**Court of Justice EU, 3 October 2013, BKK v Wettbewerbszentrale**


**UNFAIR COMMERCIAL PRACTICES**

**Terms of a provision of EU law which makes no express reference to the law of the Member States must be given an autonomous and uniform interpretation throughout the European Union, taking into account the context of the provision and the purpose of the legislation in question**

- In order to ascertain whether a national body, such as BKK, which is governed by public law and which is tasked with the management of a statutory health insurance fund, must be considered a 'business' within the meaning of the Unfair Commercial Practices Directive and whether it is, in that capacity, subject to the requirements laid down by that directive in the event that, as in the present case, it provides misleading information to its members, it should be noted from the outset that, according to the Court's settled case-law, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question.

**Public body entrusted with a task of general interest, such as management of compulsory health insurance is a "trader" within the meaning of the Unfair Commercial Practices Directive**

- That objective of the Unfair Commercial Practices Directive, which is to fully protect consumers against practices of that kind, relies on the assumption that, in relation to a trader, the consumer is in a weaker position, in that the consumer must be considered to be economically weaker and less experienced in legal matters than the other party to the contract (see, by analogy, Shearson Lehman Hutton, paragraph 18).
- Accordingly the Court has already held that, for the purposes of the interpretation of that directive, the concept of consumer is of the utmost importance and that the provisions of that directive are essentially designed with the consumer as the target and victim of unfair commercial practices in mind
- In a situation such as that at issue in the main proceedings, BKK's members, who must manifestly be regarded as consumers within the meaning of the Unfair Commercial Practices Directive, could be deceived by the misleading information circulated by that body thus preventing them from making an informed choice (see recital 14 in the preamble to that directive) and leading them to take a decision they would not have taken in the absence of such information, as envisaged by Article 6(1) of that directive. In those circumstances, whether the body at issue or the specific task it pursues are public or private is irrelevant.
- In view of the above, a body such as BKK must be considered a 'trader' within the meaning of that directive.

Source: curia.europa.eu

**Court of Justice EU, 3 October 2013**

(M. Berger, A. Borg Barthet, E. Levits and J.-J. Kasel (Rapporteur))

JUDGMENT OF THE COURT (First Chamber)

In Case C-59/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 18 January 2012, received at the Court on 6 February 2012, in the proceedings

BKK Mobil Oil Körperschaft des öffentlichen Rechts

v

Zentrale zur Bekämpfung unlauteren Wettbewerbs eV,

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: Y. Bot, Registrar: A. Calot Escobar, having regard to the written procedure, after considering the observations submitted on behalf of:

– the Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, by C. von Gierke, Rechtsanwältin,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

– the European Commission, by M. van Beek and V. Kreuschitz, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 4 July 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-toconsumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (the 'Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

2 The request has been made in the context of proceedings between BKK Mobil Oil Körperschaft des öffentlichen Rechts ('BKK') and the Zentrale zur

Bekämpfung des unlauteren Wettbewerbs eV (Office for the Prevention of Unfair Competition) ('Wettbewerbszentrale'), regarding information circulated by BKK to its members.

**Legal context**

**EU law**

3 Recitals 5 to 8, 11, 12 and 14 in the preamble to the Unfair Commercial Practices Directive state:

*'(5) […] obstacles to the free movement of services and goods across borders or the freedom of establishment […] should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty.*

*(6) This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. [... ]*

*(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-toconsumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. [...] […]*

*(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.[…][…]*

*(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. […]'*

4. According to Article 1 of that 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 that directive is worded as follows:

*'For the purpose of this Directive:*

*(a) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;*

*(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;*

*[…]'*

6 Article 3(1) of the Unfair Commercial Practices 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.*'

7 Article 5 of that directive, which is 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,*

*[…]'*

8 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: […]'*

**German law**

9 The Unfair Commercial Practices Directive was transposed into German law by the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb, BGBl. 2004 I, p. 1414) (the 'UWG').

