Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 6 September 2012 [1]

Case C-206/11

Georg Köck
v
Schutzverband gegen unlauteren Wettbewerb

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

(Directive 2005/29/EC — Harmonisation — Consumer protection — Unfair commercial practices — Procedural rules laid down in instruments for combating unfair commercial practices — Provision of a Member State requiring prior official authorisation for the announcement of clearance sales)

Table of contents

I – Introduction 3

II – Legal context 4

1. European Union law 4

2. National law 6

III – Facts, main proceedings and question referred 8

IV – Procedure before the Court 8

V – Main arguments of the parties 9

VI – Legal assessment 10

A – Introductory remarks 10

B – Analysis of the legal issues 12

1. Applicability of Directive 2005/29 12

1 — Original language of the Opinion: German
Language of the case: German

a) Scope ratione materiae 12

b) Scope ratione personae 12

c) No ground for exemption 13

d) Interim conclusion 14

2. Procedural-law aspects of the question referred 14

a) Power of review of national administrative authorities 14

b) Power of the authorities to carry out an ex ante review 14

c) Compatibility with the directive of a statutory prohibition subject to authorisation the infringement of which constitutes a criminal offence 16

d) Judicial review of the administrative authority's decision 18

i) Outline of the issue 18

ii) Discretion of the Member States in the formulation of procedural rules 18

iii) Prohibition against disregarding the obligation to carry out an individual assessment 19

e) Interim conclusion 21

3. Substantive-law aspects of the question referred 21

a) General 21

b) Examination of the structure of the two pieces of legislation 22

i) Regulatory structure of Directive 2005/29 22

ii) The substantive provisions of the UWG on the announcement of clearance sales . 22

c) Compatibility of the substantive provisions with Directive 2005/29 23

i) Imposition of general prohibitions 23

ii) Requirement of reasons for the announcement of a clearance sale 24

– Announcement of the cessation of trading and relocation of the business 24

– Other reasons mentioned in Paragraph 33b(4) of the UWG 25

d) Interim conclusion 26

4. Summary of interim conclusions 27

VII – Conclusion 27

I – Introduction

1. Trade, and the associated question of the protection of the parties involved in an exchange of goods or services, who would now be known as the business and the consumer, was the focus of special attention even in Greek and Roman mythology. If necessary, the gods themselves were called upon to protect traders and their customers. Thus, in Greek mythology, Hermes (and Mercury in Roman mythology) was protector of merchants as well as of trade, travellers and herdsmen. Nowadays, consumers and traders are no longer protected primarily by gods, but rather by earthly laws and courts. Their role is to take due account of and to reconcile the interests of both consumers and traders.

2. In the present reference for a preliminary ruling under Article 267 TFEU, the Oberster Gerichtshof (Austrian Supreme Court) ('the referring court') asks the Court of Justice of the European Union to interpret Directive 2005/29/EC concerning unfair commercial practices in the internal market.[2] The reference is concerned in essence with the question whether the provisions of that directive preclude national legislation under which the announcement of a clearance sale requires prior authorisation by an administrative authority.

3. It has been made in proceedings between Mr Köck, who operates as a sole trader, and the Schutzverband gegen unlauteren Wettbewerb (Austrian Association for Protection against Unfair Competition) (the 'Schutzverband'), an institution which, under national law, has a legitimate interest in combating unfair commercial practices. The parties are in dispute as to whether Mr Köck was entitled to announce a clearance sale without having obtained authorisation to do so from the district administrative authority, as required by national law. This raises the question, inter alia, whether Directive 2005/29 allows a Member State, when transposing that directive into its legal system, to make the announcement of a clearance sale subject to a general requirement of authorisation under which infringements of the statutory obligation to apply for authorisation are penalised without any examination of whether such a commercial practice is in fact unfair.

4. The present case differs in one essential respect from the other cases in which the Court has also been asked to give a ruling on whether Directive 2005/29 has been transposed in accordance with European Union law, inasmuch as the present case is concerned not only with the transposition of the substantive-law provisions of the directive but also and primarily with the procedural rules laid down in the instruments intended to combat unfair business-to-consumer commercial practices within the individual legal orders of the Member States. It will therefore be necessary to examine whether the European Union legislature refrained from taking the approach of full harmonisation, to which the substantive-law provisions of the directive are in principle subject, in order to accord the Member States a margin of discretion in the formulation of procedural rules.

2 — Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC 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') (OJ 2005 L 149, p. 22).

II – Legal context

1. European Union law

5. Article 1 of Directive 2005/29 provides:

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

6. Article 2 of Directive 2005/29 provides:

‘For the purposes of this Directive:

…

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

…’

7. Article 3(1) of the directive provides:

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

8. Article 5 of the directive, which carries the heading ‘Prohibition of unfair commercial practices’, provides:

‘(1) Unfair commercial practices shall be prohibited.

(2) A commercial practice shall be unfair if:

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

and

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

…

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

9. Article 11 of the directive, which carries the heading ‘Enforcement’, provides:

‘(1) Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.

Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

(a) take legal action against such unfair commercial practices;

and/or

(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

…

(2) Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest,

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices;

or

(b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice,

even without proof of actual loss or damage or of intention or negligence on the part of the trader.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

— either with interim effect,

or

— with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision:

(a) to require publication of that decision …

(b) to require in addition the publication of a corrective statement.

…

Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given. Furthermore, in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review'.

10. Annex I to the directive ('Commercial practices which are in all circumstances considered unfair') lists inter alia the following misleading commercial practices:

'4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.

…

7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

…

15. Claiming that the trader is about to cease trading or move premises when he is not.'

2. National law

11. Directive 2005/29 was transposed in Austria with effect from 12 December 2007 by an amendment [3] to the Bundesgesetz gegen den unlauteren Wettbewerb 1984 (1984 Federal Law on Unfair Competition) [4] ('the UWG').

12. Point 7 of Annex I to Directive 2005/29 was reproduced verbatim in point 7 of the Annex to the UWG within the framework of the UWG-Novelle (UWG Amending Law).

Subsection 4a of the UWG (Paragraphs 33a to 33f), which had already been incorporated into the UWG in 1992, contains the following provisions on the 'announcement of clearance sales':

'Paragraph 33a.

(1) The announcement of a clearance sale within the meaning of this Federal law is understood to mean all public announcements or communications intended for a large circle of persons which indicate the intention to dispose of large quantities of goods quickly by retail sale and which at the same time are liable to create the impression that as a result of special circumstances the trader is compelled to sell quickly and therefore offers his goods on exceptionally advantageous terms or at exceptionally advantageous prices. Announcements or communications in which the words 'clearance sale', 'liquidation sale', 'closing-down sale', 'quick sale', 'sale at knock-down prices', 'warehouse clearance' or words with a similar meaning appear are in any event regarded as announcing a clearance sale.

(2) However, the provisions of Paragraphs 33a to 33e do not apply to announcements and communications about end-of-season sales, seasonal clearance sales, stock-taking sales and the like, and special sales customary in the relevant business sector and at particular times of the year (e.g. 'White Week', 'Coat Week').

3 — BGBl. I No 79/2007.

4 — BGBl. I No 448/1984.

(3) Point 7 of the Annex remains unaffected by the foregoing.

Paragraph 33b.

The announcement of a clearance sale is permitted only with the authorisation of the district administrative authority which is competent for the location of the clearance sale. The application for authorisation is to be made in writing and must include the following information:

1. the goods to be sold, according to quantity, characteristics and sales value;

2. the exact location of the clearance sale;

3. the period during which the clearance sale is to be held;

4. the reasons why the clearance sale is to be held, such as the death of the owner of the business, ceasing trading or ceasing to sell a certain category of goods, relocation of the business, natural disasters and the like;

5. ….

Paragraph 33c.

(1) Before deciding on the application, the district administrative authority must request the provincial chamber of commerce which is competent for the location of the clearance sale to furnish an expert opinion within two weeks.

(2) The district administrative authority must decide on the application within one month of receiving it.

(3) Authorisation must be refused if no reasons within the meaning of Paragraph 33b(4) are present or if the sale is not to be announced for a continuous period. Authorisation must also be refused if the sale is to take place in the period from the start of the penultimate week before Easter to Whit Sunday or from November 15 to Christmas or is to last for more than six months, except in the case of the trader's death, natural disasters or other cases which merit similar consideration. If the business has been established for less than three years, authorisation is only to be granted in the case of the trader's death, natural disasters or other cases which merit similar consideration.

(4) …

Paragraph 33d.

(1) Every announcement of a clearance sale must include the reason for the quick sale, the period during which the clearance sale is to take place, and a general description of the goods to be sold. This information must correspond to the decision granting authorisation.

(2) After the expiry of the sales period stated in the decision granting authorisation, no further announcement of a clearance sale may be made.

(3) During the sales period stated in the decision granting authorisation, the sale of the goods specified in the announcement is permitted only in the quantity stated in the decision granting authorisation. Any further supply of goods of those types is prohibited.

(4) …'

13. Paragraph 34(3) of the UWG contains the following provision concerning, inter alia, subsection 4a:

'A person who contravenes the provisions of this section may, without prejudice to criminal proceedings, be sued for a prohibitory order and, in case of fault, for damages. The proceedings may be brought only before the ordinary courts. …'

III – Facts, main proceedings and question referred

14. Mr Köck operates as a sole trader in Innsbruck. He announced a 'total clearance' of his goods in a newspaper advertisement, and advertised it in front of his sales premises on bill boards and window stickers. In that advertising, in addition to the term 'total clearance', he also used wording such as 'everything must go' and 'up to 90% off'. Mr Köck had not obtained authorisation from the district administrative authority to announce the clearance sale.

