OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 3 September 2009 [1]

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1 — Original language: German.

I — Introduction

1. In the present reference for a preliminary ruling under Article 234 EC the Bundesgerichtshof (German Federal Court of Justice) (hereinafter also 'the referring court') has referred to the Court a question on the interpretation of Article 5(2) of Directive 2005/29/EC on unfair commercial practices in the internal market [2] ('Directive 2005/29' or 'the Directive'). In essence, the question concerns the compatibility with

2 — Directive 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 ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

Community law of a national provision which in principle prohibits a commercial practice under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of a service.

2. The reference for a preliminary ruling arises from an action brought by the Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (a German association founded to combat unfair competition) ('the claimant in the main proceedings') against the retail chain Plus Warenhandelsgesellschaft mbH ('the defendant in the main proceedings') for an injunction and recovery of the costs of a warning notice in respect of the anti-competitive advertising of a 'bonus promotion'.

II — Legal context

A — *Community law*

3. Article 2 of Directive 2005/29 provides as follows:

'For the purposes of this Directive:

…

(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;

…'

4. Article 3(1) of the Directive provides as follows:

'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.'

5. Article 4 of the Directive 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.'

6. Article 5 of the Directive, which is entitled 'Prohibition of unfair commercial practices', provides 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.'

7. The coupling of prize competitions and lotteries with the sale of goods is not listed in Annex I to the Directive as a commercial practice which is in all circumstances regarded as unfair.

B — *National law*

8. Paragraph 1 of the Gesetz gegen den unlauteren Wettbewerb (German Law on unfair competition) of 3 July 2004,[3] as last amended by Article 1 of the First Amending Law of 22 December 2008[4] ('the UWG'), states that the purpose of the UWG is to protect competitors, consumers and other market participants from unfair competition. At the same time, it safeguards the general interest in undistorted competition.

9. Paragraph 3 of the UWG, former version, provides as follows:

'Unfair competitive acts that are likely to have a more than insignificant effect on competition to the detriment of competitors, consumers or other market participants shall be unlawful.'

10. That provision was retained in Paragraph 3(1) of the UWG, new version, after the UWG was amended in December 2008. In respect of the implementation of Directive 2005/29, two further subparagraphs

3 — BGBl. I, p. 1414.

4 — BGBl. I, p. 2949.

were added to Paragraph 3 of the UWG, the new version of which therefore now reads as follows:

'(1) Unfair commercial acts shall be unlawful if they are likely to have a perceptible adverse effect on the interests of competitors, consumers or other market participants.

(2) Commercial acts in relation to consumers shall in any case be unlawful if they are not in keeping with the due care to be expected on the part of the trader and are likely to have a perceptible adverse effect on the consumer's ability to take a decision on the basis of information and thereby to cause him to take a transactional decision which he would not otherwise have taken. In that connection regard must be had to the average consumer or, if the commercial act is directed at a particular group of consumers, at an average member of that group. Regard must be had to the viewpoint of an average member of any clearly identifiable group of consumers in particular need of protection by reason of mental or physical infirmity, age or credulity if the trader can foresee that his commercial act concerns only that group.

(3) The commercial acts which are directed at consumers and are listed in the annex to the present Law shall always be regarded as unlawful.'

11. Paragraph 4 of the UWG, former version, which remained substantially unaltered after the amendment of December 2008, provides as follows:

'In particular, any person is acting unfairly within the meaning of Paragraph 3 who:

...

6. makes the participation of consumers in a prize competition or lottery conditional on the purchase of goods or use of services, unless the prize competition or lottery is inherently linked to those goods or services;

...'

III — Facts, main proceedings and the question referred

12. According to the facts set out by the Bundesgerichtshof, in the period from 16 September to 13 November 2004 the defendant, which has approximately 2 700 branches in Germany, advertised a bonus

promotion entitled 'Your chance to win millions' under the slogan 'Go shopping, collect points, play lotto for nothing'. During the period in question, customers could collect bonus points: for every EUR 5 spent on goods they received one bonus point. With 20 points or more they could take part, free of charge, in the draws held by Deutscher Lottoblock (national association of lottery organisations) on 6 or 27 November 2004. In order to do so, they had, inter alia, to stick the bonus points on a player's card obtainable at the defendant's branches and mark their choice of six lotto numbers. The defendant had the cards collected at its branches and sent them to a third party, which arranged for the customers concerned to take part in the draw of lotto numbers with their chosen numbers.

13. On the basis of Paragraph 4(6) of the UWG, the German Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, Frankfurt am Main, took the view that the bonus promotion described above constituted an illegal coupling of the sale of goods with a lottery. As a result of the action brought against the defendant before the Landgericht (Regional Court) Duisburg, the defendant was ordered to refrain from advertising, for purposes of competition, the sale of goods in advertisements addressed to end-consumers or otherwise by announcing a lottery whereby customers, on purchasing goods, would receive bonus points which would enable them to take part in the draws of the German lotto and toto block.

14. The defendant's appeal was dismissed by the appellate court (Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf)), subject to amendment of the operative part of the injunction by the addition of the words 'free of charge' to take greater account of the specific form of breach.

15. The defendant's appeal on a point of law, for which leave was granted by the First Civil Chamber of the Bundesgerichtshof, maintains the form of order seeking dismissal of the action.

16. The referring court expresses doubts as to whether the national provision in Paragraph 4(6) of the UWG is consistent with Directive 2005/29. It has for that reason stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Is Article 5(2) of Directive 2005/29/EC concerning unfair commercial practices to be interpreted as meaning that that provision precludes a national provision which states that a commercial practice whereby the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services is in principle unlawful, irrespective of whether, in any particular case, the advertising in question affects consumers' interests?'

IV — Procedure before the Court

17. The order for reference, dated 5 June 2008, was received at the Registry of the Court on 9 July 2008.

18. Written observations were submitted by the parties to the main proceedings, the Governments of the Federal Republic of Germany, the Republic of Finland, the Kingdom of Spain, the Portuguese Republic, the Republic of Poland, the Czech Republic, the Kingdom of Belgium and the Italian Republic, as well as by the Commission, within the period specified in Article 23 of the Statute of the Court of Justice.

19. In the context of measures of procedure, the Court addressed a question to the parties to the main proceedings, to which they replied.

20. At the hearing, which took place on 11 June 2009, submissions were made by the representative of the defendant in the main proceedings, by the Agents of the Governments of the Federal Republic of Germany, the Portuguese Republic, the Republic of Poland, the Czech Republic, the Italian Republic and the Republic of Austria, as well as by the Agent of the Commission.

V — Main submissions of the parties

21. The *Spanish* and *Czech Governments* submit that Directive 2005/29 is not applicable to the case which is the subject of the main proceedings.

22. The *Spanish Government* first of all argues that the request for a preliminary ruling is inadmissible because, in its opinion, the elements of the dispute in the main proceedings are confined in all respects within a single Member State. The Spanish Government refers in this connection to the Court's ruling in *Jägerskiöld*. [5] Alternatively, it submits that Directive 2005/29 is not applicable, arguing that the factual situation underlying the national legal remedies arose not only before the period for implementing Directive 2005/29 expired, but even before that directive was adopted. National legal provisions which are not the result of implementation of a directive and which, furthermore, were introduced before the adoption of the directive in question are, it submits, not amenable to interpretation by the Court. The Spanish Government adds that, in the main proceedings, there are no concrete indications that the average consumer's economic behaviour could have been materially influenced.

23. The *Czech Government* submits that, unlike Directive 2005/29, the contested national provisions are not designed to protect consumers from unfair commercial

5 — Case C-97/98 [1999] ECR I-7319, paragraph 45.

practices, but rather to protect competition and, therefore, individual competitors from such practices. Consequently, those national provisions do not come within the scope of Directive 2005/29 and cannot therefore contravene its provisions.

24. The *claimant in the main proceedings* and the *Finnish, Portuguese, Belgian, German* and *Italian Governments* take the view that Directive 2005/29 does not preclude a prohibition such as that laid down by the UWG.

25. The *claimant in the main proceedings* submits that the prohibition of combined offers in Paragraph 4(6) of the UWG can operate in particular cases only where, first, the commercial practice is likely, in accordance with Paragraph 3 of the UWG, to have a more than insignificant adverse effect on competition to the detriment of competitors, consumers or other market participants and is likely, second, to have a perceptible adverse effect on the consumer's ability to take an informed decision and thereby to cause him to take a transactional decision which he would not otherwise have taken. The referring court's doubts as to whether Paragraph 4(6) of the UWG is consistent with Article 5(2) of Directive 2005/29 are, it submits, misplaced.

26. The *Finnish Government* begins by pointing out that a high level of consumer protection is one of the objectives of the Directive. The Directive contains general rules which allow unfair commercial practices to be identified and prohibited, but it is open to the Member States to enact more detailed rules on prohibited sales promotion methods. The Finnish Government takes the view that a national rule such as that in issue in the present case amplifies the prohibition in Article 5(1) of Directive 2005/29, without going further than the provision in Article 5(2). Consequently, it submits, the national rule is consistent with Article 5(2).

27. The *Portuguese Government* points out that Annex I to Directive 2005/29 lists the various types of commercial practices that are in all circumstances to be regarded as unfair and, under No 16, prohibits the commercial practice of 'claiming that products are able to facilitate winning in games of chance'. However, the Portuguese Government appears to rule out the possibility that the advertising campaign at issue was a commercial practice of that kind inasmuch as the mere purchase of goods or use of a service does not in itself offer the chance of a prize. The Portuguese Government concludes that the German provisions, in particular Paragraphs 3 and 4(6) of the UWG, are consistent with Directive 2005/29 because the prohibitions arising from those provisions, in conjunction with each other, are not contrary to Article 5(2) of the Directive.

