

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

4 October 2018 (*)

(Reference for a preliminary ruling — Consumer protection — Directive 2005/29/EC — Article 2(b) and (d) — Directive 2011/83/EU — Article 2(2) — Concepts of ‘trader’ and ‘commercial practices’)

In Case C-105/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria), made by decision of 16 February 2017, received at the Court on 28 February 2017, in the proceedings

Komisia za zashtita na potrebitelite

v

Evelina Kamenova,

other party:

Okrazhna prokuratura — Varna,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet (Rapporteur), M. Berger and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the German Government, by T. Henze, M. Hellmann and J. Techert, acting as Agents,
- the European Commission, by A. Cleenewerck de Crayencour, Y. Marinova, G. Goddin and N. Ruiz García, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 May 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(b) and (d) 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 Ms Evelina Kamenova and the Komisia za zashtita na potrebitelite (Consumer Protection Commission, Bulgaria) ('the CPC') concerning an act adopted by the CPC imposing administrative fines on Ms Kamenova on the ground that she failed to provide information to consumers in advertisements for the sale of goods published on a website.

Legal context

EU law

Directive 2005/29

- 3 Article 2 of Directive 2005/29 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;

...

- (d) "business-to-consumer 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;

...'

- 4 Article 3(1) of that directive is worded as follows:

'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.'

Directive 2011/83/EU

- 5 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) provides in its Article 2:

'For the purposes of this Directive:

- (1) "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;
- (2) "trader" means 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 in relation to contracts covered by this Directive;

...'

6 That directive is to apply, in accordance with Article 3(1) thereof, 'under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer'.

7 Article 6(1) of Directive 2011/83 lists the information that must be provided by the trader before the consumer is bound by a distance or off-premises contract, or any corresponding offer.

8 Article 9(1) of that directive provides that the consumer has a period of 14 days in which to withdraw from a distance or off-premises contract.

Bulgarian law

9 Articles 47 and 50 of the Zakon za zashtita na potrebitelite (Law on Consumer Protection) (DV No 99 of 9 December 2005), in the version applicable to the main proceedings ('the ZZP'), respectively transpose into the Bulgarian legal order Articles 6 and 9 of Directive 2011/83 relating, first, to information obligations in respect of distance contracts and, second, to the right of withdrawal.

10 Article 204 of the ZZP reads as follows:

'Any natural person who fails to fulfil the obligations to provide information to a consumer under Article 47(1), (2), (3), (5), (6) and (7) and Articles 48 and 49 shall be liable to a fine of between 100 and 1 000 [Bulgarian leva (BGN)], and any sole trader and legal person so failing shall be liable to a fine of between BGN 500 and BGN 3 000, as established on a case-by-case basis.'

11 Article 207(1) of the ZZP provides:

'Any person who hinders a consumer's right under Article 50 to withdraw from a distance contract or from an off-premises contract shall be liable to a fine of between BGN 1 000 and BGN 3 000, as established on a case-by-case basis.'

12 Under point 13(2) of the Supplementary Provisions to the ZZP:

'The term "trader" means any natural or legal person who sells goods or offers them for sale, or provides services or concludes a contract with a consumer as part of his commercial or professional activity in the public or private sector, as well as any person acting for or on behalf of such a person.'

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

13 A consumer bought a watch on the website www.olx.bg under a distance contract. Taking the view that that watch did not match the description given in the advertisement published on the website, he lodged a complaint with the CPC after the supplier had refused to accept the return of the item in exchange for a refund of the sum paid.

14 Following investigations, the CPC established that a Ms Kamenova, acting under the profile 'eveto-ZZ', had sold the watch. According to the manager of the website www.olx.bg, the person using that profile had published a total of eight sales advertisements for various products on that website, including the watch at issue in the main proceedings.

15 It is apparent from the order for reference that, after having consulted that website, the CPC established that, on 10 December 2014, eight sales advertisements for various products were still being published on the website under the profile 'eveto-ZZ'.

- 16 By decision of 27 February 2015, the CPC found that Ms Kamenova had committed an administrative offence and imposed on her several fines on the basis of Articles 204 and 207 of the ZZP, for breach of Article 47(1), points (1) to (3), (5), (7), (8), and (12), as well as Article 50 of the ZZP. According to the CPC, Ms Kamenova had failed to state, in each of the advertisements, the trader's name, postal address and email address, the total price of the product put on sale, inclusive of taxes and fees, the payment conditions, the conditions of delivery and performance, the consumer's right to withdraw from the distance contract, the conditions, period and procedures for exercising this right as well as a reminder that there was a statutory guarantee that the goods sold would be in conformity with the sales contract.
- 17 Ms Kamenova brought an action against that decision before the Rayonen sad Varna (District Court, Varna, Bulgaria). By judgment of 22 March 2016, that court annulled that decision on the ground that Ms Kamenova was not a trader within the meaning of point 13(2) of the Supplementary Provisions to the ZZP and Directive 2005/29.
- 18 The CPC lodged an appeal on a point of law against that judgment before the referring court, the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria). The referring court observes, first, that extensively-used consumer goods are widely bought and sold on the internet. It further points out that the objective of Directive 2005/29 is to guarantee a high level of consumer protection. In that context, it asks in essence whether, in circumstances such as those at issue in the main proceedings, in which a natural person sells online a relatively high number of goods of significant value, that person has the status of trader within the meaning of Directive 2005/29.
- 19 In those circumstances, the Administrativen sad — Varna (Administrative Court, Varna) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 2(b) and (d) of [Directive 2005/29] be interpreted as meaning that the action of a natural person who is registered on a website for the sale of goods, and who published a total of eight advertisements at the same time for the sale of different items via the website, is the action of a trader within the meaning of the legal definition in Article 2(b), represents a business-to-consumer commercial practice within the meaning of Article 2(d) and comes within the scope of the directive pursuant to Article 3(1) thereof?’

