

JUDGMENT OF THE COURT (First Chamber)

14 January 2010*

In Case C-304/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 5 June 2008, received at the Court on 9 July 2008, in the proceedings

Zentrale zur Bekämpfung unlauteren Wettbewerbs eV

v

Plus Warenhandelsgesellschaft mbH,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, acting for the President of the First Chamber, E. Levits, A. Borg Barthet, M. Ilešič and J.-J. Kasel, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 11 June 2009,

after considering the observations submitted on behalf of:

- Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, by C. von Gierke, Rechtsanwältin,
- Plus Warenhandelsgesellschaft mbH, by D. Mäder and C. Hunecke, Rechtsanwälte,
- the German Government, by M. Lumma and J. Kemper, acting as Agents,
- the Belgian Government, by T. Materne, acting as Agent,
- the Czech Government, by M. Smolek, acting as Agent,
- the Spanish Government, by F. Díez Moreno, acting as Agent,

- the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Arena, avvocato dello Stato,

- the Austrian Government, by A. Hable, acting as Agent,

- the Polish Government, by M. Dowgielewicz, K. Zawisza and M. Laszuk, acting as Agents,

- the Portuguese Government, by L. Inez Fernandes, P. Mateus Calado and A. Barros, acting as Agents,

- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

- the Commission of the European Communities, by F. Erlbacher and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2009,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 5(2) 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 reference has been made in proceedings between the Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (a German association founded to combat unfair competition; 'the Wettbewerbszentrale') and Plus Warenhandelsgesellschaft mbH, a German retail undertaking ('Plus'), concerning a commercial practice by Plus which is considered by Wettbewerbszentrale to be unfair.

Legal context

Community legislation

3 Recitals 6, 7 and 17 in the preamble to Directive 2005/29 are worded 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. 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. 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. ...
- (7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature. It does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice.

Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof.

...

- (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 2 of Directive 2005/29 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;

...’

5 Article 3(1) of that directive provides:

‘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.’

6 According to Article 4 of that 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.’

7 Article 5 of Directive 2005/29, entitled ‘Prohibition of unfair commercial practices’, reads 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.

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 Lastly, Article 19 of Directive 2005/29 provides:

‘Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 12 June 2007. ...

They shall apply those measures by 12 December 2007. ...’

National legislation

9 Paragraph 1 of the Law on unfair competition (Gesetz gegen den unlauteren Wettbewerb, BGBl. 2004 I, p. 1414; ‘the UWG’) states that the purpose of the UWG is to protect competitors, consumers and other market participants from unfair competition. At the same time, it safeguards the general interest in undistorted competition.

10 Paragraph 3 of the UWG is worded as follows:

‘Unfair competitive acts that are likely to have a more than insignificant effect on competition to the detriment of competitors, consumers or other market participants shall be unlawful.’

11 Paragraph 4 of the UWG provides:

‘In particular, any person is acting unfairly within the meaning of Paragraph 3 who:

...

6. makes the participation of consumers in a prize competition or lottery conditional on the purchase of goods or use of services, unless the prize competition or lottery is inherently linked to those goods or services;

...’

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

- 12 It is apparent from the order for reference that, from 16 September to 13 November 2004, Plus launched the promotional campaign ‘Ihre Millionenchance’ (‘Your chance to win millions’) in which the public was invited to purchase goods sold in its shops in order to collect points. By collecting 20 points, customers could take part free of charge in the draws held by the Deutscher Lottoblock (national association of 16 lottery undertakings) on 6 or 27 November 2004.
- 13 Taking the view that that practice was unfair within the meaning of Paragraph 3, read in conjunction with point 6 of Paragraph 4, of the UWG, in so far as it made the participation of consumers in a lottery conditional on the purchase of goods, the Wettbewerbszentrale applied to the Landgericht Duisburg for an injunction ordering Plus to put an end to that practice.
- 14 The courts at first and second instance found against Plus, which then appealed on a point of law (‘Revision’) to the Bundesgerichtshof (Federal Court of Justice).
- 15 In its order for reference, the Bundesgerichtshof expresses doubts regarding the compatibility of those national provisions with Directive 2005/29, in so far as those provisions provide for a general prohibition of combining a prize competition and lottery with the obligation to purchase goods. Such a practice, however, does not feature among those listed in Annex I to that directive, the latter being the only practices which can be banned in all circumstances irrespective of a threat to consumers’ interests in a particular case. In addition, according to the referring court, it is possible that, by adopting this approach, the UWG affords consumers more extensive protection than that intended by the Community legislature, even though that directive fully harmonises this area.

16 In its order for reference, the Bundesgerichtshof also makes certain observations concerning the admissibility of its reference for a preliminary ruling.

17 In this respect, it states that, although Directive 2005/29 has not yet been transposed into German law and no amendment or repeal of the provisions of the UWG at issue in the main proceedings is, moreover, envisaged in that context, it has none the less been obliged, by reason of the case-law stemming from the judgment of 4 July 2006 in Case C-212/04 *Adelener and Others* [2006] ECR I-6057, to interpret domestic law in conformity with Directive 2005/29 since 12 December 2007, this being the date by which, according to Article 19 of that directive, the application of national implementing measures had to be ensured.