28. The *Belgian Government* takes the view that the prohibition, laid down in Paragraph 4(6) of the UWG, of combining a prize competition with commercial transactions does not come within the scope of Directive 2005/29. Moreover, such a prohibition of combined offers concerns a selling

arrangement which, according to the *Keck and Mithouard* case-law,[6] is not capable of hindering intra-Community trade. Only commercial communications addressed to consumers can constitute unfair commercial practices within the meaning of Article 2(d) of Directive 2005/29. In that case the national courts would have to decide whether, taking account of the circumstances of the particular case before them, the provisions and criteria of Directive 2005/29 have been complied with.

29. The *German* and *Italian Governments* take the view that it is clear from the wording and general structure of Directive 2005/29 that the Member States may, in general, lawfully prohibit commercial practices other than those listed in Annex I, on condition that the trader's conduct is to be regarded as unfair in the light of the criteria listed in Article 5.

30. With regard specifically to the commercial practice at issue here, the *German Government* considers that tying participation in a prize competition or lottery to the purchase of goods is unquestionably an unfair commercial practice which has precisely those factual elements. It follows that a provision which prohibits generally a combination of that kind is consistent with the meaning and purpose of Directive 2005/29.

31. In view of the requirement, mentioned in recital 7 in the preamble to Directive 2005/29, that account be taken of the context of the individual case before particular commercial practices are prohibited, the *Italian Government* points out that that requirement may be satisfied by giving the trader an opportunity to adduce evidence to the contrary, that is to say, evidence that his conduct is lawful. Consequently, in the opinion of the Italian Government, the prohibition of combined offers laid down by Paragraph 4(6) of the UWG is consistent with the provisions of the Directive.

32. By contrast, the *defendant in the main proceedings* and the *Commission* take the view that a national provision such as Paragraph 4(6) of the UWG, which prohibits in principle a commercial practice whereby the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of a service, irrespective of whether, in any particular case, the advertising in question affects consumers' interests, is not consistent with the Directive. As that practice is not included in the list in Annex I, it may be prohibited only if it can be classified as unfair on a case-by-case basis in the light of the criteria set out in Article 5(2) of Direct-
ive 2005/29.

33. The *defendant in the main proceedings* contends that the plan to introduce a general ban on participation in prize competitions coupled with an obligation to purchase goods beforehand has already been discussed in connection with the Commission proposal for a regulation on sales promotions in the internal market, which indicates that the Community legislature was very well aware of the problem. If the Community legislature

6 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

had intended to include a general ban of that kind in the Directive, it would have expressly listed that commercial practice in Annex I to Directive 2005/29.

34. In the opinion of the *Polish Government*, the question whether the contested provision of the UWG is consistent with Directive 2005/29 depends on the regulatory purpose of the UWG. Finding support mainly in recital 5 in the preamble to the Directive, the Polish Government points out that the Community legislature intended to draw a clear distinction between, on the one hand, commercial practices concerning the relationship between undertakings and consumers which adversely affect the latter — which is what the Directive was intended to regulate — and, on the other hand, commercial practices concerning the relationship between undertakings which adversely affect the economic interests of competitors, which in turn do not come within the scope of Directive 2005/29. Consequently, the compatibility with Directive 2005/29 of a national provision which is designed to protect competitors cannot be called into question.

35. In the course of the hearing, the *Austrian Government*, referring on certain points to the request submitted by the Austrian Oberster Gerichtshof (Supreme Court) for a preliminary ruling in the pending Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag*, expressed the view that Directive 2005/29 primarily serves objectives of consumer-protection policy and is therefore not applicable to national measures which are designed to protect the interests of competitors. The Austrian Government considers that the latter are not affected by Directive 2005/29 and bases its view of the law in particular on recital 8 in the preamble to the Directive and also on the Commission's proposal for a regulation on sales promotions in the internal market. By way of alternative, the Austrian Government submits that, should the Court nevertheless find that Directive 2005/29 is applicable, it should at the same time rule that the Directive does not preclude national provisions such as Paragraphs 3 and 4(6) of the UWG.

VI — Legal assessment

A — *Introductory observations*

36. The present case provides the Court with an opportunity to continue the development of its case-law on the question of the compatibility with Community law of national prohibitions of combined offers. Useful guidance for the reply to the question referred can be found in the judgment in *VTB-VAB and Galatea*,[7] in which the Court was likewise asked to interpret Directive 2005/29. As in those cases, the question here is whether and, if so, how far, in view of the Community-wide harmonisation of part of fair-trading law by Directive 2005/29, the Member States retain power to enact rules which ban combined offers in principle, without the need for a case-by-case assessment of the commercial practice at issue.

7 — Joined Cases C-261/07 and C-299/07 [2009] ECR I-2949.

37. As I explained in my Opinion of 21 October 2008 in the abovementioned cases, [8] Directive 2005/29, which was adopted by the European Parliament and the Council on 11 May 2005, is aimed at creating a single legal framework for the regulation of unfair commercial practices in relation to the consumer. As is apparent from recital 5 in the preamble, that objective is to be achieved by harmonisation of fair-trading laws in the Community Member States in the interest of eliminating obstacles to freedom of movement in the internal market. [9] Its legislative objective is therefore the full harmonisation of this area of life at Community level. [10]

38. According to Article 20 of Directive 2005/29, the Directive entered into force on the day following its publication in the *Official Journal of the European Union*, that is to say, on 12 June 2005. According to Article 19(1), the Member States had to implement the Directive in national law by adopting the necessary laws, regulations and administrative provisions by 12 June 2007, but with a further transitional period of six years for certain more stringent national provisions. However, those laws, regulations and administrative provisions had to be applied only from 12 December 2007.

8 — See my Opinion in *VTB-VAB and Galatea*, judgment cited in footnote 7 above, point 48.

9 — Directive 2005/29 implements at the legislative level the Commission's ideas regarding the future of consumer protection in the European Union, as discussed in its Green Paper of 2 October 2001 (COM(2001) 531 final). In this, the Commission complains that the internal market has neither achieved its potential for consumers nor kept pace with the development of the internal market in B2C transactions ('B2C' stands for 'business-to-consumer', that is to say, communications and commercial relations between undertakings and private persons, in contrast to communications and trade relations between undertakings or between undertakings and public authorities, the so-called 'B2B' (business-to-business) sector). Only in a very few cases do consumers enjoy the direct benefits of the internal market by cross-border shopping. The Commission sees the cause of this in the fragmented set of regulations in the Member States and in the fragmented system of enforcement regarding consumer rights, which constitutes a deterrent to consumers. In the Green Paper, the Commission proposes, inter alia, the adoption of an EU framework directive to harmonise national fair-trading rules for business-to-consumer commercial practices. The Commission's approach to the drafting of a framework directive is embodied in present Directive 2005/29.
According to Wendehorst, C., 'Auf dem Weg zu einem zeitgemäßen Verbraucherprivatrecht: Umsetzungskonzepte', *Neuordnung des Verbraucherprivatrechts in Europa?* (edited by Brigitta Jud and Christiane Wendehorst), Vienna, 2009, p. 166, the hoped-for stimulation of the internal market in the consumer sector as a result of minimum harmonisation has largely failed to materialise. The reasons for this are identified, inter alia, in the enormous divergences in implementation between individual legal systems. Those divergences therefore represent an obstacle to the internal market because the average consumer is entirely unaware of the minimum standards guaranteed for the whole of Europe. In addition, businesses are hindered from offering goods across borders because adjustment to many different standards of protection involves high costs. This explains why the European legislature is going on to lay down not only minimum standards in provisions of directives but also maximum standards of consumer protection by way of so-called full harmonisation.

10 — This conclusion is also reached by Henning-Bodewig, F., 'Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken', *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, 2005, Vol. 8/9, p. 629, 630; Massaguer, J., *El nuevo derecho contra la competencia desleal — La Directiva 2005/29/CE sobre las Prácticas Comerciales Desleales*, Cizur Menor, 2006, p. 14, in particular pp. 51 and 53; Micklitz, H.-W.,'Das Konzept der Lauterkeit in der Richtlinie 2005/29/EG', *Droit de la consommation/Konsumentenrecht/Consumer law, Liber amicorum Bernd Stauder*, Basle, 2006, p. 299, in particular p. 306; Kessler, J., 'Lauterkeitsschutz und Wettbewerbsordnung — Zur Umsetzung der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken in Deutschland und Österreich', *Wettbewerb in Recht und Praxis*, Vol. 7, 2007, p. 716; De Cristofaro, G., 'La direttiva 2005/29/CE — Contenuti, rationes, caratteristiche', *Le pratiche commerciali sleali tra imprese e consumatori*, Turin, 2007, pp. 32 and 33; and Di Mauro, L.,'L'iter normativo: Dal libro verde sulla tutela dei consumatori alla direttiva sulle pratiche commerciali sleali', *Le pratiche commerciali — Direttive comunitarie ed ordenamento italiano*, Milan, 2007, p. 26, who consider that Directive 2005/29 aims at full harmonisation of national rules.

