

**Case C-100/24**

**Request for a preliminary ruling**

**Date lodged:**

7 February 2024

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

21 December 2023

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

Verbraucherzentrale Hamburg e. V.

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

bonprix Handelsgesellschaft mbH

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[...]

**BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)**

**ORDER**

[...]

in the case of

Verbraucherzentrale Hamburg e. V., [...]

[...] Hamburg,

Applicant and appellant on a point of law,

- [...]

v

bonprix Handelsgesellschaft mbH, [...]

[...] Hamburg,

Defendant and respondent in the appeal on a point of law,

- [...]

Further to the hearing held on 21 December 2023 [...], the First Civil Chamber of the Bundesgerichtshof (Federal Court of Justice)

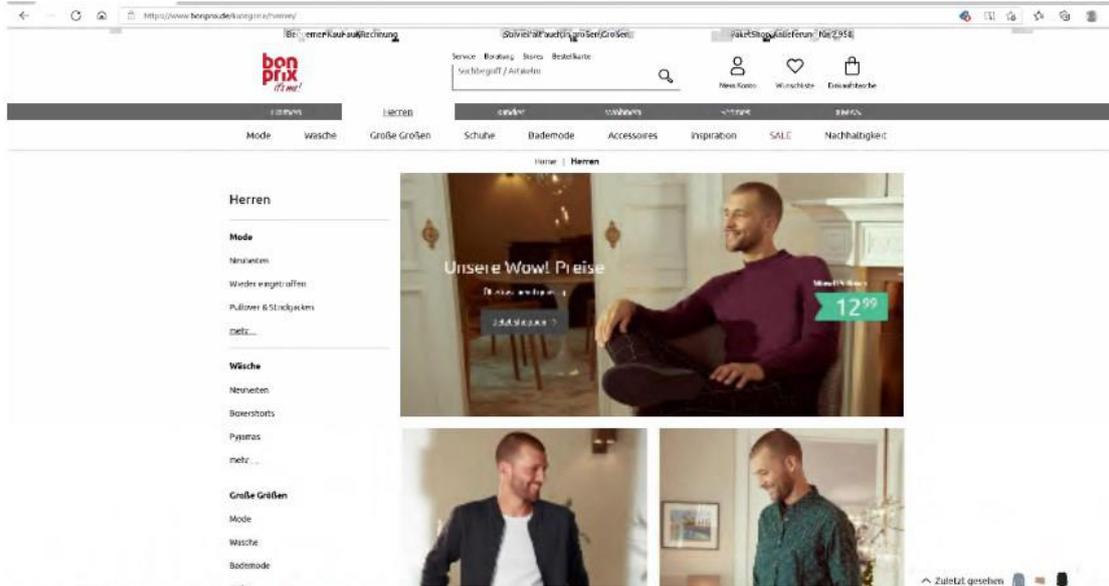
hereby orders:

- I. The proceedings are stayed.
- II. The following question is referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 6(c) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive 2000/31/EC'; OJ L 178, 17 July 2000, p. 1):

Does advertising with a payment arrangement (in the present case, 'convenient purchase on invoice'), which, while having only a low monetary value, contributes to the safety and legal interests of the consumer (in the present case, no disclosure of sensitive payment data; in the case of rescission of the contract, no reclamation of an advance payment), constitute a promotional offer within the meaning of Article 6(c) of Directive 2000/31/EC on electronic commerce?

Grounds

- 1 A. The applicant is an association on the list referred to in Section 4 of the Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Law on prohibitory injunctions in the case of breaches of consumer and other laws, – 'the UKlaG'). The defendant operates an online mail-order business.
- 2 In December 2021, the defendant included on its website [www.bonprix.de](http://www.bonprix.de) the words 'convenient purchase on invoice' (see Annex K2, reproduced below, with the addition of an arrow to clarify the information).



- 3 The applicant alleged that that advertising was misleading on the ground that it did not reveal the existing proviso of a creditworthiness assessment, and unsuccessfully sent a warning letter to the defendant.
- 4 The applicant claims that the defendant should be ordered, subject to further specified administrative sanction,
 

to cease advertising on a website published for the purposes of initiating sales contracts with consumers – as is apparent from the screenshot produced in Annex K2 – by means of the slogan ‘convenient purchase on invoice’ where the purchase on invoice thus advertised is offered only subject to an assessment of the purchaser’s creditworthiness.
- 5 The applicant also seeks reimbursement of the costs of the warning letter.
- 6 The Landgericht (Regional Court, Germany) dismissed the action. After prior notification, the court of appeal dismissed the applicant’s appeal by means of a unanimous order. By way of its appeal on a point of law, for which the Chamber granted leave and which the defendant seeks to have dismissed, the applicant is continuing the pursuit of its claims.
- 7 B. The success of the appeal on a point of law depends on the interpretation of Article 6(c) of Directive 2000/31/EC. Before a ruling can be given on the appellant’s appeal on a point of law, the proceedings must therefore be stayed and a preliminary ruling must be obtained from the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU.
- 8 I. The court of appeal gave the following reasons for dismissing the claims asserted in the action:

