European Court of Justice, 18 October 2007, KommAustria v ORF

ADVERTISING

Prize game: 'teleshopping' or 'television advertising'

- **A broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate tele-phone number, and thus in return for payment,**

– is covered by the definition given by Article 1(f) of *teleshopping* if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked;

– is covered by the definition given by Article 1(c) of *television advertising* if, on the basis of the purpose and content of that game and the circumstances in which the prizes to be won are presented, the game consists of an announcement which seeks to encourage viewers to buy the goods and services presented as prizes to be won or seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self-promotion.

Admissibility of the questions

- **It is apparent from the foregoing that the Bundeskommunikationssenat has to be considered to be a court or tribunal for the purposes of Article 234 EC with the result that its questions are admissible.**

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European Court of Justice, 18 October 2007
(K. Lenaerts, R. Silva de Lapuerta, E. Juhász, J. Malenovský and T. von Danwitz)
JUDGMENT OF THE COURT (Fourth Chamber)
18 October 2007 (*)
(Freedom to provide services – Television broadcasting activities – Directives 89/552/EEC and 97/36/EC – Definition of 'teleshopping' and 'television advertising' – Prize game)
In Case C-195/06,
REFERENCE for a preliminary ruling under Article 234 EC from the Bundeskommunikationssenat (Austria), made by decision of 4 April 2006, received at the Court on 27 April 2006, in the proceedings
Kommunikationsbehörde Austria (KommAustria),
v
Österreichischer Rundfunk (ORF),
THE COURT (Fourth Chamber),
composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,
Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,
having regard to the written procedure and further to the hearing on 29 March 2007,
after considering the observations submitted on behalf of:
– the Kommunikationsbehörde Austria (KommAustria), by M. Ogris, acting as Agent,
– the Österreichischer Rundfunk (ORF), by S. Korn, Rechtsanwalt,
– the Italian Government, by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato,
– the Portuguese Government, by L. Fernandes and J. Marques Lopes, acting as Agents,
– the United Kingdom Government, by T. Harris and M. Hoskins, acting as Agents,
– the Commission of the European Communities, by G. Braun and E. Montaguti, acting as Agents,
after hearing the **Opinion of the Advocate General at the sitting on 24 May 2007**,
gives the following
Judgment
1 This reference for a preliminary ruling concerns the interpretation of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552').
2 The reference has been made in the course of proceedings between the Kommunikationsbehörde Austria (KommAustria) (Austrian Communications Authority, 'KommAustria') and the Österreichischer Rundfunk (ORF) ('ORF') regarding the classification as 'teleshopping' or 'television advertising' of a prize game organised during the broadcast by ORF of a programme called 'Quiz-Express'.
Legal context
Community legislation
3 According to the 13th recital in the preamble to Directive 89/552:
'… this Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting; …'

4 The 27th recital in the preamble to Directive 89/552 provides:

'…in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction;'

5 Article 1 of Directive 89/552 provides:

'For the purpose of this Directive:

…

(c) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

…

(f) "teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment'.

6 Article 10 of Directive 89/552 provides:

'1. Television advertising and teleshopping shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.

2. Isolated advertising and teleshopping spots shall remain the exception.

3. Advertising and teleshopping shall not use subliminal techniques.

4. Surreptitious advertising and teleshopping shall be prohibited.'

7 According to Article 18 of Directive 89/552:

'1. The proportion of transmission time devoted to teleshopping spots, advertising spots and other forms of advertising, with the exception of teleshopping windows within the meaning of Article 18a, shall not exceed 20% of the daily transmission time. The transmission time for advertising spots shall not exceed 15% of the daily transmission time.

2. The proportion of advertising spots and teleshopping spots within a given clock hour shall not exceed 20%.

3. For the purposes of this Article, advertising does not include:

– announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes,

– public service announcements and charity appeals broadcast free of charge.'

National legislation

8 The Federal law on the Austrian Broadcasting Corporation (Bundesgesetz über den Östereichischen Rundfunk, BGBl. I, 83/2001, 'the ORF-Gesetz') transposed Directive 89/552 into the domestic legal system.

9 Paragraph 13(1) to (3) of the ORF-Gesetz provides:

'1. [ORF] may allocate broadcasting time within its radio and television schedule for commercial advertising in return for payment. Commercial advertising is any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment.

2. [ORF] is prohibited from allocating broadcasting time for direct offers to the public for the supply of goods or services, including immovable property, rights and obligations, in return for payment (teleshopping).

3. Advertising must be readily recognisable as such. It must be clearly separated from other parts of the programme service by optical and/or acoustic means.'

10 Paragraph 11 of the Federal Act on the establishment of an Austrian Communications Authority and a Federal Communications Board (Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria und eines Bundeskommunikationssenates, BGBl. 32/2001, 'the KOG'), in the version in force at the time of the facts, provides:

'1. A Bundeskommunikationssenat responsible for monitoring the decisions of KommAustria and overseeing [ORF] shall be set up at the Federal Chancellery.

2. The Bundeskommunikationssenat shall decide at last instance:

– on appeals against decisions of KommAustria, with the exception of appeals concerning administrative penalties,

– on complaints and applications, and in proceedings for administrative infringements, under the provisions of the ORF-Gesetz.

3. The decisions of the Bundeskommunikationssenat may not be set aside or varied by administrative action. Appeals against decisions of the Federal Communications Board may be brought before the Verwaltungsgerichtshof [Administrative Court].

…'

11 According to Paragraph 11a of the KOG:

'1. The Bundeskommunikationssenat shall rule on reports by KommAustria of infringements of the provisions of Paragraphs 13 to 17 of the ORF-Gesetz, and of Paragraph 9(4) and Paragraph 18 of the ORF-Gesetz in so far as the latter two provisions refer to individual provisions of Paragraphs 13 to 17 of the ORF-Gesetz. To this end it may hear KommAustria.

…'

12 Paragraph 12 of the KOG provides:

'1. The Bundeskommunikationssenat shall consist of five members, of whom three must belong to the judiciary. The members of the Bundeskommunikationssenat shall perform their duties independently and are not bound by any directions or instructions. The Bundeskommunikationssenat shall elect a chairperson and a deputy chairperson from the members who belong to the judiciary.

2. The members of the Bundeskommunikationssenat shall be appointed by the Federal President upon proposal of the Federal Government for a term of six years. For each member a substitute member shall be appointed to take the place of a member prevented from fulfilling his obligations.
…'

13 According to Article 20(2) of the Law on the Federal Constitution (Bundesverfassungsgesetz):
'Where, by means of Federal law or the law of a Land, a collegiate authority comprising at least one member of the judiciary is established to decide matters at last instance and it is provided by law that its decisions may not be set aside or varied by administrative action, the other members of the authority are also not bound by any directions in the performance of their duties.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 By letter of 20 May 2005, KommAustria, after a prior procedure, lodged a complaint with the Bundeskommunikationssenat for infringement, by ORF, of Paragraph 13(2) of the ORF-Gesetz. KommAustria submitted that in the programme 'Quiz-Express', which was broadcast by ORF, time was allocated to teleshopping in infringement of the provisions of that paragraph.

15 In that programme, an offer is made to the public through the presenter, in conjunction with the display of a premium rate telephone number, to participate in a prize game by dialling that number in return for the payment of EUR 0.70 to the telephone provider, which is bound to ORF by an agreement. The game falls into two parts: the first involves an element of chance, namely that, in order to be put through to the programme, the caller has to reach a particular telephone line; in the second part, the selected caller has to answer a question on the programme. Callers who are not put through to the programme participate in a 'weekly prize' draw.

16 After examination of the arguments submitted by KommAustria, the Bundeskommunikationssenat took the view that it is possible to categorise such a type of programme as 'teleshopping'. It was of the opinion that it was its task, in the exercise of its unlimited jurisdiction, to assess whether the announcements transmitted in that broadcast or part of that broadcast infringed other provisions of the ORF-Gesetz, in particular those relating to advertising. However, it also took the view that since the applicable national provisions transpose Directive 89/552 they had to be interpreted by reference to that directive.

