Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 22 February 2018 [1]

Case C-632/16

Dyson Ltd,
Dyson BV
v
BSH Home Appliances NV

(Request for a preliminary ruling
from the rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp, Belgium))

(Reference for a preliminary ruling — Directive 2010/30/EU — Delegated Regulation (EU) No 665/2013 — Sale of vacuum cleaners — Energy label — Reference to the conditions under which tests resulting in the vacuum cleaner's energy classification were performed — Prohibition on altering the format or content of the energy label — Prohibition on using supplementary labels which reproduce or clarify the information on the energy label — Directive 2005/29/EC — Unfair commercial practices — Consumer protection — Article 2(d) — Definition of commercial practice — Use of the energy label — Article 3(4) — EU rules governing specific aspects of unfair commercial practices — Definition of conflict — Existence of conflict — Inapplicability of the directive — Article 7 — Misleading omission — Material information — Absence of material information — Information not required to be provided under Regulation No 665/2013)

I. Introduction

1. By decision of 6 July 2016, which was received at the Court on 7 December 2016, the rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp, Belgium) submitted to the Court a request for a preliminary ruling on the interpretation of Article 7 of Directive 2005/29/EC [2] and Delegated Regulation (EU) No 665/2013. [3]

2. The request has been made in proceedings between Dyson Ltd and Dyson BV ('together, 'Dyson'), on the one hand, and BSH Home Appliances NV ('BSH'), on the other, concerning several labels describing the energy consumption of vacuum cleaners marketed by BSH under the trade marks Siemens and Bosch, including the energy label the use of which is a requirement under Regulation No 665/2013 ('the energy label'). Dyson argues that the use of those labels by BSH without specifying

1 Original language: French.

2 Directive 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 (OJ 2005 L 149, p. 22).

3 Commission Regulation of 3 May 2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of vacuum cleaners (OJ 2013 L 192, p. 1).

that they reflect the results of tests carried out with an empty dust bag amounts to an unfair commercial practice within the meaning of Directive 2005/29. The referring court also raises the question of the compatibility with that regulation of the use by BSH of labels which reproduce the information on the energy label.

3. I propose that the Court's answer to those questions should be that Regulation No 665/2013 requires suppliers and dealers to use *exclusively* the energy label and to do so without altering its content or format. That approach is, in my view, dictated by the need to protect the objective of standardising the information supplied to end users on energy consumption so that they can easily compare the products concerned, as implemented by the provisions of Directive 2010/30/EU[4] and of that regulation.

4. In the light of my suggested interpretation of Regulation No 665/2013, I consider that Article 3(4) of Directive 2005/29 must be interpreted as meaning that that directive is not applicable in the circumstances of the main proceedings, given that the traders concerned have no leeway as regards the use of the energy label and supplementary labels which reproduce or clarify the information contained in the energy label.

II. Legal framework

A. EU law

1. Directive 2005/29

5. Recital 10 of Directive 2005/29 states:

'It is necessary to ensure that the relationship between this Directive and existing [EU] law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. … This Directive accordingly applies only in so far as there are no specific [EU] law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at [EU] level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. This Directive consequently complements the [Union] acquis, which is applicable to commercial practices harming consumers' economic interests.'

6. Article 2(d) of that directive defines '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'.

7. Under the heading 'Scope', Article 3(4) of the directive provides:

'In the case of conflict between the provisions of this Directive and other [EU] rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'

4 Directive of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJ 2010 L 153, p. 1). That directive was repealed by Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (OJ 2017 L 198, p. 1) with effect from 1 August 2017, pursuant to Article 20 thereof.

8. Article 7 of Directive 2005/29, entitled 'Misleading omissions', provides:

'1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

…

5. Information requirements established by [EU] law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.'

2. Directive 2010/30

9. Recitals 5 and 8 of Directive 2010/30 state:

'(5) The provision of accurate, relevant and comparable information on the specific energy consumption of energy-related products should influence the end-user's choice in favour of those products which consume or indirectly result in consuming less energy and other essential resources during use, thus prompting manufacturers to take steps to reduce the consumption of energy and other essential resources of the products which they manufacture. It should also, indirectly, encourage the efficient use of these products in order to contribute to the EU's 20% energy efficiency target. In the absence of this information, the operation of market forces alone will fail to promote the rational use of energy and other essential resources for these products.'

'(8) Information plays a key role in the operation of market forces and it is therefore necessary to introduce a uniform label for all products of the same type, to provide potential purchasers with supplementary standardised information on those products' costs in terms of energy and the consumption of other essential resources and to take measures to ensure that potential end-users who do not see the product displayed, and thus have no opportunity to see the label, are also supplied with this information. In order to be efficient and successful, the label should be easily recognisable to end-users, simple and concise. To this end the existing layout of the label should be retained as the basis to inform end-users about the energy efficiency of products. Energy consumption of and other information concerning the products should be measured in accordance with harmonised standards and methods.'

10. Under the heading 'Scope', Article 1(1) of that directive provides:

'This Directive establishes a framework for the harmonisation of national measures on end-user information, particularly by means of labelling and standard product information, on the consumption of energy and where relevant of other essential resources during use, and supplementary information concerning energy-related products, thereby allowing end-users to choose more efficient products.'