15. The Schutzverband takes the view that that announcement infringes Paragraph 33a et seq. of the UWG. Under those provisions, Mr Köck's announcement of a clearance sale is permissible only after authorisation has first been obtained from the district administrative authority. That rule is compatible with the Unfair Commercial Practices Directive and must therefore continue to be applied.

16. The Schutzverband therefore applied to the Landesgericht Innsbruck (Regional Court, Innsbruck) for an interim order prohibiting Mr Köck from announcing a clearance sale without being in possession of the required authorisation from the district administrative authority. Mr Köck disputes the assertion that he has infringed the provisions governing clearance sales. He submits that he simply held a partial stock sale within the meaning of Paragraph 33a(2) of the UWG, which does not require authorisation. By decision of 15 June 2010, the Landesgericht Innsbruck upheld the legal opinion put forward by Mr Köck.

17. On appeal by the Schutzverband, the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck), by decision of 6 August 2010, made the interim order in the form sought. In the opinion of the appellate court, the respondent had announced a clearance sale within the meaning of Paragraph 33a(1) of the UWG, which requires authorisation. It stated that, since he had no authorisation as referred to in Paragraph 33b of the UWG, the application for a prohibitory injunction under Paragraph 34(3) of the UWG had to be granted.

18. Mr Köck lodged an appeal on a point of law against that decision before the Oberster Gerichtshof. According to the provisional assessment of the Oberster Gerichtshof, if Paragraph 33a et seq. of the UWG were applied, the appeal would be bound to fail. However, the Oberster Gerichtshof has doubts as to whether those provisions are compatible with Directive 2005/29. It therefore stayed the proceedings by way of appeal on a point of law and referred the following question to the Court of Justice for a preliminary ruling:

Do Articles 3(1) and 5(5) of Directive 2005/29 or other provisions of that directive preclude a national provision under which the announcement of a clearance sale without the authorisation of the competent administrative authority is not permitted and for that reason must be prohibited in judicial proceedings, without it being necessary in those proceedings for the court to consider whether such a commercial practice is misleading, aggressive or otherwise unfair?

IV – Procedure before the Court

19. The order for reference of 12 April 2011 was received at the Court Registry on 2 May 2011.

20. Written observations were submitted by the parties to the main proceedings, the Governments of the Republic of Austria and the Kingdom of Belgium, and the European Commission within the time-limit laid down in Article 23 of the Statute of the Court of Justice.

21. Counsel for the parties to the main proceedings, counsel for the Governments of the Republic of Austria and the Kingdom of Belgium and counsel for the Commission attended the hearing on 21 May 2012 in order to present oral argument.

V – Main arguments of the parties

22. *Mr Köck* proposes that the Court should answer the question referred in the affirmative. In his view, a statutory provision such as that at issue, which allows the administrative authorities to refuse to authorise the announcement of a clearance sale even where the commercial practice in question is neither misleading nor aggressive nor in any way unfair, is incompatible with Directive 2005/29.

23. He considers Directive 2005/29 to be applicable in the main proceedings, since, on the one hand, the announcement of a clearance sale conforms to the definition of a commercial practice and, on the other hand, the national provisions at issue are intended to protect not only competitors but also consumers. For the sake of completeness, he submits that the announcements made by him were announcements not of a clearance sale within the meaning of Paragraph 33a(1) of the UWG, which requires authorisation, but of a partial stock sale as referred to in Paragraph 33(a)(2) of the UWG, which does not require authorisation.

24. He further submits that point 7 of Annex I to Directive 2005/29 is not applicable to the main proceedings, as he did not expressly state the particular duration of the clearance sale, which was, in reality, a partial stock sale. Moreover, he argues that the national law does not ensure the legal protection of the individual because enforcement of the non-application of Paragraph 33c(3) of the UWG on account of its incompatibility with European Union law by way of administrative proceedings is unreasonable from the point of view of the undertakings concerned.

25. Both the *Schutzverband* and the *Austrian Government* take the view that the national provisions at issue concerning the official authorisation of clearance sales do not fall within the scope of Directive 2005/29. That view is confirmed both by recital 9 in the preamble to the directive and by Article 3(8) thereof, which states that the directive is without prejudice to 'any conditions of establishment or of authorisation regimes'. In the Austrian Government's submission, the non-applicability of Directive 2005/29 also follows from the fact that that directive does not govern the legal relationships between undertakings and authorities.

26. For the sake of completeness, both parties to the proceedings submit arguments in the event that the Court were none the less to find that Directive 2005/29 is indeed applicable. Thus, they point out, inter alia, that most clearance sales such as end-of-season sales, stock-taking sales etc. are not prohibited and do not require authorisation in Austria. Only the announcement of certain special sales requires authorisation. Consequently, the national provision at issue does not constitute a general prohibition in principle of certain commercial practices. Furthermore, Article 11 of the directive empowers the Member States to introduce appropriate and effective means of combating unfair commercial practices. In the view of the Austrian Government, this includes an *ex ante* examination of unfair commercial practices, which has advantages over a mere *ex post* examination. Certainly in the case of the announcement of clearance sales, the latter does not adequately fulfil the objective laid down in Article 13 of the directive of imposing effective, proportionate and dissuasive penalties for infringement of the national implementing law.

27. Both parties to the proceedings comment on the rules of administrative and judicial procedure in Austrian law, the Schutzverband referring to the obligation incumbent on the Austrian authorities, in the course of the procedure for examining an application for authorisation, to interpret the national provisions in the light of the purpose of Directive 2005/29 so as to achieve the objective pursued by that directive. It also points out that the court seised of proceedings for a prohibitory injunction will normally examine whether there has been an announcement within the meaning of Paragraph 33a of the UWG. If there has been a sale announcement requiring authorisation for which no authorisation has been obtained from the authorities, this in any event is likely to be contrary to the requirements of professional diligence within the meaning of Article 5(2)(a) of Directive 2005/29. For its part, the Austrian Government points out that the Austrian administrative authorities must authorise the announcement of a clearance sale in so far as that announcement is not misleading and does not infringe the provisions of Articles 8 and 9 of Directive 2005/29.

28. The Schutzverband proposes that the Court should answer the question referred in the negative. For its part, the Austrian Government proposes that the answer to the question referred should be that Directive 2005/29 does not preclude a national provision under which the announcement of certain special clearance sales requires authorisation from the authorities.

29. The *Belgian Government* proposes that the Court's answer to the question referred should be that Directive 2005/29 does not preclude a national provision which makes the announcement of a clearance sale conditional on prior authorisation provided that such authorisation is intended only to protect the interests of competitors. It is, however, for the national court to assess whether that is the case. The Belgian Government also points out that the aforementioned commercial practice is not listed in Annex I to the directive.

30. The *Commission* proposes that the Court should answer the question referred in the affirmative. With respect to the applicability of Directive 2005/29 to the main proceedings, it states that the announcement of a clearance sale is to be classified as a commercial practice. Furthermore, it submits, the provisions at issue serve to protect not only competitors but also consumers. However, a general prohibition subject to authorisation, as laid down by the national provision at issue, is incompatible with Article 5(2), (4) and (5) of Directive 2005/29 and with points 7 and 15 of Annex I to that directive. Moreover, such a mechanism is not in keeping with the approach of full harmonisation pursued by the directive. What is more, Article 11 of the directive, under which the Member States must use adequate and effective means of combating unfair commercial practices, does not provide for any such *ex ante* examination of all the commercial practices concerned by the national authorities. Nor can the national provisions at issue be justified by Article 3(8) of the directive, since that provision of the directive applies only to regulated professions, which do not form the subject-matter of the main proceedings. Furthermore, the Commission takes the view that no argument in support of the permissibility of a general prohibition subject to authorisation can be inferred from point 4 of Annex I to the directive.

VI – Legal assessment

A – *Introductory remarks*

31. The European Union legislature prescribed a time-limit for the transposition of Directive 2005/29 by the Member States of 12 June 2007, the deadline for its definitive application being 12 December 2007. Now that all the Member States have complied with that obligation to transpose and apply the directive within the prescribed periods,[5] this is an appropriate time to ask the question whether the

5 — On the progress of transposition in the individual Member States, see Henning-Bodewig, F., 'Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme', *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 2010, pp. 273-274.

directive has been correctly transposed into the individual legal systems of the Member States. After all, it is only through optimum transposition that the purpose of the directive, which is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests, can be achieved. [6]

32. The Court has had occasion in a number of preliminary rulings to comment indirectly on whether the directive has been correctly transposed in Austria, [7] Belgium, [8] Germany, [9] Poland [10] and Sweden. [11] [12] After all, although its jurisdiction in the context of references for a preliminary ruling under Article 267 TFEU consists in interpreting European Union law but not in commenting on the compatibility of a national provision with EU law, [13] it is those very interpretations which have contributed towards a better understanding of the meaning and scope of the individual provisions of the directive. This has in turn enabled the Member States, subsequently, to adapt their implementing provisions in such a way as to bring them into line with the requirements of European Union law. [14]

33. So far, the references for a preliminary ruling made by the Member States' courts have related only to those provisions of the directive on the basis of which the unfairness of commercial practices can be assessed. It has thus been possible to establish that the incompatibility of the relevant national provisions was essentially attributable to the fact that they were contrary to the full harmonisation approach which the directive pursues in the area of the law relating to unfair commercial practices. [15] By adopting general prohibitions on individual commercial practices, the Member States had improperly sought to extend the exhaustive list of prohibited commercial practices contained in Annex I to the directive. [16] This was also the subject-matter of Case C-540/08 (*Mediaprint*), which concerned a prohibition on the offer of bonuses laid down in the Austrian UWG. Consequently, the Court also held that the directive precludes a national provision of this kind which is framed as a general prohibition. [17]

6 — Harmonising the laws on fair trading by means of directives contributes to achieving the objective of establishing an internal market while ensuring a high level of consumer protection. One of the advantages of this approach is that it almost entirely eliminates any further conflict between the relevant fundamental freedoms and national consumer protection measures, since the European Union legislature has already reconciled both interests (see, in relation exclusively to the issue of terms of sale in the area of the law governing trade in goods, Picod, F., 'La jurisprudence Keck et Mithouard, a-t-elle un avenir[?]', *L'entrave dans le droit du marché intérieur*, Brussels 2011, p. 47).