17 In those circumstances, the Bundeskommunikationssenat decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
'(1) Should Article 1(f) of Council Directive 89/552 … be interpreted to the effect that "teleshopping" includes broadcasts or parts of broadcasts in which the television broadcaster offers viewers the opportunity to participate in the broadcaster's prize games by means of immediately dialling premium rate telephone numbers, and thus in return for payment?
(2) In the event that the answer to that question is no: should Article 1(c) of Council Directive 89/552 … be interpreted to the effect that "television advertising" includes announcements in broadcasts or parts of broadcasts where the television broadcaster offers viewers the opportunity to participate in the broadcaster's prize games by means of immediately dialling premium rate telephone numbers, and thus in return for payment?'

The admissibility of the questions referred for a preliminary ruling

18 As a preliminary point, it must be established whether the Bundeskommunikationssenat is a court or tribunal for the purposes of Article 234 EC and, therefore, whether its questions are admissible.

19 According to settled case-law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-53/03 Syfait and Others [2005] ECR I-4609, paragraph 29, and the case-law cited, and Case C-246/05 Häupl [2007] ECR I-0000, paragraph 16).

20 In that regard, it must be pointed out, first, that it is indisputably clear from the provisions of Paragraphs 11, 11a and 12 of the KOG that the Bundeskommunikationssenat meets the criteria relating to whether it is established by law, whether it is permanent and its jurisdiction is compulsory, whether its procedure is inter partes and whether it applies rules of law.

21 Secondly, it must be stated that the provisions of Paragraph 12 of the KOG, read in conjunction with those of Article 20(2) of the Bundesverfassungsgesetz ensure the independence of the Bundeskommunikationssenat.

22 It is apparent from the foregoing that the Bundeskommunikationssenat has to be considered to be a court or tribunal for the purposes of Article 234 EC with the result that its questions are admissible.

Substance

23 By its questions, which must be examined together, the national court essentially asks whether Article 1 of Directive 89/552 is to be interpreted as meaning that the definition which it gives of teleshopping or, as the case may be, that which it gives of television advertising covers a broadcast or part of a broadcast in the course of which the television broadcaster itself offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment.

24 It must be borne in mind that it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express

reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 Ekro [1984] ECR 107, paragraph 11; Case C-287/98 Linster [2000] ECR I-6917, paragraph 43; Case C-170/03 Feron [2005] ECR I-2299, paragraph 26; and **Case C-316/05 Nokia [2006] ECR I-12083**, paragraph 21).

25 The purport which the Community legislature sought to give to the definitions of 'television advertising' and 'teleshopping' within the meaning of Article 1 of Directive 89/552 must thus be examined in the light of the context of that provision and the objective pursued by the legislation in question.

26 As is apparent from the 27th recital in the preamble to Directive 89/552, the Community legislature intended to ensure that the interests of consumers as television viewers were fully and properly protected, by making the different forms of promotion such as television advertising, teleshopping and sponsorship subject to a certain number of minimum rules and standards.

27 From that point of view, the provisions of Chapter IV of Directive 89/552, which define those rules and standards, express the intention of the Community legislature, as pointed out by Advocate General Ruiz-Jarabo Colomer at point 76 of his Opinion, to keep those promotional activities separate from those covered by the other parts of the programmes broadcast, to make them unambiguously identifiable to television viewers and to restrict the transmission time thereof. Thus the protection of consumers, as viewers, from excessive advertising is an essential aspect of the objective of Directive 89/552 (see to that effect, Case C-245/01 RTL Television [2003] ECR I-12489, paragraph 64).

28 It is with a view to attaining that objective that Article 1 of Directive 89/552 establishes inter alia the definitions of 'television advertising' and 'teleshopping'. The meaning of those definitions must thus be assessed with regard to that objective.

29 It is therefore important for the Court, for the purpose of replying to the questions of the national court, to ascertain whether a broadcast such as that at issue in the main proceedings satisfies the criteria which the Community legislature employed to establish those definitions.

30 As regards, first, the application of the criteria used in Article 1(f) of Directive 89/552 to define teleshopping, it must be stated that, in the programme at issue, described in paragraph 15 of this judgment, the television broadcaster transmits directly to the public an offer which makes it possible for that public to participate in a type of prize game in return for payment of a telephone call.

31 It is common ground that, in the present case, the cost of that call is higher than the normal rate. Furthermore, it is not disputed that part of the price thereof is passed on by the telephone company to the television broadcaster which broadcasts the game. Thus, by dialling the premium rate telephone number displayed on the screen, the viewer, who contributes to the financing of that game and thus to the revenue of that broadcaster, participates in the activity offered by the broadcaster in return for payment.

32 Furthermore, an activity which enables users, in return for payment, to participate in a prize game may constitute a supply of services (see, to that effect, in respect of the organisation of lotteries, Case 275/92 Schindler [1994] ECR I-1039, paragraph 25; in respect of the making available of slot machines, Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraph 27; and in respect of the operation of games of chance or gambling, Case C-6/01 Anomar and Others [2003] ECR I-8621, paragraph 56).

33 In the present case, a direct offer to participate in a game of chance is made to television viewers during the broadcast by providing them with the necessary information to contact the programme's presenter and be on air, or, if they are unsuccessful in that regard, to enter the weekly draw. Invited by the presenter to participate in the programme's competition, the television viewer accepts the invitation by dialling the premium rate telephone number displayed on the screen. From the moment that ORF's staff answers him, the payment process is initiated and the increased cost of the call is added to the telephone bill of the viewer who, at that moment, chooses to play the game on air or, as the case may be, qualifies to take part in the draw with the other unsuccessful callers.

34 The viewer concerned thus accepts an offer to participate in a game in the hope of winning. In those circumstances, the television broadcaster may appear, in return for payment, to be making a service available to the viewer by allowing him to participate in a prize game.

35 That having been said, the categorisation of the game at issue as 'teleshopping' within the meaning of Article 1(f) of Directive 89/552 nevertheless still calls for an investigation as to whether, in view of its particular characteristics, that broadcast or part of the broadcast constitutes a real offer of services. In that regard, it is for the national court to carry out an assessment of all the factual circumstances of the case in the main proceedings.

36 Therefore, it is for the national court, in the context of that assessment, to take account of the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast as a whole in terms of time and of anticipated economic effects in relation to the economic benefits which are expected in respect of that broadcast, and also the type of questions which the candidates are asked.

37 It is important to add that a game, such as that at issue in the main proceedings, can constitute 'teleshopping' within the meaning of Article 1(f) of Directive 89/552 only if that game constituted an actual economic activity in its own right involving the supply of services and was not restricted to a mere offer of entertainment within the broadcast (see, by analogy, in

respect of a prize game inserted in a publication, Case C-368/95 Familiapress [1997] ECR I-3689, paragraph 23).

38 It is not inconceivable that the television broadcaster simply had the intention, taking into account the purpose of the broadcast of which the game forms part, of making that broadcast interactive without thereby making an actual offer of services in the gambling sector, particularly if that game represents only a minimal part of the content and the time of the entertainment broadcast and, therefore, does not change the nature of that broadcast, and if the questions which the candidates are asked are unconnected with the promotion of goods or of services in connection with a trade, business, craft or profession. The same is true if the economic interest expected from that game proves to be quite incidental in relation to that of the broadcast as a whole.

39 As regards, secondly, the application of the criteria used in Article 1(c) of Directive 89/552 to define television advertising, it must be considered whether, in a broadcast such as that at issue in the main proceedings, the invitation to viewers to dial a premium rate telephone number in order to participate, in return for payment, in a prize game constitutes a form of announcement broadcast or a broadcast for self-promotional purposes by an undertaking in connection with a trade in order to promote the supply of goods or services.

