

**Case C-371/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

7 August 2020

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

25 June 2020

**Defendant and appellant on a point of law:**

Peek & Cloppenburg KG, Düsseldorf

**Applicant and respondent on a point of law:**

Peek & Cloppenburg KG, Hamburg

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**Subject matter of the main proceedings**

Action (principally) for an order prohibiting the defendant, in the course of competition, from having advertisements published without clearly identifying them as an ‘advertisement’.

**Subject matter and legal basis of the request**

Interpretation of the first sentence of point 11 of Annex I to Directive 2005/29/EC;

Article 267 TFEU

**Questions referred 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/EC 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/EC 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?

### **Provisions of EU law cited**

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’), first sentence of point 11 of Annex I

### **Provisions of national law cited**

Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition; ‘the UWG’), Paragraph 3(3) in conjunction with point 11 of the annex to Paragraph 3(3)

These provide that a business-to-consumer commercial practice whereby the use of editorial content to promote sales is financed by an operator and that connection is not clearly identifiable from that content or from the way in which it is visually or acoustically presented (advertorial) is always illegal. Those provisions serve to transpose the first sentence of Article 5(5) of, in conjunction with the first sentence of point 11 of Annex I to, Directive 2005/29/EC.

### **Brief presentation of the facts and procedure**

- 1 The parties are two legally and economically separate and independent undertakings both of which are active in the retail sale of clothing and pursue this business through various branches under the trade name ‘Peek & Cloppenburg’. Between the two parties there is an agreement whereby the territory of the Federal Republic of Germany is divided into two economic areas (‘NORTH’ and ‘SOUTH’), with only one of the parties operating clothing outlets in each

economic area at any one time. The parties advertise their clothing outlets independently and separately.

- 2 At issue is a nationwide advertisement by the defendant that was published in the fashion magazine *GRAZIA* in March 2011. On a double-page spread of that magazine carrying the heading 'LESERAKTION' (reader offer), female readers were invited to 'an exclusive late-night shopping event', namely the 'GRAZIA StyleNight by Peek & Cloppenburg'. That double page spread includes the following text: '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!'. 'StyleNight' events enabled visitors to shop after closing time and to receive fashion, hair and make-up styling tips. The magazine article gave a more detailed description of the schedule for the events and used the trade name 'Peek & Cloppenburg' at several points in doing so. In the photographic image of one of the defendant's clothing outlets, too, the words 'Peek & Cloppenburg' appeared in illuminated lettering over the shop entrances and the trade name initials ('P&C') were visible on the door handles. The article pointed out the fact that there are two independent Peek & Cloppenburg undertakings and made it clear that 'this information is provided by Peek & Cloppenburg KG Düsseldorf'.
- 3 The article appeared as follows:

WORKING DOCUMENT

**GRAZIA**  
*StyleNight*  
by Peek & Cloppenburg

WIR LADEN EIN!  
**ZUM EXKLUSIVEN**  
*Late-Night*

Die Nacht für alle **GRAZIA-Girls**: Stöbern Sie mit uns nach Feierabend im Fashion-Tempel! Samt Sekt und persönlichem Stylisten. Wie Sie zum V.I.S. (Very Important Shopper) werden? Ganz schnell anmelden!

Hört sich traumhaft an, oder? Feierabend-Shopping mit der besten Freundin, ganz ohne rempelnde Schnell-Einkäufer, dafür mit 50 persönlichen Stylisten im Schlepptau! Außerdem sorgen Sekt, Häppchen und DJs für entspanntes Afterwork-Feeling und karapultieren Sie auf Wolke sieben. Oder besser gesagt: in eines von sieben Peek & Cloppenburg-Häusern in Deutschland und Österreich. Denn dort feiern wir ab März die GRAZIA StyleNight mit Ihnen! Schnell anmelden unter [www.grazia-magazin.de](http://www.grazia-magazin.de), denn die Einladungen sind limitiert – und heiß begehrt!