10 Paragraph 2 of the UWG reads:

*'(1) For the purposes of this Regulation:*

*1. "commercial practice" is any conduct pursued by a person for the benefit of his own or another undertaking before, during or after the conclusion of a business transaction which is objectively linked to promoting the sale or purchase of goods or services, or*

*to the conclusion or performance of a contract concerning goods or services; the goods may include real property and the services may refer to rights and obligations; [...]*
*6. "entrepreneur" means any natural or legal person who carries out commercial transactions as part of his trade, business, craft or profession and any one acting in the name of or on behalf of such a person;*
*[...]'*

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

11 BKK is a health insurance fund established as a public law body which is part of the German statutory system.

12 By its action brought at first instance, the Wettbewerbszentrale sought an order requiring:

*'BKK to desist from circulating the following information, which appeared on its website in December 2008: 'If you choose to leave BKK ... now, you will be committed to staying with your new [compulsory health insurance fund] for 18 months following that change. This means that you will miss out on attractive offers that BKK ... will be making next year, and you may end up having to pay more if the amounts allocated to your new scheme are insufficient and it therefore requires you to make an additional contribution.'*

13 The Wettbewerbszentrale is of the view that this information is misleading and thus prohibited under both the Unfair Commercial Practices Directive and under national competition law. BKK fails to mention that, in the event of being required to make a supplementary contribution, the insured person has a special statutory right of cancellation under German law.

14 Consequently, the Wettbewerbszentrale, by letter of 17 December 2008, gave BKK notice to desist from circulating that information and demanded that the latter sign an undertaking to that effect, coupled with a penalty clause, and that it pay back pre-litigation legal expenses.

15 BKK then removed the information at issue from its website. By letter of 6 January 2009, it acknowledged that it had published erroneous information and undertook to refrain from using the contested statements for advertising purposes in the future. By contrast, BKK stated that it was not willing to provide the Wettbewerbszentrale with the requested undertaking, coupled with a penalty clause, or to pay the pre-litigation legal expenses.

16 According to BKK, neither the provisions of the UWG nor those of the Unfair Commercial Practices Directive are applicable to the dispute in the main proceedings. It follows from Article 2(d) of that directive that it applies only to the 'commercial practices' of a 'trader' within the meaning of Article 2(b) of that directive; in addition the wording of points 1 and 6 of Paragraph 2(1) of the UWG is in essence identical to that of the provisions of the directive. Those criteria are not met in the present case since, as a public law body, BKK does not seek to make a profit.

17 The court at first instance ordered BKK, on pain of a financial penalty, to desist from circulating the information at issue for advertising and competitive purposes in the course of its business and to pay the Wettbewerbszentrale EUR 208.65, plus interest.

18 The appeal brought by BKK against the judgment at first instance was dismissed. By its appeal on a point of law ('Revision'), which was authorised by the appeal court, BKK is seeking that the action brought by the Wettbewerbszentrale be dismissed.

19 The Bundesgerichtshof submits that the marketing communications circulated by BKK constitute a misleading practice within the meaning of the Unfair Commercial Practices Directive which should be prohibited as an infringement of the UWG.

20 None the less, such an infringement can be established only where the practice at issue can be assessed in the light of the requirements of that directive, on which the UWG is based. 21 It has not been determined with certainty that the Unfair Commercial Practices Directive must be interpreted as meaning that an operator such as BKK, which as a public law body performs the tasks connected with the provision of statutory health insurance, has acted as a 'business' by circulating the contested information. It could be argued that such a body is not engaged in a commercial activity, but pursues an exclusively social objective.

22 In those circumstances the Bundesgerichtshof decided to stay the proceedings before it and to refer the following question to the Court for a preliminary ruling:

'*Is Article 3(1), in conjunction with Article 2(d), of the [Unfair Commercial Practices Directive] to be interpreted as meaning that the action of a statutory health insurance fund in making (misleading) statements to its members concerning the disadvantages that those members would suffer were they to move to another statutory health insurance fund can also constitute an act by a trader in the form of a business-to-consumer commercial practice?'*

**The question referred for a preliminary ruling**

23 As a preliminary point, it should be noted that it is apparent from the file that the Bundesgerichtshof takes the view that the information giving rise to the dispute in the main proceedings must be treated as a misleading practice within the meaning of Article 6(1) of the Unfair Commercial Practices Directive and that it is proposing to prohibit it, in accordance with Article 5(1) of that directive and of the UWG.

24 To that effect, the referring court is however unsure whether the person circulating that information, in this case BKK, is covered by that directive, even though that person is a public law body charged with a task of public interest, such as the management of a statutory health insurance fund.

25 In order to ascertain whether a national body, such as BKK, which is governed by public law and which is tasked with the management of a statutory health insurance fund, must be considered a 'business' within the meaning of the Unfair Commercial Practices

Directive and whether it is, in that capacity, subject to the requirements laid down by that directive in the event that, as in the present case, it provides misleading information to its members, it should be noted from the outset that, according to the Court's settled case-law, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question (see, inter alia, Case C-287/98 Linster [2000] ECR I-6917, paragraph 43; **Case C-40/01 Ansul [2003]** ECR I-2439, paragraph 26; and **Case C-271/10 VEWA [2011]** ECR I-5815, paragraph 25).

