

**Court of Justice EU, 19 December 2013, Trento Sviluppo v AGCM**



### UNFAIR COMMERCIAL PRACTICES

**A commercial practice is misleading where that practice contains false information, or is likely to deceive the average consumer, and is likely to cause the consumer to take a transactional decision that he would not take otherwise**

- **A transactional decision is any decision directly related to the decision whether or not to purchase a product**

30. Since the misleading commercial practices referred to in Article 6 of Directive 2005/29 constitute a specific category of unfair commercial practices, referred to in Article 5(2) of that directive, they must necessarily combine all the constituent elements of such unfairness, including, in consequence, the element relating to the ability of the practice to materially distort the economic behaviour of the consumer by causing him to take a transactional decision that he would not have taken otherwise.

33. Consequently, for a commercial practice to be classified as ‘misleading’ for the purposes of Article 6(1) of Directive 2005/29, it must inter alia be likely to cause the consumer to take a transactional decision that he would not have taken otherwise. purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop.

36. It is apparent from the very wording of Article 2(k) of Directive 2005/29 that the concept of ‘transactional decision’ is broadly defined. In the words of that provision, ‘any decision taken by a consumer concerning whether, how and on what terms to purchase’ is a transactional decision. That concept therefore covers not only the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop.

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**Court of Justice EU, 19 December 2013**

(A. Borg Barthet (Rapporteur), E. Levits, M. Berger)  
JUDGMENT OF THE COURT (Sixth Chamber)

19 December 2013 (\*)

*(Request for a preliminary ruling – Consumer protection – Unfair business-to-consumer commercial practices – Directive 2005/29/EC – Article 6(1) –*

*Concept of ‘misleading action’ – Cumulative nature of the conditions set out in the provision in question)*

In Case C-281/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 13 December 2011, received at the Court on 6 June 2012, in the proceedings

Trento Sviluppo srl,

Centrale Adriatica Soc. coop. arl

v

Autorità Garante della Concorrenza e del Mercato,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet (Rapporteur), President of the Chamber, E. Levits and M. Berger, Judges, Advocate General: J. Kokott, Registrar: A. Impellizzeri, Administrator, having regard to the written procedure and further to the hearing on 26 September 2013, after considering the observations submitted on behalf of:

– Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl, by M. Pacilio, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone and P. Garofoli, avvocati dello Stato,

– the Lithuanian Government, by D. Kriauciūnas and V. Kazlauskaitė-Švenčionienė, acting as Agents,

– the Hungarian Government, by M. Fehér and K. Szíjjártó, acting as Agents,

– the European Commission, by L. Pignataro-Nolin and M. van Beek, acting as Agents, having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

1. This reference for a preliminary ruling concerns the interpretation of Article 6(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 (‘Unfair Commercial Practices Directive’) (OJ 2005 L 149, p. 22).

2. The reference has been made in proceedings between, on the one hand, Trento Sviluppo srl (‘Trento Sviluppo’) and Centrale Adriatica Soc. coop. arl (‘Centrale Adriatica’) and, on the other, the Autorità Garante della Concorrenza e del Mercato (Authority responsible for compliance with competition and the rules of the market; ‘the AGCM’) concerning a commercial practice engaged in by Trento Sviluppo and Centrale Adriatica which the AGCM has classified as ‘misleading’.

### **Legal context**

#### **Union law**

3. Recital 7 in the preamble to Directive 2005/29 states inter alia that that directive addresses commercial practices directly related to influencing consumers’ transactional decisions in relation to products.

4. According to recital 11 to Directive 2005/29, that directive establishes a single general prohibition covering unfair commercial practices that distort consumers' economic behaviour.

5. Recital 13 to that directive reads as follows:

*'... 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.'*

6. Recital 14 to Directive 2005/29 states:

*'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. ...'*

7. Article 2(e) of Directive 2005/29 defines 'to materially distort the economic behaviour of consumers' as 'using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'.

8. Article 2(k) of that directive defines 'transactional decision' as 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting'.

9. Article 6(1) of Directive 2005/29 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:*

*...*

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

*...'*

#### **Italian law**

10. In Legislative Decree No 206 on the Consumer Code (decreto legislativo n. 206 – Codice del consumo) of 6 September 2005 (ordinary supplement to the GURI No 162 of 8 October 2005), Article 21(1)(b), which was inserted by Legislative Decree No 146 of 2 August 2007 (which, inter alia, transposed Directive 2005/29 into national law) provides:

*'A commercial practice shall be regarded as misleading if it contains information which does not correspond to the truth or which, even if factually correct, in any way, including through its overall presentation, deceives or is likely to deceive the average consumer in relation to one or more of the following factors, 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 ...'*

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

11. Trento Sviluppo runs a number of large supermarkets in the Province of Trento (Italy). Those supermarkets are affiliated with the COOP Italia retail group, of which Trento Sviluppo is itself a member.

