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# **CJEU rules on website requirements for newspaper advertisements in unfair commercial practices case**

*Verband Sozialer Wettbewerb eV v. DHL Paket GmbH  
Case C-146/16*

**Article by David Bowden**

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### Executive speed read summary

DHL placed adverts in a German Sunday newspaper featuring 5 products on sale on its MeinPaket website. There were limitations on space in the newspaper advert. Consumers who went to the website could choose from 5million products that 2500 different businesses were selling. The website made it clear which business was offering the product for sale and its geographical address. VSW is a mail order products trade association whose members regarded MeinPaket as a threat to their own interests. VSW obtained an injunction in a German court preventing DHL publishing similar adverts claiming it contravened the information requirements in the Unfair Commercial Practices Directive. That injunction was overturned on appeal but on final appeal the German Supreme court referred 2 questions to the CJEU. The CJEU has ruled that in principle trader information could be provided in a website rather than in the newspaper advert itself noting that there are limitations on space in a newspaper. Disappointingly the CJEU has ducked the issues referred to it and sent the case back to the German Supreme Court for it to resolve on the facts whether the limitations of space in the newspaper advert did in fact warrant supplier information being provided only on the MeinPaket website and to establish if the UCPD information was communicated 'simply and quickly' by DHL on its MeinPaket website.

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*The Government of the Kingdom of the Netherlands and the European Commission intervening*  
*Court of Justice of the European Union (10<sup>th</sup> Chamber) - Judges Maria Berger (President), Borg Barthet*  
*and Levits*

*Advocate-General Saugmandsgaard Øe*

*30 March 2017*

### **What are the facts?**

DHL Paket ('DHL') runs a website [www.MeinPaket.de](http://www.MeinPaket.de) on which business can offer various items for sale. Verband Sozialer Wettbewerb (VSW) is trade association of suppliers of electrical products and mail order companies. DHL paid for an advert in the 'Bild am Sonntag' Sunday newspaper in which it advertised 5 products that could be bought on the MeinPaket website. The advert contained product codes. When a reader visited the MeinPaket website and entered a code, it would display the trading name and business address of the supplier. MeinPaket had 2500 trader subscribers and offered over 5 million products for sale.

### **What does the Unfair Commercial Practices Directive say?**

The relevant parts of the Unfair Commercial Practices Directive **2005/29/EC** ('UPCD') are these.

- **Article 2** – 'For the purposes of this Directive:...(i) "invitation to purchase" means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;...'
- **Article 7** – '1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise  
2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.  
3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.  
4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:  
(a) the main characteristics of the product, to an extent appropriate to the medium and the product;  
(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;....'

### **Are there any recitals in the Unfair Commercial Practices Directive of relevance?**

There is one recital to the UPCD that is also relevant. This is:

- **Recital 15** – 'Where Community law sets out information requirements in relation to commercial communication, advertising and marketing that information is considered as material under this Directive. Member States will be able to retain or add information requirements relating to contract law and having

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*contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. A non-exhaustive list of such information requirements in the acquis is contained in Annex II. Given the full harmonisation introduced by this Directive only the information required in Community law is considered as material for the purpose of Article 7(5) thereof. ...'*

### **What happened in the German courts?**

VSW issued an application before a German first instance court (the Bonn Regional Court) seeking an order that DHL cease disseminating its adverts for its MeinPaket website. The Bonn court granted this application on 6 March 2014. On appeal by DHL, a German Court of Appeal (the Köln Higher Regional Court) overturned that order. VSW issued a final appeal to the German Supreme Court (the Federal Court of Justice). It made a number of observations of its own in this case and then referred 2 questions to the CJEU for a preliminary opinion.

### **What were the terms of reference to the CJEU?**

The German Federal Court of Justice referred these 2 questions to the CJEU. These were:

- **Question 1** – Must the information concerning the geographical address and identity of the trader within the meaning of Article 7(4)(b) of the UCPD appear in advertising material for specific products which appears in a print medium - even if consumers obtain the advertised products exclusively via a website of the trader who publishes the advertisement, which is indicated in the advertisement and consumers can easily obtain the information required by Article 7(4) on that website?
- **Question 2** – Does the answer to question 1 depend on whether the business advertising in a print medium is advertising sales of its own products and refers directly to its own website for the information required by Article 7(4), or whether the advertising relates to products which are sold by other businesses on an internet platform operated by the advertiser, and consumers are able to access the information set out in Article 7(4) only through one or more clicks via links to the internet sites of those other businesses which are made available only on the website specified in the advertisement?

### **Are there any special provisions in German Law?**

The UCPD was transposed into German law by means of 'Gesetz gegen den unlauteren Wettbewerb' (Law against unfair competition) as amended on 22 December 2008 and 3 March 2010.