26 Consequently, the classification, legal status and specific characteristics of the body at issue under national law are irrelevant for the purposes of the interpretation of that directive by the Court and for the Court's answer to the question referred by the referring court.

27 In order to provide that answer, it must be stated that whilst the Unfair Commercial Practices Directive invariably uses the term 'consumer', it refers to the other party in a commercial transaction relating to a product either as a 'business' or as a 'trader'.

28 Thus, as set out in Article 3(1), that directive *'shall apply to unfair business-to-consumer commercial practices […] before, during and after a commercial transaction […]'*.

29 Article 2(d) of that directive provides that 'business-to-consumer commercial practices'

refer to *'any act, omission, course of conduct or representation, or commercial communication, including advertising and marketing, by a trader, which is directly connected with the promotion, sale or supply of a product to consumers'*. '[P]roduct' is defined at the same article under (c) as referring to any goods or service, with no business sector being excluded.

30 Article 2(b) defines 'trader' as referring to *'any natural or legal person who, in commercial practices covered by [that] 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'*.

31 In the light of the foregoing, it must be held that, for the purpose of applying the Unfair Commercial Practices Directive, the terms 'business' and 'trader' have an identical meaning and legal significance. Moreover, 'trader' is the most frequently used in the provisions of that directive.

32 In that regard, it is from the outset clear from the drafting of Article 2(b) of the Unfair Commercial Practices Directive that the EU legislature has conferred a particularly broad meaning on the term 'trader', which refers to 'any natural or legal person' which carries out a gainful activity and does not exclude from its scope either bodies pursuing a task of public interest or those which are governed by public law.

33 In addition, with regard to the actual wording of the definitions in Article 2(a) and (b) of that directive, the meaning and scope of the concept of 'trader' which is used in that directive must be determined in relation to the related but diametrically opposed concept of 'consumer', which refers to any individual not engaged in commercial or trade activities (see, by analogy, Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 22).

34 As is apparent inter alia from Article 1 of and recital 23 in the preamble thereto, the Unfair Commercial Practices Directive seeks to provide a high common level of consumer protection by carrying out a complete harmonisation of the rules concerning unfair commercial practices, including misleading advertising by traders with regard to consumers, which harm consumers' economic interests (see, to that effect, **Case C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag [2010]** ECR I-10909, paragraph 27).

35 That objective of the Unfair Commercial Practices Directive, which is to fully protect consumers against practices of that kind, relies on the assumption that, in relation to a trader, the consumer is in a weaker position, in that the consumer must be considered to be economically weaker and less experienced in legal matters than the other party to the contract (see, by analogy, Shearson Lehman Hutton, paragraph 18).

36 Accordingly the Court has already held that, for the purposes of the interpretation of that directive, the concept of consumer is of the utmost importance and that the provisions of that directive are essentially designed with the consumer as the target and victim of unfair commercial practices in mind (see, to that effect, Case C-122/10 Ving Sverige [2011] ECR I-3903, paragraphs 22 and 23, and Case C-435/11 CHS Tour Services [2013] ECR I-0000, paragraph 43).

37 In a situation such as that at issue in the main proceedings, BKK's members, who must manifestly be regarded as consumers within the meaning of the Unfair Commercial Practices Directive, could be deceived by the misleading information circulated by that body thus preventing them from making an informed choice (see recital 14 in the preamble to that directive) and leading them to take a decision they would not have taken in the absence of such information, as envisaged by Article 6(1) of that directive. In those circumstances, whether the body at issue or the specific task it pursues are public or private is irrelevant.

38 In view of the above, a body such as BKK must be considered a 'trader' within the meaning of that directive.

39 The foregoing interpretation is the only one which is able to give full effect to the Unfair Commercial Practices Directive, by ensuring that, in accordance with the requirement of a high level of consumer protection, unfair commercial practices are effectively combatted.

40 That interpretation is also consistent with the wide scope ratione materiae of that directive
which has already been acknowledged (see, to that effect, **Mediaprint Zeitungs- und Zeitschriftenverlag**, paragraph 21).
41 Having regard to all of the foregoing, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted to the effect that a public law body charged with a task of public interest, such as the management of a statutory health insurance fund, falls within the persons covered by the directive.

**Costs**

42 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 (the 'Unfair Commercial Practices Directive'), must be interpreted to the effect that a public law body charged with a task of public interest, such as the management of a statutory health insurance fund, falls within the persons covered by the directive.

