E-1/19-20

REPORT FOR THE HEARING
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 the case 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.

I Introduction

1. By a letter of 3 January 2019, registered at the Court on the same day, Borgarting Court of Appeal (*Borgarting lagmannsrett*) made a request for an Advisory Opinion in a case pending before it between Andreas Gyrre ("the Appellant") and the Norwegian Government, represented by the Ministry of Children and Equality.

2. The case before the referring court concerns an action brought by the Appellant in which he challenges a decision by the Norwegian Market Council (*Markedsrådet*) imposing an administrative fine of NOK 200 000 on him, on the basis of a "violation of Section 6 of the Norwegian Marketing Act; see Section 1(9) of the Regulation on unfair commercial practices". The Appellant initially brought his challenge before Oslo District Court (*Oslo tingrett*), which found in favour of the Norwegian Government. The Appellant subsequently brought an appeal against that judgment before Borgarting Court of Appeal.

II Legal background

EEA law

3. 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 31e of Annex IX,[1] and inserted it as point 7g, and added it in point 7d of Annex XIX. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, and the decision entered into force on 1 February 2009.

4. Recitals 3, 4, 5, 6, 11, 12, 13 and 17 of the Directive read:

(3) The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising establishes minimum criteria for harmonising legislation on misleading advertising, but does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. As a result, Member States' provisions on misleading advertising diverge significantly.

(4) These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.

(5) In the absence of uniform rules at Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment could be justified in the light of the case-law of the Court of Justice of the European Communities as long as they seek to protect recognised public interest objectives and are proportionate to those objectives. In view of the Community's objectives, as set out in the provisions of the Treaty and in secondary Community law relating to freedom of movement, and in accordance with the Commission's policy on commercial communications as indicated in the Communication from the Commission entitled "The follow-up to the Green Paper on Commercial Communications in the Internal Market", such

[1] Point 31e of Annex IX was originally numbered point 30d. It was renumbered as point 31c by Decision of the EEA Joint Committee No 114/2007 (OJ 2008 L 47, p. 34, and EEA Supplement 2008 No 9, p. 28), and then as point 31e by Decision of the EEA Joint Committee No 81/2008 (OJ 2008 L 280, p. 12, and EEA Supplement 2008 No 64, p. 5).

obstacles should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty.

(6) This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. Nor does this Directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising. Further, this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision.

(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.

(12) Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area.

(13) In order to achieve the Community's objectives through the removal of internal market barriers, it is necessary to replace Member States' existing, divergent general clauses and legal principles. The single, common general prohibition established by this Directive therefore covers unfair commercial practices distorting consumers' economic behaviour. In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution. The general prohibition is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices.

(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.

5. 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.

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

(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;

7. 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.

8. 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.

9. 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.

10. 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.

11. 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

12. 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.[2] ("Marketing Act").

13. 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.

14. 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.

15. Section 1 of the Regulation of 1 June 2009 No 565 on unfair commercial practices[3] ("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

…

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

16. 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

[2] *Lov 9. januar 2009 nr. 2 om kontroll med markedsføring og avtalevilkår mv. (markedsføringsloven)*. All translations of national legal provisions are unofficial.
[3] *Forskrift 1. juni 2009 nr. 565 om urimelig handelspraksis*.

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.

17. 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.

United Kingdom law

18. The London Olympic Games and Paralympic Games Act 2006 ("LOGA 2006") set out the applicable framework and provided for "controls over marketing in connection with the Games, including the protection of Olympic intellectual property, restrictions on commercial association with the Games, the prohibition … of ticket touting in connection with Olympic events".[4]

19. Section 31 LOGA 2006 entitled "Sale of tickets" prohibited the resale of tickets to the London 2012 Games, other than through authorised dealers. It reads as follows:

(1) A person commits an offence if he sells an Olympic ticket—

(a) in a public place or in the course of a business, and

(b) otherwise than in accordance with a written authorisation issued by the London Organising Committee.

(2) For the purposes of subsection (1)—

(a) "Olympic ticket" means anything which is or purports to be a ticket for one or more London Olympic events,

(b) a reference to selling a ticket includes a reference to—

(i) offering to sell a ticket,

(ii) exposing a ticket for sale,

(iii) advertising that a ticket is available for purchase, and

[4] Explanatory notes on the LOGA 2006, paragraph 4, available at https://www.legislation.gov.uk/ukpga/2006/12/notes/division/2.

(iv) giving, or offering to give, a ticket to a person who pays or agrees to pay for some other goods or services, and

(c) a person shall (without prejudice to the generality of subsection (1)(a)) be treated as acting in the course of a business if he does anything as a result of which he makes a profit or aims to make a profit.

(3) A person does not commit an offence under subsection (1) by advertising that a ticket is available for purchase if—

(a) the sale of the ticket if purchased would be in the course of a business only by reason of subsection (2)(c), and

(b) the person does not know, and could not reasonably be expected to discover, that subsection (2)(c) would apply to the sale.

(4) A person does not commit an offence under subsection (1) (whether actual or inchoate) only by virtue of making facilities available in connection with electronic communication or the storage of electronic data.

(5) Where a person who provides services for electronic communication or for the storage of electronic data discovers that they are being used in connection with the commission of an offence under subsection (1), the defence in subsection (4) does not apply in respect of continued provision of the services after the shortest time reasonably required to withdraw them.

(6) A person guilty of an offence under subsection (1) shall be liable on summary conviction to a fine not exceeding [£20,000][5].

(7) Section 32(2)(b) of the Police and Criminal Evidence Act 1984 (c. 60) (power to search premises) shall, in its application to the offence under subsection (1) above, permit the searching of a vehicle which a constable reasonably thinks was used in connection with the offence.

(8) Subsection (9) applies where a person in Scotland is arrested in connection with the commission of an offence under subsection (1).

(9) For the purposes of recovering evidence relating to the offence, a constable in Scotland may without warrant enter and search—

(a) premises in which the person was when arrested or immediately before he was arrested, and

(b) a vehicle which the constable reasonably believes is being used or was used in connection with the offence.

[5] Word in Section 31(6) substituted with effect from 14 February 2012 by London Olympic Games and Paralympic Games (Amendment) Act 2011 Section 3(1). Prior to that substitution, the text read "level 5 on the standard scale".

(10) Subsection (9) is without prejudice to any power of entry or search which is otherwise exercisable by a constable in Scotland.

(11) The London Organising Committee shall make arrangements for the grant of authorisations under subsection (1)(b); and the arrangements may, in particular—

(a) make provision about charges;

(b) enable the Committee to exercise unfettered discretion.

(12) In this section a reference to a London Olympic event includes a reference to an event held by way of a pre-Olympic event in accordance with arrangements made by the London Organising Committee in pursuance of paragraph 7 of the Bye-Law to Rule 49 of the Olympic Charter.

20. Section 41(5) LOGA 2006 entitled "Extent and application" reads as follows:

(5) Section 31 shall apply in respect of anything done whether in the United Kingdom or elsewhere.

21. The London Organising Committee of the Olympic Games ("LOCOG"), a company limited by guarantee, was established by the United Kingdom Government with responsibility for organising, publicising and staging the London 2012 Games. The explanatory notes on Section 31 of LOGA 2006 state in paragraph 78: "LOCOG is required to establish a system for granting written authorisations to official ticket sellers. It will be allowed to charge for such authorisations and will be entitled to exercise unfettered discretion in deciding whether or not to authorise vendors."

22. Clauses 17 and 18 of LOCOG's terms and conditions read, in extract, as follows (with original emphasis):

Transfer, resale and use of Tickets

17.1 Tickets shall not be purchased or obtained from or through any Person other than directly from LOCOG or an ATR [Authorised Ticket Reseller]. *Tickets purchased or obtained from or through Persons other than directly from LOCOG or an ATR and otherwise in accordance with these Terms and Conditions shall be VOID and may be SEIZED or CANCELLED WITHOUT REFUND OR ENTRY TO A SESSION.*

17.2 Save as set out at clauses 17.3 and 17.4 below, Tickets are STRICTLY NON-TRANSFERABLE and MUST NOT BE SOLD nor advertised for sale whether on the internet, in newspapers or elsewhere.

17.3 If more than one Ticket is issued to a Purchaser, those Tickets may only be used by the Purchaser and a family member, friend or colleague who is known to the Purchaser personally and who is intended to accompany the Purchaser to a Session. The transfer of a Ticket in this manner shall not contravene clauses 17.1 and 17.2 PROVIDED THAT:

17.3.1 Such a transfer takes place without payment or benefit in excess of the face value of the Ticket

17.3.2 Such a transfer is subject to these Terms and Conditions; and

17.3.3 A Purchaser will provide the name and address (and any other identification details, as required by LOCOG) of those who are intended to accompany them if asked at any time by any official, steward or employee of LOCOG or the Venue owner or any police officer.

