OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 21 October 2008 [1]

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I — Introduction

1. These cases arise from two references under Article 234 EC from the Rechtbank van koophandel te Antwerpen, in which it essentially asks the Court to answer the question whether Directive 2005/29/EC concerning unfair commercial practices in the internal market ('Directive 2005/29') [2] and Article 49 EC are to be interpreted as precluding national legislation which fundamentally prohibits combined offers.

2. The main focus of the cases to be examined below is on essential aspects of the Community harmonising legislation in the field of consumer protection and of the cross-border free movement of goods and freedom to provide services in the internal market.

2 — 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') (OJ 2005 L 149, p. 22).

II — Legal framework

A — *Community law*

3. Recitals 11 and 17 in the preamble to Directive 2005/29 are worded as follows:

'(11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. It also sets rules on aggressive commercial practices, which are currently not regulated at Community level.

…

including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

(17) It 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.'

…'

5. Article 3(1) and (5) of the Directive are worded as follows:

4. Article 2 of the Directive 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.

'For the purposes of this Directive:

…

…

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

(d) "business-to-consumer commercial practices" (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication

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. Under Article 4 of the Directive, Member States must neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by the Directive.

7. Article 5 of the Directive, headed '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.'

8. Article 6 of the Directive defines 'misleading commercial practices' 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 …

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise …'

9. Article 8 of the Directive defines 'aggressive commercial practices':

'A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.'

10. Article 19 of the Directive provides as follows:

'Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 12 June 2007. …

They shall apply those measures by 12 December 2007. …'

B — *National law*

11. Article 54 of the Belgian Law on trade practices and consumer information and protection ('the Belgian Law') [3] states:

'For the purposes of this article, a combined offer exists where the acquisition, whether or not free of charge, of products, services or other advantages, or of vouchers with which they can be acquired, is tied to the acquisition of other, even identical, products or services.

Subject to the exceptions specified below, any combined offer to consumers which is made by a seller is hereby prohibited. Any combined offer to consumers which is made by several sellers acting with a common purpose is also hereby prohibited.'

12. Articles 55 to 57 of the Belgian Law provide for a number of exceptions to that prohibition.

13. Article 55 of the Belgian Law provides as follows:

'It is hereby permitted to offer the following in combination at an all-inclusive price:

1. Products or services which form a whole.

3 — Wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument (*Belgisch Staatsblad* of 19 January 1994).

…

2. identical products or services, provided that:

(a) each product and service can be acquired separately at the normal price in the same establishment,

(b) the purchaser is informed clearly of that possibility and of the individual price of each product and service,

(c) any price reduction granted to the purchaser of the totality of the products or services does not exceed one third of the individual prices added together.'

14. Article 56 of the Belgian Law is worded as follows:

'It is hereby permitted to offer the following free of charge in combination with a main product or service:

1. accessories of a main product, which the manufacturer of the product has specifically adapted to that product and which are supplied together with that product in order to extend or facilitate its use,

2. the packaging or containers used for the protection and market preparation of products, taking into account the nature and value of those products,

3. small products and services accepted as customary in trade, as well as the delivery, installation, control/regulation and maintenance of the products sold,

4. samples from the product range of the manufacturer or supplier of the main product, provided that they are offered in the quantities or sizes strictly necessary for an assessment of the characteristics of the product,

5. colour photographs, stickers and other images with minimal commercial value,

6. tickets for legally authorised lotteries,

7. objects with indelible and clearly visible advertising inscriptions, which are not found as such in the shops, provided that the cost price paid by the supplier does not exceed 5% of the retail price of the main product or service with which they are given away.'

III — Facts, main proceedings and questions referred for a preliminary ruling

15. The subject-matter of the main proceedings in *Case C-261/07* is an action brought by VTB-VAB ('VTB'), a company providing breakdown and accident assistance services, against Total Belgium NV ('Total'), a subsidiary of the Total group, whose primary business is the sale of fuels at filling stations.

16. Since 15 January 2007, Total has offered free breakdown services for a period of three weeks (TOTAL ASSISTANCE) to customers who are TOTAL CLUB cardholders with every purchase of at least 25 litres of fuel for their own vehicle or at least 10 litres for their own motorcycle.

17. On 5 February 2007, VTB brought an action before the Rechtbank van koophandel te Antwerpen against Total Belgium NV, seeking an order prohibiting it from continuing that commercial practice on the ground that it constituted a combined offer prohibited by Article 54 of the Belgian Law.

18. The subject-matter of the main proceedings in *Case C-299/07* is an action brought by BVBA Galatea, a firm which runs a lingerie shop in Schoten (Belgium), against Sanoma Magazines Belgium NV, a subsidiary of the Finnish Sanoma group ('Sanoma'), which publishes, inter alia, women's magazines, including the weekly 'Flair'.

19. In the issue of 13 March 2007, that magazine contained an attached 47-page supplement including a voucher entitling the holder to a reduction of 15 to 25% on miscellaneous products sold in various lingerie shops during the period from 13 March to 15 May 2007.

20. On 22 March 2007, Galatea brought an action before the Rechtbank van koophandel te Antwerpen seeking an order prohibiting that commercial practice on the ground that it infringed inter alia Article 54 of the Belgian Law.

21. The Rechtbank van koophandel te Antwerpen does point out in its orders for reference that, at that point in time, the period for the transposition of Directive 2005/29/EC had not yet expired. However, it expresses certain doubts regarding the compatibility of the prohibition of combined offers, contained in Article 54 of the Belgian Law, with Directive 2005/29/EC and, at least so far as concerns Case C-299/07, with Article 49 EC. For that reason, it decided to stay both sets of proceedings and to refer the following questions to the Court for a preliminary ruling:

In *Case C-261/07*

'Does Directive 2005/29 of the European Parliament and of the Council concerning unfair commercial practices preclude a national provision such as Article 54 of the Belgian Law of 14 July 1991 on trade practices and consumer information and protection, which, except in the cases listed exhaustively in that Law, prohibits any combined offer by a seller to a consumer, including an offer in which goods which the consumer has to buy are tied to a free service, the acquisition of which is linked to the purchase of the goods, and this regardless of the circumstances of the case, in particular regardless of the influence which the specific offer may have on the average consumer and of whether that offer can be considered in the specific circumstances to be contrary to professional diligence or fair commercial practices?'

In *Case C-299/07*

'Do Article 49 of the EC Treaty concerning the freedom to provide services and Directive 2005/29/EC of the European Parliament and of the Council concerning unfair commercial practices preclude a national provision such as Article 54 of the Belgian Law of 14 July 1991 on trade practices and consumer information and protection, which, except in the cases listed exhaustively in that Law, prohibits any combined offer by a seller to a consumer whereby the acquisition, whether or not free of charge, of products, services or other advantages or of vouchers with which they can be obtained is linked to the acquisition of other, even identical, products or services, and this regardless of the circumstances of the case, in particular regardless of the influence which the specific offer may have on the average consumer and of whether that offer can be considered in the specific circumstances to be contrary to professional diligence or fair commercial practices?'

IV — Proceedings before the Court of Justice

22. The orders for reference dated 24 May 2007 (Case C-261/07) and 21 June 2007 (Case C-299/07) were lodged at the Court Registry on 1 June 2007 and 27 June 2007 respectively.

23. On 29 August 2007, the President of the Court of Justice ordered that the two cases be joined.

24. VTB, Total and Sanoma, the Governments of the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the Portuguese Republic and the Commission submitted written observations in accordance with Article 23 of the Statute of the Court of Justice.

25. By way of measures of organisation of procedure, the Court asked the parties a question, which they have answered.

26. At the hearing held on 18 June 2008, the agents of VTB, Total and Sanoma, the agents of the Governments of the Kingdom of Belgium, the French Republic and the Kingdom of Spain and the agent of the Commission presented submissions.

V — Main arguments of the parties

Directive 2005/29

27. In both cases, the national court is essentially asking the Court whether the prohibition of combined offers, as provided for in Article 54 of the Belgian Law, accords with Directive 2005/29.

28. *VTB* first calls in question the admissibility of the question referred, since it concerns the interpretation of a directive of which the period for transposition had not yet expired at the material time.

29. For the same reason, and without expressly raising an objection of inadmissibility, the *Spanish* and *Belgian Governments* are of the view that the Directive is not applicable to a case such as this. In particular, a national provision cannot be declared by a court to be inapplicable on the ground of infringement of the Directive so long as the period for the transposition of that Directive has not yet expired.

