with the promotion, sale or supply of a product to consumers'.[7]

22. As the referring court states, referring to the findings of the appeal court, the contested practice was initiated by P&C Düsseldorf[8] and was used for the purpose of promoting that operator's sales. That practice originates from P&C Düsseldorf, on the one hand, and forms part of that company's commercial strategy and is directly aimed at the promotion and sale of its products, on the other. That practice therefore constitutes a commercial practice within the meaning of Article 2(d) of Directive 2005/29 and, consequently, falls within its scope.[9]

23. That finding is not called into question either by the fact that the article published in *GRAZIA* concerned an advertisement organised by P&C Düsseldorf in cooperation with that magazine, or by the fact that that article was intended to promote the sales of both operators.

24. As the Court has already stated, given the definition of 'trader' in Article 2(b) of Directive 2005/29, that directive may apply in a situation where an operator's commercial practices are put to use by another undertaking, acting in the name of and/or on behalf of that operator, with the result that the provisions of that directive could, in certain situations, be relied on as against both that operator and the undertaking, if they satisfy the definition of 'trader'.[10] A fortiori, it cannot be ruled out that a single commercial practice is attributable to two separate operators when they act on their own behalf and on behalf of a co-operant. Such commercial practice would also fall within the scope of Directive 2005/29. That said, as I have already noted in point 19 of this Opinion, P&C Hamburg's action is directed only against P&C Düsseldorf, and therefore the question of whether the provisions of that directive can be relied on in respect of *GRAZIA* magazine does not arise in this case.[11]

25. Moreover, the legal classification set out in point 22 of this Opinion corresponds, in essence, to that adopted by the referring court. That court states that, according to the appeal court, the publication of the article constituted a commercial practice within the meaning of both Paragraph 2(1)(1) of the UWG and Article 2(d) of Directive 2005/29. It also asserts that the assessment by the appeal court is not vitiated by an error of law. I understand that assertion as also referring to the legal classification of the publication of the article in the light of that provision of EU law.

26. In that context, the referring court draws attention to a nuance which characterises the concept of 'commercial practices' as defined in German law. It explains that that concept is defined in Paragraph 2(1)(1) of the UWG as any conduct by a person for the benefit of his own or a third party's undertaking before, during or after the conclusion of a business transaction which is objectively linked to promoting the sale or supply of goods or services. According to the referring court, the concept of 'commercial practices' adopted in German law is broader than that used in

7 See judgment of 4 October 2018, *Kamenova* (C-105/17, EU:C:2018:808, paragraphs 42 and 43).

8 See footnote 5 above, in particular the statement that 'at issue is a nationwide advertisement by [P&C Düsseldorf] that was published in the fashion magazine'.

9 See, to that effect, judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraph 36).

10 See, to that effect, judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraph 38).

11 Without wishing to prejudge the answer to such a question, it is true that paragraph 39 of the judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669) may suggest that the publication of an article cannot constitute a commercial practice originating from a newspaper publisher. However, the case which gave rise to that judgment concerned articles about events external to a newspaper publisher, whereas the present case concerns the publication of an article concerning an advertisement organised by a newspaper publisher in cooperation with P&C Düsseldorf.

Article 2(d) of Directive 2005/29 as it also includes acts by third parties aimed at promoting the sales or purchases of a third company not acting on behalf of or in the name of the trader. It considers, however, that Directive 2005/29 does not preclude the concept of 'commercial practices' from being given a broader definition in national law, since that directive governs only one 'partial aspect' of law in the field of unfair competition.

27. That said, the Court has not been asked to clarify whether Paragraph 2(1)(1) of the UWG transposes Article 2(d) of Directive 2005/29 correctly. There is also no need, in order to answer the questions referred for a preliminary ruling, to determine the extent to which the definition given in German law is broader than that adopted in EU law. It must be determined only whether the practice which is challenged in the dispute in the main proceedings constitutes a commercial practice by P&C Düsseldorf within the meaning of that directive, which, as I have indicated, [12] is the case.

