OPINION OF ADVOCATE GENERAL LÉGER delivered on 10 March 2005 [1]

1. Under Belgian law, offers linked to products or services are generally prohibited. However, an exception to the prohibition rule is made when vouchers are offered free of charge and linked to the purchase of a main product or service, giving an entitlement, after a number of purchases, to a free offer or price reduction, on condition that such benefit relates to a *similar* product or service and that it is provided by the *same vendor*.

2. In the context of the present proceedings, the Commission of the European Communities essentially asks the Court to declare that the Kingdom of Belgium has failed to fulfil its obligations under Article 49 EC, by applying in a discriminatory and disproportionate manner the conditions of 'similarity' and 'sole vendor' as a precondition for the operation in that Member State of a customer loyalty programme.

3. This case concerns the area of sales promotion, on which there has previously been some work at Community level, although to date no rules have been adopted by the Community legislature. [2]

4. More specifically, the present proceedings will give me the opportunity to decide which requirements, in my opinion, are covered by the rule which provides, within the framework of proceedings brought under Article 226 EC, that it is for the Commission to prove that a Member State has failed to fulfil its obligations under Community law.

1 — Original language: French.

2 — See Commission Communication of 2 October 2001 on sales promotions in the Internal Market (COM(2001) 546 final) and the amended proposal for a European Parliament and Council Regulation of 25 October 2002 concerning sales promotions in the Internal Market (COM(2002) 585 final). The seventh recital of that proposal for a regulation states that '[i]ts scope includes loyalty programmes and air-miles schemes'.

I — Legal background

A — *Community law*

5. Article 49, first paragraph, EC states:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

B — *National legislation*

6. Article 54 of the Belgian Law of 14 July 1991 on commercial practices and consumer information and protection [3] (hereinafter 'the Belgian Law') prohibits 'any linked offer made to consumers by a vendor'. A linked offer is understood as 'the acquisition, free of charge or not, of products, services, any other benefits or vouchers used to acquire them, ... linked to the acquisition of other, even identical, products or services'. The linked offer to consumers is also prohibited when it comes from 'a number of vendors acting with a unity of intention'.

7. However, there are some exceptions to the prohibition of linked offers. Thus Article 57 of the Belgian Law permits the offer, free of charge and linked to a main product or service, of vouchers entitling the consumer to certain benefits.

8. The vouchers listed in paragraphs 1 to 3 of that article can be issued only by traders registered with the competent ministry, in accordance with Article 59, first paragraph, of the Belgian Law.

9. By contrast, Article 57(4) of that law provides for an exception to the prohibition of linked offers which may apply to traders who are not registered.

10. More precisely, Article 57(4), first subparagraph, of the Belgian Law permits traders to offer, in connection with a main product or service, 'vouchers giving entitlement, after the acquisition of a certain

3 — *Moniteur Belge* of 29 August 1991.

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'.

11. Furthermore, Article 57 states that '[t]he vouchers must indicate any time-limit as to their validity as well as the conditions applicable to the offer' and that, 'when the vendor ends his offer, the consumer must receive the benefits offered in proportion to the purchases previously made'.

12. An offer of free vouchers not complying with that legislation may be subject to a suspension order by the commercial courts, at the request of the Ministry of Economic Affairs, an interested trader or consumer protection associations.

II — Pre-litigation proceedings

13. By letter of 31 March 1999, the Commission drew the attention of the Kingdom of Belgium to the question of the compatibility of Articles 54 and 57 of the Belgian Law with Article 49 EC. It stated therein that it had been alerted by a complaint lodged by an undertaking established in the Netherlands, whose activity was to organise on behalf of other companies a consumer loyalty programme called 'Air Miles', which it wished to extend to Belgium. [4]

14. That type of activity is carried out as follows: the company organising the programme contracts with undertakings called 'sponsors' to create and manage a programme designed to secure the loyalty of the latter's clients. Those clients are then provided with an electronic memory card which enables them to record 'Air Miles' points collected through the purchase of products or services from the 'sponsors'. When they reach a certain number of points they become entitled to, for example, free trips.

15. The Kingdom of Belgium replied to the letter of formal notice by letter of 2 June 1999. It stated, in particular, that according to national case-law and legal writings the notion of 'similarity' was interpreted as presupposing that the main products or services and the products or services offered

4 — The undertaking concerned had asked the Belgian Ministry of Economic Affairs whether that customer loyalty programme was compatible with the Belgian Law. By letter of 7 April 1998, the Ministry replied that the free gift offered within the framework of that programme could not be regarded 'as a product similar to the products sold by the sponsors for which the company in question acts'.

free of charge or at reduced prices are usually offered for sale by the same distribution network and/or belong to the same branch of industrial or commercial activity.

