

Court of Justice EU, 19 September 2013, CHS v Team4 Travel



UNFAIR COMMERCIAL PRACTICES

If a practice can be categorized as a misleading practice, it is not necessary to determine whether this practice is also contrary to the requirements of professional diligence

- In the light of all the foregoing considerations, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted as meaning that, if a commercial practice satisfies all the criteria set out in Article 6(1) of that directive for being categorised as a misleading practice in relation to the consumer, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article 5(2)(a) of the directive in order for it legitimately to be regarded as unfair and, therefore, prohibited in accordance with Article 5(1) of the directive.

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Court of Justice EU, 19 September 2013

(A. Tizzano, M. Berger, A. Borg Barthet, E. Levits en J.-J. Kasel (rapporteur))

JUDGMENT OF THE COURT (First Chamber)

19 September 2013 (*)

(Directive 2005/29/EC – Unfair commercial practices – Sales brochure containing false information – Treated as ‘misleading commercial practice’ – Case in which the trader cannot be criticised for any breach of the duty of diligence)

In Case C-435/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 5 July 2011, received at the Court on 26 August 2011, in the proceedings

CHS Tour Services GmbH

v

Team4 Travel GmbH,

THE COURT (First Chamber),

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

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure, after considering the observations submitted on behalf of:

- CHS Tour Services GmbH, by E. Köll, Rechtsanwalt,
- Team4 Travel GmbH, by J. Stock, Rechtsanwalt,
- the Austrian Government, by A. Posch, acting as Agent,

- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by M. Russo, avvocato dello Stato,
- the Hungarian Government, by M.Z. Fehér, K. Szijjártó and Z. Biró-Tóth, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Swedish Government, by K. Petkovska and U. Persson, acting as Agents,
- the United Kingdom Government, by S. Ossowski, acting as Agent,
- the European Commission, by S. Grünheid, acting as Agent,

after hearing the [Opinion of the Advocate General](#) at the sitting on 13 June 2013, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJ 2005 L 149, p. 22).

2 The request has been made in proceedings between CHS Tour Services GmbH (‘CHS’) and Team4 Travel GmbH (‘Team4 Travel’) concerning a Team4 Travel advertising brochure containing false information.

Legal context

European Union law

3 Recitals 6 to 8, 11 to 14 and 17 and 18 in the preamble to the Unfair Commercial Practices Directive state as follows:

‘(6) This Directive ... approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests ... It neither covers nor affects the national laws on unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders; ...

(7) This Directive addresses commercial practices directly related to influencing consumers’ transactional decisions in relation to products. ...

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

...

(11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers’ economic behaviour. ...

(12) Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single

regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. ...

(13) In order to achieve the Community's objectives through the removal of internal market barriers, it is necessary to replace Member States' existing, divergent general clauses and legal principles. The single, common general prohibition established by this Directive therefore covers unfair commercial practices distorting consumers' economic behaviour. ... The general prohibition is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices.

(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice.

...

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

(18) ... In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice ...'

4 As set out in Article 1 of the directive:

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

5 Article 2 of the directive is worded as follows:

'For the purposes of this Directive:

...

(b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

(c) "product" means any goods or service ...

(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;

...

(h) "professional diligence" means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers,

commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;

...'

6 Article 3 of the Unfair Commercial Practices Directive provides:

'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.

2. This Directive is without prejudice to contract law ...'

7 Article 5 of the directive, entitled 'Prohibition of unfair commercial practices', is worded as follows:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

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

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

...

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

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

or

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

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

8 As is apparent from their headings, Articles 6 and 7 of the Unfair Commercial Practices Directive define 'misleading actions' and 'misleading omissions' respectively.

9 Article 6(1) of the directive provides:

'A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

(a) the existence or nature of the product;

(b) the main characteristics of the product, such as its availability, benefits ...

...'

10 Articles 8 and 9 of the directive concern aggressive commercial practices and the use of harassment, coercion and undue influence.

Austrian law

11 The Unfair Commercial Practices Directive was transposed in Austria, with effect from 12 December 2007, by the Federal Law on Unfair Competition of

1984 (Bundesgesetz gegen den unlauteren Wettbewerb 1984) (BGBl. 448/1984), in its amended version as applicable to the case in the main proceedings (BGBl. I, 79/2007).

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

12 According to the order for reference, CHS and Team4 Travel are two Austrian companies that operate, in Innsbruck (Austria), travel agencies competing in the arranging and selling of skiing lessons and snow holidays in Austria for groups of schoolchildren from the United Kingdom.

