Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 26 November 2013 [1]

Case C-421/12

European Commission
v
Kingdom of Belgium

(Action for failure to fulfil obligations brought by the Commission against the Kingdom of Belgium)

(Failure to fulfil obligations — Consumer protection — Unfair commercial practices — Directive 2005/29/EC — Exclusion of the professions, dentists and physiotherapists — National legislation on the announcement of price reductions — National legislation restricting or prohibiting certain types of itinerant trading activities — Greater protection — Complete harmonisation)

1. Against the background of an application for a declaration of failure to fulfil obligations concerning the alleged incorrect transposition of Directive 2005/29/EC [2] ('the Unfair Commercial Practices Directive'), the Court of Justice has the opportunity to rule on the transitional arrangements under Article 3(5) of that directive, whereby, for a limited period of time and on certain conditions, Member States are able to apply national provisions for consumer protection which are 'more restrictive or prescriptive' than those provided for in Directive 2005/29 itself.

I – **Legislative framework**

A – *EU law*

1. Directive 2005/29

2. Recital 6 in the preamble to Directive 2005/29 states that it 'approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. … It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. Nor does this Directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising'.

1 — Original language: Spanish.

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 (OJ 2005 L 149, p. 22).

3. Further on in the preamble, in recital 14, it is stated that '[i]t is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. In conformity with the laws and practices of Member States on misleading advertising, this Directive classifies misleading practices into misleading actions and misleading omissions. In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision'.

4. Recital 15 states that '[w]here Community law sets out information requirements in relation to commercial communication, advertising and marketing that information is considered as material under this Directive. Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. A non-exhaustive list of such information requirements in the *acquis* is contained in Annex II. Given the full harmonisation introduced by this Directive only the information required in Community law is considered as material for the purpose of Article 7(5) thereof. Where Member States have introduced information requirements over and above what is specified in Community law, on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under this Directive. By contrast Member States will be able, when allowed by the minimum clauses in Community law, to maintain or introduce more stringent provisions in conformity with Community law so as to ensure a higher level of protection of consumers' individual contractual rights'.

5. Finally, recital 17 states that '[i]t is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive'.

6. Article 1 of Directive 2005/29 provides that its 'purpose … is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests'.

7. Article 2 of the directive contains a number of definitions, of which the following are relevant for the purposes of these proceedings:

'(b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

…

(d) "business-to-consumer 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.'

8. Article 3 of Directive 2005/29, entitled 'Scope', provides as follows:

'1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

…

4. In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

5. For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 18 may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.

6. Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5.

…'

9. Pursuant to Article 4 of Directive 2005/29, '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'.

10. Under the title 'Prohibition of unfair commercial practices', Article 5 of Directive 2005/29 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.

…

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.

…'

11. Under the title ‘Misleading actions’, Article 6 of Directive 2005/29 provides as follows:

‘1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

…

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

…’

2. Directive 85/577/EEC

[3]

12. Article 1(1) of Directive 85/577 provides that the directive ’shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:

— during an excursion organised by the trader away from his business premises,

or

— during a visit by a trader:

(i) to the consumer’s home or to that of another consumer;

(ii) to the consumer’s place of work; where the visit does not take place at the express request of the consumer’.

13. Article 8 of Directive 85/577 provides that the directive ‘shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers’.

3. Directive 98/6/EC[4]

14. By virtue of Article 1, ‘[t]he purpose of [Directive 98/6] is to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices’.

15. By virtue of Article 10, Directive 98/6 ‘shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty’.

3 — Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31).

4 — Directive 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).

B – *National law*

16. The Law of 5 June 2007, amending the Law of 14 July 1991 on commercial practices, consumer information and consumer protection ('the Law of 5 June 2007') and transposing Directive 2005/29,[5] in conjunction with the Law of 6 April 2010 on market practices and consumer protection,[6] excludes members of a profession, dentists and physiotherapists from its scope.

17. In judgment No 55/2011 of 6 April 2011, which was confirmed by judgment No 192/2011 of 15 December 2011, the Belgian Constitutional Court held that certain provisions of the Law of 6 April 2010 were unconstitutional in so far as they excluded members of a profession, dentists and physiotherapists from the scope of that law.

18. Article 4 of the Law of 2 August 2002 on misleading advertising, comparative advertising, unfair terms and distance contracts pertaining to the professions[7] ('the Law of 2 August 2002') gives a definition of misleading advertising and provides that it is prohibited in relation to the professions.

