Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 13 June 2013 [1]

Case C-435/11

CHS Tour Services GmbH
v
Team4 Travel GmbH

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Directive 2005/29/EC — Unfair commercial practices — Misleading practices — Duty of professional diligence — Brochure containing an erroneous exclusivity claim)

1. If a commercial practice turns out to mislead consumers, does it matter whether the trader has done what he could to prevent that from happening? This is the issue on which the Oberster Gerichtshof (Supreme Court) (Austria) requests guidance.

I – Legal context

2. Article 5 of Directive 2005/29/EC ('the Directive') [2] reads:

'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

1 — Original language: English.

2 — 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 and Regulation (EC) No 2006/2004 (OJ 2005 L 149, p. 22).

(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.'

3. Articles 6 and 7 of the Directive deal with misleading commercial practices, while Articles 8 and 9 concern commercial practices of an aggressive nature. Article 6 states:

'1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

…

(b) the main characteristics of the product, such as its availability …'

II – Facts, procedure and the question referred

4. The case before the referring court concerns two Austrian travel agents, CHS Tour Services GmbH ('CHS') and Team4 Travel GmbH ('Team4 Travel'). Both CHS and Team4 Travel organise and provide skiing courses and winter holidays in Austria for groups of schoolchildren from the United Kingdom.

5. In Team4 Travel's English sales brochure, which was published in mid-September 2010, a symbol indicating 'exclusive' was placed next to a certain number of the listed accommodation establishments. According to the brochure, the term 'exclusive' is to be understood as meaning '[a]ccomodation that is exclusively available to [Team4 Travel] parties at half term or half term and Easter or throughout the whole winter season'. The referring court explains in this connection that the use of that expression meant that the accommodation establishment had a fixed contractual relationship with Team4 Travel and that other tour operators would not be in a position to provide accommodation at that establishment on specified dates. According to the observations submitted by CHS, Team4 Travel's price list also stated that '[a]ll prices highlighted … indicate that [Team4 Travel] holds all beds exclusively on this date'.

6. For dates which are not specified in the order for reference, covering certain periods in 2012, Team4 Travel concluded contracts for bed quotas with several accommodation providers. Those contracts – the terms of which are not reproduced in the order itself – contained a clause which stated that the specified bedroom quotas would be kept available without restriction for Team4 Travel and that the provider could not repudiate that stipulation without Team4 Travel's written consent. A booking would become final 28 days before the corresponding arrival. The referring court mentions that, to secure exclusivity, Team4 Travel stipulated cancellation rights with the accommodation provider and also a contractual penalty.

7. However, it emerges from the case-file forwarded to the Court that, in spite of the abovementioned contracts, CHS reserved bed quotas in the same accommodation establishments as Team4 Travel for overlapping booking periods. The referring court mentions, moreover, that the reservations were made after Team4 Travel had concluded the exclusive contracts. Consequently, the accommodation providers were in breach of their contractual obligations towards Team4 Travel.

8. Without specifying the exact time at which this occurred, the order for reference mentions that Team4 Travel was informed by the accommodation providers that no reservations had yet been made by other tour operators. It furthermore states that the director of Team4 Travel took care to ensure that, because of the lack of available accommodation, no other tour operators would be able to find room in the hotels. She was not aware of the existence of other reservations until legal proceedings were initiated.

9. However, as CHS nevertheless managed also to book all or part of the available accommodation for February or the Easter holidays 2012, it considered the declarations on exclusivity to be incorrect and to constitute an unfair commercial practice. CHS therefore applied for an injunction before the Landesgericht Innsbruck (Innsbruck Regional Court) (Austria) to prevent Team4 Travel from stating that specific accommodation for a particular arrival date was offered by Team4 Travel on an exclusive basis.

10. By order of 30 November 2010, the Landesgericht Innsbruck refused to grant an injunction, as it held the exclusivity claim to be correct in view of the irrevocable reservation contracts concluded beforehand by Team4 Travel.

11. On 13 November 2011, the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) (Austria) upheld the decision given at first instance on the grounds that Team4 Travel had complied with the requirements of professional diligence and could legitimately expect that its co-contractors would respect their contractual obligations.

