

Case C-922/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

17 December 2019

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

13 December 2019

Appellant:

Stichting Waternet

Respondent:

MG

Subject of the action in the main proceedings

The main proceedings concern a dispute between Stichting Waternet ('Waternet'), a drinking water company, and MG, a private individual who moved house, as to whether the supply of drinking water by Waternet constitutes an unsolicited supply and, if so, whether that means that MG was under no obligation to pay.

Subject and legal basis of the request for a preliminary ruling

The present request under Article 267 TFEU concerns, first, the interpretation of Article 9 of Directive 97/7/EC and Article 27 of Directive 2011/83/EU, read in conjunction with Article 5(5) of Directive 2005/29/EC and point 29 of Annex I thereto and, in particular, the term 'unsolicited supply (of drinking water)'. Such a supply constitutes a prohibited unfair commercial practice. A second issue is whether the aforementioned directive provisions preclude a contract having been concluded.

Questions referred

1. Must Article 9 of the Distance Selling Directive and Article 27 of the Consumer Rights Directive, in conjunction with Article 5(5) and point 29 of Annex I to the Unfair Commercial Practices Directive, be interpreted as meaning that there is an unsolicited supply of drinking water within the meaning of those provisions if the commercial practice of the drinking water company consists of the following:

(i) the drinking water company is, by law, (a) exclusively authorised and obliged to supply drinking water within its distribution area by means of pipes, and is (b) obliged to make an offer to connect to the public drinking water supply those making a request to that end and to make an offer to supply drinking water;

(ii) the drinking water company maintains the connection between the consumer's home and the public drinking water supply as it existed before the consumer came into occupation of the dwelling, as a result of which there is pressure in the water pipes in the consumer's dwelling, and as a result of which the consumer, after performing an active and conscious act — consisting of turning on the tap or an equivalent act — can consume drinking water if desired, even after the consumer has indicated that he does not wish to enter into a contract for the supply of drinking water; and

(iii) the drinking water company charges costs in so far as the consumer has actually consumed drinking water by performing an active and conscious act, whereby the rates applied cover costs, are transparent and non-discriminatory and are monitored by the authorities?

2. Do Article 9 of the Distance Selling Directive and Article 27 of the Consumer Rights Directive, in conjunction with Article 5(5) and point 29 of Annex I to the Unfair Commercial Practices Directive, preclude the assumption that a contract for the supply of drinking water is concluded between the drinking water company and the consumer if (i) the consumer, like the average consumer in the Netherlands, knows that there are costs associated with supplying drinking water, (ii) the consumer nevertheless consistently consumes drinking water over a long period of time, (iii) the consumer, even after receiving a welcome letter, invoices and reminders from the drinking water company, continues his water consumption, and (iv) the consumer, after judicial authorisation has been granted to terminate the dwelling's drinking water connection, lets it be known that he does in fact wish to have a contract with the drinking water company?

Provisions of EU law cited

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts: recital 16; Articles 9, 14

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'): recitals 6, 7 and 17; Articles 5-9 and 15; Annex I, point 29

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: recital 60; Articles 3, 4 and 27

Provisions of national law cited

Burgerlijk Wetboek (Civil Code; 'BW'): Article 7:7(2) (former), Article 7:7(2) (current)

Wet van 18 juli 2009, houdende nieuwe bepalingen met betrekking tot de productie en distributie van drinkwater en de organisatie van de openbare drinkwatervoorziening (Law of 18 July 2009, laying down new provisions relating to the production and distribution of drinking water and the organisation of the public drinking water supply; 'the Drinkwaterwet'): Articles 1, 3, 4, 5, 8, 9, 10-13

Regeling van de Staatssecretaris van Infrastructuur en Milieu, van 17 april 2012, nr. IENM/BSK-2012/14677, houdende regels met betrekking tot het afsluiten van kleinverbruikers van drinkwater (Regulation of the State Secretary for Infrastructure and the Environment, of 17 April 2012, No. IENM/BSK-2012/14677, laying down rules relating to the disconnection of small-scale consumers of drinking water ('Regeling afsluitbeleid voor kleinverbruikers van drinkwater'): Articles 2, 3, 4, 6

Besluit van 23 mei 2011, houdende bepalingen inzake de productie en distributie van drinkwater en de organisatie van de openbare drinkwatervoorziening (Order of 23 May 2011, laying down provisions relating to the production and distribution of drinking water and the organisation of the public drinking water supply; 'the Drinkwaterbesluit')

Regeling van de Staatssecretaris van Infrastructuur en Milieu van 14 juni 2011, nr. BJZ2011046947 houdende nadere regels met betrekking tot enige onderwerpen inzake de voorziening van drinkwater, warm tapwater en huishoudwater (Regulation of the State Secretary for Infrastructure and the Environment of 14 June 2011, No. BJZ2011046947, laying down further detailed rules relating to certain subjects concerning the supply of drinking water, hot tap water and domestic water; 'the Drinkwaterregeling')

