



## JUDGMENT OF THE COURT

14 December 2019

*(Directive 2005/29/EC – Unfair business-to-consumer commercial practices – Annex I – Point 9 – Stating or otherwise creating the impression that a product can legally be sold when it cannot)*

In Case E-1/19,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in a case pending before it between

**Andreas Gyrre**

and

**The Norwegian Government, represented by the Ministry of Children and Equality,**

concerning 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 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, and in particular point 9 of Annex I thereto,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann (Judge-Rapporteur), and Siri Teigum (ad hoc Judge),

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Andreas Gyrre, (“the Appellant”), represented by Monica Syrdal and Dag Sørli Lund, advokats;

- the Norwegian Government, represented by Arne Johan Dahl and Ketil Bøe Moen, advocates at the Attorney General of Civil Affairs, acting as Agents;
- the Government of Ireland (“Ireland”), represented by Maria Browne, Chief State Solicitor, Gemma Hodge and Anthony Joyce, Solicitors, acting as Agents, assisted by Margaret Gray, Barrister-at-Law;
- the Government of the United Kingdom (“the United Kingdom”), represented by Anneli Howard, Barrister, and Zoe Lavery, member of the Government Legal Department, acting as Agent;
- the EFTA Surveillance Authority (“ESA”), represented by Ingibjörg-Ólöf Vilhjálmsdóttir, Erlend Møinichen Leonhardsen, Catherine Howdle and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Napoleón Ruiz García and Inese Rubene, members of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of the Appellant, represented by Dag Sørli Lund; the Norwegian Government, represented by Arne Johan Dahl and Ketil Bøe Moen; the United Kingdom, represented by Anneli Howard and Zoe Lavery; ESA, represented by Erlend Møinichen Leonhardsen and Claire Simpson, acting as Agent; and the Commission, represented by Napoleón Ruiz García and Inese Rubene; at the hearing on 4 June 2019,

gives the following

## **Judgment**

### **I Legal background**

*EEA law*

- 1 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 (“the Directive”) (OJ 2005 L 149, p. 22) was incorporated in the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by Decision of the EEA Joint Committee No 93/2006 of 7 July 2006 (OJ 2006 L

289, p. 34, and EEA Supplement 2006 No 52, p. 27), which added it in point 30d, subsequently renumbered as point 31e, of Annex IX, and inserted it as point 7g, and added it in points 2, 3a, 7d, and 7f of Annex XIX. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, and the decision entered into force on 1 February 2009.

2 Recitals 7, 11, 14 and 17 of the Directive read:

*(7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature. It does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice. Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof.*

*(11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. It also sets rules on aggressive commercial practices, which are currently not regulated at Community level.*

*(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. In conformity with the laws and practices of Member States on misleading advertising, this Directive classifies misleading practices into misleading actions and misleading omissions. In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision. Such information will not have to be disclosed in all advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in this Directive. The full harmonisation approach adopted in this Directive does not preclude the Member States from specifying in national law the main characteristics of particular products such as, for example, collectors' items or electrical goods, the omission of which would be material when an invitation to purchase is made. It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity*

*confuses consumers as to the commercial origin of the product and is therefore misleading. This Directive should be without prejudice to existing Community law which expressly affords Member States the choice between several regulatory options for the protection of consumers in the field of commercial practices. In particular, this Directive should be without prejudice to Article 13(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.*

*(17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.*

3 Article 1 of the Directive, entitled “Purpose”, provides as follows:

*The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests.*

4 Article 2(b), (c), (d) and (k) of the Directive sets out the following definitions:

*(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;*

*(c) ‘product’ means any goods or service including immovable property, 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;*

*(k) ‘transactional decision’ means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;*

5 Article 3(1) to (3) of the Directive reads as follows:

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.*
2. *This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.*
3. *This Directive is without prejudice to Community or national rules relating to the health and safety aspects of products.*

6 Article 4 of the Directive, entitled “Internal market”, reads as follows:

*Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.*

7 Article 5 of the Directive, entitled “Prohibition of unfair commercial practices”, reads as follows:

1. *Unfair commercial practices shall be prohibited.*
2. *A commercial practice shall be unfair if:*
  - (a) *it is contrary to the requirements of professional diligence,*  
*and*
  - (b) *it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*
3. *Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.*
4. *In particular, commercial practices shall be unfair which:*

*(a) are misleading as set out in Articles 6 and 7,*

*or*

*(b) are aggressive as set out in Articles 8 and 9.*

5. *Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.*

8 Article 6 of the Directive, entitled “Misleading actions”, reads, in extract, as follows:

1. *A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:*

...

*(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;*

...

9 Article 13 of the Directive, entitled “Penalties”, reads as follows:

*Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.*

10 Point 9 of Annex I to the Directive entitled “Commercial practices which are in all circumstances considered unfair” and referred to in Article 5(5) of the Directive reads as follows:

*Misleading commercial practices*

...

