

Case C-518/23

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:

10 August 2023

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

27 July 2023

Applicant and appellant in the appeal on a point of law:

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e. V.

Defendant and respondent in the appeal on a point of law:

NEW Niederrhein Energie und Wasser GmbH

Subject matter of the main proceedings

Consumer protection – Advertising – Electricity price – Directive 2005/29/EC – Articles 7(1) and (4)(c) – Information on the manner in which the price is calculated

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Must the information to be provided by the trader pursuant to Article 7(1) and (4)(c) of Directive 2005/29/EC on the manner in which the price is calculated in a pricing system which depends on consumption be such that the consumer can, on the basis of the information provided, make an independent calculation of the price if he or she knows his or her consumption?

Provisions of European Union law relied on

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), corrigendum OJ 2009 L 253, p. 18), in particular Article 7(1) and (4)(c)

Provisions of national law

Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition; 'the UWG'), in particular Paragraph 5a(1) and Paragraph 5b(1) No 3

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is the umbrella organisation of the 16 consumer organisations in Germany. The defendant is an energy supply company active throughout Germany that supplies electricity to private households, including customers who purchase heating current for night storage heaters. During off-peak hours at night, the defendant offers its electricity to those customers at a low tariff. This tariff is more favourable than the high tariff applicable during other hours. Customers equipped with night storage heaters use low-tariff electricity to load their heaters.
- 2 Depending on local conditions, the consumption of heating current and general-purpose electricity of these customers is measured separately or jointly. In the case of joint measurement, a two-part tariff meter with two disk drives is used. One disk drive measures electricity consumption during low-tariff off-peak times and the other measures electricity consumption during the other, high-tariff hours. However, as well as heating current, general-purpose electricity is also provided during the times when the low tariff applies, which cannot be measured separately. Some distribution system operators therefore impose a 'compensatory amount' on electricity suppliers, by which, on flat-rate basis, part of the electricity consumption measured at the low tariff is invoiced according to the high tariff. The defendant passes on to its customers the compensatory amount imposed by the system operators. The local system operator where the defendant has its registered office imposes a compensatory amount of 25% on the defendant.
- 3 In its general terms and conditions, which the customer must confirm by clicking when making an online order, the defendant states that the local system operator determines the off-peak hours and the compensatory amount. It also indicates the off-peak hours and the period of validity of the low tariff that have been set by the local system operator where the defendant has its registered office and designates 25% as the compensatory amount set by that system operator.

- 4 On its website, the defendant offers a tariff calculator for its electricity tariffs, which can also be used by customers who purchase heating current and have a two-part tariff meter. In the tariff calculator, they must enter their postcode and their consumption volumes in the high and the low tariffs. At the end of the transaction, customers receive a tariff offer which they can accept.
- 5 The applicant objects to the tariff proposals generated by the defendant using its tariff calculator. It argues that the total price indicated is too low because it does not take account of the compensatory amount.
- 6 The applicant has applied for the defendant to be ordered to desist, *inter alia*, from advertising or having advertised an offer for heating current and, throughout the entire ordering process, from failing to indicate or have indicated to the consumer the specific amount of compensation in the method it uses to invoice heating current when heating current and household electricity are measured jointly with a two-part tariff meter ('application for a prohibitory injunction').
- 7 By its application for a prohibitory injunction, the applicant challenges the defendant's advertising on its website, containing an offer for heating current without any express reference to the specific compensatory amount in the method used to invoice heating current. At no point in the ordering process is there any reference to the applicable compensatory amount as a percentage. It is only in the defendant's general terms and conditions that reference is made to the flat-rate compensation percentage between the low tariff and the high tariff, namely 25%. The defendant does not inform the consumer, in the context of the ordering process which includes the use of the tariff calculator, of the percentage of the compensatory amount imposed by the system operator and passed on by it for the postcode specifically entered by the customer.
- 8 The Landgericht (Regional Court, Germany) dismissed the action. The Oberlandesgericht (Higher Regional Court, Germany) dismissed the applicant's appeal against that decision.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 9 The application for a prohibitory injunction must be granted where the information to be provided by the defendant in accordance with Paragraph 5a(1) and Paragraph 5b(1) No 3 of the UWG (Article 7(1) and (4)(c) of Directive 2005/29) on the manner in which the price is calculated must include, by way of 'material information', the percentage of the compensatory amount applicable to the customer concerned.
- 10 Under Paragraph 5a(1) of the UWG, a person acts unfairly by misleading a consumer or other market participant by withholding from him or her material information, (No 1) which the consumer or other market participant requires, depending on the circumstances, to take an informed transactional decision, and (No 2) the withholding of which is likely to cause the consumer or other market

participant to take a transactional decision that he or she would not have taken otherwise. Under Paragraph 5a(3) of the UWG, when assessing whether material information has been withheld, consideration is to be given to the following: (No 1) the limitations of space or time imposed by the medium used to communicate the commercial practice, and (No 2) any measures taken by the trader to make the information available to consumers or other market participants by means other than by the medium used to communicate the commercial practice. Those rules constitute a transposition of Article 7(1) to (3) in conjunction with Article 2(k) of Directive 2005/29.