30. On the substance of the case, *Total*, *Sanoma*, the *Portuguese Government* and the *Commission* submit that the Directive precludes a prohibition of combined offers, such as is provided for by Article 54 of the Belgian Law.

31. *Sanoma*, *Total* and the *Commission* submit that combined offers are covered by the notion of 'commercial practice' within the meaning of the Directive. Since the latter undertakes a full harmonisation in the field of unfair commercial practices, only such practices as are listed in Annex I to the Directive can be prohibited 'in all circumstances' by the Member States, in accordance with Article 5(5) of the Directive. However, since combined offers as such are not mentioned in that annex, nor can they simply be prohibited *per se*, but only if the national court considers the requirements of Article 5 of the Directive to be satisfied in the light of the actual circumstances of the particular case. Consequently, the fundamental prohibition, as provided for by Article 54 of the Belgian Law, infringes the Directive. In that regard, the *Commission* adds that such a prohibition is in any case neither necessary for the reasonable protection of consumers from unfair commercial practices nor proportionate to that objective.

32. The *Portuguese Government* confines itself to arguing that Article 54 of the Belgian Law infringes the Directive in so far as it establishes a general prohibition of combined offers, even though the Belgian Law provides for certain exceptions in Articles 55 and 56..

33. *VTB* and the *Belgian* and *French Governments* advocate an alternative interpretation.

34. *VTB* argues that combined offers do not fall under the notion of 'commercial practice' within the meaning of the Directive and are therefore not covered by the latter. In any event, Article 5 of the Directive does not preclude Member States from also specifying unfair commercial practices other than those listed in Annex I.

35. The *Belgian Government* likewise argues that combined offers do not fall under the notion of 'commercial practice' within the meaning of the Directive. More specifically, it maintains that combined offers should instead be classified as falling within the scope of the Proposal for a Regulation concerning sales promotions in the Internal Market, [4] which treats combined offers differently from the commercial practices covered

4 — Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market, COM(2001) 546 final (2001/0227/COD), presented on 4.10.2001 (OJ 2002 C 75 E, p. 11).

by the Directive. However, since that proposal was only withdrawn in 2006, the Belgian authorities rightly assumed that combined offers did not constitute 'commercial practices'. Consequently, in transposing the Directive, the Belgian legislature did not assume that it needed to amend Article 54 of the Belgian Law or to interpret it in the light of Article 5 of the Directive.

36. The *French Government* puts forward in essence similar arguments to the Belgian Government and adds that, if the Directive obliges Member States to prohibit unfair commercial practices in relation to the consumer, that certainly does not prevent Member States from also prohibiting other commercial practices in order to protect the consumer, irrespective of their unfair character for the purposes of the Directive. Such practices also include combined offers, which are outside the scope of the Directive.

Article 49 EC

37. In Case C-299/07, the national court additionally asks whether Article 49 precludes a prohibition of combined offers, such as is provided for by Article 54 of the Belgian Law.

38. *VTB* and the *Spanish*, *Belgian* and *French Governments* propose that this question should be answered in the negative.

39. In *VTB*'s view, the prohibition at issue, which is applicable without distinction both to traders in Belgium and to traders in other Member States, does not entail for the latter any additional economic costs or administrative charges whatsoever which could impede freedom to provide services. In any case, such a prohibition is also justified on grounds of public welfare, in particular consumer protection.

40. The *Belgian* and *French Governments* argue that Article 49 EC is not relevant for the purpose of answering the question referred. In that regard, the French authorities point out that the offers at issue relate principally to the sale of goods (fuel in Case

C-261/07 and underwear in Case C-299/07) and not to services. If the Directive is to be interpreted in such a way that it does not preclude the Belgian Law, the prohibition of combined offers should therefore instead be interpreted in the light of Article 28 EC concerning the free movement of goods, to which, moreover, the national court refers in its order for reference.

41. The prohibition of combined offers, as laid down in the Belgian Law, thus concerns a selling arrangement within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 and is therefore not by nature such as to hinder the free movement of goods, since both conditions laid down by that case-law are fulfilled. The prohibition is in fact applicable to all traders operating within Belgian territory, and likewise concerns, in law and in fact, the marketing both of national products and of products from other Member States. Finally, the *French Government* submits that the prohibition at issue is in any case (a) justified for overriding reasons of public welfare, in particular consumer protection and the maintenance of fair competition, and (b) also proportionate in the light of those objectives, since a number of exceptions to that prohibition are provided for.

42. The *Spanish Government*, for its part, excludes the applicability of Article 49 EC to a purely national situation as in this case, where all the elements are confined within a single Member State. This case in fact concerns undertakings established in Belgium which offer services within Belgian national territory.

43. By contrast, *Sanoma*, the *Portuguese Government* and also, to a certain extent, the *Commission*, start from the assumption that the prohibition of combined offers, as provided for by Article 54 of the Belgian Law, infringes the freedom to provide services, which is guaranteed in Article 49 EC.

44. In particular, *Sanoma* claims that its right of freedom to provide services has been infringed in so far as it is not allowed to promote its sales in Belgium to the same extent as it does in other Member States which allow combination offers (in particular the Netherlands and Luxembourg). Sanoma further observes that, because of the prohibition, its Belgian customers cannot make use of the discount vouchers which are published in Dutch magazines in Flanders and the

Netherlands, but are also disseminated throughout Belgium. Finally, Sanoma submits that, because of the full harmonisation resulting from the Directive, the prohibition at issue cannot be justified either. In any case, such a prohibition is neither necessary nor reasonable in order to protect the consumer and safeguard fair competition.

45. The *Commission*, on the other hand, gives a rather ambiguous answer.

46. Even though it puts forward arguments similar to those of the French Government, it starts from the premise that Article 28 EC is in fact the relevant provision in this case and that, under the *Keck and Mithouard* case-law, the prohibition of combination offers at issue here falls outside the scope of that provision. The Commission further makes it clear that it is not necessary to carry out an analysis from the point of view of freedom to provide services, since, in circumstances such as those of this case, that freedom, for the purposes of the Court's case-law, is entirely secondary to the free movement of goods and may be considered together with it (see, in particular, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31). In addition, the Commission points out that the analysis which the national court undertakes in its order for reference does not cover possible restrictions on the freedom to provide services.

47. The Commission nevertheless examines this aspect purely by way of precaution, concluding that the prohibition of combination offers clearly constitutes an impairment of the freedom to provide services, which goes beyond what is necessary to achieve the objectives of consumer protection and fair trade.

VI — Legal assessment

A — *Introductory observations*

48. 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 interests of eliminating obstacles in the internal market. [5] Its legislative objective is therefore the full harmonisation of this area of life at Community level. [6]

49. 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, on 12 June 2005. Under Article 19(1), Member States were required to implement it by 12 June 2007 by adopting the necessary laws, regulations and administrative provisions, although with a further six-year transitional period for certain more stringent national provisions. However, those laws, regulations and administrative provisions did not have to be applied until 12 December 2007.

50. The Kingdom of Belgium formally complied with that transposition requirement by passing the Law of 5 June 2007 amending the Law of 14 July 1991 on trade practices and consumer information and protection, [7] which entered into force on 1 December 2007. However, in its order for reference, the national court refers to an older national provision, namely Article 54 of the Belgian Law, which was already in existence before Directive 2005/29 entered into force, and expresses doubts regarding the compatibility of that provision with Community law.

5 — Directive 2005/29 translates into legislation the Commission's ideas regarding the future of consumer protection in the European Union, as they are discussed in its Green Paper of 2 October 2001 (COM(2001) 531 final). In that Green Paper, the Commission complains that the consumer internal market has not achieved its potential nor matched, in business-to-consumer transactions, the development of the internal market in business-to-business transactions. Consumers rarely participate directly in the internal market through cross-border shopping. The Commission sees the cause as lying in a fragmented set of regulations in the Member States and in a fragmented system of enforcement, which deters consumers. In the paper it proposes inter alia the adoption of an EU framework directive to harmonise national fairness rules for business-to-consumer commercial practices. Its approach was incorporated in the present Directive 2005/29.