*9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.*

*National law*

- 11 The Directive has been implemented in Norway primarily by way of the Act of 9 January 2009 on the control of marketing and contract terms etc. (“Marketing Act”).
- 12 Section 6 of the Marketing Act corresponds to the prohibition of unfair commercial practices laid down in Article 5 of the Directive. The first, second and fifth paragraphs of Section 6 of the Marketing Act read as follows:

*Unfair commercial practices shall be prohibited.*

*A commercial practice is unfair if it conflicts with good business practice towards consumers and is likely materially to distort the economic behaviour of consumers, causing them to make decisions they would not otherwise have made.*

...

*The Ministry shall by regulation lay down the forms of commercial practice that are to be considered unfair in all circumstances.*

- 13 At the time of the Norwegian Market Council’s decision, the first and second paragraphs of Section 43 of the Marketing Act read as follows:

*In the event of an intentional or negligent infringement of regulation adopted under... the fifth paragraph of Section 6 ... which either is considered significant or has taken place repeatedly, an administrative fine may be determined to be paid by the party to whom the decision is directed.*

*In the determination of the amount of the fine, account shall be taken of the seriousness, scope and effects of the infringement.*

- 14 Section 1 of the Regulation of 1 June 2009 No 565 on unfair commercial practices (“Norwegian Regulation”) implements Annex I to the Directive. Section 1(9) of the Norwegian Regulation reads as follows:

*The following commercial practices shall in all circumstances be considered unfair:  
Misleading commercial practices*

...

*Stating or otherwise creating the impression that a product can legally be sold when it cannot.*

- 15 The referring court notes that an infringement of a regulation adopted under the fifth paragraph of Section 6 of the Marketing Act provides a basis for imposing an administrative fine. Decisions may also be directed to persons who are complicit in the infringement, such as the CEO, the chairman or who have contributed to the infringement by virtue of their position in an undertaking, as provided for in the second paragraph of Section 39 of the Marketing Act. In addition, it is a requirement that the infringement is intentional or negligent, and that it is repeated or significant.
- 16 The administrative fine is determined on the basis of a specific assessment in the individual case. A general principle is that the administrative fine must be set so high that it will not be financially profitable to break the law. Under Norwegian law, an administrative fine is considered a criminal sanction within the meaning of Article 7 of the European Convention on Human Rights.

## **II Facts and procedure**

- 17 Euroteam AS (“Euroteam”) was a company engaged in the marketing and resale of tickets to sporting and cultural events outside Norway. The Appellant was the chairman and sole owner of Euroteam until the company was wound up on 6 September 2012. The company purchased tickets from various sources including organisers, and official dealers, and resold them to professional operators and individuals both within and outside Norway.
- 18 The retail price of the tickets resold by Euroteam was often higher than the organiser’s retail price. Since tickets were being resold only for events in countries other than Norway, the operation did not come within the scope of the Act of 29 June 2007 No 86 on the prohibition of price mark-ups on resale of tickets for sporting and cultural events, which only prohibits such resale of tickets for events held within Norway.
- 19 Euroteam marketed the sale of tickets for the London 2012 Olympic and Paralympic Games (“London 2012 Games”). On 8 June 2011, Euroteam received a letter from the Norwegian Olympic and Paralympic Committee and Confederation of Sports (*Norges idrettsforbund og olympiske og paralympiske komité* (“NIF”). NIF manages the rights of the International Olympic Committee (“IOC”) in Norway. The letter stated that only authorised dealers were permitted to engage in the sale of tickets for the London 2012 Games, that tickets transferred contrary to the rules were invalid, and that their use was considered an “unlawful interference and a criminal violation of property rights” (“*ulovlig inntrengning og straffbar eiendomskrengelse*”). It was further stated that the resale of such tickets was a criminal offence pursuant to Section 31 of the London Olympic Games and Paralympic Games Act 2006 (“LOGA 2006”).

