

## Case law

### Case Details

**National ID:** C-206/11

**Member State:** European Union

**Common Name:** Köck

**Decision type:** Court of Justice decision

**Decision date:** 17/01/2013

**Court:** Europe Court of Justice

**Subject:**

**Plaintiff:** Georg Köck

**Defendant:** Schutzverband gegen unlauteren Wettbewerb

**Keywords:** black list, clearance sale

### Directive Articles

Unfair Commercial Practices Directive, [Chapter 2, Article 5, 5](#). Unfair Commercial Practices Directive, [Annex I, 4](#). Unfair Commercial Practices Directive, [Annex I, 7](#). Unfair Commercial Practices Directive, [Annex I, 15](#).

### Headnote

Directive 2005/29 must be interpreted as precluding a national court from ordering the cessation of a commercial practice not covered by Annex I to that Directive on the sole ground that the practice has not been the subject of prior authorization by the competent administrative authority, without itself carrying out an assessment of the unfairness of the practice in question against the criteria set out in the Directive.

### Facts

According to Austrian law, the announcement of a clearance sale is permitted only with the authorization of the district administrative authority which is competent for the location of the clearance sale.

The plaintiff, a trader established in Innsbruck (Austria), announced in a newspaper a "total clearance" of the products in his shop, and also advertised it in front of his shop by means of billboards and window stickers. In addition to the term "total clearance", he used expressions such as "Everything must go" and "Up to 90% off". The plaintiff had not applied to the district administrative authority for an authorization to announce the clearance sale, in accordance with the aforementioned Austrian regulation. Since it considered that the plaintiff's advertisement was an announcement of a clearance sale within the meaning of the aforementioned national legislation, which had not been the subject of prior administrative authorization, the defendant brought an action in the Landesgericht Innsbruck (Regional Court, Innsbruck) for a prohibitory order and publication of the judgment.

In first instance, the defendant's claim was dismissed, against which the defendant made appeal. The court in appeal issued an interim order as sought by the defendant. On its turn, the plaintiff brought an appeal on a point of law ("Revisionsrekurs") against the order of the appeal court before the Oberster Gerichtshof.

Since the Oberster Gerichtshof considered that the outcome of the main proceedings depended on the interpretation of provisions of the Directive, it decided to stay the proceedings and refer a question to the European Court of Justice for a preliminary ruling, which in essence boils down to the question whether the Directive 2005/29 precludes a national legislation under which the announcement of a clearance sale without the authorization of the competent administrative authority is automatically prohibited and for that reason must be prohibited in judicial proceedings.

### Legal issue

Must Directive 2005/29 be interpreted as precluding a national court from ordering the cessation of a commercial practice not covered by Annex I to that Directive on the sole ground that the practice has not been the subject of prior authorization by the competent administrative authority, without itself carrying out an assessment of the unfairness of the practice in question against the criteria set out in the Directive?

### Decision

The European Court first considers that clearance sales clearly form part of the commercial strategy of an operator and are aimed directly at the promotion and sale of goods, hence should be considered "commercial practices".

Secondly, the European Court investigates whether the national measures at stake are intended to protect consumer interests, so that it should not be considered as national legislation relating to unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders as such legislation is excluded from the scope of the Directive 2005/29 ((see recital 6 of the Directive). The Court first bases itself on the assessment of the referring court, according to which the national legislation should be considered to fall under the ambit of the Directive. Further, so the Court holds, the fact that any failure to comply with the provisions of the law (including the obtaining of a preliminary authorization, the elements that must be mentioned in the application by the trader, etc.) may give rise to an action for a prohibitory order or for damages, leads to the conclusion that national laws which prohibit, subject to penalties, a commercial practice that has not been authorized, constitute measures intended to combat unfair commercial practices in the interests of consumers, and therefore fall within the scope of the Directive.

Thirdly, the Court investigates whether the Directive 2005/29 precludes a national legislation such as the one at stake in the present case. As it has done in several other cases (see e.g. case C-304/08 and case C-540/08) the Court holds that 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. The defendant had argued however, that the practice concerned does fall under some of the blacklisted practices of Annex I, which was dismissed by the Court. In relation to point 4 of Annex I to the Directive (claiming that a product has been authorized by a public body when it has not), the Court ruled that these rules do not lay down a general prohibition of commercial practices which have not been the subject of prior authorization and that it only refers to the specific cases in which the applicable rules lay down certain requirements in particular. Equally, the Court dismissed the argument that the commercial

practice was similar to the one described in point 7 of Annex I to the Directive (falsely stating that a product will only be available for a very limited time). Lastly, also point 15 of Annex I to the Directive (claiming that the trader is about to cease trading or move premises when he is not) was considered not applicable as in this case it only concerned a commercial practice made use of without prior authorization from the competent authority. As a conclusion, the commercial practice concerned does not fall under the scope of any of the provisions stipulated in the Annex I to the Directive.

Although the European Court recognizes that anticipatory or preventive measures on the part of the Member State may in certain circumstances prove more adequate and more appropriate than subsequent measures, it holds that the system laid down by those national measures, which constitutes the transposition of the Directive, cannot result in a commercial practice being prohibited solely because prior authorization has not been granted by the competent authority, without there having been an assessment of the practice's unfairness. As a result, the national legislation at stake infringes the provisions of the Directive 2005/29.

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#### **Related Cases**

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#### **Legal Literature**

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#### **Result**

The plaintiff's arguments were followed and Austria's legislation was considered infringing the Directive 2005/29.