13 In its English-language sales brochure for the 2012 winter season, Team4 Travel, the defendant before the referring court, had described certain accommodation establishments as ‘exclusive’, that expression meaning that the hotels in question had a fixed contractual relationship with Team4 Travel and could not, on the specified dates, be offered by another tour operator. That reference to the exclusive reservation of bed quotas for Team4 Travel also appeared in the latter’s price list.

14 For specified periods in 2012, Team4 Travel had concluded contracts for bed quotas with several accommodation establishments. When those contracts were concluded, the director of Team4 Travel had checked with those establishments that no pre-bookings had been made by other tour operators. She had also made sure that, having regard to the available capacity, no other organised tour group could be put up in the hotels concerned during the periods in question. The contracts contained a clause pursuant to which the allocated room quotas remained at Team4 Travel’s entire disposal and those accommodation establishments might not derogate from the contract without obtaining Team4 Travel’s written consent. In addition, in order to secure exclusivity for Team4 Travel, the latter and those hotels had agreed termination rights and contractual penalties.

15 Subsequently, CHS also had bed quotas blocked in the same accommodation establishments and for the same dates as Team4 Travel. The hotels in question were, therefore, in breach of their contractual obligations to Team4 Travel.

16 In September 2010, Team4 Travel, which did not know that CHS had made competing pre-bookings, distributed its winter 2012 sales brochures and price list.

17 CHS is of the opinion that the exclusivity statement contained in those documents infringes the prohibition of unfair commercial practices. It consequently asked the Landesgericht Innsbruck (Innsbruck Regional Court) to prohibit Team4 Travel, by interim injunction, from stating, in the context of the operation of its travel agency, that, on specific dates, certain establishments can be booked only through Team4 Travel, that information being incorrect because those establishments can also be booked through CHS.

18 By contrast, Team4 Travel contends that it acted with the professional diligence required when drawing up its brochures and that, until the date the brochures

were sent out, it had not been aware of the contracts concluded between CHS and the hotels in question, so that it was not guilty of any unfair commercial practice.

19 By order of 30 November 2010, the Landesgericht Innsbruck rejected CHS’s application on the ground that the exclusivity claim disputed by it was well founded in the light of the irrevocable pre-booking contracts previously concluded by Team4 Travel.

20 Following the appeal brought by CHS before the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court), that court upheld, by order of 13 January 2011, the order of the Landesgericht Innsbruck on the ground that there was no unfair commercial practice since Team4 Travel had complied with the requirements of professional diligence when securing the exclusive pre-booking opportunity negotiated with the hotels concerned. The Oberlandesgericht Innsbruck held that Team4 Travel was properly entitled to expect that the hotels would honour their contractual commitments.

21 CHS then brought an appeal on a point of law (‘Revision’) before the Oberster Gerichtshof (Austrian Supreme Court).

22 That court observes that, according to Article 5(2) of the Unfair Commercial Practices Directive, a commercial practice is unfair if two cumulative conditions are met, namely, the practice is contrary to the requirements of professional diligence (Article 5(2)(a)) and it materially distorts or is likely ‘to materially distort’ the economic behaviour, in relation to the product, of the average consumer (Article 5(2)(b)).

23 However, Articles 6(1) and 8 of the directive contain only the second of those conditions, without expressly making reference to the requirement set out in Article 5(2)(a) of that directive.

24 The question thus arises whether the European Union legislature took as its basis the premiss that there is automatically an infringement of the obligation of professional diligence in the case of a misleading practice or an aggressive practice, as referred to in Articles 6 and 7 and in Articles 8 and 9, respectively, of the Unfair Commercial Practices Directive, or whether, on the contrary, the trader is permitted to establish, case by case, that he has not failed in his duty of diligence.

25 According to the referring court, logic argues in favour of that second interpretation. If, as in this instance, a provision of a general kind (Article 5(2) of the directive) is the subject of clarification pursuant to specific rules (Article 6 et seq. of the directive), and those rules do not expressly derogate from the former provision, it cannot be assumed the legislator intended to disapply one of the two fundamental elements of the general rule.

26 It was in those circumstances that the Oberster Gerichtshof decided to stay the proceedings refer the following question to the Court for a preliminary ruling:

‘Is Article 5 of [the Unfair Commercial Practices Directive] to be interpreted as meaning that, in the case of misleading commercial practices within the

meaning of Article 5(4) of that directive, separate examination of the criteria of Article 5(2)(a) of the directive is inadmissible?’

