



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
SZPUNAR  
delivered on 31 May 2018<sup>1</sup>

**Case C-105/17**

**Komisia za zashtita na potrebitelite**

**v**

**Evelina Kamenova,**

**interested party:**

**Okrazhna prokuratura — Varna**

(Request for a preliminary ruling from the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria))

(Reference for a preliminary ruling — Consumer protection — Unfair business-to-consumer commercial practices — Online sales — Concept of ‘trader’)

### I. Introduction

1. Online searches for goods and services are part of our daily lives and will undoubtedly henceforth be part of our culture. The number of online sales platforms has been steadily growing and, in 2016, 55% of EU citizens aged between 16 and 74 years old ordered goods and services online for their personal use.<sup>2</sup> The purpose of these platforms is to act as an online intermediary or broker. They enable direct contact between a trader and a consumer, or two traders, or two individuals, interested in acquiring new or used products for private purposes.<sup>3</sup>

2. In many cases, however, the advertisements published on online platforms do not make it clear whether the seller is a trader or an individual.

3. The present reference for a preliminary ruling, which has been submitted to the Court by the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria), concerns the interpretation of Article 2(b) and (d) of Directive 2005/29/EC.<sup>4</sup>

<sup>1</sup> Original language: French.

<sup>2</sup> See ‘Digital economy and society statistics — households and individuals, Data extracted in February 2017’, available at the following website address: <http://ec.europa.eu/eurostat>. See, also, [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc\\_ec\\_ibuy&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_ec_ibuy&lang=en).

<sup>3</sup> The role of an online platform is merely to make its website available to third-party sellers (traders or individuals) so that they can use it to offer their products (new or used) or services.

<sup>4</sup> 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 (‘the Unfair Commercial Practices Directive’) (OJ 2005 L 149, p. 22).

4. The request for a preliminary ruling has been made in proceedings between Evelina Kamenova and the Komisia za zashtita na potrebitelite (Bulgarian Consumer Protection Commission, ‘the CPC’) regarding a notice issued by the CPC establishing an administrative offence. The offence alleged against Evelina Kamenova relates to non-compliance with the Zakon za zashtita na potrebitelite ZZP (Law on Consumer Protection, ‘the ZZP’) for failing to provide information to consumers in connection with advertisements for the sale of goods published on an online platform.

5. The referring court seeks to ascertain, in essence, whether a natural person who has published eight advertisements at the same time for the sale of different products on an online sales platform may be classified as a ‘trader’, and whether her activity constitutes a ‘commercial practice’ within the meaning of the Unfair Commercial Practices Directive.

6. This case therefore gives the Court the opportunity to clarify the concept of ‘trader’ within the meaning of that directive, and the criteria to be taken into account by the national courts when assessing that concept in the specific context of online sales.

## II. Legal framework

### A. EU law

#### 1. *Unfair Commercial Practices Directive*

7. Pursuant to Article 1 of the Unfair Commercial Practices Directive, read in conjunction with recitals 14 and 15 thereof, the purpose of that directive is to achieve a high level of consumer protection by introducing full harmonisation of national laws on unfair commercial practices.

8. Article 2 of that directive provides:

‘For the purposes of this Directive:

...

(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;

...

(d) “business-to-consumer 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;

...’

9. In accordance with Article 3(1) of that directive, the 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’.

## 2. Directive 2011/83/EU

10. As is clear from Article 1 of Directive 2011/83/EU,<sup>5</sup> the purpose of that directive is ‘through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders’.

11. Article 2 of that directive provides:

‘For the purpose of this Directive, the following definitions shall apply:

...

(2) “trader” means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive;

...’

12. In accordance with Article 3(1) of the Consumer Rights Directive, that directive ‘shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer ...’.

## B. Bulgarian law

13. Article 47 of the ZZP, promulgated in DV No 99 of 9 December 2005, in the version published in DV No 61 of 2014, in force since 25 July 2014, and Article 50 of the ZZP transpose, respectively, Articles 6 and 9 of the Consumer Rights Directive concerning, first, information requirements relating to distance contracts and, secondly, the right of withdrawal.