…

17.7 All Ticket Holders are advised that, under s.31 of the London Olympic Games and Paralympic Games Act 2006, it is a CRIMINAL OFFENCE to sell a Ticket in a public place or in the course of business and otherwise than in accordance with the authorisation of LOCOG. Ticket Holders are referred to http://www.legislation.gov.uk/ukpga/2006/12/section/31.

Void Tickets
18.1 Any Ticket obtained in breach of these Terms and Conditions shall be void and all rights conferred or evidenced by such Ticket shall be nullified.

18.2 Any Person seeking to use a Ticket obtained in breach of these 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.

III Facts and procedure

23. 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.

24. 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 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.[6]

25. Euroteam marketed 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

[6] *lov 29. juni 2007 nr. 86 om forbud mot prispåslag ved videresalg av billetter til kultur- og idrettsarrangementer* – '*svartebørsloven*'.

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 eiendomskrenkelse*"). It was further stated that the resale of such tickets was a criminal offence pursuant to Section 31 LOGA 2006.

26. Euroteam disputed the fact that the sales operation was unlawful, but requested nonetheless further information from NIF. In the main proceedings, Euroteam asserts 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 is proven that tickets were likely also sold to consumers in the United Kingdom after the block had been put in place.

27. 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 in United Kingdom legislation.

28. On 24 July 2012, the High Court of England and Wales (Queen's Bench Division) issued an interim enforcement order, by which it 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.

29. 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.

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

31. 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, in essentially the same terms as the interim order.

32. 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.*

33. The referring court notes that 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.

34. Borgarting Court of Appeal has referred the following questions to the Court:

I. 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?**
>
> **b. Does it have a bearing on this assessment if, after the sale, it is determined that the prohibition was contrary to EEA law?**

II. If a determination of whether the prohibition under national law is contrary to EEA law rules has a bearing on the assessment under point 9 of Annex I to Directive 2005/29/EC:

> **a. Does the prohibition of resale of such tickets as in the London Olympic Games and Paralympic Games Act 2006 constitute regulation of commercial practices falling within the scope of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market?**

b. Does the Directive preclude a national prohibition of resale, such as provided for in the London Olympic Games and Paralympic Games Act 2006, where such a prohibition safeguards not only consumer protection considerations but also other considerations, such as security?

c. If it is necessary to ascertain whether restrictions on the resale of tickets for sporting events such as the Olympic Games are contrary to the fundamental freedoms under the EEA Agreement, including Articles 11 and 36 EEA, which criteria should the national court use as a basis for its assessment of whether such restrictions are suitable and necessary for achieving legitimate objectives such as consumer protection and security?

IV Written observations

35. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

– the Appellant, represented by Monica Syrdal and Dag Sørlie Lund, advocates;

– the Norwegian Government, represented by Arne Johan Dahl, and Ketil Bøe Moen, advocates with the Attorney General of Civil Affairs, acting as Agents;

– 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 United Kingdom, represented by Zoe Lavery, Government Legal Department, acting as Agent, and Anneli Howard, Barrister;

– the EFTA Surveillance Authority ("ESA"), represented by Ingibjörg-Ólöf Vilhjálmsdóttir, Erlend Møinichen Leonhardsen, Claire Simpson, 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.

V Summary of the arguments submitted

The Appellant

36. The Appellant submits that Questions 2a and 2b essentially concern the applicability of the Directive and therefore addresses those first. He then addresses Question 1. The Appellant does not see a need to present any arguments regarding Question 2c.

Questions 2a and 2b

37. The Appellant disagrees with the Norwegian Government's interpretation of Article 2(d) of the Directive, according to which a requirement for prior authorisation for the sale of certain products does not constitute an "act, omission, course of conduct or representation, or commercial communication" and thus is not a "commercial practice".

38. The Appellant submits that in *Köck* the Court of Justice of the European Union ("ECJ") held that a provision of national law which prohibits, subject to penalties, a commercial practice that has not been authorised falls within the scope of the Directive.[7] Further, the question of whether the Directive applies turns on whether the Appellant's secondary ticketing practice constitutes a commercial practice as defined in Article 2(d) of the Directive and not on the issue whether a requirement for prior authorisation constitutes an "act, omission, course of conduct or representation, or commercial communication".[8]

39. The Appellant asserts that the practice of marketing and reselling of tickets to sporting and cultural events must be considered to constitute a commercial practice for the purposes of Article 2(d) of the Directive. He contends that this appears to be accepted by the Norwegian Government as both the British and Norwegian authorities relied on provisions implementing point 9 of Annex I to the Directive when sanctioning the Appellant. Further support for the argument that the practice of secondary ticketing constitutes a "commercial practice" within the meaning of Article 2(d) of the Directive is provided by a written answer given by European Commissioner Jourová.[9]

40. The Appellant submits that the next question to be determined is whether Section 31 LOGA 2006 falls within the Directive's scope. He contends that only national provisions relating to commercial practices which harm only competitors are excluded from the Directive's scope.[10]

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[7] Reference is made to the judgment of 17 January 2013, *Köck*, C-206/11, EU:C:2013:14, paragraph 33.
[8] Reference is made to the judgment in *Köck*, cited above, paragraphs 26 and 27.
[9] Reference is made to the answer of 3 October 2016 given by Ms Jourová on behalf of the Commission, E-005027/2016(ASW), available at: http://www.europarl.europa.eu/doceo/document/E-8-2016-005027-ASW_EN.html?redirect.
[10] Reference is made to the judgment in *Köck*, cited above, paragraphs 29 and 30; and to the Opinion of Advocate General Trstenjak in *Mediaprint*, C-540/08, EU:C:2010:161, point 54.

41. In the Appellant's view, it appears undisputed that Section 31 LOGA 2006 includes amongst its aims the protection of consumers.[11] Therefore, Section 31 LOGA 2006, which prohibits, subject to criminal liability, a commercial practice that has not been authorised in advance, constitutes a measure intended to combat unfair commercial practices in the interests of consumers and thus falls within the scope of the Directive.

Question 1

42. Having determined that the Directive is applicable, the Appellant turns to 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.

43. Referring to Article 5(5) of the Directive, the Appellant submits that the EEA/EFTA States may not 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, thereby frustrating the objective of legal certainty.[12] 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.[13] Otherwise, "it must be examined whether it constitutes one of the regulated instances of the general clause – misleading or aggressive commercial practices".[14]

44. Consequently, the EEA/EFTA States are precluded from extending the list of prohibited commercial practices included in Annex I to the Directive, which, however, is exactly what Section 31 LOGA 2006 does.

45. 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).[15]

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[11] Reference is made to Stuyck, "The Court of Justice and the Unfair Commercial Practices Directive", *Common Market Law Review*, Volume 52, 2015, pp. 721-752, at p. 729.

[12] Reference is made to the Opinion of Advocate General Trstenjak in *VTB-VAB*, C-261/07, EU:C:2008:581, footnote 37.

[13] Reference is made to Abbamonte, "The Unfair Commercial Practices Directive and its General Prohibitions" in Weatherill and Bernitz (eds.): *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, 2007, p. 21; and Stuyck, "The Court of Justice and the Unfair Commercial Practices Directive", *Common Market Law Review*, Volume 52, 2015, pp. 721-752, at p. 727.

[14] Reference is made to the Opinion of Advocate General Trstenjak in *Köck*, C-206/11, EU:C:2012:543, point 74.

[15] European Commission Staff Working Document (SWD(2016) 163 final): *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, p. 80.

46. The Appellant contends that the legality of secondary ticketing varies throughout the EEA.[16] Therefore, it does not fall within the first category as it is not illegal "in all circumstances". As regards the second category, unlike the situation for package travel, there is no harmonised EU legislation regulating the practice of secondary ticketing.[17] In the Appellant's view, for secondary ticketing to be considered as constituting an unfair commercial practice, a case-by-case assessment is necessary.

47. The Appellant contends that the interpretation advanced by the Norwegian Government would allow the EEA/EFTA States to introduce national prohibitions, such as the prohibition set out in Section 31 LOGA 2006, and later sanction breaches of those prohibitions by reference to point 9 of Annex I to the Directive, which in turn would undermine the maximum harmonisation and the legal certainty the Directive seeks to establish. Taken to its logical extreme, this would essentially make the rest of Annex I, and indeed the whole Directive, devoid of any meaning.

48. Consequently, 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.

49. The Appellant proposes that the questions referred should be answered as follows:

1. 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 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 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.

The Norwegian Government

50. The Norwegian Government observes that the parties to this case have fundamentally different approaches to the questions asked by the referring court, in particular regarding Question 1. In its view, 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

[16] Reference is made to Annex I to the Appellant's submissions: European Consumer Centre France: The resell of tickets in the EU: forbidden or allowed?, https://www.europe-consommateurs.eu/en/news-and-alerts/sports-and-events/the-resell-of-tickets-in-the-euforbidden-or-allowed/.