19. Articles 43(2) and 51(3) of the Law of 14 July 1991 provided that traders could not announce price reductions during a sale if the reduction was not genuine with respect to the price during the month immediately prior to the date on which the reduction was applicable.

20. Under Articles 20 to 23 and 29 of the Law of 6 April 2010, products can be regarded as discounted only if the price is lower than the reference price where that is defined as the lowest price set by the undertaking for such products during that month.

21. The Law of 25 June 1993 on the practice and organisation of itinerant trading and fairground activities,[8] as amended by the Law of 4 July 2005[9] ('the Law of 25 June 1993') provides that door-to-door selling at the home of the consumer is permitted provided that the total value does not exceed EUR 250 for each consumer. Article 5 of the Royal Decree of 24 September 2006 on the practice and organisation of itinerant trading activities[10] ('the Royal Decree of 24 September 2006') prohibits itinerant trading in, inter alia, medicinal products, medicinal plants and preparations made from such plants, any product intended to affect health, medical and orthopaedic equipment, corrective lenses and spectacle frames, precious metals and stones, pearls, arms and ammunition.

II – **The pre-litigation procedure**

22. Following informal communications with the Belgian authorities, on 2 February 2009 the Commission sent the Kingdom of Belgium a letter of formal notice alleging that it had failed adequately to transpose Directive 2005/29. In letters dated 3 June 2009 and 24 June 2009 the Belgian authorities announced certain legislative amendments aimed at addressing the issues raised by the Commission. To that end the Law of 6 April 2010 on market practices and consumer protection was enacted and came into force on 12 May 2010.

23. By a reasoned opinion of 15 March 2011, the Commission informed the Belgian authorities that the Law of 6 April 2010 did not address four of the grounds of failure to fulfil Treaty obligations set out in the letter of formal notice of 2 February 2009.

5 — *Moniteur belge*, 21 June 2007, No 2007011259, p. 34272.

6 — *Moniteur belge*, 12 April 2010, No 2010011166, p. 20803.

7 — *Moniteur belge*, 20 November 2002, No 2002009820, p. 51704.

8 — *Moniteur belge*, 30 September 1993, No 199301806, p. 21526.

9 — *Moniteur belge*, 25 August 2005, No 258, p. 36965.

10 — *Moniteur belge*, 29 September 2006, No 2006022950, p. 50488.

24. The Commission has taken the view that the explanations offered by the Belgian authorities in their letter of 11 May 2011 were insufficient in relation to the failures referred to in three of the grounds set out in the letter of formal notice of 2 February 2009 and for this reason it has decided to bring the present action.

III – **The action brought by the Commission**

25. By its application, the Commission complains that the Kingdom of Belgium has failed to fulfil its obligations in three respects.

26. The first failure complained of relates to the exclusion of certain occupations from the scope of Directive 2005/29, which applies to the commercial practices of all traders, irrespective of their legal status or the sector in which they operate. It is claimed that specifically excluding members of a profession, dentists and physiotherapists from the scope of the Law of 5 June 2007 transposing Directive 2005/29 into Belgian law contravenes Article 3 of that directive, read in conjunction with Article 2(b) thereof, and that the infringement has not been remedied by the Law of 6 April 2010.

27. According to the Commission, the fact that on 6 April 2011 the Belgian Constitutional Court found the provisions of the Law of 6 April 2010 that excluded those occupations from its scope to be unconstitutional does not mean that the infringement complained of has been remedied, since before those provisions can be declared null and void, an action for annulment would have to be brought, and, were this to happen, it would be after the expiry of the period accorded to the Belgian authorities during the pre-litigation procedure for remedying the failure complained of.

28. The second failure relates to the Belgian legislation on the announcement of price reductions. The Commission argues that Article 43(2) of the Law of 14 July 1991 and Articles 20, 21 and 29 of the Law of 6 April 2010 afford the consumer more stringent protection than that provided for in Directive 2005/29, which has fully harmonised unfair commercial practices.

29. The third failure concerns the prohibition of certain types of itinerant trading. The Commission notes that the first subparagraph of Article 4(3) of the Law of 25 June 1993, which was introduced by Article 7 of the Law of 4 July 2005, prohibits all door-to-door selling, subject to certain exceptions, while Article 5(1) of the Royal Decree of 24 September 2006 provides that certain types of product may not be sold through itinerant trading. Directive 2005/29, however, does not contain prohibitions of this type and therefore precludes the national legislation in question, given the exhaustive nature of the harmonisation that it effects.

