

## Court of Justice EU, 16 April 2015, Nemzeti v UPC



## UNFAIR COMMERCIAL PRACTICES

Communication, by a professional to only one single consumer, of erroneous information is a ‘misleading commercial practice’

• the Unfair Commercial Practices Directive must be interpreted as meaning that the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a ‘misleading commercial practice’, within the meaning of that directive, even though that information concerned only one single consumer.

If there is a misleading practice it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence

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

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## Court of Justice EU, 16 April 2015

(A. Tizzano, A. Borg Barthet, E. Levits, M. Berger, F. Biltgen (rapporteur))

JUDGMENT OF THE COURT (First Chamber)

16 April 2015 (\*)

(Reference for a preliminary ruling — Directive 2005/29/EC — Unfair commercial practices — Erroneous information provided by a telecommunications undertaking to one of its subscribers which has resulted in additional costs for the latter — Classification as a ‘misleading commercial practice’)

In Case C-388/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Hungary), made by decision of 14 May 2013, received at the Court on 8 July 2013, in the proceedings brought by

Nemzeti Fogyasztóvédelmi Hatóság,

other party:

UPC Magyarország Kft.,

THE COURT (First Chamber),

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

Advocate General: N. Wahl,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 11 September 2014,

after considering the observations submitted on behalf of:

– UPC Magyarország Kft., by A. Simon, ügyvéd,

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

– the European Commission, by M. van Beek and A. Tokár, acting as Agents,

after hearing [the Opinion of the Advocate General](#) at the sitting on 23 October 2014,

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 the Nemzeti Fogyasztóvédelmi Hatóság (the Hungarian consumer protection authority) and UPC Magyarország Kft. (‘UPC’) concerning erroneous information which had been provided by UPC to one of its subscribers and which gave rise to additional costs for that subscriber.

**Legal context****EU law**

3. Recitals 5 to 9, 11 to 14, 18 and 22 in the preamble to the Unfair Commercial Practices Directive state as follows:

‘(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-to-consumer 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. ...

(9) This Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law ...

...

(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) ... The single, common general prohibition established by this Directive ... should apply equally to unfair commercial practices which occur ... following the conclusion of a contract and during its execution. 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. ...

...

(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 ...

...

(22) It is necessary that Member States lay down penalties for infringements of the provisions of this Directive and they must ensure that these are enforced. The penalties must be effective, proportionate and dissuasive.'

4. Under Article 1 of the Unfair Commercial Practices 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 provides:

'For the purposes of this Directive:

(a) "consumer" means any natural person who, in commercial practices 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;

...

(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 and, in particular, to the rules on the ... effect of a contract.

...'

7. Article 5 of the Unfair Commercial Practices 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,

...

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 evident from their titles, Articles 6 and 7 of the Unfair Commercial Practices Directive define respectively 'misleading actions' and 'misleading omissions'.

9. Article 6(1) of that 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, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;*

*(c) the extent of the trader's commitments ...*

*(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;*

*...*

*(g) the consumer's rights ...'*

10. Under Article 11 of the Unfair Commercial Practices Directive:

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

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

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

*and/or*

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

*...*

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

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

*or*

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

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

*...*

11. Article 13 of that directive provides:

*'Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.'*

#### **Hungarian law**

12. The Unfair Commercial Practices Directive was transposed into Hungarian law by Law No XLVII of 2008 on the prohibition of unfair commercial practices in relation to consumers.

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

13. It is apparent from the order for reference that, in April 2010, a private individual, Mr Szabó, who was a long-term subscriber with UPC, a provider of cable television services, and who wished to terminate the contract which he had concluded with that company, requested the latter to inform him of the specific period to which the invoice issued in 2010 related, given that that invoice did not contain information relating to that period.

14. In its reply to Mr Szabó, UPC stated that the most recent annual invoice related to the 'period between 11.01.2010 and 10.02.2011 inclusive'.

15. Mr Szabó, who wished to ensure that the end of the contract that he had concluded with UPC would coincide with the last day of service already paid for, requested that the contract be terminated with effect from 10 February 2011.

16. The provision of services was not terminated until 14 February 2011 and, on 12 March 2011, Mr Szabó received from UPC a document requesting him to pay the sum of 5 243 Hungarian Forints (HUF) in respect of arrears of payment for the period up to 14 February 2011.

