# OPINION OF ADVOCATE GENERAL TRSTENJAK
delivered on 24 March 2010[1]

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## I — Introduction

1. In the present reference for a preliminary ruling under Article 234 EC [2] the Austrian Oberster Gerichtshof (Supreme Court: 'the referring court') asks the Court two questions on the interpretation of Directive 2005/29/EC concerning unfair commercial practices in the internal market [3] ('Directive 2005/29'). The questions essentially relate to the compatibility with Community law of a national provision which makes it illegal to announce, offer or give bonuses, free of charge, with periodicals and newspapers, and to announce bonuses, free of charge, with other goods or services, without it being necessary in any particular case to consider whether such a commercial practice is misleading.

2 — In accordance with the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007, C 306, p. 1), the preliminary ruling procedure is now regulated in Article 267 of the Treaty on the Functioning of the European Union.

3 — 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).

2. The reference for a preliminary ruling stems from an application for interim relief made by Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG ('the applicant in the main proceedings') by which it seeks an injunction against 'Österreich'-Zeitungsverlag GmbH ('the defendant in the main proceedings') for anti-competitive use of a bonus which is unlawful in principle under national law in the form of a prize competition.

3. Following *VTB-VAB and Galatea* [4] and *Plus Warenhandelsgesellschaft,* [5] the present case is the third in a series of references in which national courts ask the Court whether national prohibitions of combined offers are compatible with Directive 2005/29. One of the main questions which distinguishes the present case from the previous ones and which must therefore be the subject of a careful legal examination is whether such an examination of compatibility is also possible where the purported regulatory objective of the national provision in question is to protect both media diversity and competitors.

4 — Joined Cases C-261/07 and C-299/07 [2009] ECR I-2949.
5 — Case C-304/08 [2010] ECR I-217.

## II — Legislative framework

### A — *Community law*

4. Article 1 of Directive 2005/29 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 of Directive 2005/29 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

representation, 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. Article 4 of the directive states:

'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, which has the heading 'Prohibition of unfair commercial practices', provides:

'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.

3. Commercial practices which are likely to materially 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. Announcing, offering or giving bonuses, free of charge, with periodicals and newspapers is not mentioned in Annex I to the directive as one of the commercial practices which are in all circumstances considered unfair.

B — *National law*

10. Paragraph 9a(1) of the Austrian Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, 'UWG') [6] provides:

'Any person who, in carrying on a competitive commercial activity,

(1) announces, in public advertisements or other communications destined for a large number of persons, that he is granting to consumers free advantages (bonuses) associated with products or services, or offers, announces or grants to consumers free advantages (bonuses) linked to periodicals or

6 — Bundesgesetz gegen den unlauteren Wettbewerb 1984 — UWG, BGBl. No 448, amended by the Law of 13 November 2007, BGBl. I No 79/2007.

(2) proposes, announces or grants to undertakings free advantages (bonuses) associated with products or services

may be subject to an action for an injunction and damages. That also applies where the gratuitous nature of that advantage is concealed by overall prices for the products or services, by fictitious prices for a bonus or in any other manner.'

**III — Facts, main proceedings and questions referred for a preliminary ruling**

11. According to the referring court, it must decide on a dispute between two competitors in the Austrian market for daily newspapers, which arose when the defendant in the main proceedings announced in its newspaper a vote for a 'Footballer of the Year'. The heading to the article, in bold type, was as follows: 'It's worth joining in: win a dinner with the player who comes first in the big kicker vote'. To the left of the article there was a 'voting coupon' with the words 'cut out and send in'. To the right there was information on how to vote on the internet. Similar articles appeared on the next nine days.

12. Upon an application by the applicant, the court at first instance ruled that the announcement constituted an unlawful bonus within the meaning of Paragraph 9a(1)(1) of the UWG, and granted the application for an interim injunction against making announcements. The appeal court, on the other hand, ruled that the announcement had no relevant effects on the market. The applicant submitted an appeal against that decision to the referring court, seeking the reinstatement of the interim injunction granted by the court at first instance. According to the provisional assessment of the referring court, the applicant's appeal would have to be allowed if Paragraph 9a(1)(1) of the UWG applied. However, that court believes that the directive may preclude the application of Paragraph 9a(1)(1) of the UWG, which depends on the interpretation of the regulatory scope of the directive.

13. The Oberster Gerichtshof therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Do Articles 3(1) and 5(5) of Directive 2005/29/EC or other provisions of that Directive preclude a national provision which makes it illegal to announce, offer or give bonuses, free of charge, with

periodicals and newspapers, and to announce bonuses, free of charge, with other goods or services, apart from exhaustively specified exceptions, without it being necessary in any particular case to consider whether such a commercial practice is misleading, aggressive or otherwise unfair, even where that provision serves not only to protect consumers, but also serves other purposes which are not covered by the material scope of the directive, for example, the maintenance of media diversity or the protection of weaker competitors?

(2) If the first question is answered in the affirmative:

Is the chance of taking part in a prize competition, which is acquired with the purchase of a newspaper, an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29/EC merely because that chance is, for at least some of those to whom the offer is addressed, not the only, but the decisive reason for purchasing the newspaper?'

## IV — Procedure before the Court of Justice

14. The order for reference of 18 November 2008 was lodged at the Registry of the Court of Justice on 4 December 2008.

15. Written observations were submitted by the parties to the main proceedings, the Governments of the Republic of Austria and of the Kingdom of Belgium, and by the Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

16. At the hearing, which took place on 19 January 2010, oral argument was presented by the agents of the parties to the main proceedings, the agents of the Governments of the Republic of Austria and of the Federal Republic of Germany, and the agent of the Commission.

## V — Main arguments of the parties

A — *The first question*

17. By its first question, the referring court is essentially seeking to ascertain whether a national provision which prohibits in principle the sale of goods using bonuses falls within the scope of Directive 2005/29, even though that provision does not serve exclusively to protect consumers.

18. The *applicant in the main proceedings* and the *Austrian* and the *Belgian Governments* propose that the Court answer that question in the negative.

19. In this regard, they point out, first of all, that sales promotions were the subject of a proposal for a regulation which clearly differentiated the legal treatment of such sales promotion measures from the treatment of unfair commercial practices, now regulated by Directive 2005/29. However, that proposal was withdrawn by the Commission in 2006, one year after the directive was adopted. It cannot therefore be said that sales promotions fall implicitly within the scope of the directive. Consequently, in view of the fact that according to recital 6 in the preamble to the directive the directive is intended directly to protect consumer economic interests, the directive cannot be applied to national provisions like those in the main proceedings which primarily pursue other aims, namely to protect competitors and to maintain media diversity, and only indirectly to protect consumers.

20. For the sake of completeness, *the applicant in the main proceedings* and the *Austrian Government* state that the prohibition laid down in Paragraph 9a(1)(1) of the UWG on sales using bonuses is in any case compatible with the directive.

21. Directive 2005/29 permits the Member States, under Article 5(2), to classify as unfair and therefore to prohibit commercial practices which are contrary to the requirements of professional diligence and are likely to materially distort the economic behaviour of the average consumer. However, the contested national prohibition applies only in the event that the national court finds that the consumer purchased the publication for subjective reasons connected with the prospect of the possible enjoyment of additional benefits and in so far as such benefits do not come under the exceptions listed in Paragraph 9a(2)

of the UWG. Furthermore, it is for the national courts to make an appropriate assessment in the individual case.

22. In the view of the *applicant in the main proceedings*, the Austrian provision differs substantially from the provisions at issue in *VTB-VAB and Galatea* and *Plus Warenhandelsgesellschaft* in so far as the latter contain general prohibitions and did not therefore take account of the special circumstances of the specific case.

23. The *defendant in the main proceedings*, on the other hand, argues that under recital 6 solely national laws which harm 'only' competitors' economic interests or which relate to a transaction between traders are excluded from the scope of Directive 2005/29. This is clearly not the case with the contested provision, however, since Paragraph 9a(1)(1) of the UWG seeks primarily and directly to protect consumers.

24. It also takes the view that the prohibition laid down therein is not compatible with the regulatory approach adopted in the directive since, even though sales promotions through bonuses are not listed in Annex I to Directive 2005/29 among the commercial practices which are in all circumstances considered unfair, they are subject to the general prohibition under Austrian law, as the Oberster Gerichtshof stated in its order for reference.

25. At the hearing, the *German Government* made reference to *Plus Warenhandelsgesellschaft* and pointed out that the full harmonisation pursued by Directive 2005/29 is without prejudice to the margin of discretion enjoyed by the Member States in transposing the directive. This applies specifically with regard to the transposition into national law of concepts which need to be fleshed out, like those contained in the legal definitions in Directive 2005/29. Furthermore, the German Government took the view that Directive 2005/29 does not preclude a national provision which pursues a different purpose to the directive.

26. The *Commission*, on the other hand, takes a different legal view, stating that Directive 2005/29 precludes a general and abstract prohibition, like that contained in the contested legal provision, but concludes that that legal provision does not fall within the scope of the directive because it primarily

pursues other aims, namely to maintain media diversity and, only to a limited extent, to protect consumers and fair commercial practices.

B — *The second question*

27. In the event that the Court answers the first question in the affirmative, the referring court asks whether sales using bonuses are to be regarded as unfair commercial practices within the meaning of Article 5(2) of Directive 2005/29 merely because the chance of taking part is, for at least some of those to whom the offer is addressed, not the only, but the decisive reason for purchasing the main item.

28. Since both the *Austrian* and the *Belgian Governments* answered the first question in the negative, they do not make observations on the second question, whilst the *applicant in the main proceedings* and the *Commission* each make submissions on that question in the alternative.

29. The *applicant in the main proceedings* simply asserts that the contested action by the defendant in the main proceedings constitutes an unfair commercial practice, but does not put forward any evidence in support of that assertion.

30. In the opinion of the *Commission*, the fact that the chance of taking part in a prize competition is the consumer's decisive reason for purchasing a publication cannot in itself lead to the conclusion of an unfair commercial practice within the meaning of Directive 2005/29, but represents just one of the elements which may be taken into consideration by the national court in making an assessment of the individual case.

31. The *defendant in the main proceedings* states that the concept of commercial practice refers to an average consumer, who is described in the Court's case-law as 'reasonably well informed and reasonably observant and circumspect'. The consumer, described in this way, is aware of the fact that advertising and sales promotions in a free market economy are aimed at winning over customers, not only by the price and quality of a product but also by the prospect of other benefits. Consequently, sales using bonuses may constitute an unfair commercial practice only exceptionally, namely where the offer is organised in such a way that it is likely to lead the consumer to purchase the main item not, for instance, on the basis of objective considerations, but only because of the prospect of an additional benefit.

## VI — Legal assessment

### A — *Introductory remarks*

32. The present case is already the third in a series of references in which national courts ask the Court to clarify the extent to which national prohibitions of combined offers can still be considered to be compatible with Community law as it stands at present. The relevance of this question is apparent not least from the fact that Directive 2005/29, adopted on 11 May 2005 by the European Parliament and by the Council, is aimed at creating a single legal framework for the regulation of unfair commercial practices vis-à-vis the consumer.

