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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

5 December 2024 (*)

(Reference for a preliminary ruling – Consumer protection – Unfair commercial practices – Directive 2005/29/EC – Article 2(c), (d) and (i) – Article 3(1) – Scope – Concept of ‘product’ – Combined offer consisting of the valuation and purchase of a good)

In Case C379/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Svea hovrätt Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Market Court of Appeal, Stockholm, Sweden), made by decision of 13 June 2023, received at the Court on 15 June 2023, in the proceedings

Guldbrev AB

v

Konsumentombudsmannen,

THE COURT (Fifth Chamber),

composed of I. Jarukaitis, President of the Fourth Chamber, acting as President of the Fifth Chamber, E. Regan and Z. Csehi (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Guldbrev AB, by D. Tornberg and M. Zeitlin, advokater,
- Konsumentombudsmannen, by G. Wikström, processråd,

– the European Commission, by M. Björkland, I. Rubene and N. Ruiz García, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 13 June 2024,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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) 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 Guldbrev AB and the Konsumentombudsmannen (Consumer Ombudsman, Sweden; 'the KO') concerning the compatibility with EU law and national law of certain commercial practices engaged in by Guldbrev relating to the valuation and purchase of gold from consumers.

Legal context

European Union law

3 Recitals 6 to 8, 17 and 23 of Directive 2005/29 state:

'(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. 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. ...

(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.

...

(23) Since the objectives of this Directive, namely to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices, cannot be sufficiently achieved by the Member States and can therefore be better achieved at [Union] level, the [Union] may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to eliminate the internal market barriers and achieve a high common level of consumer protection.'

4 Article 1 of that directive, headed 'Purpose', provides:

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

5 Article 2 of that directive, 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.'

7 Article 4 of Directive 2005/29, entitled 'Internal market', is worded as follows:

'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 Chapter 2 of that directive, entitled 'Unfair commercial practices', contains Article 5, itself entitled 'Prohibition of unfair commercial practices', which provides for a prohibition of unfair commercial practices and lays down the criteria for determining whether a practice is unfair. In particular, paragraph 5 thereof provides:

'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.'

9 Article 11 of that directive, entitled 'Enforcement', provides in the first subparagraph of paragraph 1 thereof:

'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.'

10 Annex I to Directive 2005/29, entitled 'Commercial practices which are in all circumstances considered unfair', provides:

'Misleading commercial practices

...

(5) Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).

(6) Making an invitation to purchase products at a specified price and then:

...

(c) demonstrating a defective sample of it,

with the intention of promoting a different product (bait and switch).'

Swedish law

11 Paragraph 5 of the marknadsföringslagen (2008:486) (Law (2008:486) on marketing; 'the MFL'), which transposed Directive 2005/29 in the Swedish legal order, provides that 'all promotional practices shall be consistent with good commercial practices'.

12 Paragraph 6 of that law provides:

'Any promotional practice which is contrary to good commercial practices within the meaning of Paragraph 5 shall be regarded as unfair if it affects or is likely to affect, to an appreciable extent, the recipient's ability to make an informed transactional decision.'

13 Paragraph 8 of that law is worded as follows:

'A misleading promotional practice within the meaning of Paragraphs 9, 10 or 12 to 17 hereof shall be regarded as unfair if it affects or is likely to affect the recipient's ability to make an informed transactional decision.

Misleading promotional practices as referred to in points 1 to 23 of Annex I to Directive 2005/29 shall always be regarded as unfair.'

14 Paragraph 9 of that law provides:

'All promotional practices shall be designed and presented in such a way as to clearly convey that they are promotional practices.

They must also clearly indicate who is responsible for the promotional practice. ...'

15 Paragraph 10 of the MFL provides:

'A trader's promotional practices may not contain inaccurate claims or other misleading representations about the trader's own or another trader's business activities.

The first subparagraph above shall apply especially in respect of representations relating to:

(1) the product's existence, nature, quantities, qualities and other distinctive characteristics;

...

(4) the product's price, the method for calculation of the price, specific price advantages and terms of payment,

...

Nor may a trader omit essential information in the promotion of its own or another trader's business activities. Misleading omissions also include cases where essential information is provided in an unclear, incomprehensible, ambiguous or other inappropriate manner.'

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

16 Guldbrev, a public limited company under Swedish law, carries on the business of valuation and purchase of gold from consumers. Since it does not have any physical shops, it values the gold sent by consumers according to its carat content and weight. Where the consumer agrees with the financial consideration proposed by the company, the transaction is completed.

17 Taking the view that certain of Guldbrev's promotional measures on its internet sites, social media and letters sent to consumers were misleading and unfair, the KO brought an action before the Patent- och marknadsdomstolen (Patent and Market Court, Sweden), seeking to have the company prohibited from engaging in such practices and ordered to provide certain information to consumers.