- 11 Where goods or services are offered with reference to their characteristics and price in such a manner appropriate to the medium of communication used that an average consumer can conclude the transaction, Paragraph 5b(1) of the UWG lists the information that is regarded as material within the meaning of Paragraph 5a(1) of the UWG if it is not already apparent from the circumstances. This provision transposes Article 7(4) in conjunction with Article 2(i) of Directive 2005/29. Under Paragraph 5b(1) No 3 of the UWG, that information includes the total price or in cases where on account of the nature of the goods or services such a price cannot be calculated in advance, the manner in which the price is calculated and, where appropriate, all additional freight, delivery or postal charges or, where those costs cannot be calculated in advance, the fact that such additional costs may be payable. That provision has its origin in Article 7(4)(c) of Directive 2005/29.
- 12 The supply of electricity which the defendant advertises vis-à-vis consumers is offered in such a manner in accordance with Paragraph 5b(1) of the UWG that an average consumer can conclude the transaction.
- 13 When transposing Article 7(4) of Directive 2005/29, the German legislature chose, rather than the concept of ‘invitation to purchase’ used in that directive, the definition that goods or services are offered in such a manner that the average consumer is in a position to conclude the transaction. According to a directive-compliant interpretation of Paragraph 5b(1) of the UWG, as required by this transposition, the existence of an invitation to purchase within the meaning of Article 7(4) of Directive 2005/29 is sufficient to constitute an offer within the meaning of this provision. According to the case-law of the Court, that is the case as soon as the information on the product advertised and its price is sufficient for the consumer to be able to take a transactional decision, without it being necessary for the commercial communication also to offer an actual opportunity to purchase the product or for it to appear in connection with such an opportunity (see judgment of the Court of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 33). Under Article 2(k) of Directive 2005/29 (Paragraph 2(1) No 1 of the UWG), a transactional decision includes any decision by a consumer concerning whether, how and on what terms to purchase; according to the case-law of the Court, this also includes the decision directly related to that decision, in particular the decision to enter a shop (see judgment of 19 December 2013, *Trento Sviluppo and Centrale Adriatica*, C-281/12, EU:C:2013:859, paragraph 36) and, in the view of the referring court, visiting an online sales portal.

- 14 The defendant's contested advertising constitutes an invitation to purchase and therefore an offer within the meaning of Paragraph 5b(1) of the UWG. When using the defendant's tariff calculator, the consumer receives the material information he or she requires in order to take the transactional decision to conclude an electricity supply contract with the defendant. The defendant's website even allows the consumer to conclude a contract for the supply of electricity directly with it on the basis of the result of the tariff calculation. Since the relevant transactional decision is already located in the beginning of the ordering process, the reference in the defendant's general terms and conditions to the compensatory amount which it brings to the consumer's attention during that ordering process is not capable, if only for temporal reasons, of fulfilling the defendant's obligation to provide information.
- 15 In the case in dispute, the defendant must therefore in principle provide, as soon as the invitation to purchase is made, information on the manner in which the price is calculated in accordance with Article 7(1) and (4)(c) of Directive 2005/29 (Paragraph 5a(1) and Paragraph 5b(1) No 3 of the UWG).
- 16 Due to the nature of the product, the (total) price for the supply of electricity cannot be calculated in advance, as it depends on the amount of electricity actually consumed. The amount of electricity actually consumed may differ from the amount of electricity which the consumer enters in the defendant's tariff calculator.
- 17 In the case in dispute, the question cannot be answered without doubt whether the information to be provided under Article 7(1) and (4)(c) of Directive 2005/29 (Paragraph 5a(1) and Paragraph 5b(1) No 3 of the UWG) on the manner in which the price is calculated in a pricing system which depends on consumption must be such that the customer can, on the basis of the information provided, make an independent calculation of the price if he or she knows his or her consumption.
- 18 It is clear from the case-law of the Court that the manner in which the price is calculated includes the detailed rules for calculating the final price as well as, where appropriate, the additional charges or the fact that additional charges are payable (see judgement of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 65). To this extent, the national court is required to examine whether the omission of the detailed rules for calculating the final price prevents the consumer from taking an informed transactional decision and, consequently, leads him or her to take a transactional decision which he or she would not otherwise have taken. It is also for the national court to take into consideration the limitations forming an integral part of the medium of communication used; the nature and the characteristics of the product and the other measures that the trader has actually taken to make the information available to consumers (see judgments of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraphs 65 to 72, and of 26 October 2016, *Canal Digital Danmark*, C-611/14, EU:C:2016:800, paragraphs 58 and 62 to 64).