**TOURDATEN:** 16. 3. Berlin, 17. 3. Köln, 18. 3. Düsseldorf, 23. 3. Frankfurt, 24. 3. Mannheim, 25. 3. Stuttgart, 31. 3. Wien\*

**Peek & Cloppenburg**

ES GIBT ZWEI UNABHÄNGIGE UNTERNEHMEN PEEK & CLOPPENBURG MIT IHREN HAUPTSITZEN IN DÜSSELDORF UND HAMBURG. DIES IST EINE INFORMATION DER PEEK & CLOPPENBURG KG DÜSSELDORF. STANDORTE FINDEN SIE UNTER [WWW.PEEK-CLOPPENBURG.DE](http://WWW.PEEK-CLOPPENBURG.DE)

Ein Modishaus öffnet exklusiv für Sie die Türen zum Shoppen, Staunen und Spaßhaben

92 611/11

**LESERAKTION**

# Shopping

SO GEHT'S:  
Schnell auf [www.grazia-magazin.de](http://www.grazia-magazin.de)  
klicken und sich für  
den jeweiligen Standort  
anmelden!

oppenburg Peek, Cloppenburg

Netürlich gehört zur GRAZIA Style-Night by P & C auch ein Red Carpet!

**CODELLO**  
Unser Style-Tipp für windige Frühlingstage: das Print-Postcard!

**BURBERRY**  
Der klassische Trenchcoat ist ein Must-Have im Frühling

**MARC CAIN**  
Trendy und sexy: ein Minidress aus Spitze

**JAKES**  
Die süße Clutch im Marine-Look macht sofort Urlaubsstimmung

Die warten schon auf Sie!

Das Shooting am 11.11. in Wien war ein Abenteuer Peek & Cloppenburg. Bild: Wiese

**GRAZIA 93**

- 4 The action brought by the applicant seeking (principally) an order prohibiting the defendant, in the course of competition, from having advertisements published without clearly identifying them as an 'advertisement' (as was the case here, according to the application) was successful at first and second instances. By its appeal on a point of law, the defendant maintains its contention that that action should be dismissed.

**Essential arguments of the parties in the main proceedings**

- 5 The applicant claims that the abovementioned advertisement infringes the prohibition on editorial advertising laid down in Paragraph 3(3) of the UWG in conjunction with point 11 of the annex to Paragraph 3(3) of the UWG.
- 6 As regards whether the magazine article has editorial content, the defendant contends that, since the reader's attention is drawn to the joint advertising events organised by *GRAZIA* magazine and the defendant, that article is at most 'self-coverage' but not an advertorial.
- 7 In this regard, the style of layout is not in itself sufficient to give the impression of objective and neutral reporting. The profiling of an event to promote (not least) the sales of the magazine's own press products does not give the impression of research or evaluation. The article's presentation as an editorial item does, however, presuppose some form of reporting. There is by no means sufficient evidence to warrant the classification of the article as a whole as advertising.
- 8 Neither does that article constitute promotion, since the contested 'report' is composed of inviting and attractive texts on the subject of an event, but says nothing about the quality of goods.
- 9 So far as 'payment' is concerned, the assumption of consideration for an editorial article presupposes the existence of a purposive relationship between the grant of the economic advantage and the publication such that what appears to be a neutral and objective report has in fact been 'purchased'. A situation in which a trader shares the cost of an advertisement which is jointly organised with a media operator and benefits both undertakings is not sufficient to support that assumption. In such a situation, only the jointly organised 'event' is collectively financed, the media operator's reference to the advertisement in the editorial article, on the other hand, serving exclusively its own interests. An averagely observant reader will not expect objective and critical reporting if for no other reason than that the publication clearly pursues the media operator's own interests as co-organiser of the event. The fact that such 'reader offers', considered in their entirety, are in the nature of advertising is clear.
- 10 In the case of a fashion magazine article which refers to an event jointly organised with a fashion retailer, a situationally observant reader will expect not objective and factual information but further details about the organisation of the event. In cases in which third-party promotion coincides with self-promotion, the criteria to be applied are different from those that normally govern 'covert advertising', on account of the different degree of attention paid to the former by the target public. The article in question does not constitute covert advertising either. It is, rather, an open promotion of the business interests of both the magazine and the defendant.