18 In support of its action, the KO stated, first, that the advertising of gold prices constituted bait advertising and bait and switch, contrary to several provisions of Annex I to Directive 2005/29. Next, it was alleged that Guldbrev had failed to identify with sufficient clarity the websites as marketing and to state that it is the originator of the advertising. Lastly, the highest prices advertised by it were unreasonable, unpredictable or impossible to obtain due to the requirements it imposes on consumers, which compromised the ability of consumers to make an informed decision.

19 Guldbrev disputed the KO's claims, arguing, in essence, that there were no facts in the main proceedings making either Directive 2005/29 or the MFL applicable, since the practices at issue related to purchasing services. In any event, according to Guldbrev, the promotion at issue was not misleading or unfair, and consumers had sufficient information on how prices were determined.

20 By judgment of 25 March 2022, the Patent- och marknadsdomstolen (Patent and Market Court) prohibited Guldbrev from engaging in its promotional practices and ordered it to provide certain information in its promotional material. After finding that that company's practices in relation to the valuation and purchase of gold constituted commercial practices falling within the scope of Directive 2005/29, it held that certain promotional practices did not comply with the MFL, which transposed that directive in the Swedish legal order.

21 Guldbrev appealed against that judgment to the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm, Sweden), the referring court.

22 In that regard, that court states that the Court's case-law relating to Article 2(c) and (d) and Article 3(1) of Directive 2005/29 can be construed as meaning that the promotional practices at issue in the main proceedings are inherently liable to constitute a commercial practice within the meaning of that directive, provided that they relate to a product within the meaning thereof. It notes, however, that the Court has not yet ruled on the question whether the trader's offer in the situation at issue in the main proceedings relates to a product within the meaning of that directive. An answer to that question would make it possible to determine whether the national law provisions should be interpreted in the light of the substantive rules of that directive.

23 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?

Consideration of the questions referred

The first question

24 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 valuation service for goods provided by a trader to a consumer before the purchase of those goods from that consumer, which makes the purchase subject to acceptance of the price determined following that valuation, constitutes, together with that purchase, a 'product' within the meaning of those provisions.

25 As a preliminary point, it should be noted that, as is apparent from the reference for a preliminary ruling, the referring court is asking that question in order to ascertain whether Directive 2005/29 is applicable in circumstances such as those of the main proceedings, where a trader purchases gold from a consumer and, to that end, combines two commercial acts into a single commercial offer, namely the valuation service of those goods and the purchase of those goods from the same consumer. In particular, it is apparent from the order for reference that the applicant in the main proceedings is willing to purchase gold from the consumer only 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. Thus, that purchase price is determined at the time of valuation and is imposed on the consumer if the consumer wants the transaction to be completed.

26 The practices for which Guldbrev is criticised in the dispute in the main proceedings consist, inter alia, in certain promotional practices regarding gold pricing which, according to the KO, constitute 'misleading commercial practices' within the meaning of point 5 and point 6(c) of Annex I to Directive 2005/29. The referring court considers that those promotional practices are in fact liable to constitute 'commercial practices' within the meaning of Article 2(d) and Article 3(1) of that directive and, therefore, to come within the scope thereof, provided however that the gold valuation and purchase service thus assessed may be regarded as forming together a 'product' within the meaning of those provisions.

27 On that latter point, Article 3(1) of Directive 2005/29 provides that it applies to unfair business-to-consumer commercial practices, as defined in Article 5 of that directive, before, during and after a commercial transaction in relation to a product. Although Article 5 provides for a prohibition of unfair commercial practices and sets out the criteria for determining whether such a practice is unfair, the question whether acts such as the promotional practices at issue in the main proceedings may be so categorised has not been addressed in any of the questions referred by the referring court.

28 As regards, however, other provisions referred to by the referring court in its first question, Article 2(c), (d) and (i) of Directive 2005/29 respectively defines the concept of 'product' as 'any goods or service including immovable property, rights and obligations', the concept of 'business-to-consumer 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' and the concept of 'invitation to purchase' 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'.

29 It follows that, in order to be categorised as a ‘commercial practice’ within the meaning of Article 2(d) and Article 3(1) of Directive 2005/29 and thus be liable to come within the scope thereof, an act must be directly connected with the promotion, sale or supply of a product to consumers (see, to that effect, judgment of 4 July 2019, *Kirschstein*, C393/17, EU:C:2019:563, paragraph 41 and the case-law cited).

30 In the present case, the gold valuation service constitutes a product provided ‘to consumers’ within the meaning of those provisions, whereas the purchase of gold is equivalent to the sale of goods by a consumer to a trader. Hence, promotional practices which are directly connected with the purchase of gold but not with the valuation of those goods are in fact liable to be regarded as ‘commercial practices’ within the meaning of Article 2(d) and Article 3(1) of Directive 2005/29 solely in the scenario envisaged by that court in its question, namely when the valuation service and the purchase may be considered together as constituting a ‘product’ provided to consumers within the meaning of those provisions.