The question referred for a preliminary ruling

27 As a preliminary point, it should be recalled that Article 2(d) of the Unfair Commercial Practices Directive gives a particularly wide definition of ‘commercial practices’: ‘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’ (see, *inter alia*, Joined Cases C-261/07 and C-299/07 VTB-VAB and Galatea [2009] ECR I-2949, paragraph 49; Case C-304/08 Plus Warenhandels-gesellschaft [2010] ECR I-217, paragraph 36; and Case C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag [2010] ECR I-10909, paragraph 17). In addition, under Article 2(c) of the directive, the term ‘product’, within the meaning of that directive, also includes services.

28 As is apparent from the order for reference, the information at issue in the main proceedings, which was provided by a travel agency in sales brochures offering skiing lessons and snow holidays for groups of schoolchildren, concerns the exclusivity that the trader, in this case Team4 Travel, claims to have on the dates indicated for certain accommodation establishments.

29 such information, to the effect that certain accommodation was available only through Team4 Travel and could not, therefore, be booked through another trader, concerns the availability of a product, as referred to in Article 6(1)(b) of the Unfair Commercial Practices Directive.

30 In those circumstances, the information relating to exclusivity on which Team4 Travel relied indubitably constitutes a ‘commercial practice’ within the meaning of Article 2(d) of the directive and it is, consequently, subject to the rules laid down in that directive.

31 That being said, clearly the question referred by the Oberster Gerichtshof concerns the interpretation of Article 5 of the Unfair Commercial Practices Directive alone.

32 However, in its order for reference, that court stated that the information relating to exclusivity, contained in the brochures distributed by Team4 Travel, is objectively incorrect and therefore constitutes, from the viewpoint of the average consumer, a misleading commercial practice such as referred to in Article 6(1) of the directive.

33 The referring court therefore raises the question whether, for the purpose of applying Article 6(1), and with a view to treating Team4 Travel’s practice as ‘misleading’ within the meaning of that provision, it is sufficient to examine that practice in the light of the criteria specified in that provision alone which, according to the findings of that court, are all met in the present case; or whether, on the contrary, it is necessary to determine, in addition, whether the condition as to whether the commercial practice is contrary to the requirements of professional diligence, as provided for

in Article 5(2)(a) of the directive, is also satisfied, which would not, however, be the case in this instance, on the ground that the travel agency concerned had done everything to secure the exclusivity it claimed in its sales brochures.

34 In other words, this request for a preliminary ruling must be understood as concerning the interpretation of Article 6(1) of the Unfair Commercial Practices Directive and the possible relationship between that provision and Article 5(2) of that directive. It seeks, in essence, to establish whether, when a commercial practice already meets all the criteria set out in Article 6(1) of the directive for being treated as a misleading practice for the purpose of that provision, the court seised is nevertheless required to determine whether such a practice is contrary to the requirements of professional diligence under Article 5(2)(a) of the directive too before it can find the practice to be unfair and, accordingly, prohibit it on the basis of Article 5(1).

35 As regards Article 5 of the directive, the Court has already held on several occasions that that article, which lays down, in paragraph (1), the principle of the prohibition of unfair commercial practices, sets out the relevant criteria for the purpose of establishing whether a practice is unfair (see VTB-VAB and Galatea, paragraph 53; Plus Warenhandels-gesellschaft, paragraph 42; and Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 31).

36 Thus, in accordance with Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely ‘to materially distort’ the economic behaviour of the average consumer with regard to the product (VTB-VAB and Galatea, paragraph 54; Plus Warenhandels-gesellschaft, paragraph 43; and Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 32).

37 Furthermore, Article 5(4) of the Unfair Commercial Practices Directive defines two specific categories of unfair commercial practices, namely, ‘misleading practices’ and ‘aggressive practices’ corresponding to the criteria set out in Articles 6 and 7 and in Articles 8 and 9 of the directive, respectively (VTB-VAB and Galatea, paragraph 55; Plus Warenhandels-gesellschaft, paragraph 44; and Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 33).

38 Finally, the Unfair Commercial Practices Directive sets out, in Annex I, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of that directive, are to be regarded as unfair ‘in all circumstances’. Consequently, as recital 17 in the preamble to the directive expressly states, those commercial practices alone can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the directive (VTB-VAB and Galatea, paragraph 56; Plus Warenhandels-gesellschaft, paragraph 45; and Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 34).