- 20 LOGA 2006 set out the applicable framework for the London Olympic Games and Paralympic Games. Section 31 LOGA 2006, subsections (1) to (6), and (11) and (12), entitled “Sale of tickets”, prohibited the resale of tickets to the London 2012 Games, other than through authorised dealers. Pursuant to Section 41(5) LOGA 2006, Section 31 LOGA 2006 shall apply in respect of anything done whether in the United Kingdom or elsewhere.
- 21 The London Organising Committee of the Olympic Games (“LOCOG”) was established by the United Kingdom Government with responsibility for organising, publicising and staging the London 2012 Games. Clauses 17 and 18 of LOCOG’s terms and conditions provide, inter alia, that tickets purchased or obtained from or through persons other than directly from LOCOG or an authorised ticket retailer shall be void and may be seized or cancelled without refund or entry to a session. They refer to the nature of the criminal offence set out in Section 31 LOGA 2006, and state that any ticket obtained in breach of the terms and conditions shall be void and all rights conferred or evidenced by such ticket shall be nullified. Any person seeking to use a ticket obtained in breach of the terms and conditions in order to gain entry to or remain at a session may be considered to be a trespasser and may be liable to be ejected and liable to legal action.
- 22 Euroteam disputed the fact that the sales operation was unlawful, but requested further information from NIF. It was later claimed by Euroteam that, after receiving NIF’s letter, it placed a block on its website to prevent those with IP addresses in the United Kingdom from being able to purchase tickets. This is disputed by the Norwegian Government, which asserts that it has been proven that tickets were likely also sold to consumers in the United Kingdom after the block had been put in place.
- 23 On 6 July 2012, the IOC, LOCOG and NIF filed a complaint against Euroteam and associated companies with the Norwegian Consumer Ombudsman (*Forbrukerombudet*). The claim concerned alleged violations of Sections 7, 8 and 6 of the Marketing Act through the marketing and sale of tickets for the London 2012 Games, contrary to the rules laid down by the organisers and by United Kingdom legislation.
- 24 On 24 July 2012, the High Court of England and Wales (Queen’s Bench Division) issued an interim enforcement order, which ordered Euroteam and the Appellant to refrain from offering for sale tickets for the London 2012 Games on a number of websites, and from giving the impression that they could lawfully sell tickets for that event.
- 25 On 6 September 2012, Euroteam was placed into bankruptcy proceedings. The bankruptcy report of 21 September 2012 stated that a number of claims had been lodged against the company for non-delivery of tickets including for the London 2012 Games.
- 26 On 17 August 2012, the Appellant received notice from the Norwegian Consumer Ombudsman that the matter would be referred to the Norwegian Market Council. In its decision of 19 February 2013, adopted on the basis of Section 43 of the Marketing Act, the Market Council levied an administrative fine of NOK 200 000 on Andreas Gyrré for a

violation of Section 6 of the Marketing Act, read in conjunction with Section 1(9) of the Norwegian Regulation.

- 27 On 15 March 2013, the High Court of England and Wales (Queen’s Bench Division) issued a final enforcement order in the case concerning Euroteam and the Appellant on essentially the same terms as the interim order.
- 28 By an application of 26 April 2017, the Appellant brought an action before Oslo District Court for a review of part of the Market Council’s decision. The District Court delivered judgment in the case on 31 October 2017. The District Court acquitted the Norwegian Government and ordered the Appellant to pay the costs of the Norwegian Government. In its judgment, the District Court held as follows:

*[a]t the time Euroteam was marketing and selling tickets, the UK legislation was still in force and it was enforced by the UK authorities. Irrespective of what may be ascertained subsequently with respect to a possible conflict of that legislation with EU law, at the time Euroteam was marketing and selling tickets, it was illegal for them to do so under UK law, and that illegality entailed a genuine uncertainty and risk for consumers.*

*Both the wording and underlying purpose of the provision indicate that the seller cannot disregard the obligation to provide information about such illegality, even though the seller may be of the view that the legislation is contrary to EU law.*

- 29 According to the referring court, the District Court did not consider it necessary to examine the parties’ submissions concerning a possible conflict with EU law. An appeal was lodged against the District Court’s judgment before Borgarting Court of Appeal. On 15 June 2018, Borgarting Court of Appeal decided to make a reference to the Court. The request, dated 10 September 2018, was registered at the Court on 3 January 2019.
- 30 Borgarting Court of Appeal referred the following questions to the Court:
1. *Is point 9 of Annex I to Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market to be interpreted as covering situations where a trader states or otherwise creates the impression that a product can legally be sold where there is a legislative provision, such as in the London Olympic Games and Paralympic Games Act 2006, in an EEA State which provides that the product cannot legally be sold and which is enforced under national law?*
    - a. *Does it have a bearing on this assessment that the prohibition applies in the EEA State where the product is to be used but not in the State where the product is sold?*



- 33 The Court considers it appropriate to answer the whole of the referring court’s first question together.

