Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

18 October 2012*

(Directive 2005/29/EC — Unfair commercial practices — Practice of informing the consumer that he has won a prize and obliging him, in order to receive that prize, to incur a cost of whatever kind)

In Case C-428/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 2 August 2011, received at the Court on 16 August 2011, in the proceedings

**Purely Creative Ltd,**

**Strike Lucky Games Ltd,**

**Winners Club Ltd,**

**McIntyre & Dodd Marketing Ltd,**

**Dodd Marketing Ltd,**

**Adrian Williams,**

**Wendy Ruck,**

**Catherine Cummings,**

**Peter Henry**

v

**Office of Fair Trading,**

THE COURT (Sixth Chamber),

composed of A. Rosas (Rapporteur), acting as President of the Sixth Chamber, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 June 2012,

* Language of the case: English.

after considering the observations submitted on behalf of:

— Purely Creative Ltd and Others, by K. de Haan, QC, and N. Tillott, Solicitor,

— the United Kingdom Government, by S. Ossowski and E. Jenkinson, acting as Agents, and by J. Simor, Barrister,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by J. Samnadda, M. van Beek and M. Owsiany-Hornung, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of paragraph 31 of Annex I to 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).

2 The reference was made in the context of a dispute between five undertakings specialised in the distribution of mailings together with a number of people who have worked for those undertakings ('the traders') and the Office of Fair Trading ('the OFT'), which is responsible for enforcing consumer protection laws, regarding the practices used by the traders.

### Legal context

*European Union law*

3 Recitals 6, 8 and 16 to 19 in the preamble to the Unfair Commercial Practices Directive state as follows:

'(6) This Directive therefore 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. ...

...

(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. ...

...

(16) The provisions on aggressive commercial practices should cover those practices which significantly impair the consumer's freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence.

(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.

(18) It is appropriate to protect all consumers from unfair commercial practices. … In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive 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 interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. … The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

(19) Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.'

4 Article 1 of the Unfair Commercial Practices Directive states:

'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 Article 2(e) of the Unfair Commercial Practices Directive contains the following definition:

'"to materially distort the economic behaviour of consumers" means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'.

6 Article 5 of the Unfair Commercial Practices Directive, headed 'Prohibition of unfair commercial practices', is worded as follows:

'(1) Unfair commercial practices shall be prohibited.

(2) A commercial practice shall be unfair if:

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

and

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

...

(4) In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

(5) Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

7 Article 8 of the Unfair Commercial Practices Directive, headed 'Agressive commercial practices', states as follows:

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

8 Annex I to the Unfair Commercial Practices Directive is a list of 31 paragraphs that describe practices which are in all circumstances regarded as unfair. The practices described in paragraphs 1 to 23 of the annex come under the heading 'Misleading commercial practices', whereas the practices described in paragraphs 24 to 31 come under the heading 'Aggressive commercial practices'.

9 Paragraph 20 of Annex I of the Unfair Commercial Practices Directive states as follows:

'Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.'

10 Paragraph 31 of Annex I to the Unfair Commercial Practices Directive states as follows:

'Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either,

— there is no prize or other equivalent benefit,

— taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.'

*National law*

11 The Unfair Commercial Practices Directive was transposed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 1277/2008) ('the regulations'). Regulation 3 of the regulations prohibits unfair practices. Regulation 5 of the regulations prohibits misleading actions, whereas Regulation 6 thereof prohibits misleading omissions.