39 Against that background, it must be pointed out that Article 5(4) of the directive categorises commercial

practices as unfair where it is established they are misleading or aggressive ‘as set out in’, Articles 6 and 7 and Articles 8 and 9, respectively, of that directive, that expression suggesting that the determination of whether the practice concerned is misleading or aggressive depends only on the assessment of the practice in the light of the criteria set out in those latter articles alone. That interpretation is supported by the fact that Article 5(4) does not contain any reference to the more general criteria set out in Article 5(2).

40 Furthermore, Article 5(4) begins with the words ‘[i]n particular’ and recital 13 in the preamble to the Unfair Commercial Practices Directive states that ‘[t]he ... general prohibition established by this Directive ... is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices’. It follows that the basic rule of that directive, that unfair commercial practices are to be prohibited, as laid down in Article 5(1) of the directive, is given effect and concrete expression by more specific provisions with a view to due account’s being taken of the risk posed to consumers by the two cases that arise most frequently, namely, misleading commercial practices and aggressive commercial practices.

41 As far as concerns Articles 6 and 7 and Articles 8 and 9 of the directive, the Court has already held that, pursuant to those provisions, misleading or aggressive practices are prohibited where, having regard to their nature and the factual context, they cause or are likely to cause the average consumer to take a ‘transactional’ decision that he would not have taken otherwise (VTB-VAB and Galatea, paragraph 55). The Court did not therefore make the prohibition of such practices dependent on any criterion other than those set out in those articles.

42 As regards, more particularly, Article 6(1) of the Unfair Commercial Practices Directive, at issue in the case in the main proceedings, it is to be stressed that, in accordance with the wording of that provision, the misleading nature of a commercial practice derives solely from the fact that it is untruthful inasmuch as it contains false information or that, generally, it is likely to deceive the average consumer in relation to, inter alia, the nature or main characteristics of a product or a service and that, therefore, it is likely to cause that consumer to take a ‘transactional’ decision that he would not have taken if there had been no such practice. When those features are to be found, the practice is to ‘be regarded’ as misleading and, therefore, unfair pursuant to Article 5(4) of that directive, and it must be prohibited in accordance with Article 5(1).

43 It is thus clear that the constituent features of a misleading commercial practice, as set out in Article 6(1) of the Unfair Commercial Practices Directive and recalled in the preceding paragraph, are in essence expressed with reference to the consumer as the person to whom unfair commercial practices are applied (see, to that effect, Case C-122/10 Ving Sverige [2011] ECR

I-3903, paragraphs 22 and 23), and correspond in substance to the second condition characterising a practice of that nature, as set out in Article 5(2)(b) of that directive. By contrast, there is no mention in Article 6(1) of the condition, set out in Article 5(2)(a) of the directive and relating to the practice’s being contrary to the requirements of professional diligence, which relates to the sphere of the trader.

44 Indeed, the Court made no reference to that latter condition when, in Case C-453/10 Pereničová and Perenič [2012] ECR, paragraphs 40 and 41, it examined to what extent a commercial practice such as that at issue in the case giving rise to that judgment fell to be regarded as ‘misleading’ pursuant to Article 6(1) of the Unfair Commercial Practices Directive.

45 It follows from the foregoing that, having regard both to the wording and to the structure of Articles 5 and 6(1) of that directive, and to its general scheme, a commercial practice must be regarded as ‘misleading’ within the meaning of the second of those provisions if the criteria set out there are satisfied, and it is not necessary to determine whether the condition of that practice’s being contrary to the requirements of professional diligence, laid down in Article 5(2)(a) of that directive, is also met.

46 The interpretation above is the only one capable of preserving the effectiveness of the specific rules laid down in Articles 6 to 9 of the Unfair Commercial Practices Directive. Indeed, if the conditions for the application of those articles were identical to those set out in Article 5(2) of the directive, those provisions would have no practical significance, even though they are intended to protect the consumer from the most common unfair commercial practices (see paragraph 40 of this judgment).

47 That interpretation is, moreover, supported by the objective pursued by the Unfair Commercial Practices Directive of providing, as stated in recital 23 in the preamble to the directive, a high common level of consumer protection by carrying out a complete harmonisation of the rules relating to unfair business-to-consumer commercial practices, including unfair advertising (see, inter alia, Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 27), given that the interpretation upheld is such as to facilitate the effective application of Article 6(1) of that directive in a way favourable to the interests of consumers to whom false information has been given in advertising brochures distributed by a trader.