- 9 The advertisement stating ‘convenient purchase on invoice’ is neither misleading nor contrary to an obligation to provide information.
- 10 The claim is not misleading. In the present context, the public understands that general indication only as meaning that a purchase on invoice is possible. However, the consumer addressed does not expect all the terms and details of a purchase on invoice to be communicated to him or her at this stage. He or she does not read into the statement that that possibility is granted unconditionally and unreservedly to any purchaser. It is not eye-catching advertising because it is not highlighted. Thus, the consumer’s attention is not drawn to a sensational or exceptional message.

However, it would be unusual for the defendant not to make purchase on invoice subject to conditions. The defendant has argued, in essence, that, in the context of online mail order sales, a purchase on invoice is customary in the industry. The applicant did not adequately rebut that analysis. Even if a consumer were not to consider the defendant’s possible conditions because of the absence of any indication to that effect, it would not be misleading. The contested statement is objectively true because a purchase on invoice from the defendant is possible and the balancing of the interests to be carried out by means of objectively accurate information, when examining whether it was misleading, would be in favour of the defendant. The advertisement did not have the effect of attracting more attention. During the ordering process, the customer has been informed of the conditions of purchase on invoice.

- 11 Nor does the statement breach an obligation to provide information. It is necessary to examine whether, in the light of the specific layout of the defendant’s website, which is directly linked to the advertising message ‘convenient purchase on invoice’, the consumer must process the information as to whether that purchase on invoice is subject to conditions, and accordingly, to which conditions it is subject. For the reasons already given, that question is to be answered in the negative. In particular, the obligation to provide information laid down in Section 6(1), point 3, of the Telemediengesetz (Telemedia Act; ‘the TMG’), which requires promotional offers, such as discounts, bonuses and gifts to be clearly identifiable as such, and is one of the provisions transposing the directives of EU law to which Section 5a(4) of the Gesetz gegen den unlauteren Wettbewerb (Act against Unfair Competition; ‘the UWG’) refers, has not been infringed. A purchase on invoice is not a non-cash benefit comparable to the discounts, bonuses or gifts referred to in the provision. There is no additional, tangible and nameable advantage in the context of goods or services offered without additional consideration. In the case of a purchase on invoice, the buyer must pay the same price; it is payable immediately, without further agreement, after receipt of the goods. The only financial advantage for the buyer lies in the fact that he or she has to pay the purchase price a few days later than with other methods of payment. No advantage is granted beyond the actual purchase.

- 12 In the absence of a right to injunctive relief, the costs of sending a warning letter should not be reimbursed.
- 13 II. The appeal on a point of law must be upheld if the court of appeal erred in finding that the defendant had not infringed Section 5a(2) and (4) of the UWG in the version in force until 27 May 2022 (UWG, old version)/Section 5a (1) and Section 5b(4) of the UWG in the version in force from 28 May 2022 (UWG, new version), read in conjunction with Section 6(1) no. 3 of the TMG.
- 14 1. [...] a right to bring proceedings [...] exists [...].
- 15 2. Under the first sentence of Section 5a(2) of the UWG, old version, a person is deemed to have acted unfairly in a particular case, on the basis of all the circumstances, where he or she omits material information (no. 1) which the consumer needs, depending on the context, in order to take an informed transactional decision; and (no. 2) where his or her omission is likely to induce the consumer into taking a transactional decision which he or she would not have taken otherwise. Under Section 5a(1) of the UWG, new version, unfairness is deemed to have occurred where a person misleads a consumer or other market participant by omitting material information (no. 1) which the consumer or other market participant needs, depending on the relevant context, in order to take an informed transactional decision; and (no. 2) where that omission is likely to induce the consumer or the other market participant into taking a transactional decision which he or she would not have taken otherwise. Under Section 5a(4) of the UWG, old version, and Section 5b(4) of the UWG, new version, ‘material’ within the meaning of section 5a(2) of the UWG, old version, and Section 5a(1) of the UWG, new version, is also deemed to include that information which may not be withheld from consumers on the basis of EU regulations or under legal provisions implementing EU directives for the purposes of commercial communications, including advertising and marketing.
- 16 The provisions of the first sentence of Section 5a(2) of the UWG, old version, and Section 5a(1) of the UWG, new version, are intended to transpose Article 7(1) of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (‘Directive 2005/29/EC’) (see Bundesgerichtshof (Federal Court of Justice, Germany), judgment of 26 October 2023 – I ZR 176/19, GRUR 2023, 1704 [juris paragraph 20] = WRP 2024, 65 – Cigarette vending machine III, with further references). Under that provision, a commercial practice is to be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, depending on the context, in order to take an informed transactional decision and thereby induces or is likely to induce the average consumer into taking a transactional decision that he or she would not have taken otherwise. Article 7(5) of Directive 2005/29/EC, on the basis of which Section 5a(4) of the UWG, old version/Article 5b(4) of the UWG, new version, were adopted (cf. Bundesgerichtshof (Federal Court of Justice),