17. Mr Szabó lodged a complaint with the Budapest Főváros Kormányhivatala Fogyasztóvédelmi Felügyelősége (Consumer Protection Inspectorate under the governmental administration of Budapest) in which he submitted that he had been provided with erroneous information, as a result of which he had had to pay an additional amount of HUF 5 243, being required to incur the costs of subscription to two different service providers relating to the same period even though the provision of services concerned was of such a nature that it could not be received from both providers at the same time.

18. By a decision of 11 July 2011, that inspectorate ordered UPC to pay a fine of HUF 25 000 in respect of an unfair commercial practice, in accordance with Law No XLVII of 2008 on the prohibition of unfair



commercial practices in relation to consumers. That decision was upheld on 10 October 2011 by the Nemzeti Fogyasztóvédelmi Hatóság, acting as the second-level authority, which took the view that the communication of erroneous information itself constituted an infringement of the requirement of professional diligence, and that it was not necessary to carry out a separate examination of the infringement of that requirement in the present case.

19. In an action brought by UPC, the Fővárosi Törvényszék (Budapest Municipal Court) varied the decision of that national authority of 10 October 2011 and set aside the fine imposed on that company. That court held that the question of the infringement of the requirement of professional diligence had to be examined also in the case where erroneous information had been provided and that such an infringement could not be established, since that examination showed that the professional concerned had not intended to mislead the consumer.

20. In the present case, according to the Fővárosi Törvényszék, UPC's conduct did not constitute continuous conduct and an isolated administrative error relating to a single client could not be classified as a 'practice'. At issue in the present case, it found, was a simple clerical error which had occurred through the inscription of a figure ('2' to represent the month of February instead of '1' to represent January) and, in addition, the consumer concerned could have obtained the correct information from several other sources.

21. The Fővárosi Törvényszék added that the dispute before it did not relate to the price, or the manner of calculating the price, or to the existence of a specific price advantage, within the meaning of Article 6(1)(d) of the Unfair Commercial Practices Directive, with the result that the information provided by UPC was not misleading, but merely erroneous. That finding, it stated, was supported by the fact that the Nemzeti Média- és Hírközlési Hatóság (the National Media and Telecommunications Authority) had rejected the complaint brought before it in the same case.

22. In support of the appeal in cassation brought by the Nemzeti Fogyasztóvédelmi Hatóság before the Kúria (Hungarian Supreme Court), that national authority observes first of all that UPC does not dispute the fact that it communicated erroneous information, on the basis of which the consumer determined the date on which he cancelled his subscription.

23. It submits, next, that, in the case where such information is communicated, it is not necessary to examine separately the question of the infringement of the requirement of professional diligence.

24. Furthermore, the Nemzeti Fogyasztóvédelmi Hatóság disputes the contention that the existence of a 'commercial practice' cannot be confirmed in the case where the conduct which is the subject of the complaint concerns only one single consumer. Articles 6 to 9 of the Unfair Commercial Practices Directive, it argues, use the word 'consumer' always in the singular and that directive must be interpreted in accordance with the objective which it pursues.

25. Finally, according to that authority, the erroneous information at issue concerns the manner of calculating the price, for the purposes of Article 6(1)(d) of that directive, or, at least, the determination of the period covered by the service and comes under Article 6(1)(b) of that directive as a main characteristic of the service provided.

26. It was in those circumstances that the Kúria decided to stay the proceedings before it and to refer the following questions to the Court of Justice for a preliminary ruling:

*'(1) Is Article 5 of the Unfair Commercial Practices Directive to be interpreted as precluding, in respect of misleading commercial practices within the meaning of Article 5(4) of that directive, a separate examination of the criteria laid down in Article 5(2)(a) of that directive?*

*(2) May a communication of false information to a single consumer be regarded as a commercial practice within the meaning of that directive?'*

#### **Consideration of the questions referred for a preliminary ruling**

27. First of all, it must be stated that the first question referred assumes that a situation such as that at issue in the main proceedings comes within the scope of the Unfair Commercial Practices Directive.

28. First, it is only where a communication of information, such as that at issue in the main proceedings, can be classified as a 'commercial practice', within the meaning of Article 2(d) of that directive, that it will be necessary to determine the conditions which must be satisfied by that practice in order for it to be regarded as 'misleading' within the meaning of Articles 6 and 7 of that directive.