7 — Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909 ('*Mediaprint*'). In connection with the obligation incumbent on Member States to transpose directives correctly, see Griller, S., 'Direktwirkung und richtlinienkonforme Auslegung', *10 Jahre Anwendung des Gemeinschaftsrechts in Österreich*, Vienna/Graz 2006, p. 91, who looks extensively at the effect of directives with the Austrian legal system.

8 — Joined Cases C-261/07 and C-299/07 *VTB-VAB* and *Galatea* [2009] ECR I-2949.

9 — Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217.

10 — Case C-522/08 *Telekomunikacja Polska* [2010] ECR I-2079.

11 — Case C-122/10 *Ving Sverige* [2011] ECR I-3903.

12 — For an overview of the case-law, see Namysłowska, M., 'Trifft die Schwarze Liste der unlauteren Geschäftspraktiken ins Schwarze? Bewertung im Lichte der EuGH- Rechtsprechung', *Gewerblicher Rechtsschutz und Urheberrecht - Internationaler Teil*, 2010, p. 1033.

13 — See, inter alia, Case 6/64 *Costa* [1964] ECR 585, 593, Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 23, and Case C-265/01 *Pansard and Others* [2003] ECR I-683, paragraph 18.

14 — Bernitz, U., 'The unfair commercial practices directive: its scope, ambitions and relation to the law of unfair competition', *The regulation of unfair commercial practices under EC Directive 2005/29 – New rules and techniques* (ed. Stephen Weatherill/Ulf Bernitz), assumes that a considerable number of references for a preliminary ruling will be needed in order to ensure that Directive 2005/29 is correctly transposed in the Member States. In the author's view, this process will also include actions for failure to fulfil obligations brought by the Commission against Member States that seek to retain specific national provisions contrary to the directive.

15 — In the opinion of Zimmermann, R., 'The present state of European private law', *American Journal of comparative law*, 2009, p. 479, the transition from minimum to full harmonisation in some areas of European Union law will create difficulties for the Member States. Basedow, J., 'Der Europäische Gerichtshof und das Privatrecht', *Archiv für die civilistische Praxis*, 2010, p. 190, expects that this transition will give rise to numerous references for a preliminary ruling to the Court. As far as Directive 2005/29 is concerned, it would seem that that prediction is gradually proving to be correct.

16 — As Micklitz, H.-W., 'Full Harmonisation of Unfair Commercial Practices under Directive 2005/29', *International review of intellectual property and competition law*, Volume 40 (2009), No. 4, p. 371, rightly states, when Directive 2005/29 was adopted, the Member States probably did not fully realise what a considerable impact the full harmonisation approach would have on their national law.

17 — *Mediaprint* (cited in footnote 7 above), paragraph 38.

B – *Analysis of the legal issues*

34. There are certain parallels between that case and this one inasmuch as the present reference for a preliminary ruling seeks a finding from the Court as to whether the contested national provision on the announcement of clearance sales is also formulated as a general provision which is contrary to Directive 2005/29. It must not be forgotten in this regard, however, that there is also a procedural-law component to the issues raised here. After all, the referring court seeks guidance as to whether a prohibition subject to authorisation such as that provided for in Austrian law satisfies the requirements of the directive. Connected with this is the question of the procedural rules laid down in the instruments for combating unfair commercial practices, in which regard it must be examined whether the directive permits an *ex ante* review of such commercial practices by the administrative authorities. Given that that question has not previously been addressed by the Court in its case-law, it merits special analysis.

35. In order to provide the referring court with a useful answer and in the interests of clarity, I shall divide my examination of the question referred into three different subject-areas. First, I shall examine whether Directive 2005/29 is applicable to the main proceedings and may therefore conceivably be used as a benchmark for assessing whether European Union law has been correctly transposed into national law. I shall then turn to the procedural-law issues mentioned above. Finally, I shall look at whether the national provisions on the authorisation of clearance sale announcements satisfy the substantive-law requirements of the directive.

1. Applicability of Directive 2005/29

a) Scope *ratione materiae*

36. In order to fall within the scope *ratione materiae* of Directive 2005/29, the national provision at issue would have to have as its subject-matter a business-to-consumer commercial practice. It must be pointed out in this regard that Article 2(d) of the directive gives a particularly broad definition of the term ‘commercial practices’ as being ‘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’.[18] Advertising measures such as those at issue in the main proceedings, which concern the sale of goods to consumers for a particular reason at reduced prices, clearly form part of a trader’s business strategy and relate directly to the promotion and sale of products. They therefore constitute commercial practices within the meaning of the aforementioned definition, with the result that national provisions such as those at issue, which lay down detailed rules on the exercise of those practices, fall within the scope *ratione materiae* of the directive.

b) Scope *ratione personae*

37. The question whether the national provision at issue falls within the scope *ratione personae* of Directive 2005/29 depends on whether it too, like the directive itself, seeks to protect consumers as well. In *Mediaprint*,[19] the Court held that national legislation concerning unfair commercial practices also falls within the scope of the directive where it not only seeks to protect consumers but also pursues other objectives. After all, as is clear from recital 6 in the preamble to the directive, only national provisions which *only* affect competitors’ economic interests or relate to a transaction

18 — See *VTB-VAB and Galatea* (cited above in footnote 8), paragraph 50, *Plus Warenhandelsgesellschaft* (cited above in footnote 9), paragraph 36, and *Mediaprint* (cited above in footnote 7), paragraph 17, and order in Case C-288/10 *Wamo* [2011] ECR I-5835, paragraph 30.

19 — *Mediaprint* (cited above in footnote 7), paragraphs 21 to 24.

between traders are excluded from the scope of the directive. Consequently, even if the rules on the announcement of clearance sales contained in Paragraph 33a et seq. of the UWG sought to protect not only consumers but also – or even predominantly – competitors, this would not preclude the applicability of the directive.

38. As the Court has repeatedly held in its case-law,[20] it is for the national court, which is also responsible for interpreting national law, to establish whether the national provision at issue in the main proceedings actually pursues objectives relating to consumer protection in order to determine whether that provision comes within the scope of the directive. It must be noted in this regard that, in its order for reference,[21] the referring court largely confines itself to the finding that 'there is no doubt that' the announcement of a clearance sale as defined in Paragraph 33a(1) of the UWG 'involves a commercial practice within the meaning of Directive 2005/29', thus clearly presupposing that the provision at issue falls within the scope of that directive. This carries with it the implicit assumption that, in any event, the provision at issue also pursues objectives relating to consumer protection.

39. There is some evidence to support such a conclusion. As is clear from the observations of the Austrian Government[22] and the Schutzverband,[23] the case-law of the Austrian courts[24] and the legal literature,[25] the objective of the provision on clearance sales contained in Paragraph 33a(1) of the UWG is to counter the misuse of (alleged) clearance sales advertised under the enticing cover of public announcements to the effect that, owing to unexpected compelling circumstances, an undertaking has been forced to hold a clearance sale on exceptionally advantageous terms or at exceptionally advantageous prices. That provision covers only announced clearance sales, in particular because they create the impression of offering special bargains. Such announcements can easily be misused to exert a psychological influence on the buying public to the detriment of competitors. To counteract this, Paragraph 33a(1) of the UWG makes the lawfulness of such an announcement conditional on the acquisition of official authorisation. In this way, it seeks to take into account the need, on the one hand, to protect traders and competitors against unfair competition, and, on the other hand, to protect customers from psychological influence.

40. It must therefore be assumed, for the purposes of the present proceedings at least, that that provision also falls within the scope *ratione personae* of Directive 2005/29, although this has yet to be confirmed by the referring court.

c) No ground for exemption

41. Directive 2005/29 may legitimately be declared applicable only in the absence of any relevant ground for exemption in the main proceedings. In its observations, the Schutzverband calls into question the applicability of the directive by reference to Article 3(8). That provision, which excludes certain items from the material scope of the directive, states that the directive 'is without prejudice to any … authorisation regimes … or other specific rules governing regulated professions'. The Schutzverband concludes from this that authorisation regimes such as a condition of examination by the authorities, including the provisions contained in Paragraph 33b et seq. of the UWG, concerning the authorisation procedure to be followed by the authorities and the required content of the decision

20 — *Wamo* (cited above in footnote 18), paragraph 28.

21 — See page 7 of the order for reference.

22 — See paragraphs 7 and 8 of the observations submitted by the Austrian Government.

23 — See paragraph 6 of the observations submitted by the Schutzverband.

24 — See the judgments of the Verwaltungsgerichtshof of 25 February 1993 (Ref.: 93/04/0011) and of 14 April 1999 (Ref.: 98/04/0159, Collection number: 15123 A/1999); judgment of the Oberster Gerichtshof of 25 March 2003 (Ref.: 4Ob48/03t).

25 — See Duursma, D., in: *UWG – Kommentar* (ed. Maximilian Gumpoldsberger/Peter Baumann), Vienna 2006, Paragraph 33a, point 1, p. 1185; Wiltschek, L., *UWG – Kommentar*, 2nd ed. Vienna 2007, Paragraph 33a-f, point. 1, p. 1034; Feik, R., *Öffentliches Wirtschaftsrecht* (ed. Michael Holoubek/Michael Potacs), Vienna 2002, p. 177.

on authorisation, do not fall within the scope of the directive. However, that submission must be countered with the argument that the main proceedings do not concern specific national rules governing a 'regulated profession' within the meaning of the aforementioned article. Consequently, that ground for exemption is not relevant.

d) Interim conclusion

42. In the light of all the foregoing, it must be concluded that there is nothing in the main proceedings to indicate that Directive 2005/29 is not applicable to those proceedings. It is, however, for the referring court to examine whether this is the case.