*Observations submitted to the Court*

The Appellant

- 34 As regards the interpretation of point 9 of Annex I to the Directive, the Appellant submits that secondary ticketing is not included among the commercial practices listed in Annex I, which shall always be regarded as unfair. At the hearing, the Appellant clarified that his case before the referring court is premised on the view that the Market Council’s reliance on the presumption in Section 1(9) of the Norwegian Regulation was not correct and that the Market Council ought to have assessed the situation against Articles 5 to 9 of the Directive.
- 35 Referring to Article 5(5) of the Directive, the Appellant submits that the EEA/EFTA States cannot unilaterally extend the list of prohibited commercial practices included in Annex I to the Directive. This would have the effect of circumventing the maximum harmonisation which the Directive is intended to achieve, frustrating the objective of legal certainty. Only if a commercial practice can be subsumed under one of the situations listed in Annex I to the Directive may it be regarded as prohibited without further assessment.
- 36 The Appellant submits that secondary ticketing does not fall within the two categories of practices identified by the Commission as covered by point 9 of Annex I to the Directive. The first category concerns practices involving products or services for which the sale is banned or illegal in all circumstances (such as the sale of illegal drugs). The second category of practices concerns products or services which are not illegal, but which may be legally marketed and sold only under certain conditions and/or subject to certain restrictions (such as package travel).
- 37 At the hearing, the Appellant submitted that the way in which categories in Annex I to the Directive are formulated, and the fact that they are presumptions, restricts how they may be interpreted and that they cannot be interpreted more broadly than they actually appear in the Annex. Regarding “misleading acts”, the Appellant contended that the text of that provision implies that a positive action is required.
- 38 The Appellant submits that point 9 of Annex I to the Directive cannot be interpreted as covering situations where a trader states, or otherwise creates the impression, that a product can legally be sold where there is a legislative provision, such as Section 31 LOGA 2006, in an EEA State which provides that the product cannot legally be sold and which is enforced under national law. At the hearing, the Appellant emphasised that point 9 of Annex I cannot be relied on for sanctioning a trader in such circumstances.

## The Norwegian Government

- 39 The Norwegian Government submits that a crucial element in the assessment of point 9 of Annex I to the Directive is the fact that this provision does not directly regulate the legality of the sale of the product in question, but concerns the information given by the trader to consumers in connection with that sale. The legality of the sale of a product could typically be regulated by secondary EU/EEA legislation, national legislation or contractual arrangements. In any event, the Norwegian Government stressed that it is not seeking to enforce LOGA 2006 in its own territory.
- 40 At the hearing, the Norwegian Government submitted that point 9 of Annex I has two alternative aspects. The first alternative is “stating”, which involves an active element. The second alternative is where the trader creates the “impression”. Both alternatives fit the scenario in the present case. In response to a question from the bench, the Norwegian Government submitted that by failing to give information about the legality of a sale and nevertheless conducting a sale, the trader gives consumers the impression that the sale is legal. The relevant fact is the impression that the consumer obtains. In the present case, the behaviour was covered by point 9 of Annex I to the Directive as most consumers would obtain the impression that the sale was legal.
- 41 The Norwegian Government contends that the answer to Question 1 hinges on the interpretation of the phrase “legally be sold”. Should a trader state to a consumer that the sale of Olympic tickets was illegal, but the parties nevertheless decided to complete the transaction, this would, in principle, not conflict with Section 1(9) of the Norwegian Regulation, as sufficient information would have been given to the consumer.
- 42 The phrase “legally be sold” refers to the legal status of the sale. In principle, the term refers to all types of legal rules influencing the status of the sale, including rules of a public or private law character. The specific rule under assessment in the case before the referring court is Section 31 LOGA 2006.
- 43 In regard to Question 1a, the Norwegian Government contends that the phrase “legally be sold” in point 9 of Annex I to the Directive does not imply any limits to its geographical scope. It must be interpreted as referring to the legal status of the sale both where the product is used, and where it is sold. The Olympic tickets could only be used in the United Kingdom, and Section 31 LOGA 2006 applied to sales of those tickets wherever sold. To adopt a contrary interpretation would lead to consumers being provided with different information in connection with the purchase of the same product consumable in the same location, depending solely on where in the EEA the transaction occurred. This would lead to different levels of consumer protection, contrary to the Directive’s purpose.
- 44 In regard to Question 1b, the Norwegian Government submits that it must be answered in the negative. The phrase “legally be sold” must be understood as referring to the national legislation in place and enforced at the time of the sale, as follows from the definition set

out in Article 2(d) of the Directive. This is irrespective of any subsequent finding that the national rule was incompatible with EU law. This interpretation follows from the wording of the phrase itself and from the structure and context of the Directive.

- 45 The Norwegian Government contends further that a trader may not rely pre-emptively on its own claim that the direct effect of EU law makes a provision illegal, in order to avoid providing a consumer with information that he would otherwise be entitled to at the time of the sale. Were the position otherwise, the consumer would bear the full risk concerning the legality of the sale without having received adequate information. Nor does the national legislation lose its relevance merely because a trader alleges that the provision is unlawful. The effects of omitting information about the legality of the purchase are for all practical purposes irreversible after the sale has been completed.
- 46 In the present case, had consumers been informed about Section 31 LOGA 2006 and decided nevertheless to complete the purchase of tickets, point 9 of Annex I would not have applied as the trader could not be said to have “[s]tated or otherwise give[n] the impression” that the sale was legal. Withholding information from a consumer about the legality of a product constitutes a commercial practice which is in all circumstances to be regarded as unfair, as set out in Annex I to the Directive, and this conduct itself is sufficient to demonstrate that point 9 has been infringed. A natural interpretation of the wording of point 9 indicates that it applies to any form of illegality, whether following from EU legislation or from legislation enacted by a Member State.