[17] Reference is made to the answer of 3 October 2016 given by Ms Jourová on behalf of the Commission, E-005027/2016(ASW), available at: http://www.europarl.europa.eu/doceo/document/E-8-2016-005027-ASW_EN.html?redirect.

trader to consumers in connection with that sale.[18] 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 stresses that it is not seeking to enforce LOGA 2006 in its own territory.

51. According to the Norwegian Government, by reason of Euroteam's failure to give consumers information about the illegality of the sale of Olympic tickets in the United Kingdom, despite the fact that Euroteam, owned by the Appellant, was fully aware of the legislation, the Appellant was complicit in infringing point 9 of Annex I to the Directive. This forms the basis for the contested parts of the Norwegian Market Council's decision.

52. The Norwegian Government contends that the answer to Question 1 hinges on the interpretation of the phrase "legally be sold" in point 9 of Annex I to the Directive. Should a trader state to a consumer that the sale of Olympic tickets was illegal, but the parties nevertheless decide 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.

53. The Norwegian Government submits that the phrase "legally be sold" in point 9 of Annex I to the Directive 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.[19] While the phrase "legally be sold", in principle, refers to a variety of different legal rules, the specific rule under assessment in the case before the referring court is Section 31 LOGA 2006.

Question 1a

54. 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. De facto, this resembled a situation where the sale was illegal across the EEA.[20] This interpretation is supported by the underlying purpose of the Directive, as set out in Article 1 thereof. 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.

[18] Reference is made to 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.
[19] Ibid.
[20] Ibid.

Question 1b

55. The Norwegian Government submits that this question 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. Moreover, point 9 of Annex I to the Directive does not directly regulate the legality of the sale, but concerns the information given by the trader to consumers in connection with that sale, irrespective of any subsequent judicial assessment. The commercial practice prohibited by point 9 is that a trader is "[s]tating or otherwise creating the impression" that a sale is legal when it is not. In this connection, the provisions of Annex I to the Directive have been interpreted with a degree of flexibility in order to ensure their effectiveness.[21]

56. 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. In this case, the purchase of tickets from unauthorised distributors is illegal in itself, putting the consumer at risk of being unable to obtain entrance to the event for which the ticket was purchased. The effects of omitting information about the legality of the purchase are for all practical purposes irreversible after the sale has been completed, and no effective remedies may be available after the sale.

57. Moreover, the Norwegian Government continues, even if a court were subsequently to agree with the trader that the legislation making the sale unlawful was itself illegal, this would not undo the actual risk faced by the consumer prior to that assessment, for instance, the risk of not being allowed entrance to the Olympic event in question. In any event, a requirement to give consumers adequate information is fair to the consumer, and does not place onerous demands on the trader.

58. 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

[21] Reference is made to the judgment of 18 October 2012, *Purely Creative and Others*, C-428/11, EU:C:2012:651, and the Opinion of Advocate General Bobek in *Kirchstein*, C-393/17, EU:C:2018:918, point 149.

point 9 indicates that it applies to any form of illegality, whether following from EU legislation or from legislation enacted by a Member State. Such an interpretation would be in line with the goals of the Directive, as set out in Article 1 thereof.

Question 2

59. The Norwegian Government contends that should the Court answer Question 1a in the negative, but Question 1b in the affirmative, Question 2 will also need to be answered. In its view, the premise underlying Question 2 is that the Court finds it necessary to consider whether Section 31 LOGA 2006 is contrary to EEA law. By Questions 2a and 2b, the referring court asks whether Section 31 LOGA 2006 constitutes the regulation of a commercial practice falling within the Directive, and whether the Directive precludes such legislation. If either Question 2a or 2b is answered in the negative, Question 2c needs to be answered, requiring an assessment of whether restrictions on the resale of tickets for sporting events such as the London 2012 Games are contrary to the fundamental freedoms under the EEA Agreement.

60. According to the Norwegian Government, it is a particular feature of this case that the rules challenged by the trader are not enacted by the State that is party to these proceedings. Crucially, the United Kingdom will not be represented in the proceedings before the national courts, which will have to assess the measure at hand in light of the Court's guidance. This needs to be taken account of by both the Court and the national courts, in particular, in the assessment of the legitimacy of the aims pursued by the measure at issue, its suitability/consistency, and its necessity.

Question 2a

61. This question concerns whether Section 31 LOGA 2006 regulates a commercial practice or not. The Norwegian Government observes that the scope of the Directive is regulated by Article 3. Article 3(1) states that the Directive shall apply to business-to-consumer commercial practices. The term "business-to-consumer commercial practices" is defined in Article 2(d) of the Directive. The term "commercial practice" appears to refer to the behaviour of the trader that is "directly connected" with the promotion, sale or supply of a product. This is illustrated by the Directive's provisions, in particular Articles 5 to 9, and points 1 to 31 of Annex I thereto. This indicates that requirements relating to a sale itself, which do not concern the practices of a specific trader, do not fall within the scope of the Directive. This understanding is supported by Article 3(8) of the Directive and recital 9 in the preamble. In this vein, the regimes referred to in Article 3(8) of the Directive do not relate to the practices of the trader in connection with a sale, but to the sale itself. Indeed, were the Directive intended to regulate exhaustively all situations where a sale required some kind of an authorisation in the EEA, one would expect this to be reflected in the Directive's provisions, but it is not. Although the scope of the Directive does not

encompass the authorisation regime itself, the Directive would, of course, apply in full to any commercial practices connected to the promotion or sale of such products.

62. The Directive has a wide scope with regard to business-to-consumer commercial practices, but this should not be extended to encompass all other aspects of a commercial activity involving the offering of products to consumers.[22] The Court is invited to clarify that the notion of a "commercial practice" does not extend to legal requirements relating to the sale itself, but only to the sales practices used by the trader.

63. Section 31 LOGA 2006 concerns the reselling of Olympic tickets in the course of a business without authorisation. According to LOGA 2006, such a sale was illegal, and constituted a criminal offence. According to the Norwegian Government, Section 31 LOGA 2006 rendered a sale of Olympic tickets in a public place or in the course of a business without authorisation illegal irrespective of whether the trader used unfair commercial practices. Consequently, in its submission, Section 31 LOGA 2006 appears to be an authorisation regime which falls outside the scope of the Directive.

Question 2b

64. The Norwegian Government contends that this question need only be answered if the Court finds that Section 31 LOGA 2006 constituted a regulation of commercial practices falling within the scope of the Directive.

65. The Norwegian Government submits that the Directive does not apply to measures such as Section 31 LOGA 2006, which prohibits the sale of tickets without authorisation. It follows from Article 4 of the Directive that the Directive fully harmonises at the Community level the rules relating to unfair business-to-consumer commercial practices, and EEA States may not adopt stricter rules than those provided for in the Directive.[23] The only commercial practices which can be regarded by national law as unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the Directive are those listed in Annex I to the Directive.[24] However, the harmonising effect of the Directive only extends to national rules which aim to protect the economic interest of consumers.

66. Having regard to Articles 1 and 3(3) of the Directive and recital 7 in the preamble, the Norwegian Government emphasises that if a national rule pursues objectives other than the protection of the economic interests of the consumer, such as the health and safety aspects of products or cultural reasons, that national rule is not covered by the Directive insofar as it concerns the protection of those other objectives. This is for the national court

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[22] Reference is made to the judgment of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, EU:C:2010:660, paragraphs 21 to 24, and the Opinion of Advocate General Bobek in *Kirchstein*, C-393/17, EU:C:2018:918, point 133.

[23] Reference is made to the judgment of 14 January 2010, *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2010:12, paragraphs 41 to 45.

[24] Reference is made to the judgment in *Köck*, cited above, paragraph 35.

to determine.[25] Indeed, the Directive applies only insofar as the provision in question pursues objectives relating to consumer protection.[26] Moreover, in that regard, a national measure should not fall within the scope of the Directive only because, as an incidental effect, it implies a higher level of consumer protection. This is illustrated by the example of commercial solicitation mentioned in recital 7 of the Directive, which differs from the situation in *Mediaprint Zeitungs- und Zeitschriftenverlag*.[27]

67. The Norwegian Government contends that Section 31 LOGA 2006 appears to be justified by objectives other than consumer protection. The United Kingdom Government was formally required to accept restrictions on secondary sales of tickets for profit when it bid for the London 2012 Games. Section 31 LOGA 2006 is based on Section 166 of the Criminal Justice and Public Order Act 1994, introduced following the Hillsborough disaster as a public order and safety measure. Increased consumer protection does not appear to have formed any part of the rules' justification, but is an incidental consequence.[28]

68. In the alternative, should the Court find that rules such as Section 31 LOGA 2006 fall within the scope of the Directive, the Norwegian Government submits that such rules could be justified by point 4 of Annex I to the Directive.[29]

Question 2c

69. The Norwegian Government contends that if a national measure is subject to exhaustive harmonisation at EU level, it must be assessed in the light of that harmonising measure and not the EEA Agreement.[30] Section 31 LOGA 2006 should be assessed under the general provisions of the EEA Agreement only if it does not fall within the scope of the Directive either at all or as regards those objectives relevant to the present case.