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**OPINION OF ADVOCATE GENERAL BOT**
delivered on 4 July 2013 (1)
Case C-59/12
BKK Mobil Oil Körperschaft des öffentlichen Rechts
v
Zentrale zur Bekämpfung unlauteren Wettbewerbs eV
[Request for a preliminary ruling from the Bundesgerichtshof (Germany)]

1. By this request for a preliminary ruling, the Bundesgerichtshof (Federal Court of Justice) (Germany) asks the Court of Justice to interpret the concept of 'trader' within the meaning of Directive 2005/29/EC (2) on unfair commercial practices and, thereby, to define the scope of the rules laid down therein. In particular, the Court is asked whether misleading advertising circulated by a public-law entity entrusted with a task of general public importance, such as a sickness insurance fund, is capable of constituting an unfair commercial practice carried out by a trader vis-à-vis consumers and, consequently, whether Member States can censure such advertising.
2. This question has arisen in a dispute between BKK Mobil Oil Körperschaft des öffentlichen Rechts ('BKK'), a German sickness insurance fund, and Zentrale zur Bekämpfung des unlauteren Wettbewerbs eV (Office for the Prevention of Unfair Competition in Germany) ('Wettbewerbszentrale'), regarding advertising circulated by BKK to its members which was considered to be misleading.
3. The issues involved in answering the referring court's question are clear. It is necessary to define the field of application of the Directive and, in particular, to determine the specific scope that the European Union legislature sought to confer on the concept of 'trader' or 'business', using those terms without distinction. The aim is simple: to achieve a high level of consumer protection in accordance with the objective referred to in Article 169 TFEU by ensuring that effective and coherent action is taken to combat the unfair commercial practices covered by the Directive and, in particular, by preventing the situation from arising whereby, under the cloak of the legal rules applying to the entity in question, consumers are left without protection.
4. In this Opinion, I shall propose that the Court accept the interpretation suggested by the national court as well as by the Italian Government and the European Commission in
their written observations.
5. I shall argue that the nature and importance of the public interest on which consumer protection is based warrant interpreting the provisions at issue so as to cover the conduct of a body that, irrespective of its status or the task of general public importance entrusted to it, infringes its duty of professional diligence and engages in unfair commercial practices vis-àvis consumers in the field in which it carries out its activities. I shall therefore propose that the Court rule that a body – such as the body at issue in the main proceedings – may be classified as a 'trader', within the meaning of the relevant provisions, when it circulates commercial advertising to consumers, in the same way as any other market operator pursuing such an activity.
6. I shall base my assessment on the case-law of the Court both on the meaning of 'undertaking' in competition law and on Article 2(b) of the Directive, together with its objective.

**I – Legal framework**

**A – EU law**

7. According to Article 1 of the Directive, read in conjunction with recital 14 thereto, the aim of the Directive is to achieve a high level of consumer protection by achieving the full harmonisation of national laws on unfair commercial practices.
8. The terms used by the European Union legislature are defined in Article 2 of the Directive. Under Article 2(b) of the Directive, a 'trader' is '*any natural or legal person who, in commercial practices covered by th[e] 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*'.
9. Furthermore, under Article 2(d) of the Directive, a 'business-to-consumer commercial practice' is described 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'.*

10. Article 3(1) provides that the Directive applies to '*unfair business-to-consumer commercial practices ... before, during and after a commercial transaction in relation to a product'.*

11. Finally, Article 5(1) of the Directive prohibits unfair commercial practices. Article 5 (2) lays down the constituent elements of such practices, as follows:

*'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 ...'*

**B – German law**

12. The Directive was transposed into German law by the Law on unfair competition (Gesetz gegen den unlauteren Wettbewerb). (3)

13. Paragraph 2 of the UWG defines the concepts of commercial practice and trader, while Paragraphs 3 and 5 thereof prohibit unfair and misleading commercial practices respectively.

**II – The main proceedings and the question referred for a preliminary ruling**

14. The main proceedings concern advertising circulated by BKK to its members in December 2008, which was worded as follows:

'*Anyone leaving BKK ... now will be committed to staying with his/her new [mandatory sickness] scheme for the next 18 months. This means that you will miss out on attractive offers that BKK ... will be making next year, and you may end up having to pay more if your new scheme is unable to manage on the money allocated to it and therefore requires you to make a supplementary contribution.'*

15. Before the national court, Wettbewerbszentrale argues that BKK circulated misleading advertising. In particular, it seeks the withdrawal of such advertising and the reimbursement of pre-litigation costs. BKK, for its part, submits that its actions are not caught by the Directive's provisions since, as a public-law body entrusted with a task of general public importance, it does not act with a view to making a profit and cannot, therefore, be considered to be a 'trader' within the meaning of Article 2(b) thereof.