## III. Facts, the questions referred and the procedure before the Court

14. The file of the case in the main proceedings shows that M. K. K. (the consumer in that case) acquired, under a distance sales contract, a used ‘Longines’ watch on the website <http://olx.bg>.

15. On 20 October 2014, the watch, offered for sale by a user under the alias ‘eveto-ZZ’, was delivered to the consumer by a courier company. The sender’s name, address and telephone number were provided. After discovering that the watch did not match the description given in the advertisement published on the online sales platform, the consumer informed the seller, in a telephone conversation, that he wished to terminate the contract. The seller, however, refused to accept the return of the item in exchange for a refund.

16. Consequently, the consumer lodged a complaint with the CPC. During its investigations, it was found that the sender of the watch under the alias ‘eveto-ZZ’ was Evelina Kamenova. According to the website manager, on 10 December 2014, the user ‘eveto-ZZ’ had published a total of eight advertisements for different products with a view to selling them.<sup>6</sup>

<sup>5</sup> Directive of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (‘the Consumer Rights Directive’, OJ 2011 L 304, p. 64).

<sup>6</sup> The following products were involved: a touchscreen e-reader with an illuminated screen in new condition, three latest-technology telephones (in used or new condition), a wireless telephone charging kit, a car and Turkish tiles.

17. On 27 February 2015, the CPC issued a notice establishing an administrative offence. On 17 March 2015, Evelina Kamenova contested that notice on the ground that she did not have the status of trader and the provisions of the ZZP therefore did not apply to her. The CPC adopted a penalty decision against Evelina Kamenova on the basis of Article 207 of the ZZP for infringement of Article 47(1), points (2), (3), (5), (7), (8), and (12), and Article 50 of the ZZP. The CPC relied on the fact that Evelina Kamenova had failed to state, in each of the advertisements, the trader's name, address and email address; the total cost, including all fees and taxes; the conditions of payment, delivery and performance; the consumer's right to withdraw from the distance contract; the conditions, time limit and procedures for exercising that right; and a reminder of the existence of a legal guarantee of conformity for products in relation to the sales contract.

18. Evelina Kamenova brought an action against the penalty decision before the Varnenski rayonen sad (District Court, Varna, Bulgaria). By judgment of 22 March 2016, that court annulled the CPC's penalty decision on the ground that Evelina Kamenova did not have the status of 'trader' within the meaning of Paragraph 13(2) of the supplementary provisions of the ZZP, and referred to the Unfair Commercial Practices Directive, pointing out that the concept of 'trader' at issue is linked not to a single and isolated act, but to an activity, in connection with a trade, business or profession, which is systematic in nature.

19. The CPC lodged an appeal in cassation against that judgment before the referring court.

20. Taking the view that the outcome of the case in the main proceedings depended on the interpretation of the relevant provisions of EU law, the Administrativen sad — Varna (Administrative Court, Varna) by judgment of 16 February 2017, received at the Registry of the Court on 28 February 2017, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 2(b) and (d) of Directive [2005/29] be interpreted as meaning that the action of a natural person who is registered on a website for the sale of goods, and who published a total of eight advertisements at the same time for the sale of different items via the website, is the action of a trader within the meaning of the legal definition in Article 2(b), represents a business-to-consumer commercial practice within the meaning of Article 2(d) and comes within the scope of the Directive pursuant to Article 3(1) thereof?'

21. Written observations have been lodged by the German Government and the European Commission.

## IV. Analysis

### A. Preliminary observations

#### 1. The wording of the question referred to the Court

22. By its question, the referring court seeks, in essence, to ascertain, first, whether Article 2(b) of the Unfair Commercial Practices Directive must be interpreted as meaning that a natural person registered on a website for the sale of goods may be classified as a 'trader' where that person publishes, on that website, eight advertisements at the same time for the sale of different products, and, secondly, whether that person's activity constitutes a 'commercial practice' within the meaning of Article 2(d) of that directive.

23. The question, therefore, is whether, in the context of the Unfair Commercial Practices Directive, a natural person, such as the defendant in the main proceedings, who has published eight advertisements for the sale of different products on an online sales platform should be classified as a ‘trader’, or whether such a person is excluded from the scope of that directive as she is not covered by the concept of ‘trader’, in view of the limited nature of her activity.

