COURT OF JUSTICE
OF THE EUROPEAN UNION

RECENT UCPD JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

(2021- Sept. 2023)

TIHAMÉR TÓTH
JUDGE, GENERAL COURT OF THE EU

C-536/20 TIKETA

The story behind the preliminary reference

- M. Š. asked Tiketa to reimburse his ticket and his travel costs and to compensate him for the non-pecuniary damage suffered. Tiketa informed him that he should approach Baltic Music, the event oranizer, since Tiketa was only the online ticket distributor. Tiketa was ordered to pay the damages by two courts. Supreme court requests PR.

Legal issues

- The concept of **'trader' -** point 2 of Article 2 of Directive 2011/83/EU on consumer rights: „any natural person or any legal person, *irrespective of whether privately or publicly owned*, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive" = UCPD Art. 2. b)
- Different language versions – unlike the Lithunaian, the English and French versions imply that the fact that a person makes use of an intermediary does not relieve him of his status as a trader
- Pre- and post-contractual information obligations in distant selling

C-536/20 TIKETA

The preliminary ruling:

- In case of divergence between various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules
- In *Kamenova* (C-105/17) the Court ruled that the concept of 'trader', must be interpreted uniformly in Dir. 2011/83 and 2005/29, since those are based on Article 114 TFEU and, as such, pursue the same objectives: to contribute to the proper functioning of the internal market and to ensure a high level of consumer protection
- Also a person acting as an intermediary is a 'trader' and both of those traders are required to ensure compliance with the requirements laid down by the directive, the intermediary cannot escape liability by explaining its position to the consumer
- The pre-contractual information obligations can be met through the general terms and conditions on the intermediary's website, which that consumer accepts by ticking the box
- However, this form cannot substitute for the confirmation which must be provided to the consumer on a durable medium after the conclusion of the contract; this method should fulfil the same functions as paper form, in order to enable the consumer to exercise his rights where necessary

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C-208/21 TOWARZYSTWO UBEZPIECZEŃ Ż MISLEADING STANDARD INSURANCE CONTRACTS

The story behind the reference for preliminary ruling

- Unit-linked group contract designed by TUŻ and marketed to consumers by bank Y, which received a commission from TUŻ
- When the plaintiff learned that the value of her units in the investment fund was significantly lower than the amount of the assurance premiums which she had paid, she terminated the assurance contract and requested TUŻ to refund the assurance premiums; TUŻ refused that request - she sued TUŻ.

Legal issues

- Concept of unfair commercial practices, liability in triangular legal relations
- Is a national implementing law that allows for the annulment of a contract concluded on the basis of an UCP unlawful? Under Article 3(2) UCPD a finding that a commercial practice is unfair does not directly affect the validity of the contract.
- Linked to C-143/20 and C-213/20 *A and Others ('Unit-linked' assurance contracts)*

C-208/21 TOWARZYSTWO UBEZPIECZEŃ Ż

The preliminary ruling

- When the assurance product contains an element of investment, the pre-contractual information must specify the essential characteristics of the underlying assets of the unit-linked group contract, including the structural risks in a **clear, accurate, intelligent** manner; BUT not necessary to include technical details about calculation of yields
- Failure to communicate this: **misleading omission** within the meaning of Article 7 UCPD, **harmonized approach with Dir. 2002/83** on insurance products
- **Attribution of liability**: both the insurance company and the bank are traders and thus can be held liable; however, as the issue relates to the standard contract, the insurance company should be held liable
- The consumer's **right to seek the annulment** of such a contract appears to be an effective, proportionate and dissuasive penalty (NB: Dir. 2002/83 does not require nullity as a sanction, just „may")

C-143/20 AND C-213/20 - A UNIT-LINKED INSURANCE CONTRACTS

The story behind the reference for preliminary ruling

- Polish consumers acceded to, as insured persons, 'unit-linked' assurance contracts, concluded between an assurance undertaking and the undertaking which is the policyholder
- Consumers agreed to pay assurance premiums, in return for services in the event of death or survival at the end of the assurance period; those premiums were converted into units of an investment fund, then invested in financial instruments on which their value depended, that constituted the 'underlying assets' of the 'unit-linked' contracts
- After significant loss in value of those units, consumers brought an action seeking the recovery of all their investments, claiming that they were not informed to the required level of detail of the characteristics and risks of those assurance products.