6 — Also according to Henning-Bodewig, F., 'Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken', *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, 2005, No 8/9, pp. 629, 630; Massaguer, J., *El nuevo derecho contra la competencia desleal — La Directiva 2005/29/CE sobre las Prácticas Comerciales Desleales*, Cizur Menor 2006, pp. 14, 51, 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*, Basel 2006, pp. 299, 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*, issue No 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, p. 32 et seq.; and Di Mauro, L.,'L'iter normativo: Dal libro verde sulla tutela die consumatori alla direttiva sulle pratiche commerciali sleali', *Le pratiche commerciali — Direttive comunitaria ed ordenamento italiano*, Milan 2007, p. 26, who take the view that the objective of Directive 2005/29 is a full harmonisation of national rules.

7 — Wet van 5 juni 2007 tot wijziging van de wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument (*Moniteur Belge/Belgisch Staatsblad/Belgisches Staatsblatt* of 21 June 2007, No 189, p. 34272).

B — *Admissibility of the references*

1. Proper subject of interpretation

51. Only a provision of Community law can be a proper subject of interpretation in the context of a preliminary ruling procedure under Article 234 EC. Such provisions include those of primary and secondary legislation. The questions referred by the Rechtbank van koophandel concern a proper subject of interpretation in so far as they ask the Court to interpret Article 49 EC and Directive 2005/29.

52. In my view, the fact that the period for the transposition of Directive 2005/29 had not yet expired at the time of the national court's decision to ask the Court to interpret that Community provision is irrelevant to the issue of admissibility of the references, since Directive 2005/29 had in any case been in force since 12 June 2005 and was therefore already in existence as an act legally binding on the Member States. [8]

53. Under Article 234 EC the Court has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the Community institutions, regardless of whether they are directly applicable. [9] A directive constitutes an act covered by Article 234 EC even though the period for its implementation has not yet expired, and a question concerning it may therefore validly be referred to the Court provided that that reference also satisfies the conditions for admissibility laid down in the Court's case-law. [10]

8 — As Advocate General Jacobs observed in his Opinion in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 30, the obligation to implement a directive arises not from the final date for implementation but on the day on which the directive enters into force or takes effect as laid down in Article 254 EC. Under Article 254(1) EC, directives adopted in accordance with the procedure referred to in Article 251 EC enter into force on the date specified in them. That was, as already observed, the case on 12 June 2005. In the view of Hoffmann, C., 'Die zeitliche Dimension der richtlinienkonformen Auslegung', *Zeitschrift für Wirtschaftsrecht*, 2006, No 46, p. 2113 et seq., the phase before the expiry of the period for transposition is not without legal effects. The Community objective of harmonisation is definitively implemented as soon as the directive enters into force and the instruction to transpose it is issued to the Member States. The directive is therefore binding as regards its objectives and also in that respect already becomes part of the national legal order.

9 — Case 111/75 *Mazzalai* [1976] ECR 657, paragraph 7; Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 28); and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 32.

10 — *British American Tobacco (Investments) and Imperial Tobacco*, cited above in footnote 9, paragraph 33.

2. Relevance to the decision of the questions referred

54. In regard to the relevance to the decision of the questions referred, it should be pointed out that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them. [11]

55. In the context of that cooperation, 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. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. [12]

56. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, 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. [13]

57. However, VTB and the Spanish and Belgian Governments have failed to adduce any valid arguments in support of the proposition that the interpretation of Directive 2005/29 is not relevant to the decision in the main proceedings. On the contrary, there is much to be said in favour of affirming the relevance to the decision of the questions referred.

58. It is thus clear that the events which led to the main proceedings occurred only a few months before the period for transposition expired on 12 June 2007. At that time, the national legislation had not been adapted and the Kingdom of Belgium did not appear to be

11 — See inter alia Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20.

12 — *Schneider*, cited in footnote 11, paragraph 21.

13 — See inter alia Case 244/80 *Foglia* v *Novello* [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-314/96 *Djabali* [1998] ECR I-1149, paragraph 19; and *Schneider*, cited in footnote 11, paragraph 22. See the Opinion of Advocate General Tizzano in Case C-165/03 *Längst*, point 45, and the judgment in the same case [2005] ECR I-5637, paragraphs 30 to 35.

considering a repeal of the fundamental prohibition of combined offers, a fact of which the national court was also aware, as is clear from the orders for reference. [14]

59. If the possibility that the Belgian Law was incompatible with Directive 2005/29 could not be ruled out, the national court, in its capacity as a functional Community court, would, if necessary, have been obliged to disapply the corresponding national provisions. That follows from the primacy of the application of Community law over that of national law, [15] but especially from the Member States' obligation under the second paragraph of Article 10 EC and the third paragraph of Article 249 EC, recognised in the Court's case-law, to take all the measures necessary to achieve the result prescribed by the directive in question.

60. The duty to refrain from doing anything which could frustrate the achievement of the objective of a directive is also connected with that obligation. In accordance with the Court's settled case-law, it follows from the abovementioned provisions of the Treaty in conjunction with the Directive that, during the period prescribed for the latter's transposition, the Member States to which the Directive is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it. [16] That duty to refrain applies to all the authorities of Member States including, for matters within their jurisdiction, the courts. [17] 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. [18]

61. Accordingly, in the judgment in *Adeneler*, [19] the Court held that, from the date on which a directive enters 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. It should also be borne in mind that, according to the Court's case-law, not only the national provisions specifically intended to transpose a directive, but also,

14 — In paragraph 5 of both orders for reference, the national court first states that 'Directive 2005/29 does not lay down a prohibition of combined offers, so that the legislature will probably be obliged to amend or repeal Article 54 [of the Belgian Law] and/or the courts — once the period for transposition has expired — will probably be entitled and obliged to disapply that prohibition to the extent that it imposes obligations which the Directive no longer permits'. The national court then notes that 'it would seem that the Belgian Government is not considering the abolition of that fundamental prohibition of combined offers'.

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

16 — 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.

17 — 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 16, 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.

18 — *Inter-Environnement Wallonie*, cited in footnote 16, paragraph 46. Also to that effect Vcelouch, P., *Kommentar zu EUI- und EG-Vertrag* (ed. Heinz Mayer), Vienna 2004, 'Art. 249', paragraph 45, p. 16.

19 — *Adeneler and Others*, cited in footnote 16, paragraph 123.

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 its scope. [20]

62. If, as in these cases, the national court cannot avoid the suspicion that a piece of national legislation is liable to prevent the achievement of the result prescribed by a directive which is imminently due to be implemented once the period for transposition has expired, [21] it is obliged to take the necessary measures even before the transposition phase has ended. Such measures also include, in principle, the possibility of disapplying the offending national law if an interpretation of the current law in conformity with the directive is out of the question. [22]

63. However, non-application of Article 54 of the Belgian Law would have meant that the national court would in all probability have had to dismiss in part the injunctions sought by VTB and Galatea against Total and Sanoma respectively.

64. In the light of the above, the relevance to the decision of the questions referred cannot be disputed.

20 — Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 29.

21 — The condition for an intervention by the national court is that there must be a danger that the results envisaged by the directive will be prejudiced after the period for transposition has expired (also to that effect Hoffmann, C., 'Die zeitliche Dimension der richtlinienkonformen Auslegung', *Zeitschrift für Wirtschaftsrecht*, 2006, No 46, p. 2116). Also, in a similar vein, Schroeder, W., *EUV/EGV Kommentar* (ed. Rudolf Streinz), Art. 249 EGV, paragraph 139, p. 2197, in whose view a duty for the authorities and courts to interpret national law in conformity with the Directive can be considered only by way of an exception, where legislative implementing measures give grounds for believing that the achievement of the results envisaged by the directive will be definitively frustrated.

22 — It is true that the obligation on a national court to interpret domestic law in conformity with directives is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot therefore serve as the basis for an interpretation of national law *contra legem* (see Case 80/86 *Kolpinghuis* [1987] ECR 3969, paragraph 13; *Adeneler and Others*, cited in footnote 16, paragraph 110; and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100; see, by analogy, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraphs 44 and 47. However, in so far as a directive is directly applicable, the general requirement of interpretation in conformity with Community law applies. Under that requirement, where application in conformity with Community law is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure application of which would, in the circumstances of the case, lead to a result contrary to Community law (see Case 249/85 *Albako* [1987] ECR 2345, paragraph 13 et seq.; Case 157/86 *Murphy* [1988] ECR 673, paragraph 11; and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 40; and Schroeder, W., cited above, footnote 21, Art. 249 EGV, paragraph 127, p. 2195).