30. The Commission is therefore applying to the Court of Justice for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 3, read in conjunction with Article 2(b) and (d), and Article 4 of Directive 2005/29, and for an order that the Kingdom of Belgium should pay the costs.

IV – **The procedure before the Court of Justice**

31. The Kingdom of Belgium has entered a defence in which it is argued that the first plea in law is inadmissible in so far as the Commission has disregarded the current Law of 2 August 2002 and has failed to specify which provisions of that law infringe Directive 2005/29. Regarding the substance, the Kingdom of Belgium acknowledges that certain occupations were excluded from the scope of the law transposing the directive, but points out that the Constitutional Court has held that the exclusion is unconstitutional, observing that an action for annulment was brought on 6 September 2012 which

may result in the provisions found to be unconstitutional being retrospectively annulled. The Kingdom of Belgium argues that, in any event, the provisions in question are inapplicable due to their unconstitutionality and that, as a result, on the date when the period allowed by the Commission ended, the failure had already been remedied.

32. In its reply, the Commission argues that the Kingdom of Belgium refers to the Law of 2 August 2002 for the first time in the defence and that, although it does indeed prohibit misleading advertising in relation to the professions, its purpose is not to transpose Directive 2005/29, but rather Directive 84/450/EEC.[11] Although the two directives might cover the same types of practices, they in fact have different objectives, as is apparent from recital 6 in the preamble to Directive 2005/29. Consequently, Member States were required to transpose Directive 2005/29 in order to cover misleading advertising in the area to which it relates. As regards the Kingdom of Belgium's defence concerning the substance of the first failure to fulfil obligations, the Commission replies that while the Belgian authorities maintained during the pre-litigation stage that the unconstitutional provisions could be retrospectively removed only if an action for annulment were successful, they now maintain that the finding of unconstitutionality is sufficient to remove them. Be that as it may, the Commission takes the view that legal certainty for consumers demands that a declaration of unconstitutionality alone cannot be regarded as sufficient to remove the provisions at issue from national law, since the possibility that further pronouncements might be necessary in order finally to expunge the unconstitutional provisions constitutes an uncertainty that is unacceptable.

33. In its rejoinder, the Kingdom of Belgium argues that the Commission does not deny that Article 4 of the Law of 2 August 2002 regulates misleading advertising as far the professions are concerned and, as such, corresponds to Article 2(d) of Directive 2005/29, meaning that it partially transposes that directive. It claims that the failure to take account of this law in the letter of formal notice renders the plea inadmissible. Furthermore, in the opinion of the Belgian authorities, the judgments of the Constitutional Court finding the provisions unconstitutional provide sufficient certainty, in that their effect is to bring the professions within the scope of the Law of 5 June 2007.

34. With respect to the second failure, the Kingdom of Belgium argues that the Law of 6 April 2010 no longer requires that the price announced as having been reduced was the price applied throughout the month prior to the announcement of the price reduction. Furthermore, even though it effects a complete harmonisation, Directive 2005/29 does not contain provisions which enable the economic reality of price reductions to be ascertained. On the other hand, Directive 98/6 was not amended by Directive 2005/29 and Article 10 thereof allows Member States to adopt or maintain provisions which are more favourable as regards consumer information and comparison of prices. The Kingdom of Belgium argues that, according to the Court of Justice, the right to consumer information constitutes a principle of EU law and, consequently, the legislation at issue must be examined in the light of Article 28 TFEU to ascertain whether it is justified by reasons of overriding necessity and is proportionate to the objective sought to be attained.

35. On this point, the Commission replies that the scope of Directive 98/6 does not include consumer information relating to price reductions and does not cover all aspects of consumer information that may be connected to the price of products. The intention of the legislature in relation to Directive 2005/29 is to prevent Member States from prohibiting certain commercial practices on the basis that the trader has not observed certain information requirements prescribed by national law. And, in fact, the Belgian legislation does have the effect of prohibiting the announcement of price reductions where the strict conditions contained in that legislation are not met, even where such practices may not, when examined individually, be considered misleading or unfair within the meaning of Directive 2005/29. The Commission also rejects the argument put forward by the Belgian authorities concerning Article 28 TFEU.

11 — Council Directive of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

36. In its rejoinder, the Kingdom of Belgium maintains that if the Commission's approach were to be accepted, where price reductions are concerned it would be necessary to examine each case individually, which would lead to many different criteria being applied by national courts when determining whether an announcement constituted an unfair practice, and this would be contrary to the objective sought by Directive 98/6 in the area of price comparisons.

