

# OPINION OF ADVOCATE GENERAL TESAURO

delivered on 13 March 1997 \*

1. Solving (or at least attempting to solve) crosswords, riddles or other puzzles is a daily ritual for devotees of the genre, whose interest is now catered for by a plethora of specialist 'literature'; but it is also a way of passing time, of beguiling boredom or loneliness. This accounts for the fact that various games and puzzles are also to be found in non-specialist periodicals, even in daily newspapers in some cases. And the increasing prevalence of prize draws for those who submit the correct solution undoubtedly constitutes an additional (and not insignificant) incentive to display one's skill at solving the puzzles and to purchase the periodicals containing such prize competitions in the first place.

they are lawfully produced and marketed in other Member States.

The possibility of solving crossword puzzles and entertaining the dream of winning prizes depends, therefore, in circumstances such as those just described, on what the Court's interpretation of the rules on the free movement of goods will be in this case.

## Legislative background, facts, the preliminary question

At the origin of this case is just such a prize draw, organized by a German weekly magazine, which is also distributed in Austria, and open to all its readers who submit the correct solution to puzzles appearing in the magazine. Since this is prohibited by the Austrian legislation on unfair competition, the Handelsgericht Wien (Commercial Court, Vienna), before which the main proceedings are pending, has asked the Court if Article 30 of the Treaty precludes the application of national rules, such as those contained in the relevant Austrian legislation, which result in the outright prohibition of the sale in that country of periodicals containing prize competitions or games, even if

2. An Austrian law enacted in 1992<sup>1</sup> introduced far-reaching liberalization in the area of competition and repealed *inter alia* provisions prohibiting traders from awarding prizes and other benefits to consumers. At the same time, however, a new paragraph, 9a, was inserted into the Unfair Competition Law (Gesetz gegen den unlauteren Wettbewerb; hereinafter the 'UWG') which, as amended in 1993, in addition to the more general prohibition on free gifts linked to

\* Original language: Italian.

1 — Law No 1992/147 on the 'deregulation of competition'.

sales of goods and services, specifically prohibits the offering, advertising and distribution of free gifts to the purchasers of periodicals (Paragraph 9a(1)(1)).<sup>2</sup>

It should be added that Paragraph 9a(2)(8) also provides that the prohibition on free items does not apply where the gift consists of the opportunity to take part in a competition in which the total value of the prizes on offer does not exceed a specified amount; but the provision in question is stated not to apply to lotteries organized by periodicals.<sup>3</sup> Accordingly, any periodical containing games and/or competitions for prizes is in violation of the Austrian legislation on unfair competition.

3. Let us turn to the facts. Heinrich Bauer Verlag ('the defendant'), an undertaking established in Germany, publishes *inter alia* a

magazine entitled 'Laura' which is produced in Germany and which is also distributed in Austria. This magazine carries prize competitions — readers who submit the correct solution are entered in a draw which yields for the lucky winners cash prizes ranging from DM 500 to DM 5 000. For example the issue of the magazine referred to by the national court<sup>4</sup> includes one prize crossword puzzle with two prizes of DM 500 for the lucky winners of the draw, a second crossword with a single prize of DM 1 000 and finally a third competition with a prize of no less than DM 5 000 for the sender of the first correct entry drawn.

Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH ('the plaintiff'), an undertaking established in Austria, which publishes the weekly magazine 'Die Ganze Woche' and the daily newspaper 'Täglich Alles', relying on the aforementioned Paragraph 9a of the UWG, brought proceedings in the Handelsgericht Wien seeking an order restraining the defendant from selling within Austria publications such as the magazine 'Laura' which give readers the chance of taking part in prize draws.

2 — Paragraph 9a, inserted into the UWG by the aforementioned Law No 1992/147, was amended one year later by Law No 1993/227 specifically to the effect of precluding any possibility of giving away free gifts or the chance to compete for prizes in connection with sales of periodicals.

3 — More precisely, Paragraph 9a(1) does not apply when the gift consists of 'the opportunity to take part in a competition (lottery) in which the value of the potential individual entries, obtained by dividing the total number of prizes at stake by the number of entry vouchers, does not exceed 5 schillings and the total value of the prizes competed for does not exceed 300 000 schillings'. Prize competitions and games are thus permitted, within these limits, in conjunction with the supply of services and the sale of products other than periodicals.

4. In view of the fact that the German legislation on unfair competition does not con-

4 — Issue 9 of 22 February 1995. The subsequent issues of the magazine had competitions of the same type with the same prizes on offer.

tain any rule to the same effect as Paragraph 9a of the UWG<sup>5</sup> and that the prohibition on the sale of periodicals contained in the contested provision is capable of affecting intra-Community trade, the Handelsgericht Wien considered it necessary, in order to reach its decision, to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 30 of the EC Treaty be interpreted as meaning that it precludes application of legislation of Member State A prohibiting an undertaking established in Member State B from selling in Member State A a periodical produced in Member State B, where that periodical contains prize puzzle competitions or games which are lawfully organized in Member State B?'

