



## Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

8 September 2015\*

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court — Directive 2005/29/EC — Consumer protection — Unfair commercial practices — Price reduction — Marking or display of reference price)

In Case C-13/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 9 September 2014, received at the Court on 16 January 2015, in the criminal proceedings against

**Cdiscount SA,**

THE COURT (Sixth Chamber),

composed of S. Rodin, President of the Chamber, A. Borg Barthet (Rapporteur) and E. Levits, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

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

makes the following

### Order

- 1 The reference 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 ('Unfair Commercial Practices Directive' or 'the Directive') (OJ 2005 L 149, p. 22).
- 2 This request has been submitted in criminal proceedings against Cdiscount SA ('Cdiscount') concerning the failure to indicate the reference price of items sold by Cdiscount at a reduced price on an e-commerce website.

\* Language of the case: French.

## Legal context

### *EU law*

3 Recitals 6, 8 and 17 in the preamble to the Unfair Commercial Practices Directive state as follows:

‘(6) This Directive ... approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors. ... It neither covers nor affects the national laws on unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so ...

...

(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. ...

...

(17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.’

4 Article 1 of the Directive provides:

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

5 Article 2 of the Directive states:

‘For the purpose of this Directive:

...

(d) “business-to-consumer commercial practices” (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

...’

6 Article 3(1) of the Directive is worded as follows:

‘This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.’

7 According to Article 4 of the Unfair Commercial Practices Directive:

‘Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.’

8 Article 5 of the Directive which is entitled ‘Prohibition of unfair commercial practices’ is worded as follows:

‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

...

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.’

9 Article 6(1) of the Unfair Commercial Practices 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:

...

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

...’

*French law*

10 In accordance with Article L. 113-3 of the Consumer Code in the version applicable to the main proceedings (‘the Consumer Code’), ‘any seller of goods and any supplier of services must, by marking, labelling, notice or any other appropriate method, provide the consumer with information on prices, on any limitation of contractual liability and on special terms of sale, in accordance with the procedures laid down by decrees of the Minister responsible for economic affairs’.

11 Article R. 113-1 of that code provides:

‘A penalty by way of a fine as laid down for Class 5 minor offences is the prescribed sanction for the sale of goods or products, or the supply of services, at prices set in contravention of the decrees adopted pursuant to Article 1 of Order No 86-1243 of 1 December 1986 reproduced in Article L. 113-1, or of decrees with the same objective adopted pursuant to Order No 45-1483 of 30 June 1945 and maintained in force, as a transitional arrangement, by Article 61 of the Order of 1 December 1986 mentioned above, featuring in the annex to this code.

The same penalties apply in the event of a breach of the decrees provided for in Article L. 113-3 fixing the procedures for providing information to consumers in respect of price and specific terms of sale, and of a breach of those decrees, adopted pursuant to Order No 45-1483 of 30 June 1945, which have the same objective.

In the event of a repeat offence, the fines laid down for repeated Class 5 offences shall be applicable.’

12 In accordance with Article 1(2) of the Decree of 31 December 2008 concerning announcements of price reductions to consumers (JORF of 13 January 2009, p. 689, ‘Decree of 31 December 2008’), adopted pursuant to Article L. 113-3 of the Consumer Code, where an advertisement to consumers which includes an announcement of a price reduction ‘is made at points of sale or on e-commerce websites the labelling, marking or display of prices must show, in accordance with legislation in force, as well as the reduced price announced, the reference price as defined in Article 2’.

13 Article 2 of that decree provides:

‘1. The reference price referred to in this Decree may not exceed the lowest price actually applied by the person announcing the reduction for a similar article or service in the same retail establishment or on an e-commerce website in the 30 days directly preceding the launch of the advertisement. The reference price set in this way may be maintained where reductions in price are announced consecutively throughout a single commercial operation, for a duration of one month, starting from the date of the first announcement of the price reduction, or throughout a single sales or clearance period.

The person announcing the price reduction must be able to prove by means of bills, slips, order forms, till receipts or any other document, all the prices that he applied in practice during the relevant period, where asked to do so by the agents referred to in Article L. 450-1 of the Commercial Code.

2. The person announcing the price reduction may also use, as the reference price, the price recommended by the manufacturer or importer of the product or the maximum price resulting from a provision of the economic rules.

He must in this case be able to demonstrate to the agents referred to in Article L. 450-1 of the Commercial Code that the references are genuine and that these prices are currently available from the other distributors of that same product.

