Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 January 2013*

(Consumer protection — Unfair business-to-consumer commercial practices in the internal market — Legislation of a Member State providing for prior authorisation of announcements of sales)

In Case C-206/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 12 April 2011, received at the Court on 2 May 2011, in the proceedings

Georg Köck

v

Schutzverband gegen unlauteren Wettbewerb,

THE COURT (First Chamber),

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

Advocate General: V. Trstenjak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 June 2012,

after considering the observations submitted on behalf of:

— Mr Köck, by E. Kroker, Rechtsanwalt,

— Schutzverband gegen unlauteren Wettbewerb, by M. Prunbauer, Rechtsanwältin,

— the Austrian Government, by A. Posch and G. Kunnert, acting as Agents,

— the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents,

— the European Commission, by M. Owsiany-Hornung and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3(1) and 5(5) 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, 'the Directive').

2 The request has been made in proceedings between Mr Köck and the Schutzverband gegen unlauteren Wettbewerb (Association for protection against unfair competition) concerning the announcement by Mr Köck of a 'clearance sale' of his products and associated reductions, without the necessary prior administrative authorisation.

Legal context

European Union law

3 Recitals 8 and 17 in the preamble to the Directive state:

'(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. …

…

(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 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 the Directive reads as follows:

'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;

(e) “to materially distort the economic behaviour of consumers” means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

…

(k) “transactional decision” means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

…’

6 Article 3 of the Directive provides:

‘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.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

…’

7 Article 5 of the Directive states:

‘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.

3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

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.'

8 Article 11 of the Directive provides:

'1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.

Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

(a) take legal action against such unfair commercial practices;

and/or

(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints … These facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.

…

2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices;

or

(b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice,

even without proof of actual loss or damage or of intention or negligence on the part of the trader.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

— either with interim effect,

or

— with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision:

(a) to require publication of that decision in full or in part and in such form as they deem adequate;

(b) to require in addition the publication of a corrective statement.

3. The administrative authorities referred to in paragraph 1 must:

(a) be composed so as not to cast doubt on their impartiality;

(b) have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively;

(c) normally give reasons for their decisions.

Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given. Furthermore, in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review.'

9 Article 13 of the Directive reads as follows:

'Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.'

10 Annex I to the Directive lists the commercial practices which are in all circumstances considered unfair, referring inter alia to the following practices:

'…

4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.

…

7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

…

15. Claiming that the trader is about to cease trading or move premises when he is not.

…'

Austrian law

11 In accordance with Paragraph 33a of the Law against unfair competition (Gesetz gegen den unlauteren Wettbewerb), in the version applicable in the main proceedings ('the UWG'):

'(1) The announcement of a clearance sale within the meaning of this Federal law is understood to mean all public announcements or communications intended for a large circle of persons which indicate the intention to dispose of large quantities of goods quickly by retail sale and which at the same time are liable to create the impression that as a result of special circumstances the trader is compelled to sell quickly and therefore offers his goods on exceptionally advantageous terms or at exceptionally advantageous prices. ...

(2) However, the provisions of Paragraphs 33a to 33e do not apply to announcements and communications about end-of-season sales, seasonal clearance sales, stock-taking sales and the like, and special sales customary in the relevant business sector and at particular times of the year (e.g. 'White Week', 'Coat Week').

(3) Point 7 of the Annex remains unaffected by this provision.'

12 Point 7 of the annex to that law repeats unchanged the wording of point 7 of Annex I to the Directive.

13 Paragraph 33b of the UWG provides:

'The announcement of a clearance sale is permitted only with the authorisation of the district administrative authority which is competent for the location of the clearance sale. The application for authorisation is to be made in writing and must include the following information:

1. the goods to be sold, according to quantity, characteristics and sales value;

2. the exact location of the clearance sale;

3. the period during which the clearance sale is to take place;

4. the reasons why the clearance sale is to be held, such as the death of the owner of the business, ceasing trading or ceasing to sell a certain category of goods, relocation of the business, natural disasters and the like;

…'

14 Paragraph 33c of the UWG provides:

'(1) Before deciding on the application, the district administrative authority must request the provincial chamber of commerce which is competent for the location of the clearance sale to furnish an expert opinion within two weeks.

(2) The district administrative authority must decide on the application within one month of receiving it.

(3) Authorisation must be refused if no reasons within the meaning of Paragraph 33b(4) are present or if the sale is not to be announced for a continuous period. Authorisation must also be refused if the sale is to take place in the period from the start of the penultimate week before Easter to Whit Sunday or from 15 November to Christmas or is to last for longer than six months, except in the case

of the trader's death, natural disasters or other cases which merit similar consideration. If the business has been established for less than three years, authorisation is only to be granted in the case of the trader's death, natural disasters or other cases which merit similar consideration.

…'

15 Paragraph 33d of the UWG provides:

'(1) Every announcement of a clearance sale must include the reasons for the quick sale, the period during which the clearance sale is to take place, and a general description of the goods to be sold. This information must correspond to the decision granting authorisation.

