Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 13 June 2024[1]

Case C-379/23

Guldbrev AB
v
Konsumentombudsmannen

(Request for a preliminary ruling from the Svea hovrätt Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Market Court of Appeal, Stockholm, Sweden))

(Reference for a preliminary ruling – Consumer protection – Unfair commercial practices – Directive 2005/29/EC – Article 2(c), (d) and (i) and Article 3(1) – Combined offer consisting of the valuation and purchase of gold – Concepts of 'product' and 'business-to-consumer commercial practices')

1. Is Directive 2005/29/EC concerning unfair business-to-consumer commercial practices[2] applicable to a situation in which a trader purchases a product (in this case gold) from a consumer, where that purchase entails a preliminary valuation of the product by the same trader, who thus determines the purchase price?

2. That, in essence, is the question which the Court must address in the present case, concerning a request for a preliminary ruling from the Svea hovrätt, Patent- och marknadsöverdomstolen (Patent and Market Court of Appeal, Stockholm, Sweden) on the interpretation of Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29.

3. The request for a preliminary ruling has been made in proceedings between Guldbrev AB, a public limited company under Swedish law, and the Konsumentombudsmannen (Consumer Ombudsman, Sweden; 'the KO') concerning an action brought by the KO seeking an order requiring Guldbrev to stop certain unfair commercial practices relating to the valuation of gold and the purchase of that gold from consumers.

4. The present case gives the Court of Justice the opportunity to clarify its case-law concerning the concepts of 'product' and 'unfair business-to-consumer commercial practices', within the meaning of Directive 2005/29, specifically in a novel situation in which it is the trader that purchases a product from the consumer and not the other way around, as is normally the case.

[1] Original language: French.

[2] Directive 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) 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).

I. Legal context

A. European Union law

5. Article 2 of Directive 2005/29, entitled 'Definitions', is worded as follows:

'For the purposes of this Directive:

…

(c) "product" means any goods or service including immovable property, rights and obligations;

(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;

…

(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;

…'

6. Article 3 of that directive, entitled 'Scope', provides in paragraph 1:

'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.'

B. Swedish law

7. In the Swedish legal order, Directive 2005/29 has been transposed into the marknadsföringslagen (2008:486) (Law (2008:486) on marketing; 'the MFL').

II. The dispute in the main proceedings, the questions referred and the procedure before the Court

8. Guldbrev is an internet-based purchaser of gold which carries on the business of valuation and purchase of gold from consumers. Guldbrev does not have any physical shops and runs its purchasing and price-comparison business on various websites. The claims and other practices which the action before the referring court concerns have arisen on Guldbrev's websites, on social media and in letters sent to consumers by Guldbrev.

9. The KO has claimed that some of Guldbrev's advertising should be prohibited and that Guldbrev should be ordered to provide certain information to consumers.

10. The KO submits that the product advertised by Guldbrev should be regarded as a combined offer consisting of the valuation and purchase of gold. In that regard, marketing carried out by Guldbrev, via Google advertisements and on websites with a comparison tool, should be governed by the MFL and is misleading and unfair under Directive 2005/29, [3] as well as the MFL. [4]

11. According to the KO, the advertising of gold prices constitutes bait and switch advertising contrary to several provisions of Annex I to Directive 2005/29. [5] It is alleged that Guldbrev has failed to identify with sufficient clarity the websites as marketing and to state that it is the originator of the advertising. The highest prices which Guldbrev advertises are unreasonable and unpredictable or impossible to obtain due to the requirements laid down by Guldbrev. Guldbrev is also accused of misleading price claims which affect the consumer's ability to make an informed decision.

12. Guldbrev has disputed the KO's claims and has principally submitted that there are no facts in the present case which lead to either Directive 2005/29 or the MFL being applicable since the practices at issue relate to purchasing services. In any event, according to Guldbrev, the marketing is not misleading or unfair.

13. The lower court, the Patent- och marknadsdomstolen (Patent and Market Court, Sweden), held that the practices used by Guldbrev in connection with its activity constituted commercial practices falling within the scope of Directive 2005/29. It found that the practices to which the KO's claims relate could not per se be regarded as excluded from the scope of the MFL. It thus prohibited certain marketing practices and ordered Guldbrev to provide certain information in its advertising.

14. Guldbrev has brought an appeal against sections of that judgment of the lower court before the referring court and has claimed that the KO's action should be dismissed.

15. The referring court must, inter alia, rule on whether the practices adopted by Guldbrev constitute unfair marketing. In order to assess that material question, the court must first ascertain whether Directive 2005/29 and the MFL are applicable to the situation at issue. Accordingly, it must, applying Article 2(c), (d) and (i) and Article 3(1) of that directive, rule on the extent to which the valuation and purchase of gold from consumers and such practices as are relevant here can be regarded as commercial practices under the directive.