12. CHS subsequently lodged an appeal on a point of law before the Oberster Gerichtshof.

13. The referring court considers the outcome of the proceedings to depend on the correct interpretation of Article 5(2) of the Directive. It emphasises that the appeal cannot succeed if Team4 Travel can rely on the defence that it did not act contrary to the requirements of professional diligence. On this basis, the Oberster Gerichtshof submits two different interpretations for consideration by the Court.

14. According to the first line of argument, the effect of the reference in Article 5(4) of the Directive to misleading or aggressive practices, as set out in Articles 6 to 9, is that such practices are, per se, inconsistent with the duty of professional diligence under Article 5(2). In this respect, the referring court observes that Articles 6 to 9 do not mention the duty of professional diligence under Article 5(2)(a).

15. According to the second line of argument, if the reference in Article 5(2)(b) of the Directive to distortion of a consumer's economic behaviour were to be understood as being clarified by the more specific provisions in Articles 6 to 9, Article 5(2)(a) would still be applicable. As a consequence, a misleading practice under Article 6 would require, *in addition*, a breach of the duty of professional diligence under Article 5(2)(a). The referring court considers this reasoning to be borne out by the general scheme of the Directive.

16. Entertaining doubts, in the light of those considerations, as to the interpretation of Article 5(2) of the Directive, the Oberster Gerichtshof decided to stay the proceedings and refer the following question to the Court:

'Is Article 5 of [the Directive] to be interpreted as meaning that, in the case of misleading commercial practices within the meaning of Article 5(4) of that Directive, separate examination of the criteria of Article 5(2)(a) of the Directive is inadmissible?'

17. Written observations have been submitted by CHS, by Team4 Travel, by the Austrian, German, Italian, Hungarian, Polish, Swedish and UK Governments, and by the Commission. No hearing was held.

III – Analysis

18. In what follows, I will consider the structure, wording, background and the objective of the Directive, and – in particular – the provisions in question.

A – *Relevance of the duty of professional diligence for the concept of 'misleading commercial practice'*

19. As regards the structure of the Directive, it is clear from the Court's case-law that the notion of 'unfair commercial practices', which are prohibited under Article 5(1), covers three categories: (i) practices which fulfil the two cumulative requirements laid down in Article 5(2); (ii) pursuant to Article 5(4), misleading or aggressive practices as set out in Articles 6 to 9; and (iii) pursuant to Article 5(5), the practices referred to in Annex I to the Directive ('the blacklist').[3] Unlike the first two categories, however, the commercial practices on the blacklist are automatically to be considered unfair, without any need for an individual appraisal of all the relevant circumstances.[4]

20. Article 5(4) of the Directive, by its very wording, elaborates on and clarifies that structure. In accordance with that provision, commercial practices which are misleading (Articles 6 and 7) or aggressive (Articles 8 and 9) are, 'in particular', unfair. The phrase 'in particular' shows not only that misleading and aggressive practices are specific sub-types ('precise categories') of unfair commercial practices[5] but, more importantly, that they also constitute, in themselves, unfair commercial practices.[6]

21. Thus, on the basis of a structural as well as a literal analysis, I do not share the view that Articles 6 and 7 (or Articles 8 and 9) of the Directive merely provide specific examples of the element referred to in Article 5(2)(b) of distortion of a consumer's economic behaviour, with the effect that Article 5(2)(a) remains applicable, as would follow from the second interpretation put forward by the national court.

3 — See, to that effect, Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraphs 53 to 56; Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraphs 42 to 45; and Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, paragraphs 31 to 34.

4 — See Article 5(5) of the Directive, read in conjunction with recital 17 in the preamble to the Directive.

5 — See *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 33.

6 — The majority of the various language versions of Article 5(4) of the Directive contain an expression akin to 'in particular'. However, the Swedish version even omits the term 'in particular', stating simply that '[*a*]*ffärsmetoder skall anses otillbörliga om de a) är vilseledande enligt artiklarna 6 och 7, eller b) aggressiva enligt artiklarna 8 och 9*'.