### The applicability of Article 30 of the Treaty

5. The Court therefore has to determine whether the prohibition on the sale of a magazine containing prize competitions constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty. In order to do so it is first necessary to consider whether the

relevant national legislation satisfies the test for a measure having equivalent effect to a quantitative restriction by being capable, in accordance with the well-known *Dassonville* formula, of 'hindering, directly or indirectly, actually or potentially, intra-Community trade'.<sup>6</sup>

Since the measure in question, although it applies without distinction to domestic products and imported products, prevents the access to the Austrian market of magazines lawfully manufactured and marketed in the Member State of origin, it appears at first sight that the measure is indeed one capable of hindering intra-Community trade and thus one which falls within the ambit of the *Dassonville* formula.

6. The Austrian Government argued, however, that offering readers the chance to take part in a prize competition is merely a method of sales promotion and hence a measure having to do with selling arrangements, not with product characteristics. Accordingly, the Austrian Government maintains, the measure is one which — in line with the new approach taken to this issue by the Court in a series of decisions beginning with *Keck and Mithouard*<sup>7</sup> —

5 — Pursuant to Paragraph 1 of the German Law on unfair competition the sale of periodicals containing free items is unlawful only if in the particular instance they are for some reason indecent or immoral. However, prize competitions are lawful where, as in the present case, they form an integral part of the publication's recreational content.

6 — Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5.

7 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. See also the recent decision in Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Casa Uno and Others* [1996] ECR I-2975.

does not come within the scope of Article 30 of the Treaty in the first place.

which take precedence over the requirements of the free movement of goods.

The Commission, the German Government and the defendant, on the other hand, argue that the prize competitions in question form an integral part of the content of the magazine and that, accordingly, the prohibition in the contested national legislation of the sale of periodicals having these characteristics concerns the product directly and not its selling arrangements. Thus the *Keck and Mithouard* principle, they contend, does not apply to this case.

In the same judgment, however, the Court stated that 'the application to products from other Member States of national provisions *restricting or prohibiting certain selling arrangements* is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (...), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'.<sup>9</sup>

7. It should be borne in mind at this point that in *Keck and Mithouard* the Court primarily confirmed the '*Cassis de Dijon*'<sup>8</sup> case-law by reaffirming that Article 30 of the Treaty, in the absence of harmonization of legislation, prohibits obstacles to the free movement of goods lawfully manufactured and marketed in the Member State of origin, which are the consequence of applying rules that lay down requirements to be met by such goods, such as those relating, for example, to presentation, labelling or packaging, and that this is so even if those rules apply without distinction to domestic products and imported products. In such cases the national measures in question can be justified only by public-interest objectives

8. In the light of that distinction it is therefore necessary to examine whether the prohibition laid down in the Austrian legislation on unfair competition constitutes a measure which concerns the product characteristics or the selling arrangements. It is undoubtedly true that the inclusion of prize competitions in a magazine may well constitute a method of promoting sales of the magazine, as the Austrian Government argued. Yet the fact remains that the competitions in question, together with the prizes on offer, form part of the magazine's content and thus relate directly to the product. The contested prohibition, although of a general and non-discriminatory nature, may not therefore be

8 — Case 120/78 *REWE-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

9 — *Keck and Mithouard* judgment (cited in footnote 7), paragraph 16; emphasis added.

regarded as [relating to] a 'selling arrangement' within the meaning of *Keck and Mithouard*.

In this regard I would point out that when after the *Keck and Mithouard* decision the Court had to give judgment on the prohibition of a particular type of publicity, carried on the actual packaging of the relevant product, it stated that '[A]lthough it applies to all products without distinction, a prohibition (...) which relates to the marketing in a Member State of products bearing the same publicity markings as those lawfully used in other Member States, is by nature such as to hinder intra-Community trade. It may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs'.<sup>10</sup>

9. The facts before us have obvious parallels to those of the above case and this, in my opinion, illustrates why the Court, in its new approach to the issue at hand, referred only to 'certain' and not to all selling arrange-

ments, without being more specific.<sup>11</sup> Moreover, it is relevant to bear in mind that, again in *Keck and Mithouard*, it was held that, where the conditions laid down by the Court are fulfilled,<sup>12</sup> 'the application of such rules [on selling arrangements] to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products'.<sup>13</sup>

In this case, it is clear that the impugned measure prohibits the access to the market of periodicals having the characteristics of the weekly magazine 'Laura'. Even if one regards it as having to do with selling arrangements, it is still the case that *the measure in question, by preventing the access to the market of the product in question, does not fall within the scope of the Keck and Mithouard case-law*. This point is borne out by the decision in *Alpine Investments* in which the Court, given an opportunity to extend by analogy the criteria applied in *Keck and Mithouard* to the area of services, emphasized the fact that, in contrast to the

11 — In my Opinion in *Hünernund and Others* I also observed that, within the general category of selling arrangements, selling methods and sales promotion measures may merit special treatment as they are capable, in certain circumstances, of affecting imports in a more serious and specific way and may therefore ultimately constitute an obstacle to intra-Community trade in those products (Case C-292/92 [1993] ECR I-6787 at p. I-6800, points 16 to 18 and, in particular, point 22).