39. The Federal Republic of Germany formally complied with the obligation to implement the Directive by passing the First Law amending the UWG on 22 December 2008, which entered into force on 30 December 2008. [11] The provision in Paragraph 4(6) of the UWG at issue in the present case was not, however, enacted in order to implement Directive 2005/29, but relates back to earlier national legislation. In its order for reference, the Bundesgerichtshof expresses doubts as to the compatibility of that provision with Community law and observes that, as the legislative procedure stands at present, there are no proposals to amend or abolish Paragraph 4(6) of the UWG in the context of the implementation of Directive 2005/29 in national law. [12]

B — *Admissibility of the reference*

1. Jurisdiction of the Court of Justice

40. The Spanish Government objects that the action is inadmissible primarily on the ground that there is no Community dimension to the question referred. The government cites the *Jägerskiöld* judgment, [13] paragraph 45 of which states that 'the provisions of the Treaty relating to the freedom to provide services are not applicable to a situation, such as that in the main proceedings, which is confined in all respects within a single Member State'. In so far as the Spanish Government thereby suggests that the facts of the case have no cross-border connection, its submission must be understood, for procedural purposes, as meaning that it essentially contests the Court's jurisdiction.

41. First of all, it must be observed that the reference for a preliminary ruling in *Jägerskiöld* concerned solely the interpretation of the primary law provisions on the free movement of goods and the freedom to provide services. A cross-border connection is indeed a precondition for the applicability of those provisions. [14] In the present case, however, the Court is being asked to interpret a directive as a measure of secondary Community law within the meaning of the third paragraph of Article 249 EC. Consequently, there is already a difference between the two cases.

11 — Because of delay in the implementation of Directive 2005/29, the Commission instituted Treaty infringement proceedings against the Federal Republic of Germany (Treaty infringement proceeding No 2007/0890) and brought an action before the Court on 16 July 2008 under the second paragraph of Article 226 EC. The German Government replied by letter of 6 October 2008, received at the Court Registry on 13 October 2008. By letter received on 24 February 2009, the Commission informed the Court that it wished to discontinue the action under Article 78 of the Rules of Procedure. By order of 20 March 2009, the President of the Court ordered Case C-326/08 *Commission* v *Germany* to be removed from the register and ordered the Federal Republic of Germany to pay the costs.

12 — See the observations of the Bundesgerichtshof in paragraph 8 of the order for reference.

13 — Cited in footnote 5 above, paragraph 45.

14 — See, to that effect, Becker, U., *EU-Kommentar* (edited by Jürgen Schwarze), 1st edition, Baden-Baden, 2000, Article 28, n. 19, p. 437. Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, Sweet & Maxwell, London 2006, paragraph 6-024, p. 191, point out that, when assessing the compatibility of a national provision with the primary law provisions governing the freedom of movement of persons and the free movement of goods and capital, the Court must always consider whether the facts point to a Community connection. If it is found that the facts relate to only one and the same Member State, those Treaty provisions will not be applicable.

42. Apart from that, it must be borne in mind that, within the framework of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [15]

43. Where the questions submitted by the national court concern the interpretation of a provision of Community law, the Court of Justice is, in principle, bound to give a ruling, [16] unless in reality there is an obvious intention to induce the Court to determine a fabricated dispute or to deliver advisory opinions on general or hypothetical questions, or the interpretation of Community law sought bears no relation to the actual facts of the main action or its purpose, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [17]

44. Consequently, the reply to be given to the Spanish Government's submission is that the issue of whether a matter is to be regarded as 'purely national' is a question of the interpretation of Community law and does not concern the admissibility of the question referred for a preliminary ruling. [18] In addition, it must be borne in mind that the Court has previously based its jurisdiction on the manifest interest that, in order to forestall future differences of interpretation, provisions of Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply. [19]

45. The Spanish Government's submission must accordingly be rejected.

15 — See, inter alia, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs. 33 and 34; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 18 and 19; Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 24; and Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 36.

16 — See, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 21; Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 30; and *VTB-VAB and Galatea*, cited in footnote 7 above, paragraph 32.

17 — See, inter alia, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 18; Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 19; *PreussenElektra*, cited in footnote 16 above, paragraph 39; *Schneider*, cited in footnote 16 above, paragraph 22; Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 29; and *VTB-VAB and Galatea*, cited in footnote 7 above, paragraph 33.

18 — See my Opinion of 11 September 2008 in Case C-351/07 *CEPAV DUE and Others*, point 43.

19 — See *Dzodzi*, cited in footnote 15 above, paragraph 37; *Leur-Bloem*, cited in footnote 15 above, paragraph 32; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraph 32; Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 40; Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraph 16; and Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 21.

2. Need for a decision on the question referred

46. The Spanish Government's assertion that Directive 2005/29 is not applicable to the present case is to be understood, in terms of procedural law, as an argument that a reply need not be given to the question referred in order to resolve the dispute in the main proceedings.

47. As I explained above, the presumption that questions referred by national courts for a preliminary ruling are relevant to the outcome of the main proceedings can be rebutted only in exceptional cases, inter alia where the interpretation sought of the Community law provisions mentioned in those questions obviously bears no relation to the actual facts of the main action or to its purpose. [20]

48. In the present case, the question referred is not obviously irrelevant to the decision to be given by the referring court because, as it shows at length in its order for reference, the success of the appeal on a point of law depends, so far as the grant of an injunction is concerned, on whether Paragraphs 3 and 4(6) of the UWG are consistent with Directive 2005/29. [21] If so, the referring court must dismiss the appeal. If, on the other hand, the ban in Paragraph 4(6) of the UWG on combining a prize competition or lottery with the sale of goods goes beyond the protection conferred by the Directive, the action, in so far as the claimant seeks an injunction, would have to be dismissed by the referring court and the judgment under appeal set aside.

49. The Spanish Government's objection that the events which led to the main proceedings took place before Directive 2005/29 entered into force and even before it was adopted has, in my view, no bearing on the question whether Directive 2005/29 is applicable to the main proceedings, in so far as it is relevant to the issue of the admissibility of the reference for a preliminary ruling, because in any event the action for an injunction brought by the claimant in the main proceedings against the defendant at first instance is designed to prevent future breaches, as the referring court explains in the order for reference. [22] The consequence of this, on a correct interpretation of the referring court's observations concerning the applicable national law, is that the right to an injunction continues to have legal effect as against the defendant up to the present. In view of that continuing effect, [23] the question of the compatibility of a provision such as Paragraph

20 — See, inter alia, *Foglia*, cited in footnote 17 above, paragraph 18; *Zabala Erasun and Others*, cited in footnote 17 above, paragraph 29; *Bosman*, cited in footnote 17 above, paragraph 61; *Djabali*, cited in footnote 17 above, paragraph 19; *Schneider*, cited in footnote 16 above, paragraph 22; *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 17 above, paragraph 29; and *VTB-VAB and Galatea*, cited in footnote 7 above, paragraph 33.

21 — See paragraph 7 of the order for reference.

22 — See paragraph 9 of the order for reference.

23 — The right to an injunction, regulated in Paragraph 8(1) of the UWG, is a substantive property law right, not a mere procedural remedy. It confers a right of defence in the form of a right to a prohibitory injunction where there is a risk of repetition of the breach (first sentence of Paragraph 8(1) of the UWG) and in the form of a preventive injunction where there is a risk of a first breach (second sentence of Paragraph 8(1) of the UWG). The right arises as soon as there is a risk of a future breach on the part of the anticipated defendant. This does not require interference with another person's interests to have actually taken place already and does not require a threat of a further breach (threat of repetition). For the right to arise, it is sufficient if a first breach is directly imminent (risk of first breach). Paragraph 3 in conjunction with the factual situations given as examples in Paragraph 4 and the special rules in Paragraphs 5 to 7 of the UWG form the legal basis for bringing an action for an injunction, that is to say, for resisting a breach (on this, see Piper, H., *Kommentar zum Gesetz gegen den unlauteren Wettbewerb* (edited by Henning Piper and Ansgar Ohly), 4th edtion, Munich, 2006, § 8, nn. 3 and 5).

4(6) of the UWG with Directive 2005/29 proves to be still topical and relevant for the parties to the main proceedings and for the national court which is required to deliver a ruling in the dispute.

50. That question is all the more relevant in so far as, at the date of the order for reference, namely 5 June 2008, both the deadline for implementation (12 June 2007) and the latest date for application of the Directive's provisions (12 December 2007) had passed long before. At that date the national law had not been adapted, nor did the German legislature appear to be considering repealing the basic prohibition of combined offers in Paragraph 4(6) of the UWG, of which the national court was also aware, as the order for reference shows.

51. In its capacity as a functional Community court, the national court would have been obliged, if Paragraph 4(6) of the UWG had been found to be inconsistent with Directive 2005/29, which cannot be ruled out since national competition law rights to an injunction are directed at the future, to leave the corresponding national provisions unapplied, if necessary, before the expiry of the period for implementation. This follows from the precedence of Community law over national law, [24] but primarily from the duty of the Member States, acknowledged in the Court's case-law, under the second paragraph of Article 10 EC and the third paragraph of Article 249 EC to take all appropriate measures to ensure fulfilment of the obligations laid down by the directive in question.

52. As I pointed out in my Opinion in *VTB-VAB and Galatea*, [25] this is also associated with the duty to refrain from doing anything which could frustrate the achievement of the objective of a directive. In accordance with the Court's settled case-law, it follows from the abovementioned provisions of the Treaty, in conjunction with the directive in question, that, during the period prescribed for the latter's transposition, the Member States to which that directive is addressed must refrain from taking any measures that are liable seriously to compromise the attainment of the result prescribed by it. [26] That duty to refrain applies to all the authorities of Member States including, for matters within their jurisdiction, the courts. [27] It is for the latter, where appropriate, to assess whether national measures adopted before the expiry of the period for transposition jeopardise attainment of the result envisaged by the directive in question. [28]

24 — See, inter alia, Case 26/62 *van Gend & Loos* [1963] ECR 1; Case 6/64 *Costa.* [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; and Case 106/77 *Simmenthal* [1978] ECR 629.