40 The national court raises the question whether the announcement contained in the broadcast or part of the broadcast at issue in the main proceedings may be categorised as 'television advertising' only in the event that it is not teleshopping. Having regard to the views expounded in paragraphs 35 to 38 of this judgment, from which it is apparent that there can be no teleshopping in the absence of an actual offer of services, it must be accepted that the announcement which has to be examined is part of an entertainment broadcast.

41 Article 1(c) of Directive 89/552 covering any form of announcement broadcast, it must also be accepted that the answer to the question referred by the national court requires that all the aspects of the broadcast or of the part of the broadcast must be taken into account in order to establish whether they show that there is an intention of broadcasting television advertising to viewers. There is thus no need to restrict that assessment solely to the form of announcement which is constituted by the appearance on the screen of a premium rate telephone number which allows him to participate in the game.

42 In that regard, it cannot be denied that the television broadcaster seeks, through that announcement, to promote that broadcast by encouraging viewers to watch it, making it more attractive due to the prospect of participating in a game which it is possible to win. However, generally, each broadcaster seeks to make attractive any television broadcast which it has the freedom to broadcast. It cannot be deduced from this that any form of announcement seeking to make the broadcast more attractive constitutes television advertising.

43 It is therefore important to know whether that particular form of announcement constituted by an invitation to participate in a prize game has any inherent characteristic capable of giving it the nature of television advertising.

44 It must be stated that the announcement and the game to which it may give access seek to make the viewer participate directly in the content of the broadcast. The announcement is an integral part of the broadcast and does not, a priori, in itself have the purpose of extolling the interest thereof.

45 However, by its content, the game may consist in indirectly promoting the merits of the broadcaster's programmes, in particular if the questions given to the candidate relate to his knowledge of other broadcasts by that body and are thus capable of encouraging potential candidates to watch them. The same would be true if the prizes to be won consisted of derivative goods serving to promote those programmes, such as video recordings. In such circumstances, the announcement made by that broadcast or part of a broadcast could be regarded as television advertising in the form of self-promotion. The announcement could also be regarded as television advertising if the goods and services offered as prizes to be won were the subject of representations or promotions intended to encourage viewers to buy those goods and services.

46 It must be stated that the pieces of information which the Court has at its disposal do not make it possible for it to assess whether that is true of a broadcast or part of a broadcast, such as that at issue in the main proceedings. It is for the national court to make that assessment.

47 In the light of the foregoing, the answer to the questions referred is that on a proper construction of Article 1 of Directive 89/552, a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment,

– is covered by the definition given by Article 1(f) of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked;

– is covered by the definition given by Article 1(c) of television advertising if, on the basis of the purpose and content of that game and the circumstances in which the prizes to be won are presented, the game consists of an announcement which seeks to encourage viewers to buy the goods and services presented as prizes to be won or seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self-promotion.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

On a proper construction of Article 1 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment,

– is covered by the definition given by Article 1(f) of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked;

– is covered by the definition given by Article 1(c) of television advertising if, on the basis of the purpose and content of that game and the circumstances in which the prizes to be won are presented, the game consists of an announcement which seeks to encourage viewers to buy the goods and services presented as prizes to be won or seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self-promotion.

OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 24 May 2007 1(1)
Case C-195/06
Kommunikationsbehörde Austria (KommAustria)
v
Österreichischer Rundfunk (ÖRF)
(Reference for a preliminary ruling from the Bundeskommunikationssenat, Austria)
(Television broadcasting – Directive 89/552 in the version of Directive 97/36 – Interpretation of Article 1(c) and (f) – Definition of television advertising and teleshopping – Game of chance participation in which necessitates a call to a premium rate telephone number)

– Introduction

1. Nowadays we are everywhere besieged and invaded by marketing. Every branch of the media disseminates advertisements, promotions or good deals. Newspapers, cinema, television, radio, the internet, even telephones are used to publicise the merits of all kinds of products, urging consumers to purchase a product in the belief that it will make their lives easier or bring them greater happiness, even at the risk of saturating their capacity to take in such messages or of assaulting them. (2) The emergence of advertising has encouraged the development of modern commerce (3) which has gone beyond the local or national sphere and evolved into a global interdependent market. The patter of charlatans, street traders, tricksters, discoverers of elixirs, of pain-relieving balms or of miraculous herbs, tooth-pullers, hair-restorer and cure-all sellers, hawkers, pedlars and hucksters of all kinds, who would once have extolled their goods in the markets and fairs of old, has been replaced by advertising campaigns which reach millions of consumers. (4)

2. Together with the internet, television provides perhaps the most provocative tool for the dissemination of advertising owing to its intensity and its ability to penetrate and stimulate. That factor explains the underlying concern of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, (5) known as the 'Television without Frontiers Directive', which regulates advertising activity, making it subject to a certain number of rules and to standards which must be maintained while allowing Member States the freedom to lay down more stringent rules (26th recital in the preamble to that directive).

3. At the same time, television opens up a window through which life, real or imaginary, may enter every home, and business too, making it possible to obtain goods and services without needing to go out. Teleshopping is spreading on many channels and forms a significant market which the Community could not ignore, wherefore Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (6) amended Directive 89/552 with a view to addressing that phenomenon and protecting consumers by regulating the form and content of such spots so that they are distinguishable from those devoted to advertising alone (Recitals 36 and 37 in the preamble to Directive 97/36).

4. Against that background and pursuant to Article 234 EC, the Bundeskommunikationssenat (Federal Communications Board), Austria, has referred to the Court of Justice for a preliminary ruling two questions seeking clarification of the concepts of 'television advertising' and 'teleshopping', used by Article 1(c) and 1(f) respectively of Directive 89/552, in the version of Directive 97/36. It has submitted those questions because, in the dispute in the main proceedings, it is called upon to classify correctly a television broadcast forming part of another longer and more wide-ranging broadcast, in which viewers are invited to participate in a game by dialling a premium-rate telephone number. (7)

II – The legal framework

A – Community law

5. The aim of Directive 89/552 is to eliminate from the Community obstacles to the free dissemination and

movement of information and ideas by means of television. Impediments usually arising out of disparities between national laws, the directive seeks to coordinate the latter by establishing a minimum common denominator (9th, 11th and 13th recitals). For that reason, by virtue of Article 3(1) Member States remain free to require their own broadcasters to comply with stricter or more detailed rules than those laid down in the directive.

6. Article 1(c) defines 'television advertising' as 'any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment'.

7. Article 1(f) defines 'teleshopping' as 'direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment'.

8. Article 10 (8) provides that both types of broadcast must be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means (paragraph 1), that isolated advertising is to remain the exception (paragraph 2), and prohibits subliminal and surreptitious advertising and teleshopping (paragraphs 3 and 4).

9. Articles 18 and 18a (9) limit the transmission time for teleshopping spots and windows by indicating maximum daily and hourly percentages.

B – The Austrian legislation

1. Quasi-constitutional legislation relating to the Bundeskommunikationssenat

10. The Bundeskommunikationssenat, a body answerable to the Federal Chancellery, was established by the Bundesgesetz (federal law) über die Einrichtung einer Kommunikationsbehörde Austria und eines Bundeskommunikationssenates (10) ('the KOG') to monitor the decisions of the Kommunikationsbehörde Austria (Austrian Telecommunications Regulatory Authority, 'KommAustria') and the Österreichischer Rundfunk (Austrian Broadcasting Service, 'the ÖRF').

11. Paragraph 11(2) of the KOG gives the Bundeskommunikationssenat jurisdiction to decide, as the body of last administrative instance, on appeals against decisions of KommAustria, with the exception of appeals relating to penalties.

12. Judicial appeals against the rulings of the Bundeskommunikationssenat may be brought before the Verwaltungsgerichtshof (11) (Administrative Court) (Paragraph 11(3) of the KOG).