70. The Norwegian Government considers it unclear whether provisions on the authorisation of the sale of tickets to sports and cultural events are most appropriately addressed under Articles 11 or 36 EEA, and takes no firm position on the point.[31] The tickets will scarcely fall under Article 40 EEA even if a ticket may be seen as a form of

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[25] Reference is made to the order of 8 September 2015, *Cdiscount*, C-13/15, EU:C:2015:560, paragraph 29.

[26] Reference is made to the order of 7 March 2013, *Euronics Belgium*, C-343/12, EU:C:2013:154, paragraph 31; and the judgment of 19 March 1998, *ex parte Compassion in World Farming*, C-1/96, EU:C:1998:113, paragraphs 64 and 65.

[27] Reference is made to the judgment in *Mediaprint Zeitungs- und Zeitschriftenverlag*, cited above, paragraphs 21 to 24.

[28] Reference is made to Ticket Touting: Second Report of Session 2007-08, report by the House of Commons Culture, Media and Sport Committee HC 202, pp. 4 and 24.

[29] Reference is made to the Opinion of Advocate General Bobek in *Kirchstein*, cited above, points 146 to 151.

[30] Reference is made to the judgment of 11 December 2003, *Deutscher Apothekerverband*, C-322/01, EU:C:2003:664, paragraph 64; the judgment of 16 December 2008, *Gysbrechts and Santurel Inter*, C-205/07, EU:C:2008:730, paragraph 33; the judgment of 12 October 1993, *Vanacker and Lesage*, C-37/92, EU:C:1993:836, paragraph 9; and the judgment of 13 December 2001, *DaimlerChrysler*, C-324/99, EU:C:2001:682, paragraph 32.

[31] Reference is made to the judgment of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:774, paragraphs 49 and 50, and the judgment of 24 March 1994, *Schindler*, C-275/92, EU:C:1994:119, paragraphs 22 and 23.

"bearer security". If the measure falls to be assessed under Article 11 EEA, it submits that the measure appears to amount to a non-discriminatory selling arrangement falling outside the EEA provisions governing the free movement of goods.[32]

71. If the measure falls to be assessed pursuant to Article 36 EEA, in the view of the Norwegian Government, the referring court needs to assess whether it is "liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the EEA Agreement".[33] A restriction on the freedom to provide services "may be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it".[34] It considers Section 31 LOGA 2006 is a suitable and necessary measure in order to achieve legitimate objectives: it was a formal requirement necessary for the UK Government to bid for the London 2012 Games, and is justified in order to protect cultural interests.[35] Another justification could be that the measure prevented ticket prices from being driven up artificially.

72. Section 31 LOGA 2006 is based on Section 166 of the Criminal Justice and Public Order Act 1994, introduced as a public order and safety measure, both of which constitute legitimate objectives.[36] If, however, the referring court finds that Section 31 LOGA 2006 did, as an incidental consequence, provide for increased consumer protection, the Norwegian Government notes that consumer protection also constitutes a legitimate objective.[37] Furthermore, the measure will be suitable as long as it contributes to the achievement of one or more of the legitimate aims pursued.[38] Finally, it considers the measure to be suitable and consistent, and as fulfilling the necessity test.[39]

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[32] Reference is made to the judgment of 24 November 1993, *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, paragraphs 16 and 17; Case E-16/10 *Philip Morris* [2011] EFTA Ct. Rep. 330, paragraph 44; and the judgment of 19 November 1998, *Nilsson and Others*, C-162/97, EU:C:1998:554, paragraph 28.

[33] Reference is made to Case E-8/17 *Kristoffersen*, judgment of 16 November 2018, not yet reported, paragraph 73, and Case E-8/16 *Netfonds* [2017] EFTA Ct. Rep. 163, paragraph 108.

[34] Reference is made to Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 83, and Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 732, paragraph 49.

[35] Reference is made to the judgment of 11 July 1985, *Cinéthèque*, 60/84 and 61/84, EU:C:1985:329, and the judgment of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft*, C-531/07, EU:C:2009:276, paragraph 34.

[36] Reference is made to the judgment of 3 March 2011, *Kakavetsos-Fragkopoulos*, C-161/09, EU:C:2011:110, paragraph 59, and the judgment of 26 October 2006, *Commission* v *Greece*, C-65/05, EU:C:2006:673, paragraphs 32 to 34.

[37] Reference is made to the judgment of 20 February 1979, *Rewe-Zentral, 'Cassis de Dijon'*, 120/78, EU:C:1979:42, paragraph 8, and the judgment of 30 April 1991, *SCP Boscher and Others*, C-239/90, EU:C:1991:180, paragraph 17.

[38] Reference is made to *Netfonds*, cited above, paragraph 117.

[39] Reference is made to *Kristoffersen*, cited above, paragraph 126, and, to the same effect, to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 58.

73. The Norwegian Government proposes that the questions referred be answered as follows:

Question 1

Point 9 of Annex I to Directive 2005/29/EC must 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 entails that the product cannot legally be sold and which is enforced under national law.

Question 1a

Point 9 of Annex I to Directive 2005/29/EC should be interpreted to encompass a measure like the one at hand, where the sale of a product is illegal in the only jurisdiction where the product can be used.

Question 1b

It is not of significance to the interpretation of point 9 of Annex I to Directive 2005/29/EC if it, after the sale, is determined that the prohibition was contrary to EEA law.

Question 2

It is not necessary to answer questions 2a, 2b and 2c.

74. Should the Court consider it necessary to answer Question 2, the Norwegian Government proposes the following answers:

Question 2a

A prohibition of resale of tickets without authorisation, such as in the London Olympic Games and Paralympic Games Act 2006, does not constitute regulation of commercial practices falling within the scope of Directive 2005/29/EC.

Question 2b

Directive 2005/29/EC does not preclude a national prohibition of resale, such as provided for in the London Olympic Games and Paralympic Games Act 2006.

Question 2c

A prohibition of resale of tickets without authorisation, such as in the London Olympic Games and Paralympic Games Act 2006, is not contrary to the fundamental freedoms under the EEA Agreement, provided suitable and necessary in ensuring legitimate objectives, which is for the referring court to ascertain.

Ireland

75. Notwithstanding that the Directive may not apply at all, if the activity in question is assessed as falling within the field approximated by the Directive, as Question l assumes, Ireland submits that it would fall under point 9 of Annex I to the Directive.

76. Referring to recitals 11 and 12 of the Directive, Ireland submits that the convergence under the Directive stems from the objective of furthering the aim of removing internal market barriers arising in relation to measures which have consumer protection amongst their aims. In effect, the Directive creates a shorthand means of allowing a determination to be made that, in circumstances where an unfair commercial practice falls within the Directive, the corresponding prohibition of that unfair commercial practice has already been deemed to pursue a public interest objective and to be proportionate to those objectives, and is, accordingly, compatible with EEA law.[40]

77. Ireland submits that a State is still entitled to lay down, for example, certain lawful restrictions or prohibitions for reasons other than consumer protection, which could present obstacles to the free movement of services and goods or the freedom of establishment.

Question 1

78. Ireland contends that 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.[41]

Question 1a

79. That the prohibition applies in the EEA State where the product is to be used (the United Kingdom) but not in the State where the product is sold (Norway) is immaterial, according to Ireland, if a national enforcement body such as the Norwegian Market Council has jurisdiction to enforce the Marketing Act, including the Norwegian Regulation which transposes inter alia point 9 of Annex I to the Directive. Such an enforcement body would have to consider, as a matter of fact, that a relevant law existed (LOGA 2006) and the trader's statement or impression did not respect the requirements of that law. Clearly, the Norwegian Market Council in the present case was satisfied of that condition.

80. Ireland submits that a determination as to the condition of whether it has been stated or represented that a product or service can "legally be sold when it cannot" is a question of fact. This is consistent with the submission that when carrying out an assessment of

[40] Reference is made to the judgment of 10 July 2014, *Commission* v *Belgium*, C-421/12, EU:C:2014:2064, paragraphs 55 and 56.

[41] Reference is made to 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.

whether point 9 of Annex I to the Directive applies at all, it is not relevant that it may be determined subsequently that a prohibition was not compatible with EEA law. It is an established principle that the courts of one Member State have no jurisdiction to review the legality of acts of another Member State.[42] The legality of LOGA 2006 was not challenged, it appears, in the proper forum, the High Court of England and Wales, and it would be wholly improper if it could be raised as an issue before the Norwegian courts. This would be contrary to the established principles of jurisdiction, based on State comity and trust.

81. Moreover, it would be contrary to legal certainty and the principles underpinning the harmonisation wrought by the Directive if the question of whether or not a prohibition of a certain practice was otherwise lawful could be altered in circumstances where the legality of such prohibitions might be challenged depending on the arguments raised by a particular trader in a particular State, and only after the sale of the product or service in question. It would upset the balance struck by the Directive.[43] Finally, 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.

