

Court of Justice EU, 26 October 2016, Canal Digital



## ADVERTISING LAW

Consideration should be given to the context in which the practice takes place when assessing whether a commercial practice must be considered as a misleading omission

- In particular limitations of the communication mediums used should be given consideration

In the light of the above considerations, the answer to the first question is that Article 7(1) and (3) of Directive 2005/29 must be interpreted as meaning that, for the purposes of assessing whether a commercial practice must be considered as a misleading omission, consideration should be given to the context in which that practice takes place, in particular the limitations of the communications medium used for the purposes of that commercial practice, the limitations of time and space imposed by that communications medium and any measures taken by the trader to make the information available to consumers by other means, even though that requirement is not expressly referred to in the wording of the national legislation in question.

Dividing the price of a product into several components and highlighting one of them must be regarded as misleading

- That practice would be likely to give the average consumer the false impression the has been offered a favourable prices and cause him to make a transactional decision he would not have made otherwise

In the light of those considerations, the answer to the second question is that Article 6(1) of Directive 2005/29 must be interpreted as meaning that a commercial practice which consists of dividing the price of a product into several components and highlighting one of them, must be regarded as misleading, since that practice would be likely, first, to give the average consumer the false impression that he has been offered a favourable price and, secondly, cause him to make a transactional decision that he would not have made otherwise, which it is for the referring court to ascertain, taking into account all the relevant circumstances of the main proceedings. However, the time constraints that may apply to certain communication media, such as television commercials, cannot be taken into account when assessing whether a commercial practice is misleading under Article 6(1) of that directive.

Highlighting the monthly charges and omitting entirely or presenting in a less conspicuous manner of six-monthly charges in marketing communications is a misleading omission when it causes a transactional decision of a consumer he would not have taken otherwise.

- It is for the referring court to assess, taking into account the limitations of the communication medium used, the nature and characteristics of the products and the other measures the trader has actually taken to make material information about the product available to the consumer

In the light of those considerations, the answer to the third question is that Article 7 of Directive 2005/29 must be interpreted as meaning that, where a trader has opted to state the price for a subscription so that the consumer must pay both a monthly charge and a sixmonthly charge, that practice must be regarded as a misleading omission if the price of the monthly charge is particularly highlighted in the marketing, whilst the six-monthly charge is omitted entirely or presented only in a less conspicuous manner, if such failure causes the consumer to take a transactional decision that he would not have taken otherwise. It is for the referring court to assess, taking into account the limitations of the communication medium used, the nature and characteristics of the product and the other measures that the trader has actually taken to make material information about the product available to the consumer.

Article 7(4) of Directive 2005/29 contains an exhaustive list of the material information that must be included in an invitation to purchase

- It is for the national court to determine whether the trader at issue has satisfied his duty to provide information

In the light of those considerations, the answer to the sixth and seventh questions is that Article 7(4) of Directive 2005/29 must be interpreted as meaning that it contains an exhaustive list of the material information that must be included in an invitation to purchase. It is for the national court to determine whether the trader at issue has satisfied his duty to provide information, taking into account the nature and characteristics of the product but also the communication medium used for the invitation to purchase and additional information possibly provided by that trader. The fact that a trader provides, in an invitation to purchase, all the information listed in Article 7(4) of that directive does not preclude that invitation from being regarded as a misleading commercial practice within the meaning of Article 6(1) or Article 7(2) of that directive.

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Court of Justice EU, 26 October 2016

(J.L. da Cruz Vilaça, M. Berger, A. Borg Barthet (Rapporteur), E. Levits and F. Biltgen)

JUDGMENT OF THE COURT (Fifth Chamber)

26 October 2016 (\*)

*(Reference for a preliminary ruling — Unfair commercial practices — Directive 2005/29/EC — Articles 6 and 7 — Advertising relating to a satellite TV subscription — Subscription price including, in addition to the monthly subscription charge, a six-monthly charge for the card required for decoding emissions — Six-monthly charge omitted or presented in a less conspicuous manner than the monthly charge — Misleading action — Misleading omission — Transposition of a provision of a directive only in the preparatory work for the national transposing legislation and not in the wording of that legislation itself)*