48 In the light of all the foregoing considerations, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted as meaning that, if a commercial practice satisfies all the criteria set out in Article 6(1) of that directive for being categorised as a misleading practice in relation to the consumer, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article 5(2)(a) of the directive in order for it legitimately to be regarded as unfair and, therefore, prohibited in accordance with Article 5(1) of the directive.

Costs

49 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:

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 meaning that, if a commercial practice satisfies all the criteria specified in Article 6(1) of that directive for being categorised as a misleading practice in relation to the consumer, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article 5(2)(a) of the directive in order for it legitimately to be regarded as unfair and, therefore, prohibited in accordance with Article 5(1) of the directive.

[Signatures]

* Language of the case: German.

OPINION OF ADVOCATE GENERAL WAHL

delivered on 13 June 2013 (1)

Case C-435/11

CHS Tour Services GmbH

v

Team4 Travel GmbH

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

(Directive 2005/29/EC – Unfair commercial practices – Misleading practices – Duty of professional diligence – Brochure containing an erroneous exclusivity claim)

1. If a commercial practice turns out to mislead consumers, does it matter whether the trader has done what he could to prevent that from happening? This is the issue on which the Oberster Gerichtshof (Supreme Court) (Austria) requests guidance.

I – Legal context

2. Article 5 of Directive 2005/29/EC ('the Directive') (2) reads:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

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

and

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

...

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

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

or

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

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

3. Articles 6 and 7 of the Directive deal with misleading commercial practices, while Articles 8 and 9 concern commercial practices of an aggressive nature. Article 6 states:

'1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

...

(b) the main characteristics of the product, such as its availability ...'

II – Facts, procedure and the question referred

4. The case before the referring court concerns two Austrian travel agents, CHS Tour Services GmbH ('CHS') and Team4 Travel GmbH ('Team4 Travel'). Both CHS and Team4 Travel organise and provide skiing courses and winter holidays in Austria for groups of schoolchildren from the United Kingdom.

5. In Team4 Travel's English sales brochure, which was published in mid-September 2010, a symbol indicating 'exclusive' was placed next to a certain number of the listed accommodation establishments. According to the brochure, the term 'exclusive' is to be understood as meaning *'[a]ccommodation that is exclusively available to [Team4 Travel] parties at half term or half term and Easter or throughout the whole winter season'*. The referring court explains in this connection that the use of that expression meant that the accommodation establishment had a fixed contractual relationship with Team4 Travel and that other tour operators would not be in a position to provide accommodation at that establishment on specified dates. According to the observations submitted by CHS, Team4 Travel's price list also stated that *'[a]ll prices highlighted ... indicate that [Team4 Travel] holds all beds exclusively on this date'*.

6. For dates which are not specified in the order for reference, covering certain periods in 2012, Team4 Travel concluded contracts for bed quotas with several accommodation providers. Those contracts – the terms of which are not reproduced in the order itself – contained a clause which stated that the specified bedroom quotas would be kept available without restriction for Team4 Travel and that the provider could not repudiate that stipulation without Team4 Travel's

written consent. A booking would become final 28 days before the corresponding arrival. The referring court mentions that, to secure exclusivity, Team4 Travel stipulated cancellation rights with the accommodation provider and also a contractual penalty.

7. However, it emerges from the case-file forwarded to the Court that, in spite of the abovementioned contracts, CHS reserved bed quotas in the same accommodation establishments as Team4 Travel for overlapping booking periods. The referring court mentions, moreover, that the reservations were made after Team4 Travel had concluded the exclusive contracts. Consequently, the accommodation providers were in breach of their contractual obligations towards Team4 Travel.

8. Without specifying the exact time at which this occurred, the order for reference mentions that Team4 Travel was informed by the accommodation providers that no reservations had yet been made by other tour operators. It furthermore states that the director of Team4 Travel took care to ensure that, because of the lack of available accommodation, no other tour operators would be able to find room in the hotels. She was not aware of the existence of other reservations until legal proceedings were initiated.

9. However, as CHS nevertheless managed also to book all or part of the available accommodation for February or the Easter holidays 2012, it considered the declarations on exclusivity to be incorrect and to constitute an unfair commercial practice. CHS therefore applied for an injunction before the Landesgericht Innsbruck (Innsbruck Regional Court) (Austria) to prevent Team4 Travel from stating that specific accommodation for a particular arrival date was offered by Team4 Travel on an exclusive basis.

10. By order of 30 November 2010, the Landesgericht Innsbruck refused to grant an injunction, as it held the exclusivity claim to be correct in view of the irrevocable reservation contracts concluded beforehand by Team4 Travel.