Brief summary of the facts and the procedure in the main proceedings

- 1 In practice in the Netherlands, when a consumer moves house, the drinking water connection of the dwelling is not (directly) closed, not even if the departing occupant has terminated his contract with the drinking water company and the incoming occupant has not (yet) concluded a contract with the drinking water company. That practice is the result, among other things, of the legal obligation of the drinking water company to pursue a policy aimed at preventing consumers from being disconnected from the public drinking water supply.
- 2 MG has been the occupant of a dwelling in Amsterdam since September 2012 ('the dwelling'). When he moved into the dwelling, he did not report to Waternet — a company which, under the Drinkwaterwet, is exclusively charged with supplying drinking water by means of pipes in the municipality of Amsterdam — as a new occupant and the previous occupant did not notify it of his departure. Waternet supplied drinking water to that address.
- 3 The invoices for the supply of drinking water in the period up to 1 January 2014 were paid by the previous occupant of the dwelling.
- 4 On 12 November 2014, Waternet sent MG a so-called welcome letter.
- 5 As of 18 November 2014, Waternet sent MG invoices for the supply of drinking water in the period commencing 1 January 2014.
- 6 MG did not pay the invoices relating to the period from 1 January 2014 to 18 November 2016, sent to him by Waternet.
- 7 Waternet brought a claim against MG before the kantonrechter (sub-district court judge) in the rechtbank Amsterdam (Amsterdam District Court) which primarily seeks payment for the drinking water supplied. That court rejected that claim by judgment of 4 November 2016.
- 8 Waternet then lodged an appeal against that judgment before the gerechtshof Amsterdam (Amsterdam Court of Appeal). Waternet asked that court to set aside the judgment of 4 November 2016 and to order MG to pay EUR 283.79, plus statutory interest and costs, for water consumption in the period from 1 January 2014 to 18 November 2016. In a judgment of 10 April 2018, the gerechtshof Amsterdam upheld that judgment.
- 9 Waternet then lodged an appeal in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands; 'the referring court').

Main submissions of the parties to the main proceedings

- 10 MG submits, in essence, that he did not conclude a contract with Waternet and that Waternet supplied him with drinking water even though he had not requested it.
- 11 Waternet submits, in the first place, that the gerechtshof Amsterdam committed an error of law with regard to the term ‘unsolicited supply’ as referred to in Article 7:7(2) (current) of the BW. According to Waternet, there is no question of ‘unsolicited supply’ if the consumer, who must be assumed to be in need of water for his own dwelling, himself chooses to access water by making use of a legal obligation on the part of the water company to connect and supply. That applies in any event in the Netherlands, where the water company operates as a monopoly in a market with regulated rates and not subject market forces, so that in principle there can be no question of an aggressive commercial practice. Moreover, it is important that the water company has no real possibility of preventing water use. Waternet also notes that Article 7:7(2) (former) of the BW does not apply to the supply of drinking water and does not preclude the consumption of drinking water from resulting in the conclusion of a contract.
- 12 In the second place, Waternet argues that the gerechtshof Amsterdam was wrong to hold that no contract came into existence between Waternet and MG. According to Waternet, the gerechtshof Amsterdam did not take into account the fact that (i) MG knew that the supply of drinking water is not free, (ii) MG nevertheless consumed drinking water consistently for almost four years, (iii) MG continued his water consumption after he had received the letter of welcome from Waternet and the subsequent invoices and reminders, and (iv) after judicial authorisation had been granted to close the dwelling’s drinking water connection, MG let it be known that he did in fact want a contract with Waternet.

Brief summary of the reasons for the referral

Question 1

- 13 The referring court notes that it must ascertain whether Waternet’s commercial practice is unfair on the ground that there is an unsolicited supply of drinking water.
- 14 It points out that such supply is prohibited under Article 7:7(2) (former) of the BW, which is relevant for the assessment of Waternet’s claim for the period from 1 January 2014 to 12 June 2014, and under Article 7:7(2) (current) of the BW, which is relevant for the assessment of Waternet’s claim for the period starting on 13 June 2014. Unsolicited supplies are furthermore prohibited under Article 5(5) of Directive 2005/29 and point 29 of Annex I thereto, Article 9 of Directive 97/7 and Article 27 of Directive 2011/83.

- 15 It states that the supply of drinking water in question has the following characteristics:
- 1) Waternet is by law exclusively authorised and obliged, within its distribution area, to supply drinking water by means of water pipes;
 - 2) Waternet is obliged by law to make an offer, to those requesting it, to connect to the public drinking water supply and to supply drinking water;
 - 3) Waternet maintained the existing connection between MG's home and the public drinking water supply. As a result, pressure remained in the water pipes in that dwelling and MG could access drinking water if he so wished, even after he had indicated that he did not want to enter into a contract for the supply of drinking water, and
 - 4) Waternet applied tariffs regulated by legislation for the drinking water which MG had used.
- 16 The referring court points out that, in its preliminary opinion, the question whether there is a question here of an unsolicited supply of drinking water must be answered in the negative. It is of the view that Waternet's commercial practice does not directly harm the economic interests of the average consumer and does not limit the latter's freedom of action with regard to accessing drinking water. Nor are the economic interests of Waternet's legitimate competitors indirectly harmed, since there is no question of market forces or competition with regard to the supply of drinking water in the Netherlands. The supply at issue does therefore not constitute a commercial practice which Directive 2005/29 seeks to prohibit under its intended scope.
- 17 It further notes that the matter at issue in the present case differs in important respects from the case which gave rise to the judgment of 13 September 2018 in *Wind Tre and Vodafone Italia* (C-55/17 and C-55/17, EU:C:2018:710), concerning the interpretation of the term 'unsolicited supplies'. For example, the Netherlands consumer has no freedom of choice as regards the supplier of drinking water, costs are only charged if the consumer has performed an active and conscious act, and the average Netherlands consumer is aware that there are costs associated with the supply of drinking water. Consequently, that case-law of the Court of Justice is not relevant in the present case.

Question 2

- 18 The referring court also wishes to ascertain whether the aforementioned directive provisions preclude the conclusion of a contract between Waternet and MG.
- 19 The referring court states that MG knew that there was a cost attached to the supply of drinking water, that he nevertheless consumed drinking water consistently for almost four years, that he continued his consumption of water after receiving the Waternet welcome letter and subsequent invoices and

reminders, and that, after judicial authorisation had been granted to terminate the dwelling's drinking water connection, he let it be known that he did in fact wish to conclude a contract with Waternet.

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