12. Centrale Adriatica provides services to companies in the COOP Italia group, of which it is a member.

13. In March 2008, Centrale Adriatica launched a special promotion in a number of COOP Italia brand outlets, as part of which a number of products were put on offer at attractive prices.

14. The promotion lasted from 25 March until 9 April 2008. The advertising leaflet indicated '*Reductions of up to 50% and many other special offers*'.

15. Among the products offered in that advertising leaflet at a promotional price was a laptop computer.

16. On 10 April 2008, a consumer complained to the AGCM that that commercial announcement was in his view inaccurate because, when he went to the supermarket in Trento during the validity period of the promotion, the IT product in question was not available.

17. Following that complaint, the AGCM initiated proceedings against Trento Sviluppo and Centrale Adriatica for unfair commercial practices within the meaning of Articles 20, 21 and 23 of Legislative Decree No 206 of 6 September 2005 on the Consumer Code. Those proceedings culminated in the adoption, on 22 January 2009, of a decision imposing a fine on those two companies.

18. Both companies contested that decision before the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court), which dismissed both actions.

19. Trento Sviluppo and Centrale Adriatica then brought an appeal before the Consiglio di Stato (Council of State; 'the referring court') against the judgments at first instance.

20. The referring court has doubts regarding the scope of the concept of '*misleading commercial practice*' as referred to in Article 6(1) of Directive 2005/29. It is uncertain whether, in order to be regarded as misleading, the commercial practice concerned must satisfy the condition set out in the last part of the introductory section of Article 6(1), under which that commercial practice must be capable of influencing the consumer's transactional decision. The referring court wonders whether that condition is additional to the two alternative conditions laid down in the first part of the introductory section – that the information presented must be false or must be likely to deceive the consumer – or whether it marks another case of misleading commercial practice.

21. According to the referring court, the problem regarding the interpretation of Article 6(1) of Directive

2005/29 arises from the differences between the language versions of that provision. The Italian version (which uses the expression '*e in ogni caso*') and the German (which uses the expression '*und ... in jedem Fall*') seem to refer to a general provision under which the mere fact that a commercial practice is likely to influence the transactional decision of the consumer is sufficient for that commercial practice to be classified as misleading. By contrast, the English version (which uses the expression '*and in either case*') and the French ('*et dans un cas comme dans l'autre*') suggest that a misleading commercial practice can exist only if both the condition that the commercial practice be capable of influencing the transactional decision of the consumer and one of the alternative conditions laid down in the first part of the introductory section of that provision are satisfied.

22. In those circumstances, the Consiglio di Stato decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

*'Is Article 6(1) of Directive 2005/29/EC, as regards the part in which the Italian-language version uses the words "e in ogni caso", to be understood as meaning that, in order for the existence of a misleading commercial practice to be established, it is sufficient if even only one of the elements referred to in the first part of that paragraph is present, or that, in order for the existence of such a commercial practice to be established, it is also necessary for the additional element to be present, that is to say, the commercial practice must be likely to interfere with a transactional decision adopted by a consumer?'*

#### **The question referred for a preliminary ruling**

23. By its question, the referring court asks essentially whether a commercial practice must be classified as 'misleading' for the purposes of Article 6(1) of Directive 2005/29 on the sole ground that that practice contains false information or that it is likely to deceive the average consumer, or whether it is also necessary that that practice be likely to cause the consumer to take a transactional decision that he would not have taken otherwise.

24. Article 6(1) of Directive 2005/29 provides that a commercial practice is to 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 in relation to, inter alia, the main characteristics of a product, such as its availability, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.

25. It must be stated in this respect that, whereas the Italian-language version uses the expression '*e in ogni caso*' – which, according to the referring court, is made up of words introducing a sort of '*closing phrase*' pursuant to which the mere fact of a commercial practice being likely to distort the economic behaviour of the consumer is sufficient for such a practice to be classified as misleading – the Spanish, English and French versions of Article 6(1), on the other hand, use the expressions '*y en cualquiera de estos casos*', '*and in*

*either case*' and '*et dans un cas comme dans l'autre*' respectively. By expressly referring to the two cases relating to the misleading character of the commercial practice concerned, those three language versions indicate that the commercial practice must also cause the consumer to take a transactional decision that he would not have taken otherwise.

26. It is settled case-law that the wording used in one language version of a Union provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement that Union law be applied uniformly. In the event of divergence between the language versions, the provision in question must accordingly be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16, and Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraph 38).

27. As regards, first, the general scheme of Article 6(1) of Directive 2005/29, it should be noted that misleading commercial practices for the purposes of Article 6 of Directive 2005/29 constitute a specific category of unfair commercial practices prohibited by Article 5 of that directive (see, to that effect, [Joined Cases C-261/07 and C-299/07 VTB-VAB and Galatea](#) [2009] ECR I-2949, paragraph 55, and [Case C-435/11 CHS Tour Services](#) [2013] ECR, paragraph 37).