(2) After the expiry of the sales period stated in the decision granting authorisation, no further announcement of a clearance sale may be made.

(3) During the sales period stated in the decision granting authorisation, the sale of the goods specified in the announcement is permitted only in the quantity stated in the decision granting authorisation. Any further supply of goods of those types is prohibited.

…'

16 In accordance with Paragraph 34(3) of the UWG:

'A person who contravenes the provisions of this section may, without prejudice to criminal proceedings, be sued for a prohibitory order and, in case of fault, for damages. The proceedings may be brought only before the ordinary courts. …'

The main proceedings and the question referred for a preliminary ruling

17 Mr Köck, a trader established in Innsbruck (Austria), announced in a newspaper a 'total clearance' of the products in his shop, and also advertised it in front of his shop by means of billboards and window stickers. In addition to the term 'total clearance', he used expressions such as 'Everything must go' and 'Up to 90% off'. Mr Köck had not applied to the district administrative authority for authorisation to announce the clearance sale.

18 Since it considered that Mr Köck's advertisement was an announcement of a clearance sale within the meaning of the national legislation and infringed Paragraph 33a et seq. of the UWG, as it had not been the subject of prior administrative authorisation, the Schutzverband gegen den unlauteren Wettbewerb brought an action in the Landesgericht Innsbruck (Regional Court, Innsbruck) for a prohibitory order and publication of the judgment.

19 That action was dismissed, and the Schutzverband gegen den unlauteren Wettbewerb appealed to the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck). That court issued an interim order as sought by the appellant.

20 Mr Köck brought an appeal on a point of law (Revisionsrekurs) against the order of the Oberlandesgericht Innsbruck before the referring court.

21 According to the order for reference, first, the judicial proceedings in the present case concern solely the question whether Mr Köck has an appropriate authorisation issued by an administrative authority. In those proceedings, the assessment of whether a commercial practice is unfair is transferred from the courts to the administrative authorities, and there is no presumption that the practice is unfair 'in all circumstances' from the point of view of Article 5(5) of the Directive.

22 Secondly, the referring court does not rule out the possibility that, under the Directive, a judicial prohibition of a commercial practice may be regarded as permissible only if the administrative authority's decision on the point itself complies with the requirements of the Directive.

23 Since it considered that the outcome of the main proceedings depended on the interpretation of provisions of the Directive, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Do Articles 3(1) and 5(5) of [the Directive] or other provisions of that directive preclude a national provision under which the announcement of a clearance sale without the authorisation of the competent administrative authority is not permitted and for that reason must be prohibited in judicial proceedings, without it being necessary in those proceedings for the court to consider whether such a commercial practice is misleading, aggressive or otherwise unfair?'

Consideration of the question referred

24 By its question the referring court asks essentially whether the Directive must be interpreted as precluding a national court from ordering a commercial practice to cease on the sole ground that the practice has not been the subject of prior authorisation by the competent administrative authority, without itself carrying out an assessment of whether the practice is unfair.

25 To answer that question, it must be determined, as a preliminary point, whether a commercial practice such as the announcement of a clearance sale, mentioned in Paragraph 33a(1) of the UWG, is a 'commercial practice' within the meaning of Article 2(d) of the Directive, and accordingly subject to the rules laid down in the Directive.

26 It must be recalled that Article 2(d) of the 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' (Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, paragraph 17).

27 Advertising measures, such as those at issue in the main proceedings, which concern the sale of goods to consumers on advantageous terms or at advantageous prices clearly form part of the commercial strategy of an operator and are aimed directly at the promotion and sale of those goods. It follows that they are 'commercial practices' within the meaning of Article 2(d) of the Directive and consequently fall within its material scope.

28 That having been determined, it must be examined whether provisions of national law such as Paragraphs 33b and 34(3) of the UWG can fall within the scope of the Directive in terms of their objectives.

29 It must be recalled that, as the Court has previously held, according to recital 8 in the preamble, the Directive 'directly protects consumer economic interests from unfair business-to-consumer commercial practices' and ensures, as stated in particular in Article 1 of the Directive, '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' (order of 4 October 2012 in Case C-559/11 *Pelckmans Turnhout*, paragraph 19 and the case-law cited).

30 As may be seen from recital 6 in the preamble to the Directive, it is only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders that is excluded from the scope of the Directive (*Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 21).

31 In the case at issue in the main proceedings, as the referring court states, an 'announcement of a clearance sale' within the meaning of Paragraph 33a(1) of the UWG, a provision applied in the main proceedings, is a 'commercial practice' within the meaning of the Directive. The referring court thus implicitly accepts, as the Advocate General observes in point 38 of her Opinion, that that provision is aimed at the protection of consumers, and not solely the protection of competitors and other operators in the market.

32 Moreover, Paragraph 33b of the UWG provides that an announcement of a clearance sale is only lawful if it has been the subject of prior administrative authorisation. It also lists the elements that must accompany an application for authorisation. Paragraph 34(3) of the UWG for its part provides that any failure to comply with the provisions of Paragraphs 33a to 33d of that law may give rise to an action for a prohibitory order or, in the case of fault, for damages.