16. The national court raises the question of the scope of the Directive. It asks whether BKK, by conducting itself in such a manner towards its members, behaved as a 'trader' under Article 2(b) of the Directive, in which case its conduct may constitute an unfair commercial practice of the kind prohibited by Article 5(1) of the Directive and Paragraph 3 of the UWG.

17. Since it had doubts as to how to interpret the provisions at issue, the Bundesgerichtshof decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

*'Is Article 3(1) [of the Directive], in conjunction with Article 2(d) [thereof], to be interpreted as meaning that the action of a statutory sickness fund in making (misleading) statements to its members concerning the disadvantages that those members would suffer were they to move to another statutory sickness fund can also constitute an act by a trader in the form of a business-to-consumer commercial practice?'*

18. Wettbewerbszentrale, the Italian Government and the European Commission have submitted written observations to the Court.

**III – Analysis**

19. By its question, the national court asks the Court of Justice, in essence, whether Article 3(1) of the Directive, read in conjunction with Article 2(d) thereof, is to be interpreted as meaning that a public-law body with responsibility for managing statutory sickness insurance can be categorised as a 'trader' or 'business' when it circulates misleading advertising intended for its members – advertising which could, therefore, amount to an unfair commercial practice.

20. The question is therefore whether, in the context of consumer law, the terms 'trader' or 'business' can be used to describe a body governed by public law entrusted with a task of general public importance, such as a sickness insurance fund, or whether that body, in view of the rules under which it operates and the task for which it is responsible, is excluded from the ambit of the Directive.

21. Before examining the question referred by the Bundesgerichtshof, I would like to make three comments.

22. First, the reply to the question raised by the national court should provide an independent and uniform interpretation of the concept of trader across the whole of the European Union. As is clearly evident from recital 14 to the Directive, the EU legislature seeks to achieve full harmonisation of the rules on combating unfair commercial practices and refers to the laws of Member States only in relation to the establishment of the applicable penalties in the event of infringement of the measures laid down in the Directive. (4) The Court of Justice must therefore determine the meaning and scope of that concept having regard to, in particular, the context in which it is used and the objectives pursued by the rules of which it forms part. (5)

23. Secondly, the interpretation that the Court of Justice is asked to provide must enable the concept of trader to be applied more coherently and with greater uniformity in the wider context of consumer law. Paradoxically, even though the European Union legislature and the Court of Justice consistently pursue the objective of consumer protection, the concept of trader is not clearly understood. This term does not have a single meaning, despite being of fundamental importance to the implementation of consumer rights throughout consumer rights legislation as a whole. (6) As the Commission pointed out in its Green Paper on the Review of the Consumer Acquis of 8 February 2007, (7) there is no serious justification for those differences in terms of the specific purposes of the relevant directives and the uncertainty they cause is aggravated by the fact that Member States use minimum clauses to

extend the vague definitions of the concept of 'trader' in various ways. (8)

24. Thirdly, the national court asks the question since, in the case of competition law, the Court of Justice has excluded from the concept of 'undertaking' entities that carry out activities in pursuit of an exclusively social objective, such as those carried out by German sickness insurance funds or bodies involved in the management of the public social security system. (9) Even though that interpretation was reached against a background that differs from that of the present case, it provides a useful interpretive key for the purpose of my analysis. That is why I shall begin my examination with an overview of that case-law.

25. In the field of competition law, the Court of Justice has held that an undertaking covers 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. (10) The concept of undertaking is therefore a functional one. First and foremost, it is defined by its economic activity which must, according to the Court, consist in offering goods or services in a given market. (11) The concept of undertaking is not defined by the legal status of the entity or even by the way in which it is financed. Such an interpretation is necessary for the effective implementation of the rules laid down in Articles 101 and 102 TFEU, as it prevents economic operators from circumventing the rules on competition by adopting a legal status that would exclude them from the scope of those rules.

26. Thus, in Commission v Italy, (12) the Court classified as an 'undertaking' a State body – l'Amministrazione autonoma dei monopoli di Stato – which forms part of the Italian Ministry of Finance. The Court took account of the fact that the body in question carried out economic activities of an industrial or commercial nature consisting in offering goods and services on the market. It held that the fact that a body has or has not, under national law, legal personality separate from that of the State was irrelevant in deciding whether it may be regarded as an undertaking. The Court thus applied the dicta laid down in that case-law to public undertakings, undertakings on which special or exclusive rights have been conferred, and undertakings entrusted with the management of services of general public importance.