B. The objection to a commercial practice in the context of a dispute between two competitors

28. The present reference for a preliminary ruling arises from a dispute in which P&C Hamburg requests that P&C Düsseldorf be prohibited, as a competitor, from having advertisements published which are not clearly identifiable as such, that it be obliged to provide certain information and that it be ordered to make good the damage caused. It is in the context of that dispute that the referring court seeks to ascertain whether the publication of the article at issue constitutes a commercial practice referred to in point 11 of Annex I to Directive 2005/29 and must, therefore, be considered unfair in all circumstances.

29. It is true that the existence of a commercial practice within the meaning of Directive 2005/29 may be accepted only where it concerns both a trader and a consumer. [13]

30. However, the fact that the dispute in the main proceedings is between two traders who appear to be in competition does not automatically mean that the national provisions which transposed Directive 2005/29 are not applicable in the present case.

31. The Court has already stated that provisions of national law which prohibit, subject to penalties, an unfair commercial practice in the interest of consumers, fall within the scope of Directive 2005/29. [14] The interests of consumers may be protected through actions brought between competitors, in this case taking the form of private enforcement of consumer protection law, as provided for in Article 11(1) of that directive. That provision stipulates that Member States are to ensure that adequate and effective means exist to combat unfair commercial practices. Such means may include legal provisions under which competitors may take legal action against such practices.

32. The fact that a competitor has its own interest in that legal action is not such as to render Directive 2005/29 inapplicable.

[12] See point 22 of this Opinion.

[13] See my Opinion in *Kamenova* (C-105/17, EU:C:2018:378, point 40).

[14] See judgment of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraph 33).

33. Directive 2005/29 was adopted on the basis of Article 114 TFEU and, in accordance with Article 1 thereof, one of the objectives it pursues is to contribute to the proper functioning of the internal market.[15] In that context, recitals 6 and 8 of that directive state that it directly protects consumer economic interests from unfair business-to-consumer commercial practices and, thereby, it also indirectly protects the economic interests of legitimate competitors.[16] As the Court has already stated, referring to recital 6 of that directive, only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is excluded from that scope.[17]

C. Observations on the subject matter and scope of the questions referred for a preliminary ruling

34. By its two questions, the referring court wishes to ascertain whether, in view of the circumstances in the dispute in the main proceedings and, more specifically, the benefits provided by P&C Düsseldorf to the media operator, namely the publisher of *GRAZIA* magazine, the contested commercial practice constitutes an unfair commercial practice in all circumstances, within the meaning of point 11 of Annex I to Directive 2005/29. While that provision sets out a number of conditions which must be satisfied in order to establish the existence of a commercial practice which is in all circumstances considered unfair, the two questions referred for a preliminary ruling concern only the condition relating to payment for the promotion of a product.

35. By its first question, the referring court seeks to establish, in essence, whether point 11 of Annex I to Directive 2005/29 must be interpreted as meaning that, where editorial content is used to promote a product, that promotion is 'paid for' by the trader not only where the trader has provided the media operator with a monetary benefit to promote that product but also where it has provided a benefit which consists of goods, services or assets of any other kind.[18]

36. The second question referred for a preliminary ruling is in two parts. By the first part of that question, which is to be answered only if the first question is answered in the affirmative, the referring court seeks to ascertain whether, for the purposes of point 11 of Annex I to Directive 2005/29, such a benefit with an asset value constitutes consideration for the use of editorial content to promote a product.

37. Although, in the wording of the first question, the use of the concept of 'consideration', provided 'for the use of editorial content', may suggest that that question overlaps with the first part of the second question, that, however, is not the case. Whereas the first question concerns whether the payment may take a form other than that of a monetary payment, the first part of

[15] See, to that effect, my Opinion in *Kamenova* (C-105/17, EU:C:2018:378, point 32). With regard to the link between the proper functioning of the internal market and different forms of private enforcement of EU law see, by analogy, judgment of 17 September 2002, *Muñoz and Superior Fruiticola* (C-253/00, EU:C:2002:497, paragraphs 29 to 32).

[16] See also, to that effect, judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraph 40), in which the Court held that Directive 2005/29 is intended to protect consumers of products and services of those same undertakings and their legitimate competitors.

[17] See judgments of 14 January 2010, *Plus Warenhandelsgesellschaft* (C-304/08, EU:C:2010:12 paragraph 39), and of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraph 30).