3. Where a similar item has not previously been sold at the same point of sale or on the same e-commerce website, and where a manufacturer or importer no longer recommends a price, price reduction announcements caught by Article 1 may be set by reference to the last recommended price, as long as the latter does not precede the launch of the advertisement by three years or more.

In these circumstances, the price reduction announcement shall indicate next to the reference price the mention “recommended price” along with the year to which this price relates.

Upon request by the agents referred to in Article L. 450(1) of the Commercial Code, the person announcing the price reduction must be able to show that this recommended price existed and that it has been applied.’

### **The case in the main proceedings and the question referred for a preliminary ruling**

- 14 As transpires from the decision to refer, on 16 October 2009 the services of the Gironde Direction départementale de la protection des personnes (departmental body responsible for, inter alia, competition and consumer protection) drew up an official report recording several infringements of the Decree of 31 December 2008.
- 15 Those services found that Cdiscount, which operates an e-commerce website, had not indicated in the context of reduced price promotions either the reference prices before the application of any reduction, or the price recommended by the manufacturer before the reduction. Failure by retailers to display or mark the reference price during the announcement of reduced prices amounts to a breach of the provisions of that decree and of Article L. 113-3 of the Consumer Code, punishable by a criminal penalty.
- 16 Cdiscount was summoned before the tribunal de police (Local Criminal Court) of Bordeaux which dismissed Cdiscount’s argument that the Decree of 31 December 2008 is incompatible with the provisions of the Unfair Commercial Practices Directive; it found the accused guilty of the offending conduct.
- 17 Cdiscount lodged an appeal against this decision before the Court of Appeal of Bordeaux which, by judgment of 5 July 2013, upheld the decision on the grounds that the marking or display of the reference price is not in itself a commercial practice but a way of executing the commercial practice of announcing price reductions. Therefore, this type of marking or display would not fall within the scope of the Unfair Commercial Practices Directive.
- 18 Cdiscount’s conviction having been upheld on appeal, Cdiscount brought an appeal in cassation on a point of law.
- 19 The referring court points out, firstly, that the ban imposed by the national measures before the Court applies in all cases, and secondly, that the Unfair Commercial Practices Directive sets out an exhaustive list of practices unfair in all circumstances and provides in Articles 5 to 9, that a commercial practice can be considered unfair only following a case-by-case assessment, unless it is an expressly listed practice.

20 Taking the view that the outcome of the case depends on an interpretation of the Unfair Commercial Practices Directive, the Cour de cassation decided to stay proceedings and referred the following question to the Court of Justice for a preliminary ruling:

‘Do Articles 5 to 9 of the [Unfair Commercial Practices Directive] preclude a rule which prohibits, in all circumstances and regardless of the impact they may have on the decision of the average consumer, price reductions which are not calculated against a reference price laid down by regulation?’

### **Consideration of the question referred**

21 Pursuant to Article 99 of its Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.

22 It is appropriate to apply that article in the present case.

23 By its question, the referring court asks in essence whether the Unfair Commercial Practices Directive must be interpreted as precluding provisions of national law, such as those at issue in the main proceedings, which impose a general prohibition of price reduction announcements that do not indicate the reference price when prices are marked or displayed.

24 In order to answer this question, it must first be established whether Articles 1(2) and 2 of the Decree of 31 December 2008, which apply to the facts of the main proceedings, pursue the objective of protecting consumers, so that they are liable to fall within the scope of the Unfair Commercial Practices Directive.

25 In accordance with recital 8, the Directive under consideration ‘directly protects consumer economic interests from unfair business-to-consumer commercial practices’ and guarantees, as stipulated for instance in Article 1, ‘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 interest’ (order in *INNO*, C-126/11, EU:C:2011:851, paragraph 27 and the case-law cited).

26 By contrast, in accordance with recital 6, the national laws on unfair commercial practices which harm ‘only’ competitors’ economic interests or which relate to transactions between traders are excluded from the scope of the Unfair Commercial Practices Directive (order in *INNO*, C-126/11, EU:C:2011:851, paragraph 28 and the case-law cited).

27 In this regard, it should be noted that the referring court does not take a clear view on the purpose of the Decree of 31 December 2008.