12 Schedule 1 to the regulations corresponds to Annex I to the Unfair Commercial Practices Directive. It does not however include the headings contained in Annex I to that directive. Paragraph 31 of Schedule 1 to the regulations is identical to paragraph 31 of Annex I to the directive.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

13 After a lengthy process of consultations and negotiations between the OFT and the traders with a view to obtaining an undertaking by the traders to comply with certain rules regarding advertising, the OFT brought proceedings before the High Court of Justice of England and Wales, Chancery Division (Companies Court) seeking to restrain the traders from continuing to distribute promotions similar to five promotions made in 2008 and numbered 5 to 9 in the case materials submitted to the High Court. The OFT claimed that those promotions were prohibited as 'unfair commercial practices' under regulation 3 of the regulations, on the basis that they breached paragraph 31(b) of Schedule 1 to the regulations and that they included misleading actions within the meaning of regulation 5 of the regulations and misleading omissions within the meaning of regulation 6 of the regulations.

14 The abovementioned promotions include individually addressed letters, scratch-cards and other advertising inserts placed into newspapers and magazines. Whilst they differ in detail, they have a number of common features, which are described as follows by the referring court, the Court of Appeal (England and Wales) (Civil Division):

(i) The consumer was informed that he was entitled to claim one of a number of specified prizes or awards ranging from a prize of considerable value to a prize worth, at most, a few pounds, referred to throughout the proceedings as the 'most numerous award'. In between there were a number of prizes of values between the two extremes. It was not disputed that the prizes were genuinely available to the consumers concerned.

(ii) With the exception of promotion 8, in order to find out what a consumer was entitled to claim and to obtain a claim number the consumer was given the option of:

  (a) calling a premium rate telephone number, or

  (b) using a reverse SMS text messaging service, or

  (c) obtaining the information by ordinary post.

(iii) Less prominence was given to the postal method than to the premium rate telephone method, with the result that consumers were encouraged to use a more expensive route than the postal route. In relation to promotion 5, it was found that at least 80% of participating consumers responded by telephone or text. No specific finding in this regard was made in relation to the other promotions. The telephone number was a premium rate line. The consumer was told the cost per minute and the maximum duration of the call.

(iv) The consumer was not told:

(a) that the minimum time within which he would obtain the information necessary to claim the most numerous award was a few seconds short of the maximum call duration;

(b) that from the cost per minute of GBP 1.50 the promoter took GBP 1.21.

(v) In some cases the consumer had to pay an additional cost stated to include delivery and insurance, part of which was used by the promoter to finance the cost of acquiring the item claimed.

(vi) Over 99% of those claiming a prize were entitled to receive the most numerous award, the equivalent or a substantial proportion of the value of which they might already have paid in telephone/text charges and/or charges stated to include delivery and insurance.

15 By way of example, with regard to promotion 5, it is apparent from paragraphs 87 and 90 of the judgment of the High Court that, in order to receive a watch supposedly from Switzerland, made in Japan, a consumer had to pay GBP 18 (GBP 8.95 telephone charges, GBP 8.50 insurance and delivery charges and the cost of two envelopes and two stamps). Choosing the postal route would cost the consumer GBP 9.50. Use of the telephone would result in the trader receiving GBP 15.71 (GBP 7.21 telephone charges and GBP 8.50 insurance and delivery charges), whereas his costs amounted to GBP 9.36.

16 Promotions 6 and 8 concern cruises. According to paragraphs 171 to 173 of the High Court's judgment, in promotion 8 a consumer who was one of the 356 578 persons who won a Mediterranean sea cruise for four persons could claim his prize by filling out a form and paying GBP 14.95 for insurance and delivery. He then received a voucher, costing the trader GBP 0.35. The small print on the voucher revealed that the cruise would last three days, in Corsica (France) and Sardinia (Italy), leaving from an unspecified port in Tuscany (Italy) on unspecified dates. The voucher provided the right to a transfer from England to the port of departure of the cruise plus the return voyage for a price of GBP 159. A supplement was payable for one-bed or two-bed cabins (not for four beds). The consumer was obliged to pay for the cost of food and drink and for port fees. According to the High Court, two couples would have to pay GBP 1 596 in total, or GBP 399 per person, in order to participate in the cruise.

