OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 3 February 2011 [1]

I — Introduction

1. Article 169 of the Treaty on the functioning of the European Union requires the Union to promote the interests of consumers and to ensure a high level of consumer protection. 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'), [2] clearly intended to promote that aim and to be an effective instrument for preventing and combating unfair commercial practices.

2. By Directive 2005/29, the Union legislature chose to subject traders to a stricter obligation to disclose information where they decide to distribute commercial communication under the particular form of an invitation to purchase. This case affords to the Court a first opportunity to interpret that concept.

II — Legal background

A — *Union law*

3. The fourteenth recital in the preamble to Directive 2005/29 states that '[i]n respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision. Such information will not have to be disclosed in all advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in this Directive'.

1 — Original language: French.
2 — OJ 2005 L 149, p. 22.

4. Article 1 of Directive 2005/29 provides as follows: 'The purpose of this Directive 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.'

5. Pursuant to Article 2(1) of Directive 2005/29, 'invitation to purchase' means 'a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.'

6. Article 2(k) of Directive 2005/29 defines a transactional decision as 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.'

7. Article 4 of Directive 2005/29 provides that '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 this Directive.'

8. Article 5 of Directive 2005/29 provides as follows:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

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

and

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

...'

9. Article 7 of Directive 2005/29 which relates to misleading omissions states as follows:

'1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

(a) the main characteristics of the product, to an extent appropriate to the medium and the product;

(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;

(e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.'

B — *National law*

10. Directive 2005/29 was transposed into Swedish law by Law 2008:486 on marketing practices (hereinafter the 'Law on marketing practices'), Article 12 of which regulates invitations to purchase as follows:

'Marketing is misleading when the trader in a presentation offers consumers a specific product, giving the price, but without the following material information being stated:

(1) the main characteristics of the product, to an extent appropriate to the means of communication and to the product,

(2) the price and the unit price stated in the manner provided for in Paragraphs 7 to 10 [of Law 2004:347 on price information],

(3) the identity and the geographical address of the trader,

(4) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from what is normal for the industry or product in question,

(5) information about the right of withdrawal or the right to cancel a purchase, which must by law be provided to the consumer.

Marketing is also misleading where the trader offers consumers in a presentation several specific products, giving a common price, without the offer containing material information in accordance with points 1 to 5 of the first paragraph.'

III — Main proceedings and questions referred

11. Ving Sverige AB ('Ving') arranges and sells charter holidays and package holidays

using scheduled flights. Ving also sells individual airline tickets and hotel accommodation to persons travelling independently. The holidays are sold in Ving agencies, in selected travel agencies throughout Sweden, by telephone, and via the Internet.

12. On 13 August 2008, Ving put an advertisement in the Swedish daily newspaper *Svenska Dagbladet* formulated as follows. At the top and in bold, the words 'New York from 7 820 crowns'; below, in smaller characters, the words 'flights from Arlanda airport with British Airways and two nights at the Bedford hotel — Price per person staying in a double room, airport taxes included. Additional night from 1 320 crowns. For selected journeys from September to December. Limited number of places'. At the foot of the advertisement the Ving website and telephone number were given.

13. The Director-General of the Swedish authority responsible for consumer protection is also the ombudsman specifically responsible for ensuring that undertakings comply with the law on marketing practices. In that connection the ombudsman considered that the advertisement published was a commercial communication constituting an invitation to purchase involving a misleading omission in that it merely mentioned an entry-level price without specifying, or specifying inadequately, the main characteristics of the product offered. On 27 February 2009, it therefore brought proceedings before the marknadsdomstolen (commercial court) (Sweden) seeking an order against Ving to state a fixed price when it issues a commercial communication relating to travel that it sells and to give further particulars of the way in which the main characteristics of the travel, such as the dates or options available to consumers, are likely to affect the entry-level price shown. The ombudsman is also asking the national court to prohibit Ving, under penalty of a fine, from continuing to state entry-level prices.

14. Before the national court, the ombudsman argued that the communication at issue should be classed as an invitation to purchase and that it was misleading since information on the main characteristics of the journey was missing. The communication was therefore not in compliance with Article 12 of the law on marketing practices. In addition, the main characteristics of travel are described misleadingly since only an entry-level price is mentioned. Finally, the advertisement published by Ving constitutes an unfair practice to the extent that it impairs or is likely to impair the ability of the consumer to take an informed commercial decision.

15. Ving, for its part, considers that merely by publishing the advertisement it was not inviting consumers to buy a given product and therefore disputed its advertisement being classed as an invitation to purchase. In

the alternative, Ving argued before the national court that the main characteristics of the product were indicated in an appropriate manner, regard being had to the means of communication used and the product concerned. The price is also mentioned in a manner consistent with the law relating to information on prices to which the law on marketing practices refers. Ving asserts that no material information was omitted. In any event, if there were held to have been an omission of information, that did not, nor is likely to, impair the ability of the consumer to take an informed commercial decision, and the communication at issue cannot therefore constitute an unfair practice.

16. The question arises as to whether the advertisement published by Ving can be regarded as an invitation to purchase and, in the event of an affirmative answer, whether or not it constitutes an unfair commercial practice, those two concepts having been introduced into Swedish law on the transposition of Directive 2005/29.