33. In view of the intended full harmonisation of the rules on unfair business-to-consumer commercial practices [7] in the Community Member States, it is necessary to examine the conformity with Community law not only of the provisions which the Member States have newly adopted in order to transpose the directive, but also of the provisions which were in force before the directive was adopted — like the contested provision in Paragraph 9a(1) of the UWG — but which nevertheless have a transposing function from the point of view of the relevant Member State.

34. In view of the narrow margin of discretion which full harmonisation generally allows the Member States in transposing a directive, the maintenance of such older provisions does not always prove to be without problems from a legal point of view. Even though they ultimately fall within the scope of the directive in question, they are often not consistent with the requirements of the directive. As the *VTB-VAB and Galatea* cases have shown, this was the case with the transposition of Directive 2005/29 in Belgium [8] and Germany. [9]

7 — *VTB-VAB and Galatea*, cited above in footnote 4, paragraph 52, and *Plus Warenhandelsgesellschaft*, cited above in footnote 5, paragraph 41.
In the case of possible more extensive harmonisation of the law on fair commercial practices and the law on contracts in the European Union, due regard should also be had to the stipulations of the Draft Common Frame of Reference (DCFR), since one of its focuses is the protection of consumers, for example by imposing specific duties to provide information on businesses marketing to consumers as regards the main characteristics of the goods and services acquired (see, for example, II.-3:102 DCFR). These 'good commercial practices' are certainly in contrast with the 'prohibited commercial practices' listed in Annex I to Directive 2005/29.

8 — The provisions in question are Article 54 et seq. of the Belgian Law of 14 July 1991 on commercial practices and consumer information and protection.

9 — The relevant provisions are Paragraphs 3 and 4(6) of the German Gesetz gegen den unlauteren Wettbewerb (German Law on unfair competition, UWG) (BGBl. I p. 1414), last amended by Article 1 of the First Amending Law of 22 December 2008 (BGBl. I p. 2949).

35. Under Article 20, Directive 2005/29 entered into force on the day following its publication in the *Official Journal of the European Union*, that is to say on 12 June 2005. Under the first paragraph of Article 19, the Member States were required to transpose it into national law by adopting the necessary laws, regulations and administrative provisions by 12 June 2007, but with a further transitional period of six years for certain more stringent national provisions. However, those laws, regulations and administrative provisions did not have to be applied until after 12 December 2007.

36. The Republic of Austria formally complied with this duty of transposition by adopting the federal law amending the UWG (2007 UWG Amending Law), which entered into force on 12 December 2007. [10] As has already been intimated, however, the contested provision in Paragraph 9a(1)(1) of the UWG was not adopted to transpose Directive 2005/29, but dates back to earlier national legislation. [11] In its order for reference the referring court expresses doubts as to the compatibility of that provision with Community law. [12]

10 — BGBl. I No 79/2007.

11 — The prohibition of bonuses under Paragraph 9a of the UWG, which was originally governed by the Prämiengesetz (Law on prizes) of 20 June 1929 (BGBl. 227) and later by the Zugabengesetz 1934 (1934 Law on bonuses), was integrated into the UWG by the Wettbewerbs-Deregulierungsgesetz 1992 (1992 Law on deregulation of competition, BGBl. 1992/147). With regard to the history of that provision, see Duursma, D., in: *UWG — Kommentar* (ed. Maximilian Gumpoldsberger/Peter Baumann), Vienna 2006, Paragraph 9a, paragraph 1, p. 276, and Wiltschek, L., *UWG — Kommentar*, 2nd edition, Vienna 2007, Paragraph 9a, p. 44.

12 — See, inter alia, p. 9 and 10 of the order for reference.

B — *The first question*

37. It should be noted at the outset that in proceedings under Article 234 EC the Court does not have jurisdiction to rule on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it. [13]

38. The first question seeks a ruling as to whether Directive 2005/29 precludes a national provision such as Paragraph 9a(1)(1) of the UWG. To that end, it is necessary first to establish whether the regulatory subject-matter of that provision comes within the scope *ratione materiae* and *ratione personae* of Directive 2005/29. In a further step, it is necessary to determine whether Directive 2005/29 is to be interpreted as also covering the legal consequences laid down by Austrian law in the event of infringement of that provision.

13 — See, inter alia, Case 6/64 *Costa* [1964] ECR 585; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 23; and Case C-265/01 *Pansard and Others* [2003] ECR I-683, paragraph 18.

1. The concept of 'commercial practices' in Article 2(d) of Directive 2005/29

39. According to the referring court, Paragraph 9a(1)(1) of the UWG prohibits traders from announcing to consumers free bonuses with goods or services. A prohibition of combined offers must therefore be taken to exist.

40. This prohibition would also have to cover commercial practices within the meaning of Article 2(d) of Directive 2005/29. That provision adopts a particularly broad definition of commercial practice [14] as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'.

41. As I explained in detail in my Opinion in *VTB-VAB and Galatea* [15] and as the Court confirmed in the same cases, [16] 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. Combined offers are therefore commercial practices within the meaning of Article 2(d) of Directive 2005/29 and consequently the prohibition of combined offers under Paragraph 9a(1)(1) of the UWG comes within its scope *ratione materiae*. [17]

2. Scope *ratione personae* of Directive 2005/29

42. The question whether the disputed national provision in Paragraph 9a(1)(1) of the UWG comes within the scope *ratione personae* of the directive depends on whether that provision is intended, like the directive itself, to protect consumers.

14 — *VTB-VAB and Galatea*, cited above in footnote 4, paragraph 49, and *Plus Warenhandelsgesellschaft*, cited above in footnote 5, paragraphs 36 and 39. See Keirsbilck, B., 'Towards a single regulatory framework of unfair commercial practices?', *European Business Law Review*, 4/2009, p. 505, in whose view Directive 2005/29 is distinguished by its very broad scope.

15 — See my Opinion in *VTB-VAB and Galatea* (judgment cited above in footnote 4, points 68 to 70).

16 — *VTB-VAB and Galatea*, cited in footnote 4, paragraphs 48 and 50. In connection with a promotional campaign which enabled consumers to take part free of charge in a lottery subject to their purchasing a certain quantity of goods or services, see *Plus Warenhandelsgesellschaft*, cited above in footnote 5, paragraph 37.

17 — See also Heidinger, R., 'Zugabenverbot, quo vadis?', *Medien und Recht*, 1/2009, p. 45, according to whom Directive 2005/29 applies because the prohibition of bonuses under Paragraph 9a of the UWG is to be regarded as regulation of unfair commercial practices vis-à-vis consumers.

(a) The coverage of Directive 2005/29

43. In fact, the directive regulates only the B2C (business-to-consumer) sector, that is to say, the relationship between traders and consumers. This is apparent from Article 3(1), according to which the directive applies to unfair *business-to-consumer* commercial practices before, during and after a commercial transaction in relation to a product. That connection is emphasised in particular in recital 8 of the preamble to the directive, which states that the directive *directly protects only consumer economic interests* from unfair business-to-consumer commercial practices. [18]

44. However, I believe the view that the directive therefore considers the economic interests of competitors who act within the law less worthy of protection to be wrong. [19] I recently made reference to an argument to that effect put forward by the Austrian Government in my Opinion in *Plus Warenhandelsgesellschaft*. [20] As is clear from recital 8, the directive *also indirectly protects legitimate businesses from their competitors* who do not play by the rules in the directive. This is given legislative expression in Article 11(1) of the directive, which requires the Member States to accord to competitors too the right to bring proceedings in the event of conduct which is incompatible with the directive, with the result that they are able to bring judicial proceedings against unfair commercial practices.

45. The statement made in recital 6, according to which Directive 2005/29 approximates the laws of the Member States on unfair

18 — See also Hoeren, T., 'Das neue UWG — der Regierungsentwurf im Überblick', *Betriebs-Berater*, 2008, p. 1183; Stuyck, J., 'The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotion and the Law of Unfair Competition', *The regulation of unfair commercial practices under EC Directive 2005/29 — New rules and new techniques*, Norfolk 2007, p. 166.

19 — See also Koppensteiner, H.-G., 'Grundfragen des UWG im Lichte der Richtlinie über unlautere Geschäftspraktiken', *Wirtschaftsrechtliche Blätter*, 2006, Vol. 12, p. 558, in whose view it would be wrong to deny that Directive 2005/29 has any significance in relations between businesses. The author bases his arguments on both recitals 6 and 8, according to which the economic interests of legitimate businesses are indirectly protected, and Article 11(1) of the directive, under which the Member States are required to allow competitors the right to bring proceedings in the case of conduct which is incompatible with the directive. The same author, 'Das UWG nach der Novelle 2007', *Die Europäisierung des Kartell- und Lauterkeitsrechts*, Tübingen 2009, p. 86, footnote 8, points out that competitors are also indirectly protected by Directive 2005/29.

20 — See points 35 and 64 of my Opinion in *Plus Warenhandelsgesellschaft*.

commercial practices which *directly* harm consumers' economic interests and thereby *indirectly* harm the economic interests of legitimate competitors, is of central importance. The directive thus takes account of the fact that it is not always possible to distinguish clearly between the interests of consumers and those of competitors because they very often overlap. [21] Many commercial practices affect both the interests of consumers and those of competitors. In the light of this close connection, the Community legislature decided to take account of consumer protection interests by provisions actually regulating competition, like those contained in Directive 2005/29. [22] There is no methodical contradiction between the directive's competition-based orientation to the conditions on which the internal market operates and the legislation's protective orientation to the typified interests of European consumers. [23]

21 — Marsland, V., 'Unfair Commercial Practices: Stamping out Misleading Packaging', *The regulation of unfair commercial practices under EC Directive 2005/29 — New rules and new techniques*, Norfolk 2007, p. 194, rightly points out that despite its consumer protection orientation, Directive 2005/29 recognises the fact that the interests of consumers and competitors are similar with regard to unfair commercial practices and that it is in the common interest of consumers and competitors that all traders adhere to the rules. Büllesbach, E., *Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken*, Munich 2008, p. 16, states that many commercial practices affect both the interests of consumers and those of competitors. In order to reach appropriate conclusions in assessing commercial actions from the point of view of the rules on fair practices, it is therefore necessary to adopt a multi-dimensional approach, taking into account uniformly the interests of all those concerned. The fact that protection of competitors and consumers is generally 'two sides of the same coin' can be seen from the example of misleading advertising, which affects not only the economic interests of consumers, but also those of competitors if their business prospects would be affected. The same holds for denigration, which causes harm to the wrongly criticised party and distorts the decision-making basis for the misinformed consumer. Bargelli, E., 'L'àmbito di applicazione della direttiva 2005/29/CE: La nozione di pratica commerciale', *Le pratiche commerciali sleali tra imprese e consumatori*, Turin 2007, p. 80, points out the difficulty of distinguishing between the interests of consumers and competitors. In the view of Schuhmacher, W., 'The Unfair Commercial Practices Directive', *Law Against Unfair Competition — Towards a New Paradigm in Europe* (ed. Reto M. Hilty/Frauke Henning-Bodewig), Berlin/Heidelberg 2007, p. 132, Directive 2005/29 clearly shows that there are situations in competition law where it is not possible to distinguish protection of competitors from protection of consumers.

