



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

3 October 2013*

(Directive 2005/29/EC — Unfair commercial practices — Scope — Misleading information circulated by a health insurance fund which is part of the statutory social security system — Fund established as a public law body)

In Case C-59/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 18 January 2012, received at the Court on 6 February 2012, in the proceedings

BKK Mobil Oil Körperschaft des öffentlichen Rechts

v

Zentrale zur Bekämpfung unlauteren Wettbewerbs eV,

THE COURT (First Chamber),

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

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, by C. von Gierke, Rechtsanwältin,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,
- the European Commission, by M. van Beek and V. Kreuzschatz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 July 2013,

gives the following

* Language of the case: German.

Judgment

- 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, 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 (the ‘Unfair Commercial Practices Directive’) (OJ 2005 L 149, p. 22).
- 2 The request has been made in the context of proceedings between BKK Mobil Oil Körperschaft des öffentlichen Rechts (‘BKK’) and the Zentrale zur Bekämpfung des unlauteren Wettbewerbs eV (Office for the Prevention of Unfair Competition) (‘Wettbewerbszentrale’), regarding information circulated by BKK to its members.

Legal context

EU law

- 3 Recitals 5 to 8, 11, 12 and 14 in the preamble to the Unfair Commercial Practices Directive state:
 - (5) ... obstacles to the free movement of services and goods across borders or the freedom of establishment ... should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty.
 - (6) This Directive therefore 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. ...
 - (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. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. ...
- ...
- (11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers’ economic behaviour. ...
- (12) Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. ...

...

(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. ...'

4 According to Article 1 of that directive:

'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 is worded as follows:

'For the purpose of this Directive:

- (a) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
- (b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;
- (c) "product" means any goods or service ...;
- (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 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.'

7 Article 5 of that 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,

...'

8 Article 6(1) of the directive provides:

'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:

...'

German law

9 The Unfair Commercial Practices Directive was transposed into German law by the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb, BGBl. 2004 I, p. 1414) (the 'UWG').

10 Paragraph 2 of the UWG reads:

'(1) For the purposes of this Regulation:

1. "commercial practice" is any conduct pursued by a person for the benefit of his own or another undertaking before, during or after the conclusion of a business transaction which is objectively linked to promoting the sale or purchase of goods or services, or to the conclusion or performance of a contract concerning goods or services; the goods may include real property and the services may refer to rights and obligations;

...

6. "entrepreneur" means any natural or legal person who carries out commercial transactions as part of his trade, business, craft or profession and any one acting in the name of or on behalf of such a person;

...'

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

11 BKK is a health insurance fund established as a public law body which is part of the German statutory system.

12 By its action brought at first instance, the Wettbewerbszentrale sought an order requiring BKK to desist from circulating the following information, which appeared on its website in December 2008:

'If you choose to leave BKK ... now, you will be committed to staying with your new [compulsory health insurance fund] for 18 months following that change. This means that you will miss out on attractive offers that BKK ... will be making next year, and you may end up having to pay more if the amounts allocated to your new scheme are insufficient and it therefore requires you to make an additional contribution.'