65. The references for a preliminary ruling are therefore admissible.

C — *Compatibility of Article 54 of the Belgian Law with Directive 2005/29*

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

66. 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 to decide the case before it. [23]

67. Both references seek a ruling as to whether Directive 2005/29 precludes a national provision such as Article 54 of the Belgian Law. For that purpose, it must first be examined whether such a provision, in terms of its subject-matter, is covered by the scope *ratione materiae* of Directive 2005/29.

68. That depends on the answer to the question whether combined offers can be regarded as 'commercial practices' within the meaning of Article 2(d) of Directive 2005/29 at all. That provision contains a broad legal definition of 'business-to-consumer commercial practices' which, in my view, allows the notion of combined offers to be subsumed under it without any problems.

69. Combined offers are based on the linking together of at least two different offers of products or services into a single unit of sale. A combined offer thus exists only where the components of the combination are two or more separate products. A characteristic feature for the purpose of distinguishing between the various forms in which such tie-in arrangements occur is the method of combination, that is, the particular terms on

23 — See inter alia *Costa* v *ENEL*, cited in footnote 15; 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.

which suppliers structure and market their combined offers. [24] From a business management perspective, combined offers constitute a measure of pricing and communications policy, two of the most important policies in marketing. Since markets without competition are somewhat rare, and advertisers must almost always compete against other suppliers, traders are forced to differentiate themselves from the competitive environment, to design offers which are not only of interest, but also exert a strong power of attraction on the relevant consumers. Combined offers are supposed, by virtue of the distinctive combination of different products or services in one offer and by virtue of their actual or apparent good value resulting from that form of combination, to create an incentive for customers to purchase. In other words, they serve to attract customers and to increase the new-business potential of undertakings. [25]

70. Taking as a basis the function of combined offers described above and the way in which the consumer encounters them in everyday life, it is logical to define them as acts or commercial communications including advertising and marketing, by a trader, directly connected with promotion or selling. They therefore accord fully with the notion of commercial practices within the meaning of Article 2(d) of Directive 2005/29. Consequently, the combined offers regulated in Article 54 of the Belgian Law fall within the scope *ratione materiae* of Directive 2005/29.

24 — The intensity of the linkage, the function of the components of the offer within the all-inclusive offer (for example, the main or minor function) and the price share of each part of the offer in the total price are decisive parameters for the division of combined offers into categories. A distinction is made between combined offers in the narrower sense and in the broader sense. In the case of combined offers in the narrower sense, all the linked products possess a main function. In contrast to other package deals, which are characterised by the fact that there is a relationship of the products or services to one another as main and ancillary product or ancillary service, in this case all the components of the offer have equal importance. This form of linkage includes, in particular, the all-inclusive price offer, in which different products or services are put together as a package with an all-inclusive price. Combined offers in the wider sense include those offers in which several products or services are also put together and sold as a package, but which do not have the characteristic features of an all-inclusive price offer. They include, in particular, the case of so-called enticement offers in which, together with a main product or service offered in the normal way, another, minor product or service is offered at a particularly favourable price, but which cannot be purchased without the main product. They also include the case of the free gift of a product or service with a product offered against payment (see, in this regard, Charaktiniotis, S., *Die lauterkeitsrechtlichen Zulässigkeitsschranken der Kopplungsangebote nach der Aufhebung der Zugabeverordnung*, Frankfurt am Main 2005, pp. 28-33).

25 — To that effect, Charaktiniotis, S., cited above (footnote 24), p. 19; Köhler, H., 'Kopplungsangebote (einschließlich Zugaben) im geltenden und künftigen Wettbewerbsrecht', *Gewerblicher Rechtsschutz und Urheberrecht*, 2003, No 9, p. 729. Bartolomucci, P., 'Le pratiche commerciali sleali ed il contratto: Un'evoluzione del principio della transparenze", *Le pratiche commerciali — Direttive comunitaria ed ordenamento italiano*, Milan 2007, p. 261, also counts the offering of accessory services as a marketing measure to which businesses resort in order to gain scope for themselves in the relevant market and win over to themselves the largest possible number of customers.

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

71. The same applies to the scope *ratione personae* of Directive 2005/29, since, while the latter is aimed directly at protecting consumers, the economic interests of legitimate competitors are not for that reason regarded as less worthy of protection.

72. That follows, in the first place, from recital 6, but primarily from recital 8 in the preamble to the Directive, from which it is clear that Directive 2005/29 also indirectly protects businesses from their competitors who do not play by the rules in the Directive and thus guarantees fair competition in fields coordinated by it. [26]

3. Analysis of the structures of both sets of provisions

73. In order to be able to ascertain whether Directive 2005/29 precludes a national provision such as Article 54 of the Belgian Law, it is necessary to analyse and then compare both sets of provisions in terms of their legislative objectives and regulatory structure.

(a) The provisions of Directive 2005/29

(i) Full and maximum harmonisation of national provisions as a legislative objective

74. As observed at the beginning, [27] Directive 2005/29 is aimed at full harmonisation of Member States' legislation on unfair commercial practices. In addition, in contrast to what was previously the case in the sector-specific legal instruments for the harmonisation of consumer protection legislation, it is aimed not only at minimum harmonisation, but at maximum approximation of the national laws and regulations, which bars Member States,

26 — See 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. 17, who takes the view that the protection of competitors from unfair competition is an indirect effect of the Directive.

27 — See point 48 of this Opinion.

subject to certain exceptions, from retaining or introducing more stringent provisions. [28] Both result from an interpretation of the preamble and of the general provisions of the Directive.

75. Firstly, that follows from recital 11 in the preamble, according to which the *approximation* of national provisions through the Directive is intended to create a high common level of consumer protection. Secondly, recital 12 refers to the fact that consumers and business will be 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. The method of *approximation of legislation* is again referred to in Article 1 of Directive 2005/29, from which it is clear that it is intended to serve the purpose of improving consumer protection and perfecting the internal market.

28 — To that effect, Massaguer, J., cited above (footnote 6), p. 15; Abbamonte, G., cited above (footnote 26), p. 19, and De Brouwer, L., 'Droit de la Consommation — La Directive 2005/29/CE du 11 mai 2005 relative aux pratiques comerciales déloyales', *Revue de Droit Commercial Belge*, No 7, September 2005, p. 796, who draws from the circumstance of maximum harmonisation by Directive 2005/29 the conclusion that Member States are not authorised to adopt more prescriptive provisions, even if the latter are intended to ensure a higher level of consumer protection. De Cristofaro, G., cited above (footnote 6), p. 32, is of the view that Member States are not allowed either to derogate from the provisions of the Directive or to set a higher level of consumer protection. In the view of Kessler, J., cited above (footnote 6), p. 716, the Directive not only sets minimum standards, but at the same time prevents the Member States from maintaining in force rules which, in the interests of a postulated consumer orientation, go beyond the substantive provisions of the Directive and thus contain more stringent requirements.
See also Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, paragraphs 40 and 44, in which the Court drew attention to the extent of the Member States' powers in the case of a minimum and of an exhaustive harmonisation. On the one hand, it held that the Community legislature had carried out only a minimal harmonisation of national rules on misleading advertising, so that Article 7(1) of Directive 84/450 allowed Member States to apply stricter national provisions in that area, to ensure greater protection of consumers in particular. On the other hand, it rejected an equivalent competence for protection against misleading advertising in connection with comparative advertising, since Directive 84/450 carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be permissible.

76. The aim of comprehensive and maximum regulation at Community level in the area of life covered by the scope of the Directive again becomes clear in the statements in recitals 14 and 15, which expressly concern *full harmonisation*. This is also to be inferred from the internal market clause in Article 4 of Direct-

ive 2005/29, pursuant to which Member States must neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field *approximated* by the Directive

77. By way of derogation, Article 3(5) of Directive 2005/29 provides that, for a period of six years from 12 June 2007, Member States are to be able to continue to apply national provisions within the field approximated by the Directive which are more restrictive or prescriptive than the Directive. However, that derogation is limited to those national provisions which implement directives containing minimum harmonisation clauses. [29] Finally, a further derogation from full harmonisation is to be found in Article 3(9) in relation to financial services, as defined in Directive 2002/65/EC, and immovable property.

29 — The directives referred to in Article 3(5) of Directive 2005/29, containing minimum harmonisation clauses, include the following: Council Directive 85/577/EEC 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 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); and 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) Regulatory structure of Directive 2005/29

78. The core of Directive 2005/29 is the general provision in Article 5(1), which lays down the prohibition of unfair commercial practices. The precise detail of what is to be understood by 'unfair' is set out in Article 5(2). Under that provision, a commercial practice is unfair if it is contrary to the requirements of 'professional diligence' and on the other hand is likely 'to materially distort' the economic behaviour of the consumer. 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(5) refers to Annex I and the commercial practices listed there, which 'shall in all circumstances be regarded as unfair'. The same single list is to apply in all Member States and may only be modified by revision of the Directive.