22 — Gamerith, H., 'Richtlinie über unlautere Geschäftspraktiken: bisherige rechtspolitische Überlegungen zu einer Neugestaltung des österreichischen UWG', *Lauterkeitsrecht im Umbruch*, 2005, p. 157, even takes the view that Directive 2005/29 does not really distinguish between the interests of consumers and competitors within its regulatory scope, but contains an 'incomplete B2B + B2C system', which suggests that the directive has been transposed in the Austrian UWG.

23 — See also Kessler, J., 'Lauterkeitsschutz und Wettbewerbsordnung — Zur Umsetzung der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken in Deutschland und Österreich', *Wettbewerb in Recht und Praxis*, 2007, Vol. 7, p. 716. See also Falce, V./Ghidini, G., 'The new regime on unfair commercial practices at the intersection of consumer protection', *Competition law and unfair competition, Antitrust between EC law and national law*, 2009, p. 374, who state that with Directive 2005/29 the Community legislature takes the position that only free competition in the internal market can guarantee decision-making freedom for consumers.

For example, the grant of the right to bring proceedings prescribed under Article 11(1) of the directive, which authorises affected competitors to bring applications for injunctions against competitors who act unfairly can certainly benefit consumer protection. [24]

46. Nevertheless, with a view to a better definition of its scope, the directive clearly distinguishes between, on the one hand, commercial practices which harm both consumers and competitors and, on the other, commercial practices which may affect the interests of just one of those two categories. Thus, recital 8 states that it is understood that there may be other commercial practices which, although not harming consumers, may hurt competitors and business customers.

47. As the Court found in *Plus Warenhandelsgesellschaft*, this second situation does not fall within the scope of the directive [25] as, according to recital 6, it neither covers nor affects the national laws on unfair commercial practices which harm *only* competitors' economic interests or which relate to a transaction between traders. As can also be seen from a comparison of different language versions of Directive 2005/29, [26] the word 'only' typically has the meaning of 'exclusiveness'.

24 — See also Gamerith, H., cited above in footnote 22, p. 157, in whose opinion applications for injunctions made by affected competitors against competing undertakings acting unfairly increase consumer protection where they concern prohibitions directed against unfair influence on the consumer's decision-making freedom through deception, surprise tactics, enticement, pressurisation etc.

25 — *Plus Warenhandelsgesellschaft*, cited above in footnote 5, paragraph 39. See Micklitz, H.-W., 'Full Harmonization of Unfair Commercial Practices Under Directive 2005/29', *International Review of Intellectual Property and Competition Law*, 2009, Vol. 4, p. 373, in whose view Directive 2009/25 is applicable to B2B relationships where two conditions are met: the commercial practice in question affects directly the interests of consumers and indirectly the interests of competitors. The author fears that this restriction of the scope of the directive could open up new defence strategies. For example, undertakings might be tempted to claim that their commercial practices affect only B2B relationships.

26 — German: 'lediglich'; Danish: 'udelukkende'; English: 'only'; French: 'uniquement'; Italian: 'unicamente'; Dutch: 'alleen'; Portuguese: 'apenas'; Slovenian: 'samo'; Spanish: 'sólo'.

Thus, recital 6 also states that, taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so.

legislative aim which goes beyond the consumer protection pursued by the directive.

(b) The protective purpose of the prohibition in Paragraph 9a(1)(1) of the UWG

49. In addition to consumer protection, the prohibition serves both to maintain effective competition and to protect media diversity. By preventing competitors from outbidding one another with further ancillary benefits, it is intended above all to protect competitors who, because of their more minimal economic resources, are not in a position to promote sales of their products by means of free bonuses. Such protection is justified in view of the importance of the media in forming opinions in a democratic society. This has already been argued by the Austrian Government in Case C-368/95 *Heinrich Bauer Verlag*, [29] which concerned the compatibility of that prohibition with free movement of goods, and it has also not been called into question by the Court as a legitimate legislative purpose which can justify a restriction of that fundamental freedom.

(i) The different weighting of the individual interests

48. The question therefore arises whether the contested prohibition of combined offers in Paragraph 9a(1)(1) of the UWG is a national law which seeks to prevent a commercial practice which harms *only* competitors' economic interests. The referring court [27] and the Austrian Government [28] point out that the contested prohibition of combined offers in Paragraph 9a(1)(1) of the UWG has a further

50. It must be stated, however, that the assessments relating to the weighting of the individual interests of the UWG differ.

27 — See p. 10 to 12 of the order for reference.

28 — See p. 4 and 5 of the observations submitted by the Austrian Government.

29 — Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH* v *Heinrich Bauer Verlag* [1997] ECR I-3689.

51. In the view of the referring court, Paragraph 9a(1)(1) of the UWG does not, in the estimation of the Austrian legislature, serve purposes of consumer protection predominantly, but is 'at least equally' concerned with the protection of competing undertakings and the maintenance of effective market conditions. [30] This is expressly disputed by the Austrian Government which argues that the prohibition of combined offers serves 'primarily' to protect effective competition in the media sector, [31] but does not present convincing evidence in support of that legal opinion, especially since in its arguments on linking a magazine with a competition in the main proceedings it repeatedly warned against the danger of the consumer being unlawfully influenced as a result of the exploitation of his gaming compulsion. [32] In my opinion, there is no doubt that the fear expressed by the Austrian Government is based primarily on considerations of consumer protection.

52. The following points should be made regarding these different statements regarding the interpretation of national law.

53. It should be borne in mind, first of all, that the procedure under Article 234 EC is based on cooperation between the Court of Justice and the national courts, where it is not for the Court to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct. [33] The Court must take account, under the division of jurisdiction between the Community courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set. [34]

54. Secondly, this different substantive assessment ultimately proves to be irrelevant since it is in any case undisputed that Paragraph 9a(1)(1) of the UWG is not intended to prevent unfair commercial practices which, in accordance with recital 6 in the preamble to the directive, harm *only* competitors' economic interests or which relate to a transaction between traders. On the contrary, it is common ground that, having regard to its

30 — See p. 10 to 12 of the order for reference.

31 — See paragraph 11, p. 4 of the observations submitted by the Austrian Government.

32 — In this respect there is a similarity with the arguments put forward by the German Government in *Plus Warenhandelsgesellschaft*, which concerned the compatibility of a national provision (Paragraph 4(6) of the German UWG) which prohibited combined offers in connection with prize competitions or lotteries. This prohibition was based primarily on considerations of consumer protection. With regard to the arguments put forward by the German Government in that case, see my Opinion of 3 September 2009 in that case, in particular points 93 and 107.

33 — Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42.

34 — Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10; Case C-153/02 *Neri* [2003] ECR I-3555, paragraphs 34 and 35; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*, cited above in footnote 33, paragraph 42; and Case C-267/03 *Lindberg* [2005] ECR I-3247, paragraphs 41 and 42.

regulatory purpose, Paragraph 9a(1)(1) of the UWG prohibits unfair commercial practices which always affect the B2C sector. Paragraph 9a(1)(1) of the UWG therefore lies in any case within the regulatory scope of Directive 2005/29, it being irrelevant whether that prohibition of combined offers serves primarily to protect a specific legal interest, to protect the interests of consumers, competitors or the general public, for example in the form of the maintenance of media diversity. From a legal point of view it is not therefore necessary, for the purposes of the present reference for a preliminary ruling, to answer the question whether and to what extent, as the Austrian Government claims, the contested national provision also pursues the aim of maintaining media diversity.

(ii) Analysis of the relevant national provisions and case-law

55. In view of the need to give the referring court a helpful answer to its questions, [35] and at the same time discharging the duty of the Advocates General under Article 222 EC, acting with complete impartiality and independence, to make reasoned submissions, [36] I would point out, as a precaution, that an analysis of the rules in question, including the legislative documents relating to the UWG, makes clear that consumer protection must have been at least as important to the Austrian legislature as protection of competitors. Thus, it is clear from the explanatory memorandum on the bill for the 2007 UWG Amending Law [37] that the UWG regulates the B2B sector no differently from the B2C sector as, in the view of

35 — In Case 244/78 *Union Laitière Normande* [1979] ECR 2663, paragraph 5, the Court stated that whilst Article 234 EC does not permit the Court to evaluate the grounds for making the reference, the need to afford a helpful interpretation of Community law may make it essential to define the legal context in which the interpretation requested should be placed. In the view of Lenaerts, K./Arts, A./Maselis, I., *Procedural Law of the European Union*, 2nd edition, p. 188, section 6-021, there is nothing to prevent the Court setting out its understanding of the facts in the main proceedings and of certain aspects of national law as the basis for a helpful interpretation of the applicable Community legislation and principles of Community law.

36 — In the view of Advocate General Ruiz-Jarabo Colomer, 'La función del Abogado del Tribunal de Justicia de las Comunidades Europeas', *Problèmes d'interprétation*, Brussels 2004, p. 334 et seq., the Opinion should be used by the judges as the basis for their deliberations. As a rule, they should give an answer to all legal questions arising in the proceedings, with an extensive examination of the previous case-law of the Court of Justice. The Advocate General also stresses the growing importance of legal literature for the examination of those legal questions.

37 — In the 'Erläuterungen zur Regierungsvorlage für ein Bundesgesetz, mit dem das Bundesgesetz gegen den unlauteren Wettbewerb 1984 — UWG geändert wird (UWG-Novelle 2007)', published in *Recht und Wettbewerb*, 53rd year, No 170, December 2007, p. 13, it is stated: 'As in the applicable UWG, the proposal essentially regulates the B2B sector no differently from the B2C sector, as it is not possible to separate protection of competitors and protection of consumers.'

the Austrian legislature, it is 'not possible to separate' protection of competitors and protection of consumers.