37. As far as the third failure is concerned, the Kingdom of Belgium argues that both Article 5(1) of the Royal Decree of 24 September 2006 and Article 7 of the Law of 4 July 2005 fall within the scope of Directive 85/577 and constitute more stringent national measures, which are permitted under that directive. The Commission's argument that the exhaustive nature of the harmonisation required by Directive 2005/29 has been overlooked is therefore without basis. Directive 2005/29 constitutes an additional measure to supplement the EU consumer protection measures already in force and does not amend or limit the scope of Directive 85/577, which is complementary to that of Directive 2005/29. Finally, it is argued that the national measures relate to implementation measures for Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64), which the Kingdom of Belgium was required to adopt before 13 December 2013.

38. The Kingdom of Belgium asks the Court of Justice to declare the first plea in the application inadmissible, to dismiss the remainder as unfounded and to order the Commission to pay the costs.

V – **Assessment**

A – *The first plea in law*

1. Admissibility

39. As I have already mentioned, the Commission believes that specifically excluding members of a profession, dentists and physiotherapists from the scope of the Law of 6 April 2010 transposing Directive 2005/29 into Belgian law is contrary to Article 3 of the directive, read in conjunction with Article 2(b) thereof.

40. The Kingdom of Belgium argues in response that the first plea in law is inadmissible inasmuch as the Commission has failed to take into account the Law of 2 August 2002 on misleading advertising, comparative advertising, unfair terms and distance contracts pertaining to the professions and has failed to specify which provisions of that law infringe Directive 2005/29.

41. Countering the plea of inadmissibility, the Commission points out that the Kingdom of Belgium refers to the Law of 2 August 2002 for the first time in its defence. That aside, and even assuming that that law prohibits misleading advertising in relation to the professions, the Commission argues that its purpose is to transpose Directive 84/450 rather than Directive 2005/29, when the two directives have different purposes and these proceedings concern the incorrect transposition of the latter. The response of the Kingdom of Belgium is that Article 4 of the Law of 2 August 2002 regulates misleading advertising as far the professions are concerned and consequently it corresponds to Article 2(d) of Directive 2005/29, meaning that it constitutes a partial transposition of that directive.

42. In my view, the first plea should not be declared inadmissible.

43. In paragraph 1 of the letter of formal notice sent to the Kingdom of Belgium on 2 February 2009, the Commission made it clear that the Law of 5 June 2007 transposing Directive 2005/29 excludes the professions from its scope, indicating that the exclusion was 'confirmed by the existence of a separate law relating to the professions, namely the Law of 2 August 2002 …, which has not been amended in order to effect the transposition of Directive [2005/29]'. The Commission went on to make the point, which the Kingdom of Belgium has not disputed, that the Belgian authorities, in their earlier correspondence, 'have acknowledged that this is the case' and have indicated their intention to introduce an amendment. Indeed, the Law of 6 April 2010 was enacted precisely for the purpose of addressing the Commission's request, although it still excludes the professions.

44. In view of this, it seems to me that the Commission was not obliged to make further reference to the possibility that the Law of 2 August 2002 represented the fulfilment of the obligations under Directive 2005/29 as far as the non-exclusion of the professions was concerned, since from the outset the Belgian authorities accepted the Commission's assertion that the Law of 2 August 2002 confirmed the existence of the exclusion established in the Law of 5 June 2007.

2. The substance of the plea

45. The Kingdom of Belgium acknowledges that certain professions have been excluded from the scope of the law transposing Directive 2005/29. It argues, however, that this infringement of the directive has been remedied as a result of the fact that the provisions of the Law of 6 April 2010 establishing that exclusion have been held to be unconstitutional.

46. It should be pointed out that the period granted by the Commission in its reasoned opinion of 15 March 2011 for the adoption by the Belgian authorities of the measures necessary to comply with the obligations arising under Directive 2005/29 ended on 15 May 2011.

47. Since Article 2(1) and (2) and Article 3(2) of the Law of 6 April 2010 were held to be unconstitutional by a judgment of the Constitutional Court of 6 April 2011, the Belgian authorities would be correct in stating that at the time when the period granted by the Commission in its reasoned opinion ended (15 May 2011) the infringement complained of had already been remedied.