11. Under the heading ‘Responsibilities of Member States’, Article 3 of the directive provides:

‘Member States shall ensure that:

(a) all suppliers and dealers established in their territory fulfil the obligations laid down in Articles 5 and 6;

(b) with respect to products covered by this Directive, the display of other labels, marks, symbols or inscriptions which do not comply with the requirements of this Directive and of the relevant delegated acts is prohibited, if such display is likely to mislead or confuse end-users with respect to the consumption of energy or, where relevant, other essential resources during use;

…’

12. Article 4 of Directive 2010/30, entitled ‘Information requirements’, provides:

‘Member States shall ensure that:

(a) information relating to the consumption of electric energy, other forms of energy and where relevant other essential resources during use, and supplementary information is, in accordance with delegated acts under this Directive, brought to the attention of end-users by means of a fiche and a label related to products offered for sale, hire, hire-purchase or displayed to end-users directly or indirectly by any means of distance selling, including the Internet;

…’

13. Article 10 of Directive 2010/30 confers power on the European Commission to adopt delegated acts in order to lay down the details relating to the label and fiche for each type of product.

3. Regulation No 665/2013

14. According to recital 5 of Regulation No 665/2013, which was adopted on the basis of, in particular, Articles 10 and 11 of Directive 2010/30, that regulation is to specify a uniform design and content for the energy label to be affixed to vacuum cleaners.

15. Under the heading ‘Subject matter and scope’, Article 1(1) of that regulation provides:

‘This Regulation establishes requirements for the labelling and the provision of supplementary product information for electric mains-operated vacuum cleaners, including hybrid vacuum cleaners.’

16. Under the heading ‘Responsibilities of suppliers and timetable’, Article 3(1) of the regulation provides:

‘Suppliers shall ensure that from 1 September 2014:

(a) each vacuum cleaner is supplied with a printed label in the format and containing the information set out in Annex II;

…’

17. Under the heading 'Responsibilities of dealers', Article 4 of Regulation No 665/2013 provides:

'Dealers shall ensure that from 1 September 2014:

(a) each model presented at the point of sale bears the label provided by suppliers in accordance with Article 3 displayed on the outside of the appliance or hung on it, in such a way as to be clearly visible;

…'

18. Annex II to that regulation, entitled 'The label', prescribes the design of the energy label to be affixed to vacuum cleaners and lists the information to be included on the label.

B. Belgian law

19. Under Article VI.97(2) of the Wetboek economisch recht (Code on Economic Law, *Moniteur belge*, 30 December 2013, p. 103506), which transposes Article 6(1)(a) of Directive 2005/29, a commercial practice will be regarded as misleading if it contains false information and is therefore untruthful or in any way, including by its overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to the main characteristics of the product, including the results and material features of tests or checks carried out on the product, and causes or is likely to cause the average consumer in either of those cases to take a transactional decision that he would not have taken otherwise.

20. Article VI.105(1)(a) of that code prohibits any business advertisement which, all factors considered, in any way deceives or is likely to deceive the person to whom it is directed or whom it reaches, including by its presentation or the omission of information, with regard to, inter alia, the characteristics of the goods, including the results and material features of tests or checks carried out on the goods or services.

21. Pursuant to Article VI.99(1) of the code, which transposes Article 7(1) of Directive 2005/29, a commercial practice is to be regarded as a misleading omission if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

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

22. Dyson markets vacuum cleaners which operate without a dust bag. BSH markets conventional vacuum cleaners which operate with a dust bag under the trade marks Siemens and Bosch.

23. Dyson challenges the energy labelling of the vacuum cleaners marketed by BSH on the following grounds. It claims that the labelling reflects the results of energy efficiency tests carried out with an empty dust bag. According to Dyson, under normal conditions of use, the pores of the bag become clogged when it fills with dust so that the motor must generate more power to maintain the same suction. Dyson therefore argues that the energy labelling of those vacuum cleaners misleads consumers. It also claims that the vacuum cleaners marketed by Dyson, which operate without a dust bag, are not affected by that loss of energy efficiency under normal conditions of use.

24. For those reasons, on 20 October 2015, Dyson brought an action against BSH before the rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp) comprising two parts.

25. First, Dyson submits that the advertising statements listed below are inaccurate and mislead consumers as regards the efficiency of the Siemens vacuum cleaner VSQ8POWER4 and all other BSH models with the same technical features. On that basis, it contends that BSH infringed Article VI.97(2) of the Code on Economic Law and engaged in an unfair commercial practice for the purpose of Article VI.105(1)(a) of that code.

26. The following advertising statements are covered by the first part of the action:

– the energy label indicating class A for energy efficiency and cleaning performance on carpet;

– the green energy label indicating class A for energy efficiency;

– the carpet label indicating class A for cleaning performance on carpet;

– the AAAA label on the packing box and on the vacuum cleaner itself;

– the orange AAAA label on the packing box;

– the eco-label on the packing box; and

– the words 'HEPA filter'.

27. Secondly, Dyson submits that BSH is misleading consumers by omission for the purpose of Article VI.99(1) of the Code on Economic Law by failing to make clear that those advertising statements are based on the results of tests conducted with an empty dust bag.

28. The referring court states that, at the request of BSH, the VDE Prüf- und Zertifizierungsinstitut (VDE Testing and Certification Institute) carried out a series of tests on 15 January 2015, 29 October 2015 and 2 November 2015 demonstrating that the Siemens vacuum cleaner VSQ8POWER4 indeed qualifies for energy efficiency class A. The court also states that, in consequence, Dyson cannot be supported in its argument that BSH is wrong to claim A labels for that vacuum cleaner.

