

[Stamp: BALATE &  
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18<sup>TH</sup> MARCH 2011

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A/10/00549

Rep. 720

The Presiding Judge of the Tournai District Commercial Court, in the province of Hainaut, sitting in ordinary public session in summary proceedings has issued the following court order after deliberation

**CONCERNING**

**THE DIRECTOR-GENERAL OF THE GENERAL DIRECTORATE ON CONTROL AND MEDIATION OF THE FEDERAL PUBLIC SERVICE ECONOMY, SMES, SELF-EMPLOYED AND ENERGY, with its offices located at 1000-BRUXELLES, Boulevard du Roi Albert II, 16, having appointed the office of Maître Balate & ASSOCIES, Lawyers of 7000-MONS, Rue du Gouvernement, 50.**

The Claimant

Represented by Maître Balate & ASSOCIES, Lawyer of 7000-MONS

**VERSUS**

**AGENCE DE MARKETING APPLIQUE, abbreviated to A.M.A., with its head office at 7700-MOUSCRON, Drève Gustave Fache, 1, bte 1, Europole.**

The respondent is represented by Maître VRIELYNCK, Lawyer of 1180-BRUXELLES, Avenue De Fré, 269/4 and by Maître Deur, Lawyer of 06045-NICE, cedex 1, Boulevard Dubouchage,2

Whereas the summons initiating proceedings before the Presiding judge sitting in these summary proceedings served on 14 June 2010;

Whereas the main findings of the parties and the respondent's summary findings;

Having heard the counsel for the parties at the hearing on 16 February 2011;

**1. SUBJECT-MATTER OF THE CLAIM**

The claimant's action for an injunction seeks a ruling that the respondent's advertising disseminated on British and French territory under the brand names VITAL BEAUTY and SWISS HOME SHOPPING is illegal as it breaches the provisions of several directives of the European Parliament and the Council on unfair business-to-consumer commercial practices in the internal market mentioned in detail in the summons and transposed into British, French and Belgian law. The claimant also requests that the court orders these practices to cease within 48 hours of notice of judgment or risk a penalty of

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**MERRILL BRINK INTERNATIONAL**

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€10,000 payable by the respondent, that a summary of the judgment be disseminated by sending such to all clients on the list of customary recipients for both the British and French markets and at risk of a penalty of €10,000 for each late day and that the summary of the judgment be published in both French and English in two British and French national newspapers at the respondent's expense and order it to pay costs.

The respondent finds that its rights to proper defence have been violated as it has not been notified of the consumer complaints and their identity invoked by the claimant and it seeks a court ruling on the fact that the mass mailing in question in the United Kingdom and France does not breach the rules stipulated by the European directives on unfair company commercial practices towards consumers and thus reject the claimant's claim and sentence it to pay one Euro by way of damages for abuse of procedure or at the very least unjustified procedure and to pay legal costs in and by itself of €10,000.

## **2. THE FACTS**

The chronology of the facts impacting on the dispute can be summarised as follows:

1. The respondent is a company under Belgian law and its main activity is mail order sales of well-being products in the form of plant-based food supplements and cosmetic products traded under the brand name "VITAL BEAUTY" and lifestyle products under the brand name "SWISS HOME SHOPPING". It sells these products in three European Union countries, namely France, the United Kingdom and Germany. When it send out its catalogues for products it markets, the respondent also disseminates invitations to take part in prize competitions in the form of advertising lotteries with a main prize and ancillary prizes, which are subject to gaming rules that are reproduced on the paperwork. Such marketing practices are commonly called "SWEEPSTAKES".
2. The OFT (Office of Fair Trading) is a British body in charge of making sure markets operate smoothly for consumers. Its goals are, inter alia, to protect and inform consumers of fraudulent practices. Following numerous complaints it received concerning the respondent's advertising and certain misleading aspects therein, this body contacted the latter to obtain a commitment that the latter would amend the content of its advertising, which did not materialise, since complaints continued up to the beginning of 2009;
3. In implementing Regulation EC No. 2006/2007 of the European Parliament and the Council of 27 October 2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws, the OFT asked the competent Belgian authority, i.e. the claimant, to intervene against the respondent. It did this by registered letter on 24 March 2009, by which it made a formal request for the respondent to cease with immediate effect dissemination on British territory of its advertising entitled "SWISS HOME SHOPPING" and "VITAL BEAUTY", the misleading content of which breaches the provisions of Directive 2005/29/EC on unfair commercial practices. The formal request was confirmed by the claimant's counsel by mail on 2 December 2009. These objections were contested by the

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respondent in a letter from its counsel, which led the claimant to file this action for an injunction.