11. On 13 November 2011, the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) (Austria) upheld the decision given at first instance on the grounds that Team4 Travel had complied with the requirements of professional diligence and could legitimately expect that its co-contractors would respect their contractual obligations.

12. CHS subsequently lodged an appeal on a point of law before the Oberster Gerichtshof.

13. The referring court considers the outcome of the proceedings to depend on the correct interpretation of Article 5(2) of the Directive. It emphasises that the appeal cannot succeed if Team4 Travel can rely on the defence that it did not act contrary to the requirements of professional diligence. On this basis, the Oberster Gerichtshof submits two different interpretations for consideration by the Court.

14. According to the first line of argument, the effect of the reference in Article 5(4) of the Directive to misleading or aggressive practices, as set out in

Articles 6 to 9, is that such practices are, per se, inconsistent with the duty of professional diligence under Article 5(2). In this respect, the referring court observes that Articles 6 to 9 do not mention the duty of professional diligence under Article 5(2)(a).

15. According to the second line of argument, if the reference in Article 5(2)(b) of the Directive to distortion of a consumer's economic behaviour were to be understood as being clarified by the more specific provisions in Articles 6 to 9, Article 5(2)(a) would still be applicable. As a consequence, a misleading practice under Article 6 would require, in addition, a breach of the duty of professional diligence under Article 5(2)(a). The referring court considers this reasoning to be borne out by the general scheme of the Directive.

16. Entertaining doubts, in the light of those considerations, as to the interpretation of Article 5(2) of the Directive, the Oberster Gerichtshof decided to stay the proceedings and refer the following question to the Court:

'Is Article 5 of [the Directive] to be interpreted as meaning that, in the case of misleading commercial practices within the meaning of Article 5(4) of that Directive, separate examination of the criteria of Article 5(2)(a) of the Directive is inadmissible?'

17. Written observations have been submitted by CHS, by Team4 Travel, by the Austrian, German, Italian, Hungarian, Polish, Swedish and UK Governments, and by the Commission. No hearing was held.

III – Analysis

18. In what follows, I will consider the structure, wording, background and the objective of the Directive, and – in particular – the provisions in question.

A – Relevance of the duty of professional diligence for the concept of 'misleading commercial practice'

19. As regards the structure of the Directive, it is clear from the Court's case-law that the notion of 'unfair commercial practices', which are prohibited under Article 5(1), covers three categories: (i) practices which fulfil the two cumulative requirements laid down in Article 5(2); (ii) pursuant to Article 5(4), misleading or aggressive practices as set out in Articles 6 to 9; and (iii) pursuant to Article 5(5), the practices referred to in Annex I to the Directive ('the blacklist'). (3) Unlike the first two categories, however, the commercial practices on the blacklist are automatically to be considered unfair, without any need for an individual appraisal of all the relevant circumstances. (4)

20. Article 5(4) of the Directive, by its very wording, elaborates on and clarifies that structure. In accordance with that provision, commercial practices which are misleading (Articles 6 and 7) or aggressive (Articles 8 and 9) are, 'in particular', unfair. The phrase 'in particular' shows not only that misleading and aggressive practices are specific sub-types ('precise categories') of unfair commercial practices (5) but, more importantly, that they also constitute, in themselves, unfair commercial practices. (6)

21. Thus, on the basis of a structural as well as a literal analysis, I do not share the view that Articles 6 and 7

(or Articles 8 and 9) of the Directive merely provide specific examples of the element referred to in Article 5(2)(b) of distortion of a consumer's economic behaviour, with the effect that Article 5(2)(a) remains applicable, as would follow from the second interpretation put forward by the national court.

22. Next, on examining the background and objective of the Directive, it appears that firm support for the above analysis of its structure and wording is to be found, furthermore, in the legislative history leading to its adoption. Indeed, the observations contained in the Commission proposal (7) regarding misleading and aggressive commercial practices unequivocally spell out that the criterion relating to professional diligence under Article 5(2)(a) of the Directive does not play a separate role. This is in stark contrast to the inferences that the Polish Government seems to draw from that very same document. (8)

23. On a more basic level, however, the fulfilment of additional criteria in order to trigger the operation of Article 6 would be at odds with the very terms of that latter provision. Indeed, Article 6 appears – at least in certain circumstances – to embrace a no-fault approach as regards the trader. (9) It would be contrary to that approach if, in the absence of any reference to Article 5(2)(a), traders were entitled to rely on the defence that they had acted in compliance with their duty of professional diligence. (10) As mentioned in the travaux préparatoires, infringement of Article 6 constitutes, per se, a breach of the duty of professional diligence.

