

MONS COURT OF APPEAL – FIRST CHAMBER

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FIRST CHAMBER**

Register of cases no.: 4218

General list of cases: 2011/RG/302

IN THE CASE OF:

The limited company **AGENCE DE MARKETING APPLIQUE [AMA]**, whose registered office is situated at Europole, 1 Dreve Gustave Fache, 7700 MOUSCRON, registered in the Banque-Carrefour des Entreprises [Register of companies] under number 0866.619.675, represented by its Chairman of Board of Directors in office, domiciled in that capacity at the said registered office,

The Appellant

Represented at the hearing by Maitre Jean-Paul VRIELYNCK, barrister, whose chambers are situated at 269/4 Avenue De Fre, 1180 BRUSSELS, and by Maitre Nicolas DEUR, barrister at 2 Boulevard Dubouchage, 06045 NICE, FRANCE, his counsel,

VERSUS:

The Managing Director of the **DIRECTION GENERALE DU CONTROLE ET DE LA MEDIATION DU SERVICE PUBLIC FEDERAL ECONOMIE, PME CLASSES MOYENNES & ENERGIE** [Department for the Control and Mediation of the Federal Public Department for the Economy, Small and Medium Size Enterprises and Energy], whose offices are situated at 16 Boulevard du Roi Albert II, designating official domicile at the office of its counsel,

The Respondent

Represented at the hearing by Maitre Eric BALATE, barrister, whose firm is situated at 50 Rue du Gouvernement, 7000 MONS, its legal counsel.

* * * *

After deliberating, the Court gives the following ruling:

Having regard to the documents lawfully submitted to the proceedings prescribed by law, in particular:

- the appeal application lodged with the Registry of this Appeal Court on 30 March 2011;
- a certified true copy of the Order appealed against, delivered in the presence of all parties on 16 March 2011 by the Presiding judge of Toumai Commercial Court, giving an urgent interim ruling, under no. A/10/0549 in the case list, a decision notified by process served on 18 April 2011,

Stamp:

*Unsigned copy sent for information
to the police under [text illegible]
Exercising rights of [text illegible]
Article 230/2 EC of 15/07/7?
On 15 NOV. 2011*

- the pleadings and files of the Parties;
- the application to re-open the proceedings filed with the Court Registry on 21 October 2011.

The appeal, limited to the provisions of the Order made which rules upon the principal application, which is lawful as to its form and lodged within the legal period, is admissible;

There is no necessity, as the Appellant requests, to re-open the proceedings, as the elements that it submits in support of its application do not constitute a new document or a new and major fact under article 772 of the Judicial Code;

The relevant facts in the case and the history of the proceedings

AGENCE DE MARKETING APPLIQUE SA, hereinafter referred to as “**AMA**”, carries on in France, Great Britain and Germany a mail-order business selling food supplements and plant-based cosmetic products under the trade mark “**VITAL BEAUTY**” and care products under the trade mark “**SWISS HOME SHOPPING**”;

The mail-order selling of its products is promoted exclusively through direct marketing commercial advertising consisting in sending potential clients a product catalogue and a personalised form for free participation in a lottery for which the lots at attractive prices in euros have been pre-drawn;

The Managing Director of the DIRECTION GENERALE DU CONTROLE ET DE LA MEDIATION DU SERVICE PUBLIC FEDERAL ECONOMIE, PME CLASSES MOYENNES & ENERGIE [Department for the Control and Mediation of the Federal Public Department for the Economy, Small and Medium Size Enterprises and Energy], hereinafter referred to as “**the Belgian Authority**”, is the competent Belgian authority designated under EC Regulation no. 2006/2004 of the European Parliament and the Council of 27 October 2004 relating to cooperation between national authorities responsible for monitoring the application of the law on consumer protection;

It was asked to act against AMA:

- by the competent British authority, the Office of Fair Trading, hereinafter referred to as “**the OFT**”, (reference UK-2008.09.17-001),
- by the competent French authority, the Direction Generale de la Concurrence, de la Consommation et de la Repression des Fraudes [Department of Competition, Consumer Affairs and the Eradication of Fraud], hereinafter referred to as “**the DGCCRF**” (reference FR-2009.06.05.001),

both of which accused AMA of a breach of Directive no. 2005/29/EC of the European Parliament and of the Council of 11 May 2005 relating to unfair commercial practices by companies with regard to consumers in the internal market and amending Directive no. 84/450/EEC of the Council and Directive nos. 97/7/EC, 98/27/EC, 2002/65/EC of the European Parliament and the Council, hereinafter described as “**the Directive on unfair commercial practices**”, transposed:

- in France by Law no. 2008-3 of 3 January 2008 for the development of competition in the service of consumers (JORF no. 003/4/01/2008),
- in the United Kingdom by The Consumer Protection from Unfair Trading Regulations 2008 of 8 May 2008, no. 1277,

In particular:

- the OFT referred to breach of articles 5, 6 and 7 of the said Directive as well as practice 31 in its Annex I, in addition to national law,
- the DGCCRF referred to article 6 and practice 19 of its Annex I, in addition to national law;

After an exchange of letters and a formal notice given on 2 December 2009 to AMA to put an end to its messages disseminated both in Britain and France under the trade names “Vital Beauty” and “Swiss Home Shopping”, established as deceitful and unfair, the Belgian Authority brought an action against AMA to cease its advertising whose presentation and headings varied but that had a harmful effect on French and British consumer behaviour as it *consistently* makes the target consumer believe:

1. that he really is, *with certainty*, the first prize winner of a cheque for several thousand euros,
2. that, if he wished to receive the cheque (*of which he was the winner*), he had to reply to the mailshot *immediately*,
3. that if he wishes to have a guarantee of receiving the cheque quickly (or simply just receiving it), he had to place an order,

and that only a reading of the general conditions, in small print, indicated that no purchase is required, that a deadline for participation in the competition is fixed and that a pre-draw of lots had been organised in which the winner of the first prize had been chosen by an independent jury;

The decision made

By Order of 16 March 2011, the President of Toumai Commercial Court, giving an urgent interim ruling:

- ruled that AMA’s mailings that it disseminated in Britain and France under the trade names VITAL BEAUTY and SWISS HOME SHOPPING were illegal as they contained a clear contradiction between the announcement that the receiver of the letter was the winner of the first prize in a lottery of a large amount in euros and pounds sterling, and because the placing of an order from the catalogue attached to the letter was compulsory or was likely to accelerate the process of receiving the winnings when the winnings were only a voucher of €2 to be used exclusively on purchases of products from the said company, and was unfair and deceitful as it obliged the consumer to take action to pay money in order to obtain information as to the certainty that he had actually won the said amount and

refrained from awarding the prizes described or a reasonable equivalent although it announced that a competition had been organised, and all these mailings were contrary to articles 5, 6 and 7 and to practices 19 and 31 of Annex I of Directive 2005/29EC relating to unfair commercial practice by companies relating to consumers in the internal market and amending Directive no. 84/450/EEC of the Council and Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and the Council and EC Regulation no. 2006/2004 of the European Parliament and the Council, as transposed into British law and into French law respectively by “The Consumer Protection from Unfair Trading Regulations 2008” and by Law 2008-3 of 3 January 2008 for the development of competition for consumer service and Law 2008-776 of 4 August 2008 on the modernisation of the economy and therefore the Law of 6 April 2010 relating to market practices and consumer protection;

- ordered the cessation of these practices within 48 hours of the notification of the “ruling” ;
- in addition ordered by sending an email or letter duly recorded both in Britain and in France that a fine of €2,500 would be payable by AMA with a maximum of one million euros;
- ordered the publication of the summary of the “ruling” both in French and in English in two national British newspapers and two national French newspapers as chosen by AMA for which the costs are exclusively payable by it;

The basis of the appeal

1. AMA disputed the order made by the first court ordering it to cease sending the messages that it sent to French and British consumers, under the direct application of the Directive of 11 May 2005;