48. The fact is, however, that under Belgian law the effects of a finding of unconstitutionality are such that it is possible that the provisions held to be unconstitutional might still be applied at a later date. As the Belgian authorities themselves have acknowledged, in order that the provisions found to be unconstitutional be 'expunged' from national law with retroactive effect, the finding of unconstitutionality should, in principle, be followed by a successful action for annulment.

49. The Kingdom of Belgium asserts in paragraph 17 of its defence in these proceedings that, once it has been declared unconstitutional, 'an unconstitutional provision remains part of the legal order but cannot be applied by the Belgian courts'. However, this statement does not always correspond to reality, since, as the Belgian authorities themselves recognise, in fact the provisions held to be unconstitutional by the abovementioned judgment of 6 April 2011 were subsequently the subject of a further finding of unconstitutionality on 15 December 2011, also referred to above. Moreover, the Kingdom of Belgium has stated that an action for annulment of the provisions held to be unconstitutional in 2011 is pending before the Constitutional Court, which indicates that under Belgian law it is impossible to be sure that provisions that have been found to be unconstitutional will not continue to be applied as long as an action for annulment has not been successfully brought.

50. Admittedly, in view of the practices followed by the Belgian courts, the *de facto* situation may be, as the Kingdom of Belgium maintains, that a formal finding of unconstitutionality is in itself basis enough to rule out the possibility of the provision in question being applied. However, the circumstances of these proceedings show that this will not always necessarily be the case. In the light

of the foregoing, there are good grounds for stating that the legal position regarding provisions that have been found to be unconstitutional is characterised by an element of doubt that is incompatible with legal certainty and is unacceptable in the context of assessing whether national law fully meets the requirements of timely transposition of a directive.

51. I am in agreement in this respect with the Commission as to the relevance of the rule laid down by the Court of Justice in *Commission* v *Netherlands*,[12] whereby 'even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty', which 'is particularly true in the field of consumer protection'. In my opinion, it goes without saying that the reference to the 'case-law of a Member State' can be extended to cover national legal rules governing the effects of a finding of unconstitutionality where those legal rules admit the possibility, however remote in practice, that provisions found to be unconstitutional might be applied, which the Belgian authorities have admitted is the case. An uncertainty of this kind can be satisfactorily resolved only by totally removing the provision that is incompatible with Union law and this outcome cannot be properly assured under the current national rules on unconstitutionality.

52. In the light of the foregoing, I take the view that the Commission's first plea of failure to fulfil obligations must succeed.

B – *The second plea in law*

53. The Commission's complaint is that the Belgian legislation affords the consumer more stringent protection in relation to announcements of price reductions than that available under Directive 2005/29. The Commission takes the view that since the directive has fully harmonised unfair commercial practices, there is no scope for adopting more prescriptive national measures, even for the purposes of giving consumers greater protection.

54. The Kingdom of Belgium does not dispute that its legislation gives consumers greater protection than that available under Directive 2005/29, but it maintains that it is entitled to do so by virtue of Directive 98/6, which continued to be applicable when the period granted by the Commission in its reasoned opinion ended.

55. The Court of Justice has already held that announcements of price reductions constitute commercial practices within the meaning of Article 2(d) of Directive 2005/29,[13] which gives a 'particularly wide definition'[14] to the term, namely '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'.

56. There is therefore no doubt that Article 43(2) of the Law of 14 July 1991 and Articles 20, 21 and 29 of the Law of 6 April 2010 relate to an activity that falls within the scope of Directive 2005/29.

12 — Case C-144/99 [2001] ECR I-3541, paragraph 21.

13 — This was specifically stated in the order of 15 December 2011 in Case C-126/11 *INNO* (paragraph 30), which refers to the rules laid down in Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217 and Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909.

14 — *Plus Warenhandelsgesellschaft*, paragraph 36.

57. The Belgian authorities agree with the Commission that Directive 2005/29 indeed 'fully harmonises at the Community level the rules relating to unfair business-to-consumer commercial practices',[15] to use the words of the Court of Justice. They note, however, that despite this, the directive 'does not contain adapted and harmonised rules which allow the economic reality of announcements of price reductions to be ascertained',[16] which lacuna the Belgian legislature has addressed by having recourse to Directive 98/6 on consumer protection in the indication of the prices of products.

58. However, in my view, the approach of the Belgian authorities is based on a mistaken premiss. Despite its name, the precise purpose of Directive 98/6 is not to protect consumers in relation to the indication of prices in general, but to protect them, very specifically, from the problems that arise in relation to the indication of the prices of products by reference to different units of quantity.