In Case C-611/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Retten i Glostrup (Court of Glostrup, Denmark), made by decision of 1 December 2014, received at the Court on 23 December 2014, in the criminal proceedings against Canal Digital Danmark A/S, THE COURT (Fifth Chamber), composed of J.L. da Cruz Vilaça, President of the Chamber, M. Berger, A. Borg Barthet (Rapporteur), E. Levits and F. Biltgen, Judges, Advocate General: Y. Bot, Registrar: A. Calot Escobar, having regard to the written procedure, after considering the observations submitted on behalf of:

- Canal Digital Danmark A/S, by M. Hopp, advokat,
- the Danish Government, by C. Thorning and M. Søndahl Wolff, acting as Agents,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Urbani Neri, avvocato dello Stato,
- the Austrian Government, by G. Eberhard, acting as Agent,
- the Finnish Government, by H. Leppo, acting as Agent,
- the Norwegian Government, by T. Skjeie and I. Jansen, acting as Agents,
- the European Commission, by M. Clausen and D. Roussanov, acting as Agents,

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

#### Judgment

1. This request for a preliminary ruling concerns the interpretation of Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European

Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

2. This request has been submitted in criminal proceedings against Canal Digital Danmark A/S ('Canal Digital') concerning the marketing by that company of television programme packages by subscription.

#### Legal context

##### Directive 2005/29

3. Recitals 5, 6, 11, 12, 14 and 18 in the preamble to Directive 2005/29 state:

*'(5) In the absence of uniform rules at Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment could be justified in the light of the case-law of the Court of Justice of the European Communities as long as they seek to protect recognised public interest objectives and are proportionate to those objectives. In view of the Community's objectives, as set out in the provisions of the Treaty and in secondary Community law relating to freedom of movement, and in accordance with the Commission's policy on commercial communications as indicated in the Communication from the Commission entitled "The follow-up to the Green Paper on Commercial Communications in the Internal Market", such obstacles should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty.*

*(6) This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors.*

...

*(11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour.*

*(12) Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area.*

...

*(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. In conformity with the laws and practices of Member*

States on misleading advertising, this Directive classifies misleading practices into misleading actions and misleading omissions. In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision. Such information will not have to be disclosed in all advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in this Directive. The full harmonisation approach adopted in this Directive does not preclude the Member States from specifying in national law the main characteristics of particular products such as, for example, collectors' items or electrical goods, the omission of which would be material when an invitation to purchase is made.

...

(18) It is appropriate to protect all consumers from unfair commercial practices. ... In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice ... The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.'

4. Article 1 of Directive 2005/29 is worded as follows: 'The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.'

5. Article 2 of that directive provides as follows: 'For the purposes of this Directive:

...

(c) "product" means any goods or service ...;

(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;

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

...

(i) "invitation to purchase" means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;

...

(k) "transactional decision" means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting'.

6. Article 5 of Directive 2005/29 is worded as follows:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

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

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

...

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

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

7. Article 6 of Directive 2005/29, entitled 'Misleading actions', provides:

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

...

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

...'

8. Article 7 of Directive 2005/29, headed 'Misleading omissions', provides:

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

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



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

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

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

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

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

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

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

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

#### **Danish law**

9. Directive 2005/29 was transposed into Danish law by lov nr. 1547 om ændring af lov om markedsføring (Gennemførelse af direktivet om urimelig handelspraksis, kontrolundersøgelser m.v.) (Law No 1547 amending the Commercial Practices Act (transposing the Unfair Commercial Practices Directive, and concerning inspections, etc.)) of 20 December 2006 ('the Law amending the Commercial Practices Act').

10. Article 3 of the markedsføringslov (Commercial Practices Act), in the version applicable to the dispute in the main proceedings ('the Commercial Practices Act'), provides as follows:

*'Traders may not use misleading or improper statements or omit material information if this is likely to materially distort consumers' or other traders' economic behaviour in the market. Marketing whose content, form or method used is misleading, aggressive or subjects the consumers or traders to improper influence, and which is likely to materially distort their economic behaviour, is not permitted. Where factual statements are made, these must be capable of being documented. The Minister for Business and Growth lays down more detailed regulations for specific forms of marketing which, under EU law, are considered in any circumstances to be unfair to consumers.'*

11. The statement of the reasons for draft Law No L 2 of 4 October 2006, which led to the adoption of the Law amending the Commercial Practices Act, states:

*'Articles 6, 7, 8 and 9 of the [Unfair Commercial Practices Directive] are to be incorporated into a redrafting of the current provision on misleading and improper marketing in Article 3, together with a new provision which incorporates the Directive's requirement of information for an invitation to purchase in consumer situations.'*

12. In accordance with the preparatory work for that legislation, relating to the draft of Article 3 (1), which formed the basis for the current wording of Article 3(1) of the Commercial Practices Act:

*'Omissions can consist in a trader failing to disclose information or providing it in an unclear, unintelligible, ambiguous or unsuitable manner. In the assessment of whether there is a material omission, account must be taken of the context in which the marketing takes place, including all circumstances and limitations relating to the communications medium used. Account must also be taken of any measures taken by the trader to make the information available in other forms of marketing. There may, however, be some material information which under any circumstances it will be misleading to omit, even in advertisements which are limited in time and space. The final decision on whether there has been an infringement will, as has been the case to date, turn on a concrete assessment of the specific commercial practice.'*

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

13. Canal Digital is an undertaking established in Denmark which provides television solutions, including television programme packages, to consumers.

14. Proceedings against that company have been brought before the Retten i Glostrup (Glostrup Court, Denmark) for having infringed Article 3(1) of the Commercial Practices Act on six occasions, in connection with an advertising campaign for TV subscriptions in the autumn of 2009.

15. According to that court, that campaign consisted of two advertisements shown on television and on the internet, as well as three banner ads on the internet, in particular on the homepage of Canal Digital's website.

16. The prices of those subscriptions consisted, first, of a monthly charge of DKK 99 (about EUR 13.30) or DKK 149 (about EUR 20) and, secondly, a six-monthly 'card service' charge of DKK 389 (about EUR 52.30).

17. In the two advertising spots shown on television and on the internet, the monthly charge was given by voiceover and shown in a circle and in a text at the bottom of the screen. No information about the six-month 'card service' was given by voiceover. The charge for that 'card service' was given in the text at the bottom of the screen, which also stated the total amount the consumer would have to pay for the first year of subscription ('the commitment period'). The total price the consumer would have to pay for the commitment period, including the six-monthly 'card

service', was also shown in the circle on the screen, in smaller font than for the monthly charge, but was not mentioned in the advertisement's voiceover. The text referring to the six-monthly 'card service' and the total price to be paid for the commitment period, shown in smaller font at the bottom of the screen, was shown for longer than the circle, for about 6 seconds. In the advertisement for the DKK 99 price, the monthly charge in the circle was given in font that was about four times larger than the text at the bottom of the screen. The latter text was white and part of it, relating, in particular, to the six-monthly 'card service', was shown against a light background. In the advertisement for the DKK 149 price, the monthly charge in the circle was given in font that was about 1.5 times larger than the text at the bottom of the screen. The latter text was white and was shown against a blue and green background.

18. In one of the banner ads, the monthly subscription price of DKK 99 was shown in a circle. The circle also contained, in smaller font, the total price the consumer would have to pay for the commitment period. No information was given for the six-monthly 'card service'. By clicking on the banner ad, the consumer could obtain further information about the subscription, in particular about the 'card service'.

19. In the two other banner ads only the monthly subscription price of DKK 99 was shown. By clicking on the banner ad, the consumer could access the homepage of Canal Digital's website, where he could find further information about the subscription, in particular about the six-monthly 'card service'.

20. The last count in respect of which proceedings have been brought concerns the homepage of Canal Digital's website. The television subscription was marketed under the heading 'Denmark's cheapest digital TV package with HD'. Alongside that text, there was a circle in which the price of DKK 99 was shown. Under that reference the total price to pay for the commitment period was shown in smaller font. Information relating to the six-monthly 'card service' appeared a little lower on that homepage, in a different and smaller font, and, further down, under the heading 'terms and conditions of the offer'. Here the total price the consumer would have to pay for the commitment period, including the 'card services', was also mentioned.

21. In the above-mentioned six cases, proceedings for infringement of Article 3(1) of the Commercial Practices Act were brought against Canal Digital before the referring court, on the ground that Canal Digital did not provide consumers with sufficiently clear information regarding the fact that, in addition to the monthly price of DKK 99 or DKK 149, there was also a six-monthly charge of DKK 389 for a 'card service'.

