Court of Justice EU, 18 July 2013, Citroën v FvF

UNFAIR COMMERCIAL PRACTICES

General prohibition of combined offers involving financial services to consumers permitted under directive and freedom to provide services

- **that Article 3 (9) of Directive 2005/29 must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.**
- **Article 56 TFEU must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.**

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Court of Justice EU, 18 July 2013

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

JUDGMENT OF THE COURT (First Chamber)

18 July 2013 (*)

"Article 56 TFEU – Freedom to provide services – Directive 2005/29/EC – Unfair commercial practices – Consumer protection – Combined offers involving at least one financial service – Prohibition – Exceptions"

In Case C-265/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hof van beroep te Brussel (Belgium), made by decision of 22 May 2012, received at the Court on 29 May 2012, in the proceedings

Citroën Belux NV

v

Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF),

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Berger, A. Borg Barthet (Rapporteur), E. Levits and J.-J. Kasel, Judges, Advocate General: Y. Bot, Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 April 2013,

after considering the observations submitted on behalf of:

– Citroën Belux NV, by S. Willemart, C. Smits, T. Balthazar, D. De Keyzer, and A. Destrycker, advocaten,

– the Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF), by D. Dhaenens and R. Vermeulen, advocaten,

– the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents,

– the European Commission, by M. van Beek, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(9) 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') (OJ 2005 L 149, p. 22); it also concerns the interpretation of Article 56 TFEU.

2 The request has been made in proceedings between Citroën Belux NV ('Citroën') and the Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF) (Federation of Insurance and Financial Agents) concerning a commercial practice engaged in by Citroën, and considered by the FvF to be unfair, consisting in a free offer of comprehensive insurance for six months on the purchase of a Citroën vehicle.

Legal context

European Union legislation

3 Recital 9 in the preamble to Directive 2005/29 is worded as follows:

'… Financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers. …'

4 Paragraphs 1 and 9 of Article 3 of Directive 2005/29, which is entitled 'Scope', provide:

'1. 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.

[...]

9. In relation to "financial services", as defined in Directive 2002/65/EC [of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16)], and immovable property, Member States may impose requirements which are more restrictive or

prescriptive than this Directive in the field which it approximates.'

5 Article 2(b) of Directive 2002/65 defines the term 'financial service' as '*any service of a banking, credit, insurance, personal pension, investment or payment nature'*.

The Belgian legislation

6 Article 72 of the Law of 6 April 2010 on market practices and consumer protection (*Belgisch Staatsblad*, 12 April 2010, p. 20803; 'the Law of 6 April 2010') provides:

'1. Any combined offer to the consumer, of which at least one component is a financial service and which is made by a business or by various businesses acting with a common purpose, shall be prohibited.

2. By way of derogation from paragraph 1, however, combined offers shall be permitted of:

(1) Financial services which constitute a whole;

The King may, on a proposal from the competent ministers and the Minister for Finance, designate the services offered in the financial sector which constitute a whole;

(2) Financial services and incidental goods and incidental services permitted by commercial practice;

(3) Financial services and tickets for legally authorised lotteries;

(4) Financial services and objects with indelible and clearly visible advertising inscriptions, which are not found as such in shops, provided that the cost price paid by the business does not exceed EUR 10, excluding VAT [value added tax], or 5% of the retail price, excluding VAT, of the financial service with which they are given away. The percentage of 5% applies if the amount corresponding to that percentage is greater than EUR 10;

(5) Financial services and colour photographs, stickers and other images with minimal commercial value;

(6) Financial services and vouchers consisting in documents conferring entitlement, after the acquisition of a certain number of services, to a free offer or a price reduction upon the acquisition of a similar service, on condition that that benefit is provided by the same business and does not exceed one third of the price of the services previously acquired.

The vouchers must indicate any time limit on their validity as well as the conditions applicable to the offer.