29. In the light of the results of those tests, the referring court considers that the resolution of the dispute in the main proceedings gives rise to two issues concerning, first, the energy label, the use of which is a requirement under Regulation No 665/2013, and, secondly, the other supplementary labels used by BSH.

30. As regards the energy label, the question which arises is whether BSH is misleading consumers for the purpose of Article 7 of Directive 2005/29 by failing to mention that the tests were carried out with an empty dust bag. The referring court agrees with Dyson in its contention that those tests do not allow the energy efficiency of vacuum cleaners operating without a dust bag to be compared against those which do. However, the court notes that BSH strictly complied with the provisions of Regulation No 665/2013. Furthermore, it enquires whether the addition of such a reference would be compatible with the provisions of that regulation which establish the format and content of the label.

31. The referring court also states that BSH used several symbols not provided for in Regulation No 665/2013, such as:

– the green label stating 'Energy A', indicating that the vacuum cleaner's overall score placed it in class A with regard to energy efficiency;

– the orange label stating 'AAAA Best rated: A in all classes', indicating that the vacuum cleaner's score placed it in class A with regard to cleaning performance on both carpet and hard floors, energy efficiency and dust re-emission;

– the black label with the image of a carpet stating ‘class A Performance’, indicating that the vacuum cleaner’s score placed it in class A with regard to dust pick-up on carpet.

32. The referring court notes that those labels reproduce information provided by the energy label. Accordingly, it enquires whether the use of such labels is compatible with Regulation No 665/2013, in the light of the risk that they might mislead or confuse consumers as regards energy consumption.

33. In those circumstances, the rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Can strict compliance with [Regulation No 665/2013] (without supplementing the [energy label] as defined in Annex II thereto with information about the test conditions which lead to the classification in an energy efficiency class in accordance with Annex I) be regarded as a misleading omission within the meaning of Article 7 of [Directive 2005/29]?

(2) Does [Regulation No 665/2013] preclude supplementing the [energy] label with other symbols which communicate the same information?’

IV. Procedure before the Court

34. The reference for a preliminary ruling was lodged at the Court Registry on 7 December 2016.

35. Written observations were submitted by Dyson, BSH, the Belgian, German and Italian Governments and the Commission.

36. Dyson, BSH, the Belgian Government and the Commission appeared at the hearing on 26 October 2017 to make oral submissions.

V. Assessment

37. By its first question, the referring court seeks to ascertain whether the use of the energy label in accordance with Regulation No 665/2013, without specifying the conditions under which the tests that led to the vacuum cleaner’s energy classification were performed, may amount to a misleading omission within the meaning of Article 7 of Directive 2005/29.

38. In my view, the first question comprises two separate parts. In the first place, it is necessary to determine whether Regulation No 665/2013 precludes the information on the energy label being clarified on that label or a supplementary label for the purpose of mentioning the conditions under which the tests were performed. Only then, in the second place — and having regard to the interpretation of that regulation — will it be necessary to examine whether the use of the energy label is likely to constitute a misleading omission within the meaning of Article 7 of Directive 2005/29.

39. Furthermore, the second question seeks to determine whether Regulation No 665/2013 prevents the energy label being accompanied by supplementary labels which reproduce the information contained in the energy label. In my view, the second question and the first part of the first question may usefully be considered together since they both relate to the interpretation of that regulation.

40. In the light of the foregoing, the remainder of my Opinion will be divided into two sections, one dealing with the interpretation of Regulation No 665/2013 and the other with that of Directive 2005/29.

A. Interpretation of Regulation No 665/2013

41. By the first part of its first question and by its second question, the referring court asks, in essence, whether Regulation No 665/2013 must be interpreted as preventing, first, the content or format of the energy label being altered and, secondly, the energy label being accompanied by supplementary labels which reproduce or clarify the information contained in the energy label, particularly for the purpose of mentioning the conditions under which the tests that led to the vacuum cleaner's energy classification were performed.

42. I shall examine those two issues separately below.

43. Before undertaking that examination, I should point out that the rules on the energy labelling of products have, in spite of their long-standing nature,[5] been the subject of relatively few decisions by the EU Courts.[6] In my view, neither that case-law nor the case-law on the rules relating to the energy performance of buildings[7] contains anything of relevance for the purpose of answering the questions submitted in the present case.

44. As regards, in particular, the action for annulment brought by Dyson against Regulation No 665/2013, it is settled case-law that measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.[8] However, in this case, the Court is called upon not to examine the lawfulness of Regulation No 665/2013, but rather to determine whether that regulation and/or Directive 2005/29 preclude the use of the energy label and/or supplementary labels in the circumstances of the main proceedings. Since the action for annulment brought by Dyson is pending before the General Court,[9] the Court must, in the context of this case, start from the premiss that Regulation No 665/2013 is lawful.

1. Prohibition on altering the content or format of the energy label

45. In order to answer the first question, it is necessary to examine whether it is open to manufacturers and dealers of vacuum cleaners to alter the content or format of the energy label, particularly for the purpose of mentioning the conditions under which the tests that led to the vacuum cleaner's energy classification were performed. In the context of the main proceedings, the existence of such leeway might mean that it is possible for BSH to state on the energy label itself that the information contained in it reflects the results of tests carried out with an empty dust bag, in accordance with Dyson's wishes.