#### Ireland

- 47 Ireland contends the condition of making a statement or giving an impression that a product “can legally be sold when it cannot” covers the activity in question, and that this activity falls within the unfair practices that point 9 of Annex I to the Directive seeks to outlaw. This position is consistent with the Commission’s 2016 Guidance (see the European Commission Staff Working Document (SWD(2016) 163 final): *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, point 4.1).
- 48 With regard to Question 1a, Ireland submits that point 9 of Annex I to the Directive is silent as to its territorial scope. Consequently, in Ireland’s view, the fact that a prohibition applies in the EEA State where the product is to be used but not in the State where the product is sold has no bearing on the applicability of point 9 of Annex I.
- 49 In regard to Question 1b, Ireland submits that the best way to ensure the homogeneity and harmonisation of terms of trade across the EEA is to focus the necessary assessment on the legal position to the time the sale was made. Ensuring the highest level of consumer protection would also militate in favour of consumers being able to rely on a presumption of legality in favour of the lawfulness of a prohibition such as that contemplated by point 9 of Annex I to the Directive.

## The United Kingdom

- 50 The United Kingdom submits that there may be some confusion in two regards as to the proper interpretation of point 9 of Annex I to the Directive. First, as to whether the wording in point 9 is confined narrowly to the sale of the product or service (as opposed to its subsequent use) and, second, as to whether “legally” is defined narrowly to mean lawfully in terms of a product or service being illegal per se or also encompasses regulatory or contractual conditions imposed as a matter of law on the marketing or sale of the product or service in question.
- 51 In this regard, the United Kingdom holds that point 9 of Annex I should be interpreted pragmatically by reference to the adequacy (or otherwise) of the information and the impression given by the trader to the consumer at the time of sale about the product or service he/she was purchasing. At the hearing, the United Kingdom submitted that it agreed with the Norwegian Government that the wording of point 9 evidently covers an omission to provide information on the true state of affairs. Having regard to the definitions set out in Article 2(c) and (k) of the Directive, the term “product” does not just entail the physical ticket itself, but “any goods or service including ... rights and obligations” conferred under it. As such, point 9 of Annex I is not confined to the sale or delivery of the product or service, but also the transfer of the inherent rights of use. Further, it entails both the trader’s legal authority under any applicable statutory or regulatory framework, and under terms and conditions imposed by any applicable contractual framework.
- 52 In regard to Question 1a, the United Kingdom submits that point 9 of Annex I to the Directive is silent as to its geographic scope. However, given the nature of cross border sales within the internal market, particularly with the development of e-commerce, it would be a mistake to focus narrowly on whether the commercial practice was illegal in the place of sale. It is also important to look at the law of the place where the product or service is used or performed. In the United Kingdom’s view, the misleading nature of the commercial practice was not just the false impression given regarding the trader’s authority to sell the product but also the misrepresentation that the sale of the ticket would lawfully transfer valid rights and obligations to the purchaser and could be used legitimately to gain entry to the London 2012 Games.
- 53 In regard to Question 1b, the United Kingdom submits that a subsequent challenge to the legality of the statutory prohibition also makes no difference to the unfair or misleading characterisation of the commercial practice. The material time for assessing unfairness under point 9 of Annex I to the Directive is the “impression” that is given to the consumer when making a “transactional decision” in relation to the product. This concept covers both pre and post purchase decisions, including, as provided for in Article 2(k) of the Directive, the “right to exercise a contractual right in relation to the product”. Having regard to Article 3(1) of the Directive, the relevant period in this case would appear to be from 2011 until the end of the London 2012 Paralympic Games in September 2012. Moreover, regard

should be had to the information asymmetry between the parties and the importance of legal certainty.

- 54 The United Kingdom contends that if a trader could “cure” his previous misleading commercial practices and be exonerated from any liability for a violation of the Directive by invoking his subjective objections to, or subsequently challenges, the legality of the statutory prohibition, that would undermine the Directive’s effectiveness, and particularly the intended high level of consumer protection. It would also be contrary to the scheme and purpose of Annex I to the Directive as set out in Article 5(5) of the Directive.