59. As recital 5 in the preamble to Directive 98/6 explains, 'the link between indication of the unit price of products and their pre-packaging in pre-established quantities or capacities corresponding to the values of the ranges adopted at Community level has proved overly complex to apply', thus making it 'necessary to abandon this link in favour of a new simplified mechanism and in the interest of the consumer, without prejudice to the rules governing packaging standardisation'. According to recital 6 in the preamble to the directive, this new mechanism is based on 'the obligation to indicate the selling price and the unit price [which] contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons'.

60. The concern of the legislature in enacting Directive 98/6 was, therefore, 'to ensure homogenous and transparent information'[17] concerning the quantity of a product in relation to a uniform system of units as a basis for calculating its price.

61. To that effect, Article 1 of Directive 98/6 provides that the purpose of the directive is 'to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices'.[18] The substantive rules contained in the directive are concerned with matters relating to the two pricing methods.[19]

62. Thus, Directive 98/6 does not contain anything in the nature of 'adapted and harmonised rules which allow the economic reality of announcements of price reductions to be ascertained', to refer back to the words of the Belgian authorities quoted earlier. Similarly, Article 10 of the directive does not provide a basis upon which Member States might adopt measures guaranteeing the economic reality of price reductions.

15 — *Plus Warenhandelsgesellschaft*, paragraph 41.

16 — See paragraph 36 of the defence.

17 — Recital 12 in the preamble to Directive 98/6.

18 — Article 2 of the directive defines 'selling price' as 'the final price for a unit of the product, or a given quantity of the product …' and 'unit price' as 'the final price … for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member State concerned in the marketing of specific products'. The article provides that 'products sold in bulk' are 'products which are not pre-packaged and are measured in the presence of the consumer'.

19 — Both prices to be indicated for products offered by traders to consumers (Article 3); the requirement that both prices be unambiguous and clear and that the unit price refer to a quantity declared in accordance with national and Community provisions (Article 4); possible exceptions (Article 5).

63. Article 10 of Directive 98/6 provides that the directive 'shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty'. Those more favourable provisions can obviously only be referring to the subject-matter of Directive 98/6, namely consumer information relating to standards used as a reference point when calculating product prices so as to facilitate the comparison of prices, not by reference to previous prices but by reference to different systems of measurement.

64. Thus, the information to be provided to consumers in relation to 'price reductions' cannot be seen as falling with the scope of Directive 98/6, and, as a result, neither can it be covered by the option available to Member States under Article 10 of that directive.

65. That said, it is true that Article 3 of Directive 2005/29 provides for a number of situations in which the directive's provisions can be overridden by other rules, whether Community or national in nature.

66. More specifically, Article 3(2) provides that Directive 2005/29 'is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'. It is clear to me that the national legislation under consideration here does not affect contract law, but should be seen as establishing on what conditions an offer may be made to the public to enter into a contract, that is, a legal transaction governed by the rules that comprise the law of contract.

67. Turning to Article 3(4) of Directive 2005/29, this provides that, '[i]n the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects'. This exception cannot justify altering the foregoing conclusion either, since, for the reasons already mentioned and in view of its purpose, Directive 98/6, on which the Belgian authorities seek to rely, cannot be seen as a rule regulating 'specific aspects of unfair commercial practices'.

68. Article 3(5) provides that '[f]or a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses'. Two conditions apply: first, such national provisions must be 'essential to ensure that consumers are adequately protected against unfair commercial practices and … proportionate to the attainment of this objective'. Secondly, under Article 3(6), Member States must 'notify the Commission without delay of any national provisions applied on the basis of paragraph 5'.

69. Article 3(5) of Directive 2005/29 does not identify the 'directives containing minimum harmonisation clauses' that can continue to apply by virtue of more restrictive national provisions for a period of six years. For the purposes of interpretation, it may be helpful to refer to paragraph 45 of the explanatory memorandum to the proposal presented by the Commission,[20] which states that '[w]here a sectoral directive regulates only aspects of commercial practices, for example the content of information requirements, the framework directive will come into play for other elements, for example, if the information required in the sectoral legislation were presented in a misleading way. The directive therefore complements both existing and future legislation, such as the proposed Regulation on sales promotion, or the consumer credit Directive, and the e-commerce Directive'.