16. In that respect, the referring court finds that, in the light of the case-law of the Court of Justice, the advertising in question can per se constitute a commercial practice under Directive 2005/29, provided that it relates to a product within the meaning of the directive. However, it would seem that the Court has not yet ruled on the question of whether the trader's offer in the situation at issue relates to a 'product' within the meaning of Directive 2005/29, a question which is relevant to whether the national provisions, namely the MFL, are to be interpreted in the light of that directive's substantive rules.

[3] Specifically, in point 22 of Annex I to the directive.

[4] Specifically, Paragraphs 8 and 9 of the MFL.

[5] See, respectively, point 5 and point 6(c) of Annex I to Directive 2005/29.

17. In those circumstances, the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Market Court of Appeal, Stockholm), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the valuation and purchase of gold from consumers constitute a product (combined product) within the meaning of Article 2(c), (d) and (i) and Article 3(1) of [Directive 2005/29] in a situation such as that at issue before the national court?

(2) If the answer to Question 1 is in the negative, does the valuation of gold in the situation at issue before the national court constitute a product within the meaning of the directive?'

18. The Court has received written observations from Guldbrev, the KO and the European Commission.

III. Analysis

A. The first question referred

19. By its first question, the referring court asks, in essence, whether Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29 must be interpreted as meaning that the commercial act consisting of the combined offer of the valuation by a trader of goods – in this case gold – for a consumer and the purchase of those goods by that trader from the consumer in question constitutes a 'product' within the meaning of those provisions.

20. The referring court asks this question in order to determine whether Directive 2005/29 is applicable in the case before it, such that the relevant provisions of the national law on commercial practices must be interpreted in the light of the substantive rules of the directive. The question thus exclusively concerns the scope of Directive 2005/29 and not the possible unfairness of commercial acts such as those at issue in the main proceedings. My analysis will therefore concentrate on that aspect.

21. The parties which have submitted observations to the Court have adopted different positions as to the answer to be given to that question. While the KO and the Commission submit that it is necessary to answer the question in the affirmative, Guldbrev submits that, in the present case, the commercial act constituted by the combination of the valuation and the purchase of gold cannot constitute a 'product' within the meaning of Directive 2005/29.

22. In order to answer the first question put by the referring court, it should first be recalled that, as is apparent from the Court's case-law, it follows inter alia from Article 1 and recital 23 of Directive 2005/29 that the directive seeks to provide a high common level of consumer protection by carrying out a complete harmonisation of the rules concerning unfair commercial practices. [6]

[6] Judgments of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 34 and the case-law cited), and of 19 September 2018, *Bankia* (C-109/17, EU:C:2018:735, paragraph 29 and the case-law cited).

23. Next, the Court has also held that Directive 2005/29 is characterised by a particularly wide scope *ratione materiae*, since the EU legislature conferred a very broad meaning on the term 'commercial practice', for the purposes of that directive, Article 2(d) thereof defining it as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader'. [7]

24. In that regard, the Court held that the sole criterion referred to in Article 2(d) of Directive 2005/29 is that the trader's practice must be *directly connected* with the promotion, sale or supply of a product or service to consumers. [8]

25. In the context of the present case, it should likewise be recalled that the Court has also held that combined offers, which are based on the linking together of at least two different products or services into a single offer, constitute commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development. It follows that they do indeed constitute commercial practices within the meaning of Article 2(d) of Directive 2005/29 and, consequently, come within its scope. [9]

26. In the light of the guidance provided in the case-law, it is necessary to ascertain whether commercial acts such as those at issue in the case before the referring court come within the scope of Directive 2005/29.

27. In the present case, those commercial acts consist, on the one hand, of a gold valuation service that the trader provides to the consumer and, on the other hand, on the basis of that valuation, of the purchase of gold by that trader from the same consumer.

28. It is clear from the order for reference that, in the trader's commercial offer, those two acts are combined and indissociable, in the sense that one is dependent on the other. Indeed, it follows from that order that the trader is only willing to purchase gold from the consumer on condition that the consumer accepts the valuation service provided by the trader in order to determine the quality and purchase price of the gold in question. The price of the gold is determined at the time of the valuation and the consumer must accept that price if the sale of the gold is to take place.

29. In that context, as the Commission rightly submits, there is no doubt that the gold valuation service that the trader provides to the consumer constitutes a 'product' within the meaning of Article 2(c) of Directive 2005/29, which, by definition, includes 'any service'. Accordingly, business-to-consumer commercial practices relating to such a product within the meaning of Article 2(d) of Directive 2005/29 clearly come within the scope of that directive.