When the business ends its offer, the consumer must receive the benefits offered in proportion to the purchases previously made.'

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

7 Citroën is the importer of Citroën vehicles in Belgium. It sells those goods through a network of authorised distributors.

8 On 10 December 2010, Citroën launched an advertising campaign with the slogan 'Je veux tout' ('I want everything'). That campaign ran at least to the end of February 2011.

9 The advertising offer was worded as follows:

'"6 months' free comprehensive insurance" applies to every new, complete comprehensive insurance contract concluded in the first year. It applies to all private and commercial vehicles sold through official Citroën distributors, with the exception of demonstration and rental vehicles. The Citroën Insurance conditions of acceptance apply. Citroën Insurance is a product of Servis, an insurance NV (public limited liability company) authorised under No. 1396. PSA Finance Belux NV (CBFA No. 019.653A) acts as insurance agent for Servis NV. The CBFA-recognised Citroën distributors act as subagents for PSA Finance Belux NV … This insurance offer is independent of any other product or service except the vehicle to be insured.'

10 FvF took the view that those special 'show' conditions, as regards the offer of 6 months' free comprehensive insurance on the purchase of a Citroën, constituted a prohibited combined offer. It gave Citroën formal notice to that effect by letter of 22 December 2010.

11 Citroën replied by letter of 23 December 2010 that the offer applied to every new contract for a year's comprehensive insurance and not only to the purchase of a new Citroën. It maintains that there is no connection between the 6 months free comprehensive insurance and the purchase of a new Citroën.

12 On 18 January 2011, the FvF applied to the Rechtbank van koophandel te Brussel (Brussels Commercial Court) for an order directing Citroën to cease that commercial practice, on the ground that it was contrary to Article 72(1) of the Law of 6 April 2010.

13 By judgment of 13 April 2011, the Rechtbank van koophandel te Brussel held at first instance that the offer at issue did indeed constitute a combined offer for the purposes of Article 2(27) of the Law of 6 April 2010 and was directed at the potential purchasers of new vehicles. It held that that offer constituted a prohibited combined offer under Article 72(1) of that law and that such an offer was an act contrary to honest market practices and therefore prohibited under Article 95 of that law.

14 Citroën appealed against that judgment to the Hof van beroep te Brussel (Brussels Court of Appeal). That court finds that the offer at issue constitutes a combined offer and that obtaining six months' free comprehensive insurance was effectively linked, in the eyes of the average consumer, to the purchase of a new Citroën vehicle.

15 The Hof van beroep te Brussel points out that, under Article 3(9) of Directive 2005/29, Member States may, in relation to financial services and immovable property, impose requirements which are more restrictive or 'prescriptive' than that directive. It believes that that provision is open to three different interpretations: (i) the prohibition of a combined offer involving a financial service is compatible with Directive 2005/29, regardless of whether the financial service constitutes the main component of the offer; (ii) the prohibition of such an offer is compatible with that directive only if the financial service is a decisive

component of the combined offer; and (iii) such a prohibition is not compatible with Directive 2005/29 in so far as Article 3(9) of that directive, being an exception to the principle of full harmonisation, must be narrowly construed. Lastly, the Hof van beroep te Brussel raises the issue of whether the Law of 6 April 2010 is compatible with Article 56 TFEU.

16 In those circumstances, the Hof van beroep te Brussel decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 3(9) of Directive 2005/29 be interpreted as precluding a provision, such as Article 72 [of the Law of 6 April 2010], which generally prohibits – save in the cases exhaustively listed by the statute – any combined offer to the consumer where at least one component is a financial service?

(2) Must Article 56 TFEU, concerning the freedom to provide services, be interpreted as precluding a provision, such as Article 72 [of the Law of 6 April 2010], which generally prohibits – save in the cases exhaustively listed by the statute – any combined offer to the consumer where at least one component is a financial service?'