GRUR 2023, 1704 [juris, paragraph 20] – cigarette vending machine III, with further references), provides that information established by EU law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II to the Directive, is to be regarded as material. Reference is made in the list in Annex II to Directive 2005/29/EC to Article 6 of Directive 2000/31/EC, which is transposed into German law by Section 6(1) of the TMG.

- 17 3. In the present case, it is conceivable that the defendant breached the obligation to provide information laid down in Article 6(1) no. 3 of the TMG. Under Article 6(1) no. 3 of the TMG, service providers must, in the case of commercial communications which are telemedia or parts of telemedia, comply with the following conditions: promotional offers, such as discounts, premiums and gifts, must be clearly identifiable as such, and the conditions which are to be met to qualify for them must be easily accessible and presented clearly and unambiguously. That provision is intended to transpose Article 6(c) of Directive 2000/31/EC (on the previous provision, identical in that regard, of Section 7 of the TMG, old version, cf. explanatory memorandum to the Government Draft Act on the Legal Framework for Electronic Commerce, Bundestag printed paper 14/6098, p. 22), and therefore requires an interpretation consistent with the Directive. Under Article 6(c) of Directive 2000/31/EC, in addition to other information requirements established by EU law, Member States are to ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions: promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, must be clearly identifiable as such, and the conditions which are to be met to qualify for them must be easily accessible and be presented clearly and unambiguously.
- 18 a) As the operator of an online mail-order business, the defendant is a service provider within the meaning of Section (2) no. 2 of the TMG/Article 2(b) of Directive 2000/31/EC (on the concept of service provider, cf. Bundesgerichtshof (Federal Court of Justice), judgment of 9 September 2021 – I ZR 90/20, BGHZ 231,38 [juris paragraph 106 – Influencer I).
- 19 b) The indication ‘convenient purchase on invoice’ contested in the present case is a commercial communication and is part of an electronic media or information society service within the meaning of Section 6(1) no. 3 of the TMG/Article 6(c) of Directive 2000/31/EC.
- 20 A commercial communication within the meaning of Section 2 no. 5 of the TMG/Article 2(f) of Directive 2000/31/EC means any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession, but not information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address, or communications relating to the

goods, services or image of the company, organisation or person, compiled in an independent manner, particularly if without financial consideration. According to the Chamber, this definition of commercial communications is also decisive for the interpretation of Section 5a(4) of the UWG, old version, Section 5b(4) of the UWG, new version/Article 7(5) of Directive 2005/29/EC (see Bundesgerichtshof (Federal Court of Justice), GRUR 2023, 1704 [juris, paragraph 20 – Cigarette vending machine III). It follows that the defendant's statement contested in the present case falls within the concept of commercial communication because it contributes to promoting directly the sale of the defendant's products.

- 21 The statement is also part of a telemedium (first sentence of Section 1(1) of the TMG) or an information society service (Article 2(a) of Directive 2000/31/EC) because the defendant makes it on the website advertising its mail-order service (cf. Article 1(2) of Directive 98/48/EC as amended by Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations).
- 22 c) It must be determined whether the disputed indication, promoting the possibility of a 'convenient purchase on invoice', falls within the concept of promotional offers within the meaning of Article 6(c) of Directive 2000/31/EC.
- 23 aa) The meaning and scope of a legal term of EU law, which is not defined in the EU law at issue, must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part (see, to that effect, Court of Justice of the European Union, judgment of 3 September 2014 – C-201/13, GRUR 2014, 972 [juris paragraph 19] = WRP 2014, 1181 – *Deckmyn and Vrijheidsfonds*; Court of Justice of the European Union, judgment of 7 April 2022 – C-668/20, ZfZ 2022, 184 [juris paragraph 67] – *Y GmbH* [vanilla oleoresin]).
- 24 bb) According to the literal meaning of the requirement 'promotional offers', the offer of 'convenient purchase on invoice' that an undertaking makes to promote its goods may fulfil the criteria for an offence. The very fact that the defendant considers the statement to be worth mentioning shows that it anticipates it will have an advertising effect, that is to say, a promotional effect.
- 25 cc) The regulatory context raises the question whether the concept of promotional offers is limited by the addition of examples ('such as') of 'price discounts, bonuses and gifts', to the effect that mere payment arrangements, such as the possibility of a purchase on invoice, are not covered by that provision. In so far as it is argued that Section 6(1) no. 3 of the TMG refers only to non-cash benefits (see BeckOK, *Informatons- und Medienrecht*, Pries, 42nd edition [situation of 1 November 2023], Section 6 of the TMG, paragraph 7; BeckOK, *IT-Recht*, Sasing-Wagenpfeil, 12th edition [situation of 1 July 2023], Section 6 of the TMG, paragraph 31; Spindler in Spindler/Schmitz, *TMG*, 2nd edition, Section 6 paragraph 23), this does not preclude the inclusion of the offer to purchase on invoice within the concept of an offer for promotion where – as in the present