12 — This refers to the conditions, set out in the aforementioned paragraph 16 of the *Keck and Mithouard* judgment (see point 8), which national legislation on selling arrangements must satisfy in order to fall outside the scope of Article 30.

13 — *Keck and Mithouard* (cited in footnote 7), paragraph 17; emphasis added.

10 — Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 13.

*Keck and Mithouard* case, the prohibition in issue 'directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services'.<sup>14</sup>

10. It is also instructive to recall the measures which the Court has hitherto held to relate to 'selling arrangements' and thus to fall outside the scope of Article 30. In addition to the prohibition on below-cost selling considered in *Keck and Mithouard*, other measures deemed to come within this category have included: a prohibition on selling at a very low profit margin;<sup>15</sup> rules governing the opening hours of shops<sup>16</sup> and filling stations;<sup>17</sup> a prohibition on selling infant formula otherwise than in pharmacies;<sup>18</sup> a retailing system for manufactured tobacco products;<sup>19</sup> a prohibition on pharmacists advertising quasi-pharmaceutical products outside pharmacies;<sup>20</sup> a prohibition on television advertising by distribution compa-

nies.<sup>21</sup> These national measures, as can easily be seen, are clearly not by nature such as to 'affect directly the access to the market' of the relevant product.

At a general level then I think it can reasonably be inferred that the only measures excluded from the scope of Article 30 are those which are absolutely general in nature, which apply — needless to say — without distinction, which do not impede imports and which might lead at most to a (hypothetical) reduction in the volume of imports only as a consequence of an equally hypothetical reduction in the overall volume of sales. Moreover, the Court itself has not hesitated to emphasize, and indeed has laid down as a basic premiss underlying this approach, that 'the fact that national legislation may restrict the volume of sales generally, and hence the volume of sales of products from other Member States, is not sufficient to characterize such legislation as a measure having an equivalent effect to a quantitative restriction'.<sup>22</sup>

11. Returning to the measure at issue in this case, I therefore take the view that although it applies without distinction it does directly affect the marketing of the relevant product and obliges the trader concerned to alter its presentation and content. In contrast to *Keck*

14 — Case C-384/93 [1995] I-1141, paragraph 38. On the same point see also Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 92 to 104. In that judgment, it will be recalled, the Court held that the law on the free movement of persons was infringed by rules concerning transfers between clubs which 'directly affect players' access to the employment market in other Member States' (paragraph 103).

15 — Case C-63/94 *Belgapom* [1995] ECR I-2467, paragraphs 12 and 15.

16 — Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355, paragraphs 12 and 15; see also *Casa Uno and Others*, cited in footnote 7, paragraphs 12 and 13.

17 — Joined Cases C-401/92 and C-402/92 *Tankstation* [1994] ECR I-2199, paragraphs 12, 15 and 18.

18 — Case C-391/92 *Commission v Greece* [1995] ECR I-1621, paragraphs 13 to 18.

19 — Case C-387/93 *Banchero* [1995] ECR I-4663, paragraphs 36 and 37.

20 — Case C-292/92 *Hünemund* [1993] ECR I-6787, paragraphs 20 to 23.

21 — Case C-412/93, *Leclerc-Siplec* [1995] ECR I-179, paragraphs 21 to 24.

22 — *Casa Uno and Others* (footnote 7), paragraph 24. See also, to the same effect, *Keck and Mithouard* (footnote 7), paragraph 13.

and *Mithouard* and subsequent cases decided similarly, the prohibition in question is not in any way linked to a hypothetical reduction in the volume of imports as part of a more general contraction in the overall volume of sales.

regarded as taking precedence over the requirements of the free movement of goods.

In conclusion, the measure in question, by prohibiting the importation of magazines of a certain format and having certain characteristics, amounts to an outright ban on the importation of a specific product, which is therefore simply denied access to the market for as long as it retains that format and content. The measure is thus by nature such as to impede intra-Community trade and therefore falls clearly, at least on the face of it, within the scope of Article 30.

The Court has consistently held<sup>23</sup> that potential obstacles to trade — which are due, as here, to differences in national legislation — are acceptable if the 'mandatory requirements' pleaded to justify the national measure in question satisfy the following three conditions: (a) they are regarded as meriting protection by Community law; (b) they are suitable for the purpose of attaining the objective pursued; (c) they are appropriate and necessary for the purpose of attaining that objective, which is the case where there are no alternative measures less restrictive of trade.

