

Case C-697/23

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

Date lodged:

17 November 2023

Referring court:

Landgericht München I (Germany)

Date of the decision to refer:

7 November 2023

Applicant:

HUK-COBURG Haftpflicht-Unterstützungs-Kasse kraftfahrender Beamter Deutschlands a.G. in Coburg

Defendants:

Check24 Vergleichsportal GmbH

CHECK24 Vergleichsportal für Kfz-Versicherungen

CHECK24 Vergleichsportal für Sachversicherungen GmbH

CHECK24 Vergleichsportal für Krankenversicherungen GmbH

CHECK24 Vergleichsportal für Vorsorgeversicherungen GmbH

CHECK24 Vergleichsportal für Versicherungsprodukte GmbH

Subject matter of the case in the main proceedings

Approximation of laws – Directive 2006/114/EC – Misleading advertising – Article 4 – Conditions of permitted comparative advertising – Comparison website for insurance schemes – Performance of comparison by means of a grading or points system

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Is Article 4(c) of Directive 2006/114/EC to be interpreted as meaning that the conditions of permitted comparative advertising under that provision may also be satisfied where the comparison is performed by means of a grading or points system?

Provision of EU law relied on

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, Article 4(c)

Provision of national law relied on

Gesetz gegen den unlauteren Wettbewerb (Law on unfair competition, ‘the UWG’), Paragraph 6(2)(2)

Succinct presentation of the facts and procedure

- 1 The parties to the main proceedings disagree, in essence, as to whether and, if so, under what conditions a comparison of insurance schemes by means of ‘Tarifnoten’ (‘policy grades’) on a comparison website is permitted.
- 2 The applicant is the parent company of a large German insurance group whose subsidiaries also offer insurance schemes in different types of insurance.
- 3 The defendants form part of a group of companies which operates a large comparison website on the internet, that is to say, a website which offers users (free of charge) a means of comparing various products, including insurance schemes, on the basis of a number of criteria, including but not limited to price, and subsequently, as the case may be, concluding contracts with the providers of those products.
- 4 The first defendant is the holder of the (umbrella) domain name. The content of the pages is the responsibility of the various operating companies of the group, which are not connected to one another by control agreements and surrender-of-profits agreements. The first defendant makes the website available to the various operating companies on that basis. The second defendant is responsible for motor vehicle insurance, the third defendant for contents, home, private third-party and legal expenses insurance, the fourth defendant for private health insurance and

supplementary health insurance, the fifth defendant for term life insurance, accident insurance, Riester pensions, basic pensions, flexible private pensions and insurance against incapacity for work, and the sixth defendant for insurance against death grants.

- 5 The defendants design the presentation of policy comparisons for the various types of insurance according, in principle, to the same model: after entering certain key data, some mandatory and some optional, on the policy holder and the desired product ('filter settings'), the website user receives a results page relating to the information he has given (generated by the relevant defendant).
- 6 The results page contains a list of insurance policies from various providers. What is considered the essential information on each policy is presented in the form of an overview (specifying the insurer, the price, but also the policy details in the form of keywords). In addition, a 'policy grade' expressly labelled as such is displayed in a box below the defendant's brand name. It has a numerical value ranging from 1.0 to 4.0 and is supplemented by grade names familiar from the school system: 'sehr gut' ('excellent'), 'gut' ('good'), 'befriedigend' ('satisfactory') or 'ausreichend' ('sufficient').
- 7 At the top of the list of policies is one which is labelled (for the most part) as 'recommended for value for money' and another that is labelled as 'recommended for level of cover'. After that, the policies on offer are listed, in principle, in rising order of price. However, the customer always has the option (by clicking the relevant buttons) of displaying the policies in a different order: listed by provider (meaning alphabetically), in declining order of grades or in declining order of customer review scores.
- 8 On all results pages, if the user touches the box containing the policy grade with the cursor of the computer mouse (in what is known as a mouseover or hover effect), a pop-up window opens containing the information underpinning the policy grade. The policy grade is based on a points system: points are awarded up to a certain maximum score under a series of different grading parameters, adding up to a total score. The grading parameters and the total number of points available differ depending on the type of insurance. The grading parameters are collated into criteria or categories (which differ according to the type of insurance). In all types of insurance, the criteria and categories are further subsumed into the 'insurer module' and the 'policy module', while the weighting of the two modules in relation to one another (that is to say, the ratio between their maximum scores) varies. Each grading parameter is marked with a green or yellow tick or a red cross. At the bottom of the window, users are informed that those symbols stand for 'excellent' (green tick), 'average' (yellow tick) and 'below average/not covered' (red cross). Depending on the type of insurance, the pop-up windows sometimes display all grading parameters directly, sometimes only the different categories at first. Where the pop-up windows do not directly display all grading parameters but only the categories, the individual parameters

can be consulted via arrows at the beginning or end of the line specifying each category, as well as by clicking on the categories.

