JUDGMENT OF THE COURT (First Chamber)

23 April 2009 *

In Joined Cases C-261/07 and C-299/07,

REFERENCES for a preliminary ruling under Article 234 EC made by the Rechtbank van koophandel te Antwerpen (Belgium) by decisions of 24 May and 21 June 2007, received at the Court on 1 and 27 June 2007 respectively, in the proceedings

VTB-VAB NV (C-261/07)

v

Total Belgium NV,

and

Galatea BVBA (C-299/07)

* Language of the cases: Dutch.

v

Sanoma Magazines Belgium NV,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), A. Borg Barthet, E. Levits and J.-J. Kasel, Judges,

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 June 2008,

after considering the observations submitted on behalf of:

— VTB-VAB NV, by L. Eliaerts and B. Gregoir, advocaten,

— Total Belgium NV, by J. Stuyck, advocaat,

— Sanoma Magazines Belgium NV, by P. Maeyaert, advocaat,

— the Belgian Government, by L. Van den Broeck and T. Materne, acting as Agents, assisted by E. Balate, avocat,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the French Government, by G. de Bergues and R. Loosli-Surrans, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes, acting as Agent,

— the Commission of the European Communities, by W. Wils, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 21 October 2008,

gives the following

Judgment

1 The references for a preliminary ruling relate to the interpretation of Article 49 EC and of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22; 'the Directive').

2 Those references have been submitted in the course of proceedings between, in the first case, VTB-VAB NV ('VTB') and Total Belgium NV ('Total Belgium') and, in the second, Galatea BVBA ('Galatea') and Sanoma Magazines Belgium NV ('Sanoma') concerning commercial practices of Total Belgium and Sanoma regarded as unfair by VTB and by Galatea.

Legal context

Community legislation

3 Recitals 5, 6, 11 and 17 in the preamble to the Directive state:

'(5) … obstacles to the free movement of services and goods across borders or the freedom of establishment … should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty.

(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. …

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

(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.'

4 Article 1 of the Directive provides:

'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 of the Directive provides:

'For the purposes of this Directive:

…

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

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

…'

6 Article 3(1) of the Directive provides:

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

7 In accordance with Article 4 of the Directive:

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

8 Article 5 of the Directive, entitled 'Prohibition of unfair commercial practices', states 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 materially to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

3. Commercial practices which are likely materially to distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

4. In particular, commercial practices shall be unfair which:

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

or

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

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

9 Article 6 of the Directive, entitled 'Misleading actions', provides:

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

(a) the existence or nature of the product;

(b) the main characteristics of the product, such as 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;

(c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;

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

(e) the need for a service, part, replacement or repair;

(f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;

(g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [(OJ 1999 L 171, p. 12)], or the risks he may face.

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

(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;

(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:

(i) the commitment is not aspirational but is firm and is capable of being verified,

and

(ii) the trader indicates in a commercial practice that he is bound by the code.'

10 Article 7 of the Directive, entitled 'Misleading omissions', states:

'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.'

11 Article 8 of the Directive, entitled 'Aggressive commercial practices', provides:

'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 significantly to 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.'

12 Article 9 of the Directive, entitled 'Use of harassment, coercion and undue influence', states as follows:

'In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

(a) its timing, location, nature or persistence;

(b) the use of threatening or abusive language or behaviour;

(c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;

(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;

(e) any threat to take any action that cannot legally be taken.'

13 Finally, in accordance with Article 19 of the Directive:

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

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

National legislation

14 Article 54 of the Law of 14 July 1991 on commercial practices, consumer information and consumer protection (*Belgisch Staatsblad* of 29 August 1991; 'the 1991 Law') states as follows:

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

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

15 Articles 55 to 57 of the 1991 Law provide for a number of exceptions to that prohibition.

16 Article 55 of the 1991 Law provides as follows:

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

1. products or services which form a whole;

The King may, on a proposal from the competent Ministers and the Minister for Finance, designate the services offered in the financial sector which constitute a whole;

2. identical products or services, provided that:

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

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

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

17 Under Article 56 of the 1991 Law:

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

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

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

3. small products and services accepted as customary in trade, as well as the delivery, installation, inspection and maintenance of the products sold;

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

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

6. tickets for legally authorised lotteries;

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

18 Finally, Article 57 of the 1991 Law provides:

'It shall also be permitted to offer, free of charge, in connection with a main product or service:

1. vouchers conferring entitlement to the acquisition of an identical product or service, provided that the reduction in price resulting from that acquisition does not exceed the percentage fixed in Article 55(2);

2. vouchers conferring entitlement to the acquisition of one of the benefits referred to in Article 56(5) and (6);

3. vouchers conferring entitlement exclusively to a cash refund, on condition:

   (a) that they state the cash value which they represent;

   (b) that, on premises where products are sold or services supplied, the rate or size of the refund offered be clearly stated, in the same way as for products or services the acquisition of which confers an entitlement to receive vouchers;

4. vouchers conferring entitlement, after the acquisition of a certain number of products or services, to a free offer or a price reduction upon the acquisition of a

similar product or service, on condition that that benefit is provided by the same vendor and does not exceed one third of the price of the products or services previously acquired.

The vouchers must indicate any time-limit on their validity as well as the conditions applicable to the offer.

When the vendor ends his offer, the consumer must receive the benefits offered in proportion to the purchases previously made.'

19 On 5 June 2007, the Kingdom of Belgium adopted the Law amending the Law of 14 July 1991 on commercial practices, consumer information and consumer protection (*Belgisch Staatsblad*, 21 June 2007, p. 34272; 'the Law of 5 June 2007') which, in accordance with Article 1 thereof, transposes the provisions of the Directive.

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

Case C-261/07

20 It is apparent from the decision for reference that, since 15 January 2007, Total Belgium, a subsidiary of the Total group, the primary business of which is the sale of fuels at filling stations, has been offering free breakdown services for a period of three weeks to consumers who are Total Club cardholders with every purchase of at least 25 litres of fuel for a car or at least 10 litres for a motorcycle.

21 On 5 February 2007, VTB, an undertaking which operates in the breakdown-service sector, brought an action before the Rechtbank van koophandel te Antwerpen (Antwerp Commercial Court) (Belgium) by which it sought an order requiring Total Belgium to discontinue that commercial practice on the ground that it constituted, inter alia, a combined offer prohibited by Article 54 of the 1991 Law.

22 In those circumstances, the Rechtbank van koophandel te Antwerpen decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

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

Case C-299/07

23 The dispute in the main proceedings is between Galatea, a firm which runs a lingerie shop in Schoten (Belgium), and Sanoma, a subsidiary of the Finnish Sanoma group, which publishes a number of magazines, including the weekly magazine *Flair*.

24 The issue of *Flair* of 13 March 2007 contained a voucher entitling the holder to a reduction of 15% to 25% on products sold in various lingerie shops in Flanders during the period from 13 March to 15 May 2007.

25 On 22 March 2007, Galatea brought an action before the Rechtbank van koophandel te Antwerpen seeking an order prohibiting that commercial practice, submitting that Sanoma had infringed, inter alia, Article 54 of the 1991 Law.

26 In those circumstances, the Rechtbank van koophandel te Antwerpen decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

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

27 By order of the President of the Court of Justice of 29 August 2007 Cases C-261/07 and C-299/07 were joined for the purposes of the written and oral procedure and also for judgment.

The questions referred

28 By its two questions, the national court asks essentially whether the Directive is to be interpreted as precluding a national rule, such as Article 54 of the 1991 Law, which, subject to certain exceptions, and without taking account of the specific circumstances, lays down a general principle prohibiting the making of combined offers by a vendor to a consumer.

Admissibility of the reference for a preliminary ruling in Case C-261/07

29 VTB calls into question the admissibility of the question referred, on the ground that it concerns the interpretation of a directive the period for the transposition of which, which ended on 12 December 2007, had not yet expired at the date on which the decision to refer was made, that is to say, 24 May 2007.

30 For the same reasons, and without expressly raising an objection of inadmissibility, the Belgian and Spanish Governments are of the view that the Directive is not applicable to the dispute in the main proceedings. In particular, in the view of the Spanish Government, a national provision cannot be declared by a court to be inapplicable on the ground that it infringes the Directive so long as the period set for the transposition thereof has not yet expired.

31 Those arguments cannot, however, be accepted.

32 In that regard, it should be noted that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is bound, in principle, to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 30).

33 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases and, in particular, where it is quite obvious that the interpretation which is sought of the

provisions of Community law referred to in the questions bears no relation to the actual facts of the main action or to its purpose (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61, and Case C-212/06 *Gouvernement de la Communauté française et gouvernement wallon* [2008] ECR I-1683, paragraph 29).