5 The basic scheme was initially established by Council Directive 79/530/EEC of 14 May 1979 on the indication by labelling of the energy consumption of household appliances (OJ 1979 L 145, p. 1), which was replaced, in turn, by Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances (OJ 1992 L 297, p. 16), Directive 2010/30 and Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (OJ 2017 L 198, p. 1).

6 Judgments of 12 February 1998, *Commission* v *Italy* (C-139/97, EU:C:1998:58); of 12 December 2002, *Commission* v *Council* (C-281/01, EU:C:2002:761); of 18 November 2004, *Commission* v *Luxembourg* (C-79/04, not published, EU:C:2004:736); of 3 April 2014, *Rätzke* (C-319/13, EU:C:2014:210); of 11 November 2015, *Dyson* v *Commission* (T-544/13, EU:T:2015:836); and of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357).

7 That scheme was established by Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings (OJ 2003 L 1, p. 65), replaced by Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJ 2010 L 153, p. 13). See judgments of 17 January 2008, *Commission* v *Greece* (C-342/07, not published, EU:C:2008:25); of 29 October 2009, *Commission* v *Luxembourg* (C-22/09, not published, EU:C:2009:684); of 13 June 2013, *Commission* v *Italy* (C-345/12, not published, EU:C:2013:396); of 16 January 2014, *Commission* v *Spain* (C-67/12, EU:C:2014:5); and of 2 March 2017, *Commission* v *Greece* (C-160/16, not published, EU:C:2017:161).

8 Judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 52 and the case-law cited).

9 After setting aside the judgment of the General Court of 11 November 2015, *Dyson* v *Commission* (T-544/13, EU:T:2015:836), the Court referred the case back to the General Court. See judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357).

46. However, I believe that the regulation does not give manufacturers and dealers any leeway whatsoever in terms of the format and content of the energy label.

47. As is clear from its title, Regulation No 665/2013 supplements Directive 2010/30 with regard to the energy labelling of vacuum cleaners. Under Article 4(a) of that regulation, dealers are to ensure that each vacuum cleaner model bears the energy label provided by the supplier and drawn up in accordance with Annex II to that regulation in such a way as to be 'clearly visible'.

48. Annex II to Regulation No 665/2013 comprises three sections headed 'Label 1', 'Label 2' and 'Label design', respectively. The 'Label 2' section is not relevant to the main proceedings since it applied only from 1 September 2017 onwards under Article 3(2) of that regulation.[10]

49. In addition, each of those three sections is divided into three subsections relating to 'general purpose vacuum cleaners', 'hard floor vacuum cleaners' and 'carpet vacuum cleaners', respectively. In the absence of information on the classification of the model at issue in the main proceedings, reference must be made to points 1.1 and 3.1 of that annex, concerning 'general purpose vacuum cleaners'. In any event, I note that the minor differences between those subsections are irrelevant for the purpose of this case.[11]

50. Point 1.1 of Annex II to Regulation No 665/2013 lists the information that the energy label must contain, namely the supplier's name or trade mark, the model identifier, the energy efficiency class, the average annual energy consumption, the dust re-emission class, the carpet cleaning performance class, the hard floor cleaning performance class and the sound power level.

51. It also states that the design of the energy label must be in accordance with point 3.1 of the annex.[12] That point establishes in a clear and detailed manner the design of the energy label to be provided by suppliers and affixed by dealers of vacuum cleaners. It defines inter alia the minimum dimensions of the label and its constituent elements as well as the colours and fonts to be used for each of those elements.

52. In my view, it follows from the foregoing that suppliers and dealers of vacuum cleaners have no leeway whatsoever as to the use and drawing-up of the energy label. Its use is compulsory. Moreover, the label must comply with all the requirements set out in Annex II to the regulation as regards both its format and the information to be included in it. The only two qualifications in that regard relate to the possibility of also using a copy of the eco-label awarded under Regulation (EC) No 66/2010[13] (point 1.1 of the annex)[14] and the use of an energy label that is larger than the required minimum size (point 1.3 of the annex).

53. In other words, by adopting Regulation No 665/2013, the EU legislature made a deliberate choice as to the information — of a necessarily limited nature — to be provided to consumers by way of the energy label, which does not include the methodology used for measuring the energy performance of vacuum cleaners.

10 Dyson's action in the main proceedings was brought on 20 October 2015. See point 24 of this Opinion.

11 The energy label for 'general purpose vacuum cleaners' is to mention both the carpet cleaning performance class and the hard floor cleaning performance class (point 1.1(VI) and (VII)). The energy label for 'hard floor vacuum cleaners' is to include the hard floor cleaning performance class and an exclusion sign in place of the carpet cleaning performance class (paragraph 1.2(VI) and (VII)). Conversely, the energy label for 'carpet vacuum cleaners' is to include the carpet cleaning performance class and an exclusion sign in place of the hard floor cleaning performance class (point 1.3(VI) and (VII)). Also see points 3.2 and 3.3 specifying the format of the exclusions signs.

12 I note that the references to the designs set out in section 3 of Annex II to Regulation No 665/2013, which appear in sections 1 and 2 of that annex, were the subject of a corrigendum (OJ 2017 L 59, p. 40) in so far as they wrongly mentioned section 4 of that annex, which does not exist.

13 Regulation of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ 2010 L 27, p. 1).

14 See point 64 of this Opinion.

54. It follows from the foregoing that Regulation No 665/2013 must be interpreted as meaning that it prevents the content or format of the energy label from being altered, particularly for the purpose of specifying the conditions under which the tests that led to the vacuum cleaner's energy classification were performed.