33 In those circumstances, it is clear that provisions of national law such as Paragraphs 33b and 34(3) in conjunction with Paragraph 33a(1) of the UWG which prohibit, subject to penalties, a commercial practice that has not been authorised constitute measures intended to combat unfair commercial practices in the interests of consumers, and therefore fall within the scope of the Directive.

34 That having been established, it must be ascertained whether the Directive precludes national legislation such as that at issue in the main proceedings.

35 According to settled case-law, the only commercial practices which can be regarded by national law as unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the Directive are those listed in Annex I to the Directive. Consequently, a practice not covered by that annex may be declared unfair only after an examination of its unfairness in accordance with the criteria set out in Articles 5 to 9 (see, to that effect, Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraphs 41 to 45, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraphs 30 to 34).

36 A commercial practice consisting in the announcement of a clearance sale, as referred to in Paragraph 33a(1) of the UWG, by a trader who has not obtained the corresponding prior authorisation from the competent authority cannot be regarded as falling, as such, within the practices listed in Annex I to the Directive.

37 Among the practices considered as unfair in all circumstances, listed in that annex, those which might perhaps be of relevance in the circumstances of the main proceedings, and were referred to by the parties in the procedure before the Court, should be examined.

38 Point 4 of the annex mentions the practice of '[c]laiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation'.

39 Point 4 does not lay down a general prohibition of commercial practices which have not been the subject of authorisation granted by a competent body. On the contrary, it refers to the specific cases in which, as the Advocate General notes in point 93 of her Opinion, the applicable rules lay down certain requirements in particular as regards the status of a trader or the quality of his products and provide in this respect for a system of recognition, approval or authorisation.

40 In the same way, the announcement of a clearance sale made without obtaining the appropriate prior authorisation cannot be covered by point 7 of Annex I to the Directive and be regarded as a false statement inducing consumers to believe that the product in question 'will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice'.

41 Nor, similarly, can point 15 of that annex be applicable to the dispute in the main proceedings. That point concerns the practice of '[c]laiming that the trader is about to cease trading or move premises when he is not'. However, in the dispute in the main proceedings, what is concerned is not a practice such as that referred to in point 15, but a commercial practice made use of without prior authorisation from the competent authority.

42 It follows from the above that the announcement of a clearance sale as referred to in Paragraph 33a(1) of the UWG carried out by a trader who does not have prior authorisation to do so, inasmuch as it does not fall within that annex, cannot, as such, be considered unfair in all circumstances.

43 In those circumstances, it must be assessed whether the national legislation referred to in paragraph 33 above runs counter to the system introduced by the Directive.

44 The Directive, as the Advocate General observes in points 44 to 55 of her Opinion, leaves Member States a margin of discretion as to the choice of national measures intended, in accordance with Articles 11 and 13 of the Directive, to combat unfair commercial practices, on condition in particular that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive.

45 Given that anticipatory or preventive measures on the part of the Member State may in certain circumstances prove more adequate and more appropriate than subsequent measures ordering the cessation of a commercial practice that has already been carried out or is imminent, those national measures may consist inter alia in providing for a system of prior authorisation, with penalties for non-compliance, of certain practices whose nature makes such measures necessary with a view to combating unfair commercial practices.

46 However, the system laid down by those national measures, which constitutes the transposition of the Directive, cannot result in a commercial practice being prohibited solely because prior authorisation has not been granted by the competent authority, without there having been an assessment of the practice's unfairness.

47 First, the Directive precludes national legislation which excludes the review against the criteria set out in Articles 5 to 9 of the Directive of a commercial practice not listed in Annex I to the Directive.

48 Secondly, national legislation under which it is not until after the prohibition laid down for failure to comply with the prior authorisation requirement that the commercial practice is examined as to its unfairness is incompatible with the system established by the Directive, as that practice, because of its nature and in particular because of the time factor involved, is thus deprived of economic sense for the trader.

49 National legislation such as that referred to in the preceding paragraph would amount to enacting a general prohibition of the commercial practices made use of in a particular system even though the possible unfairness of those practices has not even been assessed, in accordance with the case-law referred to in paragraph 35 above, against the criteria set out in Articles 5 to 9 of the Directive.

50 It follows from all the foregoing that the Directive must be interpreted as precluding a national court from ordering the cessation of a commercial practice not covered by Annex I to the Directive on the sole ground that the practice has not been the subject of prior authorisation by the competent administrative authority, without itself carrying out an assessment of the unfairness of the practice in question against the criteria set out in Articles 5 to 9 of the Directive.

Costs

51 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, 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 court from ordering the cessation of a commercial practice not covered by Annex I to that directive on the sole ground that the practice has not been the subject of prior authorisation by the competent administrative authority, without itself carrying out an assessment of the unfairness of the practice in question against the criteria set out in Articles 5 to 9 of that directive.

[Signatures]