Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

23 January 2025 *

(Reference for a preliminary ruling – Consumer protection – Unfair commercial practices – Directive 2005/29/EC – Article 7 – Misleading omissions – Invitation to purchase – Material information – Information to be provided to the consumer on the manner in which the price is calculated – Online electricity supply offer – Tariff calculator – Indication of a percentage increase in the price applicable to the consumer)

In Case C-518/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 27 July 2023, received at the Court on 10 August 2023, in the proceedings

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.

v

NEW Niederrhein Energie und Wasser GmbH,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the Sixth Chamber, A. Kumin (Rapporteur) and I. Ziemele, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V., by P. Wassermann, Rechtsanwalt,

– NEW Niederrhein Energie und Wasser GmbH, by T. Höch, Rechtsanwalt,

– the European Commission, by P. Kienapfel, P. Ondrůšek and I. Rubene, acting as Agents,

* Language of the case: German.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7(1) and (4)(c) 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, 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 request has been made in proceedings between Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. (Federal Union of Consumer Organisations and Associations, Germany) ('the Federal Union') and NEW Niederrhein Energie und Wasser GmbH regarding allegedly misleading advertising in respect of an offer for electricity supply.

Legal context

European Union law

3 Recitals 6, 7, 14 and 18 of Directive 2005/29 state:

'(6) This Directive therefore 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. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. …

(7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. …

…

(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. In conformity with the laws and practices of Member States on misleading advertising, this Directive classifies misleading practices into misleading actions and misleading omissions. In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision. Such information will not have to be disclosed in all advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in this Directive. The full harmonisation approach adopted in this

Directive does not preclude the Member States from specifying in national law the main characteristics of particular products such as, for example, collectors' items or electrical goods, the omission of which would be material when an invitation to purchase is made. …

…

(18) It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases … to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices … The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.'

4 Article 2 of that directive provides:

'For the purposes of this Directive:

…

(d) "business-to-consumer 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.

…

(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;

…'

5 Article 7 of that directive provides:

'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:

…

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

…'

German law

6 The Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) of 3 July 2004 (BGBl. 2010 I, p. 254), in the version in force as of 28 May 2022, applicable to the dispute in the main proceedings ('the UWG'), is intended inter alia to transpose Directive 2005/29 into German law.

7 Paragraph 5a(1) and (3) of the UWG provides:

'(1) A person also acts unfairly by misleading a consumer or other market participant by withholding from him or her material information

1. which the consumer or other market participant requires, depending on the circumstances, to take an informed transactional decision and

2. the withholding of which is likely to cause the consumer or other market participant to take a transactional decision that he or she would not have taken otherwise.

…

(3) When assessing whether material information has been withheld, consideration is to be given to the following:

1. the limitations of space or time imposed by the medium used to communicate the commercial practice and

2. any measures taken by the trader to make the information available to consumers or other market participants by means other than by the medium used to communicate the commercial practice.'

8 Paragraph 5b(1) of the UWG provides:

'Where goods or services are offered with reference to their characteristics and price in a manner appropriate to the medium of communication used so that an average consumer can conclude the transaction, the information referred to is therefore regarded as material within the meaning of Paragraph 5a(1) if it is not already apparent from the circumstances:

…

3. the total price or in cases where on account of the nature of the goods or services such a price cannot be calculated in advance, the manner in which the price is calculated and, where appropriate, all additional freight, delivery or postal charges or, where those costs cannot be calculated in advance, the fact that such additional costs may be payable by the consumer;

…'

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

9 NEW Niederrhein Energie und Wasser, which operates throughout Germany, supplies electricity to inter alia customers with an electric storage heating system ('electricity used for heating purposes'). Thus, that company sells to those customers, in particular, electricity billed according to a low tariff during 'off-peak hours' corresponding to a night-time slot and intended to supply that system.

10 It is apparent from the order for reference that the consumption by those customers of electricity used for heating purposes and electricity used for other purposes may be measured separately or jointly. In the case of joint measurement, a two-part-tariff meter is used with two disk drives measuring electricity consumption, the former at the low tariff for off-peak hours and the latter at the high tariff applied during the other hours of the day.

11 The referring court states that customers may consume, during the hours when the low tariff applies, in addition to electricity used for heating purposes, electricity used for other purposes, the consumption of which cannot be measured separately. In that situation, some electricity distribution network managers and operators impose on electricity suppliers a so-called 'compensatory' amount ('the compensatory amount'), which corresponds to invoicing at the high-tariff part of the electricity consumption measured at the low tariff on a flat-rate basis.