55. It remains to be examined whether such information could be provided on a supplementary label accompanying the energy label.

2. Prohibition on using supplementary labels which reproduce or clarify the information on the energy label

56. By its second question, the referring court essentially asks whether Regulation No 665/2013 must be interpreted as preventing the energy label being accompanied by supplementary labels which reproduce the information contained in the energy label. In the circumstances of the main proceedings, that question is directed at several symbols used by BSH even though they are not provided for in that regulation, namely a green label stating 'Energy A', an orange label stating 'AAAA Best rated: A in all classes' and a black label with the image of a carpet and the words 'class A Performance'. [15]

57. It is also necessary, in order to answer the first question, [16] to determine whether that regulation prevents the energy label being accompanied by a supplementary label stating that the information contained in it reflects the results of tests carried out with an empty dust bag, in accordance with Dyson's wishes. The purpose of that supplementary label is not to *reproduce* the information on the energy label, but rather to *clarify* that information.

58. My view is that these two issues should be resolved in the same way, namely that Regulation No 665/2013, read in conjunction with Directive 2010/30, must be interpreted as precluding the use of supplementary labels which reproduce or clarify the information on the energy label.

59. That interpretation follows, in the first place, from the actual purpose of the system established by that directive, as is apparent from Article 1(1) thereof, namely to *standardise* the information provided to end users with respect to the consumption of energy and other essential resources, in order to facilitate an easy comparison of the products concerned. [17] Allowing manufacturers or dealers to use supplementary labels which reproduce or clarify the information on the energy label would call in question that standardisation. [18]

60. That is particularly the case since permitting the use of such labels would be likely to create a game of one-upmanship between vacuum cleaner manufacturers, who would be able to adorn their models with a wide range of different supplementary labels, thereby undermining the standardisation of information implemented by Directive 2010/30 and Regulation No 665/2013.

61. In the second place, that interpretation is also apparent from Article 3(1)(b) of Directive 2010/30, which requires Member States to prohibit the use of other labels that are inconsistent with that directive or delegated acts where such use could mislead or confuse end users with respect to the consumption of energy.

15 See points 31 and 32 of this Opinion.

16 The prohibition on using such supplementary labels will inevitably lead to the existence of 'conflict' within the meaning of Article 3(4) of Directive 2005/29. See points 90 to 93 of this Opinion.

17 Also see recitals 5 and 8 of Directive 2010/30.

18 Also see recital 5 of Regulation No 665/2013.

62. That is precisely the case as regards labels which reproduce or clarify the information on the energy label. The possible presence of such supplementary labels could, to my mind, confuse end users with respect to the individual energy performance of vacuum cleaners which bear such labels and those which do not.

63. By way of illustration, the use by BSH of an orange label stating 'AAAA Best rated: A in all classes' in the circumstances of the main proceedings [19] is likely to prompt end users to believe that the model in issue performs better than a model without such a supplementary label. Similarly, a supplementary label specifying the conditions under which the energy classification tests were performed, which BSH is required to use under Article 7 of Directive 2005/29, might result in end users believing that the model in issue performs less well than a model which does not bear such a label.

64. In the third place, I also find that this interpretation is borne out by Annex II to Regulation No 665/2013. The only exception to the obligation to use the energy label is set out in point 1.1 of that annex, which provides that, by way of derogation, a copy of the eco-label awarded under Regulation No 66/2010 may be added. I can conclude *a contrario* from the foregoing that Regulation No 66/2010 precludes the use of any *other* supplementary label which reproduces or specifies the information on the energy label. [20]

65. I should make clear that my proposed interpretation is exclusively concerned with information falling within the scope of Regulation No 665/2013. Clearly, that regulation does not preclude the provision of information which falls outside its scope such as, for example, the selling price, place of manufacture or duration of the warranty. By contrast, it does preclude, in my view, the addition of labels which reproduce or clarify the information on the energy label, such as a label stating the conditions under which the energy classification tests were performed.

66. I should add, for the sake of completeness, that the above approach does not imply that the tests conducted with a view to ensuring standardised labelling as provided for in Regulation No 665/2013 reflect the normal conditions of use of vacuum cleaners, whether or not they operate with a dust bag. Furthermore, all steps taken towards standardisation, such as those relating to such labelling, necessarily involve a simplification of reality, as BSH essentially argued. [21] If that simplification is contrary to higher-ranking provisions of EU law, it is possible to challenge their lawfulness before the EU Courts, just as in the action for annulment brought against that regulation by Dyson. [22]

67. However, in no way can the existence of such a simplification call in question the standardisation of energy labelling implemented by Directive 2010/30 and, with regard to vacuum cleaners, by Regulation No 665/2013, by allowing the undertakings concerned to alter the format of the energy label or use supplementary labels which reproduce or clarify the information contained in the energy label.

68. For those reasons, I propose that the Court should answer the second question referred for preliminary ruling as follows: Regulation No 665/2013, read in the light of Directive 2010/30, must be interpreted as preventing, first, the content or format of the energy label being altered and, secondly, the energy label being accompanied by supplementary labels which reproduce or clarify the information contained in the energy label, particularly for the purpose of mentioning the conditions under which the tests that led to the vacuum cleaner's energy classification were performed.

