

Case C-379/23**Request for a preliminary ruling****Date lodged:**

15 June 2023

Referring court:

Svea hovrätt, Patent- och marknadsöverdomstolen (Sweden)

Date of order for reference:

13 June 2023

Appellant:

Guldbrev AB

Respondent:

Konsumentombudsmannen

[...]

JUDGMENT UNDER APPEAL

Judgment of the Patent- och marknadsdomstolen, Stockholms tingsrätt (Patent and Market Court, District Court, Stockholm, Sweden) of 25 March 2022 [...]

[Or. 2] After legal argument, the Patent- och marknadsöverdomstolen (Patent and Market Court of Appeal, Stockholm, Sweden), which does not find grounds for reference of the question proposed by the Konsumentombudsmannen (Consumer Ombudsman; ‘the KO’), rules as follows

ORDER (to be served on 14 June 2023)

1. The Patent and Market Court of Appeal orders a preliminary ruling to be obtained from the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union and a request for a preliminary ruling to be submitted to the Court of Justice in accordance with Annex A to these minutes.

2. The Patent and Market Court of Appeal declares that the action shall be stayed pending the ruling from the Court of Justice of the European Union.

[...]

[Or. 3] The referring court

- 1 [...] Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden), Patent- och marknadsöverdomstolen,

[...] Stockholm, Sweden

[...]

Parties to the case before the national court

- 2 Appellant: Guldbrev AB, [...] Stockholm

[...]

Respondent: Konsumentombudsmannen, [...] Karlstad

[...]

Subject matter: Unfair advertising

Action before the national court and relevant facts

- 3 Guldbrev AB (Guldbrev) is an internet-based purchaser of gold which carries on the business of valuation and purchase of gold from consumers. Guldbrev does not have any physical shops but runs its purchasing activity and price comparison service on various websites. The claims and other practices which the action concerns have arisen on Guldbrev's websites, on social media and in letters sent to consumers by **[Or. 4]** Guldbrev. The KO has claimed that certain advertising should be prohibited and that Guldbrev should be ordered to provide certain information to consumers.

The KO has – in the parts relevant here – submitted principally and in summary the following. The product advertised by Guldbrev should be regarded as a bundled service consisting of valuation and purchase of gold, for which reason the advertising falls within the scope of the marknadsföringslagen (2008:486) (Law (2008:486) on marketing; 'the MFL'). Marketing carried out via Google advertisements and on websites with a comparison tool is misleading and unfair, first, under point 22 in Annex I to 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 directive') and, second, under Paragraphs 8 and 9 of the MFL. The advertising of gold prices constitutes bait advertising which is contrary to points 5 and 6(c) of Annex I to the directive. Guldbrev has failed sufficiently clearly to identify the websites as marketing and to state that Guldbrev is the originator of the advertising. The highest prices which Guldbrev advertises are unreasonable and, in addition, as regards 24 carat gold, wholly unpredictable or impossible to obtain due to the requirements laid down by Guldbrev. Furthermore, there are misleading price claims which affect the consumer's ability to make an informed transactional decision under Paragraph 10, second subparagraph, point (4), in conjunction with the first subparagraph of Paragraph 8 of the MFL. The way in which Guldbrev advertises its prices is also so unusual, compared to business operations in general and gold purchasing activity in particular, that it may likewise be regarded as being contrary to good marketing practice under Paragraphs 5 and 6 of the MFL. Guldbrev's advertising of the price which the company pays for gold lacks sufficient pricing information and also lacks other essential information. Those deficiencies mean that the marketing is contrary to Paragraph 5, the third subparagraph of Paragraph 10 and Paragraph 12 of the MFL. By placing a countdown timer directly linked to an offer to sell gold at the highest gold price, expressed in Swedish kronor per gram for a certain carat content, Guldbrev has conveyed the incorrect impression that there is a connection between that price and the countdown timer. The marketing is therefore misleading under Paragraph 10 of the MFL and unfair under Paragraph 8 of that law since it has affected the ability of the consumer to reach an [Or. 5] informed transactional decision.

Guldbrev has disputed the claims and has principally submitted that there are no facts which lead to either the directive or the MFL being applicable since the practices at issue relate to purchasing services. In any event, according to Guldbrev, the marketing is not misleading or unfair. In addition, Guldbrev has put forward, inter alia, the following factors. In each section of the price comparison page there is information that Guldbrev is the originator of the information, for which reason there is no question of any disguised advertising. Sufficient information has been given to consumers regarding how the price is reached. It is clear both from Guldbrev's contract terms and in close connection with the places where the price per gram is stated that the company's price is fixed when the valuation is made. The consumer's acceptance of the price is also required before the sale of the gold takes place. The countdown timer present on the company's website does not in any way imply that any offer is limited in time. The average consumer does not receive the impression that the countdown means that swift action is needed in order to obtain a particular purchase price.