27. Under competition law, a public entity must therefore be classified as an undertaking when it is shown that the State, acting through that entity, carries out economic activities of an industrial or commercial nature consisting in offering goods and services on a given market.

28. By contrast, the Court has excluded two types of activity from the concept of undertaking, namely those involving the exercise of powers of a public authority (13) and those which pursue an exclusively social objective. (14) Thus, when the relevant activity relates to either the exercise of powers of a public authority or the pursuit of an exclusively social objective, it is not of an economic nature and the body in question is thereby excluded from classification as an 'undertaking'.

29. In this connection, the judgment in AOK Bundesverband and Others is of particular interest. In that case, the Court was invited to classify the activities of German sickness insurance funds, such as those at issue in the main proceedings, in light of the rules laid down in Articles 101, 102 and 106 TFEU. First of all, the Court accepted that sickness funds and bodies involved in the management of the public social security system fulfil an exclusively social function, preventing them being treated in the same way as undertakings. In reaching that conclusion, the Court relied on the obligatory nature of membership of the social security system as well as on the principle of solidarity on which the system is based. None the less, the Court went on to state that it was perfectly possible that *'besides their functions of an exclusively social nature within the framework of management of the German social security system, sickness funds ... engage in operations which have a purpose that is not social and is economic in nature'*. (15) That being so, the Court expressly recognised that decisions adopted against that background by sickness insurance funds could be regarded as decisions of undertakings. (16) Thus, in application of those principles, in Aéroports de Paris v Commission (17) the European Union judicature drew a distinction between, on the one hand, purely administrative activities, in particular the supervisory activities for which the entity was responsible, and, on the other hand, the management and operation of the Paris airports, which are remunerated by commercial fees and which therefore fall under the concept of economic activity.

30. Those cases provide a particularly good illustration of the dual nature of the functions discharged by certain undertakings entrusted with tasks of general public importance, whether they involve the supply of water or energy, transportation, waste management, social services, health care or even education and postal services.

31. As mentioned above, the approach taken by the European Union Courts in those cases is relevant for the purpose of my analysis.

32. It is true that there are significant differences between competition law and consumer law as regards their nature and scope. They also pursue different aims and, indeed, the European Union legislature has been careful to distinguish between the rules on competition applicable to undertakings set out in Articles 101 to 106 TFEU and those aimed at protecting consumers in Article 169 TFEU. None the less, both competition law and consumer law fall within the sphere of economic law and contribute to market regulation by preventing and combating the excesses inherent in its free operation, the victims of which are consumers and competing undertakings. Although the concept of undertaking is a functional concept under competition law, defined only by reference to the pursuit of an economic activity, to my mind, under consumer law, the concept of trader exhibits the same characteristics.

My assessment is based on the wording of Article 2 of the Directive – which describes the specific scope of Article 3(1) thereof – and on the objective of the Directive.

33. It should be recalled that, under Article 2(b) of the Directive, a trader is defined as *'any natural or legal person who, in commercial practices covered by the Directive, is acting for purposes relating to his trade, business, craft or profession'*.

34. The European Union legislature clearly opted for an extremely broad definition of the party concluding the contract with the consumer. First, by using the expression 'any natural or legal person', the entities covered include both private-law and public-law bodies. It goes without saying that public-law bodies are generally created to pursue an objective in the public interest.

35. Secondly, the concept of trader is defined by reference to the trader's commercial activity. It must be borne in mind that the Directive extends only to 'commercial practices' of businesses, which are defined in Article 2(d) thereof as *'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, [...] directly connected with the promotion, sale or supply of a product to consumers'*.

36. In that regard, it is interesting to note that the definition of trader proposed by the European Union legislature in Article 2(b) of the Directive is identical to that used to describe traders in Directive 85/577/EEC (18) on door-to-door sales.

37. The concept of trader must therefore be understood, in view of those provisions, as referring to a natural or legal person who, in the context in question and irrespective of his public or private nature, acts in a commercial capacity.