#### The grounds given as justification for the prohibition

12. Having established that the measure in question, although it applies without distinction, is potentially an obstacle to intra-Community trade, it is now necessary to determine whether the justifications adduced during the course of the proceedings in order to take the measure outside the scope of the prohibition contained in Article 30 may be

13. To begin with let it be said that there is no shortage of justifications in this case; in the course of the procedure several — perhaps too many — were raised and argued. They included not only consumer protection, fair trading, and press diversity, but also public policy requirements such as the need to combat crime and tax evasion, the protection of health, in the guise of the need to combat compulsive gambling, and the upholding of public morality.

23 — See in particular the judgment in '*Cassis de Dijon*' (cited in footnote 8), paragraph 8; and the recent judgment in Case C-313/94 *Fratelli Graffione* [1996] ECR I-6039, paragraph 17.

These are mandatory requirements which have been recognized as such in previous judgments of the Court and which therefore, it goes without saying, are worthy of protection by Community law. In my view, however, there are not a few well-founded concerns regarding the suitability of some of them, even in terms of the causal connection alone, to justify the national measure under discussion. Accordingly I think it sensible to clear up some confusion which may have arisen in the course of the procedure and, by examining the premisses on which they are based, to narrow the range of justifications which may be taken into consideration in this case.

become the determining factor in the purchase decision'.

Going by the explanatory memorandum therefore, the prohibition on the sale of periodicals containing prize competitions or games has as its essential purpose the maintenance of press diversity<sup>24</sup> and, to a lesser extent, consumer protection and fair trading. These then are the mandatory requirements which may justify the impugned prohibition; these are indeed the only justifications adduced by the Austrian Government to defend the compatibility of the prohibition with the Treaty provisions on the free movement of goods.

14. On this point it is worthwhile recalling the grounds for the prohibition on the sale of periodicals containing prize competitions or games, as expressly set out in the explanatory memorandum to the national enactment under discussion. The reasons given for the prohibition are the following: 'In relation to periodicals, account has to be taken of the fact that intense competition in the form of free gifts, including entry to prize draws, in view of the relatively high number of different newspapers and magazines on the market, causes a huge financial strain on smaller newspaper and magazine publishers which could be driven out of business as a result. This must be prevented in the interest of media diversity. (...) there is therefore a danger (...) that the consumer may attach more importance to the possibility of winning a prize than to the quality of the product and this would bring an unsound element into the market in the sense that the prospect of winning a prize by chance would ultimately

15. In the course of the procedure however, as I said, some of the other States which submitted observations contended that the prohibition in question, relating as it does to games of chance, could also be justified on the grounds of public policy, protection of health and public morality. The *Schindler* judgment<sup>25</sup> was cited in support of this argument. In that case, it will be recalled, the Court held that the Treaty provisions relating to freedom to provide services do not preclude national legislation prohibiting lotteries, *in view of the concerns of social policy*

24 — Indeed the Austrian Constitutional Court itself upheld the constitutionality of Paragraph 9a of the UWG on the very ground that the prohibition it imposes is necessary for the purpose of maintaining media diversity (Decision of 11 March 1994, ÖBl 1994, p. 151).

25 — Case C-275/92 [1994] ECR I-1039.



and of the prevention of fraud which justify it. The Court acknowledged that 'lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. (...) they are an incitement to spend which may have damaging individual and social consequences'.<sup>26</sup>

I do not think that this approach can be transposed to the instant case. The two situations — large-scale lotteries on the one hand and prize competitions or puzzles on the other — are hardly comparable, in my opinion, since the latter are small-scale contests with modest prizes at stake, and since they in any event form an integral part of the content of the periodical in which they appear.<sup>27</sup> The social policy and tax evasion considerations which form the basis of the *Schindler* judgment thus do not even arise in this case, since there is no connection between such considerations and the prohibition in question. Moreover, the fact that the Austrian legislation makes no mention of such matters is significant and one may infer that 'requirements' not expressly set out in

the enactment were not among the reasons behind the prohibition.

It is in any case not easy to understand how the mere chance of winning a prize of DM 500 offered to those who submit the correct solution to a crossword could make it necessary to ban the sale of the periodical in which it appears in the name of the fight against crime. Nor can one regard as credible the justifications based on the protection of health, in the guise of measures to deter compulsive gambling; or those based on public morality, on the premiss that gambling is a vice which is abhorrent to society. If nothing else, the same States which invoked these 'social catastrophes' have their own large-scale lotteries and 'scratch-card' games, *aut similia*, and it does not appear that in relation to these games they are unduly concerned about measures to deter compulsive gambling.<sup>28</sup>

16. As regards the relevance of the *Schindler* judgment to the case in hand I think that one further point must be made. The special features of lotteries and games of chance in general led the Court to state that 'national authorities [have] a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light

26 — The Court added that 'A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture' (paragraph 60; emphasis added).