case – the payment method advertised is associated with a non-cash advantage (even a minimal one) in view of the associated de facto deferral of payment. In any event, if the requirement of a non-cash benefit is waived and even the promise of preferential treatment is deemed to be sufficient (the view taken by Roßnagel/Schmitt, *Beck'scher Kommentar zum Recht der Telemediendienste*, Article 6 of the TMG, paragraph 24), the criteria for an offence have been fulfilled.

- 26 On the other hand, it could mitigate against the inclusion of payment arrangements within the criteria for an offence to emphasise – with the appeal against the appeal on a point of law – the ‘campaign character’ of the sales promotion measures listed by way of example in order to delimit the concept of sales promotion from the (wider) concept of promotion (Section 2 no. 5 TMG/Article 2(f) of Directive 2000/31/EC).
- 27 dd) Under its recital 10, the objective of Directive 2000/31/EC is to create an area without internal frontiers as far as electronic commerce is concerned, which ensures a high level of protection of objectives of general interest, including consumer protection. Under the second sentence of recital 29 of that directive, in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements.
- 28 The inclusion of advertising involving methods of payment in the concept of a sales promotion offer seems to be consistent with the objective of consumer protection. The appeal on a point of law rightly argues that granting the option to purchase on invoice is also in the interests of the purchaser in terms of security because, when making a purchase on invoice, he or she is not required to indicate to the seller sensitive payment data (for example, in the case of payment by credit card, the credit card number and control number, or account number in the case of direct debit). In addition, in the case of a possible rescission, for example because of the exercise of the right of withdrawal conferred on the consumer at the time of distance sale under Article 9(1) of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights or in the case of defects in the goods, the purchaser is not exposed to the effort of making a repayment claim due to his or her advance payment.
- 29 The fact that Article 6(1)(g) of Directive 2011/83/EU provides that, in the case of a distance contract, the consumer must be informed of the arrangements for payment before the contract is concluded does not preclude a broad interpretation of the concept of offers for sales promotion. It is true that a broad interpretation of Article 6(c) of Directive 2000/31/EC would lead to clear upstreaming of the information requirement laid down in Article 6(1)(g) of Directive 2011/83/EU. However, under the express wording of the provision, the information to be provided under Article 6(c) of Directive 2000/31/EC is ‘in addition to other information requirements established by [EU] law’.

- 30 ee) The question therefore arises whether advertising with a payment arrangement (in the present case: ‘convenient purchase on invoice’) is subject to the concept of promotional offers within the meaning of Article 6(c) of Directive 2000/31/EC, which, while having only a low monetary value, contributes to the safety and legal interests of the consumer (in the present case, no disclosure of sensitive payment data; in the case of rescission of the contract, no reclamation of an advance payment).
- 31 4. The question referred will permit to rule over the issue.
- 32 a) In so far as the disputed indication constitutes a promotional offer within the meaning of Section 6(1) no. 3 of the TMG, the claims for an injunction and for reimbursement of the costs of giving formal notice, relied on in the action, exist because the defendant failed to provide information on the conditions of use of the promotional offer provided for in that provision, since it omitted to state that the advertised possibility of purchasing on invoice is subject to a prior assessment of creditworthiness.
- 33 b) The claim is not well founded on the ground of deception within the meaning of Section 5(1) and (2) no. 1 of the UWG. The appellate court did not err in law in denying the existence of such a right.

[...]

Lower courts:

Landgericht Hamburg (Regional Court Hamburg, Germany), decision of 21 July 2022-403 HKO 37/22 –

Oberlandesgericht Hamburg (Higher Regional Court Hamburg, Germany), decision of 9 January 2023-15 U 75/22

[...]