2. Procedural-law aspects of the question referred

43. Now that the applicability of Directive 2005/29 has in principle been established, it must next be examined whether the Austrian legislature, when adopting the procedural measures necessary to implement the directive at national level, also satisfied the requirements of European Union law contained in it. In view of the many legal issues which the reference for a preliminary ruling raises, I shall, in the interests of clarity, address each of those issues in turn.

a) Power of review of national administrative authorities

44. The first procedural-law question raised by the reference for a preliminary ruling is whether Directive 2005/29 allows administrative authorities to review the fairness of commercial practices. In my view, the answer to that question is apparent from the provisions of Articles 11 and 12 of the directive, from which it follows that the Member States are empowered to institute judicial or administrative proceedings to combat unfair commercial practices in order to enforce compliance with that directive. The fact that the two forms of procedure are alternatives, as clearly expressed in the wording ('courts or administrative authorities') of the individual provisions, shows that the choice of suitable procedure was in principle left to the discretion of the Member States.[26] Accordingly, it must be concluded that Directive 2005/29 unquestionably allows administrative authorities to be given the task of reviewing the fairness of commercial practices.

b) Power of the authorities to carry out an *ex ante* review

45. A further procedural-law question which arises here is, as I have already mentioned, whether Directive 2005/29 allows administrative authorities to carry out an *ex ante* review of such commercial practices. It must be said in this regard, as the referring court rightly pointed out in its order for reference,[27] that the directive certainly does not expressly prohibit it. It cannot be inferred from the directive that it permits only *ex post* review and therefore makes it impossible to prescribe prior

26 — See Holzmayr-Schrenk, T., *Die Richtlinie über unlautere Geschäftspraktiken*, Munich 2010, p. 68, who states, that although Directive 2005/29 aims to achieve full harmonisation, it does not prescribe a specific system for combating unfair commercial practices. Stolze, C., *Harmonisierung des Lauterkeitsrechts in der EU – Unter besonderer Berücksichtigung der Sanktionssysteme*, Hamburg 2010, p. 159, refers to Articles 11 and 12 of Directive 2005/29, which, in his opinion, show that the Member States are free to make provision for protection against unfair commercial practices under either administrative law or civil law. Alexander, C., 'Die Sanktions- und Verfahrensvorschriften der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken im Binnenmarkt – Umsetzungsbedarf in Deutschland?', *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 2005, p. 810, points out that, to date, European Union law has harmonised the punitive and procedural provisions applied by the Member States only in a piecemeal fashion and does not prescribe a particular system for combating unfair commercial practices. Directive 2005/29 does nothing to change that acceptance of different legislative systems by European Union law. The national legislatures remain responsible for deciding whether action to combat unfair commercial practices is to be pursued under administrative, criminal or civil law. Ciatti, A., 'La tutela amministrativa e giurisdizionale', *Le pratiche commerciali sleali tra imprese e consumatori* (ed. Giovanni De Cristofaro), Turin 2007, p. 267, says that, whereas Directive 2005/29 contains a high degree of precision and detail when it comes to the substantive-law requirements to be satisfied by national implementing law, the same is not true of the enforcement and penalty mechanisms, particularly since the national legislature is afforded a broad margin of discretion in this regard.

27 — See paragraph 3 of the order for reference.

authorisation by an administrative authority for certain commercial practices. Indeed, as I shall demonstrate below, it is even possible, by way of an interpretation based on the wording and scheme of the relevant provisions, to put forward arguments to the effect that such *ex ante* review is compatible with the directive.

46. First, the central provision in the first subparagraph of Article 11(1) of Directive 2005/29 lays down the Member States' obligation under European Union law to 'ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers'. This means that the compatibility of a measure adopted by a Member State with the directive is subject to the condition that it should be sufficiently 'adequate' and 'effective' to prevent unfair commercial practices. As I have already explained in my Opinion in *Banco Español de Crédito*,[28] the Member States are afforded a broad margin of discretion,[29] particularly since there are in theory various potential measures open to them which satisfy both conditions. Ultimately, the only measures that are ruled out should be those which are clearly inadequate and ineffective. That provision, in common with other legal instruments in the area of consumer protection,[30] takes account of the different legal traditions of the Member States.

47. The directive defines the particular measures that may be adopted for this purpose in Article 11(1) and (2), for example by empowering persons or organisations which, under national law, have a legitimate interest in combating unfair commercial practices to take legal action against such unfair commercial practices[31] and/or to bring such practices before an administrative authority. Moreover, Article 11(2) confers on national courts and administrative authorities a series of powers which they require in order to prohibit unfair commercial practices. It also provides for the grant of interim relief and the ordering of measures to eliminate the consequences of commercial practices of this kind. That the list of such measures is by no means exhaustive[32] and represents, at most, a minimum standard to be met by all the Member States[33] is apparent, on the one hand, from the central provision of the first subparagraph of Article 11(1), which refers generally to 'means' but does not specify any individual measures. It is clarified only by the provision in the second subparagraph to the effect that the means

28 — See the Opinion in Case C-618/10 *Banco Español de Crédito* [2012] ECR, point 105.

29 — See Stolze, C., op. cit. (footnote 26), p. 158, in whose view the flexible wording of Directive 2005/29 leaves the Member States with an extensive range of options when it comes to the means by which to transpose the rules on enforcement laid down in Article 11 et seq. A similar view is taken by Koch, E., *Die Richtlinie gegen unlautere Geschäftspraktiken – Aggressives Geschäftsgebaren in Deutschland und England und die Auswirkungen der Richtlinie*, Hamburg 2006, p. 55. See Henning-Bodewig, F., 'Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken', *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 2005, p. 633, who points out that, in essence, Directive 2005/29 reproduces the provisions of Directive 84/450/EEC. Both directives leave extensive scope for the adoption of all kinds of legislative schemes under civil, criminal and administrative law as long as they are confined to combating unfair competition in an adequate and effective manner. The directive does not secure any futher harmonisation of the national legislative systems, which are in fact very different in the area of enforcement. De Cristofaro, G., 'Die zivilrechtlichen Folgen des Verstoßes gegen das Verbot unlauterer Geschäftspraktiken: eine vergleichende Analyse der Lösungen der EU-Mitgliedstaaten', *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 2010, p. 1023, bemoans the different rules which have been adopted on the basis of Article 11 of Directive 2005/29 and concludes that the ambitious attempt to harmonise in full the laws of the Member States on unfair business-to-consumer commercial practices has failed.

30 — Articles 11 and 12 of Directive 2005/29 reproduce verbatim Articles 4 to 6 of Council Directive 84/450/EEC of 10 September 1984 concerning misleading advertising (OJ 1984 L 250, p. 17). For its part, Article 11(1) of Directive 2005/29 bears a certain similarity with Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), which states that 'Member States shall ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'. See in this regard my comments in the Opinion in Case C-472/10 *Invitel* [2012] ECR, point 38.

31 — On the significance of collective actions in the field of consumer protection law, see my Opinion in *Invitel* (cited in footnote 30 above), points 36 and 37.

32 — See Massaguer, J., *El nuevo derecho contra la competencia desleal – La Directiva 2005/29/CE sobre las Prácticas Comerciales Desleales*, Madrid 2006, p. 144.

33 — See my Opinion in *Banco Español de Crédito* (cited in footnote 28 above), point 105. See Stuyck, J., 'Enforcement of consumer rights and legal redress for consumers in the EU: An institutional model', *New frontiers of consumer protection* (ed. Fabrizio Cafaggi/H.-W. Micklitz), Oxford 2009, pp. 72-73, who, on the one hand, points to the freedom which the Member States enjoy when it comes to formulating the means of enforcement to be applied at national level, but, on the other hand, draws attention to the fact that Directive 2005/29 lays down certain minimum standards under European Union law with which the Member States must compulsorily comply.

in question 'include' the specific measures set out thereafter. The wording of that provision indicates that the Member States must in any event adopt the measures expressly listed in their legal systems. It does not, however, support the conclusion that they are precluded by law from introducing other procedures or remedies which may be just as adequate and effective.

48. Furthermore, Article 11(2)(b) expressly confers on administrative authorities the power to prohibit an unfair commercial practice if it 'has not yet been carried out but is imminent'. What the directive has in mind here is a preventive prohibition by the authorities. Both the similarity with that mechanism of preventive prohibition and the non-exhaustive listing of measures to combat unfair commercial practices indicate in themselves that an *ex ante* review mechanism is compatible with Directive 2005/29. The same is true of fulfilment of the adequacy and effectiveness criteria laid down in the first subparagraph of Article 11(1) of the directive, particularly since there can be little doubt that recognising unfair business-to-consumer commercial practices at the earliest opportunity is instrumental in being able to prevent them before they produce their distorting effects on competition.

49. The Austrian Government's observations [34] on the legislative purpose of the provisions on the announcement of clearance sales seem to me to be relevant in this regard. They indicate that, in the case of clearance sales, which are covered by the authorisation requirement laid down in Paragraph 33a et seq. of the UWG, an *ex post* assessment of unfair commercial practices would not be effective, since, in most cases, the undertaking no longer exists after the clearance sale has come to an end. In accordance with Paragraph 33a of the UWG, a clearance sale announcement means 'all public announcements or communications intended for a large circle of persons which indicate the intention to dispose of large quantities of goods quickly by retail sale and which at the same time are liable to create the impression that as a result of special circumstances the trader is compelled to sell quickly and therefore offers his goods on exceptionally advantageous terms or at exceptionally advantageous prices. Announcements or communications in which the words "clearance sale", "liquidation sale", "closing-down sale", "quick sale", "sale at knock-down prices", "warehouse clearance" or words with a similar meaning appear are in any event regarded as announcing a clearance sale'.