79. For purposes of the application of law by the national courts and administrative authorities, it therefore follows that the first point of reference must be the list of 31 cases of unfair commercial practices contained in Annex I. If a commercial practice can be subsumed under one of those constituent elements, it must be prohibited; prohibition does not depend on a further examination of, for example, the effects. If the actual situation is not covered by that list of prohibited practices, it is necessary to consider whether one of the regulated illustrative cases in the general

provision — misleading and aggressive commercial practices — is present. Only when that is not the case does the general provision in Article 5(1) of Directive 2005/29 apply directly. [30]

(b) The provisions of the Belgian Law

80. According to settled case-law, 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 it pursues. [31] That involves the obligation of the national legislature to transpose the relevant directive properly into national law. [32]

81. It must first be observed that the Belgian Law has a different regulatory structure from Directive 2005/29, since, in Article 54, it imposes a fundamental prohibition of combined offers. Unlike the Belgian Law, the Directive presupposes that commercial practices are fair as long as the precisely defined legal conditions for a prohibition are not fulfilled. [33] It thus follows an opposite approach, in favour of the trader's entrepreneurial freedom, which accords essentially with the legal concept of '*in dubio pro libertate*'. [34]

82. Since combined offers are not included among the commercial practices listed in Annex I, which are to be regarded as unfair in all circumstances, they may in principle be prohibited only if they constitute unfair commercial practices because, for example, they are misleading or aggressive within the meaning of the Directive. Apart from that, a prohibition under Directive 2005/29 is

30 — Also according to the scheme of analysis used by De Cristofaro, G., cited above (footnote 6), p. 12, and Henning-Bodewig, F., cited above (footnote 6), p. 631.

31 — 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.

32 — The transposition of a directive is part of a two-stage legislative process in which the second stage must take place at the level of national law. Directive law is given concrete expression by substantive transposition at the level of national law (see, in this regard, Vcelouch, P., cited above (footnote 18),'Art. 249', paragraphs 48 and 50, pp. 17 and 18).

33 — Abbamonte, G., cited above (footnote 26), p. 15, therefore describes the approach followed by the Directive as liberal. Under it, everything that is not expressly prohibited is permitted. De Cristofaro, G., cited above (footnote 6), p. 11, correctly notes that the Directive follows a selective approach in that it lays down the criteria for regarding a commercial practice as unfair, whereas it completely omits to define the characteristics of a fair commercial practice.

34 — This dictum of Roman law means, literally, 'in doubt for freedom' and originally applied only to the question of whether or not someone was a slave (see Liebs, D., *Lateinische Rechtsregeln und Rechtssprichwörter*, Munich 1998, p. 103). In modern jurisprudence, the minimum freedom of each individual in a given social order is associated with that principle. Thus, Kelsen, H., *Reine Rechtslehre*, Vienna 1960, p. 43, points out that the law as a social order laying down sanctions regulates human conduct not only in a positive sense, by imposing such conduct in such a way that it attaches a coercive act as a sanction to the opposite conduct and thus prohibits the latter, but also in a negative manner, by attaching no coercive act to particular conduct, and thus not prohibiting such conduct and not imposing the opposite conduct. Kelsen infers from this that 'conduct that is not prohibited in law is (in that negative sense) permitted in law'. Also to that effect, Alexy, R., *Theorie der Grundrechte*, Baden-Baden 1985, p. 517, who refers to a prima facie primacy of legal freedom as a principle of law.

possible only if a commercial practice is to be regarded as unfair because it is contrary to the requirements of professional diligence or because it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer.

83. However, whether that is the case with combined offers cannot be stated in universally applicable terms, but rather, as the Belgian Government itself concedes, [35] requires an assessment of the actual commercial practice involved in a particular case. As is apparent from recital 17 in the preamble to Directive 2005/29, moreover, the Community legislature also assumes the necessity of a case-by-case assessment against the provisions of Articles 5 to 9 of the Directive in the event that a commercial practice does not fall under the commercial practices listed in Annex I. [36]

84. The Belgian Government argues, however, that the national legislature itself, by creating the exceptions in Articles 55 to 57 of the Belgian Law, carried out that assessment. However, an objection to that argument is that, even though those exceptions do indeed qualify the fundamental prohibition in Article 54 of the Belgian Law, that does not alter that fact that they amount to an exhaustive list of permitted commercial practices which allows no extensions in favour of entrepreneurial freedom. The Belgian provision is conceptually static and could be modified only by way of an amendment of the Law in order to satisfy the requirements of the Directive.

85. That fundamental prohibition effectively reverses the liberal orientation of the law of unfair competition intended by Directive 2005/29, since the prohibition is elevated to a principle and entrepreneurial freedom is made the exception. Viewed from a legal perspective, the prohibition in Article 54 of the Belgian Law, notwithstanding the exceptions contained in it, results in a clear extension of the list of prohibited commercial practices contained in Annex I, which, however, is precisely what the Member States are forbidden from doing in the light of the full and maximum harmonisation associated with Directive 2005/29. [37]

35 — In point 19 of its written answer to the Court's question, the Belgian Government points out that Article 54 of the Belgian Law has its origin in the Law of 14 July 1971. At that time, the Belgian legislature was of the view that combined offers could not *per se* be regarded as unfair commercial practices, with the consequence that it was obliged to examine the fairness of combined offers in individual cases.

36 — This follows by contrary inference from the third sentence of recital 17, which actually states that the commercial practices listed in Annex I 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'.

37 — Abbamonte, G., cited above (footnote 26), p. 21, points out that the Member States are not allowed to extend the list of prohibited commercial practices contained in Annex I to Directive 2005/29 themselves. Were they permitted to do so, that would have the effect of circumventing the maximum harmonisation which the Directive is intended to achieve, thereby frustrating the objective of legal certainty.

86. In terms of its regulatory structure, despite the exceptions in Articles 55 to 57, Article 54 of the Belgian Law is therefore clearly more repressive and less flexibly framed than Directive 2005/29, which requires an assessment of the existence of the constituent element of unfairness on a case-by-base basis. [38]

87. As the Commission correctly states, the Community legislature assigns the task of assessing the fairness of a commercial practice by reference to particular circumstances, in particular in the light of its effect on the economic conduct of an average consumer, to the national courts or administrative authorities. That is made expressly clear by the wording of recital 18 in the preamble to the Directive. [39] Under Articles 11 and 12, it is for them, acting within the framework of systems of penalties to be created at national level, to enforce compliance with the Directive. [40] However, if the Belgian legislature specifies by law the only permitted commercial practices and allows the organs of State authority, which are responsible for interpreting and implementing the law and which in this respect are equally addressees of Directive 2005/29, no margin of assessment, the aim of effective implementation of the Directive at Member-State level will be frustrated. [41]

88. In summary, it is clear that a national provision such as Article 54 of the Belgian Law, which imposes a fundamental prohib-

38 — According to Massaguer, J., cited above (footnote 6), pp. 50, 51, the national legislature is barred, by reason of the full harmonisation effected by Directive 2005/29, from introducing other prohibited commercial practices over and above those listed in Annex I. Nor may the national legislatures introduce fundamental ('*per se*') prohibitions (that is, prohibitions which do not require any case-by-case assessment of the existence of the conditions specified in Articles 5 to 9 of Directive 2005/29) which go beyond those listed in Annex I. The author therefore has doubts whether a fundamental prohibition of combined offers would be compatible with Directive 2005/29 at all.

39 — Also according to 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, which also cites recital 18 in the preamble to the Directive. That recital states: 'National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case'. In addition, recital 20 mentions recourse to administrative or judicial action.

40 — Various systems of penalties under fair trading legislation are to be found in the Community Member States — a result of historical developments and differently structured legal systems. Community law has previously only selectively standardised the Member States' penalties and procedural rules and does not prescribe any particular system for combating unfair commercial practices. Directive 2005/29 does not alter anything in regard to that acceptance by Community law of different national enforcement systems. It remains a matter for the national legislatures whether the control of unfair commercial practices is effected using administrative, criminal or civil law remedies, as the third subparagraph of Article 11(1) of the Directive confirms. In that regard, combinations of different systems of penalties are permissible. They also have competence to stipulate whether a judicial and/or an administrative procedure is to take place (see, in this regard, Alexander, C., 'Die Sanktions- und Verfahrensvorschriften der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken im Binnenmarkt — Umsetzungsbedarf in Deutschland?', *Gewerblicher Rechtsschutz und Urheberrecht*, 2005, No 10, p. 810, and Massaguer, J., cited above (footnote 6), p. 144).