17 As explained by the traders in their observations submitted to the Court, they regard it as important to have up-to-date databases of participants likely to be interested in responding to prize promotions, that is to say, data which can be used to offer other relevant products to consumers or licensed to other companies who wish to offer their products.

18 The High Court found that the promotions involved unfair practices, albeit on a more limited basis than contended by the OFT.

19 In its judgment, the High Court stated that the practice described in paragraph 31 of Annex I to the Unfair Commercial Practices Directive comes under the heading 'Aggressive commercial practices' and not 'Misleading commercial practices', noting however that those headings do not appear in Schedule 1 to the regulations. However, in paragraph 47 of that judgment, the High Court held that the misleading nature of a commercial transaction lies at the heart of the prohibition laid down in paragraph 31 of Annex I to the directive. It accepted the argument that paragraph 31 would not apply if the payment required was *de minimis* (such as the purchase of a stamp or the cost of an ordinary telephone call), no part of which would benefit the trader concerned, and if that payment were *de minimis* compared with the value of the prize won.

20 Pursuant to its powers, the High Court made an order setting out the undertakings by the traders. Under paragraph 1 of the order, the traders undertook not to 'create the false impression that the consumer has already won, will win or will on doing a particular act win, a prize or equivalent benefit, when in fact taking any action recommended by the defendant in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost which is either:

(a) a substantial proportion of the unit cost to the defendant of the provision to the consumer of the thing described as a prize or other equivalent benefit; or

(b) in the case of a charge stated to be for delivery and insurance, used by the defendant to finance in whole or in part its acquisition, handling or other cost of the making available of that thing, other than the actual cost of its delivery to the consumer and insurance (if any) in transit'.

21 The traders appealed against the decision of the High Court to the Court of Appeal (England and Wales) (Civil Division), requesting that paragraph 1 of that decision be amended so as to delete paragraph 1(a) or, in the alternative, replaced with the following text:

'(a) a substantial proportion of the likely cost to the average consumer of acquiring the thing described as a prize or other equivalent benefit'.

22 The OFT lodged a cross-appeal also relating to paragraph 1(a) of the order, requesting that its wording be replaced by:

'create the impression that the consumer has already won, will win or will on doing a particular act win, a prize or equivalent benefit, when in fact taking any action identified by the defendants in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or [incurring a cost]' or, alternatively, '[anything other than a *de minimis* cost]'.

23 The Court of Appeal (England and Wales) (Civil Division) is of the opinion that a correct interpretation of paragraph 31 of Annex I to the Unfair Commercial Practices Directive is necessary because the Member States have transposed that provision differently in their legislation. The Court of Appeal (England and Wales) (Civil Division) therefore decided to stay the proceedings and to submit the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the banned practice set out in paragraph 31 of Annex I to the [Unfair Commercial Practices] Directive prohibit traders from informing consumers that they have won a prize or equivalent benefit, when in fact the consumer is invited to incur any cost, including a *de minimis* cost, in relation to claiming the prize or equivalent benefit?

(2) If the trader offers the consumer a variety of possible methods of claiming the prize or equivalent benefit, is paragraph 31 of Annex I [to the Unfair Commercial Practices] Directive breached if taking any action in relation to any of the methods of claiming [the prize or equivalent benefit] is subject to the consumer incurring a cost, including a *de minimis* cost?

(3) If paragraph 31 of Annex I [to the Unfair Commercial Practicies Directive] is not breached where the method of claiming [the prize or equivalent benefit] involves the consumer in incurring *de minimis* costs only, how is the national court to judge whether such costs are *de minimis*? In particular, must such costs be wholly necessary:

(a) in order for the promoter to identify the consumer as the winner of the prize, and/or

(b) for the consumer to take possession of the prize, and/or

(c) for the consumer to enjoy the experience described as the prize?

(4) Does the use of the words "false impression" in paragraph 31 [of Annex I to the Unfair Commercial Practices Directive] impose some requirement additional to the requirement that the consumer pays money or incurs a cost in relation to claiming the prize, in order for the national court to find that the provisions of paragraph 31 have been contravened?