27 — It would be different only if the periodical were built around the lottery, in other words if it were merely a pretext for organizing a large-scale lottery of major proportions, particularly in respect of the size of the prizes on offer. Clearly this is not the case here.

28 — Even if one sides with the great philosopher Benedetto Croce, who said that lotteries are 'a tax on fools', I do not think that the undoubted benefit to the State of such a 'tax' can justify the outlawing of the activity when the proceeds flow not to the State of which the player is a citizen but to another State or, as in the present case, to some entity other than a State.

of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory'.<sup>29</sup> In other words, the Court, while taking due account of the suitability of the prohibition in question for the purpose of attaining the aims to be achieved, found that by reason of the particular nature of games of chance the Member States have broad discretion in their regard with the result that it is not even necessary, again provided the measures are not discriminatory, to test their proportionality by examining whether there are other measures less restrictive of trade by which the same aims could be achieved: the Court therefore did not embark on a rigorous test of proportionality.

to be regarded as applying to every game of chance, meaning by that any drawing of lots for prizes, irrespective of the scale and extent of the game in question, thus also including the present case, a dangerous and wholly unwarranted breach would be opened in the exercise of the fundamental freedoms guaranteed by the Treaty. Any restriction placed on these freedoms, needless to say, must be an exception which must be strictly construed and hence subjected to a rigorous test of proportionality.

17. In the light of all those considerations, I now turn to examine the proportionality of the measure in question in relation to the 'mandatory requirements' which are relevant, that is, those which were expressly set out as the basis for its adoption: consumer protection and fair trading, together with the maintenance of press diversity.

In view of the aforementioned differences which distinguish major lotteries from prize draws which are based on the solution of a crossword and which form an integral part of a periodical, it seems to me that in a case such as the present the national legislature cannot be given the same degree of latitude. I am further of the opinion that the approach adopted in *Schindler* is and should be confined to the particular circumstances of that case. Clearly, if this were not to be the case, that is to say if the *Schindler* decision were

— *Consumer protection and fair trading*

18. It was argued that the consumer could be attracted more by the game and the hope of winning a prize by playing it than by the quality of the magazine; and secondly that, as a result of this, competition would be distorted through the effect that this would

<sup>29</sup> — *Schindler* (cited in footnote 25 above), paragraph 61.

have on fair trading. Furthermore, the consumer could be misled as to the real price of the product. In other words the possibility of winning a prize would distract the consumer and distort the conditions on which genuine competition is based, which relate to the quality and the value of the product.

It was also argued that the lawfulness of restrictions on trade through measures such as the one under discussion had been upheld by the Court in the *Oosthoek* case,<sup>30</sup> in which it was held that 'the offering of free gifts as a means of sales promotion may mislead consumers as to the real prices of certain products and distort the conditions on which genuine competition is based. Legislation which restricts or even prohibits such commercial practices for that reason is therefore capable of contributing to consumer protection and fair trading'.

19. It must first be said that the reference to *Oosthoek* is only partly relevant. That case concerned a general prohibition on the offering of free gifts; in our case, by contrast, we are concerned with a prohibition which affects only periodicals and not other publications or communications addressed to the public: prize competitions or games are

permitted on certain conditions,<sup>31</sup> when they are connected with the sale of products other than periodicals. This fact alone already suggests that the requirement underlying this form of justification is less 'mandatory' than was argued, since it cannot be accepted, in the absence of any distinguishing features, that the consumer needs to be protected in relation to the purchase of periodicals only and not any other products.

While it is true that offering a free gift could lead purchasers to think that the gift in question was in fact entirely free and thus mislead them as to the real price of the product they are about to buy, I do not think that the same holds true in relation to the purchase of a periodical containing crossword puzzles. In this regard it is pertinent to recall that the consumer taken into consideration by the Court in its judgments and to whom proper protection must be given against conduct which may be misleading or otherwise harmful, is the average consumer, that is, a 'reasonably circumspect consumer'.<sup>32</sup> Such a consumer, in my opinion, would be very unlikely to be misled as to the real price of a periodical by reason solely of the fact that it

31 — See point 2, above, and in particular footnote 3.

32 — This is, for example, the expression used in the *Mars* judgment (cited in footnote 10), paragraph 24. With this in mind, I do not think we need dwell unduly on the argument advanced by the Portuguese Government that the consumer could be led into purchasing hundreds of copies of the same magazine with a view to increasing his chances of being the lucky winner of the draw. Anyone who buys hundreds of copies of the same magazine and solves the same crossword puzzle hundreds of times requires, if I may say so, quite a different form of protection. Such an individual might, by the same token, buy hundreds of tickets for a single lottery draw or buy several scratch-cards every day, yet such games are not prohibited.