18 Moreover, whilst it is, admittedly, true that the advertising complained of predates even the date on which Directive 2005/29 entered into force, namely 12 June 2005, the referring court states that, in view of the fact that the application for an injunction submitted by the Wettbewerbszentrale is intended to prevent future breaches, the appeal on a point of law can be upheld only if the injunction can also be applied for on the basis of the law in force when its decision is delivered.

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

‘Is Article 5(2) of Directive 2005/29 ... to be interpreted as meaning that that provision precludes a national provision which states that a commercial practice whereby the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services is in principle unlawful, irrespective of whether, in any particular case, the advertising in question affects consumers’ interests?’

The question referred for a preliminary ruling

- 20 By its question, the referring court asks, in essence, whether Directive 2005/29 must be interpreted as precluding national legislation, such as the UWG, which provides for a prohibition in principle, without taking account of the specific circumstances of individual cases, of commercial practices in which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services.

Admissibility

- 21 The Spanish Government contests the admissibility of the reference for a preliminary ruling on the ground that Directive 2005/29 is not applicable to a situation such as that in the main proceedings.
- 22 According to that government, given that the dispute is between two German undertakings, the situation at issue in the main proceedings is characterised by the fact that it is confined in all respects within a single Member State, with the result that the provisions of Directive 2005/29 are not applicable to the dispute in the main proceedings (see Case C-97/98 *Jägerskiöld* [1999] ECR I-7319, paragraph 45). In the alternative, the Spanish Government contends in essence that Directive 2005/29 is not applicable to the case in the main proceedings in so far as the facts which gave rise to it occurred not only before the period for transposing that directive elapsed, but even before that directive was adopted. Consequently, it contends, the Court cannot assess whether the German Law is consistent with Directive 2005/29. Lastly, the Spanish Government states that, in any event, Directive 2005/29 does not seek to regulate prize competitions or lotteries concerned with the marketing of goods or services directed at consumers, as that field was expressly covered by the proposal for a regulation COM (2001) 546 final concerning sales promotions, which was subsequently withdrawn by the Commission of the European Communities in 2006.

23 Those arguments cannot, however, be accepted.

24 In this regard, it should be noted at the outset that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is bound, in principle, to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 30).

25 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases and, in particular, where it is quite obvious that the interpretation which is sought of the provisions of Community law referred to in those questions bears no relation to the actual facts of the main action or to its purpose (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61, and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 29).

26 However, that does not appear to be the situation in the present case.

27 With regard, first of all, to the Spanish Government's reference to *Jägerskiöld* as support for its contention that there is no Community dimension to the case which gave rise to the present reference for a preliminary ruling, suffice it to note that that judgment concerned the interpretation of the provisions of the EC Treaty relating to the freedom

to provide services, which, as the Court observed expressly in paragraph 42 of that judgment, are not applicable to activities which are confined in all respects within a single Member State.

- 28 However, in the case in the main proceedings here, contrary to the provisions of the Treaty at issue in the case which gave rise to the judgment in *Jägerskiöld*, the application of Directive 2005/29 is not conditional on the presence of an external factor. By virtue of Article 3(1) thereof, that directive is applicable to any unfair commercial practice used by an undertaking with regard to consumers.
- 29 As regards, next, the argument that Directive 2005/29 does not apply to the dispute in the main proceedings on the ground that the facts which gave rise to it occurred before that directive was adopted, it should be observed, first, that, according to the case-law of the Court, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive (see, in particular, Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 39 and the case-law cited).
- 30 In the present case, such an obligation to refrain was applicable, at the very least, when the order for reference was made, namely on 5 June 2008, by which date not only had Directive 2005/29 entered into force, but the period for its transposition, which ended on 12 December 2007, had expired.
- 31 Second, and in any event, it follows expressly from the order for reference that the outcome of the appeal on a point of law lodged by Plus is dependent on whether the injunction at issue can be applied for on the basis of the law applicable at the time at which, following the delivery of the present judgment, the decision ruling on the dispute in the main proceedings is given, inasmuch as that application relates also to future breaches.

32 In those circumstances, as the Advocate General observed at points 49 to 57 of her Opinion, the interpretation of Directive 2005/29 sought by the Bundesgerichtshof must be regarded as being capable of being useful to that court for the purpose of enabling it to rule in the case before it.

33 Lastly, with regard to the argument that Directive 2005/29 does not apply to the sales promotion practices at issue in the main proceedings, on the ground that they were expressly covered by a Commission proposal for a regulation, suffice it to note that that circumstance cannot, by itself, preclude the possibility, particularly in view of the fact that that proposal was withdrawn in 2006 and did not therefore lead to the adoption of a regulation, that such practices may constitute, in the current state of Community law, unfair commercial practices within the terms of that directive and come within its scope.

34 In view of the foregoing, the reference for a preliminary ruling must be treated as being admissible.

Substance

35 In order to reply to the question referred, it is necessary first of all to determine whether the practices which combine the purchase of goods or use of services with the participation of consumers in lotteries or prize competitions, and which are the subject of the prohibition at issue in the main proceedings, constitute commercial practices within the meaning of Article 2(d) of Directive 2005/29 and are therefore subject to the rules laid down by that directive.