50. Irrespective of the question whether such public announcements are to be classified as 'unfair commercial practices' within the meaning of Directive 2005/29, the answer to which will be determined by an assessment of the individual case in question, early intervention by the authorities would seem to be justified by the aforementioned circumstances of a clearance sale, which call for urgency. A provision which confers on the administrative authorities the power to carry out an *ex ante* review of commercial practices therefore fulfils the conditions of adequacy and effectiveness laid down in the first subparagraph of Article 11(1) of Directive 2005/29.

51. In principle, therefore, Directive 2005/29 allows Member States to confer on their administrative authorities the power to carry out an *ex ante* review of commercial practices.

c) Compatibility with the directive of a statutory prohibition subject to authorisation the infringement of which constitutes a criminal offence

52. If the Member States are given such a power, they must, logically, also be granted the power in principle to formulate their national procedural law so as to provide that the use of certain commercial practices that may be regarded as being unfair is subject to a statutory prohibition unless authorised beforehand. It is not, in principle, contrary to Directive 2005/29 for traders to be required by law to obtain official authorisation before holding a public clearance sale, particularly since such a legal requirement is simply a procedural rule intended to enable the administrative authorities to

34 — See paragraph 18 of the observations of the Austrian Government.

carry out the *ex ante* review in the first place. After all, as I have already said,[35] there would in all probability be no point in the authorities carrying such a review if they had no knowledge of a trader's intention to announce a clearance sale. To this extent, the statutory formulation of national procedural rules to this effect fulfils the criteria, laid down in the first subparagraph of Article 11(1) of the directive, of adequacy and effectiveness for the purposes of combating unfair commercial practices.

53. What is more, there is also nothing in Directive 2005/29 to prevent Member States, when formulating such a statutory prohibition subject to authorisation in their procedural law, from providing in their legislation that, in the event of an infringement of that prohibition, the administrative authorities must confine themselves to establishing the absence of authorisation, without deciding on the actual substance of the matter at that stage of the procedure. However, this applies only on condition that the trader is then given the opportunity to follow the proper administrative procedure by submitting an application for authorisation so that a decision can be made on the substance of the matter, which decision must serve as the basis for any future proceedings.

54. For only in those circumstances would the statutory formulation of a prohibition subject to authorisation serve any function as part of a procedural mechanism for ensuring *ex ante* review. If the trader were deprived of such an opportunity – there is no evidence that this is the case in the main proceedings – such a provision would amount to a definitive prohibition equivalent to a general prohibition on the pursuit of commercial practices, for which there is no basis in Directive 2005/29. A definitive *ex post* prohibition of this kind would run counter not only to the liberal orientation of the directive in favour of entrepreneurial freedom,[36] but also to the regulatory structure of the directive, under which commercial practices are allowed provided that they do not fulfil the criteria of unfairness. After all, as the Court held in *Mediaprint*, where a commercial practice falling within the scope of the directive does not appear in Annex I to the latter, that practice can be regarded as unfair, and thus prohibited, only after a specific assessment, particularly in the light of the criteria set out in Articles 5 to 9 of the directive.[37] Such a prohibition would also be a penalty disproportionate to the objective of ensuring enforcement of the directive. I shall address this point in more detail in my examination of the substantive-law issues.

55. The fact that, under Paragraph 33 et seq. of the UWG, infringements are punishable by a fine does not in itself indicate that those provisions are incompatible with Directive 2005/29, particularly since Article 13 of the directive expressly requires the Member States to 'lay down penalties for infringements of national provisions adopted in application of this Directive'. That article also provides that Member States 'shall take all necessary measures' to ensure enforcement of the directive. Those penalties must be 'effective, proportionate and dissuasive'.[38] In view of the fact that the threat of a fine is in principle capable of encouraging traders to act in accordance with the law and to report any clearance sale announcement – which may or may not fulfil the conditions governing classification as an unfair commercial practice within the meaning of the directive – to the authorities, there is no doubt that such a penalty is both effective and dissuasive. There is no evidence that such a fine is disproportionate to the objective pursued of combating unfair commercial practices.

35 — See point 49 of this Opinion.

36 — See my Opinions in *VTB-VAB* and *Galatea*, point 81 (cited in footnote 8 above), and in *Mediaprint*, point 74 (cited in footnote 7).

37 — *Mediaprint* (cited in footnote 7 above), paragraph 43.

38 — Assuming that the European Union legislature did not unnecessarily duplicate the rules of Directive 2005/29, Article 13 may be regarded as a specific provision aimed at the legal consequences under national law of an infringement of the principle of fairness (penalties), whereas the first subparagraph of Article 11(1) of the directive relates more to matters of enforcement and procedure. Although a clear distinction between those two areas is not maintained in the wording of the directive, this is of only minor significance for the purposes of transposition into national law. See to this effect Alexander, C., op. cit. (footnote 26), p. 811.

d) Judicial review of the administrative authority's decision

i) Outline of the issue

56. Another procedural-law issue raised by the referring court in its reference is the scope of the power of assessment exercised by national courts in the context of actions for a prohibitory injunction brought by competitors under Paragraph 34(3) of the UWG. In essence, it wishes to ascertain whether a national court may be required by law to prohibit the announcement of a clearance sale on the sole ground that the trader did not have authorisation to make such an announcement, without having to examine, in those proceedings, whether that commercial practice is misleading, aggressive or otherwise unfair.

57. In my view, the answer to that question must take account primarily of the legal effects which such a judicial prohibition has within the national legal system. A rule of procedural law such as that at issue certainly does not satisfy the requirements of the directive where it has the effect of definitively prohibiting a particular commercial practice before the unfairness of that practice has first been established as part of an individual assessment of the case in question. I have already said that an individual assessment of a given practice is an essential prerequisite if there is to be any possibility at all of imposing a prohibition on that practice. [39]

58. As I shall explain in the course of my observations, there may be some situations in which it is not absolutely guaranteed that such an assessment will be carried out. To that extent, Directive 2005/29 would prohibit Member States from requiring their courts by law to confine their hearing of such cases to an examination of compliance with the requirement to obtain authorisation.

ii) Discretion of the Member States in the formulation of procedural rules

59. Before I discuss those particular situations, however, it is appropriate for me to clarify certain aspects of the power exercised by the Member States when it comes to the formulation of rules governing actions for a prohibitory injunction. In this connection, consideration must be given above all to the question of what kind of judicial review must be carried out by the national courts which have jurisdiction over such actions. In other words, may the courts seised of an action for a prohibitory injunction confine themselves to examining compliance with a formality such as the obtaining of authorisation or are they, rather, required by European Union law to examine whether the commercial practice in question is actually unfair within the meaning of Directive 2005/29?

60. As I have already said, in principle, the Member States enjoy a broad margin of discretion in the formulation of the procedural rules laid down in instruments for combating unfair business-to-consumer commercial practices. [40] If the Member States – as is my view – are accepted as having authority under European Union law to review the fairness of commercial practices by conferring on national authorities the power to carry out an *ex ante* examination of those practices, it follows logically that they should also have authority to prescribe in their legal systems that, in the context of actions for a prohibitory injunction, the courts must apply the same legal criterion as the authorities. This is particularly so given that the purpose of an injunction prohibiting the announcement of a clearance sale which is issued by a court following an action brought by a competitor under Paragraph 34(3) of the UWG is, in essence, to ensure the effectiveness of a statutory provision such as that at issue here by recourse to the means available before the courts of

39 — See point 53 of this Opinion.

40 — See point 46 of this Opinion.

ordinary jurisdiction.[41] Actions for an injunction are the very 'means', within the meaning of Article 11 of Directive 2005/29, on which competitors may rely in order to proceed against infringements of the requirement to obtain authorisation. The legal threat of a court order imposing a prohibition serves ultimately, as the Schutzverband convincingly argued in its oral submissions, to compel the trader to comply with the authorisation procedure laid down in Paragraph 33b of the UWG.

61. If the legal protection provided for at national level is to be consistent, the authorities and the courts must apply the same legal criterion when examining whether the trader has acted lawfully. If the trader has infringed the authorisation requirement laid down in Paragraph 33b of the UWG, it is in principle legitimate to prescribe in national law that the judicial examination conducted as part of a procedure under Paragraph 34(3) of the UWG must confine itself to determining whether the planned announcement required authorisation under national law and whether such authorisation was obtained, without the court necessarily having to decide at that stage whether the commercial practice in question is unfair.

62. It must therefore be concluded that, in principle, Directive 2005/29 allows Member States to provide in law that, in the context of actions for a prohibitory injunction, national courts must confine their judicial review to an examination of compliance with the requirement to obtain authorisation.

iii) Prohibition against disregarding the obligation to carry out an individual assessment

63. The discretion which Member States enjoy in relation to the formulation of such 'means' is not, however, unlimited. It may be exercised only within the limits laid down by Directive 2005/29. For the purposes of the issue to be addressed here, this means that the rules governing actions for a prohibitory injunction must not under any circumstances be formulated in such a way as to frustrate the obligation under European Union law to carry out an individual assessment, whether in the judicial proceedings themselves or subsequently.

64. In accordance with the foregoing submissions concerning the administrative procedure,[42] a prohibitory injunction issued by a court must not have the effect, for example, of denying the trader the right, subsequently, to follow the proper administrative procedure by submitting an application for authorisation. For only then would a prohibitory injunction issued by a court no longer serve the function of ensuring observance, under procedural law, of the power of the authorities to carry out an *ex ante* examination. It would, instead, constitute a definitive court injunction amounting to a general prohibition on the pursuit of commercial practices.