Consideration of the questions referred

The first question

17 By its first question, the referring court asks, in essence, whether Article 3(9) of Directive 2005/29 must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.

18 As is apparent from **paragraph 50 of the judgment in Joined Cases C-261/07 and C-299/07 VTB-VAB and Galatea [2009] ECR I-2949**, the Court has held that combined offers constitute commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development and accordingly constitute commercial practices within the meaning of Article 2(d) of Directive 2005/29 and, consequently, fall within the scope of that directive.

19 It follows that combined offers of which at least one component is a financial service – the kind of offer covered by the prohibition at issue in the main proceedings – also constitute commercial practices within the meaning of Article 2(d) of Directive 2005/29 and are therefore subject to the requirements laid down in that directive.

20 It should be borne in mind, next, that Directive 2005/29 in principle fully harmonises at Community level the rules relating to unfair business-to-consumer commercial practices, so that, as Article 4 thereof expressly provides, Member States may not adopt more restrictive rules than those provided for in the directive, even in order to achieve a higher level of consumer protection (see **Case C-304/08 Plus Warenhandelsgesellschaft** [2010] ECR I-217, paragraph 41 and the case-law cited).

21 However, Article 3(9) of Directive 2005/29, entitled 'Scope', allows an exception to the objective of full harmonisation in the case of requirements which relate, in particular, to financial services within the meaning of Directive 2002/65.

22 According to recital 9 in the preamble to Directive 2005/29, financial services, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. It is also stated in that recital that, in so far as those services are concerned, Directive 2005/29 is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers.

23 The term 'financial service' as used in Directive 2002/65 is to be understood as referring to 'any service of a banking, credit, insurance, personal pension, investment or payment nature'. Article 2(24) of the Law of 6 April 2010 uses the same definition to designate financial services. It follows that combined offers of which at least one component is a financial service – such as those covered by a prohibition in the case before the referring court – fall within the scope of Article 3(9) of Directive 2005/29.

24 Thus, in accordance with that provision, Member States may impose requirements in relation to financial services which are more restrictive or 'prescriptive' than those provided for under Directive 2005/29.

25 Furthermore, it must be noted that the wording of Article 3(9) of Directive 2005/29 merely allows Member States to adopt more stringent national rules in relation to financial services and does not enter into further detail. Accordingly, it does not impose any limit as regards how stringent national rules may be in that regard or lay down any criteria regarding the degree of complexity or risk which those services must involve in order to be covered by more stringent rules. Nor does it follow from the wording of that provision that the more restrictive national rules can cover only combined offers composed of a number of financial services or only combined offers of which the main component is the financial service.

26 Contrary to what Citroën claims, there is therefore no need to restrict the application of Article 3(9) of Directive 2005/29 to combined offers composed of a number of financial services or to combined offers involving a complex financial service.

27 Such an interpretation is consistent with the objective pursued by Article 3(9) of Directive 2005/29. Recital 9 in the preamble to Directive 2005/29 makes express reference to the intention of allowing Member States the right to adopt more stringent measures in relation to financial services in order to ensure a high level of consumer protection. The intention of the EU legislature is therefore to leave it to the Member States themselves to assess how restrictive they wish to make those measures and to allow them freedom of action in that connection, enabling them to go so far as to prohibit certain arrangements.

28 In the light of the foregoing considerations, the answer to the first question is that Article 3 (9) of

Directive 2005/29 must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.

The second question

29 By its second question, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.

30 As regards the admissibility of the second question, the FvF contends that it is inadmissible in so far as, when a particular sphere has been harmonised at EU level, the national measures in that sphere must be assessed, not in the light of the provisions of the TFEU, but in the light of the harmonising measure.

31 In that connection, it is true that a national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty (see, to that effect, Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887, paragraph 64 and the case-law cited). However, Article 3(9) of Directive 2005/29 – as indicated by recital 9 in the preamble to that directive – provides specifically that, in relation to financial services, Directive 2005/29 does not exhaustively harmonise the existing law and leaves Member States freedom of action, which they must exercise in accordance with the Treaty.