17. Confronted, therefore, with a problem of interpretation of European Union law, the marknadomstolen decided to stay the proceedings and, by order for reference lodged on 8 March 2010, to refer the following seven questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'(1) Is the requirement "thereby enables the consumer to make a purchase" in Article 2(i) of Directive 2005/29 to be interpreted as meaning that an invitation to purchase exists as soon as information on the advertised product and its price is available so that the consumer may make a decision to purchase, or is it necessary that the commercial communication also offer an actual opportunity to purchase the product (e.g. an order form) or that it appears in connection with such an opportunity (e.g. an advertisement outside a shop)?

(2) If the answer to the above question is that it is necessary that there be an actual opportunity to purchase the product, is that to be regarded as existing if the commercial communication refers to a telephone number or website where the product can be ordered?

(3) Is Article 2(i) of Directive 2005/29 to be interpreted as meaning that the requirement for a price is met if the commercial communication contains an entry-level

price, that is to say, the lowest price for which the advertised product or category of product can be bought at the same time as the advertised product or category of products are available in other versions or with other content at prices which are not stated?

(4) Is Article 2(i) of Directive 2005/29 to be interpreted as meaning that the requirement concerning a product's characteristics is met as soon as there is a "verbal or visual reference to the product", that is to say, so that the product is identified but not further described?

(5) If the answer to the above question is affirmative, does that also apply where the advertised product is offered in many versions, but the commercial communication refers to them only by a common designation?

(6) If there is an invitation to purchase, is Article 7(4)(a) to be interpreted as meaning that it is sufficient for only certain of a product's main characteristics to be given and for the trader to refer in addition to its website, on the condition that on that site there is material information on the product's main characteristics, price and other terms in accordance with the requirement in Article 7(4) [of Directive 2005/29]?

(7) Is Article 7(4)(c) to be interpreted as meaning that it is sufficient to give an entry-level price for the price requirement to be met?'

IV — Proceedings before the Court

18. The defendant in the main proceedings, the Swedish, German, Spanish, Netherlands, Polish, United Kingdom and Norwegian Governments, as well as the European Commission, submitted written observations to the Court.

V — Legal analysis

A — *Concept of invitation to purchase (first to fifth questions)*

19. By the first five questions raised, the national court is seeking to obtain from the Court clarification on the concept of an 'invitation to purchase' within the meaning of

Directive 2005/29. Article 2(i) of that directive defines the invitation to purchase as 'a commercial communication indicating the characteristics of the product and its price in an appropriate manner depending on the means used for this commercial communication and thus allowing the consumer to make a purchase'; the first five questions should therefore be rearranged to follow the order of the criteria laid down in the definition provided by the directive.

20. In addition, I should like as a preliminary matter to make three sets of comments.

21. First, I wish to recall that Directive 2005/29 effects a complete harmonisation of the rules relating to unfair commercial practices of undertakings vis-à-vis consumers, [3] and undeniably has the specific purpose of ensuring a high level of consumer protection. [4] None the less, traders are not absent from the concerns of the Union legislature. Thus, the twelfth recital in the preamble to Directive 2005/29 states that '[h]armonisation will considerably increase legal certainty for both consumers and business. Both 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 EU.' In interpreting Directive 2005/29 it will therefore be important to bear in mind this twofold objective and to maintain the equilibrium established by it in that connection.

22. Next, under the terms of Directive 2005/29, the invitation to purchase is a particular form of advertising which attracts a stricter obligation under Article 7(4) of the directive. There are other forms of advertising and the trader therefore makes a deliberate choice to issue an invitation to purchase, thus taking the risk of being subject to a stricter obligation to disclose information.

23. The interpretative exercise which the Court is invited to conduct should, in my view, seek to uphold this twofold balance: as between the rights of consumers and the rights of traders, but also as between advertising in general and the invitation to purchase in particular. All interested parties who lodged written observations with the Court have highlighted the risks related to an interpretation that is either too restrictive of the concept of invitation to purchase — which would then restrict the circumstances under which Article 7(4) of Directive 2005/29 would apply — or too broad, which would then discourage

3 — Joined Cases C-261/07 and C-299/07 *VTB-GVA* [2009] ECR I-2949, paragraph 52; Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] I-00217 ECR, paragraph 41; and Case C-540/08 *Mediaprint Zeitungsund Zeitschriftenverlag* [2010] ECR I-10909, paragraph 27.

4 — See the fifth, twentieth and twenty-fourth recitals in the preamble to, and Article 1 of Directive 2005/29.

traders from choosing this particular type of commercial communication.

1. The criterion relating to appropriate indication of the product's characteristics (fourth and fifth questions)

25. Of all interested parties who lodged written observations with the Court, Ving is the only one to maintain that a verbal or visual representation of the product, with no more detailed description, does not satisfy the criterion relating to the indication of the product characteristics, within the meaning of Article 2(i) of Directive 2005/29 and, therefore, for there to be an invitation to purchase. However, on this issue, several elements tend rather to persuade me otherwise.