### 3. DISCUSSION

#### a. The jurisdiction of the Presiding judge

The action for an injunction is based on Regulation EC No. 2006/2007 of the European Parliament and the Council of 27 October 2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws;

As the respondent has its head office in Mouscron, international competence for Belgian jurisdictions applies under the aforementioned regulation;

Furthermore, as the respondent has its head office in the Tournai district, the Presiding judge of this Court has competence over this area;

#### b. The merits of the case

Directive 2005/29/EC of 11 May 2005 aims to harmonise national legislation on protecting consumers' interests. In article 5, it stipulates that there shall be a general prohibition of unfair commercial practices where one of the two criteria in paragraph 2 "materially distorts or is likely to materially distort the economic behaviour, with regard to the product, of the average consumer whom it reaches or to whom it is addressed";

Furthermore, articles 6 and 7 of the said Directive denounce misleading commercial practices which contain false information, in particular, which is likely to mislead the average consumer, leading him to purchase products that he would not otherwise have purchased under other circumstances, and particularly false information as to the nature of the product and the extent of the trader's commitments;

Lastly the directive lists 31 practices in annex I that it deems unfair in all circumstances, practice 31 especially, which stipulates:

- creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when there is no prize, or taking any action in relation to claiming the prize is subject to the consumer paying money or incurring a cost;

The aforementioned directive was transposed into Belgian, French and British law respectively by the law of 6 April on market practices and consumer protection, the law of 4 August 2008 on modernisation of the French economy and, lastly, the Consumer Protection from Unfair Trading Regulations

In this case, the advertising messages encompassed by this action for an injunction are delivered in essentially identical fashion in the three European Union countries, namely France, the United Kingdom and Germany. They tell the recipient that he has won a sizeable sum of money (amounts ranging from £19,200 to £23,000) and encourage him to make an order to fast-track the processing of his file in the following terms: "*Congratulations on your confirmed cheque win! I look forward to your response so I can make sure it reaches you according to your choice. Do not delay, every day counts. By making an order, you can rest assured that you will receive your confirmed cheque in your parcel in a few days' time!*";

The text in another publicity message stated in even more precise terms:

*"Dear lucky winner, congratulations on your prize! As the financial director, it is my honour to inform you that following the decision of the prize and gift committee, you really are the recipient of an order claim in your name. This will enable you to claim your prize*

**ON BEHALF OF**

**MR. KILL BRINK INTERNATIONAL**

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*straightaway. As such, let me remind you that the top prize cheque to be awarded amounts to €19,200. What is more, you are entitled to an exceptional surprise free of charge on orders of €39 and over! You can trust us entirely. All checks have been made. There is no doubt as to your status as winner of a top prize cheque. Furthermore, the top prize cheque really is for €19,200. This is formally guaranteed. By sticking on the choice No.1 label, you will receive the top prize cheque that you have definitely won within a very short space of time. As you can see, it couldn't be simpler. But watch out – you need to act very quickly as your response is subject to strict processing time rules. To be on the safe side, I would invite you to place an order within nine days”;*

The message from the above quotes is that the way the wording is presented in the advertising in question makes the recipient believe that he definitely is the clear winner of a cheque for several thousand Euros or pounds sterling and that if he wishes to receive the cheque he has won, he needs to respond to the mailing as soon as possible and that if he wishes to be sure of receiving the cheque quickly, it would be best to place an order;

To each piece of advertising sent, the respondent appends on the back the gaming rules and conditions which it draws the recipient's attention to, stating that it is offering the latter the chance to take part in a free lottery draw, adding *“This mailing is an advertisement intended to promote VITAL BEAUTY products and does not constitute an unconditional offer to pay a sum of money to the recipient. It is not necessary to place an order. The closing date is 30<sup>th</sup> June 2009... A preliminary draw has been conducted and the number of the clear winner of the cheque worth £14,500 was selected by an independent judge... Recipients have two options to take part in the competition: placing a catalogue order... This option is called automatic processing. Not placing an order... sending back the cheque request slip... in a plain white stamped addressed envelope to VITAL BEAUTY before the closing date...”*

The Presiding judge refers, furthermore, to the documents produced by the claimant in exhibits 6, 6a and 11 of its file which reproduce the mass mailing in dispute and translations thereof;

The Presiding judge notes firstly that the terms used in the mailed advertising give British consumers the impression that this is a missive from an official body by using “NATIONAL ALLOCATION CERTIFICAD (NATIONAL ALLOCATION CERTIFICATE)” – “WINNER CERTIFIED CHEQUE (WINNER CERTIFIED CHEQUE)” – “CERTIFIED CHEQUE (CERTIFIED CHEQUE WIN)” – “PAIEMENT GUARANTIDD (PAYMENT GUARANTEED OF €17.000)”;

Moreover, the advertising in question creates the impression or at least is likely to create the impression that it is, if not indispensable, at least desirable to add an order when sending back the document to claim the prize.

In short, the presiding judge notes that respondent's advertising message makes the recipient believe that he is the only winner of the sizeable prize he has been allocated, which is contradicted by the general terms and conditions that state, in smaller print, that he is merely a potential winner.