25 — Cited in footnote 8 above, point 60.

26 — Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 67; and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 121.

27 — Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26; *Inter-Environnement Wallonie*, cited in footnote 26 above, paragraph 40; Case C-131/97 *Carbonari and Others* [1999] ECR I-1103, paragraph 48; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 110.

28 — *Inter-Environnement Wallonie*, cited in footnote 26 above, paragraph 46. See also, to the same effect, Vcelouch, P., *Kommentar zu EU- und EG-Vertrag* (edited by Heinz Mayer), Vienna, 2004, Article 249, n. 45, p. 16.

53. Accordingly, in *Adeneler and Others*, [29] the Court ruled that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

54. Regard should also be had to the fact that, according to the Court's case-law, not only the national provisions specifically intended to transpose a directive but also, from the date of that directive's entry into force, the pre-existing national provisions capable of ensuring that the national law is consistent with it must be considered to fall within the scope of that directive. [30] Those include, in the present case, the UWG provisions, including Paragraphs 3 and 4(6) thereof, which existed before Directive 2005/29 entered into force.

55. If, therefore, the national court suspects that national legislation is likely, after the period for implementation has expired, to frustrate the objective of a directive which is to be implemented shortly, [31] that court must, during the implementation period, take the necessary measures for achieving that objective.

56. Consequently, as the action for an injunction is directed at the future, the German courts were entitled, from the date on which Directive 2005/29 entered into force, to consider whether Paragraph 4(6) of the UWG is consistent with the Directive and, in case of doubt, to refer an appropriate question concerning the interpretation of the Directive for a preliminary ruling under point (b) of the first paragraph of Article 234 EC.

57. It cannot therefore be gainsaid that there is a need for a decision on the question referred, with the consequence that the reference for a preliminary ruling must be treated as admissible.

29 — Cited in footnote 26 above, paragraph 123.

30 — Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 29, and *VTB-VAB and Galatea*, cited in footnote 7 above, paragraph 35.

31 — In order for the national court to intervene, there must be a risk that the attainment of the objectives of the directive will be jeopardised after the expiry of the deadline for implementation (see also, to that effect, Hoffmann, C.,'Die zeitliche Dimension der Richtlinienkonformen Auslegung', *Zeitschrift für Wirtschaftsrecht*, 2006, Vol. 46, p. 2116). A similar view is expressed by Schroeder, W., *EUV/EGV Kommentar* (edited by Rudolf Streinz), Munich, 2003, Article 249 EC, n. 139, p. 2197, who takes the view that there may only exceptionally be an obligation, on the part of public authorities and courts, to interpret national legislation in conformity with a directive if legislative implementing measures suggest that the attainment of the objectives of the directive is ultimately to be frustrated.

C — *Examination of the question referred*

1. The concept of 'commercial practices' in Article 2(d) of Directive 2005/29

58. It should be noted at the outset that in proceedings under Article 234 EC the Court does not have jurisdiction to rule on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order that it can decide the case before it. [32]

59. The question referred seeks a ruling as to whether Directive 2005/29 precludes a national provision such as Paragraph 4(6) of the UWG. For that purpose, it is necessary first to establish whether that provision, as regards its regulatory subject-matter, comes within the scope *ratione materiae* and *ratione personae* of Directive 2005/29. Next, it is necessary to determine whether Directive 2005/29 is to be interpreted as covering a prohibition of a commercial practice such as that laid down in Paragraphs 3 and 4(6) of the UWG.

60. The provision in Paragraph 4(6) of the UWG, in conjunction with Paragraph 3 thereof, prohibits traders from making the participation of consumers in a prize competition or lottery conditional on the purchase of goods or use of services, unless the prize competition or lottery is inherently linked to those goods or services. In other words, that provision bans the combining of two different types of goods or services for the purpose of sales promotion and is consequently to be understood as a prohibition in principle of combined offers. [33]

61. As I explained in detail in my Opinion in *VTB-VAB and Galatea*, [34] and as the Court confirmed in the same cases, [35] combined offers constitute commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development.

32 — See, inter alia, *Costa*, cited in footnote 24 above; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 23; and Case C-265/01 *Pansard and Others* [2003] ECR I-683, paragraph 18.

33 — See, to that effect, Köhler, H., *Wettbewerbsrecht — Kommentar zum Gesetz gegen den unlauteren Wettbewerb*, Munich, 2007, § 4, n. 6.6, p. 308, and Seichter, D., 'Der Umsetzungsbedarf der Richtlinie über unlautere Geschäftspraktiken', *Wettbewerb in Recht und Praxis*, 2005, p. 1095, who expressly refer to the prohibition of a combined offer in connection with Paragraph 4(6) of the UWG.

34 — Cited in footnote 8 above, points 68 to 70.

35 — *VTB-VAB and Galatea*, cited in footnote 7 above, paragraphs 48 and 50.

62. Combined offers are therefore commercial practices within the meaning of Article 2(d) of Directive 2005/29 and consequently come within its scope *ratione materiae*.

2. Scope *ratione personae* of Directive 2005/29

63. As the Polish Government correctly observes, the question whether the disputed national provision in Paragraph 4(6) of the UWG comes within the scope *ratione personae* of the Directive depends on whether that provision is intended, like the Directive itself, to protect consumers.

64. In fact, the Directive regulates only the B2C (business-to-consumer) sector, that is to say, the relationship between traders and consumers. That connection is emphasised in particular in recital 8 in the preamble to the Directive, which states that the Directive directly protects consumer economic interests only. [36] However, the economic interests of competitors who act within the law are considered no less worthy of protection, as appears from recital 6 and, particularly, recital 8 in the preamble. [37]

65. Unlike the Czech Government, [38] I have no doubt whatsoever that the meaning and purpose of the rule contained in Paragraph 4(6) of the UWG is to protect consumers.

66. First, Paragraph 1 of the UWG expressly states that the UWG, in addition to protecting competitors and other market participants, also serves to protect consumers from unfair competition. [39] Second, the historical background, meaning and purpose of Paragraph 4(6) of the UWG support that construction of the provision. This domestic provision codifies the existing Bundesgerichtshof case-law [40] on the old version of Paragraph 1 of the UWG, which stated that it was anti-competitive to make participation in a prize competition or lottery conditional upon the purchase of goods or ordering of services.

36 — The same view is expressed by Hoeren, T.,'Das neue UWG — der Regierungsentwurf im Überblick', *Betriebs-Berater*, 2008, p. 1183, and Stuyck, J., 'The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotion and the Law of Unfair Competition', *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 — New Rules and New Techniques*, Norfolk, 2007, p. 166.

37 — See my Opinion in *VTB-VAB and Galatea*, cited in footnote 8 above, points 71 and 72.

38 — Written observations of the Czech Government, paragraph 13.

39 — Lutz, R.,'Veränderungen des Wettbewerbsrechts im Zuge der Richtlinie über unlautere Geschäftspraktiken', *Gewerblicher Rechtsschutz und Urheberrecht*, 2006, Vol. 11, p. 909, points out that the German UWG does not confine protection to the economic interests of consumers, as Directive 2005/29 does, but also serves to protect competitors, consumers and other market participants, as Paragraph 1 of the UWG makes clear. Consequently, the UWG covers the B2C and B2B sectors.

40 — See, inter alia, the Bundesgerichtshof judgments of 17 November 1972, I ZR 71/71 (Prize Competition); of 17 February 2000, I ZR 239/97 (Space Fidelity Peep-Show); of 13 June 2002, I ZR 173/ 01 (Combined Offer I); and of 13 November 2003, I ZR 40/01 (Reverse Auction II).

As the legislative documentation demonstrates, [41] the legislative purpose is to protect consumers against having their decision-making freedom unreasonably influenced by exploitation of their propensity to gamble. Underlying the legislation is the view that the combination of participation in a prize competition and the purchase of goods may have such a lasting effect on even the average circumspect consumer in his or her decision with regard to making a purchase that that consumer will no longer be guided by rational considerations but will be motivated by the desire to win the prize on offer. That is also the unanimous view expressed by academic commentators. [42]

67. The national provision in question consequently also comes within the scope *rationae personae* of Directive 2005/29.

3. Examination of the structures of the two measures

68. In order to be able to determine whether Directive 2005/29 precludes a national provision such as Paragraph 4(6) of the UWG, it is necessary to examine and compare the two measures with regard to their legislative purpose and their regulatory structure.

41 — See the Draft Law prepared by the Federal Government (BT-Drucksache 15/1487, p. 17).

42 — See Piper, H., cited above in footnote 23, § 4.6, n. 1, p. 348; Hecker, M., *Lauterkeitsrecht — Kommentar zum Gesetz gegen den unlauteren Wettbewerb* (edited by Karl-Heinz Fezer), Munich, 2005, Vol. 1, § 4-6, n. 33, p. 707.

(a) The provisions of Directive 2005/29

(i) Full and maximum harmonisation of national rules as the regulatory objective

69. As stated earlier in this Opinion, [43] Directive 2005/29 seeks to bring about the full harmonisation of the laws of the Member States concerning unfair commercial practices. In addition, contrary to what was previously the case in sector-specific measures for the harmonisation of consumer-protection law, Directive 2005/29 not only aims at minimum harmonisation, but also seeks to achieve maximum approximation of national provisions which prohibit the Member States, apart from certain exceptions, from retaining or introducing stricter rules, even in order to achieve a higher level of consumer protection. [44] Both those aims are

43 — See point 37 of this Opinion.