24. Finally, I recall that under settled case-law it follows from the need for uniform application of Community law and from the principle of equal treatment that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purposes of determining its meaning and scope must as a general rule be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the objective pursued by the rules of which it forms part. [5] Since Directive 2005/29 effects a complete harmonisation, and the relevant provisions relating to the invitation to purchase contain no reference to the laws of the Member States, it is for the Court to give that notion an autonomous and uniform interpretation throughout the legal order of the Union [6] by interpreting Article 2(i) of Directive 2005/29 in the light not only of its wording but also of its context and objectives. [7]

26. The wording of Article 2(i) of Directive 2005/29 requires only that the 'characteristics of the product' should be indicated, without specifying the type of information required or the scope thereof. Therefore, a commercial communication, which contains a visual or verbal representation of the product, may satisfy the condition laid down in Article 2(i) of Directive 2005/29 on indication of product characteristics.

27. The inability of the Union legislature to seek more particulars under Article 2(i) of Directive 2005/29 is a consequence of the fact that, under the same article, the description of the product characteristics will naturally be

5 — See, among many others, the judgments of the Court in Case C-168/08 *Hadadi* [2009] ECR I-6871, paragraph 38; Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 24, and Case C-433/08 *Yaesu Europe* [2009] ECR I-11487, paragraph 18.

6 — *Yaesu Europe*, cited above, paragraph 23.

7 — *Yaesu Europe*, cited above, paragraph 24, and case-law cited.

more or less detailed according to the means of communication chosen by the trader. A commercial communication broadcast on radio will necessarily contain fewer particulars of the characteristics of the product than a similar communication published on a full page of a national daily. Whilst in Article 6(1)(b) of Directive 2005/29, dealing with misleading actions, the legislature specified what it meant by the 'main characteristics of the product', [8] it is worth noting that it has not done so for the characteristics referred to in Article 2(i) of Directive 2005/29. [9]

28. Thus, rather than the exhaustiveness of the main or material features of the product, what has to be determined is whether, in the light of the product concerned and means of communication used, the information in the commercial communication is sufficient for the consumer to identify the product. A merely verbal or visual representation of the product may therefore, depending on the case, be enough. Indeed, all products will not require the same level of detail in their presentation; the same product will not be able to be described in the same way depending on the means of communication used. It is therefore for the national court to assess, case by case, whether the commercial communication for review before it meets the criteria of this first test. [10]

29. Regardless of whether the indication of an entry-level price is sufficient to satisfy the price condition set out in Article 2(i) of Directive 2005/29 — a matter that will be dealt with below — it has to be said that the indication of an entry-level price may also give the consumer to understand that the product that he has identified exists in other variants although a single common designation is used. This view, it seems to me, is reasonable inasmuch as, in accordance with its eighteenth recital, Directive 2005/29 'takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as

8 — Under that article, the main characteristics of the product may be 'its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product'.

9 — I note, in this respect, that the original text of the proposal for a directive stated, in the provision defining invitation to purchase, that it related to the *main* characteristics; this detail was deleted in the course of the procedure for adoption of Directive 2005/29 (see Article 2(k) of the Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) COM(2003) 356 final).

10 — Indeed, according to the seventh recital in the preamble to Directive 2005/29, '[f]ull account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof'.

interpreted by the Court of Justice'.[11] Therefore, depending on the nature of the product or the form of the price indication, it is conceivable that the use in a commercial communication of a common designation although the product exists in several variants may be sufficient to ensure that the criterion relating to product characteristics within the meaning of Article 2(i) of Directive 2005/29 is satisfied.

30. In this respect, and without seeking to encroach on the domain reserved to the jurisdiction of the national court, I would like to emphasize that the commercial communication in the main proceedings was published by Ving in what must represent an area of less than a quarter of the page of the newspaper chosen; that it is illustrated by a representation of the Statue of Liberty; that it mentions the airport of departure, the city of destination, the airline, the name of the hotel at the destination, the entry-level price[12] and the period to which the offer applies together with the indication that the number of places is limited. It is therefore on the basis of these elements that the national court must determine whether the consumer, with this information, was able to form a sufficiently clear idea of the product offered. The interpretation proposed by the Commission in the Guidance on the implementation/application of Directive 2005/29 is also along these lines, with a view to maintaining the useful effect of both Article 2(i), and Article 7(4) of the directive.[13]

31. In these circumstances, Article 2(i) of Directive 2005/29 does not preclude the use, in a commercial communication, of a visual or verbal representation of the product, which may be sufficient for the condition relating to the characteristics of the product to be satisfied. Nor, in principle, does it preclude the use of a common designation of the product where it can rea.sonably be inferred from the commercial communication that the product exists in several variants. It is, however, for the national court to assess case by case whether, taking account of the product concerned and the means of communication used, the representation and common designation used in the commercial communication allow an

11 — See, in particular, Cases C-373/90 *X* [1992] ECR I-131, paragraph 15; C-220/98 *Estée Lauder* [2000] ECR I-117, paragraphs 27 and 30; C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, paragraph 55; and C-356/04 *Lidl Belgium* [2006] ECR I-8501, paragraphs 77 and 78. Whilst the average consumer is the reference consumer under Directive 2005/29, the directive also provides, on an ad hoc basis, for special protection for consumers who, having regard to age, physical or mental infirmity or credulity, are particularly vulnerable to an unfair commercial practice or to the product to which it relates (see recital 19 in the preamble to and Article 5(3) of Directive 2005/29).