38. It should also be noted that in the English-language version of the Directive, 'professionnel' is translated by the term 'trader' and 'entreprise' by the term 'business'. The concept of 'business' has no equivalent in French. However, when it refers to the activity of a person, it is translated interchangeably by the expression *'activité professionnelle ou commerciale'* or even by the term 'commerce'. When it refers to the person engaging in that activity, it is translated by the terms 'professionnel' or 'commerçant'. (19)

39. In my opinion, the wording of Article 2(b) and (d) of the Directive enables the concept of trader to be defined as a functional concept, characterised by the carrying out of a commercial activity irrespective of the legal status and tasks entrusted to the entity. Such a definition can therefore cover public-law entities with responsibility for tasks of general public importance – entities that, as discussed above, may be engaged in activities of an economic and profit-making nature potentially involving unfair conduct.

40. That exercise in classification obviously calls for a case-by-case approach. As regards the body at issue in this case, the nature of the activity encompassing the disputed conduct must be examined and a distinction drawn between, first, acts in pursuit of an exclusively social objective – which, on account of their not being of a commercial nature, would fall outside the scope of the Directive – and, secondly, acts forming part of an economic or commercial activity, such as the advertising in question, which, although ancillary, may fall within its scope.

41. The foregoing interpretation of the concept of trader is consistent with that offered by the European Union legislature in the wider context of directives related to consumer rights. For example, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (20) defines 'seller or supplier' as *'any natural or legal person who [...] is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned*.' (21) Furthermore, Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (22) defines trader as *'any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity'*. (23) In the new directive, Directive 2011/83/EU, (24) the European Union legislature defines trader as *'any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession'*. (25)

42. The common thread running through these directives is that a trader may be a natural person or a public-law or private-law body who, in his relations with consumers, is acting for purposes relating to his trade or profession, which presupposes that he acts within the framework of a regular profit-making activity.

43. In view of the wording of Article 2(b) of the Directive, I see no reason why it should not cover public-law bodies entrusted with a task of general public importance, such as sickness insurance funds, when they engage in commercial practices.

44. Moreover, I am of the view that the purpose of the Directive requires the concept of trader to cover such a body.

45. The Directive aims to achieve a high level of consumer protection and ensure the fairness of commercial transactions by preventing and combating unfair commercial practices. (26)

46. In order to meet those objectives, the European Union legislature opted for the complete harmonisation of national laws and decided that the Directive's scope should be extremely broad. Pursuant to Article 3(1) thereof, the Directive is intended to cover all transactions between traders and consumers, across all sectors, and applies not only to the stages of advertising or marketing, but also to the periods before and after a commercial transaction in relation to a product.

47. The ratio legis of the Directive is set forth in Article 5, which lays down a prohibition on unfair commercial practices. That provision must therefore make it

possible to prevent, or even punish, acts forming part of a commercial activity which, first, are contrary to the requirements of professional diligence and, secondly, materially distort the economic behaviour of consumers. The aim of the Directive is thus to ensure that consumers are not misled or exposed to aggressive marketing and that all claims made by traders in the course of their commercial activities are clear, accurate and substantiated, so that consumers can make informed and judicious choices.

48. In order to guarantee the effectiveness of such a provision and, in due course, ensure that genuine and coherent action is taken to counteract unfair commercial practices, it is not only right but is also necessary for a body such as that at issue in the main proceedings to be treated as a 'trader' when it engages in economic behaviour vis-à-vis consumers, in this case the members of the sickness insurance fund. In my view, there is no valid reason why the legal rules applying to that body or the tasks entrusted to it should deprive consumers of all protection against misleading or deceptive acts.

49. First, the fact that a public-law body is entrusted with a task of general public importance does not mean a fortiori that it does not carry out commercial or economic activities in the sector of the market in which it is active. As discussed earlier, the Court analysis in AOK Bundesverband and Others is particularly illustrative in this respect, as the case concerned the tasks and activities incumbent on German sickness insurance funds. In its judgment, the Court expressly acknowledged that sickness funds were capable of engaging in operations which have a purpose that is not social and is economic in nature. (27) It is necessary for such economic operations to be subject to the obligation to comply with the rules laid down in the Directive, in the same way as all similar operations carried out by private operators.

50. Secondly, there is no reason why a public-law body entrusted with a mission of general public importance should be exempted from the obligation to comply with rules as fundamental as those of professional diligence or even excused, on account of the tasks entrusted to it, from lying to consumers or engaging in unfair conduct vis-à-vis other economic operators. Clearly, the restrictions to which such a body is subject, by reason of the tasks of general public importance it performs, do not absolve it from having to demonstrate good faith in its area of activity and to act with care and competence towards consumers; professional diligence is required across the entire spectrum of activities, perhaps more so in areas of general public importance such as health care. Accordingly, I see no reason why a body of that kind should – as far as its commercial activities are concerned – be subject to different rules from those applying to bodies governed by private law.