44 — See *VTB-VAB and Galatea*, cited in footnote 7, paragraph 52. See, to the same effect, Massaguer, J., cited above in footnote 10, p. 15; Abbamonte, G., 'The unfair commercial practices Directive and its general prohibition', *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 — New Rules and New Techniques*, Norfolk, 2007, p. 19; and De Brouwer, L.,'Droit de la Consommation — La Directive 2005/29/CE du 11 mai 2005 relative aux pratiques commerciales déloyales', *Revue de droit commercial belge*, Vol.7, September 2005, p. 796, who concludes, from the fact of full harmonisation by Directive 2005/29, that the Member States have no power to adopt stricter rules, even if the purpose is to ensure a higher level of consumer protection. De Cristofaro, G., cited above in footnote 10, p. 32, considers that Member States may neither derogate from the provisions of the Directive nor set a higher level of consumer protection. In the opinion of Kessler, J., cited above in footnote 10, p. 716, the Directive not only lays down minimum standards, but at the same time prevents the Member States from maintaining measures which go beyond the substantive obligations of the Directive in the avowed interest of consumer information and thereby provide for stricter requirements.

made clear in the preamble and in the general provisions of the Directive.

70. This follows, first, from recital 11 in the preamble to the Directive, which states that the *convergence* of national provisions through the Directive should create a high common level of consumer protection. Second, recital 12 speaks of consumers and business being able to rely on a *single regulatory framework* based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the European Union. Article 1 of the Directive refers once again to the *approximation of laws*, the purpose of which is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection.

71. The objective of comprehensive maximum regulation at Community level within the area of life covered by Directive 2005/29 becomes clear yet again in recitals 14 and 15, which refer expressly to *full harmonisation*. This also follows from the internal market clause in Article 4 of the Directive, which provides that the Member States are neither to restrict the freedom to provide services nor to restrict the free movement of goods for reasons falling within the field *approximated* by the Directive.

72. By way of exception, Article 3(5) of the Directive provides that, for a period of six years from 12 June 2007, Member States may continue to apply national provisions within the field approximated by the Directive which are more restrictive or prescriptive than the Directive. However, this exception is confined to national provisions which are adopted to implement directives containing minimum harmonisation clauses. [45] Finally, there is a further exception to full harmonisation in Article 3(9) in relation to financial services, as defined in Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16), and immovable property.

45 — The directives referred to in Article 3(5) of Directive 2005/29 that contain minimum harmonisation clauses include the following: Council Directive 85/577EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31); Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59); Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ 1994 L 280, p. 83); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19); Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ 1998 L 80, p. 27); Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23).

(ii) The regulatory structure of Directive 2005/29

73. The cornerstone of Directive 2005/29 is the general clause in Article 5(1), which prohibits unfair commercial practices. Article 5(2) sets out in detail what precisely is meant by 'unfair'. It states that a commercial practice is unfair if, first, it is contrary to the requirements of 'professional diligence' and, second, it 'materially distorts' the economic behaviour of consumers. Under Article 5(4), unfair commercial practices are, in particular, those which are misleading (Articles 6 and 7) or aggressive (Articles 8 and 9). Article 5 refers to Annex I and the commercial practices there listed, which 'shall in all circumstances be regarded as unfair'. The same single list applies in all Member States and may be modified only by revision of the Directive.

74. It follows that, when the law is being applied by the national courts and administrative authorities, reference must be made in the first place to the list of 31 unfair commercial practices set out in Annex I. If a particular practice can be subsumed under one of those factual situations, it must be prohibited and no further examination is necessary, for example, as to its effects. If the practice in question is not covered by any of the situations on the banned list, it will be necessary to determine whether one of the regulated instances of the general clause — misleading or aggressive commercial practices — is involved. The general clause in Article 5(1) of the Directive is directly applicable only where that is not the case. [46]

(b) The provisions of the UWG

75. The Court has consistently held that each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues. [47] Coupled with this is the obligation of the national legislature duly to implement the directive in question in national law. [48] However, according to its wording, the third paragraph of Article 249 EC leaves it to the national authorities to choose

46 — The same approach is taken by De Cristofaro, G., cited above in footnote 10, p. 12, and by Henning-Bodewig, F., cited above in footnote 10, p. 631.

47 — See, inter alia, Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraph 22; Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 55; Case C-336/97 *Commission* v *Italy* [1999] ECR I-3771, paragraph 19; Case C-97/00 *Commission* v *France* [2001] ECR I-2053, paragraph 9; Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 15; and Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 75.

48 — The implementation of directives forms part of a two-stage legislative process, the second stage being situated at the level of national law. Substantive implementation at the level of national law gives effect to the law contained in a directive (see, on this point, Vcelouch, P., cited above in footnote 28, Article 249, paragraphs 48 and 50, pp. 17 and 18).

the form and methods. The right to make that choice rests in particular with the national legislature.

76. For that reason, it is recognised in the Court's case-law that the proper transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim into express, specific legislation. [49] Rather, it is necessary that the national law brought into force to implement the directive should meet the requirements of legal clarity and legal certainty in order to ensure that effect is given to the whole of the directive's programme when the national law is applied by the courts and authorities of the respective Member States. [50]

77. Before considering the question whether and, if so, to what extent the contested rule in Paragraph 4(6) of the UWG meets the requirements of the Directive, a brief explanation of the salient points of that national rule will be necessary.

49 — See Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 6; Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 35; Case C-49/00 *Commission* v *Italy* [2001] ECR I-8575, paragraphs 21 and 22; and Case C-410/03 *Commission* v *Italy* [2005] ECR I-3507, paragraph 60. This is correctly pointed out by Seichter, D., cited above in footnote 33, p. 1088, in connection with the need to implement Directive 2005/29 in German law.

50 — See, to that effect, Ruffert, M., in Calliess, C. and Ruffert, M. (eds), *Kommentar zu EUV/EGV,* 3rd edition, 2007, Article 249, paragraph 49, p. 2135. According to settled case-law, the implementation of a directive must ensure its full application: see, inter alia, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31; Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 49; and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 26.

(i) The regulatory structure of the prohibition in Paragraphs 3 and 4(6) of the UWG

78. Paragraph 3 of the UWG in the version of 3 July 2004, which was in force at the date of the request for a preliminary ruling and is therefore the relevant version for the purposes of the present case, prohibits unfair competition. This fundamental rule of the law on fair trading is framed as a general clause of comprehensive application for penalising breaches of competition law. That general clause continues to exist after the 2008 amendment of the UWG in Paragraph 3(1) thereof, new version, with only slight changes of wording.

79. The substantive law relating to breaches of competition is described by the term 'unfairness in competition'. The general structure of the UWG is as follows: the general provisions of Chapter 1 (Paragraphs 1 to 7) contain a clause setting out the purpose of protection (Paragraph 1 of the UWG), the definitions (Paragraph 2 of the UWG) and the prohibition rules (Paragraphs 3 to 7). The legal consequences (Paragraphs 8 to 10) of the breach of a prohibition and limitation periods (Paragraph 11) are regulated in Chapter 2 and the formal procedural law in Chapter 3. Chapter 4 (Paragraphs 16 to 19) contains the criminal law relating to competition and Chapter 5 (Paragraphs 20 to 22) sets out the final provisions.

80. Paragraph 4 of the UWG contains a catalogue of examples of the unfair competitive practices which are generally prohibited by the general clause of Paragraph 3, including the situation with which the present case is concerned, namely the participation of consumers in prize competitions or lotteries. [51] This means that the groups of cases developed mainly by German case-law and doctrine have been adopted. By compiling a catalogue of examples, the national legislature sought to relieve the courts to a large extent of the task of applying in concrete terms the element of 'unfairness' [52] and to create greater transparency. [53] As Paragraph 4(6) of the UWG is only a specific instance of the element of 'unfairness', the requirements of Paragraph 3 of the UWG must always also be met, in addition to the factual requirements of Paragraph 4(6) of the UWG (as in the case of the other statutory examples), in order for a particular practice to be found to be anti-competitive. [54] Paragraph 3 of the UWG provides that the unfair competitive acts (or unfair commercial acts under Paragraph 3(1) of the UWG, new version) must be likely to have a more than insignificant effect on competition to the detriment of competitors, consumers or other market participants. Consequently, the competitive act (or commercial act under Paragraph 3(1) of the UWG, new version) which is the subject of complaint must take place not only within a specific competitive relationship, but must also exceed a certain threshold, that is to say, it must be of some significance for competition in general and must substantially impinge on the interests of the categories of protected persons.

81. The introduction of a '*de minimis* threshold' or a 'perceptibility requirement' releases the national courts from having to deal with insignificant instances of abusive conduct. [55] In my view, the crucial factor in determining whether the provision at issue is consistent with Directive 2005/29 is how high or low the national courts dealing with competition matters set that threshold.

(c) Compatibility of the provision at issue with Directive 2005/29

(i) Need for interpretation in conformity with the Directive

82. With regard to the question whether a provision of national law is contrary to Community law, it is necessary to take into

51 — According to Köhler, H., 'Die UWG-Novelle', *Wettbewerb in Recht und Praxis*, 2009, p. 112, the examples of unfair practices in Paragraphs 4 to 6 of the UWG are to be used as specific instances for defining the concept of fairness in Paragraph 3 of the UWG.

52 — See, to that effect, Köhler, H., *Wettbewerbsrecht — Kommentar zum Gesetz gegen den unlauteren Wettbewerb*, cited above in footnote 33, § 3, n. 6, p. 152, and Piper, H., cited above in footnote 23, § 4, n. 2, p. 243.