41 — 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. 170, points out that Directive 2005/29 requires a case-by case assessment of the unfairness of a commercial practice. He therefore takes the view that a national provision which imposes and/or abstractly regulates a fundamental prohibition of particular forms of sales promotion, such as selling at a loss, prize offers, coupons, clearance sales etc., without giving the courts competence to carry out a case-by-case assessment of whether the particular commercial practice is to be regarded as unfair to consumers, can no longer be maintained in the light of Directive 2005/29.

ition without providing for the possibility of taking into account the circumstances of each actual individual case is, by its very nature, more restrictive and prescriptive than the provisions of Directive 2005/29. [42]

89. In that connection, it must be noted that Article 54 of the Belgian Law concerns a field which is subject to full harmonisation and to which the transitional provisions of Article 3(5) of Directive 2005/29 do not apply. It is in any case not clear to what extent Article 54 of the Belgian Law is intended to implement the directives mentioned in Article 3(5). [43] Nor has that been explained by the Belgian Government. The derogating provision of Article 3(9) of Directive 2005/29 is not applicable either.

4. Withdrawal of the Commission's Proposal for a Regulation on sales promotion in the Internal Market

90. The question arises as to what the consequences of the withdrawal of the Commission's Proposal for a Regulation on sales promotion in the Internal Market are for that interpretation. The Belgian Government, supported by the French Government, essentially pleads that it assumed that the subject-matter of that regulation also included, inter alia, combined offers. In its view, the withdrawal of the Commission's proposal does not permit the inference that the scope *ratione materiae* of Directive 2005/29 can now cover that field.

91. In my view, the Belgian Government cannot successfully rely on the protection of legitimate expectations, particularly as the legitimate expectation it claims to have entertained relates merely to a proposal for a Community legal act which ultimately never entered into force. As the Belgian 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 Belgian Government played an influential part in both legislative processes and was therefore always informed of their progress. It therefore cannot plead, in a legally effective manner, ignorance of what occurred in both legislative processes. [44]

42 — See De Brouwer, L., cited above (footnote 28), p. 795, who expresses doubts regarding the compatibility with Directive 2005/29 of the Belgian prohibition of combined offers.

43 — See point 77 of this Opinion.

44 — See my Opinion in Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, point 45, in which I took the view that a government, by virtue of its status as the constitutional representative of a Member State represented within the Council, must acknowledge that it is aware of the interpretative declarations made by that institution in the course of the legislative process.

92. The Court has emphasised the special responsibility of the Member States' governments represented within the Council in the implementation of directives. Accordingly, it has concluded from the fact that they participate in the preparatory work for directives that they must be in a position to prepare within the period prescribed the legislative provisions necessary for their implementation. [45]

93. By no later than the date of withdrawal of the Commission proposal, [46] the Belgian Government should therefore have examined, if necessary, to what extent the scope *ratione materiae* of Directive 2005/29 would also apply to fields previously covered by the proposed regulation. The need for such action was obvious, particularly since, according to its original first draft, Directive 2005/29 was intended (a) to introduce general, subsidiary requirements in the field of Community consumer protection law and (b) to achieve full harmonisation of the Member States' rules on unfair commercial practices. [47] Against the background that the withdrawal took place at a time when the period for the transposition of Directive 2005/29 was still running, it was for the Belgian legislature to take account of those facts when adapting the national law.

94. This argument should therefore be rejected.

5. Conclusion

95. In the light of the foregoing considerations, I conclude that Directive 2005/29 precludes a national provision such as Article 54 of the Belgian Law.

D — *Compatibility of Article 54 of the Belgian Law with the fundamental freedoms*

96. The reference in Case C-299/07 further seeks to ascertain whether Article 49 EC precludes a national provision such as Article 54 of the Belgian Law.

45 — 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.

46 — The Commission's decision to withdraw its Proposal for a Regulation was published in OJ 2006 C 64, p. 3. However, the Commission had already announced that decision in its Communication 'Outcome of the screening of legislative proposals pending before the Legislator' COM(2005) 462 final, p. 10, of 27 September 2005.

47 — Also according to Stuyck, J., cited above (footnote 41), p. 161, who voices the suspicion that many Member States must not have been aware that the provisions of the withdrawn Proposal for a Regulation, which concerned the relationship between the trader and the consumer, were nevertheless ultimately included in Directive 2005/29 (in view of its objective of full harmonisation).

97. Although no corresponding request for an interpretation of Article 49 EC is explicitly contained in the question referred in Case C-261/07, the national court nevertheless expressly addresses this issue in the grounds of its decision making the reference. In that respect, it should be recalled that it is for the Court to provide the national court with all the elements of interpretation of Community law which may enable it to rule on the case before it, whether or not reference is made thereto in the questions referred. [48] In view of the effects which a preliminary ruling will have on the legal order of the Kingdom of Belgium, it seems to me essential to deal with Article 49 EC in the context of an examination of Case C-261/07 as well.

98. First, however, it is necessary to clarify whether the provisions of the EC Treaty can even be regarded as an assessment criterion and which fundamental freedoms, if any, would be applicable in this particular case.

48 — See Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317, '*Clinique*', paragraph 7; Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38; and Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 47.

1. Fundamental freedoms as an assessment criterion

99. Although it is the Court's settled case-law that, where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of the provisions of the EC Treaty, [49] it should nevertheless be borne in mind, as the Commission rightly points out, that the Member States were required to implement Directive 2005/29 by 12 December 2007 at the latest. [50] As already demonstrated, it was for the national court to assess whether an interpretation of national law in conformity with the Directive was necessary even before the period for transposition expired, in order to ensure achievement of the result envisaged by the Directive. However, that problem did not concern the directly applicable provisions of the EC Treaty on the fundamental freedoms, which do not require transposition, so that their fundamental applicability was beyond question. For that reason, I am of the opinion that the provisions of the EC Treaty, as least so far as concerns the main proceedings in this case, can be considered as an assessment criterion together with Directive 2005/29.

49 — Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 35; Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 35; Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 31; Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457, paragraph 25; Case C-324/99 *Daimler Chrysler* [2001] ECR I-9897, paragraph 32; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64. See also, in this regard, my Opinion in pending Case C-445/06 *Danske Slagterier* v *Germany*, pending before the Court, point 79.

50 — See point 49 of this Opinion.

2. Scope of the fundamental freedoms

100. In its order for reference in Case C-299/07, the Rechtbank van koophandel te Antwerpen examines the conformity with Community law of the national provisions in issue in the light of the provisions of primary legislation on the free movement of services and goods. In that context, it places the emphasis of the examination on Article 28 EC. The Belgian and French Governments and the Commission refer to it in support of their argument that the fundamental freedom of free movement of goods and not freedom to provide services is the main focus of both cases.

(a) Freedom to provide services

101. Under Article 50 EC, services are to be considered to be 'services' where they are normally provided for remuneration. According to its own statements, Sanoma provides marketing and advertising services in the distribution of numerous magazines, including the magazine 'Flair', in several Member States of the European Union, including Belgium, the Netherlands and Luxembourg. Those services include the publication of the discount offer in that particular magazine, which forms part of the background to the main proceedings. It can therefore be regarded as a service within the meaning of Article 50 EC.

102. In Case C-261/07, on the other hand, it is apparent from the order for reference that Total offers its customers a free breakdown service, in which the relevant services are provided by a third party, namely the company Touring. Although no details are known regarding the contractual relationship between the two companies, it can be assumed that Touring thereby provides Total with services in return for payment.

(b) Free movement of goods

103. However, from the consumer's perspective, which in my view is decisive, the purchase of a magazine combined with a discount offer, as is the situation in Case C-299/07, ultimately appears to be the acquisition of goods and not of a service, with the result that it can be regarded as falling within the scope *ratione materiae* of the free movement of goods.