13. The term of office of the five members of the Bundeskommunikationssenat, three of whom belong to the judiciary (one of the latter must also be the chairperson), lasts for six years and is renewable. The grounds for removal from office are governed by Paragraph 12 of the KOG, which stipulates that the members must be independent and declares that they are not bound by directions from elsewhere.

14. With regard to procedural matters, Paragraph 14 of the KOG refers to the Allgemeines Verwaltungsverfahrensgesetz (12) (Law on administrative procedure, 'the AVG').

2. The Broadcasting Law

15. Paragraph 47(1) of the Bundesgesetz über den Östereichischen Rundfunk (13) (Federal law on the Austrian Broadcasting Corporation, 'the ÖRF-Gesetz') states that its aim is to transpose Directive 89/552, as amended by Directive 97/36.

16. Paragraph 13(1) provides that the ÖRF may allocate, within its programme schedule and in return for payment, broadcasting time for commercial advertising, which it defines using the same words as Article 1(c) of the Television without Frontiers Directive.

17. Paragraph 13(2) prohibits the allocation of teleshopping slots, which it defines in the same terms as Article 1(f) of the Television without Frontiers Directive.

18. Last, Paragraph 13(3) reproduces Article 10(1) of the Television without Frontiers Directive exclusively with regard to advertising.

III – The facts, the dispute in the main proceedings and the questions referred for a preliminary ruling

19. During the 'Quiz Express' programme, broadcast by the ÖRF on 1 April 2005, the presenter, while a premium-rate telephone number was displayed on the screen, launched an offer inviting the public to take part in a prize game (Gewinnspiel in German) by dialling that number. The company providing the telephone service received EUR 0.70 per call, a portion of which it passed on to the ÖRF. (14)

20. The game comprised three stages. In the first, a single call was put through purely at random. In the second, the lucky caller had to answer the questions put by the presenter. In the final stage, which enabled those who had not been selected to participate in a weekly draw, the element of chance arose again.

21. KommAustria reported the ÖRF to the Bundeskommunikationssenat, arguing that, by devoting part of the broadcast to teleshopping, the ÖRF had in its opinion infringed Paragraph 13(2) of the ÖRF-Gesetz.

22. In order to resolve the matter, the Bundeskommunikationssenat stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) On a proper construction of Article 1(f) of Directive 89/552 … in the version of Directive 97/36 … does "teleshopping" include broadcasts or parts of broadcasts in which the broadcaster offers viewers the opportunity to participate in the broadcaster's prize games by directly dialling premium-rate telephone numbers, and for valuable consideration therefore?

(2) If the answer to that question should be negative, is Article 1(c) of Directive 89/552 …, in the version of Directive 97/36 …, to be interpreted to the effect that "television advertising" includes announcements in broadcasts or parts of broadcasts in which the broadcaster offers viewers the opportunity to participate in the broadcaster's prize games by directly dialling pre-

mium-rate telephone numbers, and for valuable consideration therefore?'

IV – The procedure before the Court

23. The order for reference was registered at the Court Registry on 27 April 2006. The ÖRF, the Commission and the Italian and Portuguese Governments lodged written observations, and oral argument was presented by the representatives of the first two at the hearing held on 29 March 2007, which was also attended by representatives of the United Kingdom Government and of KommAustria.

V – The jurisdiction of the Court

24. This is the first time that the Bundeskommunikationssenat has submitted a reference for a preliminary ruling to the Court, for which reason I think it appropriate to examine whether that body satisfies the characteristics of a 'court or tribunal' for the purposes of Article 234 EC. The Bundeskommunikationssenat itself feels the need to justify its status in the order for reference, employing certain arguments supported by the Commission in the latter's written observations.

25. In order to determine whether a particular body has the status of a court or tribunal, the Court has hitherto restricted itself to laying down a number of criteria for guidance, such as whether the body concerned is established by law, whether it is permanent, whether its members are independent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether its decisions are judicial in nature, and whether it applies rules of law. (15)

26. In principle, the Bundeskommunikationssenat satisfies those characteristics, for the following reasons:

(a) there is no doubt that the Bundeskommunikationssenat is a body established by law, since it was created by the KOG; nor is there any doubt that it is a permanent, stable body, which may be inferred from Paragraph 11 of the KOG which provides that its task is to monitor KommAustria and to oversee ÖRF.

(b) intervention by the Bundeskommunikationssenat is not optional but instead compulsory, because it decides on appeals brought against decisions of KommAustria, with the exception of appeals concerning penalties.

(c) the operational independence of the Bundeskommunikationssenat would appear to be beyond doubt: it is composed of five members, of whom three belong to the judiciary (from whose number the chairperson and deputy chairperson are elected), who perform their duties free from any external directions or instructions. (16) They are appointed for a renewable term of six years by the Federal Chancellor on a proposal by the Government.

(d) the procedure provides for inter partes proceedings, since the parties may put forward their arguments (Paragraph 37 of the AVG) and are also entitled to do so at a hearing for which leave is given by the Bundeskommunikationssenat of its own motion or following a request from the parties (Paragraph 39(2) of the AVG). The administration gives written reasons for its position (Paragraph 38 of the AVG) and summons witnesses and experts to attend the hearing together with the parties (Paragraphs 40 and 41 of the AVG). The right to a fair hearing is guaranteed (Paragraph 43(3) of the AVG).

(e) lastly, there is no doubt that the Bundeskommunikationssenat gives its decisions in accordance with legal principles.

27. However, it is important not to be deceived by those initial appearances. In my Opinion in De Coster, (17) I argued that the attitude adopted by the Court in respect of the concept of court or tribunal of a Member State has given rise to decisions that are too flexible and not sufficiently consistent, for which reason I propose a change of bearing with a view to taking a firmer, more decisive course which, by focusing on the raison d'être of the preliminary ruling, would encourage fruitful cooperation between courts.

28. For that purpose, I proposed in the abovementioned Opinion that, as a general rule, only bodies which form part of the judicial power of each Member State should be included in the definition of Article 234 EC, when they carry out their judicial duties in the proper sense, including, by way of an exception, those bodies which, while not belonging to that structure, have the final word in the national legal order, provided that they satisfy the requirements laid down in case-law, in particular, the requirements of independence and the adversarial nature of the proceedings.

29. In accordance with that stricter interpretation, I consider that the Bundeskommunikationssenat should not be included in the definition because it is not part of the Austrian judicial structure.

30. It is certainly true that the Bundeskommunikationssenat falls within the category of 'collegiate authorities with a judicial component', (18) which are referred to in Article 133(4) of the Austrian Constitution (19) and which I myself acknowledged had the status of a court or tribunal in a previous case. (20)

31. Although the attribution of judicial status by national law may be indicative, it cannot be decisive. (21) However, bearing in mind that, as I argued in my Opinion in De Coster, the concept must be defined in the light of Community law, according to its own structural requirements, a more rigorous approach to the analysis of the Bundeskommunikationssenat is needed, in order to determine whether it really does satisfy the requirements for initiating the preliminary-ruling dialogue.

32. That more careful assessment reveals that, unlike the other authorities referred to in Article 133 of the Austrian Constitution, such as the Oberster Patent- und Markesenat in the Häupl case, whose decisions cannot be challenged by administrative or judicial action, the decisions of the Bundeskommunikationssenat may be reviewed by the Verwaltungsgerichtshof.