53 — See the Draft Law prepared by the Federal Government (BT-Drucksache 15/1487, p. 18).

54 — See the Draft Law prepared by the Federal Government (BT-Drucksache 15/1487, p. 17). See also, to that effect, Hecker, M., cited above in footnote 42, § 4-6, n. 25, p. 704; Köhler, H., *Wettbewerbsrecht — Kommentar zum Gesetz gegen den unlauteren Wettbewerb*, cited above in footnote 34, § 4, n. 6.4, p. 309.

55 — See, to that effect, Charaktiniotis, S., *Die lauterkeitsrechtlichen Zulässigkeitsschranken der Kopplungsangebote nach der Aufhebung der Zugabenverordnung*, Frankfurt am Main, 2006, p. 164. According to Köhler, H., 'Die Bagatellklausel in § 3 UWG', *Gewerblicher Rechtsschutz und Urheberrecht*, 1/2005, p. 1, the abovementioned factual requirements in Paragraph 3 of the UWG are designed to rule out the prosecution of minor infringements.

account not only the wording of that provision, but also how it is interpreted by the national courts. [56] In view of the fact that the case-law of a Member State reproduces the interpretation of the law which has binding effect for all persons, that national case-law is the essential criterion for judging whether the implementation and interpretation of national law are in compliance with Community law. [57]

83. Although the element of 'unfairness' alone is met if the factual situation described in Paragraph 4(6) of the UWG obtains, an act is prohibited under national law only if the requirements of Paragraph 3 of the UWG are fulfilled, and the Bundesgerichtshof's observations [58] show that, in the case-law of the highest German courts, there is an obvious presumption that, in cases coming within Paragraph 4(6) of the UWG, the restriction of competition will always be significant. [59] This is clear from the reference to the opinions of legal commentators, [60] the comments on the national provisions in the order for reference, and also from the wording of the question referred itself, according to which the provision at issue prohibits combined offers, 'irrespective of whether, in any particular case, the advertising in question affects consumers' interests'. That wording suggests that Paragraph 4(6) of the UGW is interpreted as meaning that the national court has scarcely any scope for assessment in a particular case. In its earlier written observations, the German Government also appears to make that presumption when it speaks of an 'absolute' or 'general' ban [61] in relation to that national provision.

56 — Lenaerts, K., Arts, D. and Maselis, I., cited above in footnote 14, paragraph 5-056, p. 162, point out that the scope of national laws, regulations and administrative provisions must be assessed in the light of how they are interpreted by their national courts. The interpretation of national law in conformity with Community law was the subject of a reference for a preliminary ruling by the German Bundesgerichtshof in Case C-42/95 *Siemens* [1996] ECR I-6017, and by the Belgian Hof van beroep te Gent (Court of Appeal, Ghent) in Case C-205/07 *Gysbrechts and Santurel Inter* [2008] ECR I-9947.

57 — On this matter, see my Opinion in Case C-338/06 *Commission* v *Spain* [2008] ECR I-10139, point 89.

58 — See paragraphs 10, 15, 20 and 21 of the order for reference.

59 — See, for example, the judgment of the Oberlandesgericht Celle of 10 January 2008 (Ref. 13 U 118/07), in which the Oberlandesgericht points out that Paragraph 4(6) of the UWG, unlike Paragraph 4(1) thereof, does not expressly require, according to its wording, an ability to influence consumers' freedom of decision. In the opinion of the Oberlandesgericht, the legislature presumed that in principle such influence exists where the factual elements of Paragraph 4(6) of the UWG are present.

60 — In the view of Köhler, H., 'Die Bagatellklausel in § 3 UWG', cited above in footnote 55, p. 6, to which the Bundesgerichtshof refers, the fact that participation in a prize competition or lottery is made conditional upon the purchase of goods or services always has a more than insignificant adverse effect on consumers' interests in that they are compelled to make a purchase, which they did not otherwise plan, in order to be able to participate. The writer concludes that it is unnecessary to consider additionally under Paragraph 3 of the UWG whether there is a significant effect on competition to the detriment of competitors, consumers or other market participants.

61 — See paragraphs 9 and 14 of the German Government's written observations of 14 October 2008, in which it expresses the view, first, that 'additional *absolute* bans on unfair commercial practices are consistent with the general scheme of the Directive' and, second, that 'a national provision which *generally prohibits* such a combination is consistent with the meaning and purpose of the Directive'.
It will be noted that those observations in part contradict the German Government's later written observations of 19 May 2009, where it again takes the view that 'both Paragraph 3 of the UWG, in the version of 3 July 2004, and Paragraph 3(1) and (2) of the UWG, in the version of 22 December 2008, ensure that the legality of combined offers, within the meaning of Paragraph 4(6) of the UWG in the respective versions, *is to be assessed in the light of the circumstances of the particular case*' (see paragraphs 15 to 17). The German Government goes on to claim that the ban on sales promotion measures in Paragraph 4 of the UWG of 3 July 2004 is not a general prohibition to be applied automatically. Rather, it is to be applied subject to the conditions of Paragraph 3 of the UWG, which requires examination of the competitive practice in the light of the circumstances of the particular case. The situation remains in effect the same with regard to the new version of Paragraph 3 of the UWG following implementation of Directive 2005/29.

(ii) Assessment in the light of the provisions of the Directive

84. It is now necessary to determine whether that interpretation of Paragraph 4(6) of the UWG, which is in essence tantamount to a ban in principle on combined offers in connection with prize competitions or lotteries, is compatible with the Directive. For that purpose, the assessment procedure described in point 74 of this Opinion is to be followed.

— Article 5(4) and (5) of Directive 2005/29

85. First of all, it must be observed that the commercial practice prohibited by Paragraph 4(6) of the UWG does not correspond to any of the unfair commercial practices listed in Annex I to the Directive. [62] In particular, advertising claiming that products are able to facilitate winning in games of chance, listed as practice no. 16, is irrelevant. This relates to a particular form of advertising, but not to the use, in itself, of combined offers. Leaving that aside, the defendant in the main proceedings does not in any way advertise that the mere purchase of goods gives a chance of winning a prize, as has correctly been pointed out by the Portuguese Government. All that is offered is the opportunity to take part in a game of chance, which is in any case accessible to all, without promising the buyer a greater chance of winning.

86. As combined offers in general are not included among the commercial practices listed in Annex I which are in all circumstances to be considered unfair, they may in principle be prohibited only if they constitute unfair commercial practices because, for example, they are misleading or aggressive within the terms of the Directive. [63] However, the commercial practice banned by Paragraph 4(6) of the UWG cannot be described as misleading or aggressive within the meaning of Article 5(4) of the Directive.

— Article 5(2) of Directive 2005/29

87. Under the Directive, the question of a ban further arises only where a commercial practice is to be regarded as unfair because it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product. For that purpose, the factual require-

62 — Lutz, R., cited above in footnote 39, p. 910, also finds that Paragraph 4(6) of the UWG does not correspond to any of the example situations set out in the Directive. Consequently, that writer wonders whether that particular rule can remain intact.

63 — See my Opinion in *VTB-VAB and Galatea*, cited in footnote 8 above, point 82.

ments of Article 5(2)(a) and (b) must be cumulatively satisfied. [64]

88. In the opinion of the German Government, that is the case with regard to the commercial practice prohibited by Paragraph 4(6) of the UWG, the main reason being the risk of manipulation arising from the appeal to the consumer's love of gambling.

Failure of professional diligence

89. 'Professional diligence' is defined in Article 2(h) of the Directive as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.

90. This definition, which links up, inter alia, with the undefined legal concept of 'honest market practice', involves an assessment that may very well vary from one Member State to another, according to the prevailing cultural attitudes and moral standards. [65] This is also not precluded by the fact that, according to recital 13, the Directive aims, by way of the harmonisation of laws, to remove internal market barriers arising from the application of divergent general clauses and legal principles, particularly as the Member States have a degree of regulatory latitude in a narrowly defined area. [66] This is expressly recognised by the Directive because recital 7 states that 'This Directive … does not address legal requirements related to taste and decency which vary widely among the Member States' and gives, as an example, the practice of commercial solicitation in the streets, which is regarded as undesirable in several Member States. For that reason, recital 7 goes on to state that 'Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where

64 — See, to that effect, Abbamonte, G., cited above in footnote 44, p. 21, and Massaguer, J., cited above in footnote 10, p. 58.

65 — That is the view taken also by Micklitz, H.-W., cited above in footnote 10, p. 308, and Massaguer, J., cited above in footnote 10, p. 69, who consider that the definition of 'professional diligence' in Article 2(h) of the Directive is likely to lead to differing interpretations because of the use of vague legal concepts such as 'honest market practice' and 'good faith'.

66 — Glöckner, J. and Henning-Bodewig, F., 'EG-Richtlinie über unlautere Geschäftspraktiken: Was wird aus dem "neuen" UWG?', *Wettbewerb in Recht und Praxis*, 11/2005, p. 1323, refer to the Member States' discretion in implementing the Directive, which is the greater the more indefinite the Community law requirements are. In view of the uncertain nature of the concept of unfairness, the national legislatures had no doubt retained the freedom to punish commercial practices which offend taste, good faith or honest practice, following their national traditions, when implementing the general clause, provided that the amplification of those concepts does not diverge from the definition of 'unfairness' in Article 5(2), in conjunction with Article 2(h), of Directive 2005/29. The same applies in relation to the concept of 'honest market practice': see Micklitz, H.-W., cited above in footnote 10, pp. 309 and 310. That writer speaks of the Member States' latitude in matters of taste and decency.

such practices do not limit consumers' freedom of choice'.