104. The same applies to the facts in Case C-261/07, which primarily concerns the acquisition of fuel and thus goods. While the free breakdown services provided by the company Touring associated with Total certainly benefit the consumer, the latter does not purchase the goods solely for the

sake of the services linked with them. Rather it is case that those services are intended, in accordance with the function of combined offers, to create an incentive for the purchase. [51]

105. Consequently, these cases fall within the scope of both fundamental freedoms.

(c) Relationship between free movement of services and free movement of goods

106. The relationship of these fundamental freedoms to one another is at issue here. The observations of the Belgian and French Governments must be understood to the effect that, in their view, the free movement of goods overrides the freedom to provide services.

107. Where a national measure restricts both the free movement of goods and the freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it. [52] Moreover, it must be borne in mind that, under Article 50 EC, the freedom to provide services is subsidiary to the free movement of goods.

108. In these cases, however, the freedom to provide services cannot simply be considered together with the free movement of goods. A distinction between free movement of goods and free movement of services such as that proposed by the Belgian and French Governments is possible only in the case of 'mixed supplies' within the same supply relationship. [53]

51 — See point 69 of this Opinion.

52 — Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31.

53 — In the view of Holoubek, M., *EU-Kommentar* (ed. Jürgen Schwarze),'Art. 50 EG', paragraph 15, p. 793; Budichowsky, J., *Kommentar zu EU- und EG-Vertrag* (edited by Heinz Mayer), Vienna 2004,'Art. 49, 50,' paragraph 50, p. 15, and Kluth, W., in Calliess/Ruffert (ed.), *Kommentar zu EUV/EGV,* 3rd edition, 2007, 'Art. 49, 50', paragraph 15, pp. 821, 822, a distinction must be drawn between free movement of goods and freedom to provide services when 'mixed supplies' are involved. In that regard, the mixing may either consist in the fact that the supply of goods and the service related to it are the subject of one and the same supply relationship (for example, supply of a computer system including installation of an operating program) or it may actually be unclear whether a particular transaction should be classified as a supply of goods or a service (for example, certain types of skilled or manual work). In the former case, it must first be examined whether a separation of the two areas is conceivable (see Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6 et seq., in which a transmission of television signals was classified as a provision of services, whereas films and sound recordings were classified as goods. If such a breakdown into individual goods or services is not possible, that is to say, is to be assessed as a single supply, that assessment must be based on a rule of preponderance. Under such a rule, the predominant content of the supply in question is the determining factor. The effect of a distinction drawn according to that criterion may therefore be that the service aspect is purely incidental in character, so that the service is subsumed under the free movement of goods (see Case C-202/88 *France* v *Commission* [1991] ECR I-1223, relating to the connection, bringing into service and maintenance of telecommunications terminal equipment).

109. As the Commission has rightly recognised, [54] both fundamental freedoms relate respectively to different legal relationships — on the one hand, the relationship between businesses, on the other, the relationship between the business and the consumer — so that neither can be regarded as secondary in relation to the other. Accordingly, the compatibility of Article 54 of the Belgian Law with Community law must be assessed in the light of both fundamental freedoms.

3. Restriction on the fundamental freedoms

(a) Free movement of goods

(i) Measure having equivalent effect

— *Dassonville* formula

110. The free movement of goods is guaranteed in particular by the prohibition of quantitative restrictions on imports and all measures having equivalent effect between Member States of the European Community under Article 28 EC.

111. According to the Court's settled case-law, the prohibition of measures having equivalent effect to restrictions which is set out in Article 28 EC covers all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. [55] Even if a measure is not intended to regulate trade between the Member States, what is essential is its effect on intra-Community trade, whether actual or potential. [56] Moreover, according to the case-law, potential effects on intra-Community trade are in themselves sufficient for a cross-border situation to be assumed to exist in a particular case. [57]

54 — In its written observations, the Commission first assesses the applicability of the provisions on the free movement of goods (points 28 to 30) and then, by way of precaution, those on the freedom to provide services (points 32 to 38).

55 — See Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 11; Case C-217/99 *Commission* v *Belgium* [2000] ECR I-10251, paragraph 16; Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraph 25; Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 39; Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, paragraph 39; Case C-147/04 *De Groot en Slot Allium and Bejo Zaden* [2006] ECR I-245, paragraph 71; Case C-65/05 *Commission* v *Greece* [2006] ECR I-10341, paragraph 27; Case C-54/05 *Commission* v *Finland* [2007] ECR I-2473, paragraph 30; Case C-297/05 *Commission* v *Netherlands* [2007] ECR I-7467, paragraph 53; Case C-143/06 *Ludwigs-Apotheke* [2007] ECR I-9623, paragraph 25; and Case C-265/06 *Commission* v *Portugal* [2008] ECR I-2245, paragraph 31.

56 — See point 39 of the Opinion of Advocate General Mazák in Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269 and point 37 of my Opinion in Case C-265/06 *Commission* v *Portugal* [2008] ECR I-2245.

57 — Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 17 et seq.

112. In *Oosthoek's Uitgeversmaatschappij*, [58] the Court affirmed the existence of a restriction on free movement of goods in connection with a Netherlands prohibition on free gifts. At that time it took the view that legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility could not be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective might constitute an obstacle to imports even if the legislation in question applied to domestic products and imported products without distinction.

113. I see in that case a certain parallel to the facts in Case C-299/07. A prohibition on combined offers, such as that laid down in the Belgian Law, may in fact, although it does not itself regulate imports directly, make it potentially more difficult for undertakings to sell certain goods in Belgium than in other Member States where combined offers are allowed. That applies, for example, to Sanoma, an undertaking based in Finland, which, according to its own statements, communicates combined offers from various suppliers through its magazines, including in Finland, the Netherlands and Luxembourg, countries where there is no equivalent prohibition. Such a prohibition does in any case have the effect that Sanoma is allowed to sell such magazines in Belgium only once it has satisfied itself that the requirements of the Belgian Law are being complied with.

114. That would mean, at least under the broad definition of a measure having equivalent effect within the meaning of Article 28 EC, that there is here a restriction on the free movement of goods.

— Selling arrangements

115. However, in *Keck and Mithouard*, [59] the Court made it clear that national provisions restricting or prohibiting certain selling arrangements are not such as to hinder trade between Member States, so long as those provisions apply to all relevant traders oper-

58 — Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 15. The applicant in the main proceedings was an undertaking which sold throughout the Dutch-speaking area (the Netherlands, Belgium and a small part of northern France) encyclopaedias manufactured in Belgium and the Netherlands. Since 1974, in its newspaper and magazine advertisements and advertising brochures, that company had offered a dictionary, a universal atlas or a small encyclopaedia as a free gift to all subscribers to an encyclopaedia. Following the entry into force of the prohibition on free gifts in the Netherlands and in the light of that practice, criminal proceedings had been instituted against that undertaking for infringement of the provisions of the law instituting the prohibition. In the Court's view, the economic activity in question was sufficient to be regarded as 'transactions forming part of intra-Community trade', that is to say, as a cross-border situation (see paragraph 9 of the judgment).

59 — See, inter alia, *Keck and Mithouard*, cited in footnote 55, paragraph 16; Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 21; Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 23; *Deutscher Apothekerverband*, cited in footnote 49, paragraph 68; Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 37; Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paragraph 24; Case C-441/04 *A-Punkt Schmuckhandels* [2006] ECR I-2093, paragraph 15; Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, paragraph 19; and Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 29.

ating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

116. A Member State's prohibition on combined offers does not constitute a product-related provision, since it does not have as its subject-matter the designation, form, size, weight, composition, presentation, labelling or packaging of a product. [60] It is, on the contrary, a marketing-related provision, which prohibits certain marketing methods [61] intended to promote sales and is thus ultimately a selling arrangement within the meaning of the case-law.

117. Finally, it is apparent from the order for reference [62] that the prohibition on making combined offers in Belgium applies equally to domestic and foreign traders.

60 — See *Keck and Mithouard*, cited in footnote 55, paragraph 15, and Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 12.

61 — Dubois, L./Blumann, C., *Droit matériel de l'Union européenne*, 3rd edition, Paris 2004, paragraph 396, p. 243, state that the Court has previously refrained from formulating a definition of selling arrangements or citing examples of such. However, the authors point out that the question of the existence of selling arrangements has arisen primarily in the sphere of advertising. In that context, the Court has largely assumed the existence of selling arrangements, as, for example, in connection with advertising prohibitions in certain places or to protect certain groups of people (Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179), the public sale of foodstuffs (Case C-254/98 *TK-Heimdienst* [2000] ECR I-151), the sales of alcoholic beverages (Case C-405/98 *Gourmet international* [2001] ECR I-1795) or Internet sales of medicinal products (*Deutscher Apothekerverband*, cited in footnote 49). Stuyck, J., cited above (footnote 41), pp. 164, 165, referring to the abovementioned case-law, states that the classification of national provisions on advertising and sales promotion as selling arrangements had the effect of granting them immunity from the application of Article 28 EC.