It argued with some relevance that a directive, contrary to a regulation, is not directly applicable in the internal legal system of a European member State and that, to be directly applicable and to acquire normative status, it had previously to have been transposed into national law;

It lawfully argued that under article 6.1 of EC Regulation No. 864-2007 of the European Parliament and of the Council of 11 July 2007 (the Rome II Regulation) under whose terms “*The law applicable to a non-contractual obligation arising from an act of unfair competition is the law of the country on whose territory the competitive relations or the collective interests of consumers are affected or likely to be affected*”, an examination of the commercial practices employed by AMA in the United Kingdom had to be made under The Consumer Protection from Unfair Trading Regulations 2008 and in France under articles L.120-1 and following and article L.121-36 of the Consumer Code (Law of 4 August 2008);

The heading of the provision in the Order made certainly refers to articles 5, 6 and 7 and to practices 19 and 31 of Annex I to Directive 2005/29/EC relating to unfair commercial practices by companies with regard to consumers in the internal market and amending Directive 84/450/EEC of the Council and Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and the Council and EC Regulation no. 2006/2004 of the European Parliament and the Council, but states “*such as these provisions have been transposed into British law and into French law*” respectively by The Consumer Protection from Unfair Trading Regulations 2008 and by Law 2008-3 of 3 January 2008 for the development of competition in the service of consumers and Law 2008-776 of 4 August 2008 on the modernisation of the French economy, integrated into the Consumer Code under articles L.120-1 and following;

It is therefore incorrect to claim that the first court applied the Directive directly;

Conversely, it wrongly referred to the Law of 6 April 2010 relating to market practices and consumer protection, which is inapplicable to the dispute since the commercial practices that are “complained of” in the present dispute were implemented in France and Great Britain and not in Belgium; furthermore, the special nature of the requests for judicial assistance is to examine the mass mailings complained of with regard to each of them;

2. To assess the misleading or unfair character of the advertising messages at issue, it is necessary:
 - to verify whether the practice referred to corresponds to the definition of the commercial practice in the national law referred to and including article 2(d) of Directive 2005/29/EC,
 - if this is the case, to verify whether it involves any of the practices automatically regarded as unfair in any circumstances and therefore prohibited per se: article 5.5 of the Directive in fact states that the list of these practices, given in Annex I, are applied in all member States and can only be modified by a revision of Directive 2005/29/EC itself (point no. 17),
 - if a commercial practice considered unfair is not relevant here, to examine instead whether there is a misleading commercial practice (a misleading act or misleading omission) under national laws equivalent to articles 6 and 7 of the Directive, since misleading commercial practices are generally regarded as unfair by national laws that include the provisions of article 5.4 of Directive 2005/29/EC,

- lastly, if the commercial practice is not misleading, for the request for judicial assistance made by the OFT, to analyse whether it is unfair under the national law corresponding to article 5.2 and article 3 of Directive 2005/29/EC, that is, contrary to the requirements of professional care and that substantially alters or is likely substantially to alter the economic behaviour, with regard to the products, of the average consumer that it affects and at whom it is aimed,
- if this is no longer the case, to conclude that the commercial practice examined is fair and therefore lawful;

(In this regard, see C. DELFORGE “*Les pratiques déloyales des entreprises à l’égard du consommateur*” [Unfair practices by companies with regard to the consumer], in *Actualités en matière de pratiques du marché et protection du consommateur* [current trends in market practices and consumer protection], CUP, VOL. 125, Liege, Anthemis, 2011, p. 10, no. 6 ; H. JACQUEMIN, “*La loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur*” [The law of 6 April relating to market practices and consumer protection], JT, 2010, p. 548, no. 12);

3. Are we dealing with a commercial practice?

Article 2(d) of Directive 2005/29/EC defines a commercial practice as “any commercial action, omission, conduct, measure or communication, including advertising and marketing, by a professional relating directly to the promotion, sale or supply of a product to consumers”;

This definition is contained in article 2(1) of The Consumer Protection from Unfair Trading Regulations 2008;

French law does not contain a definition of commercial practice;