12 On its website, www.new-energie.de, NEW Niederrhein Energie und Wasser, which passes on to its customers the compensatory amount set by the electricity distribution network operators, makes an electricity tariff calculator available to the public. That calculator can also be used by persons who consume electricity used for heating purposes and have a two-part-tariff meter. To that end, the persons concerned must enter their postal code and the volumes of electricity which they have consumed or which correspond to their needs, respectively, in respect of the low and high tariffs. That calculator then generates a tariff offer which they can accept and thereby enter into an electricity supply contract with NEW Niederrhein Energie und Wasser.

13 According to the Federal Union, the failure to indicate, when using the calculator, the compensatory amount passed on to the consumer concerned constitutes a breach of the prohibition on misleading omission and, therefore, of the UWG. The final price displayed by the tariff calculator is lower than the actual price, since it does not take into account the percentage retained as the compensatory amount.

14 The Federal Union applied before the competent German courts, both at first instance and on appeal, for NEW Niederrhein Energie und Wasser to be ordered to cease, inter alia, advertising an offer for the supply of electricity used for heating purposes without expressly indicating to the consumer, throughout the contractual process and, more specifically, with regard to the method of invoicing for that electricity, the percentage retained as the compensatory amount, applied in the event of joint measurement of the consumption of that electricity, and that used for other purposes, by means of a two-part-tariff meter.

15 Since those courts rejected those applications, the Federal Union brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany), the referring court, reiterating its application for the cessation of that advertising.

16 It is apparent from the order for reference that the general terms and conditions of sale of the defendant in the main proceedings – according to which the person concerned must confirm that he or she has read, during the process of acceptance, online, the offer relating to the supply of electricity used, in particular, for heating purposes – state that it is the local electricity distribution network operator which determines the night-time slot and the percentage retained as the compensatory amount. It is also stated that the latter has been set at 25% by the system operator for the geographical area within which the defendant in the main proceedings has its registered office.

17 The referring court considers that the advertising for the electricity supply offer resulting from the supplier's provision of an online tariff calculator constitutes an 'invitation to purchase', within the meaning of the relevant German legislation which transposes, in particular, Article 7(4) of Directive 2005/29.

18 According to that court, since the consumer's final transactional decision, namely to enter into an electricity supply contract, originates in the initiation of the ordering process, the indication by the defendant in the main proceedings in its general terms and conditions of sale of the percentage retained as the applicable compensatory amount is not appropriate to satisfy, in particular, from a temporal point of view, its obligation to provide information. In particular, the information on the manner in which the price charged is calculated should be provided when using the calculator, by stating the specific percentage retained as the compensatory amount applicable to the person concerned. Thus, the inclusion of that percentage in the calculation of the price of electricity would allow consumers to compare the offer of the defendant in the main proceedings with that of other suppliers.

19 That court considers that the application for a prohibitory injunction brought before it by the Federal Union should be upheld if it were to be considered that the information to be provided by the defendant in the main proceedings, pursuant to Article 7(1) and (4)(c) of Directive 2005/29, as to the manner in which the price is calculated, must include the specific percentage retained as the compensatory amount, with the result that the person concerned, who knows his or her electricity consumption, can calculate that price independently. Such an interpretation

would be consistent with the objective of that directive, which aims to ensure a high level of consumer protection, and could be inferred from the regulatory context in which Article 7(4)(c) of Directive 2005/29 appears.

20 The referring court considers that the consumer needs such information in order to make an informed transactional decision and considers that the omission of that material information is likely to lead him or her to make a transactional decision that he or she would not have made otherwise.

21 Furthermore, that court states that, although the appeal court considered that the defendant in the main proceedings was not able to provide information on the specific percentage relating to the compensatory amount applicable in the geographical area covered by a given network, since electricity distribution network operators rarely publish that information, that appeal court did not, however, find that it was impossible for the defendant in the main proceedings to obtain that information from those operators.

22 That being said, the referring court notes that the wording 'the manner in which the price is calculated', set out in Article 7(4)(c) of Directive 2005/29, could also be interpreted as meaning that general consumer information on the relevant components for the calculation of the price could prove sufficient.

23 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the information to be provided by the trader pursuant to Article 7(1) and (4)(c) of Directive [2005/29] on the manner in which the price is calculated in a pricing system which depends on consumption be such that the consumer can, on the basis of the information provided, make an independent calculation of the price if he or she knows his or her consumption?'

Consideration of the question referred

24 As a preliminary point, it should be noted that it is apparent from the order for reference that the parties to the main proceedings disagree as to whether the tariff calculator available on the electricity supplier's website, which allows the consumer concerned to calculate the monthly price to be paid for electricity used, in particular, for heating purposes, must contain an indication of the specific percentage relating to the compensatory amount applied by the electricity supplier to that consumer, with the result that that the latter, who knows his or her electricity consumption, can calculate that price independently.