24. Before examining that question, it should be noted that, in its question referred for a preliminary ruling, the referring court seeks only an interpretation of the Unfair Commercial Practices Directive.<sup>7</sup> However, the description of the facts of the dispute in the main proceedings given in the order for reference appears to suggest a failure to respect the rights conferred by the Consumer Rights Directive. It is clear from the order for reference that the defendant in the main proceedings was penalised for infringing Article 47(1), points (2), (3), (5), (7), (8) and (12), and Article 50 of the ZZP. As the Commission has pointed out, those provisions transpose, respectively, Article 6 of the Consumer Rights Directive concerning information requirements for distance contracts, and Article 9 of that directive concerning the right of withdrawal.

25. Therefore, in view of the activity described in the order for reference, the issue of whether a natural person may be classified as a ‘trader’ within the meaning of Article 2(2) of the Consumer Rights Directive may be of relevance to the main proceedings.

26. It should be observed that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court may have to reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law to which the national court has not referred in its questions.<sup>8</sup>

27. In those circumstances, the question referred must be understood as asking, in essence, first, whether Article 2(b) of the Unfair Commercial Practices Directive and Article 2(2) of the Consumer Rights Directive must be interpreted as meaning that a natural person registered on a website for the sale of goods may be classified as a ‘trader’ where that person publishes on that website eight advertisements at the same time for the sale of different products, and, secondly, whether that person’s activity constitutes a ‘commercial practice’ within the meaning of Article 2(d) of the Unfair Commercial Practices Directive.

28. To answer that question, I consider it necessary to determine, first of all, whether, in the present case, it would be appropriate to provide a uniform interpretation of the definition of the concept of ‘trader’, since that concept is almost identical in the context of the directives concerned.<sup>9</sup> It is necessary, in my view, first to establish the degree of harmonisation brought about by those directives in order to ascertain whether such an approach is appropriate.

<sup>7</sup> It should be noted that the referring court has not stated, in its decision, which provisions of that directive it considers to be applicable.

<sup>8</sup> See, most recently, judgments of 7 September 2017, *Neto de Sousa* (C-506/16, EU:C:2017:642, paragraph 23), and of 26 October 2017, *Aqua Pro* (C-407/16, EU:C:2017:817, paragraph 26).

<sup>9</sup> I note, in that regard, that, according to the settled case-law of the Court, 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*, judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 25).

## 2. Degree of harmonisation brought about by the Unfair Commercial Practices Directive and the Consumer Rights Directive

29. In the first place, before addressing the issue of the degree of harmonisation brought about by the directives concerned, it is necessary to highlight a fundamental point: the concept of ‘trader’ is defined almost identically<sup>10</sup> in both directives and both definitions are closely linked to the pursuit of an economic activity.

30. That said, it should be added, in the second place, that, in order to be able to provide a uniform interpretation of the definition of the concept of ‘trader’ within the meaning of the directives concerned, it is necessary to establish whether the degree of harmonisation brought about by those two directives — and of which their respective rules are part — is the same. I would point out, in that regard, that the assessment of the degree of harmonisation brought about by a directive must be based on the wording, as well as the meaning and purpose, of that directive.<sup>11</sup>

31. I would observe, first of all, that the Unfair Commercial Practices Directive applies, under Article 3(1) thereof, ‘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’,<sup>12</sup> whereas the Consumer Rights Directive applies, in accordance with Article 3(1) thereof, ‘under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer’.

32. Thus, despite the difference between their respective scopes, those directives are based on Article 114 TFEU<sup>13</sup> and, in this respect, pursue the same objectives, namely to contribute to the proper functioning of the internal market and to ensure a high level of consumer protection in the legislative, regulatory and administrative framework they cover.<sup>14</sup>

<sup>10</sup> As regards, in particular, traders’ agents, the Unfair Commercial Practices Directive refers, in Article 2(b), to ‘anyone acting in the name of or on behalf of a trader’, whereas the Consumer Rights Directive refers, in Article 2(2) to ‘any ... person ... who is acting, including through any other person acting in his name or on his behalf ...’. It should be observed, in that regard, that, in the context of the Consumer Rights Directive, this question does not arise, since the Directive applies to contracts which, in principle, have already been concluded between the trader and the consumer (sales contract, service contract, distance contract or off-premises contract). It follows that the issue of classification of an agent acting in the name of or on behalf of a trader may no longer arise.