12 — The indication of an entry-level price in the context of Article 2(i) of Directive 2005/29 will be the subject of points 32 et seq. of this Opinion.

13 — See 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices' [SEC(2009) 1666 of 3 December 2009, p. 47] according to which once there is a verbal or visual representation of the product, the requirement relating to the characteristics of the product under Article 2(i) of Directive 2005/29 should be regarded as fulfilled. The Commission considers, in effect, that a different interpretation could encourage traders to give vague descriptions or to omit information in their commercial offers to circumvent the information requirements laid down in Article 7(4) of the directive.

average consumer, who is normally informed and reasonably observant and circumspect, to identify the product.

34. In regard to the entry-level price, reasoning very similar to that applied to the previous condition concerning product characteristics may be upheld.

2. Criterion relating to appropriate indication of the product price (third question)

32. The national court here wishes to ascertain whether the indication of an entry-level price is enough to satisfy the second part of Article 2(i) of Directive 2005/29.

33. The question whether the reference, in a commercial communication, to an entry-level price may suffice to satisfy the condition relating to indication of price is separate from the issue of whether the entry-level price indicated is misleading or not. Review of the conditions governing Article 2(i) of Directive 2005/29 must be conducted separately from consideration of the obligation to disclose information under Article 7(4). To assert that an entry-level price is enough for there to be an invitation to purchase is not the same as asserting that indicating the price meets the abovementioned obligation. Whilst some written observations submitted to the Court have focused, at the stage of review of the conditions of Article 2(i), on the question whether an entry-level price is misleading, those arguments are without effect in regard to the issue of classification as an invitation to purchase.

35. First, in the same way as Article 2(i) of Directive 2005/29 does not precisely specify the requirement relating to the characteristics of the product, the requirement concerning price is also couched in somewhat imprecise terms; it may straight away be inferred from this that the directive does not, as a matter of principle, preclude an invitation to purchase from mentioning an entry-level price. This imprecision on the part of the legislature allows a relatively broad view of the requirement as to price to be maintained. The German, Netherlands and Norwegian Governments have noted, rightly, that if the Court were to consider that the indication of an entry-level price is insufficient for the condition relating to price to be deemed to be fulfilled, it would be enough for traders to indicate, in any commercial communication, an entry-level price for the communications never to be classified as invitations to purchase, and, therefore, never subject to the enhanced obligation to disclose information under Article 7(4) of the directive. That would undeniably affect the useful effect of this provision.

36. Then, depending on the products concerned, it is quite permissible that the trader is not able to indicate in the commercial communication the final price of the product.

This possibility was envisaged by the legislature of the Union. [14] The final price of certain complex products such as a car, or composite products such as travel, which covers both transport and accommodation, will depend on factors beyond the trader's control at the time of publication or dissemination of the commercial communication. [15] The entry-level price, as illustrated by the word 'from' preceding it, constitutes a basic price, the cheapest price at which at least one of the versions of the product may be purchased. At the same time, it alerts the consumer to the fact that the product exists in other variants which may be purchased at a price higher than the entry-level price mentioned.

37. To allow reference to an entry-level price ('from') seems to me quite consistent with my proposed interpretation of the condition relating to product characteristics: accepting that a commercial communication can be based on a visual or verbal representation which employs a single designation for a product existing in many variants, and quite apart from the fact the trader is genuinely not in a position to calculate the final price, it must be accepted as a corollary that the trader may indicate only an entry-level price, failing his being able to mention each price corresponding to each of the existing variants.

38. Under Article 2(i) of Directive 2005/29 an invitation to purchase must indicate the price of the product 'in a way appropriate to the means of the commercial communication used'. The imprecision of the concept of price combined with the fact that the indications provided to the consumer are variable according to the means used militate in favour of a broad interpretation of the condition relating to indication of price. In these circumstances, a case by case analysis is required. It is therefore for the national court to verify that the indication of an entry-level price is appropriate to the means of communication used and is also sufficient to enable the consumer, after identifying the product concerned, to understand that the product described or represented can be purchased at the stated price.

3. The expression 'and thereby enables the consumer to make a purchase' (first and second questions)

39. By its first and second questions, the national court seeks to ascertain whether the expression 'and thereby enables the consumer to make a purchase', in Article 2(i) of Directive

14 — See Article 7(4)(c) of Directive 2005/29.

15 — Car manufacturers, for example, often merely state an entry-level price in their commercial literature as the same model will be available with different engine sizes and the consumer can add a whole series of options. In terms of travel packages Ving pointed out that the final price depends essentially on three factors: the date on which the reservation is made, the duration of travel and of course the destination.

2005/29 is an additional criterion for a commercial communication to be regarded as an invitation to purchase or whether only the combination of the appropriate indication of the product characteristics and its price must be sufficient to enable the consumer decide on the purchase. It asks the Court whether, under the terms of Article 2(i) of Directive 2005/29, an invitation to purchase must necessarily comprise an actual means of affecting the purchase.