24. By the same token, to allow additional requirements to be taken into account under Article 6 would be difficult to reconcile with the spirit and objective of the Directive itself. Indeed, it would lower rather than raise the high level of consumer protection which the Directive aims to achieve; (11) a level which, it must be recalled, is subject to full harmonisation across the European Union. (12)

25. In the light of the foregoing considerations, the fact that a trader may have complied with the duty of professional diligence under Article 5(2)(a) of the Directive is of no significance in the presence of misleading (or aggressive) commercial practices. CHS and the Austrian, German, Hungarian, Swedish and UK Governments all share this view, as does the Commission; moreover, that view is also consistent with the first interpretation proffered by the national court. (13)

B – Further considerations

26. Given that all interpretative elements point in the same direction, it seems somewhat puzzling that the referring court encountered difficulties when applying Articles 5 and 6 of the Directive to the facts. However, it appears likely that the Court's case-law may unfortunately have been misinterpreted in practice. Tellingly, both Team4 Travel and the Polish Government rely on the case-law of the Court to justify opposing views.

27. Team4 Travel submits that the Court held, in relation to a commercial practice that falls within the

scope of the Directive but which does not appear on the blacklist, that *'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'*. (14) However, I do not find that passage to be of relevance to the matter at hand. It concerns the requirement of an individual appraisal of a contested commercial practice under the Directive; a requirement which – it is not disputed – applies to Article 6. In contrast, the Court did not clarify in that paragraph the interrelationship between Article 5 of the Directive, on the one hand, and Articles 6 to 9, on the other, which is the issue in the current proceedings. For the same reason, contrary to the view taken by the Polish Government and Team4 Travel, it is of no relevance for the case under consideration that the Court has previously stated that *'it must also be verified whether the practice in question is contrary to the requirements of professional diligence within the meaning of Article 5(2)(a) of the Directive'*. (15) Indeed, that statement goes to the relationship between Article 5(2)(a) and Article 5(2)(b), rather than between Article 5 and Articles 6 to 9.

28. Moreover, the approach proposed by the Polish Government, according to which *'it is possible'*, in the case of misleading practices, to assess separately the criterion under Article 5(2)(a) of the Directive, is unsustainable. Indeed, such a freedom of choice would be contrary to the aim of the Directive, which is to achieve the same high level of consumer protection across the Member States, as mentioned above.

29. Yet the fact that the Directive does not grant the freedom to make the application of Article 6 subject to additional criteria does not mean that there is no room left for manoeuvre. As the Swedish Government points out, the Directive does not preclude a national court from determining, on a case-by-case basis, first, whether a contested commercial practice falls to be characterised as *'misleading'* or *'aggressive'* under Articles 6 to 9 of the Directive, failing which, second, whether the general conditions under Article 5(2) are met. Indeed, the Directive would appear to favour a *'top-down approach'*, that is to say, an assessment which begins with the blacklist, followed by the provisions on misleading or aggressive practices, and ending with the general clause. If one of the first steps indicates the existence of an unfair commercial practice, there will be no need to proceed to the next step, as the contested practice would in any event have to be regarded as unfair.

30. On a final note, I am conscious of the fact that, on the one hand, the two lower courts hearing the case in Austria found in favour of Team4 Travel (16) and, on the other, that, according to the referring court, a German court has also *'examined the criterion of lack of specialist diligence notwithstanding its finding that there was a risk of misleading consumers'*. (17) However, on the basis of the above observations, I am unshaken in my view regarding the proper approach to take in the case under consideration.

IV – Conclusion

31. In light of the above, I propose that the Court answer the Oberster Gerichtshof (Austria) as follows: *Article 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 and Regulation (EC) No 2006/2004 is to be interpreted as meaning that, where a commercial practice falls within the scope of Article 5(4) of that Directive, it is of no relevance whether the criteria under Article 5(2)(a) and/or Article 5(2)(b) are also fulfilled.*

1 – Original language: English.

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 and Regulation (EC) No 2006/2004 (OJ 2005 L 149, p. 22).

3 – See, to that effect, Joined Cases C-261/07 and C-299/07 VTB-VAB and Galatea [2009] ECR I-2949, paragraphs 53 to 56; Case C-304/08 Plus Warenhandels-gesellschaft [2010] ECR I-217, paragraphs 42 to 45; and Case C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag [2010] ECR I-10909, paragraphs 31 to 34.

4 – See Article 5(5) of the Directive, read in conjunction with recital 17 in the preamble to the Directive.