<sup>11</sup> See judgments of 25 April 2002, *Commission v France* (C-52/00, EU:C:2002:252, paragraph 16), and of 14 July 2005, *Lagardère Active Broadcast* (C-192/04, EU:C:2005:475, paragraph 46).

<sup>12</sup> Article 2(c) of the Unfair Commercial Practices Directive defines a ‘product’ as being ‘any goods or service including immovable property, rights and obligations’.

<sup>13</sup> The Unfair Commercial Practices Directive is based on Article 95 EEC, now Article 114 TFEU.

<sup>14</sup> The wording of Article 1 in both directives is almost identical. In addition to the differences relating to the matters covered by their respective scopes, the Unfair Commercial Practices Directive provides that its purpose is ‘to contribute to the proper functioning of the internal market and achieve a high level of consumer protection ...’, whereas the Consumer Rights Directive provides that its purpose is ‘through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market ...’ (my emphasis).



33. I would note, furthermore, that to achieve those objectives, the EU legislature introduced full harmonisation<sup>15</sup> of the rules covered by the directives concerned.<sup>16</sup>

34. As regards the Unfair Commercial Practices Directive, it is clear from recital 14 thereof that it introduces ‘full harmonisation’.<sup>17</sup> That harmonisation relates to rules concerning unfair commercial practices, including misleading advertising by traders with regard to consumers, which, at EU level, harm consumers’ economic interests.<sup>18</sup> More specifically, such full or exhaustive harmonisation covers the entire field covered by that directive.<sup>19</sup>

35. Furthermore, it is clear from recital 15 of the Unfair Commercial Practices Directive that that directive brings about ‘full harmonisation’ of the rules of national law, subject to certain exceptions.<sup>20</sup> Therefore, as expressly provided for in Article 4 of that directive, entitled ‘Internal market’, Member States may not adopt stricter rules than those provided for in that directive, even in order to achieve a higher level of consumer protection.<sup>21</sup>

<sup>15</sup> It should be noted that the French version of the Unfair Commercial Practices Directive uses two different terms when referring to the type of harmonisation it brings about, namely ‘harmonisation complète’ and ‘harmonisation totale’ (recitals 14 and 15). That is also the case in the Italian version in which that directive uses the terms ‘armonizzazione completa’ and ‘piena armonizzazione’. Other language versions of that directive, however, use only one term, in particular the German version (‘vollständige Angleichung’), the English version (‘full harmonisation’), the Polish version (‘pełna harmonizacja’) and the Spanish version (‘plena armonización’). Some authors considered those two types of harmonisation (‘complète’ [full] and ‘totale’ [complete]) to be synonyms, while others took the view that it is necessary to draw a distinction between them. Full harmonisation of national rules concerns the scope *ratione materiae* of directives whereas complete or maximum harmonisation refers to the level of discretion of Member States when transposing directives into their internal legislation. See, in particular, in support of such a distinction, González Vaqué, L., ‘La directive 2005/29/CE relative aux pratiques commerciales déloyales: entre l’objectif d’une harmonisation totale et l’approche d’une harmonisation complète’, *Revue de droit de l’Union européenne*, 4/2005, pp. 785 to 802; Rochfeld, J., ‘Les ambiguïtés des directives d’harmonisation totale. La nouvelle répartition des compétences communautaire et interne. À propos de l’arrêt de la CJCE du 4 juin 2009’, *Dalloz*, 2009, No 30, p. 2047, and Verdure, C., ‘L’harmonisation des pratiques commerciales déloyales dans le cadre de la directive 2005/29/CE sur les pratiques commerciales déloyales: premier bilan jurisprudentiel’, *Cahiers de droit européen*, 3-4, 2010, pp. 311 to 336. See, a contrario, Stuyck, J., Terryn, E., Van Dyck, T., ‘Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market’, *Common Market Law Review*, 2006, No 43, pp. 107 to 152, in particular p. 115. In my view, that distinction is not relevant for the present case.