19 See point 31 of this Opinion.

20 In the main proceedings, BSH affixed the eco-label to the packaging box: see point 26 of this Opinion.

21 It appears that the referring court considers to have been established that the tests performed with empty dust bags do not allow account to be taken of the loss in performance sustained by vacuum cleaners operating with a bag, such as those marketed by BSH, when the bag fills up with dust. See point 30 of this Opinion. Nevertheless, BSH submitted that the tests conducted on bagless vacuum cleaners, such as those marketed by Dyson, also do not allow account to be taken of the loss in performance sustained by those vacuum cleaners when they fill up with dust.

22 See judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357), setting aside the judgment of 11 November 2015, *Dyson* v *Commission* (T-544/13, EU:T:2015:836).

69. In the context of the answer to be given to the first question, it remains for me to consider whether the provisions of Directive 2005/29 create an obligation to state that the information on the energy label reflects the results of tests conducted with an empty dust bag.

B. Interpretation of Directive 2005/29

70. The first question submitted by the referring court seeks to ascertain whether the use of the energy label in accordance with Regulation No 665/2013, without specifying the conditions under which the tests that led to the vacuum cleaner's energy classification were performed, may amount to a misleading omission within the meaning of Article 7 of Directive 2005/29.

71. In my view, if the use of that label constitutes a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29 (section 1), Article 3(4) thereof must be interpreted as meaning that the directive is not applicable to the specific aspects of unfair commercial practices governed by Regulation No 665/2013, since the latter does not leave any leeway to the traders concerned (section 2). In the alternative, I consider there to be no misleading omission within the meaning of Article 7 of Directive 2005/29 where no reference is made to the conditions under which the tests that led to the vacuum cleaner's energy classification were performed, since the provision of such information is not a requirement under that regulation (section 3).

1. Existence of a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29

72. BSH cited the lack of leeway as regards the use and drawing-up of the energy label, described in the previous section, to argue that the use of that label is not a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29. Therefore, the directive is not applicable in the context of the main proceedings.

73. According to that reasoning, the words 'by a trader' used in that provision presuppose the existence of leeway which traders may take advantage of in order to influence consumers. Furthermore, the use of that label is not 'directly connected with the promotion, sale or supply of a product to consumers' within the meaning of that provision; instead, it is the result of an information obligation imposed on the trader, including where the information shown on the label is unfavourable to his interests because of the poor results obtained by the vacuum cleaner.

74. I am not convinced by that line of reasoning.

75. It is settled case-law that 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. [23]

23 The Court has included the following within that 'particularly wide' scope *ratione materiae*: combined offers (judgment of 23 April 2009, *VTB-VAB and Galatea*, C-261/07 and C-299/07, EU:C:2009:244, paragraphs 49 et seq.); promotional campaigns linking free participation in a lottery to the purchase of goods or services (judgments of 14 January 2010, *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2010:12, paragraphs 36 et seq., and of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, EU:C:2010:660, paragraph 17 et seq.); the indication in a consumer credit agreement of an Annual Percentage Rate lower than the real rate (judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraphs 38 et seq.); the publication of information relating to a clearance sale of goods in a shop (judgment of 17 January 2013, *Köck*, C-206/11, EU:C:2013:14, paragraph 26 et seq.); the publication of information relating to exclusivity enjoyed by a travel agency (judgment of 19 September 2013, *CHS Tour Services*, C-435/11, EU:C:2013:574, paragraphs 27 et seq.); advertising for medicinal products (judgment of 16 July 2015, *Abcur*, C-544/13 and C-545/13, EU:C:2015:481, paragraphs 74 et seq.); advertising for oral and dental care services (judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraphs 23 et seq.); and debt collection activities (judgment of 20 July 2017, *Gelvora*, C-357/16, EU:C:2017:573, paragraphs 19 et seq.). By contrast, the Court has excluded from the scope *ratione materiae* the publication of press articles of a non-promotional nature (judgment of 17 October 2013, *RLvS*, C-391/12, EU:C:2013:669, paragraphs 37 et seq.).

76. In the light of that case-law, I consider that the position taken by BSH is vitiated by excessive formalism. The provision of information relating, in particular, to the energy efficiency and cleaning performance [24] of a vacuum cleaner displayed for sale to consumers indubitably constitutes a 'commercial communication including advertising and marketing, by a trader, directly connected with the … sale or supply of a product to consumers' within the meaning of Article 2(d) of Directive 2005/29.

77. It is apparent from the very wording of that provision that the concept of 'commercial communication' is broader than that of 'advertising'. Consequently, I see no reason why such communications cannot include information which is unfavourable to the trader's interests, contrary to BSH's arguments. [25] Furthermore, it is irrelevant that Regulation No 665/2013 made such communications compulsory. If the person engaging in a commercial practice must, by definition, be a trader, the fact that he may have acted spontaneously or in order to comply with EU law is irrelevant

78. I infer from the foregoing that, contrary to BSH's submissions, the use of the energy label is a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29.

79. I would add that the argument put forward by BSH essentially raises the question of the relationship between Regulation No 665/2013 and Directive 2005/29. In my view, that question must be examined by interpreting Article 3(4) of Directive 2005/29, the purpose of which is specifically to regulate conflict between that directive and the EU rules governing specific aspects of unfair commercial practices.

2. The existence of 'conflict' within the meaning of Article 3(4) of Directive 2005/29

80. Under the rule of primacy laid down in Article 3(4) of Directive 2005/29, the other EU rules governing specific aspects of unfair commercial practices are to prevail, 'in case of conflict', over that directive.