[18] I note that the referring court does not ask the Court to clarify whether payment can take the form of a non-pecuniary benefit. For the sake of completeness, it is sufficient to note that legal literature would suggest that that question be answered in the affirmative. See Namysłowska, M., Sztobryn, K., 'Ukryta reklama po implementacji dyrektywy o nieuczciwych praktykach rynkowych', *Państwo i Prawo*, 2008, vol. 11, p. 61.

the second question concerns whether such payment must, as the referring court explains in the statement of reasons for the request for a preliminary ruling, constitute consideration with an asset value, 'in the sense of a reciprocal relationship'.

38. That question echoes the argument put forward by P&C Düsseldorf in its appeal on a point of law, in which it claimed that, in order to be able to conclude that a commercial practice which is in all circumstances considered unfair exists, a benefit provided by the trader must have a link with the editorial content, with the result that it may be considered that, by means of that payment, the article has been 'purchased' by the trader. However, that conclusion cannot be drawn, according to P&C Düsseldorf, from the fact that the trader contributes to the costs of the advertisement which is organised jointly with a media operator and benefits both operators. What is financed jointly in such a case is merely the event which is staged in collaboration, whereas the media operator announces the advertisement, in an article, solely in its own interest.

39. The referring court states, in that regard, that the link to which P&C Düsseldorf refers may be established merely because the advertisement and the article may be regarded as elements of one and the same advertisement which can be assessed and classified only as a whole. Such an outcome is not unavoidable. With regard to that assertion, the referring court states that, according to the findings of the appeal court, P&C Düsseldorf inter alia made available to the media operator the rights to the images used in that article. According to the referring court, at least some of the non-cash benefits provided by P&C Düsseldorf are therefore likely to be specifically linked to the publication of that article.

40. It is clear from the wording of the second question that the second part of that question arises only if the first part is answered in the affirmative. By the second part of the second question, the referring court seeks to establish whether the use of editorial content is 'paid for', within the meaning of point 11 of Annex I to Directive 2005/29, if the trader has made image rights available to the media operator when both operators contributed to the costs and effort associated with the advertisement seeking to promote sales of their products.

41. In view of the fact that those two questions share the same subject matter and are intrinsically linked, I take the view that they must be analysed together and require a single answer.

42. Consequently, first, it must be determined whether point 11 of Annex I to Directive 2005/29 must be interpreted as meaning that, where editorial content is used to promote a product, that promotion is 'paid for' by the trader, not only where the trader has provided the media operator with a monetary benefit to promote that product, but also where it has provided a benefit which consists of goods, services or assets of any other kind (Section D).

43. If that question is answered in the affirmative, it is necessary, secondly, to determine whether, for the purposes of point 11 of Annex I to Directive 2005/29, a benefit with an asset value of that kind constitutes consideration for the use of editorial content to promote a product, with the result that there would be a link between that benefit and the promotion in question. If that is the case, it will be necessary to ascertain whether, where a media operator reports on an advertisement organised in conjunction with a trader, making image rights available to the media operator and/or contributing to the costs and efforts of that advertisement constitutes such consideration (Section E).

D. Payment in the form of a benefit with an asset value

1. Literal interpretation

44. As is apparent from recital 5 of Directive 2005/29, the EU legislature considered that obstacles to the free movement of services and goods across borders and the freedom of establishment can be eliminated only by adopting uniform rules and by clarifying certain legal concepts. I infer from this that, for the EU legislature, the concepts used in that directive are, in principle, autonomous concepts of EU law.

45. Depending on the different language versions of Directive 2005/29 and the terms used, point 11 of Annex I thereto may be understood as meaning that a payment must take the form of a monetary benefit [19] or, according to the broader terms used in other language versions, as meaning that payment may take any form of benefit with an asset value. [20]

46. On account of that diversity, it is not possible to reach an unequivocal conclusion as to the nature of a benefit which may constitute a payment, for the purposes of point 11 of Annex I to that directive. In accordance with the settled case-law of the Court, recourse should therefore be had to methods of interpretation other than a literal interpretation. [21]

2. Systematic interpretation

47. The provisions of Directive 2005/29 are essentially designed with the consumer as the target and victim of unfair commercial practices in mind. [22] In the provisions designed in that way, the commercial practice described in point 11 of Annex I to Directive 2005/29 is classified as a 'commercial practice that is deemed unfair in all circumstances' and, as is clear from the titles used in that annex, as a 'misleading commercial practice'.