<sup>16</sup> Some authors take the view that any full or exhaustive harmonisation directive is necessarily a complete or maximum harmonisation directive, but any complete harmonisation is not *de facto* full or exhaustive harmonisation. See, inter alia, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29). See, in that regard, judgment of 4 June 2009, *Moteurs Leroy Somer* (C-285/08, EU:C:2009:351, paragraph 25): ‘Although Directive 85/374 ... seeks to achieve, in the matters regulated by it, *complete harmonisation* of the laws, regulations and administrative provisions of the Member States, it does not, however, as is apparent from the 18th recital in the preamble thereto, seek *exhaustively* to harmonise *the field* of liability for defective products beyond those matters’ (my emphasis). See, also, Rochfeld, J., cited above, p. 2047, paragraph 11, and Verdure, C., cited above, p. 326.

<sup>17</sup> Academic writings consider the full harmonisation approach of that directive to be a success ‘... since provisions that provide for the maintenance of non-harmonised national legislation on commercial practices are exceptional and (transitional) and, moreover, their application is subject to strict conditions’, see González Vaqué, L., cited above, p. 802.

<sup>18</sup> See Article 1 and recitals 11, 12 and 23 of the Unfair Commercial Practices Directive. See, also, judgments of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 34), and of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraph 27). See, also, my Opinion in Joined Cases *Abcur* (C-544/13 and C-545/13, EU:C:2015:136, point 59).

<sup>19</sup> See the Opinion of Advocate General Trstenjak in Joined Cases *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2008:581, point 48): ‘... As is apparent from recital 5 in the preamble, that objective is to be achieved by harmonisation of fair trading laws in the Community Member States in the interests of eliminating obstacles in the internal market. Its legislative objective is therefore the full harmonisation of this area of life at Community level.’ See, also, Henning-Bodewig, F., ‘Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken’, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, 2005, vol. 8/9, p. 629.

<sup>20</sup> In particular, Article 3(5) of that directive provides that under certain conditions ‘for a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses’. Article 3(6) establishes an additional requirement, namely that ‘Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5’.

<sup>21</sup> See judgment of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 52). See, also, judgment of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660). See the Opinion of Advocate General Trstenjak in Joined Cases *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2008:581, point 74): ‘... Directive 2005/29 is aimed at full harmonisation of Member States’ legislation on unfair commercial practices. In addition ... it is aimed not only at minimum harmonisation, but at maximum approximation of the national laws and regulations, which bars Member States, subject to certain exceptions, from retaining or introducing more stringent provisions. Both result from an interpretation of the preamble and of the general provisions of the Directive’.

36. As regards the Consumer Rights Directive, its objective is to harmonise national rules in the areas within its scope.<sup>22</sup> More specifically, it is clear from a combined reading of recitals 4, 5 and 7 of that directive that its purpose is ‘full’ harmonisation of certain aspects of consumer distance and off-premises contracts, namely consumer information and the right of withdrawal in those types of contracts.<sup>23</sup>

37. Furthermore, under Article 4 of that directive, entitled ‘Level of harmonisation’, ‘Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive’.<sup>24</sup> That directive therefore brings about ‘complete’ or maximum harmonisation.

38. In short, everything seems to suggest that the EU legislature brought about the same degree of harmonisation of the respective rules of each of the directives in question. For the purposes of this analysis, I am interested only in complete or maximum harmonisation, since any absence of that type of harmonisation of the directives concerned could create problems as regards the uniform interpretation of the definition of the concept of ‘trader’.

39. In the light of all of the foregoing, I consider that a uniform interpretation of the concept of ‘trader’ in the context of these two directives is appropriate, given the almost identical definitions of the concept of ‘trader’ laid down by the EU legislature, the fact that those definitions are closely linked to the pursuit of an economic activity, and the degree of complete harmonisation sought by the EU legislature in the national rules covered by the directives in question.