22. That court, which notes that the provisions of Article 7(1) and (3) of Directive 2005/29 were not included in the Commercial Practices Act, but are only mentioned in the statement of the reasons for the draft law which led to the adoption of the Act, is uncertain as to whether that Act complies with that directive.

23. Considering, moreover, that the dispute in the main proceedings raises questions concerning the interpretation of Articles 6 and 7 of that directive, the Retten i Glostrup (Glostrup Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

*'(1) Is [Directive 2005/29] to be interpreted as precluding a national scheme, such as that provided for in Article 3 of the [Danish Commercial Practices Act], which prohibits misleading commercial practices, including in connection with invitations to purchase, but which neither in Article 3 nor elsewhere in the law refers to the limitations set out in Article 7(1) of the Directive, under which account is to be taken of whether a commercial practice omits material information, that the average consumer needs, according to the context, in order to take an informed transactional decision, and as a result of Article 7(3), under which account should be taken of the fact that the*

*communications medium used imposes limitations of time and space?*

*(2) Is Article 6 of [Directive 2005/29] to be interpreted as meaning that — in situations where a trader has opted to state a total price for an ongoing subscription so that the consumer must pay both a monthly charge and a six-monthly charge — it will be considered a misleading practice if the monthly charge is particularly highlighted in the marketing, whilst the six-monthly charge is omitted entirely or presented only in a less conspicuous manner?*

*(3) Is Article 7 of [Directive 2005/29] to be interpreted as meaning that — in situations where a trader has opted to state a total price for an ongoing subscription so that the consumer must pay both a monthly charge and a six-monthly charge — it will be considered a misleading omission under Article 7 of the Directive if the monthly price is particularly highlighted in the marketing, whilst the six-monthly charge is omitted entirely or presented only in a less conspicuous manner?*

*(4) In the assessment of whether a commercial practice is misleading in a situation such as that described in questions 2 and 3, is account to be taken of whether the abovementioned commercial practice:*

*(a) states the total price for the subscription in the commitment period, including the six-monthly charge, and/or*

*(b) is done through advertisements or publicity on the internet, where reference is made to the trader's website, where the six-monthly charge and/or the total price for the subscription, including the six-monthly charge, is stated?*

*(5) Does it have any bearing on the answers to questions 2 and 3 if the marketing takes place in a television advertisement?*

*(6) Does Article 7(4) of [Directive 2005/29] contain an exhaustive list of what information is material for an invitation to purchase?*

*(7) If question 6 is answered in the affirmative, does Article 7(4) of the Directive rule out the possibility that*

*an invitation to purchase — which states the total price the consumer will have to pay for the first year of the subscription's contract period (commitment period) — can be regarded as a misleading commercial practice under Article 7(1) and (2) or Article 6 of [that] Directive if, for example, further information is given about certain — but not all — components of the product's price?'*

#### **Consideration of the questions referred**

##### **The first question**

24. By its first question, the referring court asks, in essence, whether Article 7(1) and (3) of Directive 2005/29 must be interpreted as meaning that, for the purposes of assessing whether a commercial practice must be considered as a misleading omission, consideration should be given to the context in which that practice takes place, in particular the limitations of time and space imposed by the communications medium used, even though such a requirement is not expressly referred to in the wording of the national legislation in question.

25. It should be pointed out that Directive 2005/29 is intended to establish, in accordance with recitals 5 and 6 in the preamble thereto and Article 1 thereof, uniform rules on unfair business-to-consumer commercial practices in order to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection ([judgment of 23 April 2009 in VTB-VAB and Galatea, C-261/07 and C-299/07, EU:C:2009:244, paragraph 51](#)).

26. Thus, that directive fully harmonises those rules at the EU level. Accordingly, as Article 4 thereof expressly provides, Member States may not adopt stricter rules than those provided for in that directive, even in order to achieve a higher level of consumer protection ([judgment of 23 April 2009, VTB-VAB and Galatea, C-261/07 and C-299/07, EU:C:2009:244, paragraph 52](#)).

27. It must also be pointed out that Article 7(1) and (3) of Directive 2005/29 delimits the assessment of commercial practices, stating that it is necessary to have regard to the context in which those practices take place, as well as the limitations of time and space imposed by the communications medium, in order to determine whether they must be considered as misleading practices or omissions.