29. Secondly, it is in the context of the examination of the second question that the Court will be required to rule on the meaning and scope of the concept of 'commercial practice' for the purposes of the application of that directive.

30. In those circumstances, it is necessary to answer the second question first.

#### **The second question**

31. The second question seeks essentially to determine whether the Unfair Commercial Practices Directive must be interpreted as meaning that the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, is capable of being classified as a 'misleading commercial practice', within the meaning of that directive, even though that information concerned only one single consumer.

32. In this regard, it should be noted that, first, the Unfair Commercial Practices Directive seeks to ensure a high level of consumer protection by carrying out a complete harmonisation of the rules relating to unfair business-to-consumer commercial practices (see, inter alia, judgments in [Mediaprint Zeitungs- und Zeitschriftenverlag](#), C-540/08, EU:C:2010:660, paragraph 27; [Citroën Belux](#), C-265/12, EU:C:2013:498, paragraph 20; [CHS Tour Services](#), C-435/11, EU:C:2013:574, paragraph 47; and

**Zentrale zur Bekämpfung unlauteren Wettbewerbs, C-59/12, EU:C:2013:634, paragraph 34).**

33. Secondly, 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 (see, inter alia, judgment in **Zentrale zur Bekämpfung unlauteren Wettbewerbs, C-59/12, EU:C:2013:634, paragraph 25** and the case-law cited).

34. In the first place, the Court has already held that the Unfair Commercial Practices Directive is characterised by a particularly wide scope *ratione materiae* (judgments in **Mediaprint Zeitungs- und Zeitschriftenverlag, C-540/08, EU:C:2010:660, paragraph 21**, and in **Zentrale zur Bekämpfung unlauteren Wettbewerbs, C-59/12, EU:C:2013:634, paragraph 40**), since the EU legislature conferred a very broad meaning on the term ‘*commercial practice*’, for the purposes of that directive, Article 2(d) thereof defining it as ‘*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader*’.

35. Thus, the sole criterion referred to in that provision is that the trader’s practice must be directly connected with the promotion, sale or supply of a product or service to consumers (see, inter alia, judgments in **Plus Warenhandelsgesellschaft, C-304/08, EU:C:2010:12, paragraph 39**, and in **CHS Tour Services, C-435/11, EU:C:2013:574, paragraph 27**).

36. In the second place, under Article 3(1) of the Unfair Commercial Practices Directive, read in combination with Article 2(c) thereof, the concept of ‘*commercial practice*’ referred to in that directive covers activities of a professional following on from a commercial transaction relating to any goods or services. Likewise, it follows from recital 13 in the preamble to that directive that the latter is applicable to commercial practices in relations between a professional and a consumer and following the conclusion of a contract or during the performance of that contract.

37. In the light of the foregoing, the communication of information, as in the main proceedings, made by an undertaking in the context of the after-sales service relating to a subscription to cable television services by an individual must be regarded as coming within the concept of ‘*commercial practice*’, within the meaning of the Unfair Commercial Practices Directive.

38. Moreover, in accordance with Article 5(1) and (4) of that directive, misleading commercial practices, inter alia, are unfair and prohibited.

39. As is apparent from the actual wording of Article 6(1) of that directive, a commercial practice is to be regarded as misleading if it contains false information and is therefore untruthful or in any way deceives, or is likely to deceive, the average consumer, in relation to, inter alia, the main characteristics of a product or service, including after-sales service, the price or the

manner in which the price is calculated and consumer rights, and if it causes, or is likely to cause, the consumer to take a commercial decision that he would otherwise not have taken.

40. It should be considered that, as is apparent from the order for reference, all the factors set out in that provision are present in a situation such as that at issue in the main proceedings. That situation is characterised by the fact that a consumer received from a professional, and following his request to exercise his right to terminate a contract for services concluded with that professional, erroneous information as to the duration of the relationship between the two parties, and by the fact that the mistake made by the undertaking prevented the individual from making an informed choice and, moreover, occasioned him additional costs.

41. In this regard, it should be stated that the fact that the action of the professional concerned took place on only one occasion and affected only one single consumer is immaterial in this context.

42. Neither the definitions set out in Articles 2(c) and (d), 3(1) and 6(1) of the Unfair Commercial Practices Directive nor the latter, considered as a whole, contain any indication that the act or omission on the part of the professional must be recurrent or must concern more than one consumer.

