



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

10 July 2014*

(Failure of a Member State to fulfil obligations — Consumer protection — Unfair commercial practices — Directive 2005/29/EC — Complete harmonisation — Exclusion of the professions, dentists and physiotherapists — Rules governing the announcement of price reductions — Restriction or prohibition of certain types of itinerant trading activities)

In Case C-421/12,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 13 September 2012,

European Commission, represented by M. van Beek and by M. Owsiany-Hornung, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by T. Materne and J.-C. Halleux, acting as Agents, assisted by É. Balate, avocat,

defendant,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure and after hearing the Opinion of the Advocate General at the sitting on 26 November 2013,

gives the following

* Language of the case: French.

Judgment

- 1 By its application, the European Commission asks the Court to declare that:
 - by excluding members of a profession and dentists and physiotherapists from the scope of the Law of 14 July 1991 on commercial practices, consumer information and consumer protection (*Moniteur belge* of 29 August 1991, p. 18712), as amended by the Law of 5 June 2007 (*Moniteur belge* of 21 June 2007, p. 34272) ('the Law of 14 July 1991') transposing Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('the Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22), the Kingdom of Belgium has failed to fulfil its obligations under Article 3 of that directive, read in conjunction with Article 2(b) and (d) thereof;
 - by maintaining in force Articles 20, 21 and 29 of the Law of 6 April 2010 on market practices and consumer protection (*Moniteur belge* of 12 April 2010, p. 20803) ('the Law of 6 April 2010'), the Kingdom of Belgium has failed to fulfil its obligations under Article 4 of Directive 2005/29;
 - by maintaining in force Article 4(3) of the Law of 25 June 1993 on the exercise and organisation of travelling trading and fairground activities (*Moniteur belge* of 30 September 1993, p. 21526), as amended by the Law of 4 July 2005 (*Moniteur belge* of 25 August 2005, p. 36965) ('the Law of 25 June 1993') and Article 5(1) of the Royal Decree of 24 September 2006 concerning the exercise and organisation of travelling trading activities (*Moniteur belge* of 29 September 2006, p. 50488) ('the Royal Decree of 24 September 2006'), the Kingdom of Belgium has failed to fulfil its obligations under Article 4 of Directive 2005/29.

Legal context

EU law

Directive 2005/29

- 2 Recitals 6 to 15 and 17 in the preamble to Directive 2005/29 are worded as follows:
 - '(6) This Directive ... approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. ... It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. ...
 - ...
 - (15) Where Community law sets out information requirements in relation to commercial communication, advertising and marketing that information is considered as material under this Directive. Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. A non-exhaustive list of such information requirements in [the Community *acquis*, which is applicable to commercial practices harming

consumers' economic interests] is contained in Annex II. Given the full harmonisation introduced by this Directive only the information required in Community law is considered as material for the purpose of Article 7(5) thereof. Where Member States have introduced information requirements over and above what is specified in Community law, on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under this Directive. By contrast Member States will be able, when allowed by the minimum clauses in Community law, to maintain or introduce more stringent provisions in conformity with Community law so as to ensure a higher level of protection of consumers' individual contractual rights.

...

(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.'

3 As evidenced by Article 1(1) thereof, the purpose of Directive 2005/29 'is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests'.

4 Under Article 2(b) of Directive 2005/29, 'trader' is understood to mean 'any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader', whilst Article 2(d) thereof defines 'business-to-consumer commercial practices' as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'.

5 Article 3 of the directive, entitled 'Scope', provides:

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

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

...

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

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

...'

6 Under Article 4 of Directive 2005/29:

‘Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.’

7 Article 5 of that directive, entitled ‘Prohibition of unfair commercial practices’, provides as follows:

‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

...

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 ...’

Directive 85/577/EEC

8 Article 1(1) of 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) provides that that directive is to apply to contracts under which a trader supplies goods or services to a consumer and which are concluded during an excursion organised by the trader away from his business premises, or during a visit by a trader *inter alia* to the consumer’s home, where the visit does not take place at the express request of the consumer.