Consideration of the question referred

- 20 By its question, the referring court asks, in essence, whether a natural person who simultaneously publishes on a website a number of advertisements offering new and second-hand goods for sale may be classified as a ‘trader’, within the meaning of Article 2(b) of Directive 2005/29 and, secondly, whether such activity constitutes a ‘commercial practice’, within the meaning of Article 2(d) of that directive.
- 21 A preliminary point to be made is that, according to the Court's settled case-law, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to resolve the dispute before it. To that end, the Court may have to reformulate the questions referred to it and, in that context, to interpret all provisions of EU law which national courts require in order to resolve the disputes before them, even if those provisions are not expressly indicated in the questions referred to it by those courts (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 39 and the case-law cited).
- 22 Consequently, even if, formally, the referring court has limited its question to the interpretation of provisions of Directive 2005/29, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 40 and the case-law cited).

- 23 In the present case it is apparent from the order for reference that the national provisions relevant to the main proceedings, namely Articles 47 and 50 of the ZZP, respectively transpose into Bulgarian law Articles 6 and 9 of Directive 2011/83. However, the referring court – which seeks, in particular, to ascertain whether a natural person, such as the person at issue in the main proceedings, who publishes simultaneously on a website several advertisements offering new and second-hand goods for sale, may be regarded as a ‘trader’ and, as such, must comply with the requirements set out in those articles – seeks, in the question which it has referred, only the interpretation of Directive 2005/29.
- 24 In this context, it must be understood that, by its question, the referring court is asking, in essence, whether a natural person who simultaneously publishes on a website a number of advertisements offering new and second-hand goods for sale may be classified as a ‘trader’, within the meaning of Article 2(b) of Directive 2005/29 and Article 2(2) of Directive 2011/83, and, secondly, whether such an activity constitutes a ‘commercial practice’, within the meaning of Article 2(d) of Directive 2005/29.
- 25 As regards, first, the concept of ‘trader’, it must be recalled that Article 2(b) of Directive 2005/29 defines a trader as ‘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’.
- 26 Article 2(2) of Directive 2011/83, for its part, defines a trader as ‘any natural or 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 in relation to contracts covered by this Directive’.
- 27 Thus, the concept of ‘trader’ is defined almost identically in Directives 2005/29 and 2011/83.
- 28 In addition, as the Advocate General noted in point 32 of his Opinion, both Directive 2005/29 and Directive 2011/83 are based on Article 114 TFEU and, as such, pursue the same objectives, namely to contribute to the proper functioning of the internal market and to ensure a high level of consumer protection in the legislative, regulatory and administrative framework which they cover.
- 29 Therefore, it must be stated, as did the Advocate General in point 39 of his Opinion, that the concept of ‘trader’, as defined in those directives, must be interpreted uniformly.
- 30 That said, it should be noted that it follows from the wording of Article 2(b) of Directive 2005/29 that the EU legislature adopted a particularly broad notion of the term ‘trader’, which refers to ‘any natural or legal person’ who 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 (judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-59/12, EU:C:2013:634, paragraph 32).
- 31 The same applies in regard to Article 2(2) of Directive 2011/83, in so far as that provision, first, as recalled in paragraph 26 of the present judgment, refers expressly to ‘any natural or legal person, irrespective of whether privately or publicly owned’ and, second, as stated in paragraph 29 above, must be interpreted in the same way as Article 2(b) of Directive 2005/29.
- 32 Furthermore, it is clear from the wording of Article 2(b) of Directive 2005/29 and of Article 2(2) of Directive 2011/83 that, in order to qualify as a ‘trader’, the person concerned must be acting ‘for purposes relating to his trade, business, craft or profession’ or in the name of or on behalf of a trader.
- 33 In that context, with regard to the actual wording of the definitions in Article 2(a) and (b) of Directive 2005/29 and in Article 2(1) and (2) of Directive 2011/83, the meaning and scope of the concept of ‘trader’, as used in those provisions, 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, to that effect, judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-59/12, EU:C:2013:634, paragraph 33 and the case-law cited).