[19] The Spanish- ('pagando'), Czech- ('zaplatil'), Danish- ('betalt'), German- ('bezahlt'), Estonian- ('maksnud'), English- ('paid for'), Latvian- ('ir samaksājis'), Lithuanian- ('sumokėjo'), Dutch- ('betaald'), Polish- ('zapłacił'), Romanian- ('a plătit'), Slovak- ('zaplatil'), Slovenian- ('plačal'), Finnish- ('maksanut') and Swedish- ('betalat') language versions may be cited, which use different grammatical forms of the verb 'to pay'.

[20] Above all the Italian-language version ('*costi … sostenuti*'), which, unofficially translated, means 'to bear the costs of the advertisement'. In that vein, the wording of the French- ('*financer*'), Hungarian- ('*fizetett*') and Portuguese- ('*financiar*') language versions do not appear to exclude forms of benefits with an asset value other than money.

[21] In the judgment in *4finance*, the Court confirmed the outcome of the literal interpretation of point 14 of Annex I to Directive 2005/29 with that of the teleological interpretation, whilst recalling that the need of uniform application and of uniform interpretation of an act of EU law makes it impossible to consider one language version of the text in isolation, but requires that measure to be interpreted on the basis of both the real intention of its author and the aim that the latter seeks to achieve, in the light, in particular, of the versions in all the languages (judgment of 3 April 2014, C-515/12, EU:C:2014:211, paragraphs 19, 20 and 24). Still in the context of that directive, the Court stated, in the judgment in *Trento Sviluppo and Centrale Adriatica*, that, in the event of divergence between the language versions, the provision in question must accordingly be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (judgment of 19 December 2013, C-281/12, EU:C:2013:859, paragraph 26). In addition, in the judgment in *Purely Creative and Others*, the Court answered the questions referred for a preliminary which concerned point 31 of Annex I to Directive 2005/29 by using literal (paragraphs 25 and 26), historical (paragraph 28), systematic (paragraphs 35 and 42) and teleological (paragraph 43) interpretations of that provision (judgment of 18 October 2012, C-428/11, EU:C:2012:651; 'the judgment in *Purely Creative and Others*'). In that vein, in the judgment in *Wind Tre and Vodafone Italia*, to answer the question referred for a preliminary ruling concerning point 21 of Annex I to that directive, the Court referred to literal (paragraph 43), systematic (paragraph 45) and teleological (paragraph 54) interpretations (judgment of 13 September 2018, C-54/17 and C-55/17, EU:C:2018:710). It is true that, in those last two judgments, the Court did not mention the existence of differences between the language versions of that directive. However, the methodological approach adopted in those judgments confirms that the outcome of the literal interpretation cannot obscure the outcomes of other methods of interpretation.

[22] See judgment of 16 April 2015, *UPC Magyarország* (C-388/13, EU:C:2015:225, paragraph 52).

48. The dichotomy between commercial practices which are in all circumstances to be regarded as unfair and those which may be declared unfair only after a case-by-case assessment, against the provisions of Articles 5 to 9 of Directive 2005/29, is based on the consideration that only those commercial practices that are most harmful to consumers are subject to an absolute prohibition. [23]

49. From a consumer's point of view, it is immaterial whether or not a payment for the use of editorial content takes the form of a monetary benefit. The commercial practice described in point 11 of Annex I to Directive 2005/29 is considered to be unfair in all circumstances on account of the deception it is likely to cause. In order to avoid this, as the Court has already stated, 'Directive 2005/29, in particular point 11 of Annex I thereto, [effectively requires] advertising undertakings to indicate clearly that they have financed editorial content in the media where that content is intended to promote a product or service originating from those traders'. [24]

50. Therefore, the systematic interpretation of Directive 2005/29 supports the argument that the form of payment, be it a monetary benefit or a different benefit with an asset value, is irrelevant.