9 With regard to contracts coming within the scope of that directive, Article 5(1) provides that the consumer is to have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from the time when the trader gave him notice of his right of cancellation.

10 Article 8 thereof provides that ‘[t]his Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers’.

Directive 98/6/EC

- 11 Article 1 of 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) states that the purpose of that directive is to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices.
- 12 Under Article 10 thereof, that directive ‘shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty’.

Directive 2011/83/EU

- 13 Recital 9 in the preamble to Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64) states that that directive establishes inter alia rules on information to be provided for distance contracts, off-premises contracts and contracts other than distance and off-premises contracts and also regulates the right of withdrawal for distance and off-premises contracts.
- 14 Article 28 of that directive provides that Member States are to adopt and publish, by 13 December 2013, the laws, regulations and administrative provisions necessary to comply therewith and to apply those measures as from 13 June 2014.
- 15 Article 31 of that same directive repeals Directive 85/577 as of 13 June 2014.

Belgian law

- 16 Under the amendments introduced by the Law of 5 June 2007, the Law of 14 July 1991 transposed Directive 2005/29 in national law. That law was repealed as from 12 May 2010 by the Law of 6 April 2010.
- 17 Those two successive pieces of legislation exclude from their scope members of a profession, dentists and physiotherapists. Thus, Articles 2(1) and (2), and 3(2) of the Law of 6 April 2010 were worded as follows:

‘Art. 2. For the application of the present law:

(1) “undertaking” shall mean any natural or legal person pursuing a long-term economic aim, including any associations of such persons;

(2) “member of a profession” shall mean any undertaking which is not a trader within the meaning of Article 1 of the Commercial Code and which is under the authority of a disciplinary body created by statute;

...

Art. 3. ...

(2) The present law shall not apply to members of a profession, dentists and physiotherapists.’

- 18 By judgments No 55/2011 of 6 April 2011 (*Moniteur belge* of 8 June 2011, p. 33389) and No 192/2011 of 15 December 2011 (*Moniteur belge* of 7 March 2012, p. 14196), the Constitutional Court held that Articles 2(1) and (2), and 3(2) of the Law of 6 April 2010 were unconstitutional in so far as they had the effect of excluding members of a profession, dentists and physiotherapists from its scope.
- 19 Article 4 of the Law of 2 August 2002 on misleading advertising, comparative advertising, unfair terms and distance contracts pertaining to the professions (*Moniteur belge* of 20 November 2002, p. 51704) ('the Law of 2 August 2002') gives a definition of misleading advertising and provides that it is prohibited in relation to the professions.
- 20 Articles 43(2) and 51(3) of the Law of 14 July 1991 provided, in essence, that traders could not announce price reductions *inter alia* during a sale if the price of the product offered was not genuinely reduced as regards the usual price for the month immediately prior to the date on which the reduction was applicable.
- 21 Under Articles 20, 21 and 29 of the Law of 6 April 2010, products can be regarded as discounted only if the price is lower than the reference price where that is defined as the lowest price set by the undertaking for such products during that month at that sales outlet or according to that sales technique.
- 22 Article 4 of the Law of 25 June 1993 provides that door-to-door selling at the home of the consumer is permitted provided that the total value of the goods or services does not exceed EUR 250 for each consumer. Article 5 of the Royal Decree of 24 September 2006 prohibits itinerant trading in certain products, including medicinal products, medical and orthopaedic equipment, corrective lenses and spectacle frames, precious metals and stones, fine and cultured pearls, arms and ammunition.

Pre-litigation procedure

- 23 On 2 February 2009, the Commission sent a letter of formal notice to the Kingdom of Belgium in which it set out 11 complaints concerning various infringements of Directive 2005/29. In its letters of reply of 3 and 24 June 2009, the Kingdom of Belgium reported that it would be introducing legislative amendments in order to resolve a number of the issues raised by the Commission. To that end, the Law of 6 April 2010 entered into force on 12 May 2010.
- 24 Following an analysis of that legislation, the Commission found that it failed to address four of the complaints set out in the formal notice. Accordingly, on 15 March 2011, it issued a reasoned opinion to the Kingdom of Belgium concerning those complaints, to which the latter replied on 11 May 2011.
- 25 As it was not satisfied with the Kingdom of Belgium's reply with regard to the three complaints set out in its reasoned opinion, the Commission decided to bring the present action.