(5) If so, how is the national court to determine whether such a "false impression" has been created? In particular, is the national court required to consider the relative value of the prize as compared with the cost of claiming it in deciding whether a "false impression" has been created? If so, should that "relative value" be assessed by reference to:

(a) the unit cost to the promoter in acquiring the prize; or;

(b) the unit cost to the promoter in providing the prize to the consumer; or

(c) the value that the consumer may attribute to the prize by reference to an assessment of the "market value" of an equivalent item for purchase?'

**Consideration of the questions referred**

24 By its questions, the referring court seeks an interpretation of paragraph 31 of Annex I to the Unfair Commercial Practices Directive, in particular of the expression 'false impression' and of the second indent of that paragraph, in order to determine whether that provision prohibits the imposition of a cost, even of a *de minimis* nature, on a consumer who has been informed that they have won a prize.

25 With regard to the wording of that provision, it is to be noted that it contains two contrasting parts, separated by the phrase 'when in fact'. The first part of that paragraph 31, that is to say '[c]reating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit', describes three false impressions which may be created in the mind of the consumer with regard to a prize or benefit. The second part of that paragraph describes two distinct factual situations. The first is the situation where there is no prize or other equivalent benefit, whereas in the second case there is a prize or other benefit but, in order to obtain the prize, the consumer must undertake action which is subject to the obligation to pay money or incur a cost.

26 The structure of the sentence which forms paragraph 31 of Annex I to the Unfair Commercial Practices Directive shows that the two factual situations described in the second part of that paragraph 31 further explain the first part thereof. In other words, a false impression is given where the elements of one or other of the situations described in that second part are present.

27 The traders nevertheless maintain that the 'false impression' forms an element distinct from the situations described in the second part of that paragraph 31, meaning that there is no unfair practice where the consumer is sufficiently informed of the cost of claiming the prize. They claim that the wording 'false impression' was inserted by the European Parliament at the second reading of the proposal for a directive and that that addition by the co-legislator confirms the interpretation that the 'false impression' is an essential constituent part of the unfair practice, distinct from the situations described in the two indents of that paragraph 31.

28 However, it follows from the structure of the sentence analysed in paragraph 26 above that the 'false impression' cannot be considered as an element distinct from the two situations described in the second part of paragraph 31 of Annex I to the Unfair Commercial Practices Directive. In addition, while it is not contested that the Parliament inserted the expression 'false impression' in the wording of that directive, it should be pointed out that the amendment introduced by it, as is apparent from the recommendation of 7 February 2005 for a second reading on the Council common position for adopting a directive of the European Parliament and of the Council concerning unfair

business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC and European Parliament and Council Directives 97/7/EC, 98/27/EC and 2002/65/EC and European Parliament and Council Regulation (EC) No 2006/2004 ('Unfair Commercial Practices Directive') (A6-0027/2005 final), not only adds that expression but also wording setting out the situations described in the two indents of that paragraph 31. Analysis of the amendments inserted by the Parliament therefore confirms the interpretation in paragraph 26 above, according to which the situations described in those indents further explain the expression 'false impression' and that that expression does not form a constituent element of the unfair practice distinct from those situations.

29 In any event, as correctly stated by the European Commission, the term 'false' is not vital to an understanding of paragraph 31 of Annex I to the Unfair Commercial Practices Directive but merely reinforces the sentence in question. The prohibited practice consists in the creation of one of the impressions referred to in the first part of that paragraph, whereas, as stated in the second part of that paragraph, those impressions do not correspond to reality.