62 — See point 5 of the order for reference in Case C-299/07.

(ii) Interim conclusion

118. In the light of the foregoing, I conclude that the prohibition on combined offers contained in Article 54 of the Belgian Law cannot be classified as a measure having equivalent effect within the meaning of Article 28 EC.

119. Accordingly, Article 28 EC does not preclude such a provision in a Member State.

(b) Freedom to provide services

120. Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other

Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services. [63]

121. The prohibition in Article 54 of the Belgian Law which is at issue in this case makes it more difficult for an undertaking such as Sanoma to provide other undertakings with advertising services which, under the legal definition contained in that statutory provision, are to be classified as combined offers. As already demonstrated, [64] Sanoma would in practice be forced to analyse every advertising measure in order to satisfy itself that it complies with the Belgian provision, whereas there would be no such requirement in relation to other countries of marketing, where no equivalent prohibition is in force. That requirement is certainly liable to render less advantageous the insertion of certain joint offers by Sanoma and its business partners, which are also aimed, inter alia, at the readership in Belgium. Consequently, there is here a restriction on the freedom to provide services.

122. The Court has consistently held that Article 49 EC cannot be applied to activities which are confined in all respects within a single Member State. [65] It must be stated that, unlike in Case C-299/07, no cross-border situation is immediately obvious in Case C-261/07, particularly as both Total and Touring have their headquarters in Belgium. Nevertheless, in my view, that circumstance does not preclude the applicability of Article 49 EC, since the Court's case-law acknowledges that the provisions of Article 49 EC must apply in all cases where a person providing services offers those services in a Member State other than that in which he is established, wherever the recipients of those services may be established. [66] As Total states in its written observations, Total Assistance's offer applies in more than 35 European countries. Since Touring also provides break-

63 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 25; Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 18; Joined Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453, paragraph 33; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21; and Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 22.

64 — See point 113 of this Opinion.

65 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37; Case C-332/90 *Steen* [1992] ECR I-341, paragraph 9; Joined Cases C-29/94 to C-35/94 *Aubertin and Others* [1995] ECR I-301, paragraph 9; and Case C-134/95 *USSL N° 47 di Biella* [1997] ECR I-195, paragraph 19.

66 — The Court has held that, although Article 49 EC had in mind the active and passive cross-border provision of services, it did not intend to restrict its protective effects to such forms of services and consequently exempt other situations of cross-border service provision from its scope of protection. The Court subsequently also brought within the scope of protection of Article 49 EC situations in which the service, while still offered and/or provided in another Member State, is nevertheless for a recipient who is established in the same Member State as the person providing the service (see Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 10; Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 10; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 9; and Case C-20/92 *Hubbard* [1993] ECR I-3777, paragraph 12).

down assistance for Total customers outside Belgium, it provides it, as its co-contractor, with a service which must be termed cross-border for the purposes of Article 49 EC.

123. A general prohibition on combined offers, which prohibits the provision of break-down assistance linked to the purchase of fuel without affording an opportunity to examine the circumstances of the individual case is undoubtedly liable to prohibit with lasting effect the provision of services of the type described. It must therefore be seen as a restriction on the freedom to provide services. [67]

4. Justification

124. It is clear from the Court's case-law that, since the freedom to provide services is one of the fundamental principles of the Community, [68] a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it. [69]

(a) Consumer protection as an overriding reason of public interest

125. The regulatory purpose of the national provisions at issue in this case is, as is clear from the very title of the Law, consumer

67 — See Longfils, F., *L'offre conjointe: la métamorphose? — Régime actuel et perspectives en droits belge et européen*, Brussels 2003, paragraph 100, p. 45, in whose view national legislation which regulates combined offers and in so doing lays down more stringent conditions than the other Member States, even though it is applicable without distinction to both national and imported products, may restrict the free movement of goods and the freedom to provide services.

68 — See inter alia Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 17, and Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 17.

69 — See, in particular, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 37; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 61; and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 101.

protection. The protection of consumers is recognised in the case-law as an overriding reason of public interest, which may justify a restriction on the freedom to provide services. [70]

(b) Suitability of a fundamental prohibition on combined offers

126. In the abovementioned judgment in *Oosthoek's Uitgeversmaatschappij*, [71] the Court held that the offer of free gifts as a means of sales promotion is liable to mislead consumers as to the real prices of products and to distort the condition of competition based on efficiency. Accordingly, it considered that a provision which restricts or even prohibits such commercial practices for that reason is a suitable means of helping to ensure consumer protection and fair trading.

127. Although a combined offer cannot be equated conceptually with a free gift, [72] a non-transparent combined offer may mislead consumers as to the true content and actual characteristics of the combination of goods and/or services being promoted. An increased potential to mislead exists, in particular, where the trader conceals essential information or provides it in an unclear, incomprehensible or ambiguous manner. If the consumer is thereby placed under a definite false impression as to the favourable pricing of the combined offer, the characteristics or even the value of the linked products or services, he will at the same time be deprived of the opportunity to make a price and quality comparison of that offer with other supplier's equivalent products or services. [73] In that respect, a fundamental prohibition of combined offers is a wholly suitable means of preventing that risk for consumers.

(c) Necessity/proportionality

128. However, in my view, a fundamental prohibition of combined offers goes beyond

70 — See *Reisebüro Broede*, cited in footnote 63, paragraph 38 et seq.; *Commission* v *France*, cited in footnote 68, paragraph 20; and *Oosthoek's Uitgeversmaatschappij*, cited in footnote 58, paragraph 16.

71 — *Oosthoek's Uitgeversmaatschappij*, cited in footnote 58, paragraph 15.

72 — Also according to Köhler, H./Piper, H., *Kommentar zum Gesetz gegen den unlauteren Wettbewerb mit Preisangabenverordnung*, 3rd edition, Munich 2002, § 1, paragraph 250. A free gift can be defined as an (accessory) gift dependent on the purchase of the main product or service, which, at no separate charge, comes in addition to the main product or service different from it, has an economic value of its own and, because of its accessoriness in relation to the main item, is likely to influence the customer's purchasing decision. However, in the case of combined and package offers, which combine two or more, even different, products in a single offer, there is no free gift, because each individual product or component is part of the whole package and is included in the calculation of the total price.

73 — Also according to Charaktiniotis, S., cited above (footnote 24), p. 197, who draws attention to the dangers of non-transparent combined offers.

what is necessary to attain the objective of consumer protection.

129. I agree with the Commission that such protection can also be ensured by means of a more flexible and differentiated approach, by prohibiting only those combined offers which, depending on the actual circumstances of the individual case, are to be regarded as either misleading or aggressive, or which materially distort or are likely to distort the economic behaviour of the average consumer. Directive 2005/29 offers a model for such an approach.

130. A differentiated approach is all the more necessary since, as already demonstrated, not every combined offer can be termed an unfair commercial practice.[74] The principle of proportionality can therefore be complied with only by a provision which gives the maximum possible effect to freedom to provide services and prohibits only those commercial practices which are harmful from the point of view of consumer protection. However, a provision such as that laid down by Article 54 of the Belgian Law conflicts with that liberal approach if it establishes a fundamental prohibition of combined offers and allows only exhaustively listed types of such offers.[75]

131. Consequently, there is in this case a disproportionate restriction on the freedom to provide services.

5. Interim conclusion

132. Article 49 EC therefore precludes a national provision such as Article 54 of the Belgian Law.

74 — See point 83 of this Opinion.

75 — See point 85 of this Opinion.

VII — **Conclusion**

133. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Rechtbank van koophandel te Antwerpen as follows:

Directive 2005/29/EC of the European Parliament and of the Council concerning unfair commercial practices and Article 49 EC concerning the freedom to provide services preclude a national provision such as Article 54 of the Belgian Law of 14 July 1991 on trade practices and consumer information and protection which — except in the cases listed exhaustively in that law — prohibits any combined offer by a seller to a consumer whereby the acquisition, whether or not free of charge, of products, services, other advantages or of vouchers with which they can be obtained is linked to the acquisition of other, even identical, products or services, and this regardless of the circumstances of the case, in particular regardless of the influence which the specific offer may have on the average consumer and of whether that offer can be considered in the specific circumstances to be contrary to professional diligence or fair commercial practices.