***B. The meaning and scope of the concept of ‘trader’ in the context of Article 2(b) of the Unfair Commercial Practices Directive and Article 2(2) of the Consumer Rights Directive***

40. The concept of ‘business-to-consumer commercial practices’ is defined in Article 2(d) of the Unfair Commercial Practices Directive as meaning ‘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’. The concepts of ‘consumer’ and ‘trader’ therefore lie at the heart of the definition of this concept, so that the issue of whether a situation falls within the scope of that directive depends, decisively, on their interpretation. The existence of a commercial practice within the meaning of that directive may be accepted only where it concerns both a trader and a consumer.

41. Analysis of the scope *ratione personae* of the Unfair Commercial Practices Directive is fundamental since it is only in a situation where the defendant in the main proceedings has the status of ‘trader’ that it would be necessary to examine whether her activity constitutes a commercial activity within the meaning of the directive.

42. The concept of ‘trader’ is defined, in Article 2(b) of the Unfair Commercial Practices Directive, as meaning ‘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’.

<sup>22</sup> See Article 1 of the Consumer Rights Directive.

<sup>23</sup> According to recitals 5 and 7 of the Consumer Rights Directive, that ‘full’ harmonisation will contribute to a high level of consumer protection and a better functioning of the business-to-consumer internal market and should considerably increase legal certainty for both consumers and traders.

<sup>24</sup> See, *inter alia*, Article 3(4) of the Directive on consumer protection.



43. I note, in that regard, that the Court has already held that it is clear from the wording of Article 2(b) of that 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’.<sup>25</sup> I would point out, in that regard, that such a natural or legal person is acting, in my view, for purposes relating to *an act carried out within his trade, business, craft or profession*.

44. In the present case, the fact that the defendant in the main proceedings has the status of natural person does not exclude the classification of ‘trader’. However, in order for that person to be regarded as covered by that concept within the meaning of Article 2(b) of the Unfair Commercial Practices Directive, it is also necessary to determine whether she is acting for purposes relating to such a trade, business, craft or profession or in the name or on behalf of a trader.

45. The Court has also stated that, 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.<sup>26</sup> It pointed out, in that regard, that the 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.<sup>27</sup> Thus, the concept of consumer is of the utmost importance and the provisions of that directive are essentially designed with the consumer as the target and victim of unfair commercial practices in mind.<sup>28</sup>

46. In view of the considerations set out in points 29 to 39 of this Opinion according to which, first, the Unfair Commercial Practices Directive and the Consumer Rights Directive define the concept of ‘trader’ almost identically, secondly, that concept is closely linked to the pursuit of an economic activity and, thirdly, the degree of harmonisation brought about by those directives is similar, I consider that the Court’s interpretation of the definition of the concept of ‘trader’ in the context of the Unfair Commercial Practices Directive is also valid for the purposes of the definition of the concept of ‘trader’ in the context of the Consumer Rights Directive.

47. As noted by Advocate General Bot in his Opinion in *Zentrale zur Bekämpfung unlauteren Wettbewerbs*,<sup>29</sup> such an interpretation of the concept of ‘trader’ is consistent with that established by the EU legislature in the wider context of directives relating to consumer rights, and, in particular the Consumer Rights Directive, in which the EU legislature, in Article 2(2), defines trader as referring to ‘any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession’. According to Advocate General Bot, the common thread running through directives relating to consumer protection is that ‘a trader may be a natural person or a public-law or private-law body who, in his relations with consumers, is acting for purposes relating to his trade or profession, which presupposes that he acts within the framework of a regular profit-making activity’.<sup>30</sup>

25 Judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 32). See, also, the Opinion of Advocate General Bot in *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:450, point 39).

26 Judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 33).

27 Judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 35). On the objective of providing a high common level of consumer protection by carrying out a complete harmonisation of the rules concerning unfair commercial practices, see, also, paragraph 34 of that judgment and point 34 of this Opinion.

28 Judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 36).

29 C-59/12, EU:C:2013:450, point 37: ‘The concept of trader must ... be understood ... as referring to a natural or legal person who, in the context in question and irrespective of his public or private nature, acts in a commercial capacity.’

30 Advocate General Bot’s Opinion in *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:450, points 41 and 42).

***C. The classification to be used in the present case as regards the concept of ‘trader’***

48. In the light of the foregoing, is a natural person such as the defendant in the main proceedings covered by the definition of the concept of ‘trader’ referred to in Article 2(b) of the Unfair Commercial Practices Directive and Article 2(2) of the Consumer Rights Directive?