43. In the light of the need to protect consumers which underlies that directive, those provisions cannot be interpreted as imposing conditions of that kind where they do not even set out such conditions explicitly (see, to that effect, judgment in **CHS Tour Services, C-435/11, EU:C:2013:574, paragraph 41**).

44. Furthermore, the view supported by UPC, according to which an isolated act on the part of a professional which affected only one single consumer cannot be regarded as constituting a ‘*practice*’, within the meaning of the Unfair Commercial Practices Directive, would be liable to give rise to serious disadvantages.

45. In the first place, that directive does not establish a threshold, whether in terms of frequency or the number of consumers concerned, beyond which an act or omission must come within the scope of that directive, with the result that the argument put forward by UPC is not compatible with the principle of legal certainty.

46. In the second place, that argument implies that it is for the consumer to establish that other individuals have been harmed by that same operator, even though, in practice, it is extremely difficult to provide such evidence.

47. Furthermore, the fact that conduct such as that at issue in the main proceedings is allegedly unintentional is also entirely irrelevant.

48. Article 11 of the Unfair Commercial Practices Directive expressly provides that the application of measures taken by the Member States in order to combat such practices is independent of evidence of intention, or indeed negligence, on the part of the professional, and is independent of evidence of actual harm suffered by the consumer.

49. In any event, as is apparent from the use of the word ‘likely’, Article 6 of the Unfair Commercial Practices Directive is essentially preventive in nature, with the result that, for the purposes of the application of that article, it suffices that the professional communicated objectively erroneous information which was capable of adversely influencing the consumer’s commercial decision.

50. In the present case, it is evident that, had it not been for the mistake as to the date made by UPC, the other party to the contract would not have terminated his contract with effect from 10 February 2011, where the relevant date was 10 January 2011, and that, with respect to the time which had elapsed between those two dates, an additional cost was imposed on that party. Moreover, as has already been stated in paragraph 48 of the present judgment, and by analogy with [the Court’s ruling in the judgment in Purely Creative and Others \(C-428/11, EU:C:2012:651, paragraph 57\)](#), the fact that the additional cost imposed on the consumer is insignificant is irrelevant in that regard.

51. The foregoing interpretation is supported by the fact that it makes it possible to guarantee the full effectiveness of the Unfair Commercial Practices Directive, by ensuring that, in accordance with the requirement to ensure a high level of consumer protection, set out in particular in Article 1 of that directive, unfair commercial practices are, in the words of the first subparagraph of Article 11(1) of that directive, combated effectively ‘*in the interest of consumers*’. As is apparent from, inter alia, recitals 7, 8, 11, 13 and 14 in the preamble, that directive establishes to that effect a general prohibition of unfair commercial practices that distort consumers’ economic behaviour (see judgment in Trento Sviluppo and Centrale Adriatica, C-281/12, EU:C:2013:859, paragraph 32).

52. Moreover, the Court has already held that the provisions of the Unfair Commercial Practices Directive are essentially designed with the consumer as the target and victim of unfair commercial practices in mind (see judgment in [Zentrale zur Bekämpfung unlauteren Wettbewerbs, C-59/12, EU:C:2013:634, paragraph 36](#) and the case-law cited).

53. The objective of the Unfair Commercial Practices Directive, which is to protect consumers in full against practices of that kind, relies on the assumption that, in relation to a trader, the consumer is in a weaker position, particularly with regard to the level of information, 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 judgment in [Zentrale zur Bekämpfung unlauteren Wettbewerbs, C-59/12, EU:C:2013:634, paragraph 35](#)).

54. In the light of the foregoing considerations, UPC’s assertion that the consumer, in this case, could himself have obtained the correct information must therefore be regarded as irrelevant.

55. In those circumstances, it must be held that conduct such as that alleged against UPC in the main

proceedings comes within the scope of the Unfair Commercial Practices Directive and, as a result, is subject to the requirements which that directive lays down.

56. That being clarified, it is further necessary to note that that directive restricts itself to providing, in Article 5(1) thereof, that unfair commercial practices ‘*shall be prohibited*’.

57. As the Court has already held, that directive therefore leaves the Member States a margin of discretion as to the choice of national measures intended, in accordance with Articles 11 and 13 of that directive, to combat unfair commercial practices, on condition that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive (judgment in Köck, C-206/11, EU:C:2013:14, paragraph 44).