The action

The first complaint

- 26 By this complaint, the Commission submits that, by excluding the professions, dentists and physiotherapists from the scope of the Law of 6 April 2010, the Kingdom of Belgium has failed to fulfil its obligations under Article 3(1) of Directive 2005/29, read in conjunction with Article 2(b) and (d) thereof.

Admissibility of the first complaint

– Arguments of the parties

- 27 The Kingdom of Belgium submits that, in this complaint, the Commission disregards the Law of 2 August 2002. That piece of legislation, which is still in force, defines what constitutes misleading advertising committed by a person engaged in a profession and also establishes specific measures of judicial review. Yet in its application the Commission failed to specify which consumer protection provisions of Directive 2005/29 were not transposed in Belgian legislation and how the Law of 2 August 2002 infringes that directive.
- 28 The Kingdom of Belgium also observes that the Commission does not dispute that Article 4 of the Law of 2 August 2002 prohibits misleading advertising for the professions, thereby implementing Article 2(d) of Directive 2005/29. That provision of national legislation ensures at least partial transposition of provisions of that directive. As the Commission has failed to take account of the Law of 2 August 2002 in drawing up its application, the first complaint is inadmissible.
- 29 In its reply, the Commission observes that, although the Law of 2 August 2002 does prohibit members of a profession from engaging in acts of misleading advertising, the real purpose of that law, which was relied on by the Kingdom of Belgium for the first time in its statement in defence, is not to transpose Directive 2005/29 in domestic law, but rather, in all essential respects, Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

– Findings of the Court

- 30 By virtue of the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union and Article 120(c) of the Court's Rules of Procedure, the Commission must, in any application made under Article 258 TFEU, indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based. It follows that the Commission's action must contain a coherent and detailed statement of the reasons which have led it to conclude that the Member State in question has failed to fulfil one of its obligations under the Treaties (see, *inter alia*, *Commission v Belgium*, C-150/11, EU:C:2012:539, paragraphs 26 and 27 and the case-law cited).
- 31 In the present case, the application lodged by the Commission, in which it in essence criticises the Kingdom of Belgium for having, contrary to Articles 3(1) and 2(b) and (d) of Directive 2005/29, excluded the professions, dentists and physiotherapists from the scope of the national legislation transposing that directive, namely the Law of 6 April 2010, contains a clear presentation of that complaint and the factual or legal material on which it is based.
- 32 Admittedly, it is common ground that in that application the Commission did not seek to show in what way the Law of 2 August 2002, which was in force at the time Directive 2005/29 was adopted and which prohibits the professions from engaging in misleading advertising, failed to comply with the provisions of that directive.
- 33 However, it should be remembered that, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Member States, under Article 4(3) TEU, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 17(1) TEU, in ensuring that the provisions of the FEU Treaty and the measures taken by the institutions pursuant thereto are applied (see, to that effect, *Commission v Italy*, C-456/03, EU:C:2005:388, paragraph 26 and the case-law cited).