65. In the light of those considerations, a national provision such as that at issue would certainly not be compatible with the directive in question if the fact that *ex ante* authorisation was not obtained had the effect of irreversibly prohibiting the practice in question and precluding any substantive examination – by the courts or the authorities – of whether that practice was fair. In other words, the trader must still be able to obtain an individual assessment of the substance of his case, by the courts or the authorities, even if he initially acted in breach of the procedure and did not obtain *ex ante* authorisation. Such action must not have as its inevitable consequence the permanent prohibition of a commercial practice which is intrinsically fair. The question whether it is lawful to impose a penalty on the trader solely because he has infringed the national procedural rules is a different matter. In the

41 — As is clear from Paragraph 34(3) of the UWG, an action for a prohibitory injunction may be brought only before the courts of ordinary jurisdiction, that is to say, therefore, before the civil courts. The right to bring an action for a prohibitory injunction under that provision is not dependent on the existence of fault or of intent, through the infringement, to procure an advantage over law-abiding competitors. The same is true of an action for an eliminatory injunction under Paragraph 15 of the UWG. In the case of infringements of the administrative provisions laid down in Section II, which include the provisions at issue here, recourse may also be had to the interim relief provided for in Paragraph 24 of the UWG (see Duursma, D., in: *UWG – Kommentar*, op. cit. (footnote 25), Paragraph 34(4), p. 1203).

42 — See point 53 of this Opinion.

context of the procedural autonomy which Directive 2005/29 confers on the Member States, the imposition of such a penalty is not in principle open to objection.[43] What *would* be objectionable, however, is a situation in which the national procedural rules had the effect, in law or in practice, of preventing a commercial practice which in itself, because fair, is innocuous.[44]

66. A heightened risk of fair commercial practices being prevented would exist, for example, in situations where the time factor is particularly important to the trader. This would be true of a clearance sale of seasonal items,[45] which by definition takes place only at certain times of year. A court injunction prohibiting the announcement of the clearance sale for the period in question on the sole ground that authorisation had not been obtained would, in fact, have the effect of an absolute prohibition. It is true that the trader could in principle apply for authorisation subsequently. From his point of view, however, there would no longer be any point in holding a clearance sale outside the relevant period. Consequently, any judicial decision confined exclusively to the finding that the requirement to obtain authorisation has been infringed would itself lead ultimately to the permanent prohibition of an intrinsically innocuous measure. It must be borne in mind, however, that the imposition of a permanent prohibition on the sole basis of a procedural irregularity is contrary to the objective of Directive 2005/29 to the effect that only those commercial practices should be prohibited which are actually aggressive, misleading or otherwise unfair.

67. The Austrian legislature appears to have taken that specific situation into account by automatically exempting 'end-of-season sales' from the authorisation requirement in Paragraph 33a(2) of the UWG. The purpose of the business practice of end-of-season sales is to enable traders to offload residual stock, in particular seasonal and fashion items. They are therefore used to clear warehouses and are intended to forestall depreciation and increase liquidity.[46] As is clear both from the Austrian Government's oral submissions and from the case-law of the Austrian courts,[47] such end-of-season sales cover not only the aforementioned seasonal items but also other goods which do not necessarily fall within that category,[48] so that it is probably fair to assume that that exemption is interpreted broadly in the Austrian legal system. Assuming that that assumption is correct, Paragraph 33a(2) of the UWG would ultimately help mitigate the risk that the pursuit of a fair commercial practice may be prevented. After all, in those circumstances, the trader's commercial activity would be regarded from the outset as not requiring authorisation, with the result that it would not be subject to any procedural conditions or, therefore, any restrictions, provided that his commercial practices are not declared to be unfair in the legal sense of that term. On this basis, the national provision at issue would in principle satisfy the requirements of Directive 2005/29, at least in the context of the situation under consideration here.

43 — See point 55 of this Opinion.

44 — The Member States' laws of civil procedure do not by any means escape the requirements of European Union law. Most importantly, they must not make ineffective or impossible in practice the exercise of the legal rights conferred by European Union law. They must provide for legal remedies which enable European Union law to be effectively enforced (see Hess, B., *Europäisches Zivilprozessrecht*, Heidelberg 2010, § 11, p. 621, paragraph 7). With regard to the issues raised by the present case, the objective of Directive 2005/29 would be frustrated if an intrinsically fair commercial practice were allowed to be definitively prohibited on the sole ground that a procedural requirement (in this case, the obligation to obtain authorisation) had not been satisfied. In the formulation of procedures, a balance must be struck between the interests of the national legislature (in this case, timely notification to the authorities of a potentially unfair commercial practice) and the interest of the European Union legislature in ensuring that only commercial practices which are actually unfair are prohibited. In order to ensure that a legal right (in this case, the freedom to pursue a fair commercial practice) is not irremediably prejudiced, the national legislature must provide for the necessary legal remedies.

45 — These include, inter alia, items that are typically used for traditional festivities such as Christmas, New Year's Eve, Carnival and Easter (e.g. decorations, costumes, specific items of food and drink, fireworks).

46 — See Duursma, D., in: *UWG – Kommentar*, op. cit. (footnote 25), Paragraph 33a, point 11, p. 1189; Wiltschek, L., *UWG – Kommentar*, op. cit. (footnote 25), Paragraph 33a-f, point 59, p. 1039.

47 — See the judgments of the Oberster Gerichtshof of 16 June 1987 (Ref.: 4 Ob 342/87) and of 29 June 1993 (Ref.: 4 Ob 54/93) and the judgment of the Verwaltungsgerichtshof (Administrative Court) of 16 December 1998 (Ref.: 97/04/0090).

48 — See the judgment of the Oberster Gerichtshof of 29 June 1993 (Ref.: 4 Ob 54/93), in which the sale of oriental carpets in an end-of-season sale was considered lawful, even though goods of that kind were not typical seasonal items.

68. It must therefore be concluded that the national provision at issue must not have the effect of definitively and permanently prohibiting the trader from pursuing an intrinsically fair commercial practice. On the contrary, the trader must be given the opportunity to obtain from the competent authorities a decision on the substance matter made on the basis of Annex I and the criteria laid down in Articles 5 to 9 of Directive 2005/29. It is for the referring court, which has direct knowledge of the local situation and exclusive jurisdiction to interpret national law, to determine whether the national law of procedure provides sufficient guarantees for this purpose.

e) Interim conclusion

69. The foregoing examination of the procedural-law aspects of the question referred has shown that Directive 2005/29 does not in principle preclude a national provision such as that at issue in the main proceedings under which the announcement of a clearance sale without the authorisation of the competent administrative authority is not permitted and must therefore be prohibited in court proceedings, without it being necessary in those proceedings for the court to consider whether such a commercial practice is misleading, aggressive or otherwise unfair, provided that it is ensured that an intrinsically fair commercial practice is not definitively prohibited. The trader must be given the opportunity to obtain an individual examination of the fairness of the commercial practice in question in either judicial or administrative proceedings. [49]

3. Substantive-law aspects of the question referred

a) General

70. Whether the substantive-law provisions of Directive 2005/29 were correctly transposed into Austrian law – at least as regards the specific area of clearance sale announcements – is one of the central questions of the present case. The question as to whether the provisions contained in Paragraphs 33a et seq. of the UWG are compatible with the directive has arisen because those provisions constitute the legal basis on which the administrative authorities ultimately have to decide whether or not to grant authorisation to the trader. The refusal to give authorisation on a legal basis which is contrary to the directive would be an administrative decision which is also contrary to the directive. The referring court is reluctant to rule out the possibility that some of those legal bases are not in compliance with the directive. [50]

71. The incompatibility of the national provisions at issue might arise from the fact that they impose on the administrative authorities a decision-making process which is not in conformity with Directive 2005/29. That decision-making process might also include the criteria which the administrative authorities must use to assess the unfairness of commercial practices. Taking into account the fact that the directive seeks to harmonise in full the substantive provisions of the laws of fair trading, any deviation from the requirements of European Union law would have to be regarded as an infringement of European Union law. As the referring court rightly points out [51] with reference to the relevant case-law of the Court of Justice, in the light of the primacy of European Union law, the administrative authorities should not apply any opposing provisions of national law to citizens in such circumstances.

49 — The example of the procedural-law requirements which Directive 2005/29 lays down for the purpose of its enforcement in the individual Member States makes apparent the close connection between the supranational and national levels of legislation. The European Union legislature confines itself to establishing general provisions and minimum requirements, but otherwise leaves it to the national legislature to formulate the more detailed means of enforcement. The two legislative levels form part of an interconnected 'two-tier system', as Grundmann, S., 'Systemdenken und Systembildung', in: *Europäische Methodenlehre* (ed. Karl Riesenhuber), 2nd edition, Berlin 2010, paragraph 10, point 2, p. 287, would describe it.

50 — See paragraph 5 of the order for reference.

51 — See paragraph 6 of the order for reference.

b) Examination of the structure of the two pieces of legislation

72. In order to be able to determine whether Directive 2005/29 precludes the provisions on the announcement of clearance sales contained in Paragraph 33a et seq. of the UWG, the regulatory structure of the essential provisions of the two pieces of legislation must be examined and then compared.

i) Regulatory structure of Directive 2005/29

73. The cornerstone of Directive 2005/29 is the general clause contained in Article 5(1), which prohibits unfair commercial practices. Article 5(2) defines in detail what exactly is meant by 'unfair'. It states that a commercial practice is unfair if, firstly, it is contrary to the requirements of 'professional diligence' and, secondly, it is likely 'materially [to] distort' the economic behaviour of consumers. In accordance with Article 5(4), unfair commercial practices are, in particular, those which are misleading (Articles 6 and 7) or aggressive (Articles 8 and 9). Article 5 refers to Annex I and the commercial practices listed there, which 'shall in all circumstances be regarded as unfair'. The same single list is to apply uniformly in all Member States and may be modified only by revision of the directive.