58. It follows that it is for the Member States to provide for an appropriate system of sanctions with regard to professionals who employ unfair commercial practices, while ensuring that those sanctions comply, in particular, with the principle of proportionality. It is in this context that due account could be taken of factors such as the frequency of the practice complained of, whether or not it is intentional, and the degree of harm caused to the consumer.

59. In the present case, it will be for the referring court to assess, taking account of all of the circumstances of the case pending before it, whether the consequences resulting, pursuant to the national legislation implementing the Unfair Commercial Practices Directive, from the prohibition of the misleading commercial practice used in the present case by the professional comply with the requirements of that directive and, more particularly, with the principle of proportionality.

60. In the light of all of the foregoing considerations, the answer to the second question is that the Unfair Commercial Practices Directive must be interpreted as meaning that the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a ‘*misleading commercial practice*’, within the meaning of that directive, even though that information concerned only one single consumer.

#### The first question

61. By its first question, the referring court asks, in essence, whether the Unfair Commercial Practices Directive must be interpreted as meaning that, if a commercial practice meets all of the criteria specified in Article 6(1) of that directive for classification as a misleading practice in relation to the consumer, it still remains 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 that directive, in order for it legitimately to be regarded as unfair and, consequently, prohibited in accordance with Article 5(1) of that directive.

62. The Court has, however, already ruled on that question in the judgment in [CHS Tour Services \(C-](#)



[435/11, EU:C:2013:574](#)) and the answer given in that judgment is fully applicable to the present case.

63. In those circumstances, on the same grounds as those set out in [paragraphs 31 to 47 of the judgment in CHS Tour Services \(C-435/11, EU:C:2013:574\)](#), the answer to the first question is that the Unfair Commercial Practices Directive must be interpreted as meaning that, if a commercial practice meets all of the criteria specified in Article 6(1) of that directive for classification as a misleading practice in relation to the consumer, it is not necessary further to determine whether such a practice is also contrary to the requirements of professional diligence, as referred to in Article 5(2)(a) of that directive, in order for it legitimately to be regarded as unfair and, consequently, prohibited in accordance with Article 5(1) of that directive.

#### Costs

64. 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:**

1. 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 the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a 'misleading commercial practice', within the meaning of that directive, even though that information concerned only one single consumer.

2. Directive 2005/29 must be interpreted as meaning that, if a commercial practice meets all of the criteria specified in Article 6(1) of that directive for classification as a misleading practice in relation to the consumer, it is not necessary further to determine whether such a practice is also contrary to the requirements of professional diligence, as referred to in Article 5(2)(a) of that directive, in order for it legitimately to be regarded as unfair and, consequently, prohibited in accordance with Article 5(1) of that directive.

[Signatures]

\* Language of the case: Hungarian.

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#### OPINION OF ADVOCATE GENERAL WAHL

delivered on 23 October 2014 (1)

Case C-388/13

UPC Magyarország kft

v

Nemzeti Fogyasztóvédelmi Hatóság

(Request for a preliminary ruling from the Kúria (Hungary))

(Unfair commercial practices — Erroneous information provided by a telecommunications undertaking to a subscriber causing added costs for the latter — Concept of 'commercial practice' — Role of contract law)

1. What constitutes a 'commercial practice' for the purposes of Directive 2005/29/EC ('the UCP Directive')? (2) Or, more specifically, may the communication of erroneous information to a single consumer be regarded as a 'commercial practice' for those purposes? That, in essence, is the question on which the referring court seeks guidance in the present case. In what follows, I will explain why that question ought to be answered in the negative.

#### I – Legal context

2. Recital 6 in the preamble to the UCP Directive mentions the principle of proportionality. In line with that principle, the directive protects consumers from the consequences of unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible.

3. Recital 7 to the UCP Directive states:

*'This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. ...'*

4. Recital 9 to that directive explains:

*'This Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to [EU] and national rules on contract law ...'*

5. Article 1 of the UCP Directive provides:

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

6. Article 2 of the UCP Directive is worded as follows:

*'For the purposes of this Directive:*

*...*

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

*...*

7. Article 3 of the UCP 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 and, in particular, to the rules on the validity, formation or effect of a contract.*

*...*

8. In accordance with Article 5 of the UCP Directive ('Prohibition of unfair commercial practices'):

*'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.'*

## **II – Facts, procedure and the questions referred**

9. In April 2010, Mr S sent a request to UPC Magyarország ('UPC'), a provider of cable television services, for information concerning the specific payment period to which the annual invoice issued in 2010 referred, as this was not clear from the invoice.