ESA

- 55 ESA contends that the Court should interpret point 9 of Annex I to the Directive using an approach similar to that taken by the Court of Justice of the European Union (“ECJ”) in interpreting point 31 of Annex I in *Purely Creative and Others*, C-428/11, EU:C:2012:651, namely, by analysing the wording of the provision at issue from a literal perspective, and by confirming that approach by an analysis of its context as well as the objectives of the Directive. In the present case, two aspects of point 9 of Annex I require clarification: the applicable national law to determine whether a product has been sold “legally” and, second, the meaning of the phrase “otherwise creating the impression”.
- 56 ESA submits that, in the context of a contract which is concluded in one country and is contemplated to be executed in another, the word “legally” must be interpreted such that it refers to the legality in both those countries, and in any event must be legal at the contemplated place of performance or execution.
- 57 ESA notes that point 9 of Annex I to the Directive applies to two types of conduct, both of which appear at first sight to require a positive action on the part of the trader: the provision applies on its face to the actions of “stating” and of “otherwise creating the impression” that a product can legally be sold. On the basis of the request, ESA considers that the Appellant did not make any positive statement that it was lawful to sell the tickets in question. Therefore, the relevant question concerns the extent to which the Appellant’s conduct, i.e. any type of practice falling within the scope of Article 2(d) of the Directive, falls within the phrase “otherwise creating the impression”. ESA submits that the phrase “otherwise creating the impression” must encompass a situation where a trader fails to provide information to consumers that the sale contract cannot legally be executed at the contemplated place of performance.
- 58 In ESA’s assessment, consumers will normally expect, and should be entitled to expect, that products which they are offered to purchase are offered lawfully. It would seem highly unusual for a trader to warrant expressly that a particular transaction is actually legal – legality is presumed. Omitting such information would therefore be liable to create the impression that a product could legally be sold. Information about the legality (or otherwise) of the sale is as fundamental as information about the price, which has

consistently been held to be information necessary to enable the consumer to make a fully informed decision. Such a broad interpretation would also be appropriate in light of the information asymmetry between a trader and consumer in the context of cross-border service purchases where knowledge of the law in different jurisdictions may be relevant.

- 59 ESA submits that in circumstances such as those of the present case it is irrelevant for the purposes of the application of point 9 of Annex I to the Directive whether the provision of the law of the contemplated place of performance, by virtue of which the sales contract cannot legally be executed there, is, in fact, contrary to EEA law.

The Commission

- 60 As a preliminary point, the Commission stresses that the main objective of the Directive, as provided for in Article 1 thereof, is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection. It considers it undisputed that the Appellant is a trader within the meaning of Article 2(b) of the Directive, and that he was engaging in a business-to-consumer commercial practice within the meaning of Article 2(d) of the Directive. The exhaustive list of commercial practices in Annex I to the Directive are per se unfair.
- 61 The Commission contends that the prohibition of point 9 of Annex I to the Directive applies in a situation, such as in the present case, where a trader who is not an authorised seller resells tickets for a particular event that may only be sold by authorised sellers.
- 62 In regard to Question 1a, the Commission considers that the fact that the non-authorised resale of the tickets for London 2012 Games is banned in the State where the tickets are to be used (the United Kingdom) and not where they are sold (Norway) is immaterial for the purposes of applying point 9 of Annex I to the Directive. Rather, the question is irrelevant in the light of Section 41(5) LOGA 2006 and the explanatory note thereto as a result of which, in accordance with Section 31 LOGA 2006, it is an offence to resell London 2012 Games tickets regardless of the location of the sale.
- 63 According to the Commission, point 9 of Annex I to the Directive should be interpreted as covering a situation where a trader creates an impression that a product can be legally sold, by omitting to inform the consumer of any legal restriction affecting the sale, possession or use of a particular product which might deceive the consumer. A more restrictive interpretation would not achieve the goal of preventing the consumer from being actually deceived by the trader. On the contrary, it would undermine the *effet utile* of that rule and would render it devoid of purpose.
- 64 In regard to Question 1b, the Commission submits that an “eventual” and “hypothetical” finding that the relevant provision of United Kingdom law would be incompatible with EEA law should not affect the assessment of whether the Appellant engaged in an unfair commercial practice within the meaning of point 9 of Annex I to the Directive. Referring

to Article 2(e) and (k) and Article 5(2) of the Directive, it contends that only the circumstances involving the performance of the commercial practice, i.e. at the time when the tickets were sold, should be taken into account. A commercial practice qualifies as unfair under point 9 of Annex I insofar as the appearance of legality of the product in the eyes of the consumer triggers the decision, for instance, to purchase a ticket. It can then be inferred that the only relevant factor that the consumer can rely upon when deciding whether or not to enter into a particular transaction is the appearance of legality of the product at that time. Any other interpretation would be contrary to the principle of legal certainty and would place the consumer, the weaker party, in the unfair and unreasonable position of having to make his or her own legality assessment.