28. It appears, therefore, that a national regulation, according to which there is no need, for the purposes of assessing whether a commercial practice must be considered as a misleading omission, within the meaning of Article 7 of Directive 2005/29, to take into account the context in which that practice takes place, in particular the limitations of time and space imposed by the communications medium used for the purposes of that commercial practice and any measures taken by the trader to make the information available to consumers by other means, would fail to satisfy the requirements laid down by that directive.

29. While the national legislation applicable to the main proceedings does not explicitly mention that it is appropriate, in the context of the assessment of the

commercial practice at issue, to take into account the context in which that practice takes place and, more specifically, the conditions and limitations related to the mode of communication used, the referring court states, however, that the statement of reasons of the draft law transposing Directive 2005/29 refers to such a requirement. In that regard, the Danish Government argued, in the context of the written procedure, that the preparatory work has a special status in the legal tradition of the Kingdom of Denmark and northern European countries, in so far as the courts and public administrations, it is contended, attach great importance to that work when they have to interpret a legislative act.

30. In those circumstances, it should be noted that the obligation, arising from a directive, to achieve the result envisaged by that directive and the duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation in accordance with the principle of sincere cooperation in the second subparagraph of Article 4(3) TEU is binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, *inter alia*, judgments of 10 April 1984 in *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 26; of 8 September 2011 in *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 51, and of 19 April 2016 in *DI*, C-441/14, EU:C:2016:278, paragraph 30).

31. It is the responsibility of the national courts, in particular, to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective (judgment of 8 September 2011 in *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 52).

32. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (judgments of 5 October 2004 in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 113 and the case-law cited, and of 19 April 2016 in *DI*, C-441/14, EU:C:2016:278, paragraph 31).

33. The requirement for national law to be interpreted in conformity with EU law is inherent in the system of the TFEU, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it (judgment of 5 October 2004 in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 114).

34. In the present case, therefore, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 2005/29 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to



implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (judgments of 5 October 2004 in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 117, and 19 April 2016 in *DI*, C-441/14, EU:C:2016:278, paragraph 31).

35. In the light of the above considerations, the answer to the first question is that Article 7(1) and (3) of Directive 2005/29 must be interpreted as meaning that, for the purposes of assessing whether a commercial practice must be considered as a misleading omission, consideration should be given to the context in which that practice takes place, in particular the limitations of the communications medium used for the purposes of that commercial practice, the limitations of time and space imposed by that communications medium and any measures taken by the trader to make the information available to consumers by other means, even though that requirement is not expressly referred to in the wording of the national legislation in question.

#### **The second question**

36. By its second question, the referring court asks, in essence, whether Article 6(1) of Directive 2005/29 is to be interpreted as meaning that — in situations where a trader has opted to state the price for a subscription so that the consumer must pay both a monthly charge and a six-monthly charge — that practice will be considered a misleading action if the monthly charge is particularly highlighted in the marketing, whilst the six-month charge is omitted entirely or presented only in a less conspicuous manner.

37. Under Article 6(1) of Directive 2005/29, a commercial practice is to be regarded as misleading if, in any way, including overall presentation, first, it deceives or is likely to deceive the average consumer in relation to one or more of the elements listed in that provision, which include, in particular, the price or the manner in which the price is calculated, and, secondly, causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise.

38. It follows from the wording of that provision that the constituent features of a misleading commercial practice, as set out in that provision, are in essence expressed with reference to the consumer as the person to whom unfair commercial practices are applied (judgment of 19 September 2013, *CHS Tour Services*, C-435/11, EU:C:2013:574, paragraph 43).

39. It must be noted, in that regard, that the benchmark to be used is that of the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors (judgment of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 22). It should be added that, as is apparent from recital 18 in the preamble to Directive 2005/29, the ‘average consumer’ test is not a statistical test and that, to determine the typical reaction of that consumer in a given case, the national courts and authorities have to exercise their own faculty of judgment.

40. It follows that, for the purposes of assessing whether commercial practices, such as those at issue in the main proceedings, deceive or are likely to deceive the average consumer in relation to the price, it is for the referring court to determine, having regard to all the relevant circumstances, whether the commercial communication concerned has the effect of suggesting to the average consumer an attractive price which, ultimately, is proven to be misleading.