- 34 An application of the principle of sincere cooperation is provided for in Article 19 of Directive 2005/29 which, like other directives, requires Member States to provide clear and precise information. The Court has held that, in the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 258 TFEU in order to establish the failure to fulfil the obligation (*Commission v Italy*, EU:C:2005:388, paragraph 27 and the case-law cited).
- 35 In the present case, moreover, it is undisputed that the Kingdom of Belgium has relied on the argument that the Law of 2 August 2002 transposes Directive 2005/29 for the first time only at the stage of submitting its statement in defence to this Court. In its reply to the reasoned opinion, the Kingdom of Belgium's entire defence on this point consisted in a mere reference to judgment No 55/2011 of the Constitutional Court, delivered on 6 April 2011, which held the exclusion of the professions from the scope of the Law of 6 April 2010 to be unconstitutional. The Kingdom of Belgium further stated that a legislative amendment would be introduced 'in the coming weeks' in order to ensure compliance with EU law.
- 36 In those circumstances, the Kingdom of Belgium cannot criticise the Commission for having merely set out in its application how the Law of 6 April 2011 does not transpose Directive 2005/29 correctly, without seeking to explain how the Law of 2 August 2002 has no bearing in that regard. In fact, the alleged lack of precision in the application results from the very conduct of the Belgian authorities during the pre-litigation procedure.
- 37 It follows from the foregoing that the Commission's first complaint put forward in support of its action must be admissible.

Substance of the first complaint

– Arguments of the parties

- 38 Relying on the wording of Articles 2(b) and 3(1) of Directive 2005/29, which refers specifically to the professions, the Commission submits that that directive applies to the commercial practices of all traders, irrespective of their legal status or the sector in which they operate. Consequently, the specific exclusion of members of a profession, dentists and physiotherapists from the scope of the Law of 6 April 2010 infringes Article 3 of Directive 2005/29, read in conjunction with Article 2(b) thereof.
- 39 During the pre-litigation phase, the Kingdom of Belgium argued that, in its judgment No 55/2011 of 6 April 2011, the Constitutional Court had held to be contrary to the Constitution precisely those provisions of the Law of 6 April 2010 which excluded those professions from its scope and that such a finding of unconstitutionality opened the door to an action for annulment being brought against that law within six months, which could lead to retroactive annulment of the disputed legislative provisions. The Commission observes in that regard, first of all, that, by that line of argument, the Kingdom of Belgium recognises that the infringement alleged against it, including the expiry date of the time period prescribed in the reasoned opinion, is well founded. Secondly, the Commission submits that any hypothetical retroactive annulment which the Constitutional Court might effect cannot remedy the infringement alleged and runs counter to the Court's case-law on the need for clarity and legal certainty in the transposition of the rules of EU law relating to consumer protection, since that regularisation is not such as to eliminate the infringement which was ongoing when the time-limit laid down in the reasoned opinion expired.

40 Regarding the substance, the Kingdom of Belgium does not dispute that certain professions are excluded from the scope of the Law of 6 April 2010. It points out, however, that the Constitutional Court held that exclusion to be unconstitutional by its judgments No 55/2011 of 6 April 2011 and No 192/2011 of 15 December 2011. It submits that the Court must assess the transposition in question having regard to those judgments, as they had the effect of rendering the relevant provisions of the Law of 6 April 2010 inapplicable in the Belgian courts, with the result that the exclusion provided for therein was rendered nugatory as from the time of delivery of those judgments and before the expiry of the time-limit prescribed in the reasoned opinion.

41 In its statement in defence, the Kingdom of Belgium adds that, on the date when it lodged that statement, an action for annulment was also brought before the Constitutional Court which, if successful, will have the effect of annulling, retroactively, Articles 2(2) and 3(2) of the Law of 6 April 2010. It follows that those national legal provisions will be deemed never to have been part of the Belgian legal order, with the result that the infringement alleged against the Kingdom of Belgium will never have existed.

– Findings of the Court

42 It should be observed that, whilst acknowledging that the first complaint is well founded, the Kingdom of Belgium argues that, in reality, the infringement alleged by the Commission has been ‘corrected’ by the effect of the judgments No 55/2011 of 6 April 2011 and No 192/2011 of 15 December 2011 of the Constitutional Court, which held Articles 2(1) and (2) and 3(2) of the Law of 6 April 2010 to be unconstitutional.

43 It should be remembered, however, in accordance with the Court’s settled case-law, that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations under rules of EU law (see, inter alia, *Commission v Luxembourg*, C-450/00, EU:C:2001:519, paragraph 8, and *Commission v Luxembourg*, C-375/04, EU:C:2005:264, paragraph 11).