Question 1b

82. 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. This is particularly so where the activity concerns the level of information that must be provided to the consumer at the time of sale. 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.

Question 2

83. Ireland's submissions on Question 2 are made on an alternative basis only, should the Court consider it necessary to adjudicate upon those issues.

Question 2a

84. It is those commercial practices defined in Article 2(d) of the Directive which are prohibited by Article 5 of the Directive. It is for the for the referring court determine, on

[42] Reference is made to the judgment of 14 March 2018, *Astellas Pharma*, C-557/16, EU:C:2018:181, paragraphs 40 and 41.

[43] Reference is made to the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: First Report on the application 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 (COM(2013) 139 final), section 2.3.

the basis of the facts before it, whether the combination of the Norwegian Marketing Act and the LOGA 2006 are aimed at regulating commercial practices as defined in Article 2(d) of the Directive. Ireland submits that there are number of factors to suggest that LOGA 2006 principally pursues objectives other than the protection of the economic interests of consumers, as pursued by the Directive. Such objectives may include: to protect the Olympic and London Olympics brands; to reduce security, public order and health and safety risks that could arise in circumstances where there is less visibility of who bought the tickets; to protect other commercial entities, including potentially entities owned by the International Olympic Committee and its related bodies; and to allow a broader access of members of the community to attend sporting events; and reduce criminal activity arising from the unauthorised selling and reselling of tickets.

85. In any event, if there are sufficient aims directed at the protection of the economic interests of consumers in the Norwegian Marketing Act and LOGA 2006 such that sufficient regulation of commercial practices is demonstrated, and the Directive applies, Ireland considers that the activities in question constitute an unfair commercial practice of the type prohibited by point 9 of Annex I to the Directive.

Question 2b

86. Ireland submits that if other considerations are pursued by the LOGA 2006, as well as the protection of the economic interests of consumers, this may still be compatible with the harmonised regime under the Directive, provided that the other considerations or aims constitute a lawful exemption or justification within the terms of the Directive.[44] That other aims are also pursued by a national prohibitory measure would not, in principle, justify a finding that such a measure was otherwise incompatible with the Directive, as those other aims could either form an Article 3 exception or be justified through the prism of Article 4 of the Directive, having regard to recitals 7 and 9 of the Directive.

87. To the extent that the prohibition in LOGA 2006 does fall within the scope of the Directive, Ireland considers that it is compatible with the Directive's requirements.

88. Ireland submits that the Appellant appears to challenge LOGA 2006 also on the basis of Article 4 of the Directive. It contends that the prohibition in question is not incompatible with the principles of fundamental free movement of goods and services which Article 4 of the Directive makes patent. National rules which place restrictions on the sale or resale of a particular product or service are not aimed at regulating trade and, arguably constitute selling arrangements.[45] Member States have competence to make rules

[44] Reference is made to the judgment of 17 October 2013, *RLvS Verlagsgesellschaft*, C-391/12, EU:C:2013:669, paragraph 33, and the judgment in *Mediaprint Zeitungs- und Zeitschriftenverlag*, cited above, paragraphs 26, 27, and 34.

[45] Reference is made to the judgment in *Keck and Mithouard*, cited above, paragraphs 16 and 17, and *Philip Morris*, cited above, paragraphs 38 to 51.

that are either such mere selling arrangements and are not aimed at affecting trade on the justificatory grounds which would otherwise apply to any such restriction.

89. Alternatively, such a restriction would be deemed to fall under either Article 11, 12, 31, or 36 EEA. As underlined in recital 5 of the Directive itself, should the activity and prohibition in question fall outside the Directive's scope and require assessment in light of EEA free movement rules, in Ireland's view, the prohibition is justified by the application of Articles 13, 33, and 39 EEA. Moreover, an inherent jurisdiction exists for the ECJ or the Court to expand these public interest objectives in exceptional circumstances.

Question 2c

90. Ireland submits that a national court ought to apply the framework of assessment mentioned in its submissions on Question 2b, namely considering whether the restriction protects one of the recognised public interest objectives and is proportionate to that objective when assessing whether that restriction can be justified and, accordingly, found not in breach of the fundamental freedoms under the EEA Agreement. Ireland refers to the well-established criteria set out in *Philip Morris*.[46]

91. Ireland suggests that the Court should answer the questions referred as follows:

Question 1

Annex I point 9 of the Directive covers a situation where a trader states or otherwise creates the impression that a product can legally be sold in an EEA State in circumstances where there is a legislative provision of another EEA State, such as the UK 2006 Act, which provides that the product cannot legally be sold.

The fact 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 has no bearing on this assessment. Neither does the fact that, after the sale, it is determined that the prohibition was contrary to EEA law have any bearing on the assessment

Given Ireland's response to part of Question 1, Question 2 need not be addressed, and is answered below strictly as Ireland's alternative position.

Question 2 (in the alternative)

The Directive permits national measures regulating activities which restrict the sale of a product or service, such as reselling tickets, or impose restrictions on the marketing of such products or services. It is for the Referring Court to determine, by application of the principles to the facts, whether the activities in question may not be business-to-consumer commercial practices, or whether the aims pursued by the national measures imposing the prohibitions are, in fact, other than protection of the economic interests of consumers. Such national rules will not fall within the

[46] Reference is made to *Philip Morris*, cited above, paragraphs 78, 80, 81, 82, and 85.

scope of the Directive where their objectives seek to meet public interest ends which do not include the protection of the economic interests of consumers. To the extent that a rule pursues protection of the economic interests of consumers and other objectives, it will still be compatible with the Directive provided that it can be exempted or justified within the terms of the Directive itself, such as on grounds of upholding contract law principles, ensuring the health and safety aspects of products and services and their delivery including addressing public security or public safety issues which could arise at a large scale event, or encouraging cultural or societal integration by ensuring access to certain events.

Further, such a national measure would be compatible with inter alia Articles 11, 31 and 36 of the EEA Agreement as either not falling at all within the scope of those provisions being selling arrangements and not restrictions on trade, or being justified under one of the public interest grounds codified in Articles 13, 33 and 39 of the EEA Agreement, being public security, public policy and public health, or constituting an exceptional basis for providing a further public interest justification by the Court.

In making the assessment as to whether a national measure is suitable and necessary for achieving a legitimate objective such as, for example, public health or security, the criteria that the national court must apply require it to undertake the following:

to identify the aims which the national measure at issue is actually intended to pursue;

to consider whether those effects could have been attained by less restrictive means which necessitates determining the appropriate degree of protection to be afforded;

to give effect to the fact that, in particular for certain aims such as public health and security, an EEA State has a wide margin of discretion when setting an appropriate level of protection, and so variations as between States may be disregarded;

to determine that the measures are justified and appropriate in that they do not go beyond what is necessary to attain the objective in question;

to acknowledge that, where there are unidentified risks involved, that an EEA State should be able to act in a precautionary manner and take protective measures without having to wait and to take measures to reduce as far as possible a public health risk; and

to determine if the measure is suitable, meaning that it does not go beyond what is necessary to meet the declared purpose and could not be achieved by less extensive restrictions having less effect on intra-EEA trade.

The United Kingdom

Question 1

92. The United Kingdom submits that there may some confusion in two regards regarding 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 marketing or sale of the product or service in question. 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. 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 not just the trader's legal authority under any applicable statutory or regulatory framework but also pursuant to the terms and conditions imposed by any applicable contractual framework.

93. When Euroteam offered the tickets for sale in 2012, Section 41(5) LOGA 2006 prohibited the resale of tickets by unauthorised dealers, regardless of the place where such sale took place and the medium used. As a matter of English law, the applicable law governing the rights and obligations conferred by the ticket as well as the conditions for their sale and/or transfer, Euroteam was not authorised by LOCOG to sell or transfer the tickets such that any resale was in breach of Section 31 LOGA 2006 and Clause 17 of LOCOG's terms and conditions. Euroteam could not give good title to the ticket, in accordance with the *nemo dat* principle. The tickets were void and any rights thereunder were nullified (Clauses 17.1 and 18 of LOCOG's terms and conditions). Consequently, a consumer did not acquire any rights thereunder and so could not lawfully use the ticket to gain access to the London 2012 Games.

94. The United Kingdom submits that an offer or sale of tickets in circumstances where the seller cannot give good title to those tickets and/or the consumer cannot lawfully make use of them infringes point 9 of Annex I to the Directive and is automatically unfair.[47]

Question 1a

95. The United Kingdom submits that point 9 of Annex I to the Directive is silent as to its geographic scope. It is immaterial where the statutory or contractual prohibition applies in the State where the product is used but is not in force in the State where the product is sold. In any event, Section 41(5) LOGA 2006, gave the statutory prohibition extra-territorial application, and so sales across the EEA were illegal as a matter of English law.

[47] Reference is made to 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, and the ruling in the related proceedings in the High Court of England & Wales *Office of Fair Trading* v *Euroteam SA* [2012] EWHC per Parker J.