33. There are historical reasons for that particular circumstance. Before the KOG was adopted, broadcasting in Austria was regulated by the Privatrundfunkbehörde (Private Broadcasting Authority) in accordance with the Regionalradio-Gesetz (Law on regional broadcasting). The Privatrundfunkbehörde was established as a collegiate authority within the meaning of Paragraph 133(4) of the Constitution and its

decisions could not be appealed before the Verwaltungsgerichtshof. However, in a judgment dated 29 June 2000, (22) the Verfassungsgerichtshof (Constitutional Court) held that the Privatrundfunkbehörde was unconstitutional because, in the light of Paragraph 133(4) of the Constitution, its immunity from judicial review and its creation as an administrative authority of last instance were unlawful. In accordance with case-law, (23) the Constitutional Court upheld a strict interpretation of the right to establish collegiate authorities since that right amounts to a special derogation from the general principle that all administrative acts are subject to judicial review, wherefore the right must be justified on a case-by-case basis, a requirement which was not satisfied in the case of the Privatrundfunkbehörde. In order to comply with that judgment, Paragraph 13 of the Regionalradio-Gesetz was amended to provide for appeals to be brought before the Verwaltungsgerichtshof, but the remainder of the provisions were retained. When the Constitutional Court was once again called upon to intervene, it held that the defect existed still, because the fact that the Privatrundfunkbehörde was able to act administratively as the sole authority was incompatible with constitutional principles. (24) Faced with the need to take action, the legislature set up the Bundeskommunikationssenat, an administrative review body, and left the way open for a judicial remedy to be sought before the Verwaltungsgerichtshof, a situation which the Constitutional Court finally approved. (25)

34. However, that decisions of the Bundeskommunikationssenat are subject to review by an administrative court alters the situation and means that the Bundeskommunikationssenat cannot be classified as a court or tribunal within the meaning of Article 234 EC.

35. The risk of difficulties arising as a result of the intervention of an administrative authority in a dialogue between courts, which I described in points 75 to 79 of my Opinion in De Coster, is obvious. However elevated the technical and legal level of the administrative authority concerned may be, when reviewing the administrative decision handed down after the Court of Justice has answered the questions referred for a preliminary ruling, the Verwaltungsgerichtshof may consider that it was incorrect to make the reference or take the view that it ought to have been approached differently. If it should reach the conclusion that the dispute does not concern the interpretation or the application of provisions of Community law, the reference for a preliminary ruling and the effort invested in its resolution would have been pointless and the fact that its judgments were not taken into account would undermine the legitimacy of the Court of Justice. If it should be convinced that the questions ought to have been formulated differently it would be bound by the question actually asked and the judgment given, it being likely that, for reasons of procedural economy, the Verwaltungsgerichtshof would not be inclined to make another reference for a preliminary ruling, contenting itself with consultation envisaged in the administrative sphere and a reply vitiated from the outset, whereby the achievement of a 'genuine dialogue between courts' would be disrupted.

36. To my mind, the intervention of an administrative body in the system of judicial cooperation under Article 234 EC is always a serious matter, since the participation of such a body, even if well-intentioned, obscures the procedure. In my Opinion in De Coster (footnotes 36 and 98), I explained that the wording of the question may determine the Court's reply, so it is important that the bodies taking part in the preliminary-ruling procedure should continue to be of a genuinely judicial nature. If the question were to be referred by an administrative body, any subsequent judicial remedy would be affected from the outset by the way in which or the time at which it was made, with the result that the real judicial body would be dispossessed of the power to make use of the preliminary-ruling procedure, for even though it could in theory make another reference, that would cause the parties an additional delay, which would be intolerable where the administration of justice was already slow.

37. Those considerations explain why it is appropriate to allow non-judicial bodies to take part in the dialogue only where their decisions are not subject to subsequent review by a court, providing the last word under national law, a context offering access to the preliminary-ruling procedure in order to ward off the danger of leaving patches of Community law outside the scope of the unifying intervention of the Court of Justice.

38. Recent developments in case-law (26) have shown a more marked commitment to identifying the features which define the concept of a court or tribunal, especially independence, allowing a glimpse of a situation close to that to in De Coster. Thus, in Schmid, (27) the Court held that it lacked jurisdiction to answer the questions referred by the Berufungssenat V der Finanzlandesdirektion (Fifth Appeal Chamber of the Regional Finance Authority) for Vienna, Lower Austria and Burgenland, while, in Syfait and others, (28) the Court gave a similar ruling in a reference made by the Epitropi Antagonismou (Greek Competition Commission).

39. That trend is abundantly clear if regard is had to the fact that, in the past, the Court did deal with questions referred for a preliminary ruling by bodies similar to the ones mentioned, such as the Spanish economic and administrative courts (29) and the Spanish Tribunal de Defensa de la Competencia (Competition Court). (30)

40. My position has not altered since my Opinion in De Coster, which is why, not only for the sake of consistency but also with total conviction, I maintain that the Bundeskommunikationssenat does not qualify as a court or tribunal for the purposes of Article 234 EC and I propose that the Court should declare that it lacks jurisdiction to give it an answer.

41. I cherish the hope that the judges whom I address will be persuaded of the virtues of the proposal set out in De Coster, but, in case they do not follow my

recommendation, I shall now go on to analyse, in the alternative, the substance of the present reference for a preliminary ruling, with the intention of fulfilling my duty, acting with complete impartiality and independence, to make in open court reasoned submissions on the questions referred (second paragraph of Article 222 EC).

VI – Subsidiary analysis of the questions referred for a preliminary ruling

A – The questions referred

42. The Bundeskommunikationssenat has asked the Court to define the Community law terms 'teleshopping' and 'television advertising' for the purpose of classifying the mini-spot inserted in the 'Quiz Express' programme. If it were to be held to fall within the definition of teleshopping, the mini-spot would be prohibited in Austria since, in reliance on Article 3(1) of Directive 89/552, Paragraph 13(2) of the ORF-Gesetz prohibits that form of commercial television, with the result that KommAustria's position would be correct. If, on the other hand, it were to be classed as self-promotion, other criteria would need to be taken into account in the assessment since advertising is permitted provided that it is readily recognisable as such and is clearly separated from other parts of the programme by optical and/or acoustic means (Paragraph 13(3) of the ORF-Gesetz).

43. However, the referring administrative authority has not formulated its uncertainties in the abstract but rather in relation to a type of broadcast which it were useful to define, because Article 1(c) and (f) of the Television without Frontiers Directive links both advertising and teleshopping to the supply of goods and services. It is, therefore, appropriate to ascertain whether the disputed broadcast entails a supply of services (it clearly does not display the specific features of a supply of goods); for which reason it is necessary, first, to determine whether it possesses the features of a game of chance and, if it does, to establish its true scope with a view to defining it as teleshopping or advertising, as the case may be.

44. None the less, before I continue, it is necessary to rule out another possibility underlying the questions submitted by the Bundeskommunikationssenat, namely: that the mini-spot is neither advertising nor teleshopping but simply a broadcast falling within the definition of 'television broadcasting' laid down in Article 1(a) of the Television without Frontiers Directive.

B – The 'Gewinnspiel' in question is not a television quiz show

45. In that regard, the pertinent observations submitted by the Italian Government in the written stage of these preliminary-ruling proceedings are most enlightening. Unlike a quiz show which takes place on set, where the faces of the main participants – the presenter and the contestants – are visible and the audience (both the invited studio audience and those watching at home) is assigned a passive role, the Gewinnspiel run by ÖRF is a game where the player, who was merely a viewer a few moments before, appears on the other end of the telephone line, while the other viewers entertain the hope that they will become participants in the game and receive a prize.

46. That format demonstrates that whereas in a traditional-style quiz programme television is used as a medium to broadcast a game which takes place on set with the intention of entertaining the public, the aim of the mini-spot broadcast by the ÖRF is to attract viewers with the lure of a prize, either in the first instance if they are lucky enough to have their call selected and they guess the right answer, or at a second opportunity by taking part in a weekly draw.

47. However, to take part it is necessary to pay a sum of money from which the television channel benefits, for the greater the number of telephone calls the greater the profits which accrue to it; for that reason, in principle and subject to a more detailed examination below, the aim of the disputed game is to raise direct finance for the ÖRF. Thus the issue of payment arises, which is referred to in Article 1(c) and (f) of Directive 89/552.