25 In those circumstances, by its question, the referring court asks, in essence, whether Article 7(1) and (4)(c) of Directive 2005/29 must be interpreted as meaning that, in the context of online advertising in respect of an offer for electricity supply, the information relating to the manner in which the price is calculated must contain the specific percentage of a component which may vary, such as the compensatory amount, applied by the electricity supplier to the consumer concerned, with the result that the latter, as soon as he or she knows his or her electricity consumption, can calculate that price independently.

26 It should be borne in mind that only a commercial practice which is categorised beforehand as an 'invitation to purchase' is covered by Article 7(4) of Directive 2005/29, whereas all commercial practices, including invitations to purchase, are subject to the requirements of Article 7(1) to (3) and (5) of that directive (judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 24).

27 Since the referring court considers that advertising in respect of an offer for electricity supply by means of a tariff calculator made available to the consumer on the electricity supplier's website constitutes an 'invitation to purchase' within the meaning of Article 2(i) of Directive 2005/29, it is important to note that that provision defines that concept as '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'.

28 Furthermore, the Court has held that, as a specific form of advertising, an invitation to purchase is subject to a stricter obligation to provide information under Article 7(4) of Directive 2005/29, read in conjunction with recital 14 thereof (judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 28).

29 Thus, an invitation to purchase must contain a number of material items of information, which are listed in Article 7(4) of Directive 2005/29, which the consumer needs in order to make an informed transactional decision. That information includes, under point (c) of that provision, the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated.

30 It follows from the wording of Article 7(4)(c) of Directive 2005/29, first of all, that a distinction must be made between the indication of the final price and that relating to the manner in which that price is calculated; next, that the nature of the product determines the situation in which that price cannot reasonably be calculated in advance by the trader; and, lastly, that, if the trader is unable to indicate that price, he or she must indicate the methods on the basis of which it is calculated or, in other words, the method for calculating the final price.

31 Therefore, where the final price of the electricity supply cannot reasonably be calculated in advance, given that it may depend on certain components, such as, for example, the costs borne by an electricity provider, which are beyond the latter's control and may vary, and, moreover, as the referring court notes, the volume of electricity actually consumed by the consumer, information on the application of a component such as a percentage increase under the compensatory amount, included by the trader in the final price, falls within 'the manner in which the price is calculated' within the meaning of Article 7(4)(c) of Directive 2005/29 and, as such, constitutes material information which the consumer needs in order to make an informed transactional decision.

32 Furthermore, under Article 7(1) of Directive 2005/29, an invitation to purchase, such as the advertisement at issue in the main proceedings, is to be regarded as misleading if it fails to mention material information which the average consumer, taking into account the context, needs in order to make an informed transactional decision and, consequently, causes or is likely to cause him or her to take a transactional decision that he or she would not have taken otherwise.

33 It follows from the foregoing considerations that material information, such as the indication concerning the application of a percentage increase in respect of the compensatory amount, must be set out in an invitation to purchase such as that at issue in the main proceedings, when the average consumer, taking into account the context, needs it in order to make an informed transactional decision.

34 It should be noted that the meaning of 'consumer' is of the utmost importance for the purposes of interpreting the provisions of Directive 2005/29. That directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors (judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 22).

35 Thus, as regards the misleading nature of advertising, the national courts must take into account the perception of an average consumer who is reasonably well informed and reasonably observant and circumspect (judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 23 and the case-law cited).

36 It should be further stated that, as follows from recital 18 of Directive 2005/29, the 'average consumer' test is not a statistical test and that, to determine the typical reaction of that consumer in a given case, the national courts and authorities have to exercise their own faculty of judgment.

37 That being said, the wording of Article 7(4)(c) of Directive 2005/29 does not prescribe to the trader the manner in which he or she must inform the consumer of the methods for calculating the price.

38 Furthermore, in view of the nature of the product concerned and, in particular, the conditions of production, supply or even final use of that product, the trader may not have, in advance and precisely, all the components of the final price, with the result that he or she can communicate to the consumer the method for calculating that price in such a way that the person concerned can carry out that calculation himself or herself.

39 Therefore, the degree of information as to the manner in which the price is calculated cannot imply that the consumer must be able, on the basis of that information, to calculate that price himself or herself and thus reach a final numerical result.

40 In that regard, it should be borne in mind that Directive 2005/29 does not contain any specific details concerning the question of the degree to which material information must be communicated, and by what medium this must be done (see, to that effect, judgment of 8 February 2017, *Carrefour Hypermarchés*, C-562/15, EU:C:2017:95, paragraph 37).