16. The Commission did not consider that the explanations given in the reply were satisfactory, and on 1 August 2000 sent the Kingdom of Belgium a reasoned opinion complaining, in essence, that the Kingdom of Belgium had applied in a discriminatory and disproportionate manner the conditions of 'similarity' and 'sole vendor' as set out in the Belgian Law. The Kingdom of Belgium was requested to comply with the reasoned opinion within a period of two months.

17. The Belgian authorities replied to the reasoned opinion by letter of 16 October 2000. In that letter they stated, in essence, that it appeared to them appropriate to await the guidelines adopted by the Commission with regard to a proposal for Community legislation in the area of sales promotions, in order to carry out a comprehensive reform of national legislation on linked offers, rather than merely make a specific amendment to Article 57(4) of the Belgian Law alone.

18. Nor was the Commission persuaded by that reply, and it initiated the present proceedings under Article 226 EC by an application lodged at the Court Registry on 3 July 2003.

III — The action

19. By the present action, the Commission asks the Court to 'declare that, by applying in a discriminatory and disproportionate manner the conditions of "similarity" and "sole vendor" as between products and services acquired by a consumer, on the one hand, and products or services made available free of charge or at reduced prices as part of a customer loyalty programme, on the other hand, as a precondition for the operation of such a programme as a cross-border provision of services between undertakings, the Kingdom of Belgium has failed to fulfil its obligations under Article 49 EC'. The Commission also claims that the Court should order the Kingdom of Belgium to pay the costs.

20. The Kingdom of Belgium contends that the action is inadmissible and ill-founded and that the Commission should pay the costs.

A — *Admissibility*

21. The Belgian Government argues that the action is inadmissible, given the excessive

length of time between the Kingdom of Belgium's reply to the reasoned opinion and the bringing of the application before the Court, that is to say nearly three years.

22. Such a delay is incompatible with the principles of legal certainty and legitimate expectations. The Belgian Government submits, in particular, that it was reasonable for it to take the view that its reply to the reasoned opinion was satisfactory, since it had not been contradicted by the Commission during that time. The bringing of the present application before the Court thus 'abused the legitimate expectations' of the Kingdom of Belgium. [5]

23. It seems to me that those arguments have no relevance in the light of the case-law of the Court concerning the connection between, on the one hand, the discretion of the Commission as to the progress and outcome of the pre-litigation procedure and, on the other hand, the necessary protection of the rights of the defence of a Member State impugned under Article 226 EC.

24. It is recognised that the Commission has a freedom of assessment, not only as to its power to bring proceedings before the Court, but also as to the time which it considers appropriate to bring an action before the Court. This principle was set out by the Court as follows: 'the action for a declaration that a State has failed to fulfil an obligation ... does not have to be brought within a predetermined period, since, by reason of its nature and its purpose, this procedure involves a power on the part of the Commission to consider the most appropriate means and time-limits for the purposes of putting an end to any contraventions of the Treaty'. [6]

25. However, this principle may be moderated in cases where 'the excessive duration of the pre-litigation procedure ... is capable of making it more difficult for the Member State concerned to refute the Commission's arguments and of thus infringing the rights of the defence'. [7] It is thus for the Member State against which an action for failure to fulfil an obligation is brought to prove that the length of the pre-litigation procedure has had an adverse effect on the conduct of its defence.

26. In my opinion, it is sufficient to observe that the Kingdom of Belgium puts forward no specific argument capable of proving that the delay had an impact on the way it conducted its defence, and there is no need for the Court to express a view as to whether the period between the Member State's reply to the reasoned opinion and the commencement of these proceedings is excessive. [8]

5 — See p. 11 of the defence.

6 — Case 7/71 *Commission* v *France* [1971] ECR 1003, paragraph 5.

7 — Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 16.

8 — See, to this effect, Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355. In that case nearly eight years had elapsed between the United Kingdom's reply to the reasoned opinion and the commencement of proceedings.

27. In fact, all the arguments developed by the Kingdom of Belgium tend solely to criticise, firstly, the Commission's exercise of its freedom of assessment as to the progress of the procedure commenced under Article 226 EC and, secondly, the way in which the implementation of the procedure was coordinated with the Community-level consideration of a proposal for legislation on sales promotions.

28. In addition, it appears that the Kingdom of Belgium's objection as to the admissibility of the action is principally founded on the argument that the Commission should have responded to that Member State's letter of 16 October 2000 to the Commission in reply to the reasoned opinion otherwise than by bringing an action before the Court.