- 13 The Wettbewerbszentrale is of the view that this information is misleading and thus prohibited under both the Unfair Commercial Practices Directive and under national competition law. BKK fails to mention that, in the event of being required to make a supplementary contribution, the insured person has a special statutory right of cancellation under German law.
- 14 Consequently, the Wettbewerbszentrale, by letter of 17 December 2008, gave BKK notice to desist from circulating that information and demanded that the latter sign an undertaking to that effect, coupled with a penalty clause, and that it pay back pre-litigation legal expenses.
- 15 BKK then removed the information at issue from its website. By letter of 6 January 2009, it acknowledged that it had published erroneous information and undertook to refrain from using the contested statements for advertising purposes in the future. By contrast, BKK stated that it was not willing to provide the Wettbewerbszentrale with the requested undertaking, coupled with a penalty clause, or to pay the pre-litigation legal expenses.
- 16 According to BKK, neither the provisions of the UWG nor those of the Unfair Commercial Practices Directive are applicable to the dispute in the main proceedings. It follows from Article 2(d) of that directive that it applies only to the ‘commercial practices’ of a ‘trader’ within the meaning of Article 2(b) of that directive; in addition the wording of points 1 and 6 of Paragraph 2(1) of the UWG is in essence identical to that of the provisions of the directive. Those criteria are not met in the present case since, as a public law body, BKK does not seek to make a profit.
- 17 The court at first instance ordered BKK, on pain of a financial penalty, to desist from circulating the information at issue for advertising and competitive purposes in the course of its business and to pay the Wettbewerbszentrale EUR 208.65, plus interest.
- 18 The appeal brought by BKK against the judgment at first instance was dismissed. By its appeal on a point of law (‘Revision’), which was authorised by the appeal court, BKK is seeking that the action brought by the Wettbewerbszentrale be dismissed.
- 19 The Bundesgerichtshof submits that the marketing communications circulated by BKK constitute a misleading practice within the meaning of the Unfair Commercial Practices Directive which should be prohibited as an infringement of the UWG.
- 20 None the less, such an infringement can be established only where the practice at issue can be assessed in the light of the requirements of that directive, on which the UWG is based.
- 21 It has not been determined with certainty that the Unfair Commercial Practices Directive must be interpreted as meaning that an operator such as BKK, which as a public law body performs the tasks connected with the provision of statutory health insurance, has acted as a ‘business’ by circulating the contested information. It could be argued that such a body is not engaged in a commercial activity, but pursues an exclusively social objective.
- 22 In those circumstances the Bundesgerichtshof decided to stay the proceedings before it and to refer the following question to the Court for a preliminary ruling:

‘Is Article 3(1), in conjunction with Article 2(d), of the [Unfair Commercial Practices Directive] to be interpreted as meaning that the action of a statutory health insurance fund in making (misleading) statements to its members concerning the disadvantages that those members would suffer were they to move to another statutory health insurance fund can also constitute an act by a trader in the form of a business-to-consumer commercial practice?’

The question referred for a preliminary ruling

- 23 As a preliminary point, it should be noted that it is apparent from the file that the Bundesgerichtshof takes the view that the information giving rise to the dispute in the main proceedings must be treated as a misleading practice within the meaning of Article 6(1) of the Unfair Commercial Practices Directive and that it is proposing to prohibit it, in accordance with Article 5(1) of that directive and of the UWG.
- 24 To that effect, the referring court is however unsure whether the person circulating that information, in this case BKK, is covered by that directive, even though that person is a public law body charged with a task of public interest, such as the management of a statutory health insurance fund.
- 25 In order to ascertain whether a national body, such as BKK, which is governed by public law and which is tasked with the management of a statutory health insurance fund, must be considered a ‘business’ within the meaning of the Unfair Commercial Practices Directive and whether it is, in that capacity, subject to the requirements laid down by that directive in the event that, as in the present case, it provides misleading information to its members, it should be noted from the outset that, according to the Court’s settled case-law, the need for uniform application of EU law and the principle of equality require 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 context of the provision and the purpose of the legislation in question (see, inter alia, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-40/01 *Ansul* [2003] ECR I-2439, paragraph 26; and Case C-271/10 *VEWA* [2011] ECR I-5815, paragraph 25).
- 26 Consequently, the classification, legal status and specific characteristics of the body at issue under national law are irrelevant for the purposes of the interpretation of that directive by the Court and for the Court’s answer to the question referred by the referring court.
- 27 In order to provide that answer, it must be stated that whilst the Unfair Commercial Practices Directive invariably uses the term ‘consumer’, it refers to the other party in a commercial transaction relating to a product either as a ‘business’ or as a ‘trader’.
- 28 Thus, as set out in Article 3(1), that directive “shall apply to unfair business-to-consumer commercial practices ... before, during and after a commercial transaction ...”.
- 29 Article 2(d) of that directive provides that ‘business-to-consumer commercial practices’ refer to ‘any act, omission, course of conduct or representation, or commercial communication, including advertising and marketing, by a trader, which is directly connected with the promotion, sale or supply of a product to consumers’. ‘[P]roduct’ is defined at the same article under (c) as referring to any goods or service, with no business sector being excluded.
- 30 Article 2(b) defines ‘trader’ as referring to ‘any natural or legal person who, in commercial practices covered by [that] Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader’.
- 31 In the light of the foregoing, it must be held that, for the purpose of applying the Unfair Commercial Practices Directive, the terms ‘business’ and ‘trader’ have an identical meaning and legal significance. Moreover, ‘trader’ is the most frequently used in the provisions of that directive.