30 — Case 286/81 [1982] ECR 4575, paragraph 18.

contains prize competitions, particularly where, as in the present case, it is a weekly magazine of a recreational nature which is thus held out as being essentially a source of entertainment and enjoyment.

it automatically follows, having regard *inter alia* to the parallel between goods and services, that this is a requirement which is also worthy of protection in this case.

20. In fact the real reason for the prohibition, as is clear from the explanatory memorandum to the enactment, is to prevent consumers from being induced to buy periodicals by the prospect of winning prizes, since this would have adverse effects on small publishers, who as a rule are unable to offer readers a similar opportunity. In view of this, one cannot but acknowledge that both consumer protection and fair trading do not constitute objectives in their own right but are ancillary to the real purpose, which is to maintain press diversity.

— *The maintenance of press diversity*

21. Since the Court has included the safeguarding of diversity among the general interest grounds which can justify restrictions on the freedom to provide services,<sup>33</sup>

It remains to be considered whether the prohibition in question is genuinely necessary in order to guarantee press diversity and whether, in order to attain this objective, there are no other measures less restrictive of intra-Community trade.

22. Let me say straight away that if the presence on the Austrian market of periodicals such as the weekly magazine 'Laura' were actually to cause, on account of the prize competitions which appear in them, a shift by consumers towards such periodicals to the detriment of the small Austrian publishers, one would have to conclude that the measure in question is necessary in order to ensure press diversity.

Conversely, the measure must be regarded as *not* necessary if it transpires that the prize competitions do not constitute an inducement to purchase which causes a shift by consumers towards that type of periodical and/or if in any event the said prize competitions, by reason of their target market and the different needs for which they cater, do not affect the sales of Austrian periodicals produced by small publishers. If, as stated in

33 — See, for example, Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, in which the Court held that 'the maintenance of ... pluralism (...) is connected with freedom of expression, as protected by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order' (paragraph 30). Another case in point is Case 4/73 *Nold* [1974] ECR 491, paragraph 13.

the aforementioned explanatory memorandum to the enactment, the purpose of the measure in question is to prevent small newspaper and magazine publishers being exposed to cutthroat competition such as to endanger press diversity, it is clear that such an objective cannot be pursued by prohibiting publishers from other Member States from marketing within Austria periodicals which, while they contain prize competitions, do not in fact compete with the periodicals produced by small Austrian publishers, in which case there is no risk of the latter being forced out of the market or of their market share being significantly reduced.

It is not the Court's function to embark on such an investigation and in any case it does not have the necessary data to hand to do so.<sup>35</sup> It is therefore a matter for the Austrian courts to ascertain whether the said periodicals indeed constitute, by reason of the prize competitions they carry, such an incentive to purchase as would influence consumers in their decision;<sup>36</sup> and also, whatever the result of that investigation may be, to determine whether they are in competition with periodicals produced by small domestic publishers or with other similar 'recreational' magazines produced by major publishing groups. In the latter case, the impugned measure could clearly not be regarded as necessary for the purpose of maintaining diversity in the Austrian press.

23. In view of the foregoing, I take the view that the suitability of the measure in question to attain the objective pursued cannot be determined *a priori* but requires an investigation of the specific circumstances, to be conducted on the basis of statistical data on the Austrian press market. The matters to be determined include the market shares held by the various publishers or publishing groups and the trend in market shares, the relevant product market and thus the substitutability, from the point of view of the consumer, of periodicals which, at first sight, appear to cater for altogether different needs;<sup>34</sup> and, finally, what impact the sale in Austria of periodicals such as 'Laura' has on small publishers.

24. I would add, in case the measure should be found to be necessary for the fulfilment of the requirement in question, that it is also proportionate, in view of the absence of any means less restrictive of trade which would be capable of ensuring the same result. In this regard I would dismiss the argument advanced in the course of the procedure to

34 — In this regard let me say that while it may be true, as argued by the Commission, that it is not possible to draw a distinction between informative publications and entertainment publications and that it is not only in respect of the former that diversity must be safeguarded, it is equally true that a weekly magazine such as 'Laura' cannot, by its very nature, but be in competition with periodicals of the same kind and certainly does not compete with periodicals devoted to local news, current affairs or sport.

35 — During the course of the hearing, the Austrian Government confined itself to stating the existence of a problem in Austria due to the media market being concentrated in the hands of a small number of traders and that in the early 1990s the largest Austrian publishing group had a market share of 50%, which subsequently fell to 40%. It is not clear, however, whether the drop was due to an increase in the share held by small local publishers or rather, and more significantly, whether it was due to the presence on the market of periodicals from other Member States.