81. The interpretation of that provision is of considerable strategic importance. Directive 2005/29 is intended to apply to all unfair commercial practices, irrespective of the sector of activity concerned, in order to ensure a high level of consumer protection. [26] In accordance with the words used by the Commission in its Communication of 14 March 2013, '[Directive 2005/29] provides for a high level of consumer protection in all sectors. It works as a safety net which fills the gaps which are not regulated by other EU sector-specific rules'. [27]

82. However, each situation in which Directive 2005/29 is declared to be inapplicable pursuant to Article 3(4) thereof runs the risk of breaching the safety net established by that directive where the other EU rules — those with primacy — do not guarantee as high a level of consumer protection.

83. That risk seems to me to call for a strict, or prudent, approach to the interpretation of that provision.

24 See point 50 of this Opinion.

25 I should add that the decision of a trader to withhold certain information relating to a product offered for sale to consumers may also constitute a commercial practice within the meaning of Article 2 (d) of Directive 2005/29.

26 See, in that regard, the objective set out in Article 1 of Directive 2005/29, the particularly broad definitions laid down in Article 2(a) to (d) thereof, as well as the scope as is apparent from Article 3(1) of that directive.

27 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Unfair Commercial Practices Directive, COM(2013) 138 final.

84. In my view, having regard to that requirement of strict interpretation, it must be inferred from the wording of that provision that the inapplicability of Directive 2005/29 is subject to the fulfilment of two conditions. The first condition relates to the existence of 'other [EU] rules regulating specific aspects of unfair commercial practices'. The second condition relates to the existence of 'conflict' between those other rules and the provisions of that directive. [28]

85. Furthermore, if those two conditions are fulfilled, the inapplicability of Directive 2005/29 will be limited to the specific aspects of unfair commercial practices governed by those other rules, in accordance with the wording of Article 3(4) of that directive. Thus, in the circumstances of the main proceedings, that directive, particularly Articles 6 and 7 thereof, are fully applicable to all the aspects not governed by Regulation No 665/2013, [29] even in the case of conflict with that regulation.

86. In this case, it is necessary to determine, in the first place, whether Regulation No 665/2013 governs specific aspects of unfair commercial practices.

87. In that regard, I must point out that the primary objective of standardised labelling as provided for in Directive 2010/30, on which that regulation is based, is not to protect consumers against such practices but rather to protect the environment by reducing the consumption of energy and other essential resources in the European Union. [30]

88. Nonetheless, the means employed by Directive 2010/30 in order to achieve that objective comprise an obligation to provide information to consumers by means of a uniform label, in accordance with Articles 1, 4(a), 5(a) and 6 of that directive. So far as concerns vacuum cleaners, the format and content of the energy label are strictly defined in Annex II to Regulation No 665/2013. [31]

89. However, as I have stated above, the use of the energy label is a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29. [32] Therefore, by requiring suppliers and dealers to use a label containing standardised information relating to, in particular, the energy efficiency of vacuum cleaners, that regulation governs specific aspects of unfair commercial practices within the meaning of Article 3(4) of Directive 2005/29, even though that is not its primary objective.

90. In the second place, it is necessary to ascertain whether there is 'conflict' between the provisions of Regulation No 665/2013 and those of Directive 2005/29. In my view, having regard to the strict approach that should be taken when interpreting Article 3(4) of that directive, [33] this condition calls for an assessment as to whether the traders concerned are able to reconcile the obligations arising from those instruments, or, in other words, whether it is impossible for those obligations to be fulfilled simultaneously. Consequently, I consider that a mere 'overlap' between the scope of Directive 2005/29 and that of other rules of EU law is not sufficient to exclude the applicability of that directive to the aspects of unfair commercial practices governed by those rules. [34]

28 I note that the Court expressly identified those two conditions in its judgment of 16 July 2015, *Abcur* (C-544/13 and C-545/13, EU:C:2015:481, paragraphs 79 to 81). However, the Court did not explicitly establish the existence of conflict in its judgment of 7 July 2016, *Citroën Commerce* (C-476/14, EU:C:2016:527, paragraphs 42 to 46). For reasons of legal certainty, I think it is nonetheless preferable to examine those two conditions separately and expressly.

29 See point 65 of this Opinion.

30 See recitals 5 and 8 of Directive 2010/30.

31 See points 47 to 52 of this Opinion.

32 See points 75 to 78 of this Opinion.

33 See points 81 to 84 of this Opinion.

34 The requirement for there to be 'conflict' must be distinguished from settled case-law that all national measures in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of primary law. In that scenario, a mere 'overlap' is sufficient to exclude the applicability of provisions of primary law. See, in particular, judgments of 5 October 1977, *Tedeschi* (5/77, EU:C:1977:144, paragraphs 33 to 35); of 12 November 2015, *Visnapuu* (C-198/14, EU:C:2015:751, paragraph 40); and of 7 September 2017, *Eqiom and Enka* (C-6/16, EU:C:2017:641, paragraph 15). That case-law is, however, irrelevant for the purpose of interpreting Article 3(4) of Directive 2005/29. The scope of the case-law cited above is limited to a specific situation, namely where the scope of provisions of primary law is defined by an instrument of secondary law. In addition, the wording of the abovementioned provision requires the existence of 'conflict', not a mere overlap.