30 With regard in particular to the second indent of paragraph 31 of Annex I to the Unfair Commercial Practices Directive, it is to be noted that, according to the wording of that provision, an unfair practice exists where the consumer is subject to a requirement to pay money or incur a cost on taking any action to claim what is presented to him as a prize or other equivalent benefit. That wording does not allow for any exception, meaning that it is evident that the expression 'incur a cost' does not allow the consumer to bear the slightest cost, even if it is *de minimis* compared with the value of the prize or a cost which would not procure any advantage for the trader, such as the cost of a stamp.

31 The wording of the phrase 'action in relation to claiming the prize' is imprecise, it being possible therefore that it covers, inter alia, any step taken by the consumer in order to obtain information about the nature of his prize or to collect it.

32 [Rectified by order of 26 October 2012] The traders give prominence to the phrase 'on doing a particular act', inferring from it that there is no unfair practice where the consumer may choose between a number of options, one of which involves either *de minimis* or no costs, when acting to claim the prize.

33 [Rectified by order of 26 October 2012] It must however be noted that the phrase 'on doing a particular act' appears in the first part of paragraph 31 of Annex I to the Unfair Commercial Practices Directive and refers to the situation in which the impression is given that a prize will be won where certain action is taken, for example the purchase of products proposed in a catalogue. That phrase is not, therefore, relevant for the purposes of the interpretation of the second indent of paragraph 31, which refers to action in relation to claiming a prize presented to the consumer on the basis that it has already been won.

34 In addition, given the absolute nature of the prohibition on imposing any cost, the offer of a number of options cannot eliminate the unfair character of the practice if any of the proposed options were to require the consumer to bear a cost, even a *de minimis* cost compared with the value of the prize.

35 The literal interpretation of paragraph 31 of Annex I to the Unfair Commercial Practices Directive is confirmed by an analysis of its context.

36 Accordingly, it must be noted that that provision appears in Annex I to the Unfair Commercial Practices Directive which, as provided for in Article 5(5) of that directive, contains the list of those commercial practices which are in all circumstances to be regarded as unfair. That confirms the interpretation that no assessment should be required so as to establish the existence of an intention to mislead or a misleading character distinct from the situations described in the two indents of the second part of that paragraph 31, or even the *de minimis* nature of a cost.

37 Furthermore, that paragraph 31 appears under the heading 'Aggressive commercial practices' in Annex I to the Unfair Commercial Practices Directive, making any misleading character of the commercial practice completely irrelevant. As is apparent from Article 8 of that directive, an aggressive practice is a practice which, because of its features, causes or is likely to cause a consumer to take a transactional decision which he would not have taken otherwise.

38 As stated, inter alia, by the United Kingdom and Italian Governments, the practice at issue in paragraph 31, second indent, of Annex I to the Unfair Commercial Practices Directive exploits the psychological effect caused by the announcement of the winning of a prize, in order to induce the consumer to make a choice which is not always rational, such as calling a premium rate telephone number to ask for information about the nature of the prize, travelling at great expense to collect an item of low-value crockery or paying the delivery costs of a book which he already has.

39 In that regard, it is of little consequence that the prize may be of great value compared with the cost of taking possession of it. Before the Court, the traders referred on numerous occasions to the scenario of the prize of a luxury car which the consumer would however have to go and collect in the country of manufacture, having borne the cost of registration or insurance.

40 Such an example is however hardly representative of the prizes generally offered to consumers. In any event, as stated by the United Kingdom Government, the public targeted by the practices in question does not necessarily have the financial means to assume such costs, even where a loan is taken out. Finally, prohibiting traders from making the consumer bear the slightest cost would not make it impossible to organise such promotional campaigns. The trader could impose a geographic limitation on participation in the competition or in the promotion, so as to limit the costs he would have to bear which are associated with travel by the consumer and with the formalities for the consumer's taking possession of the prize. When determining the value of the prizes to be distributed, the trader could also take into account the communication or delivery costs he would have to bear.