Legal issues

- Is the **omission** to communicate the information referred to in Directive 2002/83 to the consumer acceding to the 'unit-linked' group contract constitute a misleading omission within the meaning of Article 7(2) UCPD?

JOINED CASES C-143/20 AND C-213/20 - A

The preliminary ruling

The omission to communicate the information referred to in Directive 2002/83 to the consumer acceding to the 'unit-linked' group contract **is likely to constitute a misleading omission** within the meaning of Article 7(2) UCPD if

1) that information constitutes material information which the average consumer requires, taking account of the context, to make an informed commercial decision and
2) the failure to communicate that information, its concealment, or the communication thereof in an unclear, unintelligible, ambiguous or untimely manner appear likely to lead that consumer to make a commercial decision that he or she would not otherwise have taken.

C-335/21 VICENTE - LAWYERS' FEES

The story behind the reference for preliminary ruling

- Letter of engagement with a 'withdrawal clause' which prohibites the client from withdrawing, without the knowledge or against the advice of the lawyer, on pain of a financial penalty the amount of which can be found in the fee regulation of the bar
- The client found the lawyer through an advertisement on a social network site in which no mention had been made of the withdrawal clause
- It is not established whether the client was aware of the withdrawal clause prior to signing the letter of engagement
- When the lawyer learned that the client withdrew the action contrary to his advice, he initiated a procedure for the recovery of fees (EUR 1 337.65).
- The registrar of the referring Spanish court, as a non-judicial authority, fixed the amount under the withdrawal clause without examining its unfairness. The client brought an application for review.

Legal issues

- Directive on unfair consumer contracts, Art. 4, consumer rights, **effective judicial review**
- **Misleading ommission**, Article 7 UCPD

C-335/21 VICENTE

The preliminary ruling

- Likely problems with the national procedural regulations, if the review court could not examine the fairness of the underlying clause
- Miselading ommission, if
    - the contract provides for a financial penalty and
    - refers to the fee-scale of a professional association which was **not referred to in the advertisement or in the information given prior to the conclusion of the contract**,
    - provided that it causes or is likely to cause the consumer, to take a transactional decision that he or she would not otherwise have taken.

  Unclear:
  - What if the exact fee had been mentioned in the contract?
  - Is the size of the potential penalty payment of legal relevance (transactional decision)

C-102/20 STWL STÄDTISCHE WERKE INBOX ADVERTISING

The story behind the reference for preliminary ruling

- At the request of the electricity supplier eprimo, an advertising agency inserted advertisements into T-Online's free email service users' email inboxes promoting advantageous prices for electricity and gas services
- The messages appeared as soon as users opened their inbox, with both the users concerned and the messages displayed being chosen randomly ('inbox advertising')
- StWL, a competing electricity supplier, considered that that advertising practice involving emails without the recipient's express prior consent is contrary to the rules of unfair competition
- Reference from Bundesgerichtshof, after two contradictory judgments

Legal issue

- **Aggressive commercial practice**, 'solicitation', within the meaning of point 26 of Annex I UCPD: does an activity consisting of the display in the inbox of an email service user of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, fall within the concept of '**persistent and unwanted solicitations**' of users of email services,?

C-102/20 - STWL STÄDTISCHE WERKE

The preliminary ruling

- The content/nature of the advertising messages and the method of their dissemination (emails) allows those messages to be classified as ‘communications for the purposes of direct marketing’ within the meaning of Article 13(1) of Directive 2002/58. The fact that the recipient of those advertising messages is chosen at random is irrelevant; what matters is that there is a communication for a commercial purpose, which reaches, directly and individually, one or more email service users.
- This practice also falls within the concept of ‘**persistent and unwanted solicitations**’ within the meaning of point 26 of Annex I UCPD, if the display of those advertising messages
    - is sufficiently frequent and regular to be classified as ‘persistent’ and
    - it may be classified as ‘unwanted’ in the absence of consent having been given by that user prior to that display.