91. That said, a finding that such conflict exists must necessarily be made where the 'other EU rules' leave no leeway to the traders concerned. In such a situation, any additional obligations which may arise from the provisions of Directive 2005/29 would necessarily conflict with the obligations provided for in those other rules.

92. In the context of this case, I have set out the reasons for my view that Regulation No 665/2013 leaves no leeway to manufacturers and dealers as regards the use of the energy label or supplementary labels.[35] Let us suppose, for the sake of argument, that the failure to state the conditions under which the tests were performed actually constitutes a misleading omission within the meaning of Article 7 of Directive 2005/29, as Dyson maintains. In that scenario, a finding of conflict within the meaning of Article 3(4) of that directive would have to be made, since Regulation No 665/2013 does not permit the inclusion of such information on the energy label or a supplementary label.

93. Consequently, without it being necessary to determine whether a misleading omission within the meaning of Article 7 of Directive 2005/29 exists, Article 3(4) of that directive must be interpreted as meaning that the directive is not applicable to the specific aspects of unfair commercial practices governed by EU rules that leave no leeway to the traders concerned, such as the obligation to use the energy label and the prohibition on using supplementary labels which reproduce or clarify the information contained in the energy label.

94. For the sake of completeness, I would also like to consider an argument put forward at the hearing to the effect that Article 3(4) of Directive 2005/29 must be interpreted as not covering conflict between that directive and a non-legislative act, such as Regulation No 665/2013. I am not persuaded by that argument. Article 3(4) of Directive 2005/29 covers all 'other … rules' of EU law without distinction based on the nature of the measure containing those rules. If the legislature had intended to draw such a distinction, it would simply have stated that those other rules must be 'legislative' in nature, taking the wording of Article 290 TFEU as a guide.[36]

3. No 'misleading omission' within the meaning of Article 7 of Directive 2005/29

95. In the alternative, if the Court were to rule that Directive 2005/29 is applicable to the aspects of commercial practices governed by Regulation No 665/2013, I do not think that the failure to mention the conditions under which the tests that led to the vacuum cleaner's energy classification were performed would constitute a misleading omission within the meaning of Article 7 of that directive, since the provision of such information is not a requirement under the regulation.

96. An omission can only be misleading within the meaning of that provision if it relates to 'material' information that the average consumer needs, according to the context, to take an informed transactional decision.

97. Pursuant to Article 7(5) of Directive 2005/29, information that is required under Regulation No 665/2013, namely the information on the energy label, is to be regarded as 'material'. The question arising here is not, however, governed by Article 7(5) of that directive, since it relates to information that is *not required* under the regulation, namely details of the conditions under which the energy performance tests were carried out.

35 See points 54 and 68 of this Opinion.

36 I should make clear that recital 10 of Directive 2005/29 does nothing to change my view in that regard. As follows from the case-law of the Court, while the preamble to an EU measure may explain the latter's content, it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question (see, in particular, judgment of 20 December 2017, *Acacia and D'Amato*, C-397/16 and C-435/16, EU:C:2017:992, paragraph 40). Moreover, no conclusions can be drawn from the wording used in that recital, which refers without distinction to 'EU law provisions' (without stating the nature of the measure) and 'EU law'.

98. In that connection, as BSH and the German Government essentially pointed out, I consider that when the EU legislature adopted Regulation No 665/2013, it drew up an exhaustive list of the information to be regarded as material within the scope of that regulation, information which must, therefore, be provided to consumers by way of the energy label. My view is that national courts are not free to call in question that policy choice of the EU legislature by deciding, on a case-by-case basis, that information not required under that regulation is 'material' in the light of Directive 2005/29. Any other interpretation is likely to frustrate efforts to standardise information on energy consumption so that the products concerned can be easily compared. [37]

99. Having regard to all the above considerations, I propose that the Court should give the following answer to the first question: Article 3(4) of Directive 2005/29 must be interpreted as meaning that that directive is not applicable to the specific aspects of unfair commercial practices governed by EU rules that do not leave any leeway to the traders concerned, such as the obligation to use the energy label and the prohibition on the use of supplementary labels which reproduce or clarify the information contained in the energy label.

VI. Conclusion

100. In the light of the foregoing, I propose that the Court should give the following answers the questions referred to it for a preliminary ruling by the rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp, Belgium):

(1) Article 3(4) 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 must be interpreted as meaning that that directive is not applicable to the specific aspects of unfair commercial practices governed by EU rules that do not leave any leeway to the traders concerned, such as the obligation to use the energy label, laid down in Commission Delegated Regulation (EU) No 665/2013 of 3 May 2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of vacuum cleaners, and the prohibition on the use of supplementary labels which reproduce or clarify the information contained in the energy label.

(2) Regulation No 665/2013, read in conjunction with Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, must be interpreted as preventing, first, the content or format of the energy label provided for in that regulation being altered and, secondly, the energy label being accompanied by supplementary labels which reproduce or clarify the information contained in the energy label, particularly for the purpose of mentioning the conditions under which the tests that led to the vacuum cleaner's energy classification were performed.

37 See points 59 and 60 of this Opinion. I should point out that this attempt at harmonisation would be undermined in two ways: first, by the risk of differences between Member States in the interpretation of Article 7 of Directive 2005/29, particularly as regards the classification of information as 'material', and secondly, by the risk of differences in the information provided by traders in Member States where that provision is interpreted as obliging them to provide information not required under Regulation No 665/2013.