41 The failure to include in national legislation the headings which appear in Annex I to the Unfair Commercial Practices Directive cannot have any bearing on the interpretation of that directive. The same applies to divergences between national laws implementing that directive, referred to by the traders. By contrast, it should be recalled that, in applying national law, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Unfair Commercial Practices Directive, in order to achieve the result pursued by that directive and thereby comply with the third paragraph of Article 288 TFEU (see, to that effect, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113; and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 60).

42 As correctly pointed out by the United Kingdom Government, clarification of the interpretation of paragraph 31 of Annex I to the Unfair Commercial Practices Directive can be provided by a reading of paragraph 20 of that annex. According to that provision, there is a misleading practice where a product is described as 'gratis', 'free' 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item. Paragraph 31 of Annex I to the directive does not contain similar wording, confirming that that paragraph should be interpreted as meaning that the prohibition on making the consumer bear any cost whatsoever is absolute, whether it be the cost of a stamp or of a simple telephone conversation.

43 The objectives of the Unfair Commercial Practices Directive confirm the literal interpretation of paragraph 31 of Annex I to that directive.

44 Article 1 of that directive provides that its purpose is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection (Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 51).

45 As is apparent from the recitals in the preamble to the Unfair Commercial Practices Directive, in particular recital 17, legal certainty is an essential element for the sound functioning of the internal market. It was in order to attain that objective that the legislature collected in Annex I to the directive the commercial practices which are, in all circumstances, unfair and which, therefore, do not require a case-by-case assessment against the provisions of Articles 5 to 9 of that directive.

46 That objective would not be achieved if paragraph 31 of Annex I to the Unfair Commercial Practices Directive were interpreted as including an element of misleading conduct, distinct from the situations described in the second part of that provision. Difficult assessments would have to be carried out, on a case-by-case basis, in order to prove that element, which is precisely what Annex I to the directive sought to avoid by including that practice.

47 Equally, that objective would not be achieved if traders were allowed to impose on the consumer costs which are '*de minimis*' compared with the value of the prize. That would make it necessary to determine evaluation methods both for the costs and the prizes and would also require such evaluations to be carried out.

48 The objective of ensuring a high level of consumer protection also confirms the interpretation of paragraph 31 of Annex I to the Unfair Commercial Practices Directive according to which no cost may be imposed on a consumer who has won a prize.

49 As the United Kingdom Government, inter alia, argued and as noted in paragraph 38 above, the practice referred to in paragraph 31 of Annex I to the Unfair Commercial Practices Directive is considered, pursuant to that directive, to be aggressive because the reference to a prize seeks to exploit the psychological effect created in the mind of the consumer by the perspective of having won something and to cause him to take a decision which is not always rational and which he would not have taken otherwise. It is, therefore, in order to protect the consumer that the concept of a true 'prize' should be preserved, by interpreting paragraph 31 of Annex I to that directive as meaning that a prize in respect of which the consumer is obliged to make a payment of whatever kind cannot be regarded as a 'prize'.

50 That objective confirms the interpretation that it is not permissible to allow action to be taken in relation to the claiming of a prize pursuant to a multi-option scheme, proposed to the consumer by the trader, where at least one of the methods would not involve any payment. It is the very prospect of taking possession of the prize which influences the consumer and may cause him to take a decision he would not take otherwise, such as choosing the quickest method of finding out what prize he has won, even though that may be the most expensive method.

51 The traders claim that providing the consumer with adequate information concerning the nature of the prize and the conditions for collecting it would make it possible to conclude that the practice is not unfair. In that regard, it is important to distinguish between the prize and the taking possession thereof. While the consumer cannot influence the prize description, paragraph 31 of Annex I to the Unfair Commercial Practices Directive prohibits making action taken in relation to claiming the prize subject to the obligation, for the consumer, to pay money or incur a cost.

52 Thus, to take one of the examples given at the hearing, a prize defined as an 'entrance ticket' for a certain football match does not include the transport of the consumer from his home to the football stadium where the match takes place. On the other hand, if the prize is stated simply to be 'attendance' at that sports event, the trader must bear the costs of the consumer's travel.