- 19 The consumer requires information on the specific percentage of the compensatory amount in order to take an informed decision and the withholding of that information is likely to lead him or her to take a transactional decision that he or she would not have taken otherwise.
- 20 The conditions laid down in Paragraph 5a(1) Nos 1 and 2 of the UWG (Article 7(1) of Directive 2005/29) that the consumer requires the information withheld from him or her, depending on the circumstances, to take an informed decision and that the withholding of that information is likely to cause the consumer to take a transactional decision that he or she would not have taken otherwise, constitute additional elements which must be examined independently.
- 21 Some distribution system operators impose a compensatory amount on electricity suppliers. The percentage of the compensatory amount therefore depends on the system operator's decision. In addition, on appeal on a point of law, it is appropriate to rely, in favour of the applicant, on its disputed assertion that not all electricity suppliers pass on to customers the compensatory amount imposed by the system operator. It follows that the other conditions of Paragraph 5a(1) Nos 1 and 2 of the UWG are fulfilled in the case in dispute, since only the percentage of the compensatory amount taken into account by the defendant in calculating the price makes it possible to compare the defendant's offer with that of other electricity suppliers. Moreover, that is also the case even if all electricity suppliers pass on the compensatory amount imposed by the system operator to customers in the same way, since there may be two competing offers, one of which has a more advantageous price in the low tariff and the other a more advantageous price in the high tariff. Which offer is more advantageous for the consumer then (also) depends on the percentage of the compensatory amount.
- 22 It has not been established, nor is it evident that the defendant, which advertises on its website by including a tariff calculator, is subject to restrictions as a result of the means of communication which it uses.
- 23 The case in dispute raises the question, which cannot be answered without doubt, as to how the criterion of 'the manner in which the price is calculated' within the meaning of Article 7(1) and (4)(c) of Directive 2005/29 (Paragraph 5a(1) and Paragraph 5b(1) No 3 of the UWG) is to be interpreted. The question referred for a preliminary ruling seeks clarification of whether the information which the trader must provide on the manner in which the price is calculated in a pricing system which depends on consumption must be such that the customer can, on the basis of the information provided, make an independent calculation of the price if he or she knows his or her consumption.
- 24 The wording 'the manner in which the price is calculated' allows an interpretation to the effect that it is sufficient for the trader merely to provide general information on the elements relevant for the calculation of the price and on the details of the price calculation. In so far as the Court has held that the obligation to provide information on the manner in which the price is calculated also applies to

the details of the calculation of the final price (see judgment of the Court of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 65), this also does not preclude such an interpretation from the outset.

- 25 The objective of Directive 2005/29, consisting in ensuring a high level of consumer protection (see recitals 5 and 6 and Article 1 of Directive 2005/29; judgment of 26 October 2016, *Canal Digital Danmark*, C-611/14, EU:C:2016:800, paragraphs 25 et seq. and 62), might support the idea that the information must enable the consumer to calculate the price. However, no further clarification of the concept of ‘the manner in which the price is calculated’ can be found in Directive 2005/29.
- 26 The legislative context of Article 7(4)(c) of Directive 2005/29 could also militate against the assumption that a general reference to a compensatory amount to be taken into account is sufficient. As regards the additional freight, delivery or postage charges which cannot reasonably be calculated in advance, it is sufficient in accordance with that legislative context to state that such additional charges may be payable. However, that part of the provision does not relate to information on the manner in which the price is calculated (see Opinion of Advocate General Mengozzi in *Citroën Commerce*, C-476/14, EU:C:2015:814, paragraph 73). This could indicate that more detailed information is necessary in this respect. The dispute does not concern additional costs, but the details of the calculation of the final price.
- 27 The referring court notes, in addition, that the withholding of information presupposes that the information falls within the trader’s field of business and responsibility or that the trader is in a position to obtain that information by making reasonable efforts. This takes into account that information obligations limit the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights of the European Union) and therefore must be proportionate. It is true that Article 7(3) of Directive 2005/29 only lays down provisions on limitations of space and time of the communication medium used by the trader, but not on the availability or obtaining of the information. Were that aspect to be disregarded entirely, however, the trader would, in such cases, have to refrain from such advertising in the form of an invitation to purchase and have recourse to other forms of advertising. However, the Court of Appeal, as the court hearing the substance of the case, did not find that it would be impossible for the defendant to obtain information on the percentages of the compensatory amount. It is true that, in the judgment on appeal, it stated that it was not possible for the defendant to indicate a specific compensatory amount, but there were no findings as to the burden that would be imposed on the defendant to compile the compensatory percentages in a database, in so far as it was already aware of them, and to supplement the compensatory percentages of which it was not yet aware by consulting the distribution system operators concerned and to keep the information up-to-date.