48. Lastly, by broadcasting the entertainment spot in issue, the ÖRF does not carry out a 'television broadcasting' activity under Article 1(a) of the Television without Frontiers Directive; in other words, rather than transmitting a programme intended for reception by the public, the ÖRF uses television for an additional, if important, function, which is to obtain money.

49. That being the case, it is necessary to ascertain, as I have already stated, whether that additional function involves the supply of a service in return for payment, an investigation which calls for clarification of the nature of the disputed broadcast.

C – A game of chance

50. In paragraphs 92 to 97 of my Opinion in Placanica and Others, (31) I examined the relationship between chance, gaming and the law. That link justifies Community legislation aimed at protecting individuals from the risks which a passion for gambling poses to their property and health (32) while also guarding the commercial interests of the undertakings and centres where that type of entertainment is conducted, thereby guaranteeing, in short, freedom of establishment and freedom to provide services. (33)

51. European Community law does not contain a detailed definition of games of chance, although the case-law cited analyses their effects on the foundations of the single market while stopping short of providing a definition. It does, however, accept that, in a legal sense, the concept encompasses placing a bet of a financial nature the outcome of which is dependent on chance. (34)

52. Following on from that admittedly vague starting-point, it is appropriate to consider countless kinds of games of chance for, when it comes to enjoyment and competition, the fertility of the human mind knows no bounds. (35) However, I have identified three criteria for delimiting the concept: financial payment, uncertainty and the desire to win. (36)

53. The uncertainty of the result is inherent in a game of chance, since chance is present at all stages, adding the spice which gives the game its entrancing

flavour, and the dream of winning a prize that is bigger than the original stake is the bait which appeals to the player's greed. Moreover, the financial element enables the law to contain this social phenomenon: in order for the law to intervene in a particular field, it is essential that the field in question should have an effect on persons' property. (37) A game without any stake and without implications for a player's capital affects the player's private sphere alone and does not call for the protection of the law.

54. Chance undoubtedly plays a part in the spot inserted in the 'Quiz Express' programme. The luck of the participants is evident on two occasions: the selection of one telephone call out of those received, the happy caller being put through to speak to the presenter of the programme, and in the weekly draw which allows the other contestants the hope of winning a prize. The viewer's ability, knowledge or even mental agility, plays a secondary role in the desire to win.

55. In short, when viewers dial the telephone number they want to win the prize, whether at the first opportunity mentioned above or at the second, in the draw.

56. On the first occasion, viewers agree to pay a sum (EUR 0.70) which, although small, is significantly higher than the cost of an ordinary call in Austria, agreeing to do so in the hope of winning a prize of between EUR 200 and 330, which more than compensates for the amount they have paid out.

57. Therefore, the specific features of the game played on the programme 'Quiz Express' constitute grounds for calling it a game of chance.

D – A supply of services

58. That point having been established, it is straightforward enough to conclude that the ÖRF provides a service in return for payment.

59. The Court has not hesitated to classify the organisation of lotteries (Schindler), (38) the use of slot machines in return for payment (Läärä and Others), (39) and all games of chance or gambling (Anomar and Others) (40) as services within the meaning of Article 50 EC. (41)

60. It is of course true that the Court applied that classification when considering games of chance in their entirety as a principal activity in their own right, in the context of national measures restricting their organisation, and went on to justify such measures in the light of general interest objectives such as the protection of social order and the combating of crime and fraud. (42)

61. The judgments cited do not concern a situation in which the conduct of the game forms part of a wider context, as occurred in the facts giving rise to the main proceedings and in the facts in issue in Familiapress, (43) which unfolded against a similar background where a German weekly magazine 'Laura', distributed in Austria, published crosswords and puzzles for readers to solve and awarded cash prizes by drawing lots among the readers who sent in the correct answers. Both the ÖRF and the Portuguese Government are correct when they argue that, in accordance with that judgment, small-scale draws of such a kind do not constitute an economic activity in their own right but merely form one aspect of the editorial content of a magazine (paragraph 23), so that it is not appropriate to classify that type of draw as a supply of services under Article 50 EC. However, the Commission rightly points out that that finding was intended to set that case apart from the decision in Schindler, given in the context of the review of the proportionality of national measures restrictive of large-scale games of chance, like lotteries.

62. To summarise, there is nothing in Community case-law which would prevent the mini-spot broadcast by the ÖRF from being classified as a game of chance and, consequently, as a service.

63. Before continuing, it is important to counter an argument which ÖRF put forward in its written observations (paragraph 4) and to point out that the fact that the programme 'Quiz Express' can be received only in Austria is immaterial, since its only bearing is on the application of Article 49 EC and it may not be relied on to deny that the programme has a particular inherent character. It is to be borne in mind that the Television without Frontiers Directive uses the term 'supply of services' to define an activity and not to guarantee its free movement. To put it another way, a service does not cease to be a service because it does not cross national borders, as may be inferred from paragraph 27 of the judgment in Läärä and Others. (44)

E – Teleshopping versus advertising

64. That brings me to the Gordian knot of the present reference for a preliminary ruling, which lies in determining whether the prize game included in the programme 'Quiz Express' and, by extension, the programme itself possesses the characteristics typical of a teleshopping broadcast.

65. Article 1(f) of the Television without Frontiers Directive refers to four elements: (1) the broadcast of (2) direct offers to the public (3) with a view to the supply of goods or services (4) in return for payment.

66. The first and the last two elements do not give rise to any uncertainty in the present case. No one disputes that 'Quiz Express' is a television broadcast which invites viewers to participate in a game in return for consideration: callers make a payment (received by the ÖRF) to take part in and enjoy that service, which consists of competing for a prize in one of the two stages of the game.

67. The invitation falls within the concept of 'direct offers to the public', an aspect which also helps to distinguish teleshopping from advertising, designed to promote the supply of goods or services rather than effect it.

1. Direct offers

68. In RTI and Others, (45) the Court provided a detailed definition of this concept with a view to interpreting the previous version of Directive 89/552 before the concept of teleshopping was introduced into its provisions; however, that concept underlay Article 18(3) which, in regulating the maximum duration of other 'forms of advertisements', provided that 'direct offers to the public for the sale, purchase or rental of

products or for the provision of services shall not exceed one hour per day'.

69. Paragraph 31 of the judgment in RTI and Others describes direct offers to the public as 'broadcasts presenting products which may be ordered directly by telephone, mail or videotext and which are delivered to viewers at home'. Usually, the presenter broadcasts details of goods and services on offer, praises their qualities and benefits, announces the price and forms of payment, while at the same time the phone numbers, website address and other information which may be useful for making an order are displayed on the screen. The contract is governed by the rules established for distance selling (46) in Directive 97/7/EC. (47)

70. By contrast, advertising presents an indirect offer because, although its aim, like that of teleshopping, is to persuade viewers to purchase the goods or services promoted by describing to them the features of those goods or services, the final stage of the transaction remains on the fringes of its immediate objectives and is deferred until a later time when the consumer contacts the appropriate distribution channel to complete the purchase.

71. Teleshopping goes a step further than advertising since, rather than simply publicising, it also promotes and sells.

72. Those reflections support the view that the 'Quiz Express' programme invites viewers to participate in a game of chance by providing them with the information essential in order to make contact with the operator and appear on air, or, if they are unsuccessful in that regard, to enter the weekly draw, paying consideration, at least indirectly, (48) by using the special premium rate telephone number.

73. The programme presenter urges the viewers to make a note of the number displayed on the screen so that they may take part in the broadcast. The commercial demonstration focuses on drawing attention to the prizes on offer. Acceptance of the invitation takes place when a user dials the number and the ÖRF operator answers, which is also the moment when the payment process is instigated through the inclusion of the cost of the call in the telephone bill of the customer who, at the same time, chooses to play the game on air or, as the case may be, qualifies to take part in the draw with the other unsuccessful callers.