36 In that regard, it should be borne in mind that Article 2(d) of Directive 2005/29 gives a particularly wide definition to the concept of commercial practices: '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’.

37 It must be concluded that promotional campaigns, such as those at issue in the main proceedings, which enable consumers to take part free of charge in a lottery subject to their purchasing a certain quantity of goods or services, 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 the directive and, consequently, come within its scope (see, by way of analogy, in regard to combined offers, *VTB-VAB and Galatea*, paragraph 50).

38 That conclusion cannot be called into question by the argument put forward by the Czech and Austrian Governments that the provisions of the UWG at issue in the main proceedings, unlike those of Directive 2005/29, have as their principal aim to protect, not consumers, but, rather, competitors against unfair commercial practices employed by certain operators, with the result that such provisions do not come within the scope of that directive.

39 As has been stated at paragraph 36 of the present judgment, Directive 2005/29 is characterised by a particularly wide scope *ratione materiae* which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers. As is evident from recital 6 in the preamble to that directive, only national legislation relating to unfair commercial practices which harm ‘only’ competitors’ economic interests or which relate to a transaction between traders is thus excluded from that scope.

40 As the Advocate General has observed at points 65 and 66 of her Opinion, that is quite clearly not the case with the national provisions at issue in the main proceedings, since Paragraphs 1, 3 and 4 of the UWG refer expressly to the protection of consumers and not only to that of competitors and other market participants.

41 That stated, it should be borne in mind, next, that Directive 2005/29 fully harmonises at the Community level the rules relating to unfair business-to-consumer commercial practices. Accordingly, as Article 4 thereof expressly provides, Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection (*VTB-VAB and Galatea*, paragraph 52).

42 In addition, Article 5 of Directive 2005/29 provides that unfair commercial practices are to be prohibited and sets out the criteria on the basis of which practices may be classified as being unfair.

43 Thus, in accordance with Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts, or is likely materially to distort, the economic behaviour of the average consumer with regard to the product.

44 Article 5(4) of the 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 Directive 2005/29 respectively. Under those provisions, such practices are in particular prohibited where, having regard to their nature and the factual context, they cause or are likely to cause the average consumer to take a transactional decision which he would not otherwise have taken.

45 Lastly, Annex I to Directive 2005/29 establishes an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the directive, are regarded as unfair 'in all circumstances'. Consequently, as recital 17 in the preamble to Directive 2005/29 expressly states, those commercial practices alone can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the directive.

46 It is therefore in the light of the content and the general scheme of the provisions of Directive 2005/29, noted in the preceding paragraphs, that the question submitted by the referring court must be examined.

47 In that regard, clearly, by establishing a prohibition in principle of practices which make the participation of consumers in a lottery or prize competition conditional on the purchase of goods or use of services, national legislation such as that at issue in the main proceedings does not meet the requirements of Directive 2005/29.

48 First, point 6 of Paragraph 4 of the UWG prohibits any commercial transaction which couples the purchase of goods or use of services to the participation of consumers in a prize competition or lottery, with the sole exception of those relating to a lottery or prize competition which is inherently linked to the goods or services in question. In other words, that type of practice is prohibited generally, without it being necessary 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 Directive 2005/29.

49 It is not in dispute that such practices, which associate the purchase of goods or use of services with the participation of consumers in a lottery or prize competition, are not listed in Annex I to that directive, which, as has been pointed out in paragraph 45 of this judgment, exhaustively lists the only commercial practices which can be prohibited without a case-by-case assessment.

50 Second, legislation of the type at issue in the main proceedings runs counter to the content of Article 4 of Directive 2005/29, which expressly prohibits Member States from maintaining or adopting more restrictive national measures, even where such measures are designed to ensure a higher level of consumer protection.

- 51 In those circumstances, it must be held that Directive 2005/29 precludes a prohibition of commercial offers which couple the purchase of goods or use of services to the participation of consumers in a prize competition or lottery, such as that provided for by the national legislation at issue in the main proceedings.
- 52 That conclusion cannot be called into question by the fact that point 6 of Paragraph 4 of the UWG provides for an exception in favour of practices concerning a lottery or prize competition which is inherently linked to the goods or services in question.
- 53 Although it is liable to restrict the scope of the prohibition laid down in that provision, the fact remains that, because of its limited and pre-defined nature, such an exception cannot take the place of the analysis, which must of necessity be undertaken having regard to the facts of each particular case, of the 'unfairness' of a commercial practice in the light of the criteria set out in Articles 5 to 9 of the directive, where, as here in the main proceedings, that practice is not listed in Annex I thereto (see *VTB-VAB and Galatea*, paragraphs 64 and 65).
- 54 In the light of the foregoing, the answer to the question referred is that Directive 2005/29 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a prohibition in principle, without taking account of the specific circumstances of individual cases, of commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services.

Costs

- 55 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 (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 national legislation, such as that at issue in the main proceedings, which provides for a prohibition in principle, without taking account of the specific circumstances of individual cases, of commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services.

[Signatures]