28 It is worth clarifying that it is not for the Court to rule on the interpretation of national law in the context of a reference for a preliminary ruling. This is the exclusive role of the referring court. The Court must take account, under the division of jurisdiction between the Courts of the European Union and the national courts, of the factual and legislative context, as defined in the decision for reference, in which the questions put to it are set (orders in *Koukou*, C-519/08, EU:C:2009:269, paragraph 43 and the case-law cited, and *Wamo*, C-288/10, EU:C:2011:443, paragraph 27).

29 It is therefore for the national court and not for this Court to establish whether the national provisions at issue in the main proceedings, namely, Articles 1(2) and 2 of the Decree of 31 December 2008 concerning price reduction announcements to consumers, actually pursue objectives relating to

consumer protection, in order to determine whether such provisions are liable to fall within the scope of the Unfair Commercial Practices Directive (order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 28).

- 30 Were the national court to reach such a conclusion, it would still be necessary to establish whether the announcements of price reductions which do not show the reference price when the price is marked or displayed, which is the subject of the prohibition at issue in the main proceedings, constitute commercial practices within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and are therefore subject to the rules laid down by that directive (see, to that effect, order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 29).
- 31 In that regard, it should be borne in mind that Article 2(d) of the Unfair Commercial Practices Directive gives a particularly wide definition of the concept of ‘commercial practices’ as ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’ (order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 30 and the case-law cited).
- 32 Price reductions, such as those at issue in the main proceedings, intended to induce consumers to buy products on an e-commerce website, clearly form part of an operator’s commercial strategy and relate directly to the promotion and sale of these products. It follows that these reductions amount to commercial practices within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and, consequently, come within its material scope (see, to that effect, order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 31).
- 33 That having been established, it must be ascertained whether the Unfair Commercial Practices Directive precludes a prohibition of price reduction announcements which do not contain the reference price when the price is marked or displayed, such as that provided for in Articles 1(2) and 2 of the Decree of 31 December 2008.
- 34 In that regard, it is important to bear in mind, first of all, that since the Unfair Commercial Practices Directive fully harmonises the rules relating to unfair business-to-consumer commercial practices, Member States may not adopt stricter rules than those provided for in the Directive, as expressly provided for in Article 4 thereof, even in order to achieve a higher level of consumer protection (order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 33 and the case-law cited).
- 35 Next, it must also be borne in mind that Article 5 of the Unfair Commercial Practices Directive sets out the criteria which make it possible to determine the circumstances in which a commercial practice must be considered to be unfair and therefore prohibited.
- 36 Accordingly, pursuant to Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.
- 37 Besides, Article 5(4) of the Unfair Commercial Practices Directive identifies in particular two specific types of unfair commercial practices, namely ‘misleading [commercial] practices’ and ‘aggressive commercial practices’, which respectively meet the criteria set in Articles 6 and 7 of the Directive on the one hand, and Articles 8 and 9 on the other.
- 38 Lastly, the Directive sets out, in its Annex I, 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 the Directive expressly states, only those commercial practices can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the Unfair Commercial Practices Directive (order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 37 and the case-law cited).

- 39 As regards the national provisions at issue in the main proceedings, it is undisputed that practices which consist of announcing to consumers price reductions which do not show the reference price when the price is marked or displayed do not appear in Annex I to the Unfair Commercial Practices Directive. Therefore, they may not be prohibited in all circumstances, but only after a specific assessment has determined whether the practices are unfair (see, to that effect, order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 38).
- 40 The fact however remains that Articles 1(2) and 2 of the Decree of 31 December 2008 prohibit in a general manner announcements of price reductions which do not show the reference price when the price is marked or displayed, without any need to determine by having regard to the facts of each particular case, whether the commercial transaction at issue is ‘unfair’ in the light of the criteria set out in Articles 5 to 9 of the Unfair Commercial Practices Directive (see, to that effect, order in *Wamo*, C-288/10, EU:C:2011:443, paragraph 39 and the case-law cited).
- 41 In those circumstances, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which provides for a general prohibition of announcements of price reductions, in so far as the provision pursues objectives relating to consumer protection. It is for the referring court to assess whether this is the case in the main proceedings.

### 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.

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

**Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, 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 rules, such as those at issue in the main proceedings, and in so far as these pursue objectives relating to consumer protection, which impose a general prohibition on announcements of price reductions which do not show the reference price when the price is marked or displayed, when no case-by-case assessment has been undertaken to determine whether the announcements are unfair. It is for the referring court to determine whether that is so in the case in the main proceedings.**

[Signatures]