49. I do not think so. The simultaneous publication on an online platform of a total of eight advertisements for the sale of different new and used products does not seem to me to be sufficient to allow use of the classification of ‘trader’ within the meaning of those directives.

50. However, it should be noted that the classification of ‘trader’ requires ‘a case-by-case approach’.<sup>31</sup> It is therefore appropriate, in the present case, for the referring court to carry out a specific analysis, on the basis of all the facts available to it to establish whether a person, such as the defendant in the main proceedings, is covered by the definition of ‘trader’.

51. That analysis will seek, in particular, as the German Government and the Commission have rightly pointed out, to establish whether the online platform sale was made in an organised manner and for profit;<sup>32</sup> whether that sale occurs over a certain duration and with a certain frequency;<sup>33</sup> whether the seller has a legal status which enables her to engage in commercial transactions, and to what extent the online sale is connected to the seller’s commercial activity;<sup>34</sup> whether the seller is subject to VAT;<sup>35</sup> whether the seller, acting in the name of a specific trader or on his behalf or through any other person acting in her name or on her behalf, received remuneration or an incentive;<sup>36</sup> whether the seller purchases new or used goods with a view to selling them on, thus making that a regular, frequent and/or simultaneous activity in relation to her trade;<sup>37</sup> whether the amount of profit generated on the sales confirms that the transaction made falls within the scope of a commercial activity,<sup>38</sup> and/or whether the products for sale are all of the same type or value, in particular, whether the offer is focused on a limited number of products.<sup>39</sup>

<sup>31</sup> See, to that effect, the Opinion of Advocate General Bot in *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:450, point 40).

<sup>32</sup> The fact that the sale is made for profit is an important factor but cannot, in itself, allow the conclusion that a natural person is a trader. The value of certain products is likely to increase over time, as is the case with jewellery, or works of art.

<sup>33</sup> In principle, the sale of eight products per year is not, in itself, sufficient to support the conclusion that this is a professional sale, whereas the sale of eight products per week over several months could be an indication that the concept of ‘trader’ may apply. The frequent offering for sale of a significant number of products of a certain value or type could be regarded as falling under the concept of ‘trader’. The number of reviews left by buyers, provided that such a system is available on the online sales platform, could be taken into account to assess the frequency of online sales.

<sup>34</sup> It needs to be determined, in particular, whether the seller is the owner of a business dedicated to the sale of products or services which are similar to those which are the subject of the sale to individuals on the website concerned. Notably, a watchmaker who sells his products both on an online sales platform and in his watchmaking company.

<sup>35</sup> In France, in particular, the tax authority has published guidelines on the system for the taxation of income from online sales platforms, which lay down a number of criteria in order to draw a distinction between one-off operations and regular operations that are subject to a different system of taxation. See, in particular, <https://www.economie.gouv.fr/particuliers/vente-biens-declarer-revenus>.

<sup>36</sup> See points 43 and 44 of this Opinion. In some cases, a trader rewards an ‘influencer’ for purchases of the trader’s products made via the ‘influencer’s’ website. The term ‘influencer’ is defined as ‘a person having great influence over decision-makers or opinion’. See *Robert illustré*, 2018 edition. For a more complete definition, see the French language entry on Wikipedia, a highly relevant source when it comes to online matters: ‘An influencer is anyone who is active on social media who, as a result of his status, position or exposure in the media, has the power to influence consumer habits. Influencers are approached by brands and undertakings to improve their communication and as part of advertising campaigns. Influencers work primarily on social media influencing many “followers” via their Instagram or YouTube channel accounts. They act as intermediaries between undertakings and their potential customers.’

<sup>37</sup> Including, in particular, a natural person selling different products from his home on an online sales platform at a price that allows him to generate a profit.

<sup>38</sup> See the Commission guidance on Unfair Commercial Practices, available at the following website: <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.show>.

<sup>39</sup> The German Government considers, inter alia, that the supply, in trade, of services for consideration is central to allowing an activity to be classified as commercial not only in the context of its legislation transposing the Unfair Commercial Practices Directive but also, in general, in the context of the Handelsgesetzbuch (Commercial Code).