### *Findings of the Court*

- 65 By its first question, the referring court asks, in essence, whether, in circumstances such as those of the main proceedings, point 9 of Annex I to the Directive must be considered as covering situations where a trader fails to provide information to consumers about the fact that the sales contract cannot legally be executed in the contemplated place of performance.
- 66 The Court recalls that, according to Article 1 thereof, the purpose of the Directive is twofold. It is both to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating EEA States' laws, regulations and administrative provisions on unfair commercial practices, which harm consumers' economic interests. That second objective relies on the assumption that the consumer is in a weaker position in relation to a trader, particularly with regard to the level of information, in that the consumer must be considered to be economically weaker and less experienced in legal matters than the other party to the contract (compare the judgment in *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraph 53 and case law cited).
- 67 Article 5(1) of the Directive states that unfair commercial practices shall be prohibited. Pursuant to Article 5(5) of the Directive, Annex I contains a list of commercial practices that in all circumstances shall be regarded as unfair and thus prohibited under the Directive.
- 68 “Commercial practices”, also referred to as “business-to-consumer commercial practices”, are defined, pursuant to Article 2(d) of the Directive, both in the positive and in the negative as 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. This is a particularly wide definition (compare the judgment in *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, EU:C:2010:660, paragraphs 17 and 21).
- 69 In the present case, it was undisputed before the Court that the Appellant was, at the material time, a trader, within the meaning of Article 2(b) of the Directive. Moreover, it is undisputed that practices connected with marketing and selling tickets to consumers constitute business-to-consumer commercial practices within the meaning of Article 2(d)

of the Directive and, consequently, come within its scope. Further, tickets are products within the meaning of Article 2(c) of the Directive. Having regard to Article 2(k) of the Directive, as products, the sale of a ticket comprises not only the physical or electronic ticket itself, but any goods and services including the rights and obligations conferred in accordance with the contractual rights of use provided for in the terms and conditions governing the ticket.

- 70 The question arises, therefore, as to whether conduct such as that at issue in the main proceedings is covered by the practices listed in Annex I and, particularly, by point 9 thereof.
- 71 Annex I to the Directive is entitled “Commercial practices which are in all circumstances considered unfair” and is split into two parts: misleading commercial practices and aggressive commercial practices. To that end, the Court recalls that, as set out in recital 14 to the Directive, “misleading commercial practices” encompass practices, which by deceiving the consumer, prevent him from making an informed, and thus efficient, choice.
- 72 Regarding the interpretation of point 9 of Annex I to the Directive, the Court observes that the ECJ has, on several occasions, been tasked with interpreting different points of Annex I. The ECJ has interpreted Annex I by engaging in a detailed analysis of the wording of the provision, from a literal perspective, and further supported this by way of an analysis of the provision’s context within the Directive as well as by considering the objectives of the Directive (compare the judgment in *Purely Creative*, cited above, paragraphs 35 and 43 to 49; and the judgment in *Wind Tre*, C-54/17 and C-55/17, EU:C:2018:710, in particular paragraphs 41 to 46 and 54). A commercial practice may fall under more than one point in Annex I. That does not necessitate a case-by-case assessment and it may be considered unfair in all circumstances (compare the Opinion of Advocate General Bobek in *Kirschstein*, C-393/17, EU:C:2018:918, point 150).
- 73 Point 9 of Annex I provides that “[s]tating or otherwise creating the impression that a product can legally be sold when it cannot” falls within the category of misleading commercial practices which are in all circumstances considered unfair. With regard to the wording of that item, it is to be noted that it includes any positive statement, but also the passive notion of the impression otherwise created by a trader as to the legality of a sale to a “consumer”. This includes a scenario in which the trader omits to inform the “consumer” of any legal restriction affecting the sale, possession or use of a particular product as such a practice is in all circumstances likely to contradict the legitimate expectations of the consumer.
- 74 As correctly noted by the Commission in its Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices of 25 May 2016 (SWD(2016) 163 final), in point 4.1, it may be that the sale of a certain product is banned or illegal in all circumstances in an EEA State. A second category of practices concerns products which

are not illegal to possess, but which may be legally marketed and sold only under certain conditions and/or subject to certain restrictions in an EEA State such as the products in the present case.