34 In this case, it is not obvious that the present question referred is irrelevant in the light of the decision which the national court is called upon to take.

35 Firstly, it follows from the case-law that not only the national provisions specifically intended to transpose a directive but also, from the date of that directive's entry into force, the pre-existing national provisions capable of ensuring that the national law is consistent with it must be considered to fall within the scope of that directive (see, to that effect, Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 29).

36 While it is true that, in the main proceedings, the Law of 5 June 2007 amending the 1991 Law and intended formally to transpose the Directive is later in time than the main proceedings and the adoption of the decision to refer, the fact remains that, as is apparent from that decision and as the Belgian Government acknowledged at the hearing, the disputed provisions in Articles 54 to 57 of the 1991 Law, that is to say, those laying down the principle of a general prohibition of combined offers and providing for certain exceptions to that principle, were neither repealed nor even amended by the Law of 5 June 2007.

37 In other words, both at the time of the main proceedings and at the time when the decision to refer was adopted, those pre-existing provisions were regarded by the national authorities as being capable of ensuring transposition of the Directive from the date of its entry into force, that is to say, from 12 June 2005, and, accordingly, as falling within its scope.

38 Secondly, in any event, it follows from the case-law of the Court that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 67).

39 In that respect, the Court has had occasion to hold that all the authorities of the Member States concerned, including the national courts, have such an obligation to refrain from taking measures. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive (see, in particular, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 122 and 123).

40 Since the Directive had already entered into force at the time of the facts in the main proceedings, the interpretation sought by the Rechtbank van koophandel te Antwerpen, which relates to crucial provisions of the Directive, must be regarded as being useful to that court for the purpose of enabling it to rule in the case before it in compliance with that obligation to refrain.

41 In the light of the foregoing, the reference for a preliminary ruling made by the national court in Case C-261/07 is admissible.

Substance

Observations submitted to the Court

42 Total Belgium, Sanoma, the Portuguese Government and the Commission of the European Communities submit that the Directive precludes a prohibition of combined offers, such as that laid down by Article 54 of the 1991 Law.

43 In that regard, Total Belgium, Sanoma and the Commission submit that combined offers are covered by the notion of 'commercial practice' within the meaning of the Directive. Since that directive undertakes a full harmonisation in the field of unfair commercial practices, only those practices that are listed in Annex I to the Directive can be prohibited 'in all circumstances' by the Member States, in accordance with Article 5(5) thereof. Since combined offers are not referred to in that annex, they cannot, accordingly, simply be prohibited per se, but only if the national court considers the requirements of Article 5 of the Directive to be satisfied in the light of the actual circumstances of the particular case. Consequently, as the Portuguese Government also submits, a general prohibition of combined offers, such as that set out in Article 54 of the 1991 Law, is contrary to the Directive.

44 Taking the opposite view, VTB and the Belgian and French Governments submit, in essence, that combined offers do not fall within the notion of 'commercial practice' as used in the Directive and are therefore not covered by it.

45 In that regard, the Belgian Government points out that combined offers were the subject of the Proposal for a Regulation concerning sales promotions in the Internal Market (OJ 2002 C 75 E, p. 11), which distinguished clearly the legal treatment of combined offers from that of the commercial practices covered by the Directive. However, since that proposal was withdrawn only in 2006, the Belgian authorities were entitled to assume that combined offers did not constitute 'commercial practices'. Consequently, in transposing the Directive, the Belgian legislature did not take the view

that it had to amend Article 54 of the 1991 Law or to interpret it in the light of the criteria set out in Article 5 of the Directive.

46 The French Government adds, in particular, that, although the Directive obliges Member States to prohibit unfair business-to-consumer commercial practices, that nevertheless does not prevent those States, in order better to protect consumers, from prohibiting other practices, such as combined offers, regardless of whether they are unfair within the terms of the Directive.

47 Finally, in the view of VTB, Article 5 of the Directive does not in any event preclude Member States from classifying as unfair commercial practices other than those mentioned in Annex I to the Directive.

Reply of the Court

48 For the purpose of answering these questions, it is necessary first of all to determine whether combined offers, which are the subject of the disputed prohibition, constitute commercial practices within the meaning of Article 2(d) of the Directive and are therefore subject to the rules laid down by that directive.

49 In that regard, it should be borne in mind that Article 2(d) of the Directive gives a particularly wide definition to the concept of commercial practices: 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'.