30. By contrast, doubts may remain as to the commercial act consisting of the purchase of gold by the trader from the consumer. Indeed, it could be the case that, where a trader purchases a product from a consumer, that might not be 'directly connected with the promotion, sale or supply of a product to consumers', as required by the case-law cited in point 24 of this Opinion. On the contrary, such a commercial act instead consists of the consumer supplying a product to the trader.

[7] Judgments of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraph 21), and of 16 April 2015, *UPC Magyarország* (C-388/13, EU:C:2015:225, paragraph 34).

[8] Judgment of 16 April 2015, *UPC Magyarország* (C-388/13, EU:C:2015:225, paragraph 35).

[9] Judgments of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 50), and of 7 September 2016, *Deroo-Blanquart* (C-310/15, EU:C:2016:633, paragraph 28).

31. However, because of the combined and indissociable nature of the two commercial acts in question, as described in point 28 above, the commercial act consisting of the purchase of gold by the trader from the consumer and the 'product' at issue as defined in Article 2(c) of Directive 2005/29 – namely the gold valuation service provided by the trader to the consumer – must, in my view, be considered as 'directly connected' in the present case.

32. To the extent that the trader is only willing to purchase gold from the consumer on condition that the consumer accepts the valuation service provided by the trader in order to determine the quality and price of the gold in question, it must be concluded that the two indissociable commercial acts constitute a single product which – as is apparent from the case-law cited in point 25 of this Opinion – clearly forms part of the trader's commercial strategy and relates directly to the promotion of the product and its sales development. It follows that the combined offer of the purchase of gold subject to acceptance of the gold valuation service does indeed constitute a commercial practice for the purposes of Article 2(d) of Directive 2005/29 and must therefore come within the scope of that directive.

33. In that regard, first, I note that the foregoing interpretation is the only one which is able to give full effect to Directive 2005/29, by ensuring that, in accordance with the requirement of a high level of consumer protection, unfair commercial practices are effectively combatted. [10] Indeed, any interpretation to the contrary, seeking to exclude the applicability of Directive 2005/29, would leave the economic interests of the consumers in question unprotected by keeping outside the scope of this directive commercial practices that are directly related to influencing consumers' decisions, which would be manifestly contrary to the objectives of the directive. [11]

34. Second, the interpretation that I have proposed of the relevant provisions of Directive 2005/29 is also consistent with the wide scope *ratione materiae* of that directive which, as I have observed in point 22 of this Opinion, has already been acknowledged in the case-law. [12]

35. Third, the interpretation I have suggested is in line with the position expressed by the Commission in its notice entitled 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market'. [13]

36. In paragraph 2.3.2 of the guidance, the Commission takes into account that there may be situations similar to that of the present case 'where a link can be established between the sale of a product by a consumer to a trader and the promotion, sale or supply of a (different) product to the consumer'. According to the Commission, such situations fall within the scope of Directive 2005/29.

37. In addition, in the same paragraph of the guidance, the Commission expressly states that, in some circumstances, a sufficiently direct relationship may be established between the sale of gold by the consumer and the sale or provision of a gold valuation service by a trader to the consumer.

[10] See, to that effect, judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 39).

[11] See recitals 7 and 8 of Directive 2005/29.

[12] See, to that effect, judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 40).

[13] OJ 2021 C 526, p. 1.

38. Documents such as the guidance, despite having no binding effect and in no way being of imperative value for the Court, may, according to case-law, serve as an aid for interpreting secondary EU law such as Directive 2005/29. [14]

39. In conclusion, it follows from all the foregoing considerations that, in my view, the answer to the first question referred for a preliminary ruling by the referring court should be that Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29 must be interpreted as meaning that the valuation service carried out by a trader for goods belonging to a consumer and the purchase of those goods by the trader from that consumer, which is subject to acceptance of the price determined following that valuation, constitute a 'product' within the meaning of those provisions.

B. The second question referred

40. This question was asked in the event of the first question being answered in the negative. Accordingly, if the Court interprets the provisions of Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29 in the manner that I have proposed in point 39 of this Opinion, there is no need to answer it.

41. In any event, as is apparent from the considerations which I have set out in point 29 of this Opinion, the second question referred must, in my view, also be answered in the affirmative.

IV. Conclusion

42. In the light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Market Court of Appeal, Stockholm, Sweden) as follows:

Article 2(c), (d) and (i) and Article 3(1) 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) 2006/2004 of the European Parliament and of the Council

must be interpreted as meaning that the valuation service carried out by a trader for goods belonging to a consumer and the purchase of those goods by the trader from that consumer, which is subject to acceptance of the price determined following that valuation, constitute a 'product' within the meaning of those provisions.

[14] See, to that effect, inter alia, judgment of 12 March 2020, *Commission* v *Italy (Unlawful aid granted to the hotel industry in Sardinia)* (C-576/18, not published, EU:C:2020:202, paragraph 136 and the case-law cited).