44 Moreover, the existence of remedies available through the national courts cannot in any way prejudice the bringing of an action under Article 258 TFEU, since the two procedures have different objectives and effects (see *Commission v Italy*, C-87/02, EU:C:2004:363, paragraph 39 and the case-law cited).

45 It is equally settled case-law of the Court that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see *Commission v Spain*, C-168/03, EU:C:2004:525, paragraph 24; *Commission v Germany*, C-152/05, EU:C:2008:17, paragraph 15; and *Commission v Luxembourg*, C-282/08, EU:C:2009:55, paragraph 10). The Court cannot take account of any subsequent changes (see, inter alia, *Commission v Ireland*, C-482/03, EU:C:2004:733, paragraph 11, and *Commission v Sweden*, C-185/09, EU:C:2010:59, paragraph 9).

46 Moreover, the Court has also held that even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty, particularly in the field of consumer protection (see *Commission v Netherlands*, C-144/99, EU:C:2001:257, paragraph 21).

47 It follows that the circumstances as relied on by the Kingdom of Belgium are of no import as to the issue whether or not there has been a failure to fulfil obligations, which moreover it does not dispute.

48 In the light of the foregoing, the Court finds that the first complaint put forward by the Commission is well founded.

The second complaint

Arguments of the parties

- 49 The Commission observes that Articles 20, 21 and 29 of the Law of 6 April 2010 provide that any announcement of a price reduction must refer to a price defined by law, in this case, the lowest price applied throughout the month prior to the announcement of the price reduction. Those provisions further prohibit a price reduction from lasting for more than a month and provide that announcements of price reductions may not last for less than a day.
- 50 However, as Directive 2005/29 has fully harmonised the rules governing unfair commercial practices, Article 4 thereof precludes more restrictive national provisions such as those referred to in the preceding paragraph.
- 51 Annex I to Directive 2005/29 contains an exhaustive list of 31 commercial practices which are deemed to be unfair in all circumstances, which does not include the practices referred to in the Belgian legislation relating to price reductions. Such practices should thus be assessed on a case-by-case basis in order to determine whether they are unfair. However, the Belgian legislation has the effect of prohibiting the announcement of price reductions where the strict conditions contained in that legislation are not met, even where such practices may not, when examined individually, be considered misleading or unfair within the meaning of Directive 2005/29.
- 52 The Kingdom of Belgium contends, first, that although Directive 2005/29 effects complete harmonisation, it does not contain harmonised rules which allow the economic reality of price reduction announcements to be ascertained and, secondly, that Directive 98/6 was not amended by Directive 2005/29. Moreover, Article 10 of Directive 98/6 does not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices.
- 53 Furthermore, the Court, in *GB-INNO-BM*, C-362/88, EU:C:1990:102, laid down the principle of the consumer's right to information; consequently, Articles 20, 21 and 29 of the Law of 6 April 2010 must be examined solely in the light of Article 28 TFEU.

Findings of the Court

- 54 It should be observed, as a preliminary point, that Articles 20, 21 and 29 of the Law of 6 April 2010 concern announcements of price reductions, which are commercial practices within the meaning of Article 2(d) of Directive 2005/29 and therefore come within the scope of that directive (see, to that effect, order in *INNO*, C-126/11, EU:C:2011:851, paragraph 30 and the case-law cited).
- 55 The Court has held that Directive 2005/29 carries out a complete harmonisation at EU level of the rules concerning unfair commercial practices of undertakings vis-à-vis consumers. Accordingly, as expressly provided for by Article 4 thereof, Member States may not maintain or adopt more restrictive national measures than those laid down in that directive, even where such measures are designed to ensure a higher level of consumer protection (see *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2010:12, paragraph 41, and *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, EU:C:2010:660, paragraph 37).
- 56 Moreover, Directive 2005/29 establishes, in its Annex I, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of that directive, are regarded as unfair 'in all circumstances'. Consequently, as recital 17 in the preamble to that directive expressly states, only these commercial

practices can be deemed to be unfair without proceeding to a case-by-case assessment pursuant to the provisions of Articles 5 to 9 of Directive 2005/29 (see *Plus Warenhandelsgesellschaft*, EU:C:2010:12, paragraph 45).