In this context, AMA claims that the games that it organises have no direct connection with the promotion, sale or supply of its products. It argues that they are aimed, not at promoting its products directly, but arousing curiosity in customers by differentiating itself from competitor companies that adopt a more conventional method of communication and for the games to be independent of commercial solicitation since the persons who receive its advertising messages can play without making an order. It is solely a marketing process aimed at capturing the attention of customers, but it is not in any way an attempt to persuade them to make a commercial decision, and the fact of placing an order does not in any case increase the chances of winning;

The Belgian Authority disputes this analysis based on Document 83 of the file of AMA documents which states: “*This mailing is an advertisement aimed at promoting Vital Beauty products (...)*”, as well as on Document 11 in its file headed as follows:

“*By sticking on the Choice No. 1 label, you will very shortly receive the First Prize Cheque that you have definitively won. Nothing could be simpler. But be advised, you must act quickly as your reply is subject to strict regulatory periods. To avoid taking any risk, please place an order within 9 days (the Court’s underlining); Yes, by placing an order you will receive advantages that guarantee you strict adherence to the procedure that I indicate below so as to avoid any ambiguity (...)*”;

The European Court of Justice has had occasion to state the meaning to be given to the concept of “commercial practice”, as follows:

“In this regard, it must be noted that, by applying a particularly wide interpretation, article 2(d) of Directive 2005/29 defines the concept of commercial practice as “any commercial action, omission, conduct, measure or communication, including advertising and marketing, by a professional relating directly to the promotion, sale or supply of a product to consumers”.

It must be noted that promotional campaigns, such as that in the present case, making the free participation by the consumer in a lottery subject to the purchase of a certain quantity of goods or services, clearly fall within the commercial strategy of an operator and are directly aimed at promoting and boosting its sales. It follows that they do constitute commercial practices within the meaning of article 2(d) of Directive 2005/29 and consequently fall within its scope of application” (ECJ, (Large Chamber), 9 November 2010, (Mediaprint Zeitungs – und Zeitschriftenverlag), C 540/08, points 17-18; ECJ, (1st Christelle HENNETON, 14 January 2010, (Plus Warenhandelsgesellschaft), C-304/08, points 36-37);

AMA certainly does not make participation in the competition subject to the purchase of a product;

However, as the European Court of Justice notes, there must be a wide definition of the concept of commercial practice;

The disputed mailings constitute commercial practices, as the marketing operation (the lottery) directly relates to the promotion of AMA products;

Whilst the games are independent of the purchase of AMA products, they are clearly aimed at getting customers interested in these products and persuading them to buy;

The documents referred to by the Managing Director and example 2 cited on page 4 of his pleadings (“*By placing an order you have the assurance of receiving your Confirmed Cheque in your mail within a few days*”) indicate that, even if AMA argues to the contrary, it makes people think that placing an order contributes to accelerating the award of a prize, even if it is not the first prize, subject to what is said below regarding the confusion generated by this statement;

It also writes that placing an order will allow the customer to “profit **FREE** from the *Automatic Processing*” of the customer’s file, a form of words that in a company where both profit and marketing techniques are synonymous with value gives the impression of a more favourable situation. This is especially the case if attention is given to the fact that, in the absence of an order, the receiver may ask for the deferred (underlined by the Court) despatch of his guaranteed cheque after the end of the game, which conversely gives rise to the idea of delay;

4. Are these commercial practices regarded as prohibited?

It is accepted that lotteries relating to the purchase of an item of goods are not illegal in themselves, even if they constitute for some consumers the determining motive that may have persuaded them to buy (ECJ, 14 January 2010; ECJ 9 November 2010);

Annex I to Directive 2005/29/EC gives a list of 31 practices regarded as unfair in all circumstances. This Annex has been transposed into French law in articles L.121-1-1 and L.122-11-1 of the French Consumer Code and into British law in Annex I (Schedule 1) to “The Consumer Protection from Unfair Trading Regulations 2008”;

In the present case, only practices nos. 19 and 31 in Annex I to Directive 2005/29/EC in their transposition by British or French law are at issue;

