European Court of Human Rights, 11 December 2003, Krone Verlag v Austria

PUBLICATION

Violation of Article 10 ECHR: Austrian courts overstepped their margin of appreciation

- **The injunction is too broad and impairs the essence of price comparison. Furthermore, the practical implementation of the injunction is highly difficult.**

33. In looking closer at the impact of the impugned injunction on the applicant company, the Court observes that no penalty was imposed. However, the measure at issue has quite far-reaching consequences as regards future advertising involving price comparison: the applicant company will also need to provide information on how its reporting style differs on matters of foreign or domestic politics, economy, culture, science, health, environmental issues and law. The Court considers the injunction to be far too broad, impairing the very essence of price comparison. Moreover, its practical implementation – although not impossible – in general appears to be highly difficult for the applicant company. Furthermore, the applicant company risks the imposition of fines for non-compliance with the injunction.

34. The Court notes that, in the instant case, the domestic courts gave priority to the protection of the reputation of the other competitor and the rights of readers against misleading advertising. However, when balancing the conflicting interests involved and taking account of the impact of the injunction on the applicant company's possibilities in future for advertising involving price comparison, the Court considers that the Austrian courts overstepped their margin of appreciation in the present case, and that the measure at issue was disproportionate and therefore not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

Source: **HUDOC**

European Court of Human Rights, 11 December 2003

(C.L. Rozakis, E. Levits, S. Botoucharova, A. Kovler, V. Zagrebelsky, E. Steiner, K. Hajiyev)

FIRST SECTION

CASE OF KRONE VERLAG GmbH & Co. KG v. AUSTRIA (no. 3)

(Application no. 39069/97)

JUDGMENT

STRASBOURG

11 December 2003

FINAL

11/03/2004

In the case of Krone Verlag GmbH & Co. KG v. Austria (no. 3),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, President,

Mr E. LEVITS,

Mrs S. BOTOUCHAROVA,

Mr A. KOVLER,

Mr V. ZAGREBELSKY,

Mrs E. STEINER,

Mr K. HAJIYEV, judges,

and Mr S. NIELSEN, Deputy Section Registrar,

Having deliberated in private on 20 March and 20 November 2003,

Delivers the following judgment, which was adopted on the last mentioned date:

PROCEDURE

1. The case originated in an application (no. 39069/97) against the Republic of Austria lodged with the European Commission of Human Rights (*"the Commission"*) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*"the Convention"*) by Krone Verlag GmbH & Co. KG, the owner of the daily newspaper Neue Kronenzeitung with its registered office in Vienna (*"the applicant company"*), on 18 September 1997.

