

**JUDGMENT OF THE EUROPEAN COURT OF JUSTICE FROM 18.10.2012**  
IN CASE C-428/11

**(CONSUMER PROTECTION – PRIZE PROMOTIONS)**

On 18.10.2012 the European Court of Justice (“the **ECJ**”) delivered a landmark judgment on the interpretation of paragraph 31 of Annex 1 to the Unfair Commercial Practices Directive (“the **UCPD**”) concerning promotions which give a false impression that consumers have won a prize, but for which they have to pay money to claim it. The corresponding regulation in Bulgaria is provided by article 68k, point 8 from the Bulgarian Consumer Protection Act.

**Facts and questions referred to the ECJ**

The ECJ addresses the following key issues related to the prize promotions in question at the main proceedings:

- Individually addressed letters, scratch-cards and other advertising materials placed into newspapers and magazines informing the consumers that they are “lucky” to win an unspecified prize, one of a number of prizes;
- Consumers then being asked either to call a premium rate phone number, use a reverse SMS or apply by ordinary post to obtain more specific information on the nature of the prize they have won and how to collect it;
- Consumers being told the SMS cost, the maximum call duration and the cost per minute;
- 99% of the so-called “winners” received a small-scaled prize, the value of which is less than the total amount of money they have to pay to claim it;
- Compatibility of such promotions with the EU Consumer protection regulations cited above;
- Liability of businesses running such promotions with respect to the costs of claiming the prize by the consumers.

**False prize impression**

The core idea of the ECJ judgment is to prevent promoters from creating the false impression that a consumer has already won a prize when in fact taking any action to claiming the prize will impose on the consumer paying money or incurring a cost. Such promotions are considered as unfair commercial practices in the European Union under the UCPD regulations.

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In the proceedings before the ECJ it was argued that the “false” element here is essential, so if consumers were in advance informed about the costs which they will have to cover trying to obtain their prize, there would be nothing misleading and unfair. However, the ECJ stated that the false impression consists of the mere fact that a consumer is made to think that he has won a prize when actually it turns out he has to pay something to get the promised benefit. A “prize” for which one is required to pay something cannot be regarded as a true prize, is the final conclusion of the ECJ.

That is why even providing the consumers with adequate information on the conditions for claiming the prize would not make it possible to conclude that the promotion is not unfair.

### **Interpretation of “claiming the prize”**

The UCPD provisions generally prohibit promoters to make prize winners undertake any action in relation to claiming the prize which is subject to the consumer paying money or incurring a cost. Therefore, defining what “action in relation to claiming the prize” should cover comes right at the top of the agenda.

The ECJ admits that the wording of the phrase is somehow imprecise and states that it should include, *inter alia*, any step taken by the consumer in order to obtain information about the nature of the prize or to collect it.

Thus, the ECJ makes a large step towards protecting the consumers by expanding the ban on the introduction of costs to be borne by prize winners not only to costs related to receiving the prize, but also to requesting information about it.

### ***De minimis* rule not respected**

The High Court of Justice of England and Wales, which is the first instance in the initial court proceedings, had suggested that minimal costs (such as that of a stamp) could be imposed on prize winners, provided that the promoters did not benefit from such costs. However, the Court of Appeal, which is the referring court, was not convinced by the High Court’s *de minimis* argument. Neither was the ECJ.

The ECJ insists that the wording of the UCPD does not allow for any exception from the ban. In particular, it does not allow the consumers to bear the slightest cost, even if it is *de minimis* compared with the value of the prize or a cost which would not provide any benefit to the promoter, such as the cost of a postage stamp or ordinary phone call.

A convincing argument in favour of the ECJ’s decision not to respect the *de minimis* rule is that the provision of the UCPD prohibiting promotions as those in question appears in Annex 1 which contains a list of commercial practices regarded as unfair in all circumstances, i.e. no assessment on case-by-case basis should be tolerated, as such would have definitely been necessary if the *de minimis* rule were followed.

### **Multi-option scheme is not working**

In addition the ECJ states that, given the absolute nature of the prohibition of imposing any costs on prize winners, offering a number of options for claiming the prize, some of them free of charge, cannot eliminate the unfair character of the promotion if still one or more of the proposed options were to require the consumer to bear a cost.

The ECJ held that it is the very prospect of taking possession of the prize which influences the consumer and may cause him to take a decision he would not take otherwise, such as choosing the quickest method of finding out what prize he has won, even though that may be the most expensive method.

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No doubt that the ECJ judgment will significantly influence the promoters across the European Union as some may even need to revise their terms and conditions when organizing prize promotions.

However, a significant bias towards the protection of consumers may be noticed in this ECJ judgment which in some cases may raise serious concerns as to how adequate is such high level of protection. If, for example, a winner needs to take the bus to a neighbouring city in order to gather a new luxury car from the manufacturer as a prize, does anyone want to be protected from such a promotion?

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