- 57 The Kingdom of Belgium submits, in essence, that more restrictive measures, such as those provided for by Articles 20, 21 and 29 of the Law of 6 April 2010, remain permissible under the minimum harmonisation clause in Article 10 of Directive 98/6, under which Member States may adopt or maintain provisions which are more favourable as regards consumer information and comparison of prices.
- 58 It is common ground in that regard that, under Article 3(5) of Directive 2005/29, for a period of six years from 12 June 2007, Member States were able to continue to apply national provisions within the field approximated by that directive which were more restrictive or prescriptive than that directive and which implemented directives containing minimum harmonisation clauses.
- 59 It should be remembered, however, that, as observed by the Advocate General in point 58 et seq. of his Opinion, the purpose of Directive 98/6 is not to protect consumers in relation to the indication of prices, in general or with regard to the economic reality of announcements of price reductions, but specifically in relation to the indication of the prices of products by reference to different units of quantity.
- 60 It cannot, therefore, be validly argued that Article 10 of Directive 98/6 can justify maintaining in force more restrictive national provisions on the economic reality of announcements of price reductions, such as Articles 20, 21 and 29 of the Law of 6 April 2010, since those provisions do not come within the scope of Directive 98/6.
- 61 Consequently, national rules of this nature, which place a general prohibition on practices not referred to in Annex I to Directive 2005/29, without providing for an individual analysis as to whether the practices are ‘unfair’ in the light of the criteria laid down in Articles 5 to 9 of that directive, are not permitted under Article 4 thereof and run counter to the complete harmonisation objective pursued by that directive, even where they seek to achieve a higher level of consumer protection (see, to that effect, *Plus Warenhandelsgesellschaft*, EU:C:2010:12, paragraphs 41, 45 and 53).
- 62 With regard to the argument concerning the effects of the judgment in *GB-INNO-BM* (EU:C:1990:102), suffice it to observe that, as rightly pointed out by the Commission, the circumstances which gave rise to that judgment are different from the facts which led to the present proceedings being brought. In that case, the Court held that the free movement of goods precludes, in principle, national legislation refusing consumers access to certain information, whilst the purpose of Directive 2005/29, as evidenced by Article 1 thereof, is ‘to contribute to the proper functioning of the internal market and achieve a high level of consumer protection’.
- 63 However, in accordance with settled case-law, a national measure in an area which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of that harmonising measure and not those of the Treaty (see *Gysbrechts and Santurel Inter*, C-205/07, EU:C:2008:730, paragraph 33 and the case-law cited).
- 64 Since, as observed in paragraph 55 above, Directive 2005/29 has effected a complete harmonisation of the rules concerning unfair commercial practices, the national measures at issue must therefore be assessed solely in the light of the provisions of that directive and not of Article 28 TFEU.
- 65 The judgment in *GB-INNO-BM* (EU:C:1990:102), relied on by the Kingdom of Belgium, is of no import in that regard, as it concerned an area which had not yet, at that time, been so harmonised.
- 66 It follows from the foregoing that the Commission’s second complaint is well founded.

The third complaint

Arguments of the parties

- 67 The Commission notes, first, that Article 4(3) of the Law of 25 June 1993 amounts to a prohibition, save for certain goods and services, of all door-to-door selling at the home of the consumer for products or services exceeding EUR 250 for each consumer. It states, secondly, that Article 5(1) of the Royal Decree of 24 September 2006 prohibits itinerant trading in certain products, including precious metals and stones and fine pearls.
- 68 Observing that Directive 2005/29 effects a complete harmonisation and that the list of unfair practices in Annex I to that directive is exhaustive, the Commission adds that the prohibitions provided for in the relevant national provisions are not included in that list, concluding that an absolute prohibition is therefore not permissible and that practices must be assessed on a case-by-case basis in order to determine whether they are abusive practices which must be prohibited.
- 69 The Kingdom of Belgium contends, in essence, that both Article 5(1) of the Royal Decree of 24 September 2006 and Article 4(3) of the Law of 25 June 1993 come within the scope of Directive 85/577 and are more stringent national measures which are permitted under that directive. It argues, in particular, that Directive 2005/29 supplements the existing EU law provisions on consumer protection, without amending or restricting the scope of Directive 85/577, which complements the scope of Directive 2005/29.
- 70 Moreover, the national measures are part of the measures transposing Directive 2011/83 which the Kingdom of Belgium was required to enact by 13 December 2013.