74. Thus, in accordance with the wording of Article 1(f) of the Television without Frontiers Directive, the disputed broadcast makes a direct offer to the public to acquire a service in return for payment, while at the same time satisfying all the conditions required to conclude a distance contract. (49)

75. Nothing therefore prevents the programme in question from being classified, in the abstract, as a form of teleshopping.

2. The particular significance of the game in the programme 'Quiz Express'

76. The classification 'teleshopping' is not, however, triggered automatically. Taking the definitions of teleshopping and advertising set out in Article 1 of the Television without Frontiers Directive in conjunction with Chapter IV of that directive, it is clear that such spots must be kept separate and be identifiable (Article 10), with the result that they may be inserted only between programmes or, exceptionally, during programmes, provided that the integrity and value of the programme, taking into account natural breaks, autonomous parts and intervals, are not prejudiced.

77. On the face of it, the legislature did not envisage the inclusion of teleshopping and advertising in programmes, as in the circumstances of the case in the main proceedings, and the failure to enact provisions in that regard explains the referring authority's doubts as to the exact classification of that programme.

78. For the purpose of classifying a broadcast as teleshopping, it is important to consider the quantity and the quality of teleshopping in that broadcast. At this point, it is appropriate to refer again to the approach adopted in Familiapress, that is the prominence of the spot in question within the programme. If the spot is merely secondary, just one more element of the programme aimed at achieving the objective of the programme, it is subsumed into the overall content of the programme itself; if the activity is more prominent and becomes the programme's leitmotif, its particular character is passed on to the rest of the programme, thereby transforming the whole programme into a teleshopping broadcast. Needless to say, there are intermediate states between those two extremes.

79. Essentially, it is not for the Court to embark on a mission to solve the mystery of the nature of the disputed game, especially when, as is the case here, the Court does not have at its disposal all the factual information required to approach the mission with any guarantee of success. However, what the Court can do is provide the national court with a number of guidelines, albeit with the prudence which the United Kingdom's representative advocated at the hearing.

80. The first assessment criterion is the aim of the programme of which the mini-quiz forms a part. It is clear that the assessment will vary according to whether the game takes place during, and forms part of, a magazine programme or a variety show, the overall purpose of which is to entertain, (50) or whether it takes place during a completely different type of broadcast with which it has no connection, such as, for example, a news programme or a religious broadcast. (51) That assessment excludes from the definition of teleshopping cases where viewers' participation, despite being in return for payment and in the hope of receiving a prize, is included in the editorial content of the programme with a view to furthering the development of the programme, as occurs in reality shows like 'Big Brother', 'Fame Academy' or 'Strictly Come Dancing'.

81. In that connection, the financial significance of the game within the television programme as a whole also provides useful evidence, both direct and indirect. As regards direct evidence, the revenue generated by calls to the premium-rate telephone number as a proportion of the profits made by the programme as a whole, including advertising, offers an important evaluation criterion.

82. Similarly, however, in the case of indirect evidence, account must be taken not only of the time devoted to the presentation of the game and to beguiling viewers into participating by dialling the number which appears on the screen but also of the time dedicated to the drawing of the lots to find the happy person who will answer questions live, in other words, to the effort invested in selling the product. Articles 18 and 18a of the Television without Frontiers Directive, which govern the duration of advertising and teleshopping spots, supply a useful method in that regard.

83. When it comes to calculating the financial significance of the game, the nature of the questions usually asked is relevant, for the easier those questions are the greater the number of prospective contestants, which increases the amount of revenue so obtained.

84. In the light of those factors, any astute person can easily discern whether the aim is to organise entertainment or simply to raise funds for the broadcaster by selling a service.

85. Finally, the true nature of the programme may also be deduced from the number of viewers who dial the telephone number because they wish to take part in the game.

86. In light of the foregoing considerations, I propose that the Court's reply to the first question should be that, on a proper construction of Article 1(f) of Directive 89/552, broadcasts or parts of broadcasts in which the broadcaster invites viewers to participate in a prize game by directly dialling premium-rate telephone numbers, and therefore for valuable consideration, must be regarded as a type of teleshopping if the main objective is to sell the right to participate in the game. On that basis, the national court must take into account the criteria set out in paragraphs 77 to 82 of this Opinion, namely: (a) the principal aim of the broadcast; (b) the financial significance of the game; (c) the time devoted to the game, and (d) the number of viewers who call.

F – Absence, in any event, of any intention to advertise

87. If the reply to the first question were to be negative, the referring court asks whether, in the alternative, the facts of the case come within the definition of advertising, in the form of self-promotion, that is to say, an activity carried out by a television broadcaster with the intention of promoting its own products, services, programmes or channels (Recital 39 in the preamble to Directive 97/36).

88. There is a noticeable difference – not touched on in the written observations – between this question and the first in terms of their material scope, in that this question relates not to the broadcast or part of the broadcast but rather to the announcement itself, since a non-advertising broadcast may include such announcements. (52) That distinction is decisive when it comes to answering the second question.

89. If it were to be concluded that 'Quiz Express' is not a type of teleshopping spot, it would have to be regarded as being an entertainment programme. (53) In that context, the announcements giving details of the telephone number and of how to take part in the game are not intended to advertise the game but rather to provide the information essential to participation and therefore indispensable to the programme; by definition, such information is useful to viewers only in the context of the programme itself. In other words, the announcement of the telephone numbers has the status of information essential to the broadcast, and it is intended to further the progress of the programme rather than to promote an additional service.

90. To summarise, the announcement displayed on the screen during 'Quiz Express', indicating the telephone number to dial in order to take part in a game of chance, does not conceal an intention to advertise, with the result that it is not covered by Article 1(c) of the Television without Frontiers Directive.

VII – Conclusion

91. In accordance with the foregoing considerations, I suggest that the Court of Justice should:

(1) declare that it lacks jurisdiction to answer the questions referred for a preliminary ruling by the Bundeskommunikationssenat, Austria, the latter not being a court or tribunal within the meaning of Article 234 EC;

(2) alternatively, if it finds the reference for a preliminary ruling admissible, declare that:

'(a) on a proper construction of Article 1(f) of Council Directive 89/552 of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, broadcasts or parts of broadcasts in which the broadcaster invites viewers to participate in a prize game by directly dialling premium-rate telephone numbers, and therefore for valuable consideration, must be regarded as a type of teleshopping if the main objective is to sell the right to participate in the game. On that basis, the national court must take into account, inter alia, the following criteria: (a) the principal aim of the broadcast; (b) the financial significance of the game; (c) the time devoted to the game; and (d) the number of viewers who call;

(b) the purpose of the announcement displayed on the screen during a programme, indicating the numbers of a premium-rate telephone service which viewers must dial in order to take part in a prize game organised by the broadcaster during the programme, is not to advertise but merely to supply information, with the result that that announcement is not covered by Article 1(c) of Directive 89/552.'

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1 – Original language: Spanish.

2 – Beigbeder, F., in 99 francs, Grasset, Paris, 2000, complains that, for lovers of literature, advertising is one of the greatest catastrophes of the last two millennia.

3 – In Au Bonheur des Dames (The Ladies' Delight), translated by Robin Buss, Penguin Classics, London, 2003, p. 383, Emile Zola echoes that view: 'The crowd had been growing since morning. No shop had ever stirred the town with such a burst of publicity. Now, Au Bonheur was spending nearly six hundred thousand francs every year on posters, newspaper advertisements and announcements of every sort; the number of catalogues sent out had reached four hundred thousand and more than a hundred thousand francs' worth of materials were cut up for samples. Newspapers, walls and the ears of the public were comprehensively invaded, as if by a monstrous brass trumpet constantly blowing the news of great sales to the four corners of the earth'.

4 – For example, the new operating system from the American firm Microsoft has been promoted in 39 000 outlets across 45 countries at a cost of 500 million dollars (www.zdnet.fr/actualites/informatique).