29. The Court has previously held that 'even assuming that the [procedure before the Court] was opened by a Commission application which took no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion, that State's right to a fair hearing has not been infringed. It is fully open to the State to raise those matters in the [procedure before the Court], to begin with in its first pleading in defence. It will be for the Court to examine their relevance for the outcome of the action for failure to fulfil obligations.' [9]

9 — Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 20.

30. Therefore, nor can there be a complaint against the Commission for failing to express a view on the arguments in the Kingdom of Belgium's reply to the reasoned opinion.

31. In the light of all these matters, I am of the opinion that the objection of the Belgian Government as to the admissibility of the action must be rejected.

B — *Substance*

1. Subject-matter of the proceedings

32. In order to assess the pleas presented by the Commission in support of the present action, the subject-matter of the latter must be precisely determined.

33. As mentioned above, the Commission accuses the Kingdom of Belgium of having failed to fulfil its obligations under Article 49 EC *by applying in a discriminatory and disproportionate manner* the conditions of 'similarity' and 'sole vendor' under Article 57 (4), first subparagraph, of the Belgian Law, as a precondition for the operation of a

customer loyalty programme as a cross-border provision of services between undertakings.

34. It is thus made expressly clear in the *form of order sought in the application initiating proceedings* that the present action in no way relates to the *literal wording* of Article 57(4), first subparagraph, of the Belgian Law, but solely to the allegedly discriminatory and disproportionate *application* of the conditions set out in that provision.

35. Moreover, that point was expressly confirmed by the Commission at the hearing in reply to a question put by the Court.

36. The subject-matter of the present action, as explained by the Commission, therefore precludes the Court from considering in abstracto the compatibility of that provision with Article 49 EC.

37. The action is thus brought before the Court solely for the purposes of a declaration that the application of Article 57(4), first subparagraph, of the Belgian Law by the national authorities, that is, by the national administration and the national courts, is contrary to Article 49 EC.

2. Proof of the failure to fulfil an obligation

38. As the Commission has expressly confined its action to the discriminatory and disproportionate application in Belgium of the conditions of 'similarity' and 'sole vendor' as set out in the Belgian Law, it is for the Commission to adduce before the Court sufficient evidence to establish, within the given context, the failure of that Member State to fulfil its obligations under Article 49 EC.

39. I would recall in this connection that, according to settled case-law, in an action for failure to fulfil obligations, it is for the Commission to prove the allegation that the obligation has not been fulfilled and to provide the Court with the evidence necessary for the Court to establish that the obligation has not been fulfilled, and the Commission may not rely on any presumption. [10]

40. I consider that in this instance the Commission does not provide the Court with sufficient evidence to prove that the Kingdom of Belgium has failed to fulfil its obligations under Article 49 EC.

10 — See, in particular, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-62/89 *Commission* v *France* [1990] ECR I-925, paragraph 37; Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 31; Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 22; and Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34.

41. Where, as is the case here, the action relates to the actual application of a national provision, the evidential material required to establish a failure by a Member State to fulfil its obligations is of a different nature from that which is normally taken into account in the context of an action for failure to fulfil obligations relating solely to the meaning of a national provision.

42. In the latter case, which is by far the most frequent, a comparison of the terms of the disputed national provision with those of the relevant rule of Community law can be enough to indicate the existence of a failure by a State to fulfil its obligations.

43. Where, on the contrary, the subject-matter of an action for failure to fulfil obligations concerns the application of a national provision, the failure can be established only as a result of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable.

44. However, the fact remains that in this case the Commission fails to provide such proof.

45. First, as regards the alleged national administrative practice of the Kingdom of Belgium, I share the opinion of the Belgian Government that the fact that certain undertakings established in Belgium develop loyalty programmes which are questionable in the light of Article 57(4), first subparagraph, of the Belgian Law, without the competent administrative authorities bringing actions for suspension orders before the national courts, is not such as to prove that the article in question is applied in a discriminatory manner.

46. I consider that the examples given by the Commission do not prove that the application by the Belgian administration of the conditions set out in that article vary according to whether the undertaking concerned is established in Belgium or not.

47. Moreover, other examples cited by the Kingdom of Belgium in its defence tend, on the contrary, to show the existence of proceedings brought before the Belgian courts against promotional campaigns which are contrary to the Belgian Law. [11]

48. Second, I should point out that, although a State's action consisting in an administrative practice contrary to the requirements

11 — See pp. 21 and 22 of the defence.

of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, [12] there remains the requirement, according to the Court, that the administrative practice 'is, to some degree, of a consistent and general nature'. [13]

49. In the context of these proceedings, however, the Commission does not show the existence of an administrative practice which has the characteristics of consistency and generality required by the Court.