The DGCCRF blames AMA for stating in a mailing that a competition has been organised or that a prize could be won without awarding the prizes described or a reasonable equivalent, which is prohibited under article L.121-1-1 point 18 of the French Consumer Code, which is the transposition of prohibited practice no. 19;

The OFT blames AMA for ignoring practice no. 31 in Annex 1 (Schedule 1) of The Consumer Protection from Unfair Trading Regulations 2008, by giving the false impression that the consumer had already won, will win or by carrying out an act will win a prize or another equivalent benefit when in fact either no prize or other benefit existed *or carrying out an act relating to the request for the prize or other equivalent benefit was subject to the obligation for the consumer to pay money or to bear a cost*;

(a) Article L.121-1-1, point 18 of the French Consumer Code

Article L.121-1-1 point 18 of the French Consumer Code states that commercial practices whose purpose is “*to state with regard to a commercial practice that a competition has been organised or that a prize may be won without awarding the prizes described or a reasonable equivalent*” are regarded as misleading;

What this provision prohibits and therefore practice no. 19 of Annex I to Directive 2005/29/EC, which it transposes, is making consumers think that a competition has been organised and that prizes will be awarded when in reality there are none. Conversely, these provisions do not make it an unfair misleading practice for a company to give the consumer a false impression that the latter has certainly won a prize when there is an obstacle to obtaining it;

Both the DGCCRF and the first court appear to confuse the belief in having won a competition with the non-award of the prizes in a competition that have actually been won;

It has not been shown that AMA would not distribute the prizes to which the winners have a right;

This claim is therefore baseless.

(b) Practice no. 31 of Annex 1 (Schedule 1) of The Consumer Protection from Unfair Trading Regulations 2008

The Respondent uses the argument of the OFT and subsequently the first court regarding the practice by AMA as being in contradiction with this practice as it gives the consumer the false impression that he has with certainty won a prize of a cheque of several thousand euros, when in reality it is not certain that he will receive the cheque as there is an obstacle to this, namely the lottery;

Under the terms of practice no. 31 in Annex 1 (Schedule 1) of The Consumer Protection from Unfair Trading Regulations 2008, a commercial practice is regarded as unfair where it creates the false impression that the consumer has already won, will win or will win by carrying out an act a prize or another equivalent benefit, when in fact either no prize or other equivalent benefit exists or carrying out an act relating to the request for the prize or other equivalent benefit is subject to the obligation for the consumer to pay money or to bear a cost;

It has not been shown that AMA does not distribute the prizes in the competitions that it organises;

The consumer is required to affix a stamp to a letter and to send it to AMA in order to receive the prize;

The Respondent infers from this that the consumer must pay money – through the purchase of a stamp – in order to obtain the prize he has won, which is prohibited under the second hypothesis of practice no. 31;

AMA does not dispute that the consumer is required to affix a stamp to the reply envelope, but states that this cost is reimbursed to the consumer if he makes a request for it, as is expressly stipulated in the rules of the games organised by AMA submitted to the consumer;

The question put to the Court is to decide whether, as the first court found, the consumer bears a “cost” within the meaning of practice no. 31 when he has to pay for a stamp in order to receive his prize;

Even if the consumer has to buy a stamp to affix to his reply envelope in order to be able to participate in the competition, he bears this cost only because he agrees to it; consequently, he has the possibility of recovering it from AMA if he expressly requests this;

It may be inferred from this that the consumer does not have to pay any sum of money or bear any cost in order to obtain his prize;

Consequently, there is no need to refer a question for a preliminary decision by the European Court of Justice, as the Respondent has proposed;

As an additional matter, as the High Court of Justice in London has found, the purchase of a stamp constitutes a derisory cost which gives the advertiser no benefit, such that it does not involve a practice prohibited by practice 31; (High Court of Justice, Chancery Division Companies Court (London), 2 February 2011, *OFT versus Purely Creative Ltd*, point 47);

This claim is also baseless;