91. The Court's decisions in the so-called games-of-chance cases also demonstrate that games of chance may harbour a potential risk to the societies of the Member States, [67] which must therefore be in a position to take appropriate measures to control the risks arising from addiction to gambling. The central issue in those cases was to strike a balance between the freedom to provide services and the freedom of establishment, on the one hand, and, on the other, the safeguarding of imperative requirements in the general interest such as consumer protection, the prevention of fraud, preventing citizens from being tempted to spend excessively on gaming, as well as defending the social order in general. [68] The Court acknowledged that the Member States 'are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought'. In the Court's opinion, 'moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require', on condition that the measures adopted are proportionate. [69]

92. In my view, it is necessary, for the sake of consistent case-law, to apply the abovementioned principles to the interpretation of Article 5(2)(a) of the Directive, in particular to the element of 'honest market practice', and to allow the Member States a sufficient margin of discretion — within the limits laid down by Community law — when adopting measures for controlling the risks arising from addiction to gambling.

93. The German Government's general doubts concerning a commercial practice that uses the enticement effect of games of chance can be categorised as moral reservations. As the German Government correctly observes, the use of games of chance in advertising is very likely to arouse the human pleasure in gambling. Not least because of the prospect of (sometimes) very large winnings, such games exercise a certain

67 — In his Opinion in Case C-42/07 *Liga Portuguesa de Futebol Profissional and Baw International* BWIN, points 28 to 33, Advocate General Bot points out the risks to society posed by games of chance and gambling. First, these may lead players to jeopardise their financial and family situation, and even their health. Second, because of the very considerable stakes involved in gambling and games of chance, they are likely to be open to manipulation on the part of the organiser, who may wish to arrange matters so that the result of the draw or the sporting event is the most favourable to himself. Finally, games of chance and gambling may be a means of 'laundering' illicit funds.

68 — See Case C-275/92 *Schindler* [1994] ECR I-1039, paragraphs 57 to 60; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraphs 32 and 33; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraphs 30 and 31; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 60 to 67; and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 45 to 49. See also the EFTA Court judgments in Case E-1/06 *EFTA Surveillance Authority* v *Norway*, EFTA Court Report 2007, paragraph 34, and Case E-3/06 *Ladbrokes Ltd* v *Government of Norway, Ministry of Culture and Church Affairs and Ministry of Agriculture and Food*, EFTA Court Report 2007, paragraph 44.

69 — See the following cases, all cited in footnote 68: *Schindler*, paragraph 61; *Läärä and Others*, paragraph 35; *Zenatti*, paragraph 33; *Gambelli and Others*, paragraph 63; *Placanica and Others*, paragraph 47; EFTA Case E-1/06 *EFTA Surveillance Authority* v *Norway*, paragraph 29; and EFTA Case E-3/06 *Ladbrokes Ltd* v *Government of Norway, Ministry of Culture and Church Affairs and Ministry of Agriculture and Food*, paragraph 42.

attraction. They can arouse the attention of prospective customers and direct them to certain ends by means of the chosen advertising strategy. For that reason, the argument that a commercial practice of this kind has manipulatory elements and may consequently, in certain circumstances, amount to a breach of professional diligence cannot, in general, be rejected out of hand.

94. A commercial practice under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services may therefore, under certain circumstances, be contrary to the requirements of professional diligence within the terms of Article 5(2)(a) of the Directive.

Capacity materially to distort the average consumer's behaviour

95. 'To materially distort the economic behaviour of consumers', for the purposes of Article 5(2)(b) of the Directive, means, according to the legal definition set out in Article 2(e), 'using a commercial practice to appreciably impair 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'. This provision is designed to safeguard the consumer's decision-making freedom. [70]

96. The coupling of prize competitions and lotteries with the purchase of goods or services is, in view of the risks already outlined, [71] and taking as a basis a reasonable decision-making discretion of the Member States, capable in principle of materially distorting the approach of consumers to what they buy. As the German Government correctly observes, [72] the possibility cannot be ruled out that the prospect of taking part in the lottery free of charge may cause consumers to spend more than they plan in order to participate. In principle, such a prospect may also induce consumers to buy more goods from the business advertising in that way so that they can continue to take part in the lottery.

97. Consequently, the factual elements of Article 5(2)(b) of the Directive would, in principle, be satisfied.

70 — But not the consumer's economic interest. According to Abbamonte, G., cited above in footnote 44, p. 23, this provision proceeds from the basic assumption that unfair commercial practices as a rule confuse the consumer's preferences because they interfere with his decision-making freedom or capacity. As a result, consumers may buy goods which they do not need or which they would otherwise (without the interference) regard as inferior. However, Article 5(2)(b) of Directive 2005/29 does not require financial damage on the part of the consumer. In the writer's opinion, such a requirement would have been unreasonable because it would significantly have reduced the level of consumer protection within the European Union.

71 — See point 93 of this Opinion.

72 — See paragraph 23 of the German Government's written observations.

Need for an overall assessment of the circumstances of each particular case

98. It is, however, doubtful whether this general approach actually corresponds to the meaning and purpose of the Directive or to the intention of the Community legislature. As I explained in my Opinion in *VTB-VAB and Galatea*,[73] it is impossible to give a generally valid reply to the question whether bans on combined offers must be regarded as unfair because they meet the factual requirements of Article 5(2) of the Directive, and what is needed rather is an assessment of the specific commercial practice in each particular case.

99. This is perfectly clear from recital 7 in the preamble to the Directive, which states that full account should be taken of the context of the individual case concerned in applying the Directive, in particular the general clauses thereof. The words 'in particular' also show that the assessment of the individual case is not confined to applying the general clause of Article 5(1), but also extends to applying the provisions of Articles 5 to 9 of the Directive, which amplify Article 5(1). Recital 17 in the preamble to the Directive shows that the Community legislature also presumes that a case-by-case assessment by reference to the provisions of Articles 5 to 9 will be necessary where a commercial practice is not one of the practices listed in Annex I. This follows from an *a contrario* reading of the third sentence of recital 17, which states that the commercial practices listed in Annex I are the only ones which 'can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9'.

100. The prohibition in principle of combined offers laid down by Paragraph 4(6) of the UWG, as interpreted above, amounts in effect to extending the list of prohibited commercial practices in Annex I to the Directive, which is, however, precisely what the Member States are barred from doing in view of the full maximum harmonisation which goes hand in hand with Directive 2005/29.[74] In addition, the Member States are prohibited from making unilateral additions to this list because, under Article 5(5), the list can be modified only by revision of the Directive itself, that is to say, by means of the joint decision procedure laid down in Article 251 EC.

73 — Cited in footnote 8 above, point 83.

74 — Abbamonte, G., cited above in footnote 44, p. 21, points out that the Member States may not themselves add to the exhaustive list of prohibited commercial practices in Annex I to Directive 2005/29. If they were allowed to do so, this would have the result of circumventing the maximum harmonisation which is the aim of the Directive, which would frustrate the objective of legal certainty. In the view of Seichter, D., cited above in footnote 33, p. 1095, the ban on combined offers in Paragraph 4(6) of the UWG must be set aside because it goes beyond the group of cases regulated in Annex I.

101. The task of assessing the fairness of a commercial practice by reference to specific circumstances, in particular its effect on the 'economic behaviour' of a typical consumer, is assigned by the Community legislature to the national courts and administrative authorities. This is expressly stated in recital 18 in the preamble to the Directive. [75] They are responsible, under Articles 11 and 12 of the Directive, for enforcing compliance with the Directive within the framework of the systems of sanctions to be established at national level. [76] However, when the German legislature lays down prohibitions in principle which go beyond the list in Annex I to the Directive and leaves to the courts which interpret the law and to the government authorities which administer it, to which Directive 2005/29 is also addressed in that respect, no scope for adjudication, the aim of effective implementation of the Directive at national level is frustrated. [77]

102. A comprehensive assessment of the circumstances of each case in which Article 5(2) of the Directive applies is all the more necessary because it cannot be presumed that every combination of the sale of goods with a lottery will in principle and per se feature the manipulative effect alleged by the German Government. The requirement of 'material' distortion or influence in

75 — Also noted by Bernitz, U., 'The Unfair Commercial Practices Directive: Scope, Ambitions and Relation to the Law of Unfair Competition', *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 — New Rules and New Techniques*, Norfolk, 2007, p. 39, who likewise finds support in recital 18 in the preamble to the Directive, which states that 'national courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case'. Recital 20 goes on to speak of recourse to administrative or judicial action.

76 — As a result of historical developments and different structures of legal systems, the Member States of the Community have a variety of systems of sanctions in relation to fair-trading law. So far, Community law has harmonised the Member States' provisions on sanctions and procedural rules only in relation to individual areas and does not lay down a particular system for action against unfair commercial practices. Directive 2005/29 does not alter this acceptance by Community law of different national enforcement systems. The national legislatures remain responsible for deciding whether action against unfair commercial practices is to be taken by way of administrative law, criminal law or civil law, as confirmed by the third subparagraph of Article 11(1) of the Directive. Combinations of different systems of sanctions are possible. The national legislatures also have power to determine whether judicial and/or administrative authorities are to deal with disputes (on this matter, see Alexander, C., 'Die Sanktions- und Verfahrensvorschriften der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken im Binnenmarkt — Umsetzungsbedarf in Deutschland?', *Gewerblicher Rechtsschutz und Urheberrecht*, 2005, Vol. 10, p. 810, and Massaguer, J., cited above in footnote 10, p. 144.