56. This is consistent with the prevailing opinion in legal literature, which, not least for that reason, considers that, in addition to the interests of competitors and of the general public, the interests of consumers are equally protected in the UWG, and therefore suggests a 'triad of protective purpose'.[38] This also applies to the provision at the centre of the present case, Paragraph 9a(1)(1) of the UWG, whose consumer protection character is not called into question in legal literature.[39]

57. It should also be stated that according to the case-law of the Oberster Gerichtshof too[40] — partly with reference to the opinions adopted in legal doctrine — the purpose of the prohibition of bonuses under Paragraph 9a(1)

38 — In the view of Prunbauer, M., 'Kommentar zum Vorschlag für eine EU-Richtlinie über unlautere Geschäftspraktiken im binnenmarkt-internen Geschäftsverkehr zwischen Unternehmen und Verbrauchern — ein missglückter Ansatz der Harmonisierung des Lauterkeitsrechts in der EU', *Recht und Wettbewerb*, 49th year, No 161, September 2003, p. 3, the UWG essentially concerns not only consumer aspects of competition behaviour, but also aspects relating to competitors and the general public. An advertising measure cannot be seen or assessed simply from one angle in relation to consumers. The protection of competitors and of the public interest in effective competition also serve at least indirectly to protect consumers, since this ensures the effectiveness of competition, which is also in the interests of consumers. The author concludes that a competitive act cannot be separated into a 'consumer competition part' and a 'trader competition part' either in the reality of economic life or in doctrine. According to Wiebe, A., 'Umsetzung der Geschäftspraktikenrichtlinie und Perspektiven für eine UWG-Reform', *Juristische Blätter*, 129th year, Vol. 2, February 2007, p. 71, it has long been undisputed in the case of Austria and Germany that the UWG serves to protect competitors, consumers and the public interest, as is explicitly laid down in Paragraph 1 of the new German UWG. The inherent interconnection of the protective purpose actually makes it essentially impossible to separate legal regulation between B2B and B2C transactions. See also Büllesbach, E., cited above in footnote 21, p. 15, who refers to the triad of protective purpose (consumers, competitors, general public) which forms the basis for the German and Austrian rules on fair trading practices. Lettner, H., 'Die Umsetzung der EU-Richtlinie über unlautere Geschäftspraktiken — Eine Bilanz des UWG-Neu in Österreich und Deutschland', *European Law Reporter*, 2009, No 9, p. 313, also points out that the Austrian UWG seeks, by and large, to protect the interests of traders, the interests of the general public and the interests of consumers.

39 — For example, Duursma-Kepplinger, D., cited above in footnote 11, points out that Paragraph 9a of the UWG also serves to protect consumers (Paragraph 16, section 24, p. 808). The purpose of the statutory restriction of bonuses is, inter alia, to protect buyers against non-factual and misleading advertising and to prevent competitors from outbidding one another with (further) ancillary benefits (Paragraph 9a, section 2, p. 276). The author takes the view that the actual objective of the UWG is to offer preventive protection of general consumer interests in order safeguard competition against unfair practices (Paragraph 16, section 26, p. 810). According to Horak, M., 'Naht das Ende des Zugabenverbots?', *Ecolex*, 2008, p. 1138, the purpose of the prohibition of bonuses under Paragraph 9a of the UWG is recognised as principally consumer protection. The author refers to the judgment of the Oberster Gerichtshof cited in footnote 40 of this Opinion. See also Kucsko, G., 'Zur rechtspolitischen Begründung des Zugabenverbots', *Ecolex*, 1992, p. 709, who traces the legislative history of the prohibition of bonuses in Austria from the beginning of the 20th century. The author points out that the primary purpose of the Austrian 'prohibition of bonuses' since it came into being is to prevent the purchasing decision of consumers being influenced non-objectively by bonuses and the real price of the main item being hidden by the bonuses, so the customer is misled. Furthermore, it is intended to prevent competing traders outbidding one another.

40 — See judgment of the Oberster Gerichtshof of 9 March 1999 Fini's Feinstes (Ref. 4 Ob 28/99t). It states: 'The purpose of the prohibition of bonuses is recognised as principally consumer protection. The judgement of consumers — for example in the case of a chance to take part in a competition — is not clouded by the human pleasure in gambling and the desire to win. The decision on the purchase will be taken having regard to the quality and the price competitiveness of a product and on the basis of a proper comparison of the goods, but not more or less indiscriminately in order to win the prize which has been offered as bait.'

of the UWG is recognised as principally consumer protection. Accordingly, the judgement of consumers — for example in the case of a chance to take part in a competition — is not clouded by the human pleasure in gambling and the desire to win.

58. Therefore, on the basis of an analysis of the relevant Austrian provisions and case-law, the prohibition of bonuses in Paragraph 9a(1)(1) of the UWG serves to protect consumers at least equally.

(c) Conclusion

59. In the light of the above considerations, I conclude that the national provision contained in Paragraph 9a(1)(1) of the UWG falls within the scope of Directive 2005/29. It must therefore be assessed having regard to the requirements of the directive. [41]

3. Analysis of the structure of both measures

(a) The provisions of Directive 2005/29

60. In order to be able to determine whether Directive 2005/29 precludes a national provision like Paragraph 9a(1) of the UWG, it is

41 — See Horak, M., 'Zugabenverbot gemeinschaftsrechtswidrig?', *Ecolex*, 2009/123, p. 341, in whose opinion the first question hinges on whether a per se prohibition of bonuses, which is intended to protect both consumers and traders, is compatible with Directive 2005/29. In the author's view, such a per se prohibition is contrary to Community law if its scope is not sharply defined and can be restricted to offers which are addressed solely to traders and do not affect consumer interests. Those conditions are not satisfied in the case of Paragraph 9a(1)(1) of the UWG. In the view of Lettner, H., cited above in footnote 38, No 9, p. 317, the fact that the prohibition of combined offers in Paragraph 9a(1)(1) of the UWG serves not only to protect consumers, but also other purposes which are not covered by the scope *ratione materiae* of the directive, such as the maintenance of media diversity or the protection of weaker competitors, cannot justify the maintenance of a per se prohibition for the B2C sector in addition to the black lists. Both authors thus assume that the contested national provision falls within the scope of Directive 2005/29.

necessary to examine and then compare the two measures with regard to their legislative purpose and their regulatory structure.

(i) Full and maximum harmonisation of national rules as a regulatory objective

61. As stated earlier in this Opinion, [42] Directive 2005/29 seeks to bring about the full harmonisation of the laws of the Member States concerning unfair commercial practices. In addition, contrary to what was previously the case in sector-specific measures for the harmonisation of consumer protection law, Directive 2005/29 not only aims at minimum harmonisation, but also seeks to achieve maximum approximation of national provisions which prohibit the Member States, apart from certain exceptions, from retaining or introducing stricter rules, even in order to achieve a higher level of consumer protection. [43] Both those aims are made clear in the preamble and in the general provisions of the directive.

62. This follows, first, from recital 11 in the preamble to the directive, which states that the *convergence* of national provisions through the directive should create a high common level of consumer protection. Secondly, recital 12 speaks of consumers and business being able to rely on a *single regulatory framework* based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the European Union. Article 1 of the directive refers to the *approximation of laws*, the purpose of which is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection.

63. The objective of comprehensive maximum regulation at Community level within the area of life covered by Directive 2005/29 becomes clear yet again in recitals 14 and 15, which refer expressly to *full harmonisation*. This also follows from the internal market clause in Article 4 of the directive, which provides that the Member States are neither to restrict the freedom to provide services nor to restrict the free movement of goods for reasons falling within the field *approximated* by the directive.

42 — See point 33 of this Opinion.

43 — *VTB-VAB and Galatea*, cited above in footnote 4, paragraph 52.

64. By way of exception, Article 3(5) of the directive provides that, for a period of six years from 12 June 2007, Member States may continue to apply national provisions within the field approximated by the directive which are more restrictive or prescriptive than the directive. However, this exception is confined to national provisions which are adopted to implement directives containing minimum harmonisation clauses. [44] Finally, there is a further exception to full harmonisation in Article 3(9) in relation to financial services, as defined in Directive 2002/65/EC, and immovable property.

(ii) The regulatory structure of Directive 2005/29

65. The cornerstone of Directive 2005/29 is the general clause in Article 5(1), which prohibits unfair commercial practices. Article 5(2) sets out in detail what precisely is meant by 'unfair'. It states that a commercial practice is unfair if, first, it is contrary to the requirements of 'professional diligence' and, second, it 'materially distorts' the economic behaviour of consumers. Under Article 5(4), unfair commercial practices are, in particular, those which are misleading (Articles 6 and 7) or aggressive (Articles 8 and 9). Article 5 refers to Annex I and the commercial practices listed there, which 'shall in all circumstances be regarded as unfair'. The same single list applies in all Member States and may be modified only by revision of the directive.

66. It follows that, when the law is being applied by the national courts and administrative authorities, reference must be made in the first place to the list of 31 unfair commercial practices set out in Annex I. If a particular practice can be subsumed under one of those factual situations, it must be prohibited and no further examination is necessary, for example, as to its effects. If the practice in question is not covered by any of the situations on the banned list, it will be necessary

44 — The directives referred to in Article 3(5) that contain minimum harmonisation clauses include the following: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31); Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59); Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ 1994 L 280, p. 83); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19), Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ 1998 L 80, p. 27); Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23).

to determine whether one of the regulated instances of the general clause — misleading or aggressive commercial practices — is involved. The general clause in Article 5(1) of the directive is directly applicable only where that is not the case. [45]

(b) The provisions of the UWG

67. The Court has consistently held that each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues. [46] Coupled with this is the obligation of the national legislature duly to implement the directive in question in national law. [47] However, according to its wording, the third paragraph of Article 249 EC leaves it to the national authorities to choose the form and methods. The right to make that choice rests in particular with the national legislature.

68. For that reason, it is recognised in the Court's case-law that the proper transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. [48] Rather, it is necessary that the national law brought into force to implement the directive should meet the requirements of legal clarity and legal certainty in order to ensure that effect is given to the whole of the directive's programme when the national law is applied by the courts and authorities of the respective Member States. [49]

45 — The same approach is taken by De Cristofaro, G., 'La direttiva 2005/29/CE — Contenuti, rationes, caratteristiche', *Le pratiche commerciali sleali tra imprese e consumatori*, Turin 2007, p. 12, and Henning-Bodewig, F., 'Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken', *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, 2005, Vol. 8/9, p. 631.

46 — See, inter alia, Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraph 22; Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 55; Case C-336/97 *Commission* v *Italy* [1999] ECR I-3771, paragraph 19; Case C-97/00 *Commission* v *France* [2001] ECR I-2053, paragraph 9; Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 15; and Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 75.

47 — The implementation of directives forms part of a two-stage legislative process, the second stage being situated at the level of national law. Substantive implementation at the level of national law gives effect to the law contained in a directive (see, on this point, Vcelouch, P., *Kommentar zu EU- und EG-Vertrag* (ed. Heinz Mayer), Vienna 2004, Article 249, sections 48 and 50, p. 17 and 18).

48 — Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 6; Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 35; Case C-49/00 *Commission* v *Italy* [2001] ECR I-8575, paragraphs 21 and 22; Case C-410/03 *Commission* v *Italy* [2005] ECR I-3507, paragraph 60. This is correctly pointed out by Seichter, D., 'Der Umsetzungsbedarf der Richtlinie über unlautere Geschäftspraktiken', *Wettbewerb in Recht und Praxis*, 2005, p. 1088, in connection with the need to implement Directive 2005/29 in German law.

49 — See, to that effect, Ruffert, M., in Calliess/Ruffert (ed.), *Kommentar zu EUV/EGV*, 3rd edition, 2007, Article 249, paragraph 49, p. 2135. According to settled case-law, the implementation of a directive must ensure its full application: see, inter alia Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31; Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 49; and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 26.

The regulatory structure of the prohibition in Paragraph 9a(1)(1) of the UWG

69. According to the referring court, Paragraph 9a(1)(1) of the UWG prohibits traders from announcing free bonuses to consumers with goods or services. If the main item consists of a newspaper or periodical, the prohibition extends to the mere offering and giving of bonuses. In particular, according to the case-law of the Oberster Gerichtshof, [50] the possibility of taking part in a prize competition, coupled with the purchase of the main item, is deemed to be a bonus.