- 4 The lower court, the Patent and Market Court, held that the practices used by Guldbrev in the scope of its activity constituted commercial practices under the directive. The Patent and Market Court referred to the European Commission's Guidance on the implementation/application of the directive, SWD (2016) 163 final of 25 May 2016, point 1.1.2, where it states that valuation of gold for

purchase can constitute a service which falls under the scope of the directive. The Patent and Market Court found that the practices to which the KO's claims relate could not per se be regarded as excluded from the scope of the MFL. On a penalty of SEK 1 000 000 the Patent and Market Court prohibited certain marketing practices and ordered Guldbrev, in its advertising, to provide certain information. The Patent and Market Court found that Guldbrev's marketing was unfair on the basis, inter alia, of the fact that

- **[Or. 6]** Guldbrev's practices relating to valuation [and] purchase of gold constituted a commercial practice in relation to a product under the directive, which was held to be a prerequisite for the MFL to apply;
- the company's Google advertisement lacked details of the advertiser, the website containing the comparison tool was inadequate under national law as regards the advertising identification and the advertiser's details, but point 22 of the 'black list' [in Annex 1 to the directive] was, however, not applicable;
- the manner in which the information on the setting of the price of gold was presented did not diminish the incorrect impression received by the average consumer that the price stated in the advertising would be offered per gram of gold irrespective of the weight sold or the rapidity with which it was sent in to Guldbrev; and
- there was a significant risk that the average consumer, on a fleeting look at the webpage, would incorrectly conclude that the rapidity with which a 'Guldbrev' [the package sent out by the company in which the gold would be sent to it] was ordered would affect the price of the gold which the consumer wishes to sell.

5 Guldbrev has brought an appeal against sections of that judgment to the Patent and Market Court of Appeal and has claimed that the KO's action should be dismissed. The KO has opposed any variation of the judgment.

6 The Patent and Market Court of Appeal must, inter alia, rule on whether the practices adopted by Guldbrev constitute unfair marketing. In order to assess that material question, the court must first ascertain whether the directive and MFL are at all applicable to the situation at issue. Accordingly, the Patent and Market Court of Appeal must, applying Article 2(c), (d) and (i) and Article 3(1) of the directive, rule on the extent to which the valuation and purchase of gold from consumers and such practices as are relevant here can be regarded as constituting commercial practices under the directive.

[Or. 7] Relevant national provisions and judicial decisions

7 The provisions of the MFL implement the directive on unfair commercial practices. The relevant Swedish provisions are found in Paragraphs 5, 6, 8, 9, 10 and 12 of the MFL. They are worded as follows:

Paragraph 5 of the MFL

‘Marketing shall be consistent with good marketing practice.’

Paragraph 5 of the MFL

‘Marketing which fails to be consistent with good marketing practice under Paragraph 5 shall be regarded as unfair if, to an appreciable extent, it affects or is likely to affect the recipient’s ability to make an informed transactional decision.’

Paragraph 8 of the MFL

‘Marketing which is misleading under any of the provisions in Paragraphs 9, 10 or 12 to 17 shall be regarded as unfair if it affects or is likely to affect the recipient’s ability to make an informed transactional decision.’

Such misleading marketing as is set out in points 1 to 23 of Annex I to Directive 2005/29/EC shall always be regarded as unfair.’

Paragraph 9 of the MFL

‘All marketing shall be designed and presented in such a way that it is clearly understood that it is marketing.’

It must also be clear who is responsible for the marketing. However, that shall not be required of statements the only aim of which is to draw attention before follow-up statements.’

[Or. 8] Paragraph 10 of the MFL

‘In marketing, a trader may not make use of incorrect claims or other statements that are misleading in relation to the trader’s own or someone else’s business activity.’

The first subparagraph shall apply especially in respect of statements relating to

1. the product’s presence, nature, quantity, quality and other distinctive properties;

[...]

4. the product’s price, the basis of calculation of the price, special price advantages and payment conditions

[...]

Nor may a trader omit essential information in the marketing of its own or someone else's business activity. Misleading omissions also include cases where the essential information is provided in an unclear, incomprehensible, ambiguous or other inappropriate manner.'

Paragraph 12 of the MFL

'Marketing shall be misleading if the trader offers the consumer, in a statement, a particular product at a stated price without the following essential information being provided:

1. [Or. 9] the product's distinctive characteristics in so far as that is appropriate to the medium and product;
2. price and unit price stated in the manner set out in Paragraphs 7 to 10 of the prisinformationslagen (2004:347) (Law (2004:347) on pricing information);
3. the trader's identity and geographical address;
4. conditions for payment, delivery and performance if they depart from what is usual for the industry or the product in question;
5. information on the right of withdrawal or the right to cancel a purchase, which by law must be provided to the consumer.