50 As the Advocate General observed in points 69 and 70 of her Opinion, combined offers constitute commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development. It follows that they do indeed constitute commercial practices within the meaning of Article 2(d) of the Directive and, consequently, fall within its scope.

51 That having been determined, it must first be recalled that the Directive is intended to establish, in accordance with recitals 5 and 6 in the preamble thereto and Article 1 thereof, uniform rules on unfair business-to-consumer commercial practices in order to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection.

52 Thus, the Directive fully harmonises those rules at the Community level. Accordingly, as Article 4 thereof expressly provides and contrary to the assertions of VTB and the French Government, Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection.

53 Next, Article 5 of the Directive provides that unfair commercial practices are to be prohibited and sets out the criteria on the basis of which practices are to be classified as being unfair.

54 Thus, in accordance with Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely materially to distort the economic behaviour of the average consumer with regard to the product.

55 Furthermore, Article 5(4) of the Directive defines two precise categories of unfair commercial practices, that is to say, 'misleading' practices and 'aggressive' practices corresponding to the criteria specified in Articles 6 and 7 and Articles 8 and 9 of the Directive respectively. Pursuant to those provisions, such practices are prohibited where, having regard to their nature and the factual context, they cause or are likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

56 Annex I to the Directive also establishes an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the Directive, are regarded as unfair 'in all circumstances'. Consequently, as recital 17 in the preamble to the Directive expressly states, these are the only commercial practices which can be deemed to be unfair without a case-by-case assessment under the provisions of Articles 5 to 9 of the Directive.

57 Finally, it should be noted that combined offers are not included in the practices listed in Annex I to the Directive.

58 It is therefore in the light of the content and the general scheme of the provisions of the Directive noted in the preceding paragraphs that the questions referred by the national court must be examined.

59 In that regard, clearly, by establishing a presumption of unlawfulness of combined offers, national legislation such as that at issue in the main proceedings does not meet the requirements of the Directive.

60 In the first place, Article 54 of the 1991 Law lays down the principle that combined offers are prohibited, notwithstanding the fact that such practices are not referred to in Annex I to the Directive.

61 As has been pointed out in paragraph 56 of the present judgment, that annex exhaustively lists the only commercial practices which are prohibited in all circumstances and accordingly do not have to be assessed on a case-by-case basis.

62 Thus, the Directive precludes the system implemented by Article 54 of the 1991 Law in so far as that article prohibits, generally and pre-emptively, combined offers without any verification of their unfairness in the light of the criteria laid down in Articles 5 to 9 of the Directive.

63 Next, by operating in that manner, a rule of the type at issue in the main proceedings runs counter to the content of Article 4 of the Directive, which expressly prohibits Member States from maintaining or adopting more restrictive national measures, even where such measures are designed to ensure a higher level of consumer protection.

64 Finally, it should be added that such an interpretation cannot be called into question by the fact that the 1991 Law provides, in Articles 55 to 57 thereof, for a number of exceptions to that prohibition of combined offers.

65 Although those exceptions are liable to restrict the scope of the prohibition of combined offers, the fact remains that, because of their limited and pre-defined nature, they cannot take the place of the analysis, which must of necessity be undertaken having regard to the facts of each particular case, of the 'unfairness' of a commercial practice in the light of the criteria set out in Articles 5 to 9 of the Directive, where, as in the main proceedings, that practice is not listed in Annex I thereto.

66 That finding is, moreover, confirmed by the very content of certain of the derogations at issue. Thus, for example, Article 55 of the 1991 Law authorises combined offers for an overall price only on condition that they relate to products or services which form a

whole or which are identical. As the Commission rightly points out in its answer to the written question put by the Court, the possibility cannot be excluded, particularly if correct information is provided to consumers, that a combined offer of different products or services which neither form a whole nor are identical may satisfy the requirements of fairness laid down in the Directive.

67 In those circumstances, the Directive precludes a prohibition of combined offers such as that provided for by the 1991 Law. Accordingly, there is no need to examine the possibility of a breach of Article 49 EC raised in the question referred in Case C-299/07.

68 In the light of the foregoing, the answer to the questions referred for a preliminary ruling are that the Directive must be interpreted as precluding national legislation, such as that at issue in the disputes in the main proceedings, which, with certain exceptions, and without taking account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer.

Costs

69 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 (First Chamber) hereby rules:

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') must be interpreted as precluding national legislation, such as that at issue in the disputes in the main proceedings, which, with certain exceptions, and without taking account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer.

[Signatures]