70. According to the order for reference, [51] however, the courts interpret Paragraph 9a(1)(1) UWG strictly, with the result that not every bonus, given free of charge, is regarded as unlawful. The Oberster Gerichtshof has consistently held that the application of Paragraph 9a(1)(1) UWG requires that the conduct complained of in the particular case be (a) objectively likely to influence consumers in their decision to purchase the main item (main consideration) [52] and that such conduct could (therefore) have (b) led to a significant shift in demand. [53] For that reason, the definition under Paragraph 9a(1) does not apply, as it were, in the absence of an unlawful 'bonus' within the meaning of that provision, if the abovementioned conditions developed by the courts are not met. [54]

71. Notwithstanding this strict interpretation by the Austrian courts, it must be stated that the contested provision in Paragraph 9a of the UWG is based on the rule-exception principle so that the combination of two different goods or services for the purpose of sales promotion is prohibited under subparagraph 1 unless the exceptions listed in subparagraph 2 apply. In other words, that provision prohibits the combining of two different types of goods or services for the purpose of

50 — See p. 10 of the order for reference.

51 — On p. 8 of the order for reference the referring court cites the judgments of the Oberster Gerichtshof of 20 October 1992 in Welt des Wohnens (Ref. 4 Ob 87/92), of 30 January 2008 in ORF-Teletext (Ref. 3 Ob 273/07d), and of 14 February 2008 (Ref. 4 Ob 17/08s).

52 — On p. 8 of the order for reference the referring court cites the judgment in Welt des Wohnens, cited above in footnote 51.

53 — On p. 8 of the order for reference the referring court cites the judgment of the Oberster Gerichtshof of 14 December 1999 in Tipp des Tages III (Ref. 4 Ob 290/99x).

54 — See also p. 4 of the pleading lodged by the applicant in the main proceedings.

sales promotion and is consequently to be understood as a prohibition in principle of combined offers, which none the less permits derogations in certain cases. [55]

(a) Written national law

(i) Reversal of the general scheme

4. Compatibility of the contested provision with Directive 2005/29

72. It is also necessary to consider the question of the compatibility of the contested provision with Directive 2005/29, first examining the structure of the national provision. Should it be established that that national law, on the basis of its wording, is incompatible, it must then be examined whether that provision may nevertheless be regarded as consistent with the directive on the basis of the abovementioned strict interpretation adopted by the Oberster Gerichtshof.

73. As regards the question of the compatibility of the contested provision with Directive 2005/29, it must be stated that the contested prohibition of combined offers in Paragraph 9a(1)(1) of the UWG constitutes a special rule within the UWG which has no counterpart in Directive 2005/29. Paragraph 9a(1)(1) of the UWG imposes a prohibition in principle of combined offers, for which no provision is made in the directive itself.

74. Furthermore, because of the underlying rule-exception principle, the national provision has a different general structure from Directive 2005/29. It is first and foremost this reversal of the general scheme which raises doubts as to compatibility with that directive, the relevant factor being less the formal structure of the provision itself — if the national legislature is allowed a certain margin of discretion in connection with transposition — than the normative statement made in that national provision. It does not correspond

55 — See Horak, M., cited above in footnote 39, p. 1138, who compares Paragraph 9a of the UWG with so-called 'per se prohibitions'. Under per se prohibitions certain abstractly defined commercial practices are prohibited in principle without a court being able to examine the effects on consumers or competitors in the individual case. In order to create an appropriate balance, such prohibitions are generally accompanied by a list of exceptions. In the view of the author, Paragraph 9a of the UWG, with a prohibition in principle of bonuses in subparagraph 1 and a list of exceptions in paragraph 2, follows that system. Heidinger, R., cited above in footnote 17, p. 45, takes the view that Paragraph 9a of the UWG is designed as a per se prohibition under which certain commercial practices are prohibited without the effects on consumers having to be examined in the individual case.

substantively with the provisions of Directive 2005/29. As I have already explained in my Opinion in *VTB-VAB and Galatea*, Directive 2005/29 follows an approach, in favour of the trader's entrepreneurial freedom, which accords essentially with the legal concept of '*in dubio pro libertate*'.[56] Unlike Paragraph 9a(1)(1) of the UWG, the directive presupposes that commercial practices are fair as long as the precisely defined legal conditions for a prohibition are not fulfilled.[57]

75. This liberal approach has a specific regulatory background which consists in ensuring that the aim of the Community legislature enshrined in recitals 4 and 5 and in Article 1 of the directive is achieved, by eliminating obstacles to the free movement of services and goods across borders or the freedom of establishment resulting from the large number of national rules on unfair commercial practices, through uniform rules at Community level which establish a high level of consumer protection to the extent necessary for the proper functioning of the internal market.[58]

(ii) Insufficiency of the exceptions laid down in Paragraph 9a(2) of the UWG

76. Furthermore, exceptions to prohibitions in principle like Paragraph 9a(2) of the UWG are not capable of covering all situations where, under Directive 2005/29, a lawful commercial practice is to be taken to exist, because they do not allow an assessment

56 — See my Opinion in *VTB-VAB and Galatea*, cited above in footnote 4, point 81. Along the same lines see Micklitz, H.-W., cited above in footnote 25, p. 374.

57 — Abbamonte, G., 'The unfair commercial practices Directive and its general prohibition', *The regulation of unfair commercial practices under EC Directive 2005/29 — New rules and new techniques*, Norfolk 2007, p. 15, therefore describes the approach followed by the directive as liberal. Under it, everything that is not expressly prohibited is permitted. De Cristofaro, G., cited above in footnote 45, p. 11, correctly notes that the directive follows a selective approach in that it lays down the criteria for regarding a commercial practice as unfair, whereas it completely omits to define the characteristics of a fair commercial practice.

58 — See Bakardjieva Engelbrekt, A., 'An End to Fragmentation? The Unfair Commercial Practices Directive from the Perspective of the New Member States from Central and Eastern Europe', *The regulation of unfair commercial practices under EC Directive 2005/29 — New rules and new techniques*, Norfolk 2007, p. 47 et seq., who underlines the harmonising effect of Directive 2005/29, the aim of which is to overcome the considerable differences between the Member States' rules on fair practices which existed before it entered into force. See also Bargelli, E., cited above in footnote 21, p. 79. Weatherill, S., 'Who is the "Average Consumer"', *The regulation of unfair commercial practices under EC Directive 2005/29 — New rules and new techniques*', Norfolk 2007, p. 137, describes the approach adopted by Directive 2005/29 as deregulation with simultaneous regulation. Harmonisation of national laws deregulates the market by eliminating legislative diversity in the Member States in favour of a common regime. In the view of Falce, V./Ghidini, G., cited above in footnote 23, p. 372, Directive 2005/29 seeks to restore the balance between, on the one hand, competition within the internal market without borders and, on the other, consumer protection.

of the individual case by the competent national courts and authorities. [59] This was also confirmed by the Court in *VTB-VAB and Galatea*. [60]

77. As combined offers are not included among the commercial practices listed in Annex I which are in all circumstances to be considered unfair, they may in principle be prohibited only if they constitute unfair commercial practices because, for example, they are misleading or aggressive within the terms of the directive. Apart from that, a prohibition under Directive 2005/29 is possible only if a commercial practice is to be regarded as unfair because it is contrary to the requirements of professional diligence or because it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer.

78. It is impossible to give a generally valid reply to the question whether this is the case with regard to combined offers, but what is needed rather is an assessment of the specific commercial practice in each particular case. This is perfectly clear from recital 7 in the preamble to the directive, which states that full account should be taken of the context of the individual case concerned in applying the directive, in particular the general clauses thereof. The words 'in particular' also show that the assessment of the individual case is not confined to applying the general clause of Article 5(1), but also extends to applying the provisions of Articles 5 to 9 of the directive, which amplify Article 5(1). Recital 17 in the preamble to the directive shows that the Community legislature also presumes that a case-by-case assessment by reference to the provisions of Articles 5 to 9 will be necessary where a commercial practice is not one of the practices listed in Annex I. This follows from an *a contrario* reading of the third sentence of recital 17, which states that the commercial practices listed in Annex I are the only ones which 'can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9'.

(iii) Interim conclusion

79. The contested provision, on the basis of the wording of the law, is not compatible with Directive 2005/29.

59 — See also Heidinger, R., cited above in footnote 17, p. 46.
60 — Cited above in footnote 4, paragraphs 64 and 65.

(b) Possibility of an interpretation in conformity with the directive

80. As I explained in my Opinion in *Plus Warenhandelsgesellschaft*, [61] with regard to the question whether a provision of national law is contrary to Community law, it is necessary to take into account not only the wording of that provision, but also how it is interpreted by the national courts. [62] In view of the fact that the case-law of a Member State reproduces the interpretation of the law which has binding effect for all persons, that national case-law is the essential criterion for judging whether the implementation and interpretation of national law are in compliance with Community law. [63]

81. Compatibility with the directive might therefore be suggested by the fact that the Oberster Gerichtshof generally adopts a strict interpretation of the prohibition in principle of combined offers. It cannot be ruled out that such a prohibition is weakened by a strict interpretation by the national court in such a way that it is ultimately brought into line with the directive. Leaving that aside, it should be borne in mind that the Court has consistently held that national courts are required to interpret their national law — whether the provisions were adopted before or after the directive — in the light of the wording and the purpose of the directive, [64] in order to achieve the result referred to in the directive and thus to comply with Article 249(3), the courts giving that interpretation in conformity with the requirements of Community law, in so far as they are given discretion to do so under national law. [65] Connected with this is the possibility of a reduction of the national rule in question in conformity with the directive or

61 — Cited above in footnote 20, point 82.

62 — Lenaerts, K./Arts, D./Maselis, I., cited above in footnote 35, paragraph 5-056, p. 162, point out that the scope of national laws, regulations and administrative provisions must be assessed in the light of how they are interpreted by their national courts. The interpretation of national law in conformity with Community law was the subject of a reference for a preliminary ruling by the German Bundesgerichtshof in Case C-42/95 *Siemens* v *Nold* [1996] ECR I-6017, and by the Belgian Hof van beroep te Gent in Case C-205/07 *Gysbrechts* [2008] I-9947.

63 — See my Opinion of 4 September 2008 in Case C-338/06 *Commission* v *Spain* [2008] ECR I-10139, point 89.

64 — Case 14/83 *von Colson and Kamann* v *Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26; Case 79/83 *Harz* v *Deutsche Tradax* [1984] ECR 1921, paragraph 26; Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 53; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12; Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 39; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 24; Case C-131/97 *Carbonari* [1999] ECR I-1103, paragraph 48; Case 365/98 *Brinkmann Tabakfabriken* [2000] ECR I-4619, paragraph 40; Joined Cases C-240/98 to C-244/98 *Océano Grupo* [2000] ECR I-4941, paragraph 30; Case C-456/98 *Centrosteel* [2000] ECR I-6007, paragraph 16; Case C-371/97 *Gozza* [2000] ECR I-7881, paragraph 37. See also Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 89; Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 36; Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 38; Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-12537, paragraph 21; and Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835, paragraph 113. See Schweitzer, M./Hummer, W./Obwexer, W., *Europarecht*, Vienna 2007, p. 82 et seq.