22. Next, on examining the background and objective of the Directive, it appears that firm support for the above analysis of its structure and wording is to be found, furthermore, in the legislative history leading to its adoption. Indeed, the observations contained in the Commission proposal [7] regarding misleading and aggressive commercial practices unequivocally spell out that the criterion relating to professional diligence under Article 5(2)(a) of the Directive does not play a separate role. This is in stark contrast to the inferences that the Polish Government seems to draw from that very same document. [8]

23. On a more basic level, however, the fulfilment of additional criteria in order to trigger the operation of Article 6 would be at odds with the very terms of that latter provision. Indeed, Article 6 appears – at least in certain circumstances – to embrace a no-fault approach as regards the trader. [9] It would be contrary to that approach if, in the absence of any reference to Article 5(2)(a), traders were entitled to rely on the defence that they had acted in compliance with their duty of professional diligence. [10] As mentioned in the *travaux préparatoires*, infringement of Article 6 constitutes, per se, a breach of the duty of professional diligence.

24. By the same token, to allow additional requirements to be taken into account under Article 6 would be difficult to reconcile with the spirit and objective of the Directive itself. Indeed, it would lower rather than raise the high level of consumer protection which the Directive aims to achieve; [11] a level which, it must be recalled, is subject to full harmonisation across the European Union. [12]

25. In the light of the foregoing considerations, the fact that a trader may have complied with the duty of professional diligence under Article 5(2)(a) of the Directive is of no significance in the presence of misleading (or aggressive) commercial practices. CHS and the Austrian, German, Hungarian, Swedish and UK Governments all share this view, as does the Commission; moreover, that view is also consistent with the first interpretation proffered by the national court. [13]

7 — Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final.

8 — Point 56 of the explanatory memorandum accompanying the proposal for a directive – to which the Polish Government refers in point 12 of its observations in support of its view – states that 'if a commercial practice is found to be either "misleading" or "aggressive" *it will automatically be unfair, without any further reference to the conditions contained in Article 5*'. The explanatory memorandum goes on to state, in point 57, that '[m]isleading a consumer or treating them aggressively are considered *in themselves* to be distortions of consumer behaviour rather than legitimate influence *and, as such, contrary to the requirements of professional diligence. Conduct that truly deceives, harasses, unduly influences or coerces will always violate the requirements of professional diligence and significantly impair the consumer's ability to make an informed decision. For this reason there is no separate reference to the professional diligence test* or the "distortion" element of the "material distortion" definition.' Lastly, it states in point 58 that '[t]hese specific categories do not prejudice the autonomous functioning of the general prohibition, which will continue to operate as a safety net and hence provide a way of assessing the fairness of any current or future practices *that do not fall within one of the two key types explicitly mentioned*' (emphasis added). I should add that the proposal for a directive was not amended in this regard during the legislative process.

9 — In this respect, I would point out that, in accordance with the explicit wording of Article 6(1) of the Directive, that provision is applicable 'even if the information [contained in the commercial practice] is factually correct'.

10 — On a similar note, in Case C-428/11 *Purely Creative and Others* [2012] ECR, when interpreting the notion of 'false impression' as used in paragraph 31 of the blacklist, the Court held, in paragraph 46 of that judgment, that the objective of the Directive 'would not be achieved if paragraph 31 of Annex I to [the Directive] were interpreted as including an element of misleading conduct, distinct from the situations described in the second part of that provision' (see also paragraphs 26, 27 and 29 of the judgment, read in the light of the fourth question referred in that case). Admittedly, unlike the practices placed on the blacklist, misleading practices under Article 6 do require an individual appraisal of all the relevant circumstances. However, that does not prevent the reasoning of the Court, in this situation, from being equally relevant to Article 6, *mutatis mutandis*.

11 — See Case C-126/11 *INNO* [2011] ECR, paragraph 27 and the case-law cited.

12 — *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraphs 27 and 30 and the case-law cited.

13 — So far, the Court has only had the opportunity to deal with this issue in an indirect manner. In Case C-453/10 *Pereničová and Perenič* [2012] ECR, it held – in response to a question on the impact that a finding of unfair commercial practice would have on the assessment of the fairness and validity of a contractual term under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) – that the practice in question was misleading under Article 6 of the Directive, and did not go on to undertake an analysis as to whether there was also a breach of the duty of professional diligence (see paragraphs 40, 41 and 43, and point 2 of the operative part of that judgment). However, Advocate General Trstenjak has expressed a view similar to mine on numerous occasions (see her Opinions in *VTB-VAB and Galatea*, points 78 and 79; in *Plus Warenhandelsgesellschaft*, points 73 and 74; in *Mediaprint Zeitungs- und Zeitschriftenverlag*, points 65 and 66; and in *Pereničová and Perenič*, points 104 to 107).

