

The EFTA Court Case E-1/19: Strengthening of consumer protection

Blog | 28 March 2020

Tore Lunde, Professor, University of Bergen, Faculty of Law.

This blog post presents and comments the judgment of the EFTA Court of 14 December 2019 in Case E-1/19 *Andreas Gyrre v. the Norwegian Government*. In its interpretation of the Unfair Commercial Practices Directive the EFTA Court relied heavily on the twofold purpose of the Directive, i.e. to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection.

1. What is the case about?

The EFTA Court answered in its judgment of 14 December 2019 in [Case E-1/19](#) a question referred by Borgarting Court of Appeal (Borgarting lagmannsrett) regarding the interpretation of the Unfair Commercial Practices Directive ([Directive 2005/29/EC](#)), in particular its point 9 of Annex I.

The case concerned an action brought by Mr. Gyrre (the Appellant) for a partial review of a decision taken by the Norwegian Market Council to impose a fine of NOK 200,000 on Mr. Gyrre.* The fine was based on an alleged violation of the Norwegian legislative provisions implementing Article 5 and point 9 of Annex I to the Directive. Article 5(1) of the Directive states that unfair commercial practices shall be prohibited. Annex I to the Directive contains a list of commercial practices that in all circumstances shall be regarded as unfair and thus prohibited under the Directive. Point 9 of Annex I to the Directive prohibits a trader from “[s]tating or otherwise creating the impression that a product can legally be sold when it cannot”.

The Appellant was the chairman and sole owner of Euroteam AS (“Euroteam”) which was a company engaged in the marketing and resale of tickets to sporting and cultural events outside Norway. 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.

Euroteam had engaged in the marketing and resale of tickets to the London 2012 Olympic and Paralympic Games. The unauthorised resale of tickets for the London 2012 Games was prohibited under criminal law in the UK. Any tickets sold by unauthorised dealers were void and subject to seizure or cancellation without refund or entry to a session.

Euroteam and the Appellant disputed that the marketing and resale of tickets for the London 2012 Games was unlawful. After Euroteam was placed into bankruptcy proceedings, the Appellant was held responsible in his capacity as chairman and sole owner of the company.

2. Judgment of Oslo District Court

The Appellant's action before Oslo District Court for a review of part of the Market Council's decision was not successful. The District Court acquitted the Norwegian Government and ordered the Appellant to pay the costs of the Norwegian Government.

In its judgment, the Oslo 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.

3. Request for an Advisory Opinion from the EFTA Court by the Borgarting Court of Appeal (Borgarting lagmannsrett)

The Oslo District Court did not consider it necessary to examine the Appellant's submissions concerning a possible conflict with EU law. An appeal was lodged against the District Court's judgment before Borgarting Court of Appeal, that referred the following questions to the EFTA Court:

1. Is point 9 of Annex I to Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market to be interpreted as covering situations where a trader states or otherwise creates the impression that a product can legally be sold where there is a legislative provision, such as in the London Olympic Games and Paralympic Games Act 2006, in an EEA State which provides that the product cannot legally be sold and which is enforced under national law?

a. Does it have a bearing on this assessment that the prohibition applies in the EEA State where the product is to be used but not in the State where the product is sold?

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

The referring court addressed also several follow-up questions in case the Court answered Question 1b in the affirmative.

4. Judgment E-1/19

The Court considered it appropriate to answer the whole of the referring court's first question together. By its first question, the referring court essentially asked whether point 9 of Annex I to the Directive must be considered as covering situations where a trader fails to provide information to consumers about the fact that the sales contract cannot legally be executed in the contemplated place of performance.

In its findings, the Court recalled that the purpose of the Directive is twofold. It is both to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating EEA States' laws, regulations and administrative provisions on unfair commercial practices, which harm consumers' economic interests.

5. Point 9: “Stating or otherwise creating the impression that a product can legally be sold when it cannot.”

The question is whether the marketing and sale of tickets as disputed in the main proceedings is covered by point 9 of the Annex I to the Directive.

The Court stated that the phrase “[s]tating or otherwise creating the impression that a product can legally be sold when it cannot” falls within the category of misleading commercial practices which are in all circumstances considered unfair. With regard to the wording of that item, the Court expressed that it includes any positive statement, but also the *passive* notion of the impression otherwise created by a trader as to the legality of a sale to a consumer. According to the Court, this includes a scenario in which the trader omits to inform the consumer of any legal restriction affecting the sale, possession or use of a particular product as such a practice is in all circumstances likely to contradict the legitimate expectations of the consumer.