- 32 In that regard, it is from the outset clear from the drafting of Article 2(b) of the Unfair Commercial Practices Directive that the EU legislature has conferred a particularly broad meaning on the term ‘trader’, which refers to ‘any natural or legal person’ which carries out a gainful activity and does not exclude from its scope either bodies pursuing a task of public interest or those which are governed by public law.
- 33 In addition, with regard to the actual wording of the definitions in Article 2(a) and (b) of that directive, the meaning and scope of the concept of ‘trader’ which is used in that directive must be determined in relation to the related but diametrically opposed concept of ‘consumer’, which refers to any individual not engaged in commercial or trade activities (see, by analogy, Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 22).
- 34 As is apparent *inter alia* from Article 1 of and recital 23 in the preamble thereto, the Unfair Commercial Practices Directive seeks to provide a high common level of consumer protection by carrying out a complete harmonisation of the rules concerning unfair commercial practices, including misleading advertising by traders with regard to consumers, which harm consumers’ economic interests (see, to that effect, Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, paragraph 27).
- 35 That objective of the Unfair Commercial Practices Directive, which is to fully protect consumers against practices of that kind, relies on the assumption that, in relation to a trader, the consumer is in a weaker position, in that the consumer must be considered to be economically weaker and less experienced in legal matters than the other party to the contract (see, by analogy, *Shearson Lehman Hutton*, paragraph 18).
- 36 Accordingly the Court has already held that, for the purposes of the interpretation of that directive, the concept of consumer is of the utmost importance and that 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, Case C-122/10 *Ving Sverige* [2011] ECR I-3903, paragraphs 22 and 23, and Case C-435/11 *CHS Tour Services* [2013] ECR, paragraph 43).
- 37 In a situation such as that at issue in the main proceedings, BKK’s members, who must manifestly be regarded as consumers within the meaning of the Unfair Commercial Practices Directive, could be deceived by the misleading information circulated by that body thus preventing them from making an informed choice (see recital 14 in the preamble to that directive) and leading them to take a decision they would not have taken in the absence of such information, as envisaged by Article 6(1) of that directive. In those circumstances, whether the body at issue or the specific task it pursues are public or private is irrelevant.
- 38 In view of the above, a body such as BKK must be considered a ‘trader’ within the meaning of that directive.
- 39 The foregoing interpretation is the only one which is able to give full effect to the Unfair Commercial Practices Directive, by ensuring that, in accordance with the requirement of a high level of consumer protection, unfair commercial practices are effectively combated.
- 40 That interpretation is also consistent with the wide scope *ratione materiae* of that directive which has already been acknowledged (see, to that effect, *Mediaprint Zeitungs- und Zeitschriftenverlag*, paragraph 21).
- 41 Having regard to all of the foregoing, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted to the effect that a public law body charged with a task of public interest, such as the management of a statutory health insurance fund, falls within the persons covered by the directive.

Costs

- 42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (the ‘Unfair Commercial Practices Directive’), must be interpreted to the effect that a public law body charged with a task of public interest, such as the management of a statutory health insurance fund, falls within the persons covered by the directive.

[Signatures]