10. Mr S was subsequently informed that the most recent annual invoice related to the period between 11 January 2010 and 10 February 2011. To ensure that the end of the contract coincided with the last day of service already paid for, Mr S requested termination of the contract with effect from 10 February 2011. However, the service was not actually disconnected until four days later, on 14 February 2011. On 12 March 2011, a payment order was issued concerning arrears of HUF 5 243 (approximately EUR 18) due for those four days, that is, from 11 to 14 February 2011.

11. Mr S made a complaint to the Budapest Főváros Kormányhivatala Fogyasztóvédelmi Felügyelősége (Consumer Protection Inspectorate under the governmental administration of Budapest capital; 'the first level authority') alleging that he had been provided with erroneous information. As a result, he had been unable to ensure that the end of the contract coincided with the last day of the actual payment period, so that he could use the services of another company from the date of termination of the contract. Thus, during the transitional period in question he had to pay both companies.

12. By decision of 11 July 2011, the first level authority imposed a fine of HUF 25 000 (approximately EUR 85) on UPC. By decision of 10 October 2011, the Nemzeti Fogyasztóvédelmi Hatóság (National Office for Consumer Protection), acting as the second level authority, considered the claim to be well founded and confirmed the decision of the first level authority.

13. Following judicial review proceedings initiated by UPC, the Fővárosi Törvényszék (Budapest Municipal Court) varied the decision of the National Office for

Consumer Protection and dismissed the claim brought by Mr S. In particular, according to that judgment, UPC's conduct did not constitute continuous conduct. An isolated management error of an administrative nature and in respect of a single client could not be considered to be a practice.

14. Entertaining doubts as to the proper construction of the UCP Directive, the Kúria, hearing the case on appeal, decided to stay the proceedings and to refer the following questions for a preliminary ruling:

*'(1) Is Article 5 of [the UCP Directive] to be interpreted as precluding, in respect of misleading commercial practices within the meaning of Article 5(4) of that directive, a separate examination of the criteria laid down in Article 5(2)(a) of the directive?*

*(2) May the communication of false information to a single consumer be regarded as a commercial practice within the meaning of that directive?'*

15. Written observations have been submitted in the present proceedings by UPC, the Hungarian Government and the Commission, all of whom also presented oral argument at the hearing on 11 September 2014.

## **III – Analysis**

### **1. Preliminary observations**

16. The present case is closely linked to the judgment of the Court in CHS Tour Services. (3) That judgment provides an answer to the first of the two questions asked by the referring court in the present case. More specifically, the Court held that the UCP 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 UCP Directive in order for it legitimately to be regarded as unfair and, therefore, prohibited in accordance with Article 5(1) of the directive. (4)

17. In the present analysis, I will therefore focus on the second question (which is logically prior to the first), namely whether the communication of erroneous information to a single consumer may be regarded as a 'commercial practice' within the meaning of the UCP Directive. That is a novel question that the Court has not yet dealt with. The present case therefore offers the Court an opportunity to clarify the scope of the directive.

2. Does the concept of 'commercial practices' also encompass an isolated act adversely affecting a single consumer?

18. The Hungarian Government and the Commission argue that 'commercial practices' within the meaning of the UCP Directive also covers an act that adversely affects an individual consumer, such as that at issue in the proceedings before the referring court, namely the communication of erroneous information to a single consumer. The Hungarian Government, in particular, justifies its viewpoint in terms of the need to ensure a high level of consumer protection. That aim is



specifically mentioned in Article 1 of the UCP Directive and constitutes one of the directive's core objectives.

19. True, the definition of '*commercial practices*' in Article 2 of the UCP Directive is strikingly broad. That term is defined as '*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*'.

20. Therefore, an extensive range of conduct which may take place before the conclusion of a contract (such as conduct affecting the consumer's decision to acquire a certain product), but also at later stages of the contractual relationship (such as complaint-handling and after-sales services), can fall within the purview of the directive. This is demonstrated by the blacklist of unfair practices set out in Annex I to the UCP Directive. In that sense, there seems to be nothing in the UCP Directive that would exclude, at the outset, from its scope the provision of erroneous information about such matters as payment periods, the conditions governing the termination of a consumer contract, or other information concerning the performance of the contract. Certainly, the more broadly the scope of the directive is construed, the more likely a high level of consumer protection will be attained, as required by the directive.

