

Order of the Court (Sixth Chamber), 8 September 2015

Gómez-Acebo & Pombo, Barcelona

In Case C-13/15, a request for a preliminary ruling under Article 267 TFEU was submitted by the French *Cour de cassation* regarding 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. The original case was being heard in criminal proceedings against Cdiscount SA because of the failure to indicate the reference price (price without discount) of items sold by them at a reduced price on an e-commerce website.

Articles 5 to 9 of the Directive provide a list of conducts which are prohibited in all circumstances and regardless of the impact they could have on the economic behaviour or decisions of the average consumer. In remaining cases, the commercial conduct must be separately considered, as a practice can only be deemed unfair if examined case-by-case. In the present matter, the French legislation treated price reductions without a reference price as conduct that was generally prohibited. The *Cour de cassation* asked for clarification.

For this, the Court of Justice took several points into consideration:

1. It is for the national court to establish whether the national provisions actually pursue objectives relating to consumer protection in order to determine if they fall under the scope of the Directive or not.
2. If the abovementioned conclusion is reached, it becomes necessary to establish whether

the practices at issue do indeed constitute commercial practices within the meaning of Article 2 of the Directive, which gives a broad definition of the concept as "any action, omission, course of action or representation, commercial communication including advertising or marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".

3. As the Directive fully harmonizes the rules, Member States may not adopt rules stricter than those provided for in the Directive, even if to achieve a higher level of consumer protection.
4. Annex I of the Directive sets out an exhaustive list of 31 commercial practices which, pursuant to Article 5, are regarded as unfair in all circumstances.

In the present case, price reductions do not appear in Annex I and it was understood by the Court of Justice that a limitation on the same affected a commercial practice which inasmuch as "intended to induce consumers to buy products on an e-commerce website, clearly form part of an operator's commercial strategy and relate directly to the promotion and sale of these products". Consequently, the general prohibition imposed by the French legislation could not be accepted.

The Directive must be interpreted as precluding any national provision that, in the pursuance of objectives relating to consumer protection, is stricter than what is provided for in Annex I of the Directive. This here was a case in point.

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