74. It follows from this that, for the purposes of the application of the law by the national courts and the administrative authorities, regard is to be had first of all to the list of 31 cases of unfair commercial practice contained in Annex I. If a commercial practice can be subsumed under one of those situations, it must be prohibited; no further examination, of its effects, for example, is necessary. If the particular conduct in question does not fall within the scope of the list of prohibited practices, it must be examined whether it constitutes one of the regulated instances of the general clause – misleading or aggressive commercial practices. Only if this is not the case is the general clause in Article 5(1) of the directive directly applicable.

ii) The substantive provisions of the UWG on the announcement of clearance sales

75. Under Paragraph 33b of the UWG, the announcement of a clearance sale is permissible only with the authorisation of the district administrative authority responsible for the location of the clearance sale. Paragraph 33a(1) of the UWG defines what is meant by 'announcement of a clearance sale'. That provision also lists a number of key words which are normally used in that type of announcement. As is clear from the observations of the Austrian Government [52] and the Schutzverband, [53] however, not all announcements are subject to the authorisation requirement. The announcements and communications referred to in Paragraph 33a(2) of the UWG, concerning end-of-season sales, seasonal clearance sales, stock-taking sales and the like, as well as special sales customary in the relevant business sector and at particular times of the year, are exempt from that requirement.

76. Under Paragraph 33b(4), an application for the relevant authorisation must contain the reasons why the clearance sale is to be held, such as the death of the business proprietor, cessation of trading or disposal of a particular product line, relocation of the business, natural disasters and the like.

77. Under Paragraph 33c(3), authorisation must be refused if none of the aforementioned reasons obtains or if the sale is not to be announced for a continuous period. Authorisation must also be refused if the sale is to be held at some time between the penultimate week before Easter and Whit Sunday or between 15 November and Christmas or is to last for more than six months, except in the case of the trader's death, natural disasters or other cases meriting similar consideration. If the business has been established for less than three years, authorisation is to be granted only in the event of the trader's death, natural disasters or other cases which merit similar consideration.

52 — See paragraph 2 of the observations of the Austrian Government.

53 — See paragraph 4 et seq. of the observations of the Schutzverband.

c) Compatibility of the substantive provisions with Directive 2005/29

i) Imposition of general prohibitions

78. A comparison of the regulatory structures of the two pieces of legislation shows first that the UWG lists a number of general prohibitions which have no counterparts in Directive 2005/29.

79. This only becomes apparent when the relevant national provisions are considered in relation to each other. In this context, the statutory provision contained in Paragraph 33b of the UWG, which imposes the requirement of authorisation for clearance sale announcements, must be interpreted in conjunction with Paragraph 33c(3) of the UWG. The prohibitory nature of the legislation is expressed in the statutory instruction to the administrative authorities in Paragraph 33c(3) of the UWG to refuse authorisation where the sale exhibits the characteristics described in that provision. Thus, authorisation must be refused if the sale is not announced for a continuous period, if the sale is to be held at certain times of the year (on the occasion of religious festivals such as Easter, Pentecost and Christmas) or if the trader has pursued his activity for less than the minimum period of three years. [54] The criteria laid down in that statutory provision are neither referred to in the list of unfair commercial practices contained in Annex I to Directive 2005/29 nor linked to the specifically misleading, aggressive or otherwise unfair nature of that commercial practice, as is clear from the explanations provided by the referring court. [55]

80. Viewed realistically, that legislation must be understood as being a general prohibition on certain commercial practices, particularly since the trader can expect to be granted authorisation only in special circumstances. Those circumstances are themselves defined, on the one hand, very restrictively ('trader's death') and, on the other hand, in general terms ('natural disasters', 'other cases which merit similar consideration'), so that it is unlikely to be readily apparent to citizens in which situations authorisation may exceptionally be granted. In this regard, as the Court has repeatedly held, the Member States are required, in order to ensure that European Union law is fully applied, not only to bring their law into conformity with European Union law, but also to create a situation which is sufficiently precise, clear and transparent to allow individuals to know their rights in full and to rely on them before the national courts. [56] It should also be recalled in this connection that increasing legal certainty for both consumers and business was one of the objectives pursued through the adoption of the directive, as is clear from recital 12 in its preamble. They would be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the European Union. This would eliminate the barriers stemming from the fragmentation of the national rules on unfair commercial practices. However, as the Commission rightly points out, the legislation at issue does not take sufficient account of those objectives. [57]

81. The lack of legal certainty operates to the detriment of the consumer, but above all to the detriment of the trader. After all, where the administrative authority refuses to grant the authorisation requested in accordance with the aforementioned principle of rule and exception, the trader cannot announce a clearance sale without thus infringing the law and running the risk of a fine. From his point of view, therefore, that provision amounts to a general prohibition of the announcement of clearance sales of the kind defined in Paragraph 33a(1) of the UWG.

54 — See Seidelberg, H., 'Überblick über das aktuelle Ausverkaufsrecht', *Recht und Wettbewerb*, No. 162, 2003, p. 2, who, on the subject of that legislation, which existed before Directive 2005/29 was transposed into the Austrian legal system, speaks of 'statutory closed periods' in connection with clearance sale announcements. That description is clearly based on the idea that the legislation in question imposes a prohibition in principle.

55 — See paragraph 5 of the order for reference.

56 — See to this effect, in relation to directives, Case C-360/87 *Commission* v *Italy* [1991] ECR I-791, paragraph 12, and Case C-220/94 *Commission* v *Luxembourg* [1995] ECR I-1589, paragraph 10. See also Case C-162/99 *Commission* v *Italy* [2001] ECR I-541, paragraphs 22 to 25, and Case C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, paragraph 20. See, in detail, on the requirements for the proper transposition of directives into national law, Schweitzer, M./Hummer, W./Obwexer, W., *Europarecht*, Vienna 2007, p. 73, paragraph 268.

57 — See paragraph 45 of the Commission's observations.

82. It follows from the foregoing considerations that the provision in Paragraph 33c(3) of the UWG covers situations which go beyond what Annex I to Directive 2005/29 defines as commercial practices that are unfair in all circumstances. Looking at the legislative scheme of the UWG alone, this can be seen, for example, in the fact that, although the Austrian legislature incorporated the list in Annex I almost verbatim into the UWG, it also retained the earlier provision contained in Paragraph 33c(3) of the UWG. At present, therefore, the two provisions exist alongside each other without having been harmonised within the scheme of the legislation. Since this has the ultimate effect of unilaterally extending the exhaustive list of situations contained in Annex I to Directive 2005/29, the national legislation must be regarded as being contrary to the requirements of the directive.

ii) Requirement of reasons for the announcement of a clearance sale

83. It should also be noted that the UWG makes the granting of authorisation dependent on the fulfilment of certain conditions. In accordance with Paragraph 33b(4) of the UWG, an essential formal condition for the issue of a decision by the competent authority on the application is the statement of 'reasons' why the clearance sale is to be held. That provision mentions some of the reasons on the basis of which authorisation would be granted. It is apparent from its wording ('and the like') that the list contained in it is not exhaustive, which means that the administrative authorities clearly have discretion in relation to other potential reasons. [58]

84. As a formal requirement, the obligation to state reasons does not in itself give any cause for doubt as to its compatibility with Directive 2005/29, particularly since it serves merely to give the administrative authority prior warning of the planned announcement of a clearance sale. To this extent, it is procedurally necessary in order to provide the authorities with advance notice of the initial situation and to enable them to make a decision on the substance of the matter. In other words, it is intended to allow the authorities to carry out an *ex ante* examination of the commercial practice in question.

85. From a substantive-law point of view, however, the statutory 'reasons' cited by way of example are relevant, since they are the criteria on the basis of which the authorities may conclude that the announcement is unfair. Where they apply in a given case, authorisation must be granted. Although those criteria have no exact counterparts in the commercial practices contained in Annex I to the directive, the possibility cannot be ruled out that they correspond to the criteria laid down in points 7 and 15 of that annex, which must be examined *in concreto*.

– Announcement of the cessation of trading and relocation of the business

86. According to point 15 of Annex I to the directive, 'claiming that the trader is about to cease trading or move premises when he is not' constitutes a commercial practice which is in all circumstances considered unfair. Paragraph 33(4) of the UWG transposes that rule into national law to the effect that an applicant may give as the reason for the planned announcement of a clearance sale, inter alia, the fact that he is planning to cease trading or relocate his business. An authority examining such an application would be authorised to verify the truth of that statement and, where appropriate, to refuse authorisation if that statement did not correspond to the facts. The argument as to the existence of a power of substantive assessment on the part of the authority appears to be all the

58 — See Duursma, D., in: *UWG – Kommentar*, op. cit. (footnote 25), Paragraph 33b, point 3, p. 1191. The author points out that, apart from the reasons for authorisation expressly mentioned, the only circumstances which may potentially serve as reasons for authorisation are those which are comparable to the qualifying situations referred to in Paragraph 33b(4) of the UWG, that is to say, which place the applicant in a special situation separate from the competitive position of his competitors. On the other hand, circumstances which affect all the applicant's competitors in the same way are not capable of justifying the authorisation of a clearance sale announcement for an individual applicant, not even in the case of events characterised by 'force majeure'.

more compelling given that the Austrian legislature incorporated that situation almost verbatim into point 15 of the annex to the UWG. In those circumstances, the requirements laid down in the directive appear to have been transposed correctly. To that extent, therefore, there is no doubt that that provision is compatible with Directive 2005/29.