5 – OJ 1989 L 298, p. 23.

6 – OJ 1997 L 202, p. 60.

7 – Those subscribers may receive from the supplier of the telecommunications service a percentage of the amount invoiced for the call.

8 – In the wording laid down in Directive 97/36.

9 – Also inserted by Directive 97/36.

10 – BGBl. No 32 of 2001.

11 – That court, which has its seat in Vienna, judicially reviews the public administration. It hears appeals which are classed as extraordinary because they assess the legality of administrative acts without taking the facts into consideration. It fulfils the role of an administrative court of cassation which is restricted to ensuring the application of legislation by laying down a correct interpretation. It has jurisdiction to set aside administrative acts on the grounds that they infringe substantive or procedural law or that they are ultra vires or an abuse of power but it does not have jurisdiction to assess the facts.

12 – BGBl. No 51 of 1991.

13 – BGBl. No 83 of 2001, in the version contained in BGBl. No 159 of 2005.

14 – The Bundeskommunikationssenat states in the order for reference (paragraph 41) that the ÖRF has not provided any figures relating to the sum accruing to it but the Bundeskommunikationssenat assumes that the ÖRF made a significant profit under its agreement with the telephone company.

15 – See, for example, the judgments in Case 61/65 Vaassen-Göbbels [1966] ECR 377; Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 23; and Case C-416/96 Nour Eddline El-Yassini [1999] ECR I-1209, paragraph 17.

16 – The Austrian Constitution guarantees the independence of non-judicial members by providing in Paragraph 20(2) that, 'Where a collegiate authority including at least one member of the judiciary is established by federal law or by the law of a Land to decide matters at last instance and it is provided by law that its decisions may not be set aside or varied by administrative action, the other members of the authority shall also not be bound by any directions in the performance of their duties'.

17 – Case C-17/00 [2001] ECR I-9445.

18 – Weisungsfreie Kollegianbehörde mit richterlichem Einschlag', in German.

19 – That provision excludes from the jurisdiction of the Verwaltungsgerichtshof 'matters in which the decision at last instance falls to a collegiate authority where, under federal law or the law of a Land governing the creation of that authority, its members must include at least a senior judge; the other members are not bound in the performance of their duties by any directions; the decisions of the authority may not be set aside or varied in administrative proceedings; and, regardless of whether the foregoing conditions are met, the appeal has not been expressly ruled admissible before the Verwaltungsgerichtshof.'

20 – The Opinion in Case C-246/05 Häupl, with regard to the Oberster Patent-und Markesenat (Higher Patent and Trade Mark Authority).

21 – The wide range of collegiate authorities in Austria and the diversity of the rules which govern them make it advisable to eschew any automatic conclusions. The Court has agreed to hear references for preliminary rulings submitted by a number of such authorities. For example, in the judgment in Case C-44/96 Mannesmann Anlagebau Austria and others [1998] ECR I-73, the Court admitted questions from the Bundesvergabeamt, a body which hears disputes relating to public contracts, without analysing whether that body was a court or tribunal; in Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551, the Court ruled that the Tiroler Landesvergabeamt (Procurement Office of the Land of Tyrol) was a court or tribunal; and similarly, in Case C-92/00 HI [2002] ECR I-5553, the Court ruled that the Vergabekontrollsenat (Public-Procurement Review Chamber) of the Vienna Region was a court or tribunal.

22 – G175/95, VfSlg. 15.886.

23 – Judgment of 24 February 1999 (B1625/98-32, VfSlg. 15.427).

24 – Judgment of 13 June 2001 (G141/00, VfSlg. 16.189).

25 – Judgment of 25 September 2002 (B110/02 e.al., VfSlg. 16.625).

26 – As I pointed out in the Opinion in Case C-259/04 Emanuel [2006] ECR I-3089, point 26.

27 – Case C-516/99 [2002] ECR I-4573.

28 – Case C-53/03 [2005] ECR I-4609.

29 – Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others [2000] ECR I-1577.

30 – Case C-67/91 Asociación Española de Banca Privada and Others [1992] ECR I-4785.

31 – Joined Cases C-338/04, C-359/04 and C-360/04 [2007] ECR I-00000.

32 – In the Opinion in Case C-374/05 Gintec [2007] ECR I-00000, I drew attention to the risks to public health caused by using devices such as games of chance in advertisements for medicines (paragraph 72).

33 – In the judgment in Case C-243/01 Gambelli and Others [2003] ECR I-13031, the Court held that na-

tional legislation – in that case Italian – which prohibits on pain of criminal penalties the pursuit of activities in the gaming sector without a licence or police authorisation from the Member State concerned constitutes a restriction on both those freedoms (paragraph 59 and operative part). That finding was upheld in the judgment in Placanica and others (paragraph 71 and operative part).

34 – Article 1(5)(d) 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 on electronic commerce') (OJ 2000 L 178, p. 1) excludes from the scope of that directive 'gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions'.

35 – In Homo ludens, Alianza, Madrid, 1990, Huizinga, J. argues that human culture first emerged in play and developed there. The author states that when realisation dawned that the name homo sapiens did not suit the species as well as had first been thought, because, ultimately, human beings are not as wise as people believed with such naïve optimism in the 18th century, humans were given the name homo faber instead. However, in the author's opinion, that description is even less appropriate because it may be applied to many animals. The author therefore proposes the name homo ludens since, although there are also animals which play, the function of the game is as essential as that of making things, while human behaviour as a whole is nothing more than a game.

36 – In the judgment in Case C-275/92 Schindler [1994] ECR I-1039, the Court described lottery services as those provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance with the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organized and the prizes or winnings to be ascertained and paid out. The Court held that the price of the lottery ticket constitutes the remuneration (paragraphs 27 and 28).

37 – That view underlies points 95 to 98 of my Opinion in Placanica and others.

38 – Judgment in Schindler, paragraphs 19, 25 and 34.

39 – Judgment in Case C-124/97 Läärä and others [1999] ECR I-6067, paragraphs 18 and 27.

40 – Judgment in Case C-6/01 Anomar and others [2003] ECR I-8621, paragraphs 48 and 52.

41 – For a more detailed quotation, please refer to point 97 of my Opinion in Placanica and others.

42 – A number of those objectives are set out in paragraphs 14 and 15 of the judgment in Case C-67/98 Zenatti [1999] ECR I-7289.

43 – Case C-368/95 [1997] ECR I-3689.

44 – The judgment states: 'Second, as the Court held in Schindler in relation to the organisation of lotteries, the provisions of the Treaty relating to freedom to provide services apply to activities which enable users, in return for payment, to participate in gaming. Consequently, such activities fall within the scope of Article 59 of the Treaty [now, after amendment, Article 49 EC], since at least one of the service providers is established in a Member State other than that in which the service is offered.'

45 – Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 [1996] ECR I-6471.

46 – Retterer, S., Le télé-achat: une vente aux apparences publicitaires protégée des réglementations nationales, 'Droit de la consommation', Juris-Classeur, hors série, December 2000, p. 306.

47 – Directive of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

48 – It is not clear whether the cost of the call is stated.

49 – Article 2(1) of Directive 97/7 defines a distance contract as 'any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded'.

50 – A short time spent channel-hopping provides ample opportunity to see sports and variety programmes where viewers are invited to take part in games and win prizes but where the essential nature of the programme is not affected.

51 – That approach is based on Article 11(5) of the Television without Frontiers Directive which prohibits the insertion of advertising in religious programmes, and in news and current affairs programmes, documentaries and children's programmes, when their duration is less than 30 minutes.

52 – The Commission raised that possibility in points 21 and 41 of the Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without frontiers' Directive (OJ 2004 C 102, p. 2), when it referred to mini-spots and split screens on which editorial and advertising content appear simultaneously.

53 – In points 41 to 44 of this Opinion I drew attention to the difficulties involved in classifying the Gewinnspiel in the main proceedings as a television quiz show.