65 — Case 14/83 *von Colson and Kamann* v *Nordrhein-Westfalen*, cited above in footnote 61, paragraph 28, and Case 79/83 *Harz* v *Deutsche Tradax*, cited above in footnote 61, paragraph 28.

even of a further development of the law, if national courts have the power to do so. [66]

— Article 5(4) and (5) of Directive 2005/29

82. However, the strict interpretation adopted by the Oberster Gerichtshof would have to lead to the normative statement made in Paragraph 9a(1)(1) of the UWG being largely consistent with the provisions of the directive.

The list of unfair commercial practices in Annex I to the directive

Assessment in the light of the provisions of the directive

84. First of all, it must be observed that the commercial practice prohibited by Paragraph 9a(1) of the UWG does not correspond to any of the unfair commercial practices listed in Annex I to the directive. In particular, advertising claiming that products are able to facilitate winning in games of chance, listed as practice No 16, is irrelevant. This relates to a particular form of advertising, [67], but not to the use, in itself, of combined offers. [68] Leaving that aside, the defendant in the main proceedings does not in any way advertise that the mere purchase of goods gives a chance of winning a prize. All that is offered is the opportunity to take part in a game of chance, which is in any case accessible to all, without

83. It is now necessary to determine whether the contested prohibition of combined offers under the strict interpretation given to it by the Austrian courts can be regarded as compatible with the directive. For that purpose, the assessment procedure described in point 66 of this Opinion is to be followed.

66 — In the view of Streinz, R., *Europarecht*, 8th edition, Heidelberg 2008, p. 161, paragraph 456, the duty to give an interpretation in conformity with the directive finds its limits in the ability to interpret national law. Where national courts also have the power to develop national law further, they must, where appropriate, further develop national law in conformity with the directive.

67 — With regard to the regulatory purpose of this prohibition, see Büllesbach, E., cited above in footnote 21, p. 114. If a trader claimed that a product could increase chances of winning a game of chance, it is suggested to the consumer that the winning of the prize can be influenced in his favour by purchasing the product. However, games of chance are characterised by the fact that the winning of a prize is determined by chance. Because of this random element, it is fundamentally inconceivable that the winning of the prize can be influenced. The consumer is therefore deceived as to the fitness for purpose of the product. Because the claim is linked indirectly to the human pleasure in gambling, consumers are particularly vulnerable, since the rationality of their decision may be severely affected by their hope for an easy win.

68 — See point 85 of my Opinion in *Plus Warenhandelsgesellschaft*, cited above in footnote 20.

promising the buyer a greater chance of winning. A consumer who wishes to participate in choosing a 'Footballer of the Year' does not therefore necessarily need to purchase the newspaper in question, but is able to decide between various opportunities for taking part. It is neither suggested, nor is it evident from an objective analysis, that his chances of winning would be lower than the other participants as a result of him choosing a means of taking part other than the purchase of the newspaper in question.

— Misleading and aggressive commercial practices within the meaning of Article 5(4) of the directive

85. It is uncertain whether the commercial practices prohibited by Paragraph 9a(1) of the UWG may be described as misleading or as aggressive within the meaning of Article 5(4) of the directive. This is claimed by the Austrian Government, which considers that the contested provision also transposes Article 6(1)(d) and Articles 8 and 9 of the directive. [69]

Misleading commercial practices within the meaning of Articles 6 and 7 of the directive

86. Misleading commercial practices are characterised, as is shown by an interpretation of Articles 6 and 7 of the directive, above all by the element of deception over the main characteristics of the product. In accordance with Article 6(1)(d) of the directive, the main characteristics of a product include the price.

87. In *Oosthoek's Uitgeversmaatschappij*, [70] to which the Austrian Government refers in its observations, the Court held in connection with the compatibility with the free movement of goods of a Netherlands prohibition of bonuses that 'the offering of free gifts as a means of sales promotion may mislead consumers as to the real prices of certain products and distort the conditions on which genuine competition is based'. The Court concluded that 'legislation which restricts or even prohibits such commercial practices for that reason is therefore capable of contributing to consumer protection and fair trading.'

88. These findings, which were made long before the adoption of Directive 2005/29, have become no less relevant because, on a proper understanding of the passages of the judgment reproduced above, they actually

69 — See paragraph 55, p. 21 of the observations submitted by the Austrian Government.

70 — Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 18.

refer to the abstract danger emanating from a combination of offers which might not sufficiently show the value of the individual products. This is indicated by the use of the verb 'may' in the first sentence. The Court therefore implicitly assumed the need for an assessment of the individual case, as is also required by the Community legislature under Directive 2005/29.

89. Leaving this aside, it is clear from the abovementioned judgment that the Court took a position on the question of the compatibility with free movement of goods of the Netherlands prohibition of bonuses only having regard to its specific legal form. It is not therefore possible simply to apply the Court's conclusions to the main proceedings. Against this background, the argument that any use of bonuses has potential to mislead irrespective of their form is unfounded.

90. Consequently, the contested provision in the strict interpretation given to it by the Austrian court cannot be regarded as being in conformity with Article 6(1)(d) of the directive.

Aggressive commercial practices within the meaning of Article 8 of the directive

91. A general categorisation of combined offers as aggressive commercial practices is not possible either, since Article 8 of the directive requires an influence, by harassment, coercion, or the use of physical force, on the average consumer's freedom of choice or conduct with regard to the product.

92. However, that characteristic is neither typical of combined offers, nor is it present in the main proceedings. The contested provision is not therefore consistent with Article 8 of the directive, despite a strict interpretation.

— Article 5(2) of Directive 2005/29

93. Under the directive, the question of a ban further arises only where a commercial practice is to be regarded as unfair because it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product. For that purpose, the factual

requirements of Article 5(2)(a) and (b) must be cumulatively satisfied. [71]

94. The examination of the compatibility of Paragraph 9a(1)(1) of the UWG with Article 5(2) of Directive 2005/29 is to be made in two steps. First of all, it must be examined whether, having regard to the above mentioned strict interpretation, Paragraph 9a(1)(1) of the UWG lays down the same legal requirements for a prohibition as the directive. If so, it must be examined whether that national provision solely covers situations which are to be assessed as unfair within the meaning of Article 5(2).

Likelihood of materially distorting the behaviour of the average consumer

— Conformity of legal conditions

95. There is extensive substantive conformity between the contested provisions and the requirements of Directive 2005/29 at least with regard to the requirement laid down in Article 5(2)(b), since even on the basis of the strict interpretation adopted by the Austrian courts, for an unlawful bonus within the meaning of Paragraph 9a(1) of the UWG to exist, it is required that announcing, offering or giving such bonuses 'must be objectively likely to influence the behaviour of the consumers concerned'. The referring court also refers in the order of reference itself [72] to the possibility of construing this requirement, which has been developed in Austrian case-law, in the sense of Article 5(2)(b). There are no doubts in this regard provided this essentially identical requirement under national law has the same meaning as in Community law.

— Conformity of scope

96. 'To materially distort the economic behaviour of consumers', for the purposes of Article 5(2)(b), means, according to the legal definition set out in Article 2(e), 'using a commercial practice to appreciably impair the consumer's ability to make an informed

71 — See, to that effect, Abbamonte, G., cited above in footnote 57, p. 21; Massaguer, J., *El nuevo derecho contra la competencia desleal — La Directiva 2005/29/CE sobre las Prácticas Comerciales Desleales*, Cizur Menor 2006, p. 58; Maione, N., 'Le pratiche commerciali sleali nella direttiva 2005/29/CE', *Lezioni di diritto privato europeo*, 2007, p. 1068.

72 — See p. 10 of the order for reference.

decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'. This provision is designed to safeguard the consumer's decision-making freedom. [73]

97. Even though, in its question, the referring court asks generally about the compatibility of Paragraph 9a(1)(1) of the UWG with the directive, in the main proceedings the compatibility of Paragraph 9a(1)(1) of the UWG for all cases covered by it (magazines and prizes) is not relevant to the decision, but only with regard to the combination of magazines and competitions. In their observations the parties to the proceedings refer primarily to this very specific form of combined offers, which do not raise problems from the point of view of consumer protection. For that reason, it is necessary to undertake below a closer examination only of the effects of this specific commercial practice on consumer behaviour.

98. The Austrian Government considers the abovementioned requirement to be satisfied in connection with the combination of goods and competitions. [74] It states that specifically in the case of periodicals at a relatively low individual price, as in the main proceedings, the consumer will decide to purchase the main item for non-objective reasons on the basis of the chances of winning. Specifically in that case, the prospect of taking part, free of charge, in a competition with a chance of a disproportionately large prize may materially distort the purchasing behaviour of consumers in the media sector.

99. As the Austrian Government correctly observes, the use of games of chance in advertising is very likely to arouse the human pleasure in gambling. As I have already explained in my Opinion in *Plus Warenhandelsgesellschaft*, [75] not least because of the prospect of (sometimes) very large winnings, such games exercise a certain attraction. They can arouse the attention of prospective customers and direct them to certain ends by means of the chosen advertising strategy. For that reason, the argument

73 — But not the consumer's economic interest. According to Abbamonte, G., cited above in footnote 57, p. 23, this provision proceeds from the basic assumption that unfair commercial practices as a rule confuse the consumer's preferences because they interfere with his decision-making freedom or capacity. As a result, consumers may buy goods which they do not need or which they would otherwise (without the interference) regard as inferior. However, Article 5(2)(b) of Directive 2005/29 does not require financial damage on the part of the consumer. In the writer's opinion, such a requirement would have been unreasonable because it would significantly have reduced the level of consumer protection within the European Union.

74 — See paragraph 51, p. 20 of the observations submitted by the Austrian Government.

75 — Cited above in footnote 20, point 93.

that a commercial practice of this kind is capable in principle of materially distorting the approach of consumers to what they buy cannot, in general, be rejected out of hand.

100. It is doubtful, however, whether such a generalised approach is readily compatible with the requirements of Community law, as, first of all, as we have already seen, Directive 2005/29 requires a comprehensive assessment of the circumstances of the individual case by the national courts and authorities in order to be able to infer a specific commercial practice [76] and, secondly, in order to examine the effect of the advertising measure in question it has regard to the perception of an average consumer or an average member of a group of consumers.

101. As can be seen from recital 18, the concept of average consumer used in Directive 2005/29 corresponds precisely to the image of a consumer developed in the Court's case-law, [77] who is 'reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'. In the last sentence of recital 18, the concept of average consumer is clarified, it being stressed that 'the average consumer test is not a statistical test'. In addition, it is required that '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'.

102. The method developed by the Court for examining the effects of an advertising measure on an average consumer is founded on the principle of proportionality. It seeks to create an appropriate balance between the aim of consumer protection and the need to encourage the movement of goods in an internal market characterised by free competition. With Directive 2005/29, the Community legislature now codifies this method, entrusting the task of carrying out the examination —

76 — See points 76 to 78 of this Opinion.