40. Two opposing arguments divide the interested parties who lodged written observations. The Swedish, German, Spanish, Polish, and Norwegian Governments support the interpretation provided by the Commission in its Guidance on Article 2(i) of Directive 2005/29.[16] To constitute an invitation to purchase, the commercial communication need not actually enable a purchase to be made or allow access to such a possibility. The expression 'and thereby enables the consumer to make a purchase' only illustrates a consequence linked to the fact that the consumer is being provided with sufficient information relating to the product and the price to make a purchase, and not an additional criterion. For the Swedish, German and Polish Governments, it is a case of determining the influence exerted by the communication mentioning the characteristics of the product and its price on the decision to purchase, which also need not occur immediately after the consumer has taken note of the commercial communication. Nor, moreover, does the concept of the invitation to purchase preclude the consumer from performing further steps prior to the actual purchase.[17] On the other hand, Ving and the Netherlands Government consider that it is necessary for the communication to include an actual means of making a purchase. They differ, however, on the definition of that means: for Ving, that requires close proximity with a point of sale, but for the Netherlands Government, in contrast, a phone number or an Internet site address may be sufficient. Finally, the Government of the United Kingdom proposes an intermediate solution. For it, the invitation to purchase does no more than ensure or facilitate the final decision of the consumer. As a matter of principle, it says, reference to the product characteristics and price alone does not enable the consumer to buy the product. Only commercial communications which have a not inconsiderable impact on the decision to purchase should be classed as invitations to purchase within the meaning of Directive 2005/29, in order to avoid too extensive a construction of the concept which would disturb the balance

16 — Cited above in footnote 13.

17 — On this point the observations of those Governments may appear to contradict the views of the Commission, which, under the definition provided by it in the Guidance to which it referred in its written observations, considers that the invitation to purchase 'is a decisive moment when the consumer must take a commercial decision. Intrinsically it is a direct and immediate form of product promotion inciting an impulsive reaction and increasing the risk run by the consumer' (see point 18 of the Commission's written observations and point 2.6.3 in fine of the above-mentioned Guidance).

sought by the Union legislature between the interests of consumers and those of traders. It is thus the impact of the commercial communication on the decision to purchase, which could be more or less remote, that has to be evaluated, so that a commercial communication including an actual means of making a purchase would always constitute an invitation to purchase, while it would be more rarely the case for commercial communications devoid of such means. In other words, the presence of an actual means of making a purchase is therefore not an essential element of an invitation to purchase.

41. For my part, I consider that on a purely literal interpretation of Article 2(i) of Directive 2005/29, enabling a purchase to be made is a consequence of the consumer being in possession of sufficient information to identify both the product and the price. This relationship of cause (availability of information related to the product and to the price) and effect (enabling the purchase) is also expressed by the use of the adverb 'thereby'. If that purely literal interpretation is upheld, a commercial communication would therefore not need to include or indicate an actual means of making a purchase for it to constitute an invitation to purchase.

42. I also note that the Union legislature did not reproduce the term 'commercial decision' in the definition in Article 2(i) of Directive 2005/29, although it is defined a little further on, [18] since what is at stake is enabling the consumer to make a purchase, and not to take a commercial decision, which is a wider concept. [19] In fact the directive applies to 'unfair business-to-consumer commercial practices, as laid down in Article 21, before, during and after a commercial transaction in relation to a product'. [20] For the purposes of Directive 2005/29, a commercial decision can intervene at various times and is not reducible solely to the decision to purchase, [21] In contrast, the invitation to purchase is plainly located in the phase prior to purchase.

43. It remains to be determined whether the invitation to purchase must necessarily and immediately be followed by a decision to purchase, that is to say by the transition to a contractual relationship binding the

18 — See point 6 of this Opinion.

19 — Directive 2005/29 establishes, in fact, a multifaceted concept: the commercial decision is a distinct manifestation of the economic behaviour of the consumer (see in particular the eleventh and thirteenth recitals of Directive 2005/29) and enabling the consumer to make a purchase is only one example of possible commercial decisions.

20 — Article 3(1) of Directive 2005/29.

21 — The example given by the Commission on this point is of some significance: see points 2.1.1 to 2.1.3 of the abovementioned Guidance, footnote 13.

consumer and the trader in relation to the product concerned through an actual means included in the invitation to purchase. I am not persuaded of that for two major reasons. First, that interpretation would plainly reduce to a significant extent the situations in which a commercial communication would constitute an invitation to purchase. In addition, an interpretation favouring a decision to purchase immediately following an invitation to purchase would be difficult to reconcile with Article 7 of Directive 2005/29, under which it is permissible for the commercial communication not to contain all the material information listed or not to indicate a final price, [22] which presupposes that the decision to purchase is necessarily deferred, pending the consumer's being in possession of all the information required to be able to make a purchase. [23]

44. It is, in my opinion, difficult to make the definition of an autonomous concept of European Union law dependent on subjective elements, such as the psychological parameters peculiar to each individual which will prompt that person to decide, at a given time, to buy, or not to buy, such or such product. Therefore, the expression 'and thereby enables the consumer to make a purchase' should rather be construed as laying down a general criterion for establishing whether objectively the consumer is being provided with information sufficient to enable the purchase to be made. For example, apart from the condition relating to information on the product and on the price, Article 2(i) does not mention any information relating to the identity of the seller. Therefore, it appears evident that over and above the wording alone of Article 2(i), that is to say although not expressly referred to in that article, this information, with all the necessary details that it evokes depending on the seller's reputation, [24] is plainly material for there to be an invitation to purchase.