51. In the light of the above, I am convinced that the nature and importance of the public interest on which consumer protection is based warrant interpreting Article 5 of the Directive so as to cover the actions of undertakings that, irrespective of their status or the task of general public importance entrusted to them, infringe their duty of professional diligence and engage in unfair commercial practices in the sector of business in which they operate.

52. Thus, when the actions in question meet the conditions expressly laid down in Article 5 of the Directive – namely, when they involve a commercial practice that is contrary to the requirements of professional diligence and is likely materially to distort the economic behaviour of consumers – they constitute an unfair commercial practice per se, irrespective of whether the body in question is governed by public law or private law and regardless of the task of general public importance entrusted to it. 53. If such bodies were to be excluded from the field of application of the Directive, there would be a danger of undermining its practical effect as a result of reducing its scope quite significantly.

54. Moreover, to make the applicability of the Directive dependent on the nature of the rules under which the trader operates and the tasks entrusted to it, would be to introduce a 'variable geometry' style of consumer protection into the European Union, which risks jeopardising the harmonisation which the EU legislature seeks to achieve. The way in which services of general public importance are managed differs between Member States, which may entrust such management to a public undertaking or delegate it to a private undertaking. In addition, the sphere of activities falling within the scope of general public importance is also likely to differ from one Member State to the next, differences which are moreover accentuated by the effect of opening up services of general public importance to competition and the pace at which Member States implement that change. The dividing line between activities falling within the scope of services of general public importance stricto sensu and related activities subject to competition is therefore unsettled and liable to shift, which clearly cannot constitute an assessment criterion.

55. Consequently, having regard to the objectives that the European Union legislature seeks to pursue, I am of the opinion that the concept of 'trader' referred to in Article 2(b) of the Directive must cover public-law bodies entrusted with tasks of general public importance, such as sickness insurance funds, when they engage in commercial practices.

56. In view of all of the above, I therefore consider that Article 3(1) of the Directive, read in conjunction with Article 2(d) thereof, must be interpreted as meaning that a public-law body entrusted with a task of general public importance, such as a sickness insurance fund, may be categorised as a 'trader' when it circulates commercial advertising to its members.

**IV – Conclusion**

57. In the light of the foregoing considerations, I propose that the Court should reply as follows to the Bundesgerichtshof: Article 3(1) 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 ('the Unfair Commercial Practices Directive'), read in conjunction with Article 2(d) of Directive 2005/29, must be interpreted as meaning that a public-law body entrusted with a task of general public importance, such as a sickness insurance fund, may be categorised as a 'trader' when it circulates commercial advertising to its members.

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1 – Original language: French.
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 ('the Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22) ('the Directive').
3 – BGBl. 2004 I, p. 1414 ('the UWG').
4 – Article 13 of the Directive.
5 – I note that, according to settled case-law, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, in the light of the context of the provision and the purposes of the rules of which they form part (see Joined Cases C-424/10 and C-425/10 Ziolkowski and Szeja [2011] ECR I-0000,
paragraphs 32 and 34 and the case-law referred to).
6 – In the same way, it is interesting to note that, in the wider context of consumer law, EU legislation does not use the same terminology to refer to the party concluding the contract with the consumer. That party is described in varying terms in French as professionnel ('trader') or entreprise ('business') in the case of the Directive, or even commerçant, prestataire or vendeur, which are translated in the English version of the directives on consumer law as 'trader', 'seller', 'supplier', 'vendor' and 'business'.
7 – COM(2006) 744 final.
8 – Points 4.1 and 4.2 of Annex I.
9 – Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband and
Others [2004] ECR I-2493.
10 – Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21.
11 – Case C-205/03 P FENIN v Commission [2006] ECR I-6295, paragraph 25.
12 – Case C-118/85 [1987] ECR 2599.
13 – Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43.
14 – Höfner and Elser, and Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637.
15 – AOK Bundesverband and Others, paragraph 58.
16 – Ibidem.
17 – Case T-128/98 Aéroports de Paris v Commission [2000] ECR II-3929.
18 – Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31). Article 2 of Directive 85/577 defines a trader as 'a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader'.
19 – IATE, InterActive Terminology for Europe database.
20 – OJ 1993 L 95, p. 29.
21 – Article 2(c) of Directive 93/13. Emphasis added.
22 – OJ 1998 L 80, p. 27.
23 – Article 2(d) of Directive 98/6. Emphasis added.
24 – Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).
25 – See Article 2(2) of Directive 2011/83. Emphasis added.
26 – Recitals 1, 8 and 11 to the Directive.
27 – Paragraph 58.