3. Teleological interpretation

51. Referring to paragraphs 46 and 47 of the judgment in *Purely Creative and Others*, P&C Düsseldorf asserts that the Court held that the objective of Directive 2005/29 would not be achieved if, when applying the provisions of Annex I to that directive, the interpretation of the various situations gave rise to account being taken of conditions involving a difficult assessment on a case-by-case basis.

52. In my view, that assertion is not supported by the teleological interpretation of Directive 2005/29 and results from a selective reading of that judgment.

53. In the case which gave rise to the judgment in *Purely Creative and Others*, the Court was called upon to interpret point 31 of Annex I to Directive 2005/29 in order to clarify whether, under that provision, a commercial practice is considered unfair in all circumstances where a cost, even of a *de minimis* nature, is imposed on a consumer who has been informed that he or she has won a prize.

54. First, the Court concluded, on the basis of the literal and systematic interpretation of point 31 of that annex, that the prohibition of imposing a cost is absolute in nature. [25] Secondly, to confirm the outcome of the literal interpretation of that provision, the Court used the teleological interpretation. [26] In that context, the Court recalled that, as stated in recital 17 of Directive 2005/29, legal certainty is an essential element for the sound functioning of the internal market and that it was in order to attain that objective that the legislature collected in Annex I to the directive the commercial practices which are in all circumstances considered unfair. [27]

[23] See judgment of 3 April 2014, *4finance* (C-515/12, EU:C:2014:211, paragraph 32). During the preparatory work, the Commission stated that Annex I to Directive 2005/29 contains commercial practices which always materially distort consumers' decisions. See Proposal for a Directive of the European Parliament and of the Council of 18 June 2003 concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (Unfair Commercial Practices Directive) (COM(2003) 356 final), p. 10.

[24] Judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraph 48).

[25] Judgment in *Purely Creative and Others*, paragraphs 30 and 36.

[26] Judgment in *Purely Creative and Others*, paragraph 43.

[27] Judgment in *Purely Creative and Others*, paragraph 46.

55. The Court then held that the objective pursued cannot be achieved if point 31 of Annex I to Directive 2005/29 were interpreted, first, as including an element of misleading conduct, distinct from the situations described in the second part of that provision, and, secondly, as allowing the imposition on the consumer of costs which are '*de minimis*' compared with the value of the prize.[28] It also made the findings to which P&C Düsseldorf refers, in accordance with which a different interpretation would require difficult assessments being carried out on a case-by-case basis, which the inclusion of that practice in Annex 1 to the directive precisely sought to avoid.

56. It should be observed, in the first place, that the Court used the teleological interpretation only to confirm the literal interpretation of point 31 of Annex I to Directive 2005/29 which, unlike in the present case, enabled an unequivocal conclusion to be reached.

57. In the second place, that use of the teleological interpretation made it possible to rule out the existence, in the description of a commercial practice falling within the scope of Annex I, of an element distinct from the situations expressly provided for in that provision. Moreover, it is always necessary to verify whether the circumstances corresponding to the description of a commercial practice falling within the scope of Annex I are present in the case at hand. The Court has held that the application of that annex requires certain circumstances to be described using 'primarily' or 'mostly' and account to be taken of certain circumstances which are indirectly linked to others.[29]

58. In the third place, it should be pointed out that the result of the reasoning followed by the Court is the opposite of what P&C Düsseldorf is seeking to achieve. The Court referred to the teleological interpretation so as not to restrict the definition of 'commercial practices which are in all circumstances considered unfair', whereas P&C Düsseldorf seeks to exclude from that definition any form of payment other than in money.

59. In the fourth place, I consider that the Court's reasoning is fully compatible with the second objective of Directive 2005/29, which is also mentioned in the judgment in *Purely Creative and Others*,[30] namely to ensure a high level of consumer protection.

60. In the fifth place, to restrict the definition of the concept of 'commercial practices', falling with the scope of point 11 of Annex I to Directive 2005/29, to a monetary benefit would deprive that provision of its effectiveness since such a restriction would make it possible easily to evade the prohibition of advertorials.[31] In that regard, as P&C Hamburg indicates, to differentiate between monetary benefits and other benefits with an asset value would in no way be suited to the reality of journalistic practices.

61. The objectives of Directive 2005/29 therefore confirm the interpretation that it is immaterial whether a payment, for the purposes of point 11 of Annex I to that directive, takes the form of a monetary benefit or a different benefit with an asset value.