50. Thus, the consideration of the facts at the source of the complaint lodged by the undertaking organising the 'Air Miles' loyalty programme is not enough to establish that a Member State has failed to fulfil its obligations through an established practice of applying in a discriminatory and disproportionate manner the conditions of 'similarity' and 'sole vendor'. [14]

51. Moreover, I note that the reply, admittedly negative, given by the Belgian Ministry of Economic Affairs to the undertaking organising the 'Air Miles' loyalty programme on the question of whether that programme is consistent with Belgian legislation, was solely of an advisory nature and was not a decision to refuse the expansion of the 'Air Miles' loyalty programme into Belgium.

52. Third and finally, as regards the interpretation of the Law by the Belgian courts, it should be noted that the Court has very clearly set out the conditions in which a national judicial practice is capable of amounting to a failure by a Member State to fulfil its obligations within the meaning of Article 226 EC. [15]

53. The Court thus held that 'isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.' [16]

12 — See, in particular, Case 298/96 *Commission* v *Belgium* [1988] ECR 4343, and Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375.

13 — Case C-387/99 *Commission* v *Germany* [2004] ECR I-3751, paragraph 42.

14 — It is true that, in the particular context of a market on which only a few undertakings are active, such as that in postal franking machines, the Court was able to decide that a national administration's treatment of a single undertaking could give rise to a declaration of a failure to fulfil its obligations (Case 21/84 *Commission* v *France* [1985] ECR 1355, paragraph 13). However, the present case concerns, on the contrary, the sales promotion market on which there are numerous traders.

15 — Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637.

16 — Ibid., paragraph 32.

54. A decision in national case-law is therefore not likely to constitute a failure by a State to fulfil its obligations unless it is of a 'structural nature'. [17]

55. Within the framework of an action for failure to fulfil obligations under Article 226 EC, it is for the Commission to show that such is the case.

56. I note that to a large extent the Commission bases its analysis on the interpretation prevailing in Belgian law, according to which a linked offer would satisfy the condition of 'similarity' where the main products or services and the products or services offered free of charge or at reduced prices are usually offered for sale by the same distribution network and belong to the same branch of industrial or commercial activity.

57. According to the Commission, the rule prohibiting linked offers of products which are not similar is misapplied in practice to the benefit of undertakings established in Belgium which have their own distribution networks. It states that 'this misapplication of the general rule has been facilitated by the interpretation made by the courts of the concept of similarity'. [18]

58. However, in the present case, the Commission does not cite any judgment of a Belgian court to illustrate the trend in case-law on which it bases its analysis.

59. It is true that the Kingdom of Belgium itself stated in its reply to the letter of formal notice that national case-law and legal writings have interpreted the concept of 'similarity' as presupposing that the main products or services and the products or services offered free of charge or at reduced prices are usually offered for sale by the same distribution network and/or belong to the same branch of industrial or commercial activity. In support of that interpretation it also refers to a decision of the Tribunal de Commerce de Bruxelles (Commercial Court of Brussels) of 26 June 1978. [19]

60. In my opinion, however, that situation did not excuse the Commission from providing the Court with specific evidence in order

17 — See the Opinion of Advocate General Geelhoed in *Commission* v *Italy* cited above, point 114.

18 — See the application, paragraph 21.

19 — See p. 23 of the defence.

to establish and clarify the trend in national case-law on which it relies.

61. In this case the provision of such details would have been all the more desirable, since all the arguments made by the Kingdom of Belgium on the concept of 'similarity' in its defence, as well as the statements made by its representative at the hearing, in the end give credence to the idea that the interpretation of that concept adopted by the Belgian courts and legal writings is not unequivocal.

62. In the light of all these considerations, I consider that the Commission has not adduced evidence to show that the Kingdom of Belgium failed to fulfil its obligations under Article 49 EC by applying in a discriminatory and disproportionate manner the conditions of 'similarity' and 'sole vendor' as between, on the one hand, products and services acquired by a consumer and, on the other hand, products or services made available free of charge or at reduced prices in the context of a loyalty programme as a precondition for the operation of such a programme as a cross-border provision of services between undertakings.

IV — Conclusion

63. Consequently, I propose that the Court should dismiss for lack of evidence the application brought by the Commission of the European Communities and order the Commission to pay the costs, in accordance with Article 69(2), first subparagraph, of the Rules of Procedure.