C-371/20 PEEK & CLOPPENBURG ADVERTISING CAMPAIGNS

The story behind the reference for preliminary ruling

- P&C Düsseldorf and P&C Hamburg are two legally and economically independent clothing retailers, promoting their clothing businesses separately and independently under the company name ‘Peek & Cloppenburg’.
- P&C Düsseldorf launched a nationwide advertising campaign in the fashion magazine Grazia by means of a double-page article promoting an evening of private sales under the heading ‘Reader offer’. The costs of that event were shared between P&C Düsseldorf and the fashion magazine. P&C Düsseldorf made available to that company, free of charge, the images used in the article published in the corresponding issue of that magazine.
- P&C Hamburg sued P&C Düsseldorf for damages under the UWG; reference from Bundesgerichtshof after two judgments siding with the plaintiff

Legal issues

- **„Advertorial”:** does the term ‘**paid**’ within the meaning of the first sentence of point 11 of Annex I UCPD cover only monetary consideration, or does it cover every kind of consideration, irrespective of whether this consists of money, goods, services or assets of any other kind?

C-371/20 - PEEK & CLOPPENBURG

The preliminary ruling

- Not a strict interpretation of „payment", as some language versions, such as French ('*financer*') or Italian ('*i costi di tale promozione siano stati sostenuti*'), use broader terms – the context and the objective will be decisive
- The payment of a sum of money does not reflect the reality of journalistic and advertising practice
- The UCPD does not lay down any rule concerning the minimum amount of the value of the payment or the proportion of that payment and does not preclude the media company from itself bearing part of the publication costs in its own interest
- The promotion of a product by the publication of editorial content is 'paid for' by a trader in the case where
    - that trader provides consideration with an asset value for that publication, whether in the form of payment of a sum of money or in any other form and
    - there is a definite link between the payment thus made by that trader and that publication

C-543/21 VERBAND SOZIALER WETTBEWERB RETURNABLE CONTAINERS

The story behind the preliminary reference

- Verband Sozialer Wettbewerb vs. famila-Handelsmarkt Kiel GmbH & Co. KG, a company distributing foodstuffs, concerning whether or not it is necessary to include the amount of the deposit to be paid by consumers in the selling price of goods sold jars or bottles in returnable containers
- Famila advertising campaign for drinks and yoghurts in glass bottles and jars, by means of a leaflet in which the amount of the deposit relating to those containers was indicated by the additional words 'plus: EUR … deposit
- Reference from Bundesgerichtshof, after two contradictory judgments

Legal issues

- Concept of "**selling price**" under Article 2(a) of Directive 98/6 : „the final price for a unit of the product, or a given quantity of the product, including [value added tax (VAT)] and all other taxes"
- German law adds: „Where a refundable security deposit is required in addition to the price of a product or of a service, the amount of that security deposit shall be indicated separately, in addition to the price of the product or service and a total amount shall not be indicated."

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C-543/21 - VERBAND SOZIALER WETTBEWERB

The preliminary ruling

- A product in a returnable container cannot be purchased without that container and, as a result, the amount of the deposit constitutes an ‘inevitable component of the selling price’
- However, the consumer is entitled to require the seller or another trader to take back the returnable container and to reimburse him or her for the amount of the deposit paid - that amount is therefore not ‘necessarily’ payable by the consumer and, consequently, cannot be regarded as being ‘final’
- Considering the aim of the directive: as some similar products may be subject to a deposit while others may not, the inclusion of the amount of the deposit in the selling price entails a risk, for consumers, of making inaccurate comparisons
- The concept of **‘selling price’** laid down in that provision **does not include** the amount of the **deposit** when purchasing goods in returnable containers

CONCLUDING REMARKS

- Number of cases (7) – many or few?
- Countries of origin: G (3), PL (2), Sp, Ltv
- Civil law procedures: cease and desist (2), nullity/damage (5)
- The significance of cases – 3/5 judge panel formations, AG opinions, MSs intervening: I (3), H (1)
- Main topics: misleading ommissions, concept of payment/price
- UCPD almost always applied with other consumer protection directives
- Importance of preliminary rulings for NCAs: impact on interpretation