[28] Judgment in *Purely Creative and Others*, paragraphs 46 and 47.

[29] See, to that effect, judgment of 15 December 2016, *Nationale Loterij* (C-667/15, EU:C:2016:958, paragraph 30). See also, to that effect, judgment of 3 April 2014, *4finance* (C-515/12, EU:C:2014:211, paragraph 33).

[30] Judgment in *Purely Creative and Others*, paragraphs 48 and 49.

[31] See, by analogy, with regard to point 14 of that annex, judgment of 15 December 2016, *Nationale Loterij* (C-667/15, EU:C:2016:958, paragraph 31).

4. Historical interpretation

62. During the preparatory work, the European Parliament proposed, by Amendment 72,[32] to describe the commercial practice referred to in point 11 of Annex I to Directive 2005/29 as follows: 'Advertisement features, announcements or promotions, sometimes referred to as "advertorials", *that are disseminated in exchange for a payment or other reciprocal arrangement* should comply with the Directive if the marketers rather than the publishers control their content. Traders and publishers shall make it clear that advertisement features are advertisements, for example by heading them "advertisement feature"'.[33]

63. The Council of the European Union opposed that amendment, stating that '[it] could not be accepted as it does not define a practice which is in all circumstances unfair, which is the criterion for inclusion in the Annex'.[34] The Commission, for its part, did not adopt the amendment in question and point 11 of Annex I to Directive 2005/29 was not changed substantially in the course of the preparatory work.[35] However, those circumstances cannot be understood as meaning that the EU legislature precluded the interpretation that an advertorial is disseminated not only in exchange for a payment, but also in exchange for other reciprocal arrangements.

64. First, as regards the Council's opposition, Amendment 72 could indeed be read as meaning that it did not concern a description of the commercial practice which is in all circumstances considered unfair, but rather an instruction which made it possible to prevent editorial content from being regarded as such a practice ('should comply with the Directive … traders and publishers shall make it clear that advertisement features are advertisements'). It is therefore not surprising that that amendment was not adopted by the Commission in the form proposed by the Parliament.

65. Secondly, Amendment 72 clarified the benefit to be provided by the trader ('disseminated in exchange for a payment or other reciprocal arrangement'). The Parliament justified that amendment by invoking the objective of preventing too wide an interpretation of the term 'advertorials', which could be understood as ('unintentionally') encompassing editorial content. I infer from this that, for the Parliament, the addition of the passage according to which advertorials are characterised by the fact that 'the marketers rather than the publishers control [the] content [of a publication]' constituted an amendment to the description initially proposed by the Commission. It could also be assumed that the Parliament considered that the description initially proposed already implied that a benefit provided by a trader did not necessarily have to take the form of a payment. That reading of Amendment 72 seems to be confirmed by the Commission's finding that the amendments which it did not adopt, including Amendment 72, could have been accepted by the Commission at least in part.[36]

[32] Report of 18 March 2004 on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) (COM(2003) 356 – C5-0288/2003 – 2003/0134(COD)) (A5-0188/2004 final).

[33] Emphasis added.

[34] Common Position (EC) No 6/2005 of 15 November 2004 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (OJ 2005 C 38 E, p. 1), p. 20.

[35] According to the Commission's initial proposal, the description of that practice was worded as follows: 'Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content. (Advertorial).' See Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) (COM(2003) 356 final).

[36] Communication of 16 November 2004 from the Commission to the European Parliament (COM(2004) 753 final), p. 5.

66. The interpretation that any benefit with an asset value may constitute a payment, for the purposes of point 11 of Annex I to Directive 2005/29, is therefore not called into question by the preparatory work relating to that directive.

5. Interim conclusion

67. In view of the fact that the literal interpretation of point 11 of Annex I to Directive 2005/29 does not allow a satisfactory conclusion to be reached, and taking into consideration the unequivocal conclusions drawn from the systematic and teleological interpretations of that provision, which are not precluded by those drawn from the historical interpretation, I am of the opinion that that provision must be interpreted as meaning that, where editorial content is used to promote a product, that promotion is 'paid for' by the trader where that trader has provided the media operator with a benefit which consists of goods or services or assets of any other kind.