### **What opinion did Advocate-General Saugmandsgaard Øe give?**

The CJEU heard its Advocate-General at a hearing and decided to proceed directly to produce a written judgement without requiring its Advocate-General to produce an opinion for it.

### **Are there any other prior authorities of relevance?**

There is only 1 prior CJEU authority that is relevant in this case and which is referred to by the 10<sup>th</sup> chamber in its judgment:

*Ving Sverige C-122/10* (CJEU 2<sup>nd</sup> Chamber - Judges Cunha Rodrigues, Rosas, Löhmus, Ó Caoimh and Lindh. Advocate-General Mengozzi) 12 May 2011

*The words 'thereby enables the consumer to make a purchase' in Article 2(i) of the UCPD must be interpreted as meaning that an invitation to purchase exists as soon as the information on the product advertised and its price is sufficient for the consumer to be able to make a transactional decision. Article 2(i) must be interpreted as meaning that the requirement relating to the indication of the price of the product may be met if the commercial communication contains an entry-level price. Article 2(i) must be interpreted as meaning that a verbal or visual reference to the product makes it possible to meet the requirement relating to the indication of the product's characteristics. Article 7(4)(a) must be interpreted as meaning that it may be sufficient for only certain of a product's main characteristics to be given and for the trader to refer in addition to its website, on the condition that on that site there is essential information on the product's main characteristics, price and other terms. Article 7(4)(c) must be interpreted as meaning that a reference only to an entry-level price in an invitation to purchase cannot be regarded, in itself, as constituting a misleading omission.*

### **How did the CJEU treat the 2 referred questions?**

It decided not to answer them separately but its opinion treats them as 1 combined question. It did however lay out 5 factors as to how it would assess these referred questions:

- An advertisement constitutes an invitation to purchase within Article 2(i) of the UCPD because the information it contains on the products advertised and their prices is sufficient to enable a consumer to make a transactional decision,

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- Under Article 7(4)(b) the geographical address and the identity of the trader constitute material information. This provision must be read in conjunction with Article 7(1) according to which the commercial practice at issue must be assessed having regard to its factual context and the limitations of the medium of communication used,
- Under Article 7(3) account is to be taken of the limitations of space and time of the medium of communication used and of the measures taken by the trader to make that information available to consumers by other means,
- The extent of the information relating to the geographical address and the identity of the trader which has to be communicated in an invitation to purchase must be assessed on:
  - the basis of the context of that invitation,
  - the nature & characteristics of the product, and
  - the medium of communication used,
- Where an online sales platform is advertised in a print medium and where a large number of sales options offered by various traders are presented there may be limitations of space within the meaning of Article 7(3) of the UCPD.

**What did the CJEU rule on provision of geographical address and identity of trader?**

The CJEU ruled that *'although the information on the geographical address and identity of the trader' had to be 'in principle be included in the invitation to purchase' this would not 'necessarily be the case where the means of communication used...imposes limitations of space'*. However the CJEU ducked answering the referred question at all because it said that it was *'for the national court to assess, on a case-by-case basis, whether that condition is fulfilled, taking into consideration the context of the invitation to purchase and the means of communication used'*.

**What did the CJEU rule on information already provided on a website?**

The CJEU ruled that *'the obligation to include in an invitation to purchase' the Article 7(4)(b) information did 'not depend on the issue of whether the supplier of the products concerned is the author of that invitation or a third party'*. The CJEU said that where a print advertisement *'promotes products from different suppliers' then the Article 7(4)(b) the information 'remains necessary, subject to the limitations of space'*. Again the CJEU ducked answering the referred question blandly trotting out its well-rehearsed platitude that it was *'for the referring court to examine, on a case-by-case basis, first, whether the limitations of space in the advertisement warrant information on the supplier being provided only upon access to the online sales platform and, secondly, whether, so far as the online sales platform is concerned, the information required by Article 7(4)(b) of Directive 2005/29 is communicated simply and quickly'*.

**What will happen next with this case?**

This case will be sent back to the German Federal Court of Justice. It will have to examine and rule on the 2 things that the CJEU avoided namely whether:

- the limitations of space in the newspaper advert warrant information on the supplier being provided only upon access to the MeinPaket website, and
- the Article 7(4)(b) information is communicated *'simply and quickly'* on the MeinPaket website.

The German Supreme Court may have to refer the case back to the trial court to make any factual determinations. It will also have to deal with costs.

**30 March 2017**

David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at [info@DavidBowdenLaw.com](mailto:info@DavidBowdenLaw.com) or by telephone on (01462) 431444.