2. The applicant company was represented by Mr R. Fiebinger, a lawyer practising in Vienna. The Austrian Government (*"the Government"*) were represented by their Agent, Mr H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant company alleged that the injunction issued against it under the Unfair Competition Act was in breach of its right to freedom of expression within the meaning of Article 10 of the Convention, in so far as it prohibited the applicant company from comparing the sales prices of the Neue Kronenzeitung and the Salzburger Nachrichten without indicating the differences in their reporting styles as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. It was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 20 March 2003, the Chamber declared the application admissible.
8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 in fine), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Krone Verlag GmbH & Co. KG, a limited liability company with its registered office in Vienna, is the owner of the daily newspaper Neue Kronenzeitung published by Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG (*"the publisher"*).
10. On 9 and 11 December 1994 the Salzburg edition of the Neue Kronenzeitung published an advertisement for subscriptions to the newspaper in which it compared its monthly subscription rates with those of another regional newspaper, the Salzburger Nachrichten. According to the advertisement, the Neue Kronenzeitung was *"the best"* local newspaper.
11. On 13 December 1994 the Salzburger Nachrichten applied to the Salzburg Regional Court (Landesgericht) for a preliminary injunction (einstweilige Verfügung) under sections 1 and 2 of the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb) against the applicant company and the publisher. It requested that the applicant company and the publisher be ordered to refrain from publishing the advertisement.
12. On 29 December 1994 the Salzburg Regional Court issued a preliminary injunction against the applicant company and the publisher to preserve the status quo during the proceedings. On appeal by the applicant company and the publisher, the Linz Court of Appeal (Oberlandesgericht) quashed the Regional Court's decision. The court stated, inter alia, that the two newspapers were competitors in the same market and for the same readership. On 23 May 1995 the Supreme Court (Oberster Gerichtshof), on appeal by the Salzburger Nachrichten, issued a preliminary injunction. The court found that the advertisement was misleading. It considered that the Salzburger Nachrichten was a *"quality newspaper"* and the Neue Kronenzeitung was not, and that this difference was not necessarily known to readers. Furthermore, in the particular circumstances of the case, calling the Neue Kronenzeitung *"the best"* local newspaper amounted to disparagement of the Salzburger Nachrichten.
13. In the main proceedings which followed, the Salzburg Regional Court ordered the applicant company and the publisher to refrain from publishing the advertisement as long as it did not provide at the same time information which made it possible to avoid any generally pejorative value statement or any other risk of misleading readers. Secondly, it ordered them not to refer to the sales price of the Salzburger Nachrichten as *"expensive"*. Thirdly, it ordered them to refrain from comparing the sales prices of the two newspapers unless they indicated at the same time the differences in their respective reporting styles, in particular as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law, and referred also to the Neue Kronenzeitung as an entertainment-orientated communications medium and the Salzburger Nachrichten as a medium mainly geared to information. Lastly, it ordered them to publish the decision.
14. On 21 March 1997 the Linz Court of Appeal, allowing in part an appeal by the applicant company and the publisher, confined the third branch of the injunction to the order that the applicant company and the publisher refrain from comparing the sales prices of the two newspapers without indicating the differences in their reporting styles as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law. It confirmed the lower court's decision as to the remaining branches of the injunction. The court considered that it was a matter of common knowledge that both newspapers were competing in the same market. As to the differences in quality between the newspapers and the argument that readers were not familiar with these differences, the Linz Court of Appeal referred to the Supreme Court's decision of 23 May 1995.
15. On 28 April 1997 the applicant company and the publisher lodged an appeal on points of law against this decision, relying on Article 10 of the Convention.
16. On 13 May 1997 the Supreme Court declared their appeal on points of law inadmissible. The decision was served on the parties on 16 June 1997.

II. RELEVANT DOMESTIC LAW

17. The relevant sections of the Unfair Competition Act read as follows:

Section 1

"Any person who in the course of business commits, for purposes of competition, acts contrary to honest practices, may be ordered to desist from further engaging in those acts and held liable for damages.

Section 2

Any person who in the course of business, for purposes of competition, makes declarations that could be misleading about commercial conditions, especially on the quality, origin, method of production or calculation of the prices of single goods or services or the whole stock, on price-lists, about the manner and sources of supply, about the possession of awards, about the occasion or purpose of the sale or about the quantity of the stock, may be ordered to desist from further making those declarations and, if he knew or must have known that they were likely to mislead, held liable for damages. However, comparing prices in advertisements is authorised, if it is not contrary to this section or section 1."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

18. The applicant company complained that its right to freedom of expression under Article 10 of the Convention had been infringed by the Austrian courts' injunction in so far as it prohibited the comparison of

sales prices of the Neue Kronenzeitung and the Salzburger Nachrichten without indicating the differences in their reporting styles as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law. Article 10 provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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."

A. Scope of the case and existence of an interference

19. The Court notes at the outset that the injunction issued against the applicant company in the main proceedings was in three branches (see paragraphs 13 and 14 above), while its complaint before the Court merely concerned the third branch, namely the order that the applicant company must refrain from comparing the sales prices of the Neue Kronenzeitung and the Salzburger Nachrichten without indicating the differences in their reporting styles as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law.

20. In so far as this part of the injunction is concerned, the Court finds, and this was common ground between the parties, that it constituted an interference with the applicant company's right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention (see, mutatis mutandis, **Hertel v. Switzerland**, judgment of 25 August 1998, Reports of Judgments and Decisions 1998-VI, pp. 2324-25, § 31; and Schweizerische Radio- und Fernsehgesellschaft (SRG) v Switzerland (dec.), no. 43524/98, 12 April 2001).

B. Justification for the interference

21. An interference contravenes Article 10 of the Convention unless it is *"prescribed by law"*, pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is *"necessary in a democratic society"* for achieving such an aim or aims.