45. This being the case, the condition expressed by the words 'thereby enabling the consumer to make a purchase' must not be interpreted as meaning that there is an invitation to purchase only if the commercial communication includes an actual means of making a purchase or if it is displayed in the vicinity of a point of sale. That phrase must, on the contrary, be interpreted as meaning that only a commercial communication, which contains sufficient information not

22 — These points will be examined in connection with the sixth and seventh questions.

23 — Thus, without an indication of the final price, I doubt whether the standard average consumer under Directive 2005/29 would be inclined to take a decision to make a purchase.

24 — To enable the consumer to make a purchase, it is necessary that he is in possession of sufficient information to identify the product and its price. But it is also important for the seller to be identified, or even located. Depending on the reputation of the seller, sometimes the presence of his logo will be sufficient for the consumer to identify and immediately associate the seller with the place where the product will be available at the stated price. At other times the reputation of the seller will be less strong, and then, to ensure that the consumer has been able to identify the seller, the commercial communication in question will also have to contain information about the location of points of sale. In all cases, it is an additional element and its impact in terms of the consumer actually being able to make a purchase should be assessed by the national court.

only about the product and the price but also, as set out in this Opinion, about the identity of the vendor for the consumer to be able to decide on the purchase constitutes an invitation to purchase.

46. If the Court should however conclude that the expression 'and thereby enabling the consumer to make a purchase' entails that the commercial communication actually include a means of purchasing the product concerned for the communication to constitute an invitation to purchase, a telephone number or a website may be regarded as actual means of making a purchase, it being for the national court to verify that the purchase can actually be made by calling the telephone number or by logging on to the website.

B — *Concept of misleading omission (sixth and seventh questions)*

1. Material information on the main characteristics of the product (sixth question)

47. The sixth question concerns the issue of whether, in the case of an invitation to purchase under Article 2(i) of Directive 2005/29, Article 7(4)(a) of the directive must be interpreted as meaning that it is enough for only some main characteristics of the product to be indicated, if the trader otherwise refers to his Internet site, provided that this site contains the material information relating to the main characteristics of the product, price and other conditions, in accordance with the requirements of Article 7(4) aforesaid.

48. As a preliminary matter, it must be remembered that Directive 2005/29 is intended to combat unfair business practices which are, as a matter of principle, outlawed. [25] The directive identifies two distinct categories of unfair commercial trade practices: those that are misleading and those that are aggressive. [26] In addition, the Union legislature annexed to the directive a list of 31 commercial practices deemed unfair in all circumstances. Only these commercial practices are considered unfair without being assessed on a case-by-case basis under the provisions of Articles 5 to 9 of the Directive 2005/29. [27] I therefore

25 — Article 5(1) of Directive 2005/29.

26 — Article 5(4) of Directive 2005/29 then Articles 6 and 7 (for misleading commercial practices) and Articles 8 and 9 (for aggressive commercial practices).

27 — *Plus Warenhandelsgesellschaft*, cited above (paragraph 45).

note at the outset that reference by the trader to his Internet site for material information does not form part of the annexed list and that the question should be considered on the basis of Article 7 of Directive 2005/29.

49. Article 7(4) of the directive lists the information considered material in connection with an invitation to purchase. [28] More particularly, under Article 7(4)(a), material information comprises 'the main characteristics of the product, to an extent appropriate to the medium and to the product concerned', where not already apparent from the context. [29] Article 7(4)(a) should be read in conjunction with Article 7(1) which provides that '[a] commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise'.

50. Directive 2005/29 provides no definition of the concept of 'main characteristics'. Article 7(4) clearly implies that the mention of the main characteristics is governed by three factors. It first has to be checked whether the main characteristics do not already appear clearly from the context [30] in which case the additional mention of the main characteristics of the product in the commercial communication used to support the invitation to purchase will be superfluous. Next, this indication will depend also on the nature of the product and the means of communication used. The obligation under Article 7(4)(a) of Directive 2005/29 to disclose information relating to the characteristics of the product will therefore be more or less stringent depending on whether it is a simple or complex product about which an invitation to purchase has been distributed on a full page of a daily or has been broadcast on radio, for example.

51. In addition, Article 7(4)(a) of Directive 2005/29 mentions only the main

28 — Article 7(5) of Directive 2005/29 states that 'the information … provided by Community law … relating to commercial communications, including advertising or marketing, a non-exhaustive list of which is contained in annex II, shall be regarded as material'. That annex refers to Article 3 of Directive 90/314/EEC of the Council of 13 June 1990 concerning travel, holidays and package tours (OJ 1990 L 158, p. 59). Certainly, Ving's offer is undoubtedly analogous to a package tour. However, Article 3 lists only the material information that the brochures issued by the organiser or retailer must include. The communication concerned in the main proceedings does not take this form; thus, Article 3 of Directive 90/314 is not relevant to the present analysis.

29 — Article 7(4) of Directive 2005/29 *ab initio*.