- 9 In proceedings before the Landgericht Köln (Cologne Regional Court) against the first defendant and the second defendant (motor vehicle insurance) in 2020, the applicant claimed that comparison by means of policy grades contravened Paragraph 6(2)(2) of the UWG. The Landgericht Köln accepted that in its (final) judgment of 22 April 2020. The defendants subsequently revised their online presence for the motor vehicle insurance type and added further information on the policy grades.
- 10 In the course of the main proceedings, the defendants also made changes in respect of the other types of insurance (at issue in the present case). Most pop-up windows now include a clickable line of text saying, ‘Show policy details’. In clicking on the text, the user receives more information on the grading parameters with short descriptions of the substantive reasons for the points awarded (for example, information on what share of certain medical services is reimbursed).
- 11 In addition, all pop-up windows contain clickable text, above or below the grading parameters listed, saying, ‘More information on how the policy grade was calculated is available here’. Clicking on the text opens a new information page which explains in more detail how the policy grades are arrived at. Those information pages are all, in principle, identical in structure. First, they explain briefly, in general terms, what the defendant’s policy grades are. Next, a second section explains what the policy grade is derived from in the insurance type in question and describes and gives reasons for the categorisation and grading parameters. A third section explains how points are awarded – that is to say, what findings result in what number of points. Finally, it states what total scores result in what grades (conversion).
- 12 The policies listed on the results pages (that is to say, the boxes pertaining to them) contain either a line of text on the bottom edge, with an arrow pointing downwards, saying, ‘Policy details’, ‘Service details’ or ‘More information on the policy’ or a button on the right-hand side (in the location of the ‘Apply online’, ‘Apply’ or ‘Next’ button) labelled ‘Details’, through which the user can access additional information. However, no link is made between that information and the policy grade.
- 13 By document of 26 November 2020, the applicant brought an action against the first defendant. The applicant claimed injunctive relief, a declaration of liability for damages and compensation for the extrajudicial legal costs incurred for the written warning notice. The applications for injunctive relief concerned specific forms of infringement, evidence of which was submitted in the form of annexes. They were directed against the presentation of policy grades as they appear on the results pages themselves but also against the presentation of policy grades on the results pages in combination with the associated information provided by pop-up windows.

- 14 By document of 20 November 2021, the applicant expanded its action and extended the applications for injunctive relief brought against the first defendant as well as its request for a declaration of liability – differentiated according to the insurance type concerned – to include the operating company responsible for each. It also seeks information from the other defendants, supplementing each request for information with a subsidiary claim for compensation in the event of insufficient information being provided.

The essential arguments of the parties in the main proceedings

- 15 In the applicant's view, the presentation and awarding of policy grades by the defendant, even after the changes made in light of the judgment of the Landgericht Köln, constitute unlawful comparative advertising within the meaning of Paragraph 6(2)(2) of the UWG. Policy grades, it argues, are not features of a product, nor do they illustrate its price. On the contrary, they are pure value judgements which, the applicant submits, cannot be permitted as subject matter of comparative advertising. It argues that comparison by means of policy grades, such as that engaged in by the defendants on their web pages, is therefore unlawful in general. It also denies that policy grades are, as the defendants have argued, a mathematical summation of various comparisons of features, as the features of insurance contracts, such as levels of cover, cannot be added together. Rather than features, the applicant submits, the defendants add together subjective evaluations of features. That, it states, calls into question the fundamental difference between a fact and assessment of that fact. In the applicant's view, policy grades altogether reflect a false objectivity and have great potential to mislead. The applicant also refers to national case-law on the grading of products by Stiftung Warentest, the official foundation for product testing, (in particular Bundesgerichtshof (Federal Court of Justice), GRUR 1997, p. 942), under which a grade must be based on a neutral, objective and expert examination.
- 16 The defendants consider that comparison by means of policy grades is permitted both in principle and in the specific case. They submit that the grading represents the total outcome of an objective comparison. The outcome, they state, is altogether based on verifiable features. They argue that, in addition to the naming of the individual grading parameters – that is to say, the features of the insurance policy in question – and their weightings, all the necessary information underpinning the policy grade is provided in great detail. In their view, the policy grade is ultimately simply the permissible mathematical summation of the total outcome. They argue that the selected grading parameters are, from the perspective of the target section of the public, material, relevant and representative features of an insurance policy. Neutrality, they submit, is of no import in the context of Paragraph 6(2)(2) of the UWG.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 17 The outcome of the dispute in the main proceedings depends on the interpretation of Article 4(c) of Directive 2006/114, which can be clarified by obtaining an answer to the question referred for a preliminary ruling.
- 18 By the forms of order sought, the applicant also challenges the defendants' comparison by means of policy grades regardless of the associated provision for users of extensive information about the grades which enables them to understand how the grades are formed. In that respect, the referring court considers it relevant whether or not Paragraph 6(2)(2) of the UWG does in fact prohibit comparison by means of grades in general. The interpretation of Paragraph 6(2)(2) of the UWG depends in turn on the interpretation of Article 4(c) of Directive 2006/114.
- 19 In the view of the referring court, a score/grade never in itself gives the consumer information significant to the purchasing decision about the compared product but does so only when juxtaposed with other grades. Even by definition, a grade cannot constitute a feature of a product within the meaning of Article 4(c) of Directive 2006/114. Moreover, the awarding of scores or grades is always a subjective act, whereas Article 4(c) of Directive 2006/114 expressly demands objective comparison. The objectivity of the comparison is required in addition to verifiability and must therefore have a separate meaning independent of verifiability. On the other hand, Directive 2006/114 appears in principle to favour comparative advertising in terms of competition and consumer policy: where it, as described in recital 8 of that directive, compares material, relevant, verifiable and representative features and is not misleading, comparative advertising gives consumers a means of deriving the greatest possible advantage from the internal market. The requirements for the permissibility of such advertising must, therefore, not be defined in an excessively strict manner. Accordingly, it is the referring court's understanding that the conditions set out in Article 4(c) of Directive 2006/114 should be interpreted broadly.