28. In accordance with Article 5(2) of Directive 2005/29, a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely materially to distort the economic behaviour of the average consumer with regard to the product ([VTB-VAB and Galatea](#), paragraph 54, and [CHS Tour Services](#), paragraph 36).

29. Under the terms of Article 2(e) of Directive 2005/29, '*to materially distort the economic behaviour of consumers*' means using a commercial practice to impair appreciably the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise. It follows that, for a practice to be unfair for the purposes of Article 5 of Directive 2005/29, it must be likely to cause the consumer to take a transactional decision that he would not have taken otherwise.

30. Since the misleading commercial practices referred to in Article 6 of Directive 2005/29 constitute a specific category of unfair commercial practices, referred to in Article 5(2) of that directive, they must necessarily combine all the constituent elements of such unfairness, including, in consequence, the element relating to the ability of the practice to materially distort the economic behaviour of the consumer by causing him to take a transactional decision that he would not have taken otherwise.

31. As regards, secondly, the objective pursued by Article 6(1) of Directive 2005/29, it should be noted that the directive is based on Article 169 TFEU and its

aim is to achieve a high level of consumer protection by approximating the provisions of the Member States on unfair commercial practices harming consumers' economic interests. Recital 7 to Directive 2005/29 states that the directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. Recital 11 to that directive mentions that it establishes a single general prohibition of unfair commercial practices that distort consumers' economic behaviour. According to recital 13 to the directive, it is the two types of commercial practice that are by far the most common – namely, misleading commercial practices and aggressive commercial practices – which justified the adoption of specific rules in order to combat those practices. It can be seen from recital 14 to Directive 2005/29 that the directive is intended to use the concept of '*misleading commercial practices*' in such a way as to cover those practices which, by deceiving the consumer, prevent him from making an informed and thus efficient choice.

32. It follows that, in order to achieve a high level of consumer protection, Directive 2005/29 establishes a general prohibition of unfair commercial practices that distort consumers' economic behaviour.

33. Consequently, for a commercial practice to be classified as '*misleading*' for the purposes of Article 6(1) of Directive 2005/29, it must inter alia be likely to cause the consumer to take a transactional decision that he would not have taken otherwise.

34. That interpretation is also borne out by the case-law of the Court. According to paragraph 47 of the judgment in [Case C-453/10 Pereničová and Perenič](#) [2012] ECR and paragraph 42 of the judgment in *CHS Tour Services*, a commercial practice is considered to be misleading for the purposes of Article 6(1) of Directive 2005/29 to the extent that the information is misleading and is likely to cause the consumer to take a transactional decision that he would not have taken in the absence of such a practice.

35. In addition, in order to provide the referring court with all the necessary information enabling it to reach a decision in the dispute before it, it is necessary to determine the scope of the concept of '*transactional decision*' for the purposes of Article 2(k) of Directive 2005/29. Since the commercial practice at issue in the main proceedings concerns information relating to the availability of a product at an attractive price during a certain period, it must be determined whether the acts preparatory to the purchase of a product, such as the consumer's trip to the shop or the act of entering the shop, may be regarded as constituting transactional decisions for the purposes of the directive.

36. It is apparent from the very wording of Article 2(k) of Directive 2005/29 that the concept of '*transactional decision*' is broadly defined. In the words of that provision, '*any decision taken by a consumer concerning whether, how and on what terms to purchase*' is a transactional decision. That concept therefore covers not only the decision whether or not to

purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop.

37. Article 3(1) of Directive 2005/29 also lends support for such an interpretation since, in accordance with that provision, the directive applies to unfair business-to-consumer commercial practices before, during and after a commercial transaction in relation to a product.

38. Consequently, the answer to the question referred is that a commercial practice must be classified as '*misleading*' for the purposes of Article 6(1) of Directive 2005/29 where that practice contains false information, or is likely to deceive the average consumer, and is likely to cause the consumer to take a transactional decision that he would not have taken otherwise. Article 2(k) of the directive must be interpreted as meaning that any decision directly related to the decision whether or not to purchase a product is covered by the concept of '*transactional decision*'.

#### Costs

39. 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 (Sixth Chamber) hereby rules:

A commercial practice must be classified as '*misleading*' for the purposes of Article 6 (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 ('Unfair Commercial Practices Directive') where that practice contains false information, or is likely to deceive the average consumer, and is likely to cause the consumer to take a transactional decision that he would not have taken otherwise. Article 2(k) of the directive must be interpreted as meaning that any decision directly related to the decision whether or not to purchase a product is covered by the concept of '*transactional decision*'.