Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

7 March 2013 *

(Article 99 of the Rules of Procedure — Directive 2005/29/EC — National legislation laying down a general prohibition of offering for sale or selling goods at a loss)

In Case C-343/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank van koophandel te Gent (Belgium), made by decision of 27 June 2012, received at the Court on 19 July 2012, in the proceedings

Euronics Belgium CVBA

v

Kamera Express BV,

Kamera Express Belgium BVBA,

THE COURT (Sixth Chamber),

composed of M. Berger, President of the Chamber, A. Borg Barthet and J.-J. Kasel (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request 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).

* Language of the case: Dutch.

2 The request has been made in proceedings between Euronics Belgium CVBA ('Euronics'), on the one hand, and Kamera Express BV ('KE') and Kamera Express Belgium BVBA ('KEB'), on the other, concerning the sale price of various cameras.

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 the Unfair Commercial Practices 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 the Unfair Commercial Practices Directive is worded as follows:

'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 Under Article 4 of the Unfair Commercial Practices 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, which is entitled 'Prohibition of unfair commercial practices', is worded as follows:

'(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.'

Belgian law

9 In accordance with Article 101(1), first subparagraph, of the Law of 6 April 2010 on market practices and consumer protection (*Belgisch Staatsblad*, 12 April 2010, p. 20803) ('the LPPC'), which entered into force on 12 May 2010, '[a]ll undertakings shall be prohibited from offering for sale or selling goods at a loss'.

10 Under Article 101(1), second subparagraph, of the LPPC, '[a] sale at a loss shall mean any sale at a price which is not at least equal to the price at which the undertaking purchased the item or which the undertaking would have to pay to replenish its stock, after any discounts granted and definitively obtained. In order to determine whether a sale is a sale at a loss, no account shall be taken of discounts which, whether exclusive or non-exclusive, are granted in exchange for commitments entered into by the undertaking other than for the purchase of goods.'

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

11 As is apparent from the order for reference, KE and KEB offered a Panasonic Lumix DMC-TZ20 camera for sale at a price of EUR 229, inclusive of a 5-year guarantee, and a Canon EOS5D Mark II Body camera for EUR 1 695, also inclusive of a 5-year guarantee.

12 Euronics claimed that KE and KEB sold those cameras at a loss, since the official purchase price of those cameras was EUR 277.84 and EUR 1 634.78 respectively, exclusive of VAT. Even if final discounts are taken into account, the price can never be set quite so low unless the cameras are sold at a loss. However, selling goods at a loss is prohibited under Article 101 of the LPPC. Euronics therefore brought an action before the rechtbank van koophandel te Gent (Commercial Court, Ghent) seeking a declaration that there had been an infringement of Article 101 of the LPPC and an order for the immediate cessation of that practice, including any related advertising.

13 In those circumstances, the rechtbank van koophandel te Gent decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 101 of the [LPPC], which, inter alia, is intended to protect the interests of consumers ... contrary to [the Unfair Commercial Practices Directive] in so far as it prohibits sales at a loss, whereas [that] directive appears not to prohibit such sales practices and the Belgian Law may be stricter than the provisions of [that] directive and the prohibition under Article 4 of that directive?'

Consideration of the question referred

14 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 offering for sale or selling goods at a loss.

15 In accordance with Article 99 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.

16 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 from Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraphs 35 to 51, Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, paragraphs 15 to 38, and the orders in Case C-288/10 *Wamo* [2011] ECR I-5835, paragraphs 20 to 40, and of 15 December 2011 in Case C-126/11 *INNO*, paragraphs 22 to 32.

17 In order to reply to the question referred, it is important, as a preliminary point, to establish whether Article 101 of the LPPC pursues objectives relating to consumer protection so that it comes within the scope of the Unfair Commercial Practices Directive.

18 In that regard, in its order for reference, the rechtbank van koophandel te Gent submits that, although the prohibition provided for in Article 101 of the LPPC may be considered to have a bearing on the relations between economic operators, that article is nevertheless intended to protect consumers.

19 It is precisely on account of the objectives of Article 101 of the LPPC as identified that the referring court asks the Court whether the Unfair Commercial Practices Directive precludes such a provision.

20 In those circumstances, it is still necessary to establish whether offering for sale or selling goods at a loss, 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, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 16, and *Wamo*, paragraph 29).

21 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, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 17, and *Wamo*, paragraph 30).

22 The practice of selling at a loss, at issue in the main proceedings, which is used, as the referring court observes, as bait, serves the purpose of attracting consumers to the business premises of a trader and encouraging them to make purchases. It clearly forms part of an operator's commercial strategy and relates directly to its promotion and sales development. It follows that it constitutes a commercial practice within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and, consequently, comes within its material scope (see, to that effect, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 18 and case-law cited, and *Wamo*, paragraph 31).

23 That being the case, it must be determined whether the Unfair Commercial Practices Directive precludes a prohibition of offering for sale or selling goods at a loss, as provided for in Article 101 of the LPPC.

24 In that regard, it is important to bear in mind, first of all, 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, and *Wamo*, paragraph 33).

25 Next, it must also be borne in mind that Article 5 of the Unfair Commercial Practices Directive sets out the criteria which determine the circumstances in which a commercial practice must be considered to be unfair and therefore prohibited.

26 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.

27 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.

28 Lastly, the Unfair Commercial Practices Directive establishes, in its Annex I, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) thereof, are regarded as unfair 'in all circumstances'. Consequently, as recital 17 in the preamble to the Unfair Commercial Practices 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 that directive (*Plus Warenhandelsgesellschaft*, paragraph 45, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 34, and *Wamo*, paragraph 37).

29 As regards the national provision at issue in the main proceedings, it is undisputed that the practices of offering for sale or selling goods at a loss 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, and *Wamo*, paragraph 38).

30 However, the fact remains that, as the referring court observes, Article 101 of the LPPC provides for a general prohibition of offering for sale or selling goods at a loss, 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 and without conferring a discretion in that regard on the courts having jurisdiction (see, to that effect, *Plus Warenhandelsgesellschaft*, paragraph 48, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 36, and *Wamo*, paragraph 39).

31 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 offering for sale or selling at a loss in so far as that provision pursues objectives relating to consumer protection.

Costs

32 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.

On those grounds, the Court (Sixth 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 offering for sale or selling at a loss in so far as that provision pursues objectives relating to consumer protection.

[Signatures]