- 75 The Court notes that it is the overall impression conveyed to the average consumer that needs to be considered. In this regard, the Directive in Article 5(2)(b) takes as its benchmark that the term ‘consumer’ be understood as the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors (compare the judgment in *Ving Sverige*, C-122/10, EU:C:2011:299, paragraphs 22 and 23). In addition, pursuant to Article 5(3) of the Directive, should a commercial practice be likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, it must be assessed from the perspective of the average member of that group.
- 76 As with every other item of information provided by a trader to a consumer, information in relation to a product must be examined and assessed by national courts in the light of Article 5(2)(b) of the Directive. That concerns the availability of the information and how it is presented, the legibility and clarity of the wording and whether it can be understood by the public targeted by the practice (compare the judgment in *Purely Creative and Others*, cited above, paragraph 55). The conveyance of clear and adequate information on the product sold is imperative for the consumer to be able to make an informed transactional decision (compare the judgments in *Purely Creative and Others*, cited above, paragraph 53, and *Wind Tre*, cited above, paragraph 45). This would include information on the trading website regarding its advertised price, the authority to sell the product, including any representation that the sale of the product to the consumer would lawfully transfer valid rights and obligations.
- 77 As a consequence, the Court finds that point 9 of Annex I must be interpreted as covering a situation where, by omitting to inform the consumer of any legal restriction affecting the sale, possession or use of a particular product which might deceive the consumer, a trader creates an impression that a product can be legally sold when it cannot.
- 78 In this respect, if a consumer is made aware of the legal restrictions affecting or potentially preventing the use of the product, it is reasonable to assume that the consumer may consider not to enter into that particular transaction. Omitting such information could thus distort the economic behaviour with regard to the product of the average consumer whom it reaches.
- 79 It is for the referring court to determine whether, in light of the above, in circumstances such as those at issue in the main proceedings, a trader stated or otherwise created the

impression to an average consumer that a product, such as tickets to the London 2012 Games, could legally be sold when it could not.

- 80 As regards Question 1a, the Court notes that the wording of point 9 of Annex I is silent as to the geographical scope where a product may “legally” be sold. Therefore, nothing in the wording of that item indicates that the fact that a prohibition applies in the EEA State where the product is to be used but not in the State where the product is sold is material for the purpose of applying point 9 of Annex I. As noted above, at paragraphs 73 to 78, point 9 of Annex I prohibits a trader from marketing a good or a service by omitting to clearly inform the consumer of the existence of legal provisions which may restrict the sale, possession or use of that given product. As a result, point 9 encompasses a commercial practice involving the sale of a product, which is subject to legal restrictions as to its use, irrespective of whether those legal restrictions apply either at the place of sale or at the place of use.
- 81 In relation to Question 1b, the Court finds that the term “legally” in point 9 of Annex I, read in conjunction with Article 2(k) of the Directive, must be interpreted as referring to the law in force at the time that a consumer makes a transactional decision. Thus, only the circumstances at the material time of the commercial practice, i.e. at the time of the transactional decision, should be taken into account. As noted, *inter alia*, by the Commission, this conclusion also stems from the notion of “unfair commercial practice” itself. Pursuant to Article 5(2)(b) of the Directive, “a commercial practice shall be unfair if it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches...”. In turn, Article 2(e) of the Directive defines “materially distort the economic behaviour of consumers” as appreciably impairing the consumer’s ability to make an informed decision, “thereby causing the consumer to take a transactional decision that he would not have taken otherwise”.
- 82 It is immaterial that a trader may consider certain national legislative provisions, such as Section 31 LOGA 2006, to be contrary to EEA law. Such an assertion made after a consumer’s transactional decision would not facilitate the high level of consumer protection provided for in Article 1 of the Directive as the Court has set out in paragraph 66 of this judgment.
- 83 Nor is that assessment affected if, after the sale, it is determined that a national prohibition, such as Section 31 LOGA 2006, is contrary to EEA law. Otherwise the legal certainty conferred by the list contained in Annex I to the Directive, the importance of which is emphasised by recital 17 of the Directive and which is essential at the time of the transactional decision, would be nullified.

#### Conclusions

- 84 The answer to the first question must be that point 9 of Annex I to the Directive must be interpreted as encompassing situations in which a trader states or otherwise creates the

impression, based on the overall impression conveyed to the average consumer at the time of the transactional decision, that a product can legally be sold when it cannot. It does not have a bearing on that assessment whether such a national legislative prohibition, as in the present case, applies in either the EEA State of sale or the EEA State of performance or in both. Nor is that assessment affected by the national legislative prohibition in question being subsequently found to be contrary to EEA law.

85 In the light of the above, there is no need to answer the second question referred to the Court.

#### **IV Costs**

86 The costs incurred by Ireland, the United Kingdom, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Borgarting Court of Appeal (*Borgarting lagmannsrett*) hereby gives the following Advisory Opinion:

**Point 9 of 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 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 must be interpreted as encompassing situations in which a trader states or otherwise creates the impression, based on the overall impression conveyed to the average consumer at the time of the transactional decision, that a product can legally be sold when it cannot. It does not have a bearing on that assessment whether such a national legislative prohibition, as in the present case, applies in either the EEA State of sale or the EEA State of performance or in both. Nor is that assessment affected by the national legislative prohibition in question being subsequently found to be contrary to EEA law.**

Páll Hreinsson

Bernd Hammermann

Siri Teigum

Delivered in open court in Luxembourg on 14 December 2019.

Birgir Hrafn Búason  
Acting Registrar

Páll Hreinsson  
President