52. It should be noted that those criteria are neither exhaustive nor exclusive, and therefore, in principle, meeting one or more of the criteria does not, in itself, establish the classification to be used in relation to an online seller with regard to the concept of ‘trader’. It will therefore be necessary to make an overall assessment taking account of all the relevant criteria in order to decide on the classification to be used. Those criteria will thus enable the national courts to determine whether a person, such as the defendant in the main proceedings, is carrying out a commercial activity which places him in a stronger position than the consumer and, consequently, whether there is an imbalance between the trader and the consumer.

53. However, it is for the referring court, in view of the foregoing considerations, to assess, on the basis of the facts available to it and based, *inter alia*, on the criteria set out in the preceding points, whether that person may be classified as a ‘trader’ within the meaning of those directives.

54. Where the referring court considers the person concerned to be a ‘trader’ within the meaning of Article 2(b) of the Unfair Commercial Practices Directive, it will be necessary to determine whether the activity she carries out constitutes a ‘commercial practice’ within the meaning of Article 2(d) of the Unfair Commercial Practices Directive.

***D. The concept of ‘business-to-consumer commercial practices’ within the meaning of Article 2(d) of the Unfair Commercial Practices Directive***

55. As regards the issue of whether the activity of a natural person such as the defendant in the main proceedings may fall within the scope of the Unfair Commercial Practices Directive, I would point out, at the outset, that the Court has already ruled that Article 2(d) of that directive gave a particularly broad definition of the concept of ‘commercial practices’ as meaning ‘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’.<sup>40</sup>

56. Thus, to conclude that the activity at issue constitutes a commercial practice within the meaning of that article, it must be verified that that activity, first, may be classified as a practice which is ‘commercial in nature, that is to say, [it] must originate from traders’, and, secondly, is an act or commercial communication ‘directly connected with the promotion, sale or supply of their products to consumers’.<sup>41</sup>

57. I would point out, in this connection, that the commercial activity criterion, the existence of which must be verified, corresponds to the idea on which the system of protection introduced by the EU directives on consumer protection is based, namely that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge and that there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him.<sup>42</sup>

<sup>40</sup> Judgments of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 49); of 14 January 2010, *Plus Warenhandelsgesellschaft* (C-304/08, EU:C:2010:12, paragraph 36); of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraph 17); and of 19 September 2013, *CHS Tour Services* (C-435/11, EU:C:2013:574, paragraph 27).

<sup>41</sup> See, in that regard, judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraph 37).

<sup>42</sup> See point 46 of this Opinion. See, to that effect, as regards Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), judgment of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 28 and the case-law cited); and, as regards Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), judgment of 4 October 2007, *Rampion and Godard* (C-429/05, EU:C:2007:575, paragraph 65); and, as regards Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12), judgment of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 42).

58. Having regard to the analysis set out in points 40 to 52 of this Opinion, there seems to be nothing to suggest that the publication, at the same time, of eight advertisements for the sale of different products may be considered to be an activity covered by the concept of ‘trader’ within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and, therefore, that a position of weakness may exist as a result of such an activity, in the present case, between the defendant in the main proceedings and the buyer.

59. However, it is for the referring court to give a ruling in that regard when assessing whether a natural person such as the defendant in the main proceedings has the status of ‘trader’, taking into account all of the criteria set out in points 51 and 52 of this Opinion.

## V. Conclusions

60. In the light of all of the foregoing conclusions, I propose that the Court answer the question referred by the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria) as follows:

Article 2(b) 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 and 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’) and Article 2(2) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council must be interpreted as meaning that a natural person, such as the defendant in the main proceedings, registered on an online platform for the sale of goods cannot be classified as a ‘trader’ when publishing, on that website, eight advertisements at the same time for the sale of different products.

However, it is for the referring court to assess, in the light of all the other circumstances of the present case, whether that person may be classified as a ‘trader’ within the meaning of those directives and, therefore, whether the activity she carries out constitutes a ‘commercial practice’ within the meaning of Article 2(d) of the Directive 2005/29.