53 Clear and sufficient consumer information is important where the trader wishes to ensure that consumers can identify a prize and assess its nature. In that regard, it should be recalled that, pursuant to recital 18 in the preamble to the Unfair Commercial Practices Directive, where a commercial practice is specifically aimed at a particular group of consumers, it is desirable that its

impact be assessed from the perspective of the average member of that group. According to that recital, national courts will have to exercise their own judgment in order to establish the typical reaction of the average consumer in a given case.

54 Recital 19 in the preamble to the Unfair Commercial Practices Directive dwells on the idea of a particular group, particularly susceptible to a commercial practice, and on the necessity of protecting the consumers forming part of that group by evaluating the practice in question from the point of view of the average member of the group. Article 5(2)(b) of the Unfair Commercial Practices Directive accordingly defines the unfair character of a practice by reference to a particular group of consumers to whom that practice is directed.

55 Like every other item of information provided by a trader to a consumer, information on the substance of the prize must be examined and assessed by the national courts in the light of recitals 18 and 19 in the preamble to the Unfair Commercial Practices Directive, and of Article 5(2)(b) of the directive. That concerns the availability of the information and how it is presented, the legibility and clarity of the wording and whether it can be understood by the public targeted by the practice.

56 With regard, in particular, to the practice described in paragraph 16 above, it must be possible for the public targeted by the offer of such a prize to know inter alia the itinerary of the cruise, its points of departure and arrival and the type of accommodation and meals provided. It is for the national courts to establish whether the information supplied is sufficiently clear and comprehensible for the public targeted by the practice to enable the average consumer of the group concerned to take an informed decision.

57 In the light of all the foregoing considerations, the answer to the questions referred is as follows:

— paragraph 31, second indent, of Annex I to the Directive on Unfair Commercial Practices Directive must be interpreted as prohibiting aggressive practices by which traders give the false impression that the consumer has already won a prize, while the taking of any action in relation to claiming that prize, be it requesting information concerning the nature of that prize or taking possession of it, is subject to an obligation on the consumer to pay money or to incur any cost whatsoever;

— it is irrelevant that the cost imposed on the consumer, such as the cost of a stamp, is *de minimis* compared with the value of the prize or that it does not procure the trader any benefit;

— it is also irrelevant that the trader offers the consumer a number of methods by which he may claim the prize, at least one of which is free of charge, if, according to one or more of the proposed methods, the consumer would incur a cost in order to obtain information on the prize or how to acquire it;

— it is for the national courts to assess the information provided to consumers in the light of recitals 18 and 19 in the preamble to the Unfair Commercial Practices Directive and Article 5(2)(b) thereof, that is to say, by taking into account whether that information is clear and can be understood by the public targeted by the practice.

## Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

**Paragraph 31, second indent, of Annex I to 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') must be interpreted as prohibiting aggressive practices by which traders, such as those at issue in the main proceedings, give the false impression that the consumer has already won a prize, while the taking of any action in relation to claiming that prize, be it requesting information concerning the nature of that prize or taking possession of it, is subject to an obligation on the consumer to pay money or to incur any cost whatsoever;**

**It is irrelevant that the cost imposed on the consumer, such as the cost of a stamp, is *de minimis* compared with the value of the prize or that it does not procure the trader any benefit;**

**It is also irrelevant that the trader offers the consumer a number of methods by which he may claim the prize, at least one of which is free of charge, if, according to one or more of the proposed methods, the consumer would incur a cost in order to obtain information on the prize or how to acquire it;**

**It is for the national courts to assess the information provided to consumers in the light of recitals 18 and 19 in the preamble to Directive 2005/29 and Article 5(2)(b) thereof, that is to say, by taking into account whether that information is clear and can be understood by the public targeted by the practice.**

[Signatures]