- 34 It is apparent from the case-law of the Court that, in relation to a trader, the consumer is in a weaker position, in that he must be deemed to be less informed, economically weaker and legally less experienced than the other party to the contract (judgments of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-59/12, EU:C:2013:634, paragraph 35, and of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 54).
- 35 It follows that the notion of ‘trader’, within the meaning of Article 2(b) of Directive 2005/29 and Article 2(2) of Directive 2011/83, is a functional concept, requiring determination of whether the contractual relationship is amongst the activities that a person provides in the course of his or her trade, business or profession (see, by analogy, judgment of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 55 and the case-law cited).
- 36 Thus, in order to be regarded as a ‘trader’ within the meaning of Article 2(b) of Directive 2005/29 and Article 2(2) of Directive 2011/83, the natural or legal person must be acting ‘for purposes relating to his trade, business, craft or profession’ or in the name or on behalf of a trader.
- 37 With regard to the question whether an individual such as the defendant in the main proceedings comes within the concept of ‘trader’ within the meaning of those provisions, it must be stressed, as has been noted in point 50 of the Advocate General’s Opinion, that classification as a ‘trader’ requires a ‘case-by-case approach’. It follows that the referring court will have to examine, on the basis of all the facts in its possession, whether a natural person, such as the person at issue in the main proceedings, who published simultaneously on an online platform eight advertisements offering new and second-hand goods for sale, was acting for ‘purposes relating to his trade, business, craft or profession’ or in the name or on behalf of a trader.
- 38 As stated by the Advocate General in point 51 of his Opinion, in the context of that examination, the referring court will, in particular, have to verify whether the sale on the online platform was carried out in an organised manner, whether that sale was intended to generate profit, whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller’s commercial or professional activity, whether the seller was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity, whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods.
- 39 It should be noted that the criteria set out in the preceding paragraph of this judgment are neither exhaustive nor exclusive, with the result that, in principle, compliance with one or more of those criteria does not, in itself, establish the classification to be used in relation to an online seller with regard to the concept of ‘trader’.
- 40 Thus, the mere fact that the sale is intended to generate profit or that a person publishes, simultaneously, on an online platform a number of advertisements offering new and second-hand goods for sale is not sufficient, by itself, to classify that person as a ‘trader’, within the meaning of Article 2(b) of Directive 2005/29 and Article 2(2) of Directive 2011/83.
- 41 As regards, secondly, the question whether the activity of an individual, such as the defendant in the main proceedings, is a ‘commercial practice’, within the meaning of Article 2(d) of Directive 2005/29, it should be recalled that, according to settled case-law, that provision defines, using a particularly broad formulation, the concept of ‘commercial practices’ as extending to ‘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' (judgment of 19 September 2013, *CHS Tour Services*, C-435/11, EU:C:2013:574, paragraph 27 and the case-law cited).

42 Thus, in order for the activity in question to be regarded as a 'commercial practice', within the meaning of that provision, it must be established that that activity may be classified as a 'practice that is commercial in nature', that is to say, it must originate from a 'trader', and that it constitutes an act, omission, course of conduct or commercial communication 'directly connected with the promotion, sale or supply of a product to consumers' (see, to that effect, judgment of 17 October 2013, *RLvS*, C-391/12, EU:C:2013:669, paragraph 37).

43 It follows from the foregoing that the existence of a 'commercial practice', within the meaning of Directive 2005/29, may be upheld only if that practice originates from a 'trader' as defined in Article 2(b) of that directive.

44 However, it must be recalled, as has been stated in paragraph 40 above, that the mere fact that the sale is intended to generate profit or that a natural person publishes, simultaneously, on an online platform a number of advertisements offering new and second-hand goods for sale cannot suffice, by itself, to classify that person as a 'trader' within the meaning of that provision. It follows that an activity such as that at issue in the main proceedings cannot be regarded as a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29.

45 In the light of the foregoing considerations, the answer to the question referred is that Article 2(b) and (d) of Directive 2005/29 and Article 2(2) of Directive 2011/83 must be interpreted as meaning that a natural person, such as the defendant in the main proceedings, who publishes simultaneously on a website a number of advertisements offering new and second-hand goods for sale can be classified as a 'trader', and such an activity can constitute a 'commercial practice', only if that person is acting for purposes relating to his trade, business, craft or profession, this being a matter for the national court to determine, in the light of all relevant circumstances of the individual case.

Costs

46 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 (Fifth Chamber) hereby rules:

Article 2(b) and (d) 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') and Article 2(2) of 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 must be interpreted as meaning that a natural person, such as the defendant in the main proceedings, who publishes simultaneously on a website a number of advertisements offering new and second-hand goods for sale can be classified as a 'trader', and such an activity can constitute a 'commercial practice', only if that person is acting for purposes relating to his trade, business, craft or profession, this being a matter for the national court to determine, in the light of all relevant circumstances of the individual case.

[Signatures]

* Language of the case: Bulgarian.