ORDER OF THE COURT (First Chamber)

30 June 2011 *

In Case C-288/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the rechtbank van koophandel te Dendermonde (Belgium), made by decision of 2 June 2010, received at the Court on 10 June 2010, in the proceedings

Wamo BVBA

v

JBC NV,

Modemakers Fashion NV,

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, J.-J. Kasel, A. Borg Barthet, E. Levits and M. Safjan, Judges,

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

the Court proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC and 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 ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

2 The reference has been made in the course of proceedings against Wamo BVBA ('Wamo'), which runs the ZEB chain of clothes shops, brought by JBC NV and Modemakers Fashion NV, two companies which run competing shops, relating to announcements of price reductions which Wamo sent to its customers.

Legal context

European Union law

3 Recitals 6, 8 and 17 in the preamble to the Unfair Commercial Practices Directive state as follows:

'(6) This Directive … approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. … It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. …

…

(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. …

…

(17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.'

4 Article 1 of the Unfair Commercial Practices Directive provides:

'The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.'

5 Article 2 of that directive provides:

'For the purposes of this Directive:

…

(d) "business-to-consumer commercial practices" (hereinafter also referred to as "commercial practices") means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

…'

6 Article 3(1) of that directive provides:

'This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.'

7 According to Article 4 of the same directive:

'Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.'

8 Article 5 of the Unfair Commercial Practices Directive, entitled 'Prohibition of unfair commercial practices', is in the following terms:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it 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, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

…

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

National law

9 Article 49 of the Law of 14 July 1991 on commercial practices, consumer information and consumer protection (*Belgisch Staatsblad*, 29 August 1991; 'the LPPC') is in the following terms:

'For the purposes of this law, sales shall mean any offer for sale or sale to the consumer for the purpose of seasonally renewing the vendor's stock by selling goods quickly and at reduced prices, under the name "Soldes", "Opruiming", "Solden" or "Schlussverkauf", or any other equivalent name.'

10 Article 52(1) of the LPPC provides:

'In the clothing, leather goods, fine leather craft and footwear sectors [sales] may only take place in the period from 3 January to 31 January inclusive and from 1 July to 31 July inclusive. …'

11 Article 53 of the LPPC provides:

'1. During the pre-sale periods of 15 November to 2 January inclusive and from 15 May to 30 June inclusive, it is prohibited in the sectors set out in Article 52(1) to make announcements of price reductions or announcements which suggest a price reduction, …, regardless of the place or the methods of communication used.

…

Before the commencement of a pre-sale period, it is prohibited to make announcements or suggestions of price reductions which would be effective during that pre-sale period.

Notwithstanding the provisions of Article 48(4), clearance sales which take place during a pre-sale period may not be accompanied by an announcement of price reductions except in the cases and under the conditions laid down by the King.

2. The decrees adopted pursuant to Article 52(2) shall specify the pre-sale periods during which the prohibition referred to in paragraph 1 is applicable.

In the absence of regulations as referred to in Article 52(2), the prohibition referred to in paragraph 1 shall also be applicable to the [sales] referred to in Article 52(2).

…

4. The prohibition on announcements of price reductions referred to in paragraphs 1 and 2 is not applicable to sales of goods during occasional trade fairs of less than four days, organised not more than once a year by groups of local traders or with their participation.

The King may specify the conditions under which such events may be organised.'

12 The LPPC was repealed by the Law of 6 April 2010 on market practices and consumer protection (*Belgisch Staatsblad*, 12 April 2010, p. 20803). That law entered into force on 12 May 2010 and provides, in Article 32, for a similar provision to that of Article 53 of the LPPC.

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

13 In the course of December 2009, Wamo sent an invitation to some of its customers regarding a private sale in its shops from 18 to 20 December 2009 inclusive. In that invitation it was stated that, during those three days, the chosen customers could benefit from greatly reduced prices on presentation of their loyalty card.

14 On 18 December 2009, JBC NV and Modemakers Fashion NV applied to the rechtbank van koophandel te Dendermonde (Commercial Court, Dendermonde) to have that invitation declared a prohibited announcement under Article 53 of the LPPC. By order granted the same day, that court prohibited Wamo from granting any price reduction in its shops up to 1 January 2010 on pain of a fine of EUR 2 500 per infringement established.

15 Wamo brought an application to have that order set aside claiming that Article 53 of the LPPC, firstly, does not prohibit the granting of reductions but rather the advertisements announcing those reductions, and, secondly, is, in any case, contrary to the Unfair Commercial Practices Directive and therefore cannot be applied.

16 Taking the view that the resolution of the dispute before it depends on the interpretation of the aforementioned directive, the rechtbank van koophandel te Dendermonde decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the [Unfair Commercial Practices Directive] preclude a national provision such as that laid down in Article 53 of the [LPPC], which prohibits announcements of price reductions and suggestions of such reductions during defined periods?'

Consideration of the question referred

17 By its question, the national court asks, in essence, whether the Unfair Commercial Practices Directive must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which provides for a general prohibition of announcements of price reductions or announcements suggesting such reductions during the period preceding sales in specified sectors.

18 In accordance with the first subparagraph of Article 104(3) of the Rules of Procedure, where the answer to a question referred for a preliminary ruling may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to the relevant case-law.

19 The Court considers that that is true of the present case in so far as the answer to the question referred may be clearly deduced in particular from Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraphs 35 to 51, and Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, paragraphs 15 to 38.

20 Before replying to the question referred, it is important, as a preliminary point, to establish whether Article 53(1) of the LPPC, which constitutes *ratione temporis* the relevant provision to the facts in the main proceedings, pursues objectives relating to consumer protection so that it comes within the scope of the Unfair Commercial Practices Directive.