41 Thus, information as to the manner in which the price is calculated, within the meaning of Article 7(4)(c) of that directive, may be displayed, for example, in the form of a range of percentages, or a specific percentage which is conditional in its application, or, alternatively, a percentage fixed in advance together with the indication that its level may vary over time due to variable components which are beyond the control of the trader.

42 Such an interpretation of Article 7(4)(c) of Directive 2005/29 is supported by an examination of the general scheme of Article 7 of that directive.

43 In that regard, it should be borne in mind, in the first place, that, under Article 7(2) of Directive 2005/29, an invitation to purchase, such as the advertising at issue in the main proceedings, contains a misleading omission, in particular, where a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner information on the manner in which the price is calculated and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he or she would not have taken otherwise.

44 It follows that the trader is required to state all the components of the price calculation. Likewise, each of those components must be communicated by the trader in such a way that the average consumer is able to make an informed transactional decision.

45 In the second place, under Article 7(1) of Directive 2005/29, the misleading nature of the commercial practice must be assessed having regard to, in particular, the factual context of that practice, all its features and the limitations specific to the communication medium used. Article 7(3) of that directive provides that account is to be taken, in deciding whether information has been omitted, 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 (see, to that effect, judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraphs 53 and 54).

46 It follows from those provisions that the extent of the information relating to the manner in which the price is calculated which has to be communicated, by a trader, in an invitation to purchase, must be assessed, inter alia, on the basis of the factual context of that invitation and the medium of communication used (see, to that effect, judgments of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 55, and of 26 October 2016, *Canal Digital Danmark*, C-611/14, EU:C:2016:800, paragraph 27).

47 The referring court states that it is neither established nor obvious that the communication medium used for the purposes of the commercial practice concerned, namely a tariff calculator available on the website of the defendant in the main proceedings, imposes limitations of space or time.

48 That being said, in order to determine the extent of the information which the trader is required to communicate regarding the method for calculating the price, the referring court is to take account of the factual context in which the advertising at issue in the main proceedings takes place.

49 In that regard, first, the defendant in the main proceedings maintains, which it is not for the Court to ascertain, that it is not reasonably able to indicate, in its advertising, the specific percentage relating to the compensatory amount. It thus argues that the electricity distribution network managers established in Germany sometimes retain different percentages which vary over time, with the result that, if it had to indicate to consumers in real time the exact amount of such a percentage, it would have to request, on a daily basis, from all of those managers any possible change of that component. However, according to the defendant in the main proceedings, such an approach would require disproportionate resources.

50 Secondly, it is apparent from the order for reference that the advertisement displaying the price proposals generated by the tariff calculator contains a link to the general terms and conditions of sale applied by the defendant in the main proceedings. In that document, the latter informs the consumer that the local network operator determines the night-time slot corresponding to the

application of the low tariff and the percentage retained as the compensatory amount and that the latter has been set at 25% by the local network operator for the geographical area within which the defendant in the main proceedings has its registered office.

51 It follows from the foregoing considerations that, in the factual context of the invitation to purchase at issue in the main proceedings, it cannot be considered, subject to checks which it is for the referring court to carry out, that that invitation contains a 'misleading omission' within the meaning of Article 7(1) and (4) of Directive 2005/29, provided that the link to the general terms and conditions of sale, which contain information as to the percentage retained as the compensatory amount, is displayed in a visible manner and that acceptance of the offer by the consumer is technically conditional on the consumer confirming that he or she is aware of those terms and conditions, which ensures that the consumer makes an informed transactional decision.

52 In the light of all the foregoing considerations, the answer to the question referred is that Article 7(1) and (4)(c) of Directive 2005/29 must be interpreted as meaning that, in the case of an invitation to purchase made by means of an online commercial communication, the information relating to the manner in which the price is calculated must not necessarily contain the specific percentage of a component which may vary, such as the compensatory amount applied by the electricity supplier to the consumer concerned, with the result that the latter, once he or she knows his or her electricity consumption, can calculate that price independently, provided that that communication indicates the applicability in principle of such a percentage, together with a possible scale and the components having an impact on that percentage, thus enabling the average consumer to make an informed transactional decision.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Sixth Chamber) hereby rules:

Article 7(1) and (4)(c) 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, 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 meaning that, in the case of an invitation to purchase made by means of an online commercial communication, the information relating to the manner in which the price is calculated must not necessarily contain the specific percentage of a component which may vary, such as the compensatory amount applied by the electricity supplier to the consumer concerned, with the result that the latter, once he or she knows his or her electricity consumption, can calculate that price independently, provided that that communication indicates the applicability in principle of such a percentage, together with a possible scale and the components having an impact on that percentage, thus enabling the average consumer to make an informed transactional decision.

[Signatures]