77 — See with regard to the model of the consumer in the Court's case-law, Case C-373/90 *X* [1992] ECR I-131, paragraphs 15 and 16; Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31; Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-220/98 *Estée Lauder* [2000] ECR I-117, paragraph 27; Case C-30/99 *Commission* v *Ireland* [2001] ECR I-4619, paragraph 32; Case C-99/01 *Linhart and Biffl* [2002] ECR I-9375, paragraph 31; Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, paragraph 55; Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 77; Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50; Case C-421/04 *Matratzen Concord* [2006] ECR I-2303, paragraph 24; and Case C-356/04 *Lidl Belgium* [2006] ECR I-8501, paragraph 78.

in accordance with the Court's case-law — to the national courts and authorities. This is intended to avert the danger of different assessments of the same commercial practices in a Member State so as to provide a higher degree of legal certainty for consumers and competitors. [78]

and to take rational action accordingly. [79] This is also logical from a regulatory point of view, if the intention is not to regard as unfair, and thus as eligible for prohibition, any form of advertising which might possibly be provocative, but which is generally recognised as harmless. [80]

103. Consideration of a 'reasonably well informed and reasonably observant and circumspect average consumer' is to be interpreted, from a legal point of view, as meaning that in order to safeguard an appropriate relationship between both aims, correspondingly high requirements are to be imposed on the satisfaction of the criterion under Article 5(2)(b). Accordingly, not every commercial practice may be considered to satisfy the criterion merely because it is likely to influence the purchasing decision. Instead, the consumer is considered, from the point of view of Community law, to be capable of recognising the potential risk of certain commercial practices

104. As the defendant in the main proceedings observes, in my view rightly, [81] the average consumer nowadays is aware, as a rule, that advertising and sales promotions in a free market economy not only attempt to win over customers by the price and quality of the product, but promise a number of additional benefits. These may be of an emotional nature, such as, in the case of advertising, the feeling of freedom and independence or membership of a certain social group, or additional benefits with a completely economic value, such as bonuses. It is therefore logical to leave it to such a reasonably well-informed

78 — Abbamonte, G., cited above in footnote 57, p. 25, points out that with Directive 2005/29 the Community legislature now codifies this method which has not been applied by the courts of many Member States. The writer takes the view that this minimises the danger of different assessments of the same commercial practices within the European Union and increases legal certainty. See also Wiebe, A., cited above in footnote 38, p. 75, and Micklitz, H. W., 'Das Konzept der Lauterkeit in der Richtlinie 2005/29/EC', *Droit de la consommation/Konsumentenrecht/Consumer law, Liber amicorum Bernd Stauder*, Basel 2006, p. 311. Weatherill, S., 'Who is the "Average Consumer"', *The regulation of unfair commercial practices under EC Directive 2005/29 — New rules and new techniques*', Norfolk 2007, p. 135, states that employing the notion of an average consumer may appear artificial in view of different consumer behaviours, but is essential for an effective harmonised regulatory system.

79 — Lecheler, H., 'Verbraucherschutz', in: *Handbuch des EU-Wirtschaftsrechts* (ed. Manfred Dauses), Vol. 2, Munich 2004, H.V, paragraph 27, p. 11, interprets the Court's case-law (cited in footnote 77 of this Opinion) to the effect that the assumption is of a consumer acting reasonably and circumspectly in principle, who is able to orient himself and is capable of self-determination.

80 — For example, Maione, N., cited above in footnote 71, p. 1068, points out that, according to the will of the Community legislature, it is not intended to prohibit any commercial practice which influences the purchasing behaviour of the consumer, but only practices which do not meet the requirements of professional diligence by impairing the decision-making freedom of the consumer.

81 — See p. 10 of the observations of the defendant in the main proceedings.

and reasonably observant and circumspect consumer within the regulatory framework defined by Community law to decide whether to purchase a product on the basis of the advertised advantages or because of its quality or even its low price. [82]

be seen as the patronising of consumers. [83] At the same time it would represent a disproportionate restriction on free movement of goods and freedom to provide services. Such a prohibition would go beyond what is necessary in order to take account of the interests of consumers and free movement of goods and freedom to provide services.

— Interim conclusion

105. The assumption inherent in any statutory prohibition in principle that any combination of a product and a competition is dangerous and must therefore be prohibited, irrespective of its actual potential danger and the particular features of the group to whom it is addressed, would not, however, be consistent with the model of the consumer under Community law. It would ultimately have to

106. In summary, it must be stated that the prohibition of combined offers contained in Paragraph 9a(1)(1) of the UWG in the strict interpretation adopted by the Austrian court is based on a legislative balancing act which is not consistent with the stipulations of Directive 2005/29.

107. Even though this conclusion is sufficient to answer the first question in the affirmative, in reply to the statements made by the referring court and the Austrian Government, I will examine below, in the alternative, the

82 — See also Kucsko, G., cited above in footnote 37, p. 709, who doubts that the arguments underlying the background materials for the 1929 Prämiengesetz (to which the prohibition of bonuses in Paragraph 9a(1)(1) of the UWG ultimately dates back) still have significance nowadays. The consumer today is much more circumspect and informed. Advertising has also changed significantly in the last few decades. The consumer is exposed, and accustomed, to a much greater extent to being courted by — not always factual — advertising. The 'image' of certain brands is loaded with associations which no longer have anything to do with the actual characteristics of the product. On the other hand, the critical judgement of consumers has been sharpened through the regular publication of objective comparison tests, through certification marks, through critical consumer magazines etc., not only for the products tested, but in general. The consumer today is therefore much more capable of assessing himself whether he wishes to be enticed on the basis of non-objective considerations or whether the price for the main item is too high for him. In the case of a bonus, he also receives more than an intangible 'image'. He receives a real product or service. The patronising argument of seeking to protect consumers is no longer convincing.

83 — Heidinger, R., cited above in footnote 17, p. 46, and Wittmann, H., 'EuGH: Zugabenverbot vor dem Fall?', *Medien und Recht*, 6/2008, p. 284, take up the reservations expressed by the referring court in the order for reference. They point out that the image of an empowered consumer underlying Article 5(2) of Directive 2005/29 would be an argument against assuming an unfair practice in the main proceedings. Such extensive consumer protection runs counter to current image of an empowered consumer who must be free in principle to take his economic decisions on the basis of non-objective considerations.

compatibility of the contested provision with the other requirements laid down in Article 5(2) of the directive.

Failure to meet the requirements of professional diligence

— Conformity of legal conditions

108. An obvious difference with the stipulations of the directive is that, even under a strict interpretation, the contested provision dispenses entirely with the essential condition of a failure to meet the requirements of professional diligence, as laid down in Article 5(2)(a) of the directive.

109. The Austrian Government argues in this connection that the requirements of professional diligence actually form the inherent basis for the contested provision, since it seeks to protect competition from the dangers of exploitation of the consumer's gambling compulsion. Compliance with the requirements of professional diligence must be examined by the court in each individual case, depending on the specific conditions of the profession. [84] This argument is to be construed as meaning that the contested national provision is intended to implement that requirement, even if by means of a rectifying interpretation by the court having jurisdiction.

110. However, these arguments in relation to national law are not convincing. The referring court nevertheless makes express reference to the fact that, unlike the case of the abovementioned requirement of a material distortion of behaviour of consumers, [85] the Austrian courts cannot consider whether the fact of announcing, offering or giving a bonus is unfair in principle, because it is contrary to the requirements of professional diligence. [86] The referring court therefore has doubts that a general prohibition of bonuses, in the present versions, may be compatible with Directive 2005/29.

— Interim conclusion

111. The statements made by the referring court therefore confirm my opinion that the prohibition of combined offers contained

84 — See paragraph 47, p. 19 of the observations submitted by the Austrian Government.

85 — See point 95 of this Opinion.

86 — See p. 10 of the order for reference.

in Paragraph 9a(1)(1) of the UWG does not satisfy the stipulations of the directive with regard to the requirement laid down in Article 5(2)(a) either. There is therefore no conformity between the legal conditions in Article 5(2)(a) and the contested provision. It has also not been proven that there is a different condition in the Austrian rules on fair commercial practices which, for instance, conforms to the legal conditions laid down in Article 5(2)(a).

112. In view of the fact that this is sufficient to conclude that the contested provision is incompatible with Article 5(2) of Directive 2005/29, I do not consider that there is any need to continue the examination on the basis of that provision of the directive.

(c) Conclusion

113. To sum up, it may be stated that a national provision such as Paragraph 9a(1)(1) of the UWG, in the interpretation attributed to it, which imposes a prohibition in principle on combined offers, without providing for the possibility of taking account of the circumstances of the particular case, is by its nature more restrictive and more stringent than the provisions of Directive 2005/29.

114. In this connection it must be noted that Paragraph 9a(1)(1) of the UWG concerns a sector which is subject to full harmonisation and to which the transitional provisions of Article 3(5) of the directive do not apply. It has also not been demonstrated by either of the parties that the contested national provision is to be classified in one of the fields which are listed in recital 9 in the preamble to the directive. [87] The exception laid down in Article 3(9) is likewise not applicable.

115. The prohibition in principle of combined offers laid down by Paragraph 9a(1)(1) of the UWG, as interpreted above, amounts in effect to extending the list of prohibited commercial practices in Annex I to the directive, which is, however, precisely what the Member States are barred from doing in view of the full maximum harmonisation which

87 — As Schuhmacher, W., cited above in footnote 21, p. 131, rightly observes, recital 9 of the preamble to Directive 2005/29 lists certain barriers to full harmonisation. Nevertheless, neither of the parties in the present preliminary ruling proceedings has explicitly demonstrated that those barriers are applicable to the main proceedings. This does not appear to be the case on an objective analysis either.

goes hand-in-hand with Directive 2005/29 [88]. In addition, the Member States are prohibited from making unilateral additions to this list because, under Article 5(5), the list can be modified only by revision of the directive itself, that is to say, by means of the joint decision procedure laid down in Article 251 EC.

116. In view of the above considerations, I conclude that, despite a strict interpretation, a national provision like that contained in Paragraph 9a(1)(1) of the UWG is not consistent with the stipulations of Directive 2005/29.

The withdrawal of the Commission proposal for a regulation on sales promotions in the internal market

117. The Austrian Government bases some of its arguments on individual provisions of the Proposal for a regulation concerning sales promotions in the internal market ultimately withdrawn by the Commission. [89] It includes rules on the offering of free gifts, premiums and the chance of taking part in promotional contests and games. The Austrian Government believes that it can conclude from the withdrawal of that proposal that the regulatory scope which would have been covered by the proposal for a regulation concerning sales promotions is still unregulated and is not covered, for example, by Directive 2005/29.