Moreover, the legality and compatibility of the United Kingdom statutory prohibition with the Directive cannot be called into question before another Member State's courts.[48]

96. 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.

Question 1b

97. 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 time period in this case would appear to be from 2011 until the end of the London 2012 Paralympic Games in September 2012.[49]

98. In the United Kingdom's assessment, the material issue is whether the trader provided sufficient information to the consumer at the time of the offer or sale, which warned the purchaser of the potential risk that the seller might not have the requisite legal authority and that the purchaser could be refused entry under the contractual framework governing the tickets' rights of use. In this connection, regard should be had to the information asymmetry between the parties and the importance of legal certainty.

99. 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.

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[48] Reference is made, by analogy, to *Astellas Pharma*, cited above, paragraphs 40 and 41, concerning the harmonised procedure for medicinal authorisations, and to the judgment of 16 December 1981, *Foglia* v *Novello*, 244/80, EU:C:1981:302, paragraphs 24 to 31.

[49] Reference is made to 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 2.3.

Question 2

100. In the light of its response to the second sub-question in Question 1, the United Kingdom submits that there is no need to answer Question 2. Further, and in any event, given that the Appellant advanced arguments challenging the compatibility of the statutory prohibition with EEA law before the High Court of England and Wales in July 2012 and did not seek to appeal either the interim or final enforcement orders, it would be an abuse of process to seek to re-litigate those same arguments before a different forum. The United Kingdom submits that the referring court should recognise and give effect to the prior judgment given by the High Court in *OFT* v *Euroteam.*[50]

101. Should the Court wish to consider Question 2, the United Kingdom submits that Questions 2(a) and (b) should be considered together.

102. The statutory prohibition in Section 31 LOGA 2006 falls outside the Directive's scope since it does not intend to regulate commercial practices falling within its scope. The provision's primary aim is not consumer protection but a wide range of other public interests related to the unique circumstances of the London 2012 Games. Those objectives result from host city requirements and guiding principles imposed by the IOC as well as wider public interest objectives, including but not limited to: protecting the brand and reputation of LOCOG and the IOC; ensuring fair and equal access for members of the public to purchase tickets, thereby facilitating social cohesion; ensuring fair opportunities and social inclusiveness for all sections of the population to attend the Games and benefit from so doing; to prevent organised crime and money laundering by criminal gangs redistributing tickets; and providing means to address potential concerns associated with national security, public order, health and safety and/or the prevention of terrorism.

103. Should the Court consider the statutory prohibition to fall within the Directive's scope, the United Kingdom submits that there is no incompatibility as the prohibition is covered by an exception or objective justification. In terms of exceptions, recitals 7 and 9 and Article 3 of the Directive make clear that the Directive is without prejudice to Community and national rules relating to, inter alia, cultural reasons, contract law, health and safety and authorisation regimes, provided such rules are in conformity with EU law.

104. To the extent that the Appellant seeks to invoke Article 4 of the Directive, the United Kingdom submits that there is no incompatibility with the free movement of goods or

[50] Reference is made to Articles 35, 36 and 52 of the RBR [Recast Brussels Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1))] and Articles 33 and 36 of the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

services.[51] In the present case, the statutory prohibition in Section 31 LOGA 2006, read in conjunction with the applicable LOCOG contractual framework, is a mere selling arrangement. It is not designed to regulate trade between EEA States. The original tickets were only made available in the United Kingdom and there was no independent production that could be imported. Further, the prohibition is non-discriminatory as it applies to all resellers irrespective of the country from which they originate. Lastly, it affects in the same manner *de jure* and *de facto* the marketing of tickets to the London 2012 Games in both the United Kingdom and elsewhere. Accordingly, the statutory prohibition is not such as to prevent sales of tickets from Norwegian traders from having access to the secondary market or to impede such access more than it impedes the access of domestic traders.

105. If the statutory prohibition and/or contractual terms and conditions imposed by LOCOG as a state entity fall outside the Directive's scope and fall to be assessed under the EEA's free movement provisions, the United Kingdom Government submits that they either fall outside those provisions as selling arrangements, or would be fully justified by public policy, health and security concerns pursuant to Articles 13, 33 and 39 EEA and/or are suitable, effective and proportionate for securing those wider public interest objectives.

Question 2c

106. The United Kingdom submits that it is for the national court to identify the aims that the measure at issue is actually intended to pursue.[52] In terms of the criteria that the national court should apply to determine objective justification and/or the suitability and/or proportionality of the prohibition and/or LOCOG contractual restrictions, the United Kingdom refers to the well-established criteria set out in *Philip Morris*.[53]

107. The United Kingdom submits that the Court should hold as follows:

Question (1)

Point 9 of Annex I to [the Directive] should be interpreted to mean that the offer or sale of tickets shall be regarded as an unfair and misleading commercial practice, in circumstances where a trader states or otherwise creates the misleading impression that the product can legally be sold despite the existence of a legislative or regulatory prohibition, such as that in s.31 of LOGA 2006, which is in force and enforced in an EEA State under national law and/or a contractual framework that nullifies the rights and obligations conferred as part of the product or service in question. It makes no difference that the statutory prohibition applies and is enforced in the EEA State where the product is to be used. The fact that, after the sale, the trader challenges the statutory

[51] Reference is made to the European Commission Staff Working Document (SWD(2016) 163 final): *Guidance on the implementation / application of Directive 2005/29/EC on unfair commercial practices*; *Philip Morris*, cited above, paragraphs 44 and 45; and the judgment in *Keck and Mithouard*, cited above, paragraphs 16 and 17.
[52] Reference is made to the judgment in *Ladbrokes*, cited above, paragraph 43.
[53] Reference is made to *Philip Morris*, cited above, paragraphs 77, 80, 82, 83 and 85 to 88; to the judgment of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraph 51; and the judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraph 30.

prohibition and obtains a determination that the ban was contrary to EEA law has no bearing on the assessment of unfairness, which must be carried out according to the impression given by the trader at the time of the consumer's transactional decision(s) in relation to the product or service in question.

Question (2)

In the light of the response to the second sub question in Question 1, there is no need to answer Question 2.

108. In the alternative, should the Court wish to consider the issues raised in Question 2, the United Kingdom submits it should be as answered as follows:

The [Directive] does not preclude national rules which restrict the sale or use of a particular product or service or subject its marketing and/or sale to certain conditions. Such regulatory measures will fall outside the scope of the [Directive] where their primary aim is the pursuit of wider public interest considerations, such as the protection of intellectual property and goodwill, ensuring equal access and social inclusion in respect of publicly funded events, promoting participation in sporting, recreational and cultural activities, preventing organised crime and/or handling potential national security or public order incidents.

To the extent that the measures fall within the [Directive], they are not incompatible where they are covered by derogations in the [Directive] itself.

Further, they do not contravene Article 36 EEA since they are either selling arrangements or otherwise justified in the public interest by virtue of Articles 13, 33 and 39 EEA. Such public interest considerations include the protection of national security, public health and public order.

It is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to determine whether the statutory prohibition in question is suitable, necessary and proportionate to those public interest objectives. That assessment should bear in mind that an EEA State is allowed a certain margin of discretion to determine the degree of protection that it wishes to afford to the relevant public interest objective and the way in which that protection is to be achieved. The EEA State is also entitled to impose a very high level of protection without having to wait until the reality of the risk to national security or public policy becomes fully apparent.

ESA

109. ESA submits that the Directive, according to recitals 5, 6, and 12 and Article 1 thereof, is intended to establish uniform rules on unfair business-to-consumer commercial practices in order to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection. Thus, the Directive fully harmonises those rules at EEA level. Accordingly, Article 4 of the Directive expressly provides that States may not adopt stricter rules than those provided for in the Directive, even in order to

achieve a higher level of consumer protection.[54] Article 3(1) of the Directive sets out its scope, while Article 5 of the Directive contains its core operative provisions and provides that unfair commercial practices are to be prohibited and sets out the criteria on the basis of which practices are to be classified as being unfair.

110. Annex I to the Directive establishes an exhaustive list of 31 commercial practices which are regarded as unfair "in all circumstances". As recital 17 expressly states, these are the only commercial practices which can be deemed to be unfair without a case-by-case assessment under Articles 5 to 9 of the Directive. The Annex I list may only be modified by revision of the Directive itself.[55]

111. ESA submits that conduct such as in the present case falls, in principle, within the scope of point 9 of Annex I to the Directive. As the Directive's provisions cannot be interpreted in the light of only either consumer or business interests and, as it does not constitute a pure consumer protection measure, it is inappropriate to apply the teleological approach.[56] Any interpretation of Annex I should avoid interpretations which, in effect, entail a modification of that list.[57]

112. ESA contends that the Court should interpret point 9 of Annex I to the Directive using an approach similar to that taken by the ECJ in interpreting point 31 of Annex I in *Purely Creative and Others*, 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.[58] 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".