Marketing shall also be misleading if the trader offers the consumer, in a statement, several specific products with details of an inclusive price without that offer containing essential information in accordance with Paragraphs 1 to 5 of the first subparagraph.'

Relevant provisions of EU law

- 8 Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market read as follows:

'Article 2

Definitions

For the purposes of this directive: ...

(c) "product" means any good or service including immovable property, digital service and digital content, as well as rights and obligations;

(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;

[Or. 10] ...

(i) “invitation to purchase” means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;

Article 3

Scope

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.’

- 9 In a notice entitled ‘Guidance on the interpretation and application of Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market’ (OJ C 526, 29.12.2021, p. 1), the European Commission sets out expressly that the reverse situation to [such] commercial practices [set out in the directive], where traders purchase products from consumers, does not fall within the scope of the directive, but that there are, however, cases where a link can be established between the sale of a product by a consumer to a trader and the promotion, sale or supply of a (different) product to the consumer. As an example, it states that the purchase and resale of gold could in some circumstances fall under the directive. For example, a trader, who offers consumers a professional evaluation for their gold before buying it, could be considered as providing a service to the consumers. When this is the case, the directive on unfair commercial practices will apply and, as a consequence, the trader should not provide misleading information on the real value of the gold or on the price of the service offered (point 2.3.2).
- 10 In the judgment of the Court of Justice of 15 March 2012 in Case C-453/10, *Pereničová and Perenič* (EU:C:2012:144), the Court of Justice of the European Union recalled that Article 2(d) of the directive uses a particularly wide formulation when defining the term ‘commercial practice’ (paragraph 38). Further, it is stated **[Or. 11]** that, in accordance with Article 3(1) of the directive, read in conjunction with Article 2(c) of that directive, the directive applies to unfair business-to-consumer commercial practices before, during or after a commercial transaction relating to any goods or service (paragraph 39).
- 11 The Court of Justice of the European Union stated, in its judgment of 20 July 2017 in Case C-357/16, *Gelvora* (EU:C:2017:537), inter alia, that, under Article 3(1) of the directive, read in the light of recital 13 thereof, that directive applies to unfair

commercial practices in which an undertaking engages, even outside any contractual relationship, either before or after the conclusion of a contract, or following the conclusion of a contract or during the performance thereof (paragraph 20). The Court found that the words ‘directly connected with the sale of a product’ cover any measure taken in relation not only to the conclusion of a contract but also to its performance, and in particular the measures taken in order to obtain payment for the product (paragraph 21). It was held that debt recovery activities may be regarded as a ‘product’ within the meaning of Article 2(c) of the directive (paragraph 23).

- 12 In the judgment of the Court of Justice of 7 September 2016 in Case C-310/15, *Deroo-Blanquart* (EU:C:2016:623), the Court stated that combined offers, which are based on the linking together of at least two different offers of products or services into a single offer, constitute commercial acts which clearly form part of an operator’s commercial strategy and relate directly to the promotion thereof and its sales development. It follows, in the view of the Court, that they do constitute commercial practices within the meaning of Article 2(d) of the directive (paragraph 28).
- 13 In addition, in the judgment of the Court of Justice of the European Union of 22 September 2022 in Case C-335/21, *Vicente* (EU:C:2022:720), it was held that Article 2(d) of the directive uses a particularly wide formulation when defining the term ‘commercial practice’ and that under Article 3(1) of the directive, read in conjunction with Article 2(c) thereof, the directive applies to unfair business-to-consumer commercial practices before, during or after a commercial transaction relating to any goods or service (paragraphs 83 and 84).

[Or. 12] The need for a preliminary ruling

- 14 In the view of the Patent and Market Court of Appeal, it is possible to find, in the light of the case-law set out above, that the advertising in question can constitute a commercial practice under the directive, provided that it relates to a product within the meaning of the directive. As is apparent, there has been no ruling by the Court of Justice of the European Union on that question. The assessment of whether the trader’s offer in the situation at issue relates to a product within the meaning of the directive is relevant to whether the national provisions set out above are to be interpreted in the light of the directive’s substantive rules. The Patent and Market Court of Appeal therefore requests a preliminary ruling on the following questions.

Request for a preliminary ruling

1. Does the valuation and purchase of gold from consumers constitute a product (combined product) within the meaning of Article 2(c), (d) and (i) and Article 3(1) of Directive 2005/29 concerning unfair business-to-

consumer commercial practices in the internal market in a situation such as that at issue before the national court?

2. If the answer to Question 1 is in the negative, does the valuation of gold in the situation at issue before the national court constitute a product within the meaning of the directive?

[...]

WORKING DOCUMENT