30 — Article 7(4) of Directive 2005/29 *ab initio*.

characteristics, which precludes an interpretation of the directive as requiring a comprehensive description of all the characteristics of the product in the invitation to purchase. [31] Nor is it feasible to interpret Article 7(4)(a) to the effect that the main characteristics are exhaustively enumerated, because that would be contrary to the possibility of adjusting the obligation under it to disclose information.

52. There is therefore nothing to preclude the Court from forming the view that Article 7(4)(a) of Directive 2005/29 may be interpreted as meaning that it is merely necessary to mention some main characteristics of the product. Moreover, the directive expressly envisages the situation in which the trader offsets the lack of space or time forcing him to refer only to some of the main characteristics by a reference to another medium. [32] Therefore, a trader can refer the consumer to its Internet site provided that the consumer can find material information there relating to the main characteristics of the product. Finally, in the midst of these fluctuating criteria (context, nature of the product, means of communication used), there is one constant: in all cases, the consumer must remain in a position to take a decision in full knowledge of the facts. From the moment when that is no longer the case, the omission of the material information referred to in Article 7(4) becomes misleading and the invitation to purchase therefore constitutes an unfair commercial practice. In view of the role of national courts under Directive 2005/29 as to its implementation and its application, it is clearly for them to decide this issue, in light of recital 18 [33] and the reference in Article 7(1) to the factual background.

53. Thus, an invitation to purchase may mention only some main characteristics of the product concerned. Other main characteristics can be disclosed outside of the means of communication used for the invitation to purchase if mention thereof in the invitation itself is not necessary (taking account of context or of the product concerned) or not possible (taking account of the means of communication used) and if the trader refers for the rest to its Internet site or to another comparable medium provided the site or medium

31 — Moreover, to require traders to provide information that is not necessary (in view of the context or what the average consumer as defined by the Court's case-law is capable of understanding or deducing) could have the effect of rendering the commercial communication unclear, unintelligible or ambiguous so that paradoxically the commercial communication would be liable to constitute a misleading omission under Article 7(2) of Directive 2005/29.

32 — Article 7(3) of Directive 2005/29.

33 — In regard to the concept of the average consumer to which Directive 2005/29 alludes, this recital states: 'National courts and authorities will have to exercise their faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.'

actually allows the consumer to access additional information relating to the main characteristics. It is for the national court to assess all these matters, and to verify that in any event, the omission from the invitation to purchase of certain main characteristics did not result in the consumer being prevented from taking a commercial decision in full knowledge of the facts.

56. First, the fact that an invitation to purchase mentions only an entry-level price does not constitute a commercial practice that is deemed unfair in all circumstances, since it is not a situation referred to in Annex I to Directive 2005/29.

2. Material information relating to the price (seventh question)

57. Next, Article 7(4)(c) of Directive 2005/29 itself contemplates a situation in which, taking into account the nature of the product, the trader is not in a position to calculate the final price. However, when this happens, that article obliges the trader to mention the way the price is calculated as well as, where appropriate, any additional cost to be charged to the consumer or a reference to the fact that these costs may be charged to it.

54. The seventh question concerns whether Article 7(4)(c) of Directive 2005/29 must be interpreted as meaning that it is enough to indicate an entry-level price for the requirements concerning prices to be satisfied.

58. Therefore, the wording of Article 7(4)(c) of Directive 2005/29 does not in itself preclude a situation in which an entry-level price may suffice on condition that the indication of an entry-level price be accompanied by additional particulars relating to costs and to whom they are charged. The question arising is whether a commercial invitation may indicate an entry-level price without making reference to those additional particulars or whether Article 7(4)(c) must be read as meaning that when an invitation to purchase contains a entry-level price, it must necessarily

55. In my view, an approach similar to that used for the analysis of Article 7(4)(a) of Directive 2005/29 may be applied *mutatis mutandis* to consideration of the requirement in Article 7(4)(c) of the directive.

be accompanied by the additional particulars referred to above.

59. In this connection, the Swedish Government observes that, contrary to the wording of Article 7(4)(a) of Directive 2005/29, Article 7(4)(c) does not provide for the obligation to disclose information to be relaxed so as to take account of the limitations inherent in the medium of communication used, which would be an argument in favour of a strict interpretation of paragraph (c). However, subparagraph (c) cannot, any more than subparagraph (a), be interpreted without the whole of Article 7 being duly taken into account. Yet, in determining whether an omission is misleading, Article 7(3) lays down the general principle that '[w]here the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted'. The extent of material information relating to the price will thus be determined in the light of the nature of the product [Article 7(4)(c)], but also in the light of the means of communication used for the invitation to purchase and taking account of any additional information provided by the trader (Article 7(3) of Directive 2005/29).

60. Thus, without wanting to prejudge the assessment by the national court which discharges the task of applying Union law in the main proceedings, it should, when assessing whether only mentioning an entry-level price in the Ving commercial communication constitutes a misleading omission, assess the relevance of the arguments of the defendant in the main proceedings. Ving has stated that the final price of the product concerned by the invitation depends on factors that on the one hand are so familiar to the average consumer [34] and, on the other hand, are so complex [35] that the requirement of intelligibility of the communication and the principle that the content of the information provided should be assessed according to the opportunities offered by the means of communication chosen exempt the trader from having to mention them.