**Brief presentation of the reasons for the request**

- 11 The referring court states that the advertisement at issue is a commercial practice within the meaning of both national law and Directive 2005/29/EC (and, in particular, not only on the part of the defendant but also on the part of *GRAZIA* magazine), inasmuch as it is specifically intended to increase the sales of both the defendant and *GRAZIA* magazine. At the same time, the contested advertising consists only in the publication of the article, not in the organisation of the events announced and described therein.
- 12 Moreover, the article in question has editorial content. An article has editorial content where its layout is such that it appears to be an objective and neutral report by the media operator itself. The decisive criterion is the understanding of a reasonably well-informed, situationally observant and circumspect consumer. It is immaterial in this regard whether the article was drafted by the undertaking placing the advertisement itself or by an editor of the media operator. The publication at issue gives an average situationally observant reader the impression of objective and neutral reporting by *GRAZIA* magazine itself, not least because the layout and colouring of the article are consistent with the presentation of other editorial articles and differ clearly from the advertisements printed in the magazine.
- 13 Furthermore, the article is promotional. In order for an article to be classified as such, a trader must have the intention of using the editorial content in question to promote the sales of his goods or services. This must always be assumed to be the case where the article objectively contains advertising. It is not necessary for the article to identify a particular product the sales of which are to be promoted. The promotional purpose of the article is apparent not least from the illustration of the 'P&C' clothing outlet and the overlay of the branded clothing which can be purchased there. What is more, the multiple references to 'Peek & Cloppenburg' and 'P&C' represent another means by which the defendant's undertaking and products are advertised. That advertising is further reinforced by the announcement of the dates of events taking place at the defendant's branches which are specifically intended to attract female customers. In addition, the article serves to promote *GRAZIA* magazine too. It is a joint advertisement the specific purpose of which is to promote the sales of both undertakings. While it is not a precondition of using editorial content for the purpose of enhancing sales that the content in question should comment on the quality of particular goods, the article at issue certainly depicts and positively highlights a number of specific products by reference to their brand name.
- 14 The question is whether the defendant paid for the use of editorial content to promote a product, within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29/EC, and, therefore, financed its use for that purpose within the meaning of point 11 of the annex to Paragraph 3(3) of the UWG, which must be interpreted in conformity with that directive.

- 15 In that regard, the first question referred seeks to determine whether ‘payment’ within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29/EC presupposes the existence of monetary consideration or whether other forms of non-cash consideration are sufficient.
- 16 The referring court assumes that other forms of non-cash consideration are sufficient.
- 17 In support of that view, it cites, first of all, the wording used in various language versions [of that provision]. It is true that the term ‘bezahlt’, which refers primarily to monetary consideration, appears not only in the German text of the directive but also, for example, in its equivalent form, in the English (‘paid for’), Spanish (‘pagando’) and Dutch (‘betaald’) versions of that provision. However, other language versions contain a form of words corresponding to the German term ‘finanziert’ (financed), which can also include other forms of non-cash consideration. Thus, the French text of the directive, for example, uses the word ‘financé’. In addition, the Italian version refers to support for the costs of the advertisement (‘i costi di tale promozione siano stati sostenuti’).
- 18 The purpose of that provision also supports a broad interpretation of the term in question. That provision is intended to separate advertising from the editorial media. The background to that requirement of separation is the view that a consumer will be less critical of information provided by a third party that is not itself directly engaged in competition and will generally attach greater importance and attention to such information than to similar information easily recognisable as advertising provided by the advertiser himself. Disguising the promotional intention [behind content] helps to prompt consumers to set aside their intrinsically critical attitude towards advertising messages. The identification of content as advertising is intended to enable consumers to adapt to the commercial nature of the communication and to react accordingly to it. The referring court takes the view that the normative purpose of the legislation can be achieved, and obvious circumventions of it avoided, only if the scope of the term ‘payment’ is not confined exclusively to monetary consideration but also includes any kind of consideration.
- 19 Finally, the aim pursued by Directive 2005/29/EC of establishing a high level of consumer protection also militates in favour of a broad interpretation of the term ‘payment’. That aim is emphasised not only in Article 1 of that directive, but also in its recitals (see, for example, recitals 1, 5, 20, 23 and 24). It is likely to be taken adequately into account only if the prohibition of advertorials is not confined exclusively to editorial articles for which the advertiser has provided monetary consideration.
- 20 Lastly, a different interpretation would not seem to be called for even in the light of the fundamental right of freedom of the press. That fundamental right cannot justify the use of editorial content financed by a trader for the purposes of product promotion, since the reader’s confidence in the principle that recommendations



presented in editorial form are based on the conviction of the editorial staff and not on contributions from the trader profiting from that content must take priority. Purchased articles have the ultimate effect of destroying the cornerstone of press freedom.