70. Directive 98/6 contains requirements that relate to 'the content of information' concerning prices, but, as we have seen, not to price reductions, which are the subject-matter of the national legislation under scrutiny in these proceedings. Consequently, that legislation does not fall under Article 3(5) of Directive 2005/29 and cannot continue to apply once the period for transposition of that directive into national law has ended.

20 — COM(2003) 356 final.

71. The inevitable consequence of this is that the prohibition set out in Article 4 of Directive 2005/29, 'which expressly prohibits Member States from maintaining or adopting more restrictive national measures, even where such measures are designed to ensure a higher level of consumer protection' [21] is fully applicable.

72. It follows that, as argued by the Commission, since announcements of price reductions that fail to comply with requirements of the type laid down in the Belgian legislation are not covered by Annex I of Directive 2005/29, such commercial practices can be considered unfair only if, when considered on a case-by-case basis, they fall within the provisions of Articles 5 to 9 of that directive.

73. There is a risk that the requirements of the Belgian legislation on the announcement of price reductions might result in national law prohibiting announcements that would not constitute an unfair or misleading commercial practice under Article 6(1) of Directive 2005/29, pursuant to which '[a] commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: … (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage'.

74. In other words, announcements of price reductions, whether or not consistent with the Belgian legislation, can be regarded as contrary to Union law only if, in each case, they constitute unfair practice as defined in accordance with the criteria set out in Articles 5 to 9 of Directive 2005/29.

75. With regard to the arguments put forward by the Belgian authorities to the effect that, ultimately, the greater rigour of the national legislation is justified by the right to information, we would do well to follow the Commission in recalling that, as recital 15 in the preamble to Directive 2005/29 points out, only in the case of 'information requirements in relation to commercial communication, advertising and marketing' that have been laid down by Union law 'is [information] considered as material under this Directive. Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. … Given the full harmonisation introduced by this Directive only the information required in Community law is considered as material for the purpose of Article 7(5) thereof. Where Member States have introduced information requirements over and above what is specified in Community law, on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under this Directive'. Recital 15 goes on to state that, of course, 'Member States will be able, when allowed by the minimum clauses in Community law, to maintain or introduce more stringent provisions in conformity with Community law so as to ensure a higher level of protection of consumers' individual contractual rights'. In the present case, however, as we have seen, I do not think that Directive 98/6 provides a basis for the more stringent legislation under consideration here.

76. It is therefore not permissible under Directive 2005/29 to impose a general prohibition of announcements of price reductions that do not comply with the requirements of national legislation such as that under consideration in the present case. A prohibition of that nature would be permissible only if that type of announcement were covered by Annex I to Directive 2005/29, which is not the case. Prohibition is therefore possible only on a case-by-case basis and only to the extent that the application of the criteria laid down in Articles 5 to 9 of Directive 2005/29 requires it.

21 — *Plus Warenhandelsgesellschaft*, paragraph 50.

77. I therefore take the view that the Kingdom of Belgium has failed to fulfil its obligations under Article 4 of Directive 2005/29 inasmuch as Article 43(2) of the Law of 14 July 1991 and Articles 20, 21 and 29 of the Law of 6 April 2010 afford the consumer a more stringent and prescriptive protection than that available under the directive.

C – *The third plea in law*

78. The Commission's third complaint concerns the prohibition of door-to-door selling laid down in the first subparagraph of Article 4(3) of the Law of 25 June 1993, which was introduced by Article 7 of the Law of 4 July 2005, and the prohibition of itinerant trading in certain products under Article 5(1) of the Royal Decree of 24 September 2006. As in the case of the second plea, which I have just examined, the Commission argues that Directive 2005/29 does not provide for prohibitions of this kind and that it therefore precludes such national provisions, given the exhaustive nature of the harmonisation effected by it.

79. Itinerant trading is clearly a commercial practice within the meaning of Article 2(d) of Directive 2005/29. It is also beyond doubt, in my opinion, that Directive 85/577 on the protection of the consumer in respect of contracts negotiated away from business premises constitutes a perfectly adequate basis for the more stringent national legislation in force in the Kingdom of Belgium, allowing as it does, 'Member States [to adopt or maintain] more favourable provisions to protect consumers in the field which it covers' (Article 8).

80. The question is whether the higher level of protection that is permitted under Directive 85/577 is also compatible with Directive 2005/29, when the practices to which the national legislation in question refers are not included among those listed in Annex I to the directive as being unfair in all circumstances.