113. On ESA's understanding of the present case, the resale of the tickets in issue was not as such unlawful under Norwegian legislation. Rather, in imposing sanctions on the Appellant, the Norwegian authorities were in effect acting in reliance on Section 31 LOGA 2006. It may be the case that the Appellant's conduct was in breach of contractual provisions, however, in ESA's submission, such considerations are irrelevant for the purposes of interpreting the term "legally" in point 9 of Annex I.

114. The question thus arises under the law of which State the legality of the sale has to be assessed for the purposes of point 9 of Annex I to the Directive, and whether the provision refers to legality in the whole of the EEA, in any one EEA State or in a particular

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[54] Reference is made to the judgment of 23 April 2009, *VTB-VAB and Galatea*, C-261/07 and C-299/07, EU:C:2009:244, paragraphs 51 to 56.
[55] Reference is made to the judgments in *Köck*, cited above, and *Purely Creative and Others*, cited above.
[56] Reference is made to recital 12 of the Directive, to the judgment in *Commission* v *Belgium*, cited above, paragraph 55, and to the Opinion of Advocate General Trstenjak in *Köck*, cited above, footnote 6.
[57] Reference is made to recital 17 of the Directive and to the judgment in *Purely Creative and Others*, cited above, paragraph 45.
[58] Reference is made to the judgment in *Purely Creative and Others*, cited above, paragraphs 24 to 51.

EEA State. The wording of point 9 in itself provides little additional guidance.[59] However, an understanding of the word "legally" which encompasses the State of execution or performance, in accordance with recital 13, would support the purpose of achieving a high level of consumer protection envisaged by recital 1. This is further supported by Article 3(1) of the Directive which extends protection to consumers' economic decision-making to a period after the transaction. In this case, this would include going to the stadium and using the ticket, thereby executing the contract. The law of the place of performance or execution of a service contract is in any event routinely considered at least potentially relevant for the purposes of private international law, as demonstrated notably by the Rome I Regulation[60] and the Lugano Convention, respectively. On the basis of Article 6(4)(a) of the Rome I Regulation, and Article 5(1) of the Lugano Convention, for contracts for the supply or provision of services, a relevant applicable law and legal forum would, in any event, be that of the place of performance of the obligation in question. In this case, this would be the United Kingdom where the tickets gave access to the London 2012 Games.

115. 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" in point 9 of Annex I to the Directive 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.

116. 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 Directive 2005/29/EC, falls within the phrase "otherwise creating the impression".

117. In ESA's assessment, consumers will normally expect,[61] and should be entitled to expect, that products which they are offered to purchase are offered lawfully. It would seem

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[59] Reference is made to the answer of 30 June 2016 given by Ms Jourová on behalf of the Commission, E-003022/2016, available at: http://www.europarl.europa.eu/doceo/document/E-8-2016-003022-ASW_EN.html.

[60] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6). In this connection, ESA notes that, although the Rome I Regulation is not applicable in the EEA, the Norwegian Supreme Court in Rt. 2009 p. 1537 paragraph 34 stated (with reference to the Rome II Regulation): "It follows from Article 3 that the regulation is applicable not only internally within the EU, but that it for the Member States also applies with respect to States outside the community. Norway is not bound by the Regulation. To the extent that we do not have deviating legislation, the objective of legal harmony/unity speaks in favour of us taking into account the solution chosen by the EU countries, when deciding on choice of law questions." («*Det fremgår av artikkel 3 at forordningen ikke bare gjelder internt innenfor EU, men at den for medlemslandene også gjelder i forhold til stater utenfor fellesskapet. Norge er ikke bundet av forordningen. I den utstrekning vi ikke har avvikende lovregulering, taler imidlertid hensynet til rettsenhet for at vi ved avgjørelse av rettsvalgsspørsmål legger vekt på den løsning som EU-landene har valgt.*») ESA's translation.

[61] Reference is made to the judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraphs 22 and 23.

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.[62] 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.[63]

118. 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.

119. For the sake of completeness and in the light of the severity of the sanctions imposed on the Appellant, which appear capable of falling within the notion of "criminal sanctions" for the purposes of fundamental rights protection, ESA emphasises the Court's established case-law on the issue.[64] Consequently, according to ESA, it is thus incumbent on the national court, before confirming the imposition of the sanctions at issue, to verify that the principle of legal certainty[65] is complied with to a sufficient degree to permit a criminal sanction, notwithstanding certain ambiguities in the wording of point 9 of Annex I to the Directive. This applies notwithstanding the fact that Article 13 of the Directive on penalties does not entail harmonisation in the EEA and therefore EEA States can implement sanctions at their own discretion so long as they are effective, proportionate and dissuasive.

Question 1b

120. ESA submits that, in principle, a preliminary ruling on the interpretation of a rule of EEA law clarifies, and where necessary defines, the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted must in principle be applied by national courts even to legal relationships arising and established before the judgment ruling on the request for interpretation.[66] Where provisions of EU law are unconditional and sufficiently

[62] Reference is made to the judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 47 and case-law cited.
[63] Reference is made to the European Commission Staff Working Document (SWD(2016) 163 final): *Guidance on the implementation / application of Directive 2005/29/EC on unfair commercial practices*, pp. 80 and 87.
[64] Reference is made to Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 85, and case-law cited.
[65] Reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37.
[66] Reference is made to the judgment of 10 January 2006, *Skov and Bilka*, C-402/03, EU:C:2006:6, paragraph 50; and the judgment of 27 March 1980, *Denkavit Italiana*, 61/79, EU:C:1980:100, paragraph 16.

precise they may be relied on against any national provisions in an EU State, which are contrary to such law and as a result the national provisions would lack the force of law.[67]

121. In cases concerning point 9 of Annex I to the Directive, and specifically the term "legally," the determinative question concerns the fairness of the commercial practice at issue. In the present case, the proceedings concern the imposition of sanctions for failure to provide information about the resale prohibition imposed by Section 31 LOGA 2006. In ESA's submission, the information obligation incumbent on businesses by virtue of the Directive cannot be displaced by virtue of the fact that the trader merely asserts the incompatibility with EEA law of the prohibition at issue. That would weaken the deterrence resulting from effective penalties, as required by Article 13 of the Directive. If a trader has doubts about the compatibility with EEA law of a national provision, the trader may, prior to engaging in business-to-consumer commercial practices, seek effective judicial protection against the application of that national law.[68]

122. 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.

Question 2

123. In the light of its answer to Question 1(b), ESA submits that the Court need not address Question 2. It makes the following submissions should the Court deem it necessary to address the second question referred. As a preliminary point, ESA contends that by reason of the full harmonisation nature of the Directive concerning unfair commercial practices vis-à-vis consumers, EEA States may not adopt stricter rules than those provided for in the Directive even in order to achieve a higher level of consumer protection.[69]

124. The national court seeks guidance on whether the prohibition on resale in Section 31 LOGA 2006 is compatible with the Directive. Having regard to Articles 1, 3(1) and 5 of the Directive, ESA submits that for national legislation to fall within the scope of the Directive, it must regulate a business-to-consumer commercial practice, the aim of the legislation must be to protect consumers' economic interests, and none of the exemptions in Article 3 of the Directive can apply.[70] If the Directive applies, the national legislation must not go beyond the boundaries set by Articles 5 to 9 thereof.

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[67] Reference is made to the judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 42, and the judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49.
[68] Reference is made to the judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraphs 37 to 39.
[69] Reference is made to the judgment in *Commission* v *Belgium*, cited above, paragraph 55.
[70] Reference is made to the Opinion of Advocate General Trstenjak in *Köck*, cited above, point 41, the judgment in the same case, cited above, paragraphs 25 to 33, and the judgment in *VTB-VAB and Galatea*, cited above, paragraphs 46 to 68.

125. ESA submits that while Section 31 LOGA 2006 *prima facie* regulates only selling, the broad definition in Section 31(2)(b) LOGA 2006 entails that selling includes other practices including advertising. Therefore, it could regulate a commercial practice as defined in the Directive. The referring court would then need to establish whether LOGA 2006 pursues objectives relating to consumer protection.[71] If so, it would need to examine whether any exemptions apply. ESA considers that the exception in Article 3(3) of the Directive could apply.[72] If the national court finds that LOGA 2006 does, in fact, fall within the scope of the Directive, it must examine whether the commercial practice falls under Annex I thereto. If not, the commercial practice must then be examined as to whether it is unfair under Articles 5 to 9 of the Directive. If the national court does not find that the commercial practice is unfair, such legislation would be contrary to the Directive.[73]

126. Second, the national court seeks guidance on whether the prohibition on resale in Section 31 LOGA 2006 is compatible with the EEA fundamental freedoms. The national court needs to have regard to the provisions of Directive 2006/123/EC on services in the internal market.[74] ESA submits that the prohibition on resale in Section 31 LOGA 2006 is, in principle, contrary to Article 36 EEA.[75] However, the restriction may be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it is justified to secure the objective which it pursues and does not go beyond what is suitable and necessary to attain it. In the present case, the courts of Norway are called upon to examine the compatibility of the law of the United Kingdom which puts the United Kingdom's authorities in a procedurally rather less advantageous position than they would be if the matter were pending before its own courts. While the national court will have to proceed with particular caution were it to examine this issue, there is no reason of principle why it should be precluded from ruling on the matter.[76] The ECJ has given a number of preliminary rulings in similar circumstances.[77] The United Kingdom Government would need to identify the objectives relied upon in enacting Section 31 LOGA 2006, accounting for the proportionality of the level of protection sought.[78] It would be for the national court to assess these matters.[79]

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[71] Reference is made to the judgments in *Mediaprint Zeitungs- und Zeitschriftenverlag*, cited above, paragraphs 20, 21, 23, and 24, and *Köck*, cited above, paragraph 30, to the Opinion of Advocate General Bobek in *Kirchstein*, cited above, point 136, and to the judgment of 30 June 2011, *Wamo*, C-288/10, EU:C:2011:443, paragraph 28.