68. The question to which I will now turn is whether, for the purposes of point 11 of Annex I to Directive 2005/29, a benefit with an asset value of that kind constitutes consideration for the use of editorial content to promote a product and, if so, whether such consideration was provided in the circumstances of the dispute in the main proceedings.

E. Payment as consideration for the use of editorial content

69. The use of the words 'paid for' and of those in other language versions of point 11 of Annex I to Directive 2005/29 suggest that a benefit with an asset value must be provided for the use of editorial content intended to promote a product and that there must therefore be a definite link between that benefit and that promotion.

70. It is worth noting, in that regard, that, a priori, a nuance distinguishes the description in that provision of EU law from the description in German law. According to point 11 of Annex I to Directive 2005/29, the commercial practice known as an 'advertorial' consists of using editorial content to promote a product where *that promotion has been paid for by the trader*, whereas, according to point 11 of the annex to the UWG, it is *the use of editorial content* in order to promote a product which is financed by the trader. In the judgment in *RLvS*,[37] the Court has already clarified point 11 of Annex I to Directive 2005/29, taking the view that that provision requires advertising undertakings to indicate clearly *that they have financed editorial content*. That judgment therefore confirms the interpretation of the terms 'paid for' which I have just set out.

71. For the same reasons as those set out in the analysis of the first question,[38] it could be argued that the historical interpretation also supports that interpretation. Amendment 72, proposed by the Parliament, sought to clarify, with regard to advertorials, that they encompass advertisement features, announcements or promotions that *are disseminated in exchange for a payment or other reciprocal arrangement*. As I have explained, the rejection of that amendment does not appear to be based on the addition of that clarification.

[37] Judgment of 17 October 2013 (C-391/12, EU:C:2013:669, paragraph 48).

[38] See points 64 and 65 of this Opinion.

72. In the light of the foregoing, it must be considered that, for the purposes of point 11 of Annex I to Directive 2005/29, a benefit with an asset value provided by the trader to the media operator constitutes consideration for the use of editorial content to promote a product, and therefore there is a definite link between that benefit and the promotion of the product.

73. In that context, I consider that the grant of rights to use images, to which the national court refers in the second part of the second question, is consideration for the use of editorial content to promote a product.

74. First, there is a definite and direct link between the benefit provided by P&C Düsseldorf and the promotion through the editorial content, in so far as the rights to use images were made available to the media operator for the purposes of reporting on that advertisement which was also organised by that trader and those images, used in that content, contained shots of P&C Düsseldorf's stores and of the products offered for sale by that trader.

75. Secondly, point 11 of Annex I to Directive 2005/29 does not provide for any minimum amount that a benefit with an asset value must represent in order for it to be regarded as a payment for the purposes of that provision. [39] Consequently, the fact that the media operator also bore part of the costs and effort relating to a publication is irrelevant. The publication of editorial content always entails such costs and effort for a media operator. A fortiori, since point 11 of Annex I to Directive 2005/29 does not lay down any minimum amount in respect of the benefit with an asset value provided by the trader, that provision does not require there to be any equivalence between that benefit and the costs incurred and efforts made by the media operator.

76. The consideration set out in point 72 of this Opinion could therefore mark the end of the analysis of the second question and provide a useful answer to the referring court. That consideration supports the conclusion that point 11 of Annex I to Directive 2005/29 must be interpreted as meaning that a benefit with an asset value must constitute consideration for the use of editorial content to promote a product, so that there is a definite link between that benefit and that promotion. In particular, such a link exists where a media operator provides information on an advertisement organised in conjunction with a trader which, in turn, to promote that product, makes available to that media operator the rights to use images which contain shots of its stores and of the products offered for sale by that trader.