B – *Further considerations*

26. Given that all interpretative elements point in the same direction, it seems somewhat puzzling that the referring court encountered difficulties when applying Articles 5 and 6 of the Directive to the facts. However, it appears likely that the Court's case-law may unfortunately have been misinterpreted in practice. Tellingly, both Team4 Travel and the Polish Government rely on the case-law of the Court to justify opposing views.

27. Team4 Travel submits that the Court held, in relation to a commercial practice that falls within the scope of the Directive but which does not appear on the blacklist, that 'that practice can be regarded as unfair, and thus prohibited, only after a specific assessment, particularly in the light of the criteria set out in Articles 5 to 9 of the Directive'.[14] However, I do not find that passage to be of relevance to the matter at hand. It concerns the requirement of an individual appraisal of a contested commercial practice under the Directive; a requirement which – it is not disputed – applies to Article 6. In contrast, the Court did not clarify in that paragraph the interrelationship between Article 5 of the Directive, on the one hand, and Articles 6 to 9, on the other, which is the issue in the current proceedings. For the same reason, contrary to the view taken by the Polish Government and Team4 Travel, it is of no relevance for the case under consideration that the Court has previously stated that 'it must also be verified whether the practice in question is contrary to the requirements of professional diligence within the meaning of Article 5(2)(a) of the Directive'.[15] Indeed, that statement goes to the relationship between Article 5(2)(a) and Article 5(2)(b), rather than between Article 5 and Articles 6 to 9.

28. Moreover, the approach proposed by the Polish Government, according to which 'it is possible', in the case of misleading practices, to assess separately the criterion under Article 5(2)(a) of the Directive, is unsustainable. Indeed, such a freedom of choice would be contrary to the aim of the Directive, which is to achieve the same high level of consumer protection across the Member States, as mentioned above.

29. Yet the fact that the Directive does not grant the freedom to make the application of Article 6 subject to additional criteria does not mean that there is no room left for manoeuvre. As the Swedish Government points out, the Directive does not preclude a national court from determining, on a case-by-case basis, first, whether a contested commercial practice falls to be characterised as 'misleading' or 'aggressive' under Articles 6 to 9 of the Directive, failing which, second, whether the general conditions under Article 5(2) are met. Indeed, the Directive would appear to favour a 'top-down approach', that is to say, an assessment which begins with the blacklist, followed by the provisions on misleading or aggressive practices, and ending with the general clause. If one of the first steps indicates the existence of an unfair commercial practice, there will be no need to proceed to the next step, as the contested practice would in any event have to be regarded as unfair.

14 — *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 43.

15 — *Ibidem*, paragraph 46.

30. On a final note, I am conscious of the fact that, on the one hand, the two lower courts hearing the case in Austria found in favour of Team4 Travel[16] and, on the other, that, according to the referring court, a German court has also 'examined the criterion of lack of specialist diligence notwithstanding its finding that there was a risk of misleading consumers'.[17] However, on the basis of the above observations, I am unshaken in my view regarding the proper approach to take in the case under consideration.

IV – Conclusion

31. In light of the above, I propose that the Court answer the Oberster Gerichtshof (Austria) as follows:

Article 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 and Regulation (EC) No 2006/2004 is to be interpreted as meaning that, where a commercial practice falls within the scope of Article 5(4) of that Directive, it is of no relevance whether the criteria under Article 5(2)(a) and/or Article 5(2)(b) are also fulfilled.

16 — I should add that the grounds given by those two courts seem to differ. Indeed, it appears that the main reason for which the Landesgericht declined to grant the application for interim measures was that it held the claim of exclusivity to be accurate. It would therefore seem that only the decision handed down by the Oberlandesgericht Innsbruck is based on a finding that Team4 Travel did not breach its duty of professional diligence.

17 — Decision of the Oberlandesgericht Jena (Jena Higher Regional Court) (Germany) of 8 July 2009, NJOZ [2010] 1216. However, I do not agree with the interpretation which the referring court has placed on that judgment, as it seems to address only the issue as to whether the conditions required for a finding of misleading practice are met and the burden of proof in this regard. Moreover, the Oberlandesgericht Jena explicitly points out that the Directive apparently had not been implemented in Germany.