1. "Prescribed by law"

22. The applicant company disputed that sections 1 and 2 of the Unfair Competition Act fulfilled the *"prescribed by law"* requirement, arguing that there was no established Austrian court practice in this area and that the judgments were mainly based on German court practice.

23. In the Government's view, the above provisions were applied in conformity with the well-established case-law of the Austrian Supreme Court.

24. The Court considers that the interference was prescribed by law, namely by sections 1 and 2 of the Unfair Competition Act (see markt intern Verlag GmbH and Klaus Beermann v. Germany, judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30, with further references, and, mutatis mutandis, News Verlags GmbH & Co. KG v. Austria, no. 31457/96, § 43, ECHR 2000-I).

2. Legitimate aim

25. The applicant company argued that the injunction did not serve any legitimate aim, as the correct disclosure of sales prices could not harm the reputation of the competitor.

26. The Government submitted that the interference served the legitimate aim of the protection of the reputation or rights of others, in particular to ensure that the applicant company's competitor was not exposed to misleading advertisements and that readers would not be victims of misleading comparative advertising.

27. The Court considers, like the Government, that the interference served a legitimate aim, namely *"the protection of the reputation or rights of others"* within the meaning of Article 10 § 2 of the Convention.

3. "Necessary in a democratic society"

28. As regards the necessity of the interference, the applicant company cast doubts on the existence of a *"pressing social need"* to justify the interference. Since the domestic courts had based their reasoning on the assumption that the differences in quality were matters of common knowledge, the impugned injunction had been unnecessary for the protection of readers. Moreover, the domestic courts had failed to balance the interests of the parties. The applicant company further contended that the order restraining it from comparing the sales prices of the two competing newspapers without referring to their differences in reporting styles had resulted in an absolute advertising ban. In order to avoid a breach of the injunction, the applicant company would have to obtain a detailed analysis of existing differences between the two newspapers, which would have to be published at the same time as the advertising slogan. Failing this, the applicant company would risk having to pay fines up to 100,000 euros for each and every violation of the injunction, or even imprisonment of its managing directors.

29. The Government argued that, in view of the wide margin of appreciation accorded to Contracting States in purely commercial matters, the interference could not be considered disproportionate. Moreover, the interference was of a minor character as no penalty had been pronounced and no fine imposed.

30. The Court reiterates that under its case-law the States parties to the Convention have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see markt intern Verlag

GmbH and Klaus Beermann, cited above, pp. 19-20, § 33). Such a margin of appreciation is particularly essential in the complex and fluctuating area of unfair competition. The same applies to advertising. The Court's task is therefore confined to ascertaining whether the measures taken at national level are justifiable in principle and proportionate (see Casado Coca v. Spain, judgment of 24 February 1994, Series A no. 285-A, p. 28, § 50, and Jacubowski v. Germany, judgment of 23 June 1994, Series A no. 291-A, p.14, § 26).

31. For the public, advertising is a means of discovering the characteristics of services and goods offered to them. Nevertheless, it may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, even the publication of objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinised by the Court, which must weigh the requirements of those particular features against the advertising in question; to this end, the Court must look at the impugned penalty in the light of the case as a whole (see Casado Coca, cited above, p. 28 § 51).

32. Turning to the circumstances of the present case, the Court considers that the domestic courts based their decision first and foremost on the assumption that the two newspapers were not of comparable quality and that a comparison of their prices would therefore be misleading. On the other hand, the courts also stated that the two newspapers were competitors in the same market and for the same circle of readers. The Court finds these two statements rather inconsistent.

33. In looking closer at the impact of the impugned injunction on the applicant company, the Court observes that no penalty was imposed. However, the measure at issue has quite far-reaching consequences as regards future advertising involving price comparison: the applicant company will also need to provide information on how its reporting style differs on matters of foreign or domestic politics, economy, culture, science, health, environmental issues and law. The Court considers the injunction to be far too broad, impairing the very essence of price comparison. Moreover, its practical implementation – although not impossible – in general appears to be highly difficult for the applicant company. Furthermore, the applicant company risks the imposition of fines for non-compliance with the injunction.