– Other reasons mentioned in Paragraph 33b(4) of the UWG

87. As regards the other criteria referred to in Paragraph 33b(4) ('death of the owner of the business', 'ceasing to sell a certain category of goods', 'natural disasters and the like'), it must be pointed out that, within the scheme of the legislation, these are exceptional grounds in the event of which the announcement of a clearance sale is exceptionally allowed. The national provision at issue here is thus not simply a procedural rule prescribing a condition of examination as part of an *ex ante* review, but an actual general substantive-law prohibition exceptions to which are permitted only in precisely defined cases. However, as I have already explained at length in my Opinions in Joined Cases C-261/07 (*VTB-VAB*) and C-299/07 (*Galatea*),[59] and in Case C-540/08 (*Mediaprint*),[60] a statutory provision under which a particular commercial practice is prohibited in principle and allowed only in exceptional cases runs counter to both the regulatory structure and the liberal orientation of Directive 2005/29. This has also been confirmed by the Court in the judgments delivered in those cases.[61]

88. After all, unlike the national provision at issue here, the directive presupposes that commercial practices are fair as long as the precisely defined statutory conditions for a prohibition are not fulfilled. That essential difference in regulatory structure[62] is not offset by the fact that Paragraph 33b(4) of the UWG provides for a number of standardised exceptions which, depending on the circumstances, may even be extended on the basis of administrative practice, particularly since exceptions to prohibitions in principle such as those at issue here are not capable of covering all situations in which a commercial practice must be assumed to be lawful under the provisions of Directive 2005/29, because they do not make it possible for the competent national courts and authorities to carry out an individual assessment.

89. The liberal approach expressed in the directive has its background in a specific policy of ensuring that the objective of the European Union legislature set out in recitals 4 and 5 and Article 1 of the directive, to eliminate obstacles to the free movement of services and goods across borders or the freedom of establishment resulting from the large number of national rules on unfair commercial practices, through uniform rules at Community level which establish a high level of consumer protection to the extent necessary for the proper functioning of the internal market, is achieved.

90. In the light of the foregoing, it must be concluded that the provision in Paragraph 33b(4) of the UWG goes beyond the requirements of Directive 2005/29 in so far as it establishes criteria which may also apply, inter alia, to clearance sales announcements that are not necessarily to be regarded as unfair commercial practices.

59 — See my Opinion in *VTB-VAB* and *Galatea* (cited above in footnote 8), points 84 to 89.

60 — See my Opinion in *Mediaprint* (cited above in footnote 7), point 76.

61 — *VTB-VAB* (cited above in footnote 8, paragraphs 64 and 65) and *Mediaprint* (cited above in footnote 7, paragraphs 39 and 40).

62 — See Wiebe, A., 'Umsetzung der Geschäftspraktikenrichtlinie und Perspektiven für eine UWG-Reform', *Juristische Blätter*, 2/2007, p. 79, who concludes that Directive 2005/29 has a different schematic structure from the UWG currently in force. In his view, the Austrian legislature cannot disregard that difference in structure when transposing the directive. It must confront the task of transposition and tackle the diverse problems encountered by the legislature as a result of the limited scope, the content and the structure of the directive. In the author's opinion, this cannot be achieved by a few amendments, but requires more extensive structural reform. The pressure for liberalisation exerted at European level, which the Oberster Gerichtshof has also endorsed, can be used by the legislature to carry out a more comprehensive reform the outcome of which not only fulflils the requirements of legal clarity and transparency but is also long-lasting.

d) Interim conclusion

91. A national provision such as that at issue, which imposes a prohibition in principle on announcements of clearance sales and makes them subject exclusively to the fulfilment of certain grounds for exception, without making it possible for adequate account to be taken of all the circumstances of the individual case in question, is intrinsically more restrictive and stricter than the provisions of Directive 2005/29.

92. In this connection, it must be pointed out that the rules in Paragraph 33a et seq. of the UWG concern a sector which is the subject of full harmonisation and to which the transitional provisions of Article 3(5) of the directive do not apply.

93. What is more, none of the exceptions expressly provided for in Directive 2005/29 is relevant. Thus, for example, neither the Austrian Government nor the Schutzverband has convincingly argued that the national provision at issue is to be regarded as falling within one of the areas specified in recital 9 in the preamble to the directive ('conditions of establishment and authorisation regimes'). In any event, from a schematic point of view, no legal significance at variance with the provision contained in Article 3(8) can be attributed to that recital, particularly since Article 3(8) reproduces the essence of the aforementioned recital in the operative part of the directive and, in so doing, makes the intention actually pursued by the legislature more clearly recognisable. It has already been established that that derogation is not applicable to the main proceedings.[63] Moreover, contrary to the Austrian Government's submission at the hearing, a Member State cannot rely generally on the ground for prohibition contained in point 4 of Annex I to the directive in order to make all commercial practices subject to the condition of official authorisation, as is the case in the main proceedings. On the contrary, national provisions must always satisfy in full the requirements of the directive. That aside, it must be pointed out that the aforementioned ground for prohibition covers situations other than those assumed by the Austrian Government, namely the procedures by which the status of a trader (e.g. his reputability or fitness to pursue his profession) or of his products (e.g. quality mark, clearance certificates) is recognised by a public or private authority. The regulatory purpose of that ground for prohibition is to protect the consumer against untrue and thus misleading assertions by the trader to the effect that he or the product offered has been given such recognition.[64] The Austrian Government did not demonstrate in its oral submissions that the authorisation procedure laid down in the UWG pursues that objective.

94. The Austrian provisions on the announcement of clearance sales in Paragraph 33a et seq. of the UWG, in so far as they are actually framed as a general prohibition subject to authorisation, therefore have the effect ultimately of extending the exhaustive list of prohibited commercial practices contained in Annex I to the directive, which, in the light of the objective of full and maximum harmonisation pursued by Directive 2005/29, the Member States are specifically barred from doing. Given that, in accordance with Article 5(5), that list can be modified only by revision of the directive itself, unilateral extensions of it by the Member States are prohibited.

95. In the light of the foregoing considerations, I conclude that a national provision such as that at issue here does not satisfy the substantive-law requirements of Directive 2005/29.[65]

63 — See point 41 of this Opinion.

64 — See Büllesbach, E., *Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken*, Munich 2008, pp. 53-54.

65 — See Schuhmacher, W., 'Das Ende der österreichischen per-se-Verbote von Geschäftspraktiken gegenüber Verbrauchern', *Wirtschaftsrechtliche Blätter*, 2010, No. 12, pp. 615-616, who takes the view that the provisions in Paragraph 33a et seq. of the UWG contain a very broadly drafted prohibition *per se* of the announcements covered by them. He argues that, since Paragraph 33b of the UWG also prohibits truthful public announcement of genuine clearance sales which do not have prior authorisation, that provision goes beyond the relevant prohibitions contained in the annex to the UWG and is therefore inapplicable. The author concludes that the mandatory authorisation has therefore itself become invalid in its entirety.

4. Summary of interim conclusions

96. The foregoing examination has shown that Directive 2005/29 does not preclude a national provision such as that at issue here which confers on administrative authorities the power to review the fairness of commercial practices (in this case, the announcement of clearance sales). [66]

97. Nor does the directive preclude a provision which requires the trader to obtain official authorisation before pursuing certain commercial practices which are suspected of being unfair. However, such a provision of procedural law must be justified by special circumstances. It must serve the purpose of allowing the administrative authorities to carry out an *ex ante* review in situations in which there are expected to be distortions of fair competition which it will be difficult to eliminate subsequently. [67]

98. The directive does not in principle preclude national legislative provisions which penalise infringements of the statutory requirement to obtain authorisation. [68]

99. The directive also permits the Member States, in principle, to provide that the competent authorities and courts have a duty only to review compliance with the authorisation requirement, without having to decide upon the fairness of the relevant commercial practice itself. [69] However, this must not have the effect of definitively prohibiting the trader from pursuing an intrinsically fair commercial practice. On the contrary, the trader must always be given the opportunity to obtain from the competent authorities and courts a decision on the substance of the matter made on the basis of Annex I and the criteria laid down in Articles 5 to 9 of the directive. [70] It is for the referring court, which has direct knowledge of the local situation and exclusive jurisdiction to interpret national law, to determine whether the national law of procedure provides sufficient guarantees for this purpose. [71] In order to take account of the directive's requirements, it must be ensured that the fairness of the commercial practice concerned can be assessed either in the course of the procedure itself or subsequently.

100. On the other hand, Directive 2005/29 precludes national substantive-law provisions such as those at issue which impose a general prohibition on the announcement of clearance sales and allow such announcements only in certain exceptional cases. [72]

VII – Conclusion

101. In the light of the above considerations, I propose that the Court's answer to the question referred by the Oberster Gerichtshof should be as follows:

Articles 3(1) and 5(5) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC 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) do not in principle preclude a procedural provision of national law such as that at issue in the main proceedings under which the announcement of a clearance sale without the authorisation of the competent administrative authority

66 — See point 44 of this Opinion.
67 — See point 51 of this Opinion.
68 — See point 55 of this Opinion.
69 — See points 53 and 61 of this Opinion.
70 — See points 53 et seq. and 63 et seq. of this Opinion.
71 — See point 68 of this Opinion.
72 — See point 95 of this Opinion.

is not permitted and for that reason must be prohibited in court proceedings, without it being necessary in those proceedings for the court to consider whether such a commercial practice is misleading, aggressive or otherwise unfair, provided that it is ensured that an intrinsically fair commercial practice is not definitively prohibited. The trader must be given the opportunity to obtain an individual examination of the fairness of the commercial practice in question in either judicial or administrative proceedings.

Articles 3(1) and 5(5) of Directive 2005/29 preclude a substantive provision of national law such as that at issue in the main proceedings which imposes a prohibition in principle on clearance sale announcements and makes these subject exclusively to the fulfilment of certain grounds of exception, without making it possible for sufficient consideration to be given to all the circumstances of the particular case in question.