21. However, I do not think it is feasible to conclude from the above that the reach of the UCP Directive also extends to conduct — however unfair or misleading — that is directed solely against one single consumer. The reasons for this are manifold.

**a) The limits of what can be understood by the term '*practice*'**

22. As noted above, the wording of the UCP Directive does not clearly exclude an isolated act directed towards a single consumer from the scope of the directive. To my mind, however, the term '*practice*' inherently limits the types of conduct that may be covered by the directive. Indeed, the obvious precondition for the directive to apply to the conduct of the trader in a business-to-consumer ('B2C') relationship (such as the conduct blacklisted in Annex I) is that the conduct in question constitutes a '*practice*'.

23. For that to be the case, I believe that either or both of the two following conditions must be fulfilled: (i) the conduct is directed towards an unspecified group of addressees; (ii) the conduct is repeated in relation to more than one consumer. Otherwise, the conduct in question sits very uneasily with the '*practice*' terminology employed in all the language versions of the directive. (5)

24. As regards the first condition (in which case the conduct occurs only once), the conduct under consideration must be directed towards an unspecified group of consumers. The corollary idea that the criticised behaviour must have a degree of '*market relevance*' (6) can also be inferred from Articles 5 to 8 of the UCP Directive: those provisions all refer to

commercial practices affecting the economic behaviour of an '*average consumer*' or an '*average member of a group of consumers*'. The paradigmatic example of this type of a practice is, of course, an advertisement in a newspaper or a magazine, or a sign in a shop, explaining a returns-policy to all (actual or potential) customers. A closely related, albeit different, example can be found in CHS Tour Services. At issue there was false information contained in a sales brochure. While the communication of false information occurred only once, it was directed towards an unspecified group of potential consumers and was thus deemed to fall within the scope of the UCP Directive. (7)

25. Alternatively, where the conduct in question is not directed towards an unspecified group of consumers but, rather, to an individual consumer, as in the present case, the conduct must be repeated by the trader in order for it to fit with the '*practice*' terminology employed by the UCP Directive. In other words, the conduct under consideration must be recurring and concern more than one consumer. The fact that the conduct must be repeated in relation to more than one consumer means that the second condition overlaps to a certain extent with the first.

26. In the present case, we are dealing with the communication of erroneous information on an isolated occasion to one single consumer and not to a group of consumers. While it is, in the final analysis, for the referring court to verify, there seems to be nothing to suggest that the provision of erroneous information by UPC's employees — which occurred in relation to Mr S — would be a recurring phenomenon. In the absence of any objective indicator to that effect, I have difficulty in seeing how a single instance of unfair — or perhaps, more specifically, misleading — conduct could be defined as constituting a '*commercial practice*' within the meaning of the UCP Directive.

**b) The UCP Directive and contract law**

27. Leaving aside the meaning of the term '*practice*', I also attach particular importance to Article 3(2) of the UCP Directive. That provision specifically states that the directive is to be without prejudice to contract law. This reflects the reasoning in recital 9 in the preamble to the directive.

28. Yet the approach advocated by the two parties which submitted observations in support of Mr S in the present case would mean that the UCP Directive would apply (in addition to national contract law) to every individual contractual relationship. This would have notable ramifications in many respects. Not least, it would blur the distinction between private law and public law and, in particular, the distinction between the penalties variously applicable.

29. The aim of the UCP Directive is to establish a far-reaching control-mechanism over B2C conduct that may affect the economic behaviour of consumers. To ensure the effectiveness of that control, the directive requires Member States to create the necessary regulatory framework with injunctions and fines to combat such practices. (8)

30. However, it is important to keep in mind that, in accordance with Article 13 of the UCP Directive, the penalties that Member States are to lay down for conduct contrary to the directive are firmly rooted in the sphere of public law, and entirely separate from contractual remedies. If the scope of the UCP Directive were nonetheless extended to cover isolated conduct of the kind at issue in the main proceedings, it would in practice entail the consequence that a public law penalty (in the form of a fine) could be imposed on a trader for each and every contractual breach; and this in addition to possible contractual remedies available to the individual consumer. In other words, following the logic of the parties which submitted observations to that effect, every contractual '*malpractice*' would automatically attract public law penalties.