61. Ving continued by indicating that the explanations relating to the various factors

34 — Namely attractiveness of the destination, the time at which the consumer makes the reservation and the period chosen for the stay.

35 — Ving made particular mention of the modalities according to which the airlines are to determine the price of plane tickets.

influencing the final price of a stay such as that proposed by commercial communications at issue were available on the Internet on a website developed by a consumer association. However, in the light of Article 7(3) of Directive 2005/29, it is not enough for the material information not contained in the invitation to purchase to be otherwise available in another medium, but instead the provision of missing material information must be attributable to positive action on the part of the trader.

62. Finally, although Directive 2005/29 allows a certain tolerance, no omission of material information listed in Article 7(4) of the directive can be permitted if it incites or is likely to incite the average consumer to take a commercial decision that it would not otherwise have taken. As price is a determining factor for the mind of the average consumer in taking a commercial decision, this aspect will also have to be considered by the national court. In this connection, it may take into account the number of products which have been actually sold at the entry-level price shown. [36]

63. Thus, reference to a entry-level price may be enough to satisfy the requirement relating to the obligation to disclose information on the price, for the purposes of Article 7(4)(c) of Directive 2005/29, only where reference to calculation of the final price or of any additional costs is either not necessary (taking account of the context or of the product concerned), or is not possible (taking into account the medium of communication used) and if the trader refers for other particulars to its Internet site or other comparable medium, provided that the site or medium actually allows the consumer to access the reference. It is for the national court to appraise all these elements, and to verify that the omission, in the invitation to purchase, of any mention of the methods for calculating the final price or any additional costs has not had the effect of preventing the consumer from taking a commercial decision in full knowledge of the facts.

36 — Ving maintains that 80% of reservations recorded were at the entry-level price shown in the commercial communication and that in these circumstances, the reference to an entry-level price of combined with omitting to mention the methods of calculation did not mislead the consumer within the meaning of Article 7 of the Directive 2005/29. I also note that, in all cases, if a commercial invitation were to indicate invitation at an entry-level price without the trader ever being able to provide the product concerned at the entry-level price indicated to the consumer, the question then arising would be whether such a practice would not constitute an unfair commercial practice deemed misleading in all circumstances within the meaning of paragraph 5 of Annex I to Directive 2005/29.

VI — Conclusion

64. In the light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the marknadsdomstolen follows:

(1) Article 2(i) of Directive 2005/29 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 ('Directive on unfair commercial practices') does not preclude the use, in a commercial communication, of a visual or verbal representation of the product, which may be sufficient for the condition relating to the characteristics of the product to be satisfied. Nor, in principle, does it preclude the use of a common designation of the product where it can reasonably be inferred from the commercial communication that the product exists in several variants. It is, however, for the national court to assess case by case whether, taking account of the product concerned and the means of communication used, the representation and common designation used in the commercial communication allow an average consumer, who is normally informed and reasonably observant and circumspect, to identify the product.

(2) It is also for the national court to verify that the indication of an entry-level price is appropriate to the means of communication used and is also sufficient to enable the consumer, after identifying the product concerned, to understand that the product described or represented can be purchased at the stated price.

(3) — Within the meaning of Article 2(i) of Directive 2005/29/EC, the condition expressed by the words 'thereby enabling the consumer to make a purchase' must not be interpreted as meaning that there is an invitation to purchase only if the commercial communication includes an actual means of making a purchase or if it is displayed in the vicinity of a point of sale. That phrase must, on the contrary, be interpreted as establishing a general criterion enabling it to be determined whether from an objective point of view the consumer is provided with sufficient information about the product, the price and the vendor in order for the purchase to be made.

— In the event that the Court should require there to be an actual means of making a purchase for a commercial communication to constitute to purchase, a telephone number or a website may be regarded as actual means of making a purchase, it being for the national court to verify that the purchase can actually be made by calling the telephone number or by logging onto the website.

(4) Article 7(4)(a) of Directive 2005/29 must be interpreted as meaning that an invitation to purchase may mention only some main characteristics of the product concerned. Other main characteristics can be disclosed outside of the means of communication used for the invitation to purchase if mention thereof in the invitation itself is not necessary (taking account of context or of the product concerned) or not possible (taking account of the means of communication used) and if the trader refers for the rest to its Internet site or to another comparable medium provided the site or medium actually allows the consumer to access additional information relating to the main characteristics. It is for the national court to assess all these matters, and to verify that in any event, the omission from the invitation to purchase of certain main characteristics did not result in

the consumer being prevented from taking a commercial decision in full knowledge of the facts.

(5) The reference to an entry-level price may be enough to satisfy the requirement relating to the obligation to disclose information on the price, for the purposes of Article 7(4)(c) of Directive 2005/29, only where reference to calculation of the final price or of any additional costs is either not necessary (taking account of the context or of the product concerned), or is not possible (taking into account the medium of communication used) and if the trader refers for other particulars to its Internet site or other comparable medium, provided that the site or medium actually allows the consumer to access the reference. It is for the national court to appraise all these elements, and to verify that the omission, in the invitation to purchase, of any mention of the methods for calculating the final price or any additional costs has not had the effect of preventing the consumer from taking a commercial decision in full knowledge of the facts.