5. Are we dealing with a misleading commercial practice?

As AMA’s commercial practice cannot be regarded as unfair, an examination must be made as to whether it may be regarded as misleading (misleading action or misleading omission), as both the OFT and the DGCCRF argue with regard to the mailings sent by AMA stating that, since it is not clearly and sufficiently indicated that it is free to obtain a prize, the consumer may be led to order products from AMA;

The consumer would then be misled as to the nature of the products since he would believe that they were conditions for obtaining the prize;

Furthermore, it would be misleading to send a letter to a consumer leading him to think that he is the happy winner of the first prize in a lottery and that placing an order from the catalogue attached to the letter will accelerate the process of receiving the prize, when in fact a careful reading of the general conditions written in small print on the back of one of the documents indicates that, apart from the first prize, the prize won is only a voucher worth two euros valid exclusively on the purchase of AMA products and that returning the form relating to the first prize only constitutes participation in a preliminary lottery draw;

The information given to the consumer would therefore be false under article 6.1 of Directive 2005/29/EC;

In addition, AMA may also be blamed for misleading omissions where the indications relating to the nature of the lottery draw or the explanations relating to the nature of the “certified cheque” are only given in very small print in the rules for participation, and are not indicated in the main body of the mailing written in large letters;

The first court adopted this argument and found that the mailings by AMA did constitute misleading actions under articles 6 and 7 of Directive 2005/29/EC;

AMA disputes this, arguing that by cooperating with a specialist organisation in the United Kingdom (the Committee of Advertising Practice, CAP) it has already “voluntarily” made numerous modifications “in order to emphasise with greater force and clarity the obstacle to the award of the principal prizes at stake”, that articles 6 and 7 of Directive 2005/29/EC concern the products and not the promotional games accompanying them and that, as a result, it will not be shown that the information contained in AMA’s product catalogues contravene them;

The content of articles 6 and 7 of Directive 2005/29/EC were transposed into British law in articles 5 and 6 of The Consumer Protection from Unfair Trading Regulations 2008 and into French law in article L.121-1 of the French Consumer Code;

In both French and British law, an act is misleading if:

- it contains false information and is therefore untruthful,
or
- it in any way, including in its general presentation, induces or is likely to induce an error in the average consumer, even if the information presented is factually correct,
and
- leads him or is likely to lead him to make a commercial decision he would not otherwise have made;

Therefore, in order to decide whether an advertisement is likely to be misleading, a view must be had of the perception the public has of it.

In this regard, AMA unsuccessfully complaint against the OFT for not having submitted the complaints it received in claiming a breach of its rights of defence, since the Respondent is not exploiting them;

The Court shall consider the statement by Mr FREEMAN for what it is, namely a sworn declaration by an official stating that since September 2008 the OFT had received 120 complaints and questions relating to AMA, without giving any details as to their content;

A careful and complete reading of AMA’s mailings shows that they do not contain any false information;

In fact, it has not been shown that a receiving consumer who submits his document within the periods required does not receive the prize he has won. Furthermore, even if the messages may appear ambiguous since a rapid reading could make the average consumer think that he has won the first prize, it is not false information since it is stated, albeit in small print, what the prize consists of and that the first prize is still subject to a lottery draw;

These mailings are all the less likely to induce the consumer to make a mistake as to the extent of the commitments of the awarder/professional, as provided in article L.121-1, I, point 2(e) of the French Consumer Code and article 5(4)(c) of The Consumer Protection from Unfair Trading Regulations 2008, in that the average consumer, in view of the general presentation of the mailing, may reasonably think that AMA is making a commitment to give him a cheque of a substantial amount when in reality this will only be exceptionally the case, as the amount of the prize is, apart from the “First Prize Winner”, derisory. They also tend to make the consumer think that, if he places an order, his application (and his prize) will be processed automatically and be more certain;

The following elements contribute to this overall misleading impression, even for reasonably aware consumers familiar with advertising lottery draws:

- *the form of words used, such as:*
 - “IT IS CERTIFIED AND OFFICIAL: YOU HAVE WON* ‘Name of addressee’ ... you can claim today THE VERY SUBSTANTIAL SUM OF 10,000 POUNDS PAYABLE BY CHEQUE”,
 - “the cheque for 10,000 POUNDS will really be sent to your postal address by registered mail within 48 hours, in accordance with the general conditions”,
 - “Consequently, I formally certify that the price indicated of 10,000 POUNDS will be awarded to “Receiver’s name”;
 - “Receiver’s name”, you must return your documents within the regulatory period, otherwise WE CANNOT SEND YOU YOUR PRIZE”,
 - More recently (document 6 of Maitre BALATE) ...”if you have received these documents, then you are indeed the FIRST PRIZE WINNER of the Grand Prize Cheque (for over 20,000 POUNDS). In this case, simply follow the instructions to receive it”.

- the same terms used, such as “WINNER”, “WINNER IN WAITING”, “PAYMENT AND PRIZE FORM, “APPROVAL BY THE MANAGEMENT”, “PRIZE GUARANTEED under the supervision of an independent judge”, “certified cheque won”, “PLEASE KEEP THIS DOCUMENT AS PROOF”...
- *the design and page layout, for example:*
 - the order form and the participation form or claim order in France are both on the same page;
 - the page layout of the words “Winner”, “certified cheque” with, below, “more than 20,000 pounds” in bold lettering, all three framed on a white background and, outside the frame on a grey background in a different typeface and much less visible, the reserve prizes; the colours used and the relative size of certain words, preceding or accompanying other more high profile and/or striking words;
 - the use of very small lettering for the reserve prizes;
 - the absence of spaces and punctuation in certain cases between the sentences of the rules of the game; the words “prize already allocated” and lower down “Also, value of First Prize Cheque at stake” which tends to blur or give rise to confusion between the certified cheque, which is a redeemable coupon whose amount is not mentioned on the main page, and the prize (document 6(e) from Maitre BALATE). This also applies to the mailings complained of by the French applicant authority (Document 11, Annex 1 of its file);

The addition of the words “subject to verification of your potential rights” and “in accordance with the rules”, in a small typeface, is not sufficient to dispel the impression resulting from the sentence, written in a much larger font in bold immediately between the two: “I agree to send you in a sealed security envelope a cheque for €19,200.00 made out to you, reinforced by the addition of a “PRIZE Certificate” with the words CONFIRMED WINNER and FIRST PRIZE CHEQUE, in which the prize is never clearly identified;

AMA vainly argues that the main prize is described in its “bank cheque” mailing and claims that there cannot be any confusion with the attached prizes, taking the form of a redeemable cheque described as a “validated cheque” or “guaranteed cheque”, which all the receivers of the messages benefit from by participating in the game; the use of the word “cheque” is sufficient to create the confusion;

An analysis of the recent mailing submitted on 31/12/2010 (document 82 of the Appellant’s file) which, apart from one exception – the page entitled Description of the Major Prize, headed so as to make it thought that the receiver could claim the said Major Prize), makes reference to a single cheque, the prize of the first prize winner and, as a marginal note, to 3 “bodycare” gifts for orders of more than €9 only, confirms that everything has been laid out in order to mislead the receiver and make him think that he is the winner of the first prize and that it is in his interest to place an order in order to receive it quickly;

The envelope mentions on four occasions the term “bank cheque” and twice the amount of €48,000, an amount that is indicated 5 times on the document entitled “personal statement” (page 1 of 4 of AMA’s notice), as well as the phrase “bank cheque”; page 2 of 4 entitled “how to fill out the documents” once again contains this phrase twice and the words “cheque for €48,000” once; page 3 of 4, the “letter of confirmation” once again contains, in bold letters, three mentions of €48,000 with the phrase “bank cheque” twice;

The notice contains a document with two sections, as follows:

- the first section, on the letter heading “acceptance document” – which is a separate participation form – (with these words in smaller lettering in a denser font), which again makes reference twice to a first prize and to the amount of €48,000, includes five boxes to be ticked, the first 4 presented in a similar way, making it thought that they form a single whole (the claim of the prize, the agreement in principle to placing an order, confirmation of the contact details and a full knowledge of the rules of the game), before the signature and the date below in another layout, the cryptic words “no, I am not making an order today. I refer to article 4.2 of the rules”;
- the second section, put on a separate insert with the words: “for greater security, return the whole page if you wish” is an order form;

Also attached are a specimen cheque for €48,000 bearing the following words: “Dear X, This is your cheque! You will receive it made out to you sent by registered letter with advice of receipt to your personal address, to X. Congratulations!” preceded by the following words in bolder lettering: “After verification of your potential rights”. Also stated is: “SPECIMEN. This is not a cheque, you will receive a bank Cheque for this amount, provided that you return to us the document bearing the designated First Prize Winner number within the periods indicated by the bailiff”;

The statements and restrictions given in the official rules for the game are obscured by the general impression given by the advertising part, which is much more attractive and which is aimed at convincing the receiver that the prize has been won and that it will certainly help to place an order, and the catchy, numerous and repeated words also indicated in the documents sent to the consumer;

Therefore, the Respondent correctly seeks the cessation of the dissemination of the disputed mailings, which are misleading and unfair under the applicable laws in France and Britain;

The reasons for the ruling given in the Order, which wrongly upheld all the claims referred to by the requesting authorities, must be modified for the foregoing reasons;

6. AMA also criticises the period of cessation, the amount of the penalty and the publication order. As a subsidiary matter, it asks to be authorised to make some adjustments to its mailings, stating that its marketing strategy is not unlawful in itself;

The adjustments that it proposes are not sufficient;

They do not avoid the confusion created by the disputed mailings as they are currently conceived;

However, AMA could make adjustments that are more structural and/or relevant. Therefore, it should be given a reasonable period of time of three (3) months to end the breach;

The penalty ordered is excessive; a reduction to €100 per mailing sent would be adequate, with the maximum amount being fixed by the first court;

The order to publish a summary of the present ruling which is sought does not appear to be essential to contribute to the cessation of this breach;

To clarify the reasons for the present ruling, the order made shall be nullified, except as regards what was requested and ruled upon regarding costs;

As the appeal is partially well founded, each party shall pay its own costs relating to the appeal proceedings;

FOR THESE REASONS

THE COURT

Ruling in the presence of all the parties, within the limits of its jurisdiction,

Having regard to article 24 of the Law of 15 June 1935 regarding the use of languages in legal matters,

Rules that there is no need to re-open the proceedings,

Rules that in any case the application for suspension of the publication order, whilst awaiting the decision of the court on the basis of the disputes, has become inapplicable;

Allows the appeal;

Sets aside the order made, except as regards what was requested and ruled upon regarding costs;

Rules that the Appellant's mailings which it distributed in Britain and France under the trade names VITAL BEAUTY and SWISS HOME SHOPPING are illegal under articles 5 and 6 of The Consumer Protection from Unfair Trading Regulations 2008 and of article L.121-1 of the French Consumer Code, as they are likely to give the misleading impression that:

- the receiver of the letter is the winner of the first prize, which is a large one, in the lottery that it organises, when there is only one chance out of the number of pre-drawn numbers that he is the winner,
- placing an order is likely to have a positive influence over the process of paying out the first prize,

Orders the cessation of these practices within three (3) months of the pronouncement of the present ruling,

Orders the payment of a penalty of €100 per breach observed after the notification of the present ruling and the expiry of the period of three (3) months stated above, with a maximum of one million euros,

Dismisses the Respondent's outstanding claims;

Orders the parties to pay their own costs in the appeal proceedings;

As ruled by the Court of Appeal of Mons, First Chamber, where the following were sitting: Monique LEVECQUE, judge acting as presiding judge, Mr Jean MATAGNE, judge, Mr Michel LEMAL, judge, and pronounced in a civil public hearing on 14 November 2011 by Monique LEVECQUE, judge, with the assistance of Eddy GUERET, Court Clerk.

Signatures

GUERET

LEMAL

LEVECQUE

MATAGNE