31. In my view, this would clearly go beyond what is necessary to ensure a high level of consumer protection. (9) Indeed, it ought not to be forgotten that public law penalties are intended to protect the public interest and, in the present case, this would have to be the collective interests of consumers.

32. Regrettably, the UCP Directive does not explicitly limit its scope to the protection of the collective interests of consumers. However, as has been pointed out by several commentators, the directive is concerned with protecting the collective interests of consumers and not with providing redress in individual cases. (10) Redress in individual cases is afforded by contractual remedies under (national) contract law. That said, the UCP Directive may of course have a '*spill-over*' effect on contractual claims. If a certain type of conduct is deemed contrary to the UCP Directive, that may be of relevance in a dispute between a trader and an individual consumer (for assessing, for instance, the validity of the contract in question under relevant contract law provisions). (11)

33. In this context, Article 11 of the UCP Directive is also worth mentioning. It requires the Member States to put in place adequate and effective means to combat unfair commercial practices in order to enforce compliance with the provisions of the directive in the interests of consumers. Moreover, Article 11 gives persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices the possibility of taking legal or administrative action to challenge unfair commercial practices. (12)

34. Had the legislature intended to introduce an additional layer of (public law) penalties for every single instance of contractual '*malpractice*', the inclusion of that provision in the UCP Directive would seem counterintuitive. If the existence of an unfair commercial practice were to be determined on an individual basis, it would seem unnecessary to have specific rules about the collective supervision of unfair commercial practices in the directive. This view finds further support in Article 1(1) of Directive 2009/22/EC, (13) which refers to the UCP Directive as one of the instruments enacted to protect the collective interests of consumers.

35. Finally, I wish to emphasise that it cannot be regarded as desirable to apply, under the guise of consumer protection, the UCP Directive to issues for which it was clearly not intended. It is therefore my understanding that B2C conduct such as the communication of erroneous information to a single consumer cannot, to the extent that it constitutes an isolated event, be regarded as a '*commercial practice*' within the meaning of the UCP Directive.

#### IV – Conclusion

36. In light of the foregoing, I propose that the Court answer the questions referred by the Kúria as follows:

The communication of false information to a single consumer, to the extent that it constitutes an isolated event, cannot be regarded as a '*commercial practice*' within the meaning 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.

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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 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).

3 – C-435/11, EU:C:2013:574.

4 – See *ibid.*, paragraph 48 and the operative part of the judgment.

5 – To take English as an example, the noun '*practice*' is defined as 'the habitual doing or carrying out of something' in the Shorter Oxford English Dictionary, 6th edition, Volume 2, Oxford University Press, Oxford: 2007, p. 2311.

6 – See Glöckner, J., 'The Scope of Application of the UCP Directive — "I know what you did last Summer"', 5(2010) International Review of Intellectual Property and Competition Law, pp. 570 to 592, at p. 589.

7 – EU:C:2013:574, paragraph 28 et seq.

8 – For an analysis, see, for example, Collins, H., 'The Unfair Commercial Practices Directive', 4(1) 2005 European Review of Contract Law, pp. 417 to 441, at pp. 424 and 425.

9 – See, in this respect, recital 6 in the preamble to the UCP Directive.

10 – Wilhelmsson, T., 'Scope of the Directive', in Howells, G., Micklitz, H.W., and Wilhelmsson, T., European Fair Trading Law: The Unfair Commercial Practices Directive, pp. 49 to 81, at p. 72; Glöckner, op.

cit., p. 589; Keirsbilck, B., *The New European Law of Unfair Commercial Practices and Competition Law*, Hart Publishing, Oxford: 2011, pp. 247 and 248.

11 – See, for example, *Pereničová and Perenič* (C-453/10, EU:C:2012:144, paragraph 40) on the effect of unfair commercial practices on the validity of a contract. For academic comment, see, in more detail, Wilhemsson, *op. cit.*, p. 73; and Collins, *op. cit.*, p. 424.

12 – I would also note that in a number of places, the UCP Directive refers to ‘consumers’ in the plural: ‘consumers’ economic interests’, ‘consumers’ transactional decisions’. Although the use of the plural form can hardly be seen as a decisive argument here, the choice of the plural form may nonetheless be interpreted as further supporting the idea that we are dealing with the protection of collective interests.

13 – Directive of the Parliament and the Council of 23 April 2009 on injunctions for the protection of consumers’ interests (OJ 2009 L 110, p. 30).