[72] Reference is made to the judgment of 16 July 2015, *Abcur*, C-544/13 and C-545/13, EU:C:2015:481.

[73] Reference is made to the judgment in *Köck*, cited above, paragraphs 33 to 50.

[74] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

[75] Reference is made to Case E-19/15 *ESA* v *Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 85.

[76] Reference is made to the Opinion of Advocate General Slynn in *Foglia* v *Novello II*, 244/80, EU:C:1981:175, pp. 3073–3074.

[77] Reference is made to the judgments of 4 February 1965, *Albatros*, 20/64, EU:C:1965:8, of 30 November 1977, *Cayrol*, 52/77, EU:C:1977:196, of 12 July 1979, *Union Laitière Normande*, 244/78, EU:C:1979:198, and of 23 November 1989, *Eau de Cologne & Parfümerie-Fabrik 4711*, C-150/88, EU:C:1989:594.

[78] Reference is made to Case E-1/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 8.

[79] Reference is made to *Kristoffersen*, cited above, *Casino Admiral*, cited above, and *Netfonds*, cited above.

127. ESA contends that if the objective sought could be attained as effectively with a system of targeted *a posteriori* controls and appropriate penalties, *a priori* authorisation cannot be considered necessary.[80] In order for a prior authorisation scheme to be justified it must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the discretion exercised by the national authorities, so that it is not used arbitrarily.[81] The administrative scheme must be based on a procedural system where a refusal to grant authorisation is capable of being challenged in judicial or quasi-judicial proceedings.[82]

128. ESA submits that the Court should answer the questions referred as follows:

1) Point 9 of Annex I to Directive 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market is to be interpreted as covering situations where a trader fails to provide information to consumers about the fact that the sales contract cannot legally be executed at the contemplated place of performance.

2) In circumstances such as the ones of the case pending before the national court, it is irrelevant for the purposes of application of Point 9 of Annex I to Directive 2005/29 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

Question 1

129. As a preliminary point, the Commission stresses that the main of 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.[83]

[80] Reference is made to *ESA* v *Liechtenstein*, cited above, paragraphs 78 and 87.
[81] Reference is made to the judgment of 22 January 2002, *Canal Satélite Digital*, C-390/99, EU:C:2002:34, paragraph 35.
[82] Reference is made to Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 320, paragraph 48.
[83] Reference is made to the judgment in *Commission* v *Belgium*, cited above, paragraph 56.

130. 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.[84]

Question 1a

131. 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. The Commission considers the question to be irrelevant in the light of Section 41(5) LOGA 2006 and the respective explanatory note 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.

132. 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 its purpose.

Question 1b

133. 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 which 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.

[84] Reference is made to the European Commission Staff Working Document (SWD(2016) 163 final): *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, section 4.1.

Questions 2a and 2b

134. In light of the reply it proposes to Question 1, the Commission considers the second question irrelevant for the national court to give a ruling in the main proceedings. It makes the following observations in a purely subsidiary manner and only for completeness.

135. The Commission considers the referring court's questions as asking, in essence, whether the rules in Section 31 LOGA 2006 could be contrary to the Directive, since the ban of non-authorised resales of Olympic tickets could be in violation of the full harmonisation achieved by the Directive.

136. The Commission submits that where a national provision covers a commercial practice within the meaning of Article 2(d) of the Directive and pursues consumer protection objectives, which it is for the referring court to determine, then such a provision falls within the Directive's scope.[85] In accordance with Article 4 of the Directive, Member States may not maintain or adopt more restrictive national measures than those laid down in the Directive.[86]

137. The restriction on the resale of tickets does not appear, as such, in Annex I to the Directive and, as a consequence, the Commission contends, cannot be considered as unfair in all circumstances, but can be prohibited only following a specific assessment in accordance with the criteria set out in Articles 5 to 9 of the Directive allowing the unfairness of the practice to be established.[87]

138. In assessing whether Section 31 LOGA 2006 comes within the scope of the Directive, the Commission submits that the resale of tickets constitutes a "commercial practice" within the meaning of Article 2(d) of the Directive.[88] Next it must be examined whether the national provision falls within the scope of the Directive in terms of its objective i.e. whether the restriction pursues an objective of consumer protection.[89] National provisions which do not have the objective of consumer protection fall outside the scope of application of the Directive.[90]

139. The Commission highlights the explanations set out in recitals 6[91] and 9 of the Directive. Whilst it is for the national court to assess the objective pursued by the national provision,[92] the Commission submits nonetheless that since it is far from clear whether the

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[85] Reference is made to the judgment in *RLvS Verlagsgesellschaft*, cited above, paragraph 35.
[86] Reference is made to the judgment in *Commission* v *Belgium*, cited above, paragraph 55.
[87] Reference is made to the judgments in *Köck*, cited above, paragraph 35, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, cited above, paragraph 35.
[88] Reference is made to the judgment in *Mediaprint Zeitungs- und Zeitschriftenverlag*, cited above, paragraph 17.
[89] Reference is made to the judgment in *Köck*, cited above, paragraph 17, and the order in *Euronics Belgium*, cited above, paragraph 17.
[90] Reference is made to the order of 4 October 2012, *Pelckmans Turnhout*, C-559/11, EU:C:2012:615, paragraph 20.
[91] Reference is made to the judgment in *Köck*, cited above, paragraph 31.
[92] Reference is made to the order in *Cdiscount*, cited above, paragraph 19.

restriction at stake is aimed at protecting the economic interests of consumers it cannot be ascertained clearly that Section 31 LOGA 2006 comes within the Directive's scope.

Question 2c

140. Insofar as the ban on unauthorised resales of tickets imposed by LOGA 2006 might potentially fall within the scope of Directive 2006/123/EC on services in the internal market, or given that the tickets were sold online, Directive 2000/31/EC,[93] the compatibility assessment should be carried out in the light of that instrument.[94]

141. The Commission notes that Article 3 of Directive 2000/31/EC sets out a methodological assessment of potential restrictions to the provision of information society services comparable to the analysis carried out under Article 36 EEA, with Article 3(4) of Directive 2000/31/EC setting out the grounds for justification. The restriction on the resale of tickets in Section 31 LOGA 2006 could be considered as a measure potentially restricting, in particular, the freedom to provide services.[95]

142. It is for the national court to identify the objectives pursued by the national legislation, and to determine whether the restrictions are proportional.[96]

143. The Commission considers that, in the present case, the limited information provided in the request for an advisory opinion is such that it cannot provide a fully informed opinion on whether the national provision is necessary to achieve the objective supposedly pursued. Nor can it assist on the potential proportionality of the measure. Nevertheless, it has been accepted that requesting a prior authorisation for the provision of services could, in some cases, be considered proportionate, as long as the competent authority that exercises its power of discretion does so in a transparent and non-discriminatory manner.[97] In any event, it is for the Member State which has adopted such legislation to produce evidence establishing the existence of objectives capable of justifying that restriction and its proportionality.[98]

144. The Commission proposes that the questions referred be answered as follows:

Point 9 of Annex I to Directive 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market is to be interpreted as

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[93] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1).

[94] Reference is made to the judgment of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 118.

[95] Reference is made to the judgment of 30 January 2018, *Visser*, C-360/15 and C-31/16, EU:C:2018:44, paragraphs 91 and 97.

[96] Reference is made to the judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraphs 47 and 48.

[97] Reference is made to the judgment of 19 July 2012, *Garkalns*, C-470/11, EU:C:2012:505, paragraph 47.

[98] Reference is made to the judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 59.

covering situations where a trader states or otherwise creates the impression that a product can legally be sold, by omitting to inform the consumer of the legal restriction affecting the sale, possession or use of a particular product.

Under the circumstances of the present case, the determination, after the sale, that the prohibition under national law is contrary to EEA law should not have a bearing on the assessment of whether the trader engaged in an unfair commercial practice within the meaning of Point 9 of Annex I to Directive 2005/29.

Bernd Hammermann
Judge-Rapporteur