5 – See Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 33.

6 – The majority of the various language versions of Article 5(4) of the Directive contain an expression akin to ‘in particular’. However, the Swedish version even omits the term ‘in particular’, stating simply that ‘[a]ffärsmetoder skall anses otillbörliga om de a) är vilseledande enligt artiklarna 6 och 7, eller b) aggressiva enligt artiklarna 8 och 9’.

7 – Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final.

8 – Point 56 of the explanatory memorandum accompanying the proposal for a directive – to which the Polish Government refers in point 12 of its observations in support of its view – states that ‘if a commercial practice is found to be either “misleading” or “aggressive” it will automatically be unfair, without any further reference to the conditions contained in Article 5’. The explanatory memorandum goes on to state, in point 57, that ‘[m]isleading a consumer or treating them aggressively are considered in themselves to be distortions of consumer behaviour rather than legitimate influence and, as such, contrary

to the requirements of professional diligence. Conduct that truly deceives, harasses, unduly influences or coerces will always violate the requirements of professional diligence and significantly impair the consumer’s ability to make an informed decision. For this reason there is no separate reference to the professional diligence test or the “distortion” element of the “material distortion” definition.’ Lastly, it states in point 58 that ‘[t]hese specific categories do not prejudice the autonomous functioning of the general prohibition, which will continue to operate as a safety net and hence provide a way of assessing the fairness of any current or future practices that do not fall within one of the two key types explicitly mentioned’ (emphasis added). I should add that the proposal for a directive was not amended in this regard during the legislative process.

9 – In this respect, I would point out that, in accordance with the explicit wording of Article 6(1) of the Directive, that provision is applicable ‘even if the information [contained in the commercial practice] is factually correct’.

10 – On a similar note, in Case C-428/11 Purely Creative and Others [2012] ECR, when interpreting the notion of ‘false impression’ as used in paragraph 31 of the blacklist, the Court held, in paragraph 46 of that judgment, that the objective of the Directive ‘would not be achieved if paragraph 31 of Annex 1 to [the Directive] were interpreted as including an element of misleading conduct, distinct from the situations described in the second part of that provision’ (see also paragraphs 26, 27 and 29 of the judgment, read in the light of the fourth question referred in that case). Admittedly, unlike the practices placed on the blacklist, misleading practices under Article 6 do require an individual appraisal of all the relevant circumstances. However, that does not prevent the reasoning of the Court, in this situation, from being equally relevant to Article 6, mutatis mutandis.

11 – See Case C-126/11 INNO [2011] ECR, paragraph 27 and the case-law cited.

12 – Mediaprint Zeitungs- und Zeitschriftenverlag, paragraphs 27 and 30 and the case-law cited.

13 – So far, the Court has only had the opportunity to deal with this issue in an indirect manner. In Case C-453/10 Pereničová and Perenič [2012] ECR, it held – in response to a question on the impact that a finding of unfair commercial practice would have on the assessment of the fairness and validity of a contractual term under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) – that the practice in question was misleading under Article 6 of the Directive, and did not go on to undertake an analysis as to whether there was also a breach of the duty of professional diligence (see paragraphs 40, 41 and 43, and point 2 of the operative part of that judgment). However, Advocate General Trstenjak has expressed a view similar to mine on numerous occasions (see her Opinions in VTB-VAB and Galatea, points 78 and 79; in Plus Warenhandels-gesellschaft, points 73 and 74; in

Mediaprint Zeitungs- und Zeitschriftenverlag, points 65 and 66; and in Pereničová and Perenič, points 104 to 107).

14 – Mediaprint Zeitungs- und Zeitschriftenverlag, paragraph 43.

15 – Ibidem, paragraph 46.

16 – I should add that the grounds given by those two courts seem to differ. Indeed, it appears that the main reason for which the Landesgericht declined to grant the application for interim measures was that it held the claim of exclusivity to be accurate. It would therefore seem that only the decision handed down by the Oberlandesgericht Innsbruck is based on a finding that Team4 Travel did not breach its duty of professional diligence.

17 – Decision of the Oberlandesgericht Jena (Jena Higher Regional Court) (Germany) of 8 July 2009, NJOZ [2010] 1216. However, I do not agree with the interpretation which the referring court has placed on that judgment, as it seems to address only the issue as to whether the conditions required for a finding of misleading practice are met and the burden of proof in this regard. Moreover, the Oberlandesgericht Jena explicitly points out that the Directive apparently had not been implemented in Germany.