32 Admittedly, national legislation – such as that at issue in the main proceedings – which, as worded, applies to Belgian operators and to operators of other Member States alike is, generally, capable of falling within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations connected with trade between Member States (see Joined Cases C-570/07 and C-571/07 Blanco Pérez and Chao Gómez [2010] ECR I-4629, paragraph 40, and Joined Cases C-357/10 to C-359/10 Duomo Gpa and Others [2012] ECR I-0000, paragraph 26 and the case-law cited).

33 In the present case, however, it is conceivable that businesses established in Member States other than the Kingdom of Belgium are interested in making, in that Member State, combined offers involving at least one financial component, such as the offer at issue in the main proceedings.

34 It is therefore necessary to consider whether the general prohibition on combined offers of which at least one component is a financial service is consistent with Article 56 TFEU.

35 As regards the substance, it is settled case-law that the free movement of services provided for in Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services established in other Member States, but also the abolition of any restriction – even if it applies without distinction to national providers of services and to those from other Member States – which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services (see, to that effect, Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 21, and Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 22).

36 As it is, a prohibition such as that at issue in the main proceedings and provided for in Article 72(1) of the Law of 6 April 2010 may render less attractive the provision of financial services in Belgium for businesses established in other Member States who wish to make combined offers of which at least one component is a financial service. Those businesses could not make such offers on the Belgian market and would also be obliged to check whether they comply with Belgian law, whereas such a step would not be necessary in respect of other Member States.

37 It is settled case-law that a restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-341/05 Laval un Partneri [2007] ECR I-11767, paragraph 101 and the case-law cited).

38 In the present case, the objective pursued by Article 72 of the Law of 6 April 2010 is to protect the interests of consumers, as is moreover apparent from the very title of that law. The protection of consumers is recognised in the case-law as an overriding reason of public interest, capable of justifying a restriction on the freedom to provide services (see Case 286/81 Oosthoek's Uitgeversmaatschappij [1982] ECR 4575, paragraph 16, and Case 220/83 Commission v France [1986] ECR 3663, paragraph 20).

39 As regards the appropriateness of Article 72 of the Law of 6 April 2010, it must be stated, first, that financial services are, by nature, complex and entail specific risks with regard to which the consumer is not always sufficiently well informed. Secondly, a combined offer is, in itself, such as to generate on the part of the consumer the idea of a price advantage. It follows that a combined offer of which one component is a financial service is more likely to be lacking in transparency as regards the conditions, the price and the exact content of that service. Accordingly, such an offer may well mislead consumers as to the true content and actual characteristics of the combination offered and, at the same time, deprive them of the opportunity of comparing the price and quality of that offer with other corresponding services from other economic operators.

40 In those circumstances, legislation which prohibits combined offers involving at least one financial service

is of such a nature as to contribute to consumer protection.

41 As regards the proportionality of the restriction, Article 72(2) of the Law of 6 April 2010 allows for exceptions to the general prohibition of combined offers of which at least one component constitutes a financial service. The existence of those exceptions indicates that the Belgian legislature took the view that, in certain cases, it was not necessary to provide the consumer with additional protection.

42 Accordingly, the general prohibition of combined offers of which at least one component is a financial component, such as that laid down in Article 72 of the Law of 6 April 2010, does not go beyond what is necessary to achieve the high level of consumer protection intended by Directive 2005/29 and, more specifically, it does not go beyond what is necessary to protect the economic interests of consumers in the financial services sphere.

43 In the light of the foregoing considerations, the answer to the second question is that Article 56 TFEU must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.

Costs

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

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

Article 3(9) 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') must be interpreted, as must Article 56 TFEU, as not precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers made to consumers where at least one of the components of those offers is a financial service.

[Signatures]

* Language of the case: Dutch.