81. In principle, we should turn for an answer to Article 3(5) of Directive 2005/29, which, as will be recalled, provides that '[f]or a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective'. It should not be forgotten that, pursuant to Article 3(6), Member States must 'notify the Commission without delay of any national provisions applied on the basis of paragraph 5'.

82. In other words, Directive 2005/29 provides for the possibility of a transitional situation in which Member States are permitted to adopt more stringent or stricter measures if various conditions are met. First of all, they must implement particular directives. Second, the measures must be essential for the protection of consumers against unfair practices and proportionate to the attainment of that objective. Third, the Commission must be notified of such measures without delay.

83. In this case, both the prohibition of certain types of itinerant trading and the prohibition of itinerant trading in particular products were introduced by national legislation enacted after the entry into force of Directive 2005/29 and prior to 12 June 2013, when the transitional period laid down in Article 3(5) of Directive 2005/29 ended.

84. The issue that immediately presents itself is that of whether Article 3(5) of Directive 2005/29 concerns only more stringent national rules that were already being applied when Directive 2005/29 came into force, bearing in mind that the expression 'shall be able to continue to apply' appears to exclude the subsequent introduction of rules of that kind.

85. Now, it is my understanding that Article 3(5) in fact refers only to national rules that were already applicable when Directive 2005/29 came into force. However, irrespective of this, for the present purposes the decisive factor is not so much whether the more stringent national rules were or were not applicable at the time the directive came into force, as whether those rules were capable of being adopted in order to implement directives containing minimum harmonisation clauses, within the meaning of Article 3(5).

86. It should be borne in mind that this article refers to 'national provisions … which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses'. In my view, if those directives permit the subsequent adoption of more stringent rules, then those rules can be assumed to be applicable pursuant to Article 3(5) of Directive 2005/29 as well.

87. Article 8 of Directive 85/577 provides that the directive does not prevent 'Member States from *adopting* or *maintaining*' [22] more stringent provisions, which leads me to think that the fact that these might have been adopted after the entry into force of Directive 2005/29 is irrelevant.

88. That having been established, it would now in theory be necessary to examine whether, in accordance with the requirements of Article 3(5), the national provisions in question are 'essential to ensure that consumers are adequately protected against unfair commercial practices and … proportionate to the attainment of this objective'.

89. However, I do not think that it is necessary to resolve these two points since it is beyond doubt that, in any event, the requirement laid down in Article 3(6) of Directive 2005/29 that Member States must 'notify the Commission without delay of any national provisions applied on the basis of paragraph 5' has not been met.

90. The Belgian authorities did not, at the time, notify 'without delay' the more stringent provisions contained in the first subparagraph of Article 4(3) of the Law of 25 June 1993, which was introduced by Article 7 of the Law of 4 July 2005, and in Article 5(1) of the Royal Decree of 24 September 2006. This being the case, it seems to me evident that the transitional derogation provided for in Article 3(5) of Directive 2005/29 is not applicable here and, as a result, it should be concluded that the Kingdom of Belgium has committed the infringement that the Commission alleges in this regard.

91. In accordance with Article 138(1) of the Rules of Procedure, where all the pleas set out in the application are upheld, the Kingdom of Belgium must be ordered to pay the costs.

VI – **Conclusion**

92. In the light of the foregoing, I propose that the Court should rule as follows:

(1) By excluding members of a profession, dentists and physiotherapists from the scope of the Law of 5 June 2007 transposing Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, the Kingdom of Belgium has failed to fulfil its obligations under Article 3, read in conjunction with Article 2(b) and (d), of Directive 2005/29.

22 — Emphasis added.

(2) By affording, under Article 43(2) of the Law of 14 July 1991 on commercial practices, consumer information and consumer protection and Articles 20, 21 and 29 of the Law of 6 April 2010 on market practices and consumer protection, more stringent and restrictive protection than that provided for under Directive 2005/29, the Kingdom of Belgium has failed to fulfil its obligations under Article 4 of Directive 2005/29.

(3) By prohibiting certain door-to-door selling under the first subparagraph of Article 4(3) of the Law of 25 June 1993 on the practice and organisation of itinerant trading and fairground activities, which was introduced by Article 7 of the Law of 4 July 2005, and by prohibiting itinerant trading in certain products under Article 5(1) of the Royal Decree of 24 September 2006 on the practice and organisation of itinerant trading activities, the Kingdom of Belgium has failed to fulfil its obligations under Article 4 of Directive 2005/29.

(4) The Kingdom of Belgium is ordered to pay the costs.