Further, the Court emphasized that information in relation to a product must be examined and assessed by national courts in the light of Article 5(2)(b) of the Directive. To this end, it is necessary to assess the availability of the information and how it is presented, the legibility and clarity of the wording and whether it can be understood by the public targeted by the practice. The Court stressed that the conveyance of clear and adequate information on the product sold is imperative for the consumer to be able to make an informed transactional decision. This would include information on the trading website regarding its advertised price, the authority to sell the product, including any representation that the sale of the product to the consumer would lawfully transfer valid rights and obligations.

On this basis the Court held that point 9 of Annex I must be interpreted as covering a situation where, by omitting to inform the consumer of any legal restrictions affecting or potentially preventing the use of a particular product which might deceive the consumer, a trader creates an impression that a product can be legally sold when it cannot. Consequently, if a consumer is made aware of the legal restrictions affecting or potentially preventing the use of the product, it is reasonable to assume that the consumer may consider not to enter into that particular transaction. Omitting such information could thus distort the economic behaviour with regard to the product of the average consumer whom it reaches.

Whether or not a trader stated or otherwise created the impression to an average consumer that a product, such as the tickets to the London 2012 Games, could legally be sold when it could not, must however be determined by the referring court.

6. The questions regarding geographic area and the law in force

With regard to *the geographical issue* addressed in Question 1a, the Court noted that the wording of point 9 of Annex I is silent as to the geographical scope where a product may “legally” be sold. Therefore, the Court held that it was not material for applying point 9 of Annex I 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. The essence is that point 9 prohibits a trader from marketing a good or a service by omitting to clearly inform the consumer of the existence of legal provisions which may restrict the sale, possession or use of that given product. Consequently, point 9 encompasses a commercial practice involving the sale of a product, which is subject to legal restrictions as to its use, irrespective of whether those legal restrictions apply either at the place of sale or at the place of use.

With regard to Question 1b the Court held that the term “legally” in point 9, read in conjunction with Article 2(k) of the Directive, must be interpreted as referring to *the law in force at the time that a consumer makes a transactional decision*. Hence, only circumstances at the time of the transactional decision should be taken into account. It may be argued, as noted by the Commission, that this conclusion also stems from the notion of “unfair commercial practice” itself. This argument relies on Article 5(2)(b) of the Directive which states that “a commercial practice shall be unfair if it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches [...]”. The phrase “materially distort the economic behaviour of consumers” is in Article 2(e) of the Directive defined as appreciably impairing the consumer’s ability to make an informed decision, “thereby causing the consumer to take a transactional decision that he would not have taken otherwise”.

Further, the Court held that it is immaterial that a trader may consider certain national legislative provisions to be contrary to EEA law. According to the Court, such an assertion made after a consumer’s transactional decision would not facilitate the high level of consumer protection provided for in Article 1 of the Directive. Nor is that assessment affected if, after the sale, it is determined that a national prohibition is contrary to EEA law. Otherwise the legal certainty conferred by the list contained in Annex I to the Directive, the importance of which is emphasized by recital 17 of the Directive and which is essential at the time of the transactional decision, would be nullified.

The Court’s answer the first question is that

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

In the light of its conclusion, there was no need to answer the second question referred to the Court.

7. Conclusion

In my opinion the Court's interpretation of the Directive is consistent with case law from the CJEU and the purpose of the Directive. The Court has correctly focused on the Directive's twofold purpose – to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating EEA States' laws, regulations and administrative provisions on unfair commercial practices, which harm consumers' economic interests. Despite this conclusion it should also be mentioned that the referring court's follow-up questions (Question 2) are interesting, even though it was not necessary for the Court to answer those questions, given its conclusion on the first question. Hence, it will be interesting to see if any similar questions will be referred to the Court or to the CJEU in the future.

** The author of this blog post served as Chairman of the Market Council in the case in question.*

To cite this article

Lunde, Tore (2020): The EFTA Court Case E-1/19: Strengthening of consumer protection. Blog. Efta-Studies.org.

EFTA-Studies.org provides in-depth analyses of the institutions and processes that link the EFTA states to the EU. An independent academic blog addresses developments in the EFTA states from a political and legal perspective, thus providing up to date information on the EFTA states' relations with the EU.

Liechtenstein-Institut | info@liechtenstein-institut.li | www.liechtenstein-institut.li