77. That being so, for the sake of completeness, the question could still be raised as to whether a definite link between a benefit with an asset value and the use of editorial content to promote a product may also be indirect and, if so, whether such a definite and indirect link exists, in the present case, between contributing to the costs and efforts of that advertisement organised in cooperation with a media operator and the publication of the article in dispute. In isolation, the collaborative organisation of such an advertisement does not have a direct link with that publication. It is precisely the absence of such a direct link that appears to have led the referring court to consider that that advertisement and that article constitute a whole. [40]

78. I would not rule out from the outset that an indirect link between a benefit with an asset value provided to the media operator and the use of its editorial content to promote a product is sufficient to conclude that this is an unfair commercial practice in all circumstances, within the

[39] Moreover, the objective of providing greater legal certainty in the identification of unfair commercial practices, referred to in recital 17 of that directive, would not be ensured if Member States could decide what amounts are to be regarded as a payment for the purposes of point 11 of Annex I to Directive 2005/29. See, by analogy, judgment of 3 April 2014, *4finance* (C-515/12, EU:C:2014:211, paragraph 26).

[40] See point 39 of this Opinion.

meaning of point 11 of Annex I to Directive 2005/29. A contrary interpretation of that provision could deprive it of effectiveness, since the requirement of a direct link would make it possible easily to evade the absolute prohibition of advertorials.[41]

79. However, the indirect link between contributing to the costs and efforts of an advertisement organised in cooperation with a media operator and the publication of the article in dispute would be established only on the basis of a questionable presumption and would therefore not be definite.

80. First of all, to take the view that the trader has paid for the use of editorial content to promote a product where a media operator reports on an advertisement organised in cooperation with a trader would be tantamount to recognising the existence of a presumption that that trader has joined forces with that operator to carry out that promotion. Next, to accept that that presumption is relevant in the context of point 11 of Annex I to Directive 2005/29 would be liable to render that presumption irrebuttable, given that it is an unfair commercial practice in all circumstances. Finally, that commercial practice would be considered to be the act of that trader, even if its involvement in the use of editorial content to carry out the promotion is based solely on that presumption.

81. By making use of the freedom to conduct a business, a trader may join forces with a media operator, which may pursue different activities, not in order to ensure media coverage but to benefit from that company's reputation, its know-how, its resources or its business contacts.

82. If there is no payment for the purposes of point 11 of Annex I to Directive 2005/29, a commercial practice cannot be considered unfair in all circumstances under that provision. Such a commercial practice, which is not listed in that annex, may possibly be declared unfair after a case-by-case examination of its characteristics, having regard to the criteria set out in Articles 5 to 9 of that directive.

83. Without prejudice to the foregoing observations, with regard to contributing to the costs and efforts of an advertisement organised in cooperation with a media operator, I maintain the conclusion set out in point 76 of this Opinion.

84. I note, moreover, that, in order to be able to establish the existence of commercial practices which are in all circumstances considered unfair, referred to in point 11 of Annex I to Directive 2005/29, it must always be determined whether the conditions required by that provision, in addition to that relating to payment for the promotion of a product, are also satisfied. In circumstances such as those of the case in the main proceedings, it must be verified, inter alia, whether at issue is 'editorial content' within the meaning of that provision, as that concept has not been interpreted by the Court in its case-law, and whether it is not clear from the article at issue that it was content that had been co-financed by the trader. However, those other conditions are not the subject of the questions referred to the Court for a preliminary ruling and, therefore, they have not been examined in this Opinion.

[41] See, by analogy, judgment of 15 December 2016, *Nationale Loterij* (C-667/15, EU:C:2016:958, paragraph 31). In that judgment, the Court was called upon to clarify whether point 14 of Annex I to Directive 2005/29 must be interpreted as allowing a commercial practice to be classified as a 'pyramid promotional scheme' even if there is only an indirect link between the contributions paid by new members of the scheme and the compensation paid to existing members. The Court considered, in that regard, that the funding of the compensation that an existing member may receive may indirectly depend on the contributions paid by new participants in the scheme.

VI. Conclusion

85. In the light of the foregoing considerations, I propose that the Court should answer the first question referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

Point 11 of Annex I to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') must be interpreted as meaning that, where editorial content is used to promote a product, that promotion is 'paid for' by the trader also where that trader has provided the media operator with a benefit which consists of goods or services or assets of any other kind.

Such a benefit with an asset value must constitute consideration for the use of the editorial content to promote a product, so that there must be a definite link between that benefit and that promotion.

In particular, such a link exists where a media operator provides information on an advertisement organised in conjunction with a trader which, in turn, to promote that product, makes available to that media operator the rights to use images which contain shots of its stores and of the products offered for sale by that trader.