36 — What has to be determined, therefore, is whether it is the presence of prize competitions that constitutes the deciding factor in the purchase of a particular periodical, within the category of 'recreational' magazines, regardless of the characteristics it possesses. Put another way, would the consumer who chooses to purchase a weekly such as 'Laura' be equally likely to purchase a sports, current affairs, literary or scientific periodical provided it also offered a chance to win a prize? Or would the consumer in question still buy a 'recreational' periodical and choose from among that category on the basis of personal preferences, which could of course be influenced by the presence of prize competitions but could also be affected by other factors such as, for instance, a particularly attractive cover.

the effect that the measure is disproportionate on the ground that the German publisher could very well arrange for the games contained in the periodical in question not to be addressed to residents of Austria or, in general, of those States in which they are prohibited: this could be done by means of a 'warning' to that effect carried on the periodical which would not entail any additional costs or necessitate having different production arrangements according to the State in which the magazine is to be sold.

This solution might very well be adopted by the trader in question, perhaps in order to be able to continue to distribute the magazine 'Laura' in Austria if the Court should find the impugned measure to be compatible with the Treaty provisions on the free movement of goods, but that has no bearing on the proportionality of the measure itself. The latter, it is hardly necessary to point out, prohibits the sale of periodicals containing prize competitions precisely because they offer the possibility of winning a prize and not because they contain games. If the magazine 'Laura' excluded Austrian residents from the possibility of winning a prize the Court would never have been called upon to give judgment on the contested prohibition.

themselves offer the chance to win prizes.<sup>37</sup> The Commission argues that this fact must be seen in the context of the view taken by the Austrian Supreme Court, according to which the prohibition in question applies only where the opportunity to take part in prize competitions constitutes an inducement to purchase and an irresistible attraction for the consumer.<sup>38</sup>

As it is in my opinion in any event for the national court to determine, in order to decide on the necessity of the contested measure, whether the inclusion of prize competitions indeed constitutes an inducement to purchase, I do not think I need say any more on this issue. None the less, it must be emphasized that Paragraph 9a of the UWG must be identical in its application to domestic and imported periodicals. If it were otherwise the measure in question, or rather the manner of its implementation in practice, would be discriminatory and accordingly could not under any circumstances be justified by the need to maintain press diversity.

In other words, if the national court should find that it is indeed the case that Austrian periodicals may freely and lawfully offer to the public that which periodicals from other Member States are precluded from offering, the matter would be immediately resolved, because that would constitute a discrimina-

25. I shall make one final observation. It was pointed out repeatedly during the course of the procedure that Austrian periodicals

37 — For example, the 'Täglich Alles' magazine, published by the plaintiff, offers the chance to win compact discs to those who correctly guess the title of a film (see the issue of 25 January 1996). The magazine 'News', for its part, publicizes a draw for a Nissan car, which can be entered by filling out and sending in an entry card contained in the magazine (see, for example, issue 1 of 4 January 1996).

38 — See for example the following decisions of the Oberster Gerichtshof (OGH): 9 May 1995, on 'free flights' (WBl. 1995, p. 466); and 22 March 1994, on the 'free day' (Obl. 1994, p. 166).

tory barrier to trade and one accordingly not justifiable either on the basis of mandatory requirements of the kind referred to in the *Cassis de Dijon* judgment or on the basis of Article 36 of the Treaty, since none of the finite list of conditions set out therein have been met.

## Article 10 of the European Convention on Human Rights

26. Although it is not the subject of a specific question by the referring court, I feel that the issue of the compatibility of the national provision under discussion with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention'), which was raised during the course of the procedure, merits a response on the part of the Court. That is, of course, if the Court comes to the conclusion that the provision in question can be justified on the basis of the mandatory requirements discussed above.

It is firmly established by the case-law on the subject that the Court's supervisory jurisdiction, in addition to the power to review measures adopted by the Community institutions in the exercise of their functions and measures adopted by the Member States in order to give effect to Community measures, or other acts or omissions by national authorities, include the power to review the justifications put forward by a Member State for a national measure which would otherwise be incompatible with Community

law.<sup>39</sup> Besides it is clear why the observance of fundamental rights must be taken into account in a Member State's justification of a contested national measure: if it were otherwise, a breach of such rights could be sanctioned by Community law with the endorsement of the Court.

27. The Court has previously recognized that the maintenance of diversity in the audiovisual sector is a ground of justification in the general interest: precisely because the value at stake was one connected to the right of freedom of expression enshrined in Article 10 of the Convention.<sup>40</sup> At first sight it might therefore appear self-evident that the justification advanced is compatible with Article 10 of the Convention.<sup>41</sup>

39 — On this point see Case C-260/89 *ERT* [1991] ECR I-2925. In its judgment in that case the Court held that 'where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court' (paragraph 43). The Court therefore found that 'in such a case, it is for the national court and, if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court' (paragraph 44). The same considerations also apply, obviously, to requirements put forward to justify national measures which may hinder trade in goods.

40 — See footnote 33.

41 — On this point see also the decision of the Austrian Constitutional Court referred to above (cited in footnote 24), which emphasizes that the information media are not mere goods but also an essential element in the formation of public opinion. Legislation which aims, by measures which prohibit certain forms of publicity, to ensure the survival of small publishing houses, promotes the observance not just of the Austrian Constitution but also of Article 10 of the European Convention on Human Rights.