34. The Court notes that, in the instant case, the domestic courts gave priority to the protection of the reputation of the other competitor and the rights of readers against misleading advertising. However, when balancing the conflicting interests involved and taking account of the impact of the injunction on the applicant company's possibilities in future for advertising involving price comparison, the Court considers that the Austrian courts overstepped their margin of appreciation in the present case, and that the measure at issue was disproportionate and therefore not *"necessary in a democratic society"* within the meaning of Article 10 § 2 of the Convention.

35. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

37. The applicant company sought a total of 1,045,653.17 euros (EUR) for pecuniary damage caused by the injunction. This amount consisted of EUR 500,000 each for past and future loss of earnings due to the loss of new subscribers, EUR 13,682.94 in respect of reimbursement of the other party's costs incurred in the domestic proceedings and EUR 31,970.23 for costs of publishing the injunction. The applicant company submitted that, even though certain invoices had been sent to the publisher for payment, the applicant company had actually borne the expenditure.

38. The Government maintained that the claims for past and future loss of earnings were speculative as there was no causal link between the injunction at issue and the alleged loss of earnings. While the Government accepted in principle the claim in respect of the costs paid to the other party, they argued in respect of the claim for publication costs that only EUR 680.22 had been shown to have actually been incurred by the applicant company.

39. The Court considers that there is no causal link between the violation found and the claims for alleged loss of earnings. Thus, no award can be made in this regard.

40. Having regard to the direct link between the courts' order to pay the other party's costs and to publish the injunction on the one hand, and the violation of Article 10 found by the Court on the other, the applicant company would in principle be entitled to compensation under this head. However, the Court notes firstly that only one of the three branches of the injunction is at issue (see paragraph 19 above), while the sums claimed by the applicant company relate to the domestic proceedings in their entirety (see Unabhängige Initiative Informationsvielfalt v. Austria, no. 28525/95, § 54, 26 February 2002). Secondly, the Court observes that the applicant company, who was found jointly and severally liable together with the publisher, has not furnished proof that it actually paid the amounts claimed. Thus, the Court awards the applicant company EUR 680.22.

B. Costs and expenses

41. The applicant company sought EUR 22,059.72 for reimbursement of costs and expenses incurred in the domestic proceedings and EUR 15,774.78 (based on an hourly fee of EUR 330) in respect of costs and expenses incurred in the Convention proceedings.

42. In the Government's view, the costs claim relating to the domestic proceedings was excessive compared with the costs reimbursed to the other party. They argued further that there was no proof that the applicant company had actually borne these costs. In respect of the costs claim for the Convention proceedings, the Government submitted that the amount was excessive and that, assessing the claim on the basis of the Lawyers' Fees Act (Rechtsanwaltstarifgesetz), only EUR 3,346.15 could possibly be claimed.
43. The Court will consider the above claims in the light of the criteria laid down in its case-law, namely, whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and are reasonable as to quantum (see, for instance, Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 80, ECHR 1999-III).
44. Although the applicant company is in principle entitled to compensation for costs and expenses in the domestic proceedings, the Court observes that the claim relates to the entire domestic proceedings while in the Convention proceedings only one part of the injunction is at issue (see paragraphs 19 and 40 above). The Court agrees with the Government that the applicant company has not submitted proof that it actually paid the amounts claimed. Thus, no award can be made under this head.
45. In respect of the costs and expenses incurred in the Convention proceedings, the Court, having regard to the sums awarded in similar cases (see Unabhängige Initiative Informationsvielfalt, cited above, § 55), awards, on an equitable basis, EUR 6,000.

C. Interest payable pending the proceedings before the national courts and the Convention institutions

46. The applicant company claimed that interest at rates varying between 5 and 10.75% per annum should be added to the above claims starting from 1 May 1997.
47. The Court finds that some pecuniary loss must have been occasioned by reason of the period that elapsed between the time when the above costs were incurred and the Court's award (see Dichand and Others v. Austria, no. 29271/95, § 62, 26 February 2002). Deciding on an equitable basis, it awards the applicant company EUR 200 under this head.

D. Default interest

48. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 10 of the Convention;
2. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
(i) EUR 680.22 (six hundred and eighty euros twenty-two cents) in respect of pecuniary damage;
(ii) EUR 6,000 (six thousand euros) in respect of costs and expenses;
(iii) EUR 200 (two hundred euros) in respect of additional interest;
(iv) any tax that may be chargeable on the above amounts;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. Dismisses the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 11 December 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.
[signatures]