21 According to recital 8, the directive 'directly protects consumer economic interests from unfair business-to-consumer commercial practices' and assures, according to Article 1, 'a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests' (*Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 24).

22 However, as is evident from recital 6 in the preamble to the Unfair Commercial Practices Directive, national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is excluded from the scope of that directive (see *Plus Warenhandelsgesellschaft*, paragraph 39, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 21).

23 In that regard, it must be observed that the objectives of Article 53(1) of the LPPC are not evident from the order for reference.

24 Firstly, the rechtbank van koophandel te Dendermonde, referring in particular to the judgment of the Arbitragehof (Court of Arbitration) of 2 March 1995, which was delivered more than 10 years before the adoption of the Unfair Commercial Practices Directive, merely points out that 'in the past' the pre-sale period referred to in the

aforementioned provision had a twofold objective namely, on the one hand, to ensure the transparency of prices applicable immediately before and during the sales period for the protection of consumers, and, on the other hand, to guarantee the equality of sales opportunities between traders and to protect small traders.

25 Secondly, according to the national court, in order to justify the prohibition provided for in Article 53(1) of the LPPC, it is necessary to ascertain whether that measure 'can actually contribute to consumer protection'.

26 Accordingly, it is not possible to establish from the order for reference whether Article 53(1) of the LPPC actually pursues objectives relating to the protection of consumers.

27 It has to be borne in mind that it is not for the Court of Justice, in the context of a reference for a preliminary ruling, to rule on the interpretation of national law, as that is exclusively for the national court. The Court must take account, under the division of jurisdiction between the courts of the European Union and the national courts, of the factual and legislative context in which the questions referred to the Court for a preliminary ruling are set, as described in the order for reference (order of 24 April 2009 in Case C-519/08 *Koukou*, paragraph 43 and case-law cited).

28 It is therefore for the national court and not for this Court to establish whether the national provision at issue in the main proceedings actually pursues objectives relating to consumer protection in order to determine whether that provision comes within the scope of the Unfair Commercial Practices Directive.

29 Were the national court to reach such a conclusion, it would still be necessary to establish whether the announcements of price reductions and the announcements which suggest a price reduction, which are the subject of the prohibition at issue in the main proceedings, constitute commercial practices within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and are therefore subject to the rules laid down by that directive (see, to that effect, *Plus Warenhandelsgesellschaft*, paragraph 35, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 16).

30 In that regard, it should be borne in mind that Article 2(d) of the Unfair Commercial Practices Directive gives a particularly wide definition to the concept of 'commercial practices' as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers' (*Plus Warenhandelsgesellschaft*, paragraph 36, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 17).

31 Promotional campaigns, such as those at issue in the main proceedings, which serve the purpose of attracting consumers to the business premises of a trader, clearly form part of an operator's commercial strategy and relate directly to its promotion and sales development. It follows that they constitute commercial practices within the meaning of Article 2(d) of the directive and, consequently, come within its material scope (see, to that effect, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 18 and case-law cited).

32 That being the case, it must be verified whether the Unfair Commercial Practices Directive precludes a prohibition on announcing price reductions, as provided for in Article 53(1) of the LPPC.

33 In this respect, it is important to bear in mind, firstly, that since the Unfair Commercial Practices Directive fully harmonises the rules relating to unfair business-to-consumer commercial practices, Member States may not adopt stricter rules than those provided for in the directive, as expressly provided for in Article 4 thereof, even in order to achieve a higher level of consumer protection (*Plus Warenhandelsgesellschaft*, paragraph 41 and case-law cited).

34 Next, it must also be borne in mind that Article 5 of the aforementioned directive sets out the criteria which determine the circumstances in which a commercial practice must be considered to be unfair and therefore prohibited.

35 Accordingly, pursuant to Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

36 Moreover, Article 5(4) of the Unfair Commercial Practices Directive defines two precise categories of unfair commercial practices, that is to say, 'misleading practices' and 'aggressive practices' corresponding to the criteria set out in Articles 6 and 7 and in Articles 8 and 9 of that directive respectively.

37 Lastly, the same directive establishes, in its Annex I, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of that directive, are regarded as unfair 'in all circumstances'. Consequently, as recital 17 in the preamble to that directive expressly states, only those commercial practices can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the Unfair Commercial Practices Directive (*Plus Warenhandelsgesellschaft*, paragraph 45, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 34).

38 As regards the national provision at issue in the main proceedings, it is undisputed that the practices of announcing price reductions to consumers do not appear in Annex I to the Unfair Commercial Practices Directive. Therefore, they cannot be prohibited in all circumstances, but can be prohibited only following a specific assessment allowing the unfairness of those practices to be established (see, to that effect, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 35).

39 However, the fact remains that Article 53(1) of the LPPC prohibits in a general manner announcements of price reductions or announcements which suggest a price reduction, without any need to determine, having regard to the facts of each particular case, whether the commercial transaction at issue is 'unfair' in the light of the criteria set out in Articles 5 to 9 of the Unfair Commercial Practices Directive (see, to that effect, *Plus Warenhandelsgesellschaft*, paragraph 48, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 36).

40 In those circumstances, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which provides for a general prohibition of announcements of price reductions or announcements suggesting such reductions during the period preceding sales, in so far as the provision pursues objectives relating to consumer protection. It is for the national court to determine whether that is the situation in the case in the main proceedings.

Costs

41 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 (First Chamber) hereby rules:

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC and 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 ('Unfair Commercial Practices Directive') must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which provides for a general prohibition of announcements of price reductions or announcements suggesting such reductions during the period preceding sales, in so far as the provision pursues objectives relating to consumer protection. It is for the national court to determine whether that is the situation in the case in the main proceedings.

[Signatures]