The drafting in small print and layout in running text makes it hard to read such and is not very engaging for the consumer. These factors do not draw the consumer's attention sufficiently to the fact that he may not necessarily have won the sizeable cheque as purported;

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**MARILL BRINK INTERNATIONAL**  
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By acting in this way, the respondent is compromising the consumer's aptitude to make a decision with awareness of the implications and is thus leading him to make a commercial decision that he would have made differently by responding to the mailing requesting the supposedly won cheque be sent or by placing an order in the respondent's sales catalogue;

This practice runs counter to the provisions of article 5 of Directive 2005/29/EC of the European Parliament and the Council on unfair commercial practices;

Furthermore, the information given by the respondent in this advertising message is false in accordance with article 6/1 of Directive 2005/29/EC since it makes the recipient of this advertising misleadingly believe that he is the lucky winner of the first prize in a lottery and that placing an order in the catalogue will speed up the process of receiving the prize and influences him, whereas the prize won, according to the general terms and conditions, merely consists of a €2 voucher redeemable exclusively on purchases of the respondent's products.

Next, the fact that information in large print is omitted from the body of the mailing on the nature of this being a lucky draw or as to the nature of the "certified cheque" constitutes consecutive misleading omissions of unfair commercial practices under article 7 of Directive 2005/29/EC;

Finally, the content of the respondent's message runs counter to practices 19 and 31 of annex 1 to Directive 2005/29/EC since it gives the recipient the wrong impression that he is definitely the clear winner of a cheque worth several thousand Euros, whereas in actual fact there is an element of the unknown here for determining the winner, namely a lucky draw and that claiming the prize is subject to the recipient having to spend money and in this instance, the price of a stamp to affix to the correspondence that has to be sent to the respondent to obtain the cheque.

Thus, it is apparent from the above that the claimant is lawfully seeking the discontinuance of the respondent's mailings on British and French territory under the brand names VITAL BEAUTY and SWISS HOME SHOPPING;

Moreover, knowledge of the scale and nature of the complaints that have been sent by the OFT on the misleading character of the advertising in question is irrelevant since the action for an injunction is not subject to demonstrating that a significant percentage of consumers has been affected by and has complained about these practices;

There is every reason to sentence the respondent to discontinue dissemination on British and French territory under the brand names VITAL BEAUTY and SWISS HOME SHOPPING of the disputed advertising or risk a penalty which there is a case for setting at €2,500 per advertisement set to a maximum €1,000,000 to avoid causing possible undesired effects, namely endangering the respondent's activities.

It is unnecessary to order this judgment be sent to the respondent's clients, yet, conversely, the request for such to be published in two British and French national newspapers seems fitting in order to ensure consumers in these countries are adequately informed;

IN WITNESS WHEREOF OF  
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FOR THESE REASONS

Ruling after due hearing of both parties;

We, Michel de SALLE, Presiding judge of the Tournai District Commercial Court, aided by Gérard LAVENNES, head clerk;

Whereas the articles from the law of 15 June 1935;

Declare the action admissible and founded to the extent as follows;

We rule that the respondent's advertising disseminated on both British and French territory under the brand names VITAL BEAUTY and SWISS HOME SHOPPING is illegal insofar as it contains a clear contradiction between, on the one hand, the announcement that the recipient of the mail is the winner of the first prize in a lottery, of a large sum in both Euros and pounds sterling, and that placing an order in the catalogue accompanying the mail is mandatory or is likely to speed up the process of receiving the prize while the actual prize is a mere 2 Euro voucher to be redeemed exclusively on purchases of the aforementioned company's products. Such is unfair and misleading insofar as it obliges the consumer to spend money to obtain information on whether he has definitely won the aforementioned amount and insofar as the company refrains from awarding the prizes described or a reasonable equivalent, whilst announcing that a competition has been organised. All this advertising flouts articles 5, 6, 7 and practices 19 and 31 in annex 1 of Directive 2005/29/EC on unfair business-to-consumer commercial practices and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, as transposed into British and French law respectively by the Consumer Protection From Unfair Trading Regulations 2008 and by Law 2008-3 of 3 January 2008 on developing competition in the interest of consumers and Law 2008-776 of 4 August 2008 on modernisation of the economy and consequently the law of 6 April 2010 on market practices and consumer protection;

We order that these practices be discontinued within 48 hours of notification of this judgment;

Moreover, we order that the respondent pay a penalty of €2,500 for any mail duly observed on British or French territory to a maximum of one million Euros;

We order that a summary of the judgment be published in both French and English in two British national newspapers and two French national newspapers of the claimant's choice at the respondent's expense;

We sentence the respondent to pay expenses in favour of the claimant of €276.80 for summons fees and €2000 legal costs;

We hereby authorise the interim enforcement of this order;

Judgment thus given and pronounced by the Presiding judge of the Tournai District Commercial Court, in the province of Hainaut, sitting in ordinary public session in summary

ON BEHALF OF

**BRINK INTERNATIONAL**

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proceedings, Wednesday sixteenth March two thousand and eleven, attended and presided over by Messieurs Michel de SALLE, Presiding judge, and Gérard LAVENNES, head clerk.

*[signature]*  
Gérard LAVENNES

*[signature]*  
Michel de SALLE

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**ON BEHALF OF**  
**MERRILL BRINK INTERNATIONAL**

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