118. I have already made detailed comments on the consequences of the withdrawal of that Commission proposal for the legal treatment of combined offers in my Opinions in *VTB-VAB and Galatea* [90] and in *Plus Warenhandelsgesellschaft*. [91] This was in response to the essentially identical arguments put forward by the Belgian and German Governments in those cases. In those Opinions, I stated why, in my view, no conclusions can be drawn, for purposes of the interpretation of Directive 2005/29, from the Commission proposal for a regulation concerning sales promotions in the internal market or from the proposed amendments submitted in the course of the legislative process.

88 — Abbamonte, G., cited above in footnote 57, p. 21, points out that the Member States may not themselves add to the exhaustive list of prohibited commercial practices in Annex I to Directive 2005/29. If they were allowed to do so, this would have the result of circumventing the maximum harmonisation which is the aim of the directive, which would frustrate the objective of legal certainty. Keirsbilck, B., cited above in footnote 14, p. 522, describes the list of prohibited commercial practices contained in Annex I as exhaustive.

89 — Commission Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market, 15 January 2002, COM(2001) 546 final.

90 — Cited above in footnote 15, points 90 to 94.

91 — Cited above in footnote 20, points 106 to 111.

119. The abovementioned proposal concerns Community legislation which ultimately never entered into force and therefore never became part of the Community legal order. It cannot therefore be readily used as an aid to interpretation. This applies especially where the Commission withdrew that proposal of its own volition, as in the case of the abovementioned proposal for a regulation. It must be borne in mind that the Commission has a right of initiative and may therefore withdraw its proposals. Furthermore, those proposals may be subject to numerous alterations by the Council and the Parliament in the course of a legislative process, with the result that they are of only limited utility as aids to interpretation. [92] The final version of such a regulation can therefore only be conjectured. In this respect such a proposal is not likely to create a legitimate expectation.

120. A Member State also cannot successfully rely on protection of legitimate expectations if it played a key role in both legislative processes. The legislative processes for the regulation and Directive 2005/29 ran, in part, concurrently. As the constitutional representative of a Member State represented within the Council, the Austrian Government played a key role in both legislative processes and was therefore constantly informed of their progress. Therefore it cannot plead, in a legally effective manner, that it was unaware of the course of events in both legislative processes.

121. The Court has stressed the particular responsibility of the governments of the Member States represented within the Council in the implementation of directives. The Court has thus inferred that, as the governments of the Member States participate in the preparatory work on directives, they must be in a position to prepare within the period prescribed the legislative provisions necessary for their implementation. [93]

122. Therefore, by the date of the withdrawal of the Commission's proposal at the latest, [94] the Austrian Government ought to have

92 — See point 83 of my Opinion of 29 October 2009 in the pending Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* v *Ausbanc*. See Riesenhuber, K., 'Die Auslegung', in: *Europäische Methodenlehre*, Berlin 2006, p. 257, paragraph 31. The author writes that historical interpretation in European private law, which involves the historical background and legislative history, plays a central role. If the purpose of interpretation is to ascertain the legislature's intention, it is first necessary to determine whose intention is to be taken into account. The democratically legitimated legislature consists only of those legislative bodies the assent of which attaches to the legal measure in any specific case. On the other hand, various bodies have only to be heard and even the Commission has only a right of initiative and the option of withdrawing proposals; its proposals may be altered at will in the legislative process. If the Commission's proposals or intentions are not adopted, a contrary inference at the most may, but need not necessarily, be drawn from this.

93 — Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 11, and Case C-319/99 *Commission* v *France* [2000] ECR I-10439, paragraph 10.

94 — The Commission's decision to withdraw its proposal for the regulation was published in OJ 2006 C 64, p. 3. However, the Commission had already announced this decision in its communication of 27 September 2005 entitled 'Outcome of the screening of legislative proposals pending before the Legislator', COM(2005) 462 final, p. 10.

examined, if appropriate, how far the scope *ratione materiae* of Directive 2005/29 would also extend to areas previously covered by the planned regulation. This was obviously necessary, particularly as the directive was originally intended, first, to introduce general subsidiary rules into the Community-law area of consumer protection and, secondly, to bring about full harmonisation of the Member States' rules concerning unfair commercial practices. [95] As the proposal was withdrawn at a time when the period for implementing the directive was still running, the Austrian legislature ought to have taken those factors into account when adjusting national law.

123. Finally, it should be noted that in *VTB-VAB and Galatea* the Court did not examine the essentially identical arguments put forward by the Belgian Government, thereby making implicit that it did not concur with that line of argument. This was ultimately confirmed in the judgment in *Plus Warenhandelsgesellschaft*. [96]

124. This submission must accordingly be rejected.

## 5. Conclusions

125. In summary, it can be stated that the incompatibility of the contested national provision with the stipulations of Directive 2005/29 is suggested by the fact that that provision, designed as a prohibition in principle, has a regulatory structure which does not allow an assessment of the fairness of the specific commercial practice in the individual case to the same extent as the directive. [97]

126. It must also be stated that the contested national provision — even on the basis of a strict interpretation as advocated by the Austrian courts — cannot be seen as having correctly transposed the provisions of Articles 5(2), (4) and (5) of the directive. This stems from the fact that the legal conditions under national law either do not conform to the requirements of the directive for classification of a commercial practice as unfair or cannot be interpreted consistently with the directive.

95 — That is also the opinion of Stuyck, J., cited above in footnote 18, p. 161, who voices the suspicion that several Member States obviously did not realise that the provisions of the withdrawn proposal for a regulation, which concerned the relationship between traders and consumers, were ultimately taken up again by Directive 2005/29 (in view of the objective of full harmonisation).

96 — Cited above in footnote 5, paragraph 33.

97 — See points 76 to 79 of this Opinion.

127. Because Directive 2005/29 precludes a prohibition of combined offers such as that provided for in Paragraph 9a(1)(1) of the UWG, there is no need to examine the possibility of a breach of fundamental freedoms. [98]

128. Against this background, the answer to the first question must be that the provisions of Directive 2005/29 preclude a national provision which makes it illegal to announce, offer or give bonuses, free of charge, with periodicals and newspapers, and to announce bonuses, free of charge, with other goods or services, apart from exhaustively specified exceptions, without it being necessary in any particular case to consider whether such a commercial practice is misleading, aggressive or otherwise unfair, even where that provision serves not only to protect consumers, but also serves other purposes which are not covered by the material scope of the directive, for example, the maintenance of media diversity or the protection of weaker competitors.

129. Lastly, it should be borne in mind in this connection that — contrary to the apparent assumptions of the referring court [99] — the Court has held [100] that it is not required, at least under Community law, that national courts, where they are hearing proceedings between individuals, disapply a national provision which is not consistent with a directive.

C — *The second question*

130. On a reasonable interpretation, the second question essentially asks the Court to determine whether a particular commercial practice may be regarded as 'unfair' within the meaning of Article 5(2) of Directive 2005/29 under circumstances which the referring court evidently takes to exist. Specifically, in its statements, the referring court proceeds from the premise that 'the chance of taking part in a prize competition, which is acquired with the purchase of a newspaper, is, for at least some of those to whom the offer is addressed, not the only, but the decisive reason for purchasing the newspaper'.

98 — *VTB-VAB and Galatea,* cited above in footnote 4, paragraph 67.

99 — See point 2.2 on p. 13 of the order for reference. The referring court takes the view that, should the Court of Justice reply to the first question in the affirmative, Paragraph 9a(1)(1) of the UWG would serve no purpose.

100 — With regard to the horizontal direct effect of directives, see Case C-106/89 *Marleasing,* cited above in footnote 64, paragraph 6; Case C-91/92 *Faccini Dori,* cited above in footnote 64, paragraph 24 et seq.; Case C-443/93 *Unilever Italia* [2000] ECR I-7535, paragraph 50. With regard to the possibility of State liability where national provisions are not interpreted in a manner compatible with the directive, see Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845; Case C-111/97 *EvoBus Austria* [1998] ECR I-5411, paragraphs 27 and 28; and Case C-81/98 *Alcatel Austria* [1999] ECR I-7671, paragraphs 49 and 50.

This characteristic is relevant first and foremost in clarifying whether the economic behaviour of the average consumer is materially distorted within the meaning of Article 5(2)(b) of the directive in the case at issue.

131. Article 5(2)(b) of the directive makes clear that the key factor is the effect of a particular commercial practice on the behaviour of the average consumer whom it reaches or to whom it is addressed. This provision of the directive not only adopts the method of examination developed by the Court, but refines it by adapting it to situations where the interests of specific groups are concerned. [101] When a particular commercial practice is directed to a particular group of consumers, it is relevant whether that commercial practice materially distorts or is likely to materially distort the economic behaviour of the average member of that group. In carrying out this examination, regard must be had to the perspective of that average consumer, account being taken, among other things, of his expectations and probable reactions. [102]

132. Since the invitation to take part in the competition published by the defendant in the main proceedings in its newspaper clearly appeared in a general newspaper and not, for example, in a sports newspaper, it is for the national court to examine the extent to which that offer might be addressed to a specific readership and to which that second criterion is therefore to be applied.

133. In any event, it must be borne in mind that in order to be able to conclude that a commercial practice is unfair within the meaning of Article 5(2), the criteria in subparagraphs (a) and (b) must be met cumulatively. [103] A failure to meet the requirements of professional diligence would therefore also have to exist in the present case. The concept of 'professional diligence' is defined in Article 2(h) of the directive as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'. It is for the national court to examine in detail whether such a failure exists in the main proceedings.

134. The answer to the second question must therefore be that the chance of taking part in a prize competition, which is acquired with the purchase of a newspaper, is not an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29/EC merely because that chance is, for at least some of those to whom the offer is addressed, not the only, but probably the main reason for purchasing the newspaper.

101 — See also Abbamonte, G., cited above in footnote 57, p. 25, who mentions a refinement through an adaptation of that method of examination where the interests of specific groups are concerned.

102 — Abbamonte, G., cited above in footnote 57, p. 25, gives examples of the application of that provision. When a commercial practice is directed to a particular group of consumers, such as children or rocket scientists, regard must be had to the perspective of an average member of that group. In the case of toy advertising in connection with a children's programme, regard will be had, in the view of the author, to the expectations and probable reactions of an average child in the target group and such expectations and reactions which are typical of an exceptionally immature child must be disregarded.

103 — See point 93 of this Opinion.

## VII — Conclusion

135. In the light of the above considerations, I propose that the Court answer the questions referred by the Oberster Gerichtshof as follows:

(1) The provisions 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') are to be interpreted as precluding a national provision like Paragraph 9a(1)(1) of the UWG which makes it illegal to announce, offer or give bonuses, free of charge, with periodicals and newspapers, and to announce bonuses, free of charge, with other goods or services, apart from exhaustively specified exceptions, without it being necessary in any particular case to consider whether such a commercial practice is misleading, aggressive or otherwise unfair, even where that provision serves not only to protect consumers, but also serves other purposes which are not covered by the material scope of the directive, for example, the maintenance of media diversity or the protection of weaker competitors.

(2) The chance of taking part in a prize competition, which is acquired with the purchase of a newspaper, is not an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29/EC merely because that chance is, for at least some of those to whom the offer is addressed, not the only, but probably the main reason for purchasing the newspaper.