31 Moreover, it should be noted that Article 2(d) of Directive 2005/29 defines the concept of ‘commercial practice’ in particularly broad terms (see, to that effect, judgment of 23 April 2009, *VTB-VAB and Galatea*, C261/07 and C299/07, EU:C:2009:244, paragraph 49). In that regard, the sole criterion referred to in that provision is that the trader’s practice must be directly connected with the promotion, sale or supply of a product or service to consumers (judgments of 19 September 2013, *CHS Tour Services*, C435/11, EU:C:2013:574, paragraph 27, and of 16 April 2015, *UPC Magyarország*, C388/13, EU:C:2015:225, paragraph 35).

32 As regards, in particular, combined offers, based on linking together at least two different offers of products or services in a single offer, the Court has held previously that they 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 (judgments of 23 April 2009, *VTB-VAB and Galatea*, C261/07 and C299/07, EU:C:2009:244, paragraph 50, and of 7 September 2016, *Deroo-Blanquart*, C310/15, EU:C:2016:633, paragraph 28).

33 Since, in the present case, the trader is offering the consumer a gold valuation service, by combining it with the purchase of that gold which is subject to the acceptance of the price determined following the valuation, the trader can engage in a commercial practice only through communication promoting the valuation service within the meaning of the case-law referred to in paragraph 29 of the present judgment.

34 On that last point, it should be borne in mind that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the wording of that provision, its context and the objectives pursued by the rules of which it forms part (judgment of 24 October 2024, *Kwantum Nederland and Kwantum België*, C227/23, EU:C:2024:914, paragraph 56 and the case-law cited).

35 As regards, in the first place, the wording of the provisions at issue in the main proceedings, there is nothing in the definition of the concept of ‘product’, as referred to in paragraph 28 of the present judgment, precluding a combined offer which, as in the present case, is based on the linking together of at least two different offers of products or services in a single offer provided by a trader to a consumer from being considered to come within the scope of that concept. Nor is there anything in the other provisions referred to in that paragraph, which incorporate the concept of ‘product’ in the wording of their respective definitions, to suggest that such an offer may not be regarded as coming within the scope of that concept.

36 As regards, in the second place, the context of the provisions at issue in the main proceedings and the objectives pursued by the rules of which they form part, it should be noted that the Court has held on several occasions that Directive 2005/29 is characterised by a particularly broad scope *ratione materiae*

(judgment of 16 April 2015, *UPC Magyarország*, C388/13, EU:C:2015:225, paragraph 34 and the case-law cited).

37 That particularly broad scope makes it possible to guarantee the full effectiveness of Directive 2005/29, by ensuring that, in accordance with the objective of achieving a high level of consumer protection, set out in Article 1 of that directive, unfair commercial practices are, in the words of the first subparagraph of Article 11(1) of that directive, combated effectively 'in the interest of consumers' (see, to that effect, judgment of 19 December 2013, *Trento Sviluppo and Centrale Adriatica*, C281/12, EU:C:2013:859, paragraph 32).

38 The objective pursued by Directive 2005/29, consisting in protecting consumers in full against unfair commercial practices, relies on the assumption that, in relation to a trader, the consumer is in a weaker position, particularly with regard to the level of information, in that the consumer must be considered to be economically weaker and less experienced in legal matters than the other party to the contract. Thus, the provisions of that directive are essentially designed with the consumer as the target and victim of unfair commercial practices in mind (see, to that effect, judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C59/12, EU:C:2013:634, paragraphs 35 and 36 and the case-law cited).

39 In those circumstances, due to the indissociable link between the gold valuation service and the purchase thereof, as is apparent from the discussion in paragraph 25 of the present judgment, they constitute together a 'product' within the meaning of Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29, with the result that acts such as the promotional practices at issue in the main proceedings are liable to be categorised as 'commercial practices' within the meaning of Article 2(d) and Article 3(1) of that directive and, therefore, to come within the scope thereof.

40 In the light of the foregoing considerations, the answer to the first question is that Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29 must be interpreted as meaning that the valuation service for goods provided by a trader to a consumer before the purchase of those goods from that consumer, which makes the purchase subject to acceptance of the price determined following that valuation, constitutes, together with that purchase, a 'product' within the meaning of those provisions, with the result that practices directly connected with the promotion of that product to consumers come within the scope of that directive.

The second question

41 The second question was asked in the event of the first question being answered in the negative by the Court. As held in the preceding paragraph, that first question calls for an answer in the affirmative.

42 There is therefore no need to answer the second question referred.

Costs

43 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 (Fifth Chamber) hereby rules:

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 ('Unfair Commercial Practices Directive')

must be interpreted as meaning that the valuation service for goods provided by a trader to a consumer before the purchase of those goods from that consumer, which makes the purchase subject to acceptance of the price determined following that valuation, constitutes, together with that purchase, a 'product' within the meaning of those provisions, with the result that practices directly connected with the promotion of that product to consumers come within the scope of that directive.

[Signatures]

* Language of the case: Swedish.