- 21 The second question seeks to ascertain whether the first sentence of point 11 of Annex I to Directive 2005/29/EC presupposes that a trader has provided the media operator with a non-cash benefit as consideration for the use of editorial content and, if so, whether that condition is satisfied in the present case.
- 22 In the context of the prohibition of advertorials laid down in competition law, the 'payment' or 'financing' of editorial content should probably be assumed to be present only where the payment or financing is to be regarded as consideration for the editorial content. Such consideration is likely to be lacking in any event where the non-cash benefit is unconnected to the publication of the editorial article.
- 23 In the case of the reporting on a jointly organised and financed advertisement, such as that to be assessed in the present case, such a connection might possibly be assumed to be present not least because the advertisement and the report covering it could be regarded as forming part of a single advertising measure which can be viewed and assessed only as a whole. As a result, the mere fact that the advertisement is jointly financed would mean that the article published on that advertisement would have to be regarded as being (co-)financed too.
- 24 In any event, however, the defendant and *GRAZIA* magazine did not only jointly contribute towards the costs and effort associated with the advertised 'StyleNights'. Rather, the defendant also made available to the magazine the rights to use the pictures placed in the contested report. The images presented there are not confined to a photographic reproduction of the defendant's company logo and clothing outlets, but also show a number of products available for purchase from the defendant as well as various individuals (in particular, a '[female] hair and make-up stylist' and a disc jockey). The making-available of the rights to the images used must also be regarded as a non-cash benefit provided by the defendant. It is therefore likely that at least some of the non-cash benefits provided by the defendant are likely to be specifically connected to the publication of the contested magazine article too.
- 25 However, given that the contested article reports on a joint advertisement by the defendant and *GRAZIA* magazine which is intended to increase the sales of both undertakings, it is open to question whether those benefits can indeed be regarded as consideration within the meaning described above or must more accurately be classified as contributions made by a partner and, if the latter is the case, whether the criterion for the existence of an advertorial may nonetheless be met.
- 26 The appeal court formed the view without erring in law that the connection from the point of view of advertising and finance was not apparent with the requisite degree of clarity.

- 27 There is no infringement of provisions of national and EU law if it is made absolutely clear that the trader financed the use of editorial content for promotional purposes.
- 28 Accordingly, the target public is not misled (only) in the case where the nature of the editorial article as advertising is clearly identifiable by the consumer, for example where that article is identified as an ‘advertisement’. The identification must be such that the average situationally observant reader can be in no doubt as to the nature of the article as advertising.
- 29 The appeal court took the view that the contested magazine article did not meet those requirements. Its nature as advertising, the financial relationships and the defendant’s role in the publication were, it found, not apparent from the content of the article with the necessary clarity. This was true, first, with regard to the appeals made directly to readers, such as, for example, the words ‘We invite you ...! Browse around the fashion temple with us after closing! We’ll be celebrating there ... with you! Register right away at ...’. Secondly, the article is not identified as an ‘advertisement’ or ‘publicity’, but merely as a ‘reader offer’ (‘Leseraktion’). The consumer cannot draw from that term any meaningful conclusions as to the article’s nature as advertising.
- 30 Moreover, the criteria governing the assessment of a magazine’s self-promotion are no different from those that apply, for example, to the assessment under competition law of prize puzzles and the presentation in them of the prizes available.
- 31 The average situationally observant reader will generally recognise a prize game too as being a form of self-promotion by the publisher of the magazine and will therefore assess it differently from articles that come within the narrower editorial field. A presentation of the products offered as prizes is not therefore open to objection under competition law if it does not exceed the limits of what is normal and strictly customary. The depiction of prizes may, by contrast, be unlawful under competition law in the case where the promotional exhibition of the products offered as prizes stands distinctly in the foreground, while the public is given the impression that the editorial staff have followed an objective selection procedure in order to choose a product which is not only an attractive prize but also, on account of its characteristics, an item highly worthy of recommendation on other grounds too.
- 32 In the present case, the fact that the contested publication also contains self-promotion on the part of the media operator does not, in the referring court’s view, warrant a different assessment. It is true that the average reader may, to a certain extent, be aware that publishers engage in self-promotion. It does not follow from this, however, that such a reader would expect a publisher’s self-promotion to be simultaneously used to advertise a third-party undertaking or expect a third-party undertaking to be providing or to have provided non-cash consideration for the report itself or for the cooperation presented in it. This case cannot therefore be

assumed to be an instance of ‘open promotion’ of the business interests of the defendant (too).

WORKING DOCUMENT