77 — Stuyck, J., cited above in footnote 36, p. 170, points out that Directive 2005/29 requires a case-by-case assessment of the unfairness of a commercial practice. He thus takes the view that a national provision which bans in principle, or regulates in a general way, certain forms of sales promotion such as loss-leading, prize offers, discount vouchers, clearance sales, and so forth, without giving the courts power to adjudicate in individual cases whether the commercial practice in question is to be deemed unfair to consumers, can, in view of Directive 2005/29, no longer be upheld.

Article 5(2)(b) necessarily presupposes a case-by-case assessment. [78] However, it is possible to envisage situations in which the inducement to take part in a lottery or prize competition does not influence, whether at all or not materially, consumers' purchasing habits.

103. Accordingly, with regard to the case which is the subject of the main proceedings, it can be argued — without wishing to anticipate an assessment on this point by the national courts which are required to apply Community law to the dispute in the main proceedings [79] — that the prospect of playing lotto is hardly likely always to persuade an average consumer to purchase goods to the value of EUR 100, particularly as, first, that is a relatively large sum and, second, it is, after all, open to anyone to play that game. Therefore I must agree with the Spanish Government that an average consumer who wishes to play lotto will not usually wait until he has spent EUR 100 in order to join in the game. [80] Therefore, in the situation which is the subject of the present case, it will be perfectly clear to the average consumer that the benefit is limited to playing lotto free of charge and that, in order to do so, he must buy goods to the value of at least EUR 100. Against this background, the consumer is free to decide whether to take part in the promotion or to purchase from a competitor. [81]

104. To sum up, it may be stated that a national provision such as Paragraph 4(6) of the UWG, in the interpretation attributed to it, which imposes a prohibition in principle on combined offers, without providing for the possibility of taking account of the circumstances of the particular case, is by its nature more restrictive and more stringent than the provisions of Directive 2005/29.

105. In this connection, it must be noted that Paragraph 4(6) of the UWG concerns a sector which is subject to full harmonisation and to which the transitional provisions of

78 — See, to that effect, Bloß, A., 'Zum Kopplungsverbot für Preisausschreiben und Gewinnspiele', *Zeitschrift für Medien- und Kommunikationsrecht*, Vol. 5, 2008, p. 487. In the writer's opinion, a case-by-case assessment must be made according to the Directive particularly in regard to the element of 'material' distortion or influence. If the Community legislature had intended to extend the ban to lotteries combined with the sale of goods, the obvious thing to do would have been to include them expressly in Annex I to the Directive. The writer expresses the view that lotteries combined with the sale of goods are not in principle and per se capable of materially influencing consumers' buying habits. However, Paragraph 4(6) of the UWG does not provide for a case-by-case assessment, which is, however, permitted by the unfairness definitions of the Directive. Therefore it is unlikely that the general ban on combined offers in Paragraph 4(6) of the UWG can be maintained. In the view of Leible, S., 'BGH: Vereinbarkeit des deutschen Gewinnspiel-Kopplungsverbots mit der EG-Richtlinie über unlautere Geschäftspraktiken', *Lindenmaier-Möhring Kommentierte BGH-Rechtsprechung*, 2008, 269263, if the Community legislature had intended to impose a ban per se on combined prize competitions and lotteries irrespective of whether the combination results in unreasonable influence on the consumer, the obvious thing to do would have been to include in Annex I to Directive 2005/29 prize competitions and lotteries that are combined with the purchase of goods or services as commercial practices which are in all circumstances considered unfair.

79 — According to Craig, P. and De Búrca, G., *EU Law*, 4th edition, Oxford, 2008, p. 492, although Article 234 EC confers upon the Court power to interpret the Treaty, it does not expressly confer power to apply the Treaty to the case in the main proceedings. The demarcation between interpretation and application marks the distribution of powers as between the Court of Justice and the national courts. Consequently, the Court interprets the Treaty and the national courts apply that interpretation to the particular case.

80 — Written observations of the Spanish Government, paragraph 10.

81 — See also, to the same effect, Seichter, D., 'EuGH-Vorlage zum Kopplungsverbot ("Millionen-Chance")', *juris PraxisReport Wettbewerbs- und Immaterialgüterrecht*, 8/2008, n. 2.

Article 3(5) of the Directive do not apply. The exception laid down in Article 3(9) is likewise not applicable.

The withdrawal of the Commission proposal for a regulation on sales promotions in the internal market

106. The question arises as to the consequences, for that interpretation, of the withdrawal of the Commission proposal for a regulation on sales promotions in the internal market. [82] The German Government refers basically to the individual amendments which were made to the Commission proposal in the course of the legislative process [83] and which, in its opinion, justify the conclusion that there is a broad consensus among the Member States and within the European Parliament as to the need for a prohibition in principle of combined offers. [84]

107. According to the German Government, the German legislature, when enacting the UWG, which entered into force on 8 July 2004, referred to the amended Commission proposal and included the reasoning of the European Parliament in the explanatory note concerning Paragraph 4(6) of the UWG. According to this, the reason why combined offers are anti-competitive is that they seek to exploit addiction to gambling and thereby to cloud consumers' judgment.

108. However, contrary to the view taken by the German Government, no conclusions can be drawn, for purposes of the interpretation of Directive 2005/29, from the Commission proposal for a regulation concerning sales promotions in the internal market or from the proposed amendments submitted in the course of the legislative process because the German Government seeks support in a proposal for a Community legal act which ultimately never entered into force. For that reason, that government cannot successfully invoke the protection of legitimate expectations. [85] As the German Government itself states, the legislative processes for the regulation and Directive 2005/29 ran, in part, concurrently. As the constitutional representative of a Member State represented within the Council, the German Government played a key role in both legislative processes and was therefore constantly informed of their progress. [86] Therefore it cannot plead, in a legally effective manner, that it was unaware of

82 — Commission proposal of 15 January 2002 for a European Parliament and Council regulation concerning sales promotions in the internal market (COM(2001) 546 final).

83 — Amended Commission proposal of 25 October 2002 for a European Parliament and Council regulation concerning sales promotions in the internal market (COM(2002) 585 final).

84 — Written observations of the German Government, paragraphs 18 to 21.

85 — See my observations on this point concerning the submissions of the Belgian and French Governments, which are similar in certain respects, in my Opinion in *VTB-VAB and Galatea*, cited in footnote 8 above, point 91.

86 — The Federal Government's Draft Law (BT-Drucksache 15/1487, p. 12) shows that it was aware that two fair-trading proposals were being discussed within the bodies of the European Community at that time. Those were, first, the proposal for a regulation concerning sales promotions in the internal market, which had been amended after referral to the European Parliament and which, according to the Federal Government itself, 'will be rejected by the Federal Government and most of the other Member States'. Second, the Federal Government refers to a draft framework directive which, according to the government itself, 'comes closer to the ideas of the Federal Government'.

the course of events in both legislative processes. [87]

109. The Court has stressed the particular responsibility of the governments of the Member States represented within the Council in the implementation of directives. The Court has thus inferred that, as the governments of the Member States participate in the preparatory work on directives, they must be in a position to prepare within the period prescribed the legislative provisions necessary for their implementation. [88]

110. Therefore, by the date of the withdrawal of the Commission's proposal at the latest, [89] the German Government ought to have examined, if appropriate, how far the scope *ratione materiae* of Directive 2005/29 would also extend to areas previously covered by the planned regulation. This was obviously necessary, particularly as the Directive was originally intended, first, to introduce general subsidiary rules in the Community law area of consumer protection and, second, to bring about full harmonisation of the Member States' rules concerning unfair commercial practices. [90] As the proposal was withdrawn at a time when the period for implementing the Directive was still running, the German legislature ought to have taken those factors into account when adjusting national law.

111. This submission must accordingly be rejected.

4. Concluding findings

112. In view of the foregoing considerations, I conclude that an interpretation of Paragraphs 3 and 4(6) of the UWG, such as that supported in the case-law of the highest German courts, which regards those national rules as prohibiting in principle combined offers in connection with prize competitions and lotteries, [91] is not in conformity with the Directive.

113. It follows that Article 5(2) of the Directive is to be interpreted as precluding a

87 — See my Opinion in Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, point 45, in which I expressed the view that a government, as the constitutional representative of a Member State represented within the Council, cannot deny having knowledge of the interpretative declarations which were recorded by that institution in the course of the legislative process.

88 — Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 11, and Case C-319/99 *Commission* v *France* [2000] ECR I-10439, paragraph 10.

89 — The Commission's decision to withdraw its proposal for the regulation was published in OJ 2006 C 64, p. 3. However, the Commission had already announced this decision in its communication of 27 September 2005 entitled 'Outcome of the screening of legislative proposals pending before the Legislator' (COM(2005) 462 final, p. 10).

90 — That is also the opinion of Stuyck, J., cited above in footnote 36, p. 161, who voices the suspicion that several Member States obviously did not realise that the provisions of the withdrawn proposal for a regulation, which concerned the relationship between traders and consumers, were ultimately taken up again by Directive 2005/29 (in view of the objective of full harmonisation).

91 — See points 81 to 83 of this Opinion.

national provision which states that a commercial practice under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services is in principle unlawful, irrespective of whether, in a particular case, the advertising in question adversely affects consumers' interests.

VII — Conclusion

114. I therefore propose that the Court should reply as follows to the question referred by the Bundesgerichtshof:

Article 5(2) 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 ('Unfair Commercial Practices Directive') is to be interpreted as precluding a national provision which states that a commercial practice under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services is in principle unlawful, irrespective of whether, in a particular case, the advertising in question adversely affects consumers' interests.