But in the present case two rights both protected by the same provision are to be considered: on the one hand, freedom of the press to be accorded to every trader in the sector, as a general principle, together with the highly important and correlative right of the public to receive every kind of information and ideas; on the other hand, the maintenance of media diversity in a democratic society. Consequently, Article 10 of the Convention requires the reconciliation, as far as possible, of two interests as diverse as freedom of the press and the safeguarding of pluralism which, quite manifestly, could be jeopardized by excessive concentration of the information media in too few hands.<sup>42</sup>

28. With those considerations in mind, let me first observe that freedom of the press may be restricted only in the name of a 'pressing social need',<sup>43</sup> an exhaustive list of such needs being set out in Article 10.2 of the Convention.<sup>44</sup> The case-law of the European Court of Human Rights itself leaves not the slightest doubt that a 'commercial message' or, if one prefers, the commercial use of the freedom of expression is also

protected by Article 10.<sup>45</sup> In such instances, however, the Court of Human Rights conducts a less rigorous test of proportionality, on the basis that in this area the States have a greater margin of discretion.<sup>46</sup>

As regards safeguarding pluralism in the media, the Court of Human Rights has recognized that, even if no such requirement is expressly referred to in Article 10.2 of the Convention as a derogation to freedom of expression, it is in fact a legitimate objective and therefore interference by the State is permissible, provided, as always, that it is prescribed by law and necessary in a democratic society.<sup>47</sup> In other words, the requirement of pluralism in the media permits certain limits to be placed on individual freedom of

42 — On this point see the Report by the European Commission on Human Rights on the case of *Geillustreerde Pers NV v Netherlands*, DR 8, page 5.

43 — See the judgment in *Sunday Times I* (26 April 1979, Series A No 30); *Barthold v Germany* (25 March 1985, Series A No 90); *Lingens v Austria* (8 July 1986, Series A No 103).

44 — Article 10.2 provides, I need scarcely recall, that the exercise of the freedoms it protects 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

45 — On this point see for example *Groppera Radio AG v Switzerland* (28 March 1990, Series A No 173). In response to the argument advanced by the defendant government, which had raised doubts about the possibility of relying on Article 10 in relation to broadcasts consisting mainly of light music and commercials, the Court of Human Rights held that Article 10.1 applies without 'there being any need to draw distinctions according to the content of the programmes' (see in particular paragraphs 54 and 55). On the same point see also *Markt Int. Verlag and Klaus Beermann v Germany* (20 November 1989, Series A No 165) where the Court rejected the notion that the scope of Article 10 was confined to statements of an artistic, religious, scientific, political or political-economic nature and did not extend to 'commercial statements or attitudes intended to promote economic interests'.

46 — See *Markt Int. Verlag and Klaus Beermann v Germany* cited in the previous footnote.

47 — See on this point *Informationsverein Lentia and Others v Austria* (24 November 1993, Series A No 276). In that case the Court affirmed that pluralism in the media constitutes an essential value in a democratic society and may therefore entail a limitation on freedom of expression. However the Court did not accept the defendant government's argument that a television monopoly was an appropriate and necessary means to ensure pluralism, particularly in relation to quality and balance in programmes and opinions. On the contrary, the Court pointed out that pluralism in the media is normally ensured by competition and that in any event a monopoly as rigid as that under scrutiny was not permissible.



expression and information, on condition however that they are necessary and proportionate to the objective to be achieved.

29. In the light of the foregoing, in particular the recognition given by the Court of Human Rights to the two values in issue, I take the view that the prohibition on the

marketing of periodicals containing prize competitions is not in conflict with the obligation to guarantee freedom of expression and is therefore in conformity with Article 10 of the Convention, but only within the limits of what is actually necessary and proportionate to the attainment of the objective of safeguarding press diversity. These limits, I can only repeat, are strict and are outlined above in my discussion of the suitability and proportionality of the contested measure vis-à-vis the mandatory requirement relied upon.<sup>48</sup>

## Conclusion

30. In the light of the above considerations, I suggest that the Court give the following reply to the question submitted by the Handelsgericht Wien:

Article 30 of the EC Treaty is to be interpreted as not precluding application of a national rule which prevents the importation of periodicals lawfully produced and marketed in another Member State by reason of their containing prize puzzle competitions or games, provided the rule in question is necessary and proportionate to the fulfilment of mandatory requirements, in this case the safeguarding of press diversity. In this regard, it is for the national court to determine, in the light of data on the national press market, whether a periodical possessing the relevant characteristics is in competition with similar recreational periodicals produced by large publishing groups or rather with those produced by small publishers; and whether, in the latter case, the consequence is an inducement to purchase which operates to the detriment of the small publishers.

<sup>48</sup> — See paragraphs 21 to 25 above.