Findings of the Court

- 71 It should be observed, by way of preliminary point, that, as pointed out by the Advocate General in point 79 of his Opinion, it is beyond doubt, firstly, that the national measures in question prohibiting certain forms of itinerant trading come within the scope of Directive 2005/29 because they are commercial practices within the meaning of Article 2(d) of that directive and that, secondly, they comply with Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises, the minimum harmonisation clause of which in Article 8 allows Member States to adopt or maintain ‘more favourable provisions to protect consumers in the field which it covers’.
- 72 Article 4 of Directive 2005/29 precludes the maintenance in force of more restrictive national measures of this nature, subject to Article 3(5) thereof, under which ‘[f]or a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by [that directive] which are more restrictive or prescriptive than [that same directive] and which implement directives containing minimum harmonisation clauses’.
- 73 Consequently, it is clear from Article 3(5) of Directive 2005/29 that the Member States may continue to apply only those more restrictive or prescriptive national measures which were in place on the date of entry into force of Directive 2005/29.
- 74 Yet Article 4(3) of the Law of 25 June 1993 and Article 5(1) of the Royal Decree of 24 September 2006 entered into force on 4 July 2005 and 24 September 2006 respectively, that is, after the entry into force of Directive 2005/29. It follows that the Kingdom of Belgium did not continue to apply legislation which was already in place on the date of entry into force of that directive.
- 75 Consequently, it follows from Article 3(5) of Directive 2005/29 that that directive precludes the national legislation in question.

- 76 With regard to the Kingdom of Belgium's argument that the national rules at issue are based on Directive 2011/83, suffice it to note that that directive was not in force at the time of expiry of the time-limit prescribed in the reasoned opinion, which was 15 May 2011, with the result that this argument cannot be upheld in the light of the principles outlined in paragraph 45 above.
- 77 In the light of the foregoing considerations, the third complaint asserted by the Commission must be upheld.
- 78 It follows from all the foregoing considerations that, by excluding members of a profession and dentists and physiotherapists from the scope of the Law of 14 July 1991, transposing in national law Directive 2005/29; by maintaining in force Articles 20, 21 and 29 of the Law of 6 April 2010; and by maintaining in force Article 4(3) of the Law of 25 June 1993 and Article 5(1) of the Royal Decree of 24 September 2006, the Kingdom of Belgium has failed to fulfil its obligations under Articles 2(b) and (d), 3 and 4 of Directive 2005/29.

Costs

- 79 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby

1. Declares that:

- **by excluding members of a profession and dentists and physiotherapists from the scope of the Law of 14 July 1991 on commercial practices, consumer information and consumer protection, as amended by the Law of 5 June 2007, transposing in national law Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('the Unfair Commercial Practices Directive'),**
- **by maintaining in force Articles 20, 21 and 29 of the Law of 6 April 2010 on market practices and consumer protection, and**
- **by maintaining in force Article 4(3) of the Law of 25 June 1993 on the exercise and organisation of travelling trading and fairground activities, as amended by the Law of 4 July 2005 and Article 5(1) of the Royal Decree of 24 September 2006 concerning the exercise and organisation of travelling trading activities,**

the Kingdom of Belgium has failed to fulfil its obligations under Articles 2(b) and (d), 3 and 4 of Directive 2005/29;

2. Orders the Kingdom of Belgium to pay the costs.

[Signatures]