41. In circumstances such as those in the main proceedings, consideration may be given, where relevant, to the fact that offers for TV channels are characterised by a wide variety of proposals and combinations that are generally highly structured, both in terms of cost and content, resulting in a significant asymmetry of information that is likely to confuse consumers.

42. It should be noted that, unlike Article 7(1) and (2) of Directive 2005/29, Article 6(1) of that directive contains no reference to limitations of space or time related to the communication medium used. Accordingly, it must be held that the time constraints that may apply to certain communication media, such as television commercials, cannot be taken into account when assessing whether a commercial practice is misleading under Article 6(1) of that directive.

43. Where the price of a product, as defined in Article 2(c) of Directive 2005/29, is divided into several components, one being particularly emphasised in the marketing, while the other, which nevertheless constitutes an inevitable and foreseeable element of the price, is completely omitted or is presented less prominently, an assessment should be made, in particular, whether that presentation is likely to lead to a mistaken perception of the overall offer.

44. This will be the case, in particular, if the average consumer is likely to have the mistaken impression that he is offered a particularly advantageous price, due to the fact that he could believe, wrongly, that he only had to pay the emphasised component of the price, which it is for the referring court to assess.

45. In accordance with the wording of Article 6(1) of Directive 2005/29, the relevant commercial practice must, moreover, cause, or be likely to cause an average consumer ‘to take a transactional decision that he would not have taken otherwise’.

46. It should be noted, in that regard, that the price is, in principle, a determining factor in the mind of the average consumer, when he has to make a transactional decision.

47. Where the price is divided into several components, it is particularly relevant, when assessing whether the commercial practice at issue is likely to cause an average consumer to take a transactional decision that he would not have taken otherwise, that the omitted or less visible component represents a significant element of the total price.

48. As regards the fact that the total subscription price relating to the commitment period is mentioned, it is for the referring court to assess whether the general presentation of the commercial practices at issue and,

in particular, that of the total subscription price, allowed an average consumer to make an informed transactional decision or whether, on the contrary, the commercial communication at issue in the main proceedings was, overall, likely to create a mistaken perception of the offer. It should be determined, in particular, whether the average consumer was able to understand that a subscription involved costs other than those relating to the monthly charge.

49. In the light of those considerations, the answer to the second question is that Article 6(1) of Directive 2005/29 must be interpreted as meaning that a commercial practice which consists of dividing the price of a product into several components and highlighting one of them, must be regarded as misleading, since that practice would be likely, first, to give the average consumer the false impression that he has been offered a favourable price and, secondly, cause him to make a transactional decision that he would not have made otherwise, which it is for the referring court to ascertain, taking into account all the relevant circumstances of the main proceedings. However, the time constraints that may apply to certain communication media, such as television commercials, cannot be taken into account when assessing whether a commercial practice is misleading under Article 6(1) of that directive.

#### The third question

50. By its third question, the referring court asks, in essence, whether Article 7 of Directive [2005/29] is to be interpreted as meaning that — in situations where a trader has opted to state a total price for a subscription so that the consumer must pay both a monthly charge and a six-monthly charge — that practice will be considered a misleading omission if the monthly charge is particularly highlighted in the marketing, whilst the six-monthly charge is omitted entirely or presented only in a less conspicuous manner?

51. It should be pointed out, first, that Article 7 of Directive 2005/29 distinguishes invitations to purchase, as defined in Article 2(i) of that directive, from other commercial practices. Whereas all commercial practices, including invitations to purchase, are subject to the requirements of Article 7(1) to (3) and (5) of that directive, only commercial practices which are categorised as invitations to purchase are covered by Article 7(4) of that directive (see, to that effect, [judgment of 12 May 2011 in Ving Sverige, C-122/10, EU:C:2011:299, paragraph 24](#)).

52. It is for the national court to determine whether the commercial communication at issue can be categorised as an invitation to purchase within the meaning of Article 2(i) of Directive 2005/29, it being further stipulated that a commercial communication need not include an actual opportunity to purchase or appear in proximity to such an opportunity in order to constitute an invitation to purchase (see, to that effect, [judgment of 12 May 2011 in Ving Sverige, C-122/10, EU:C:2011:299, paragraph 32](#)).

53. It must also be noted that, in accordance with Article 7(1) of Directive 2005/29 '[a] commercial

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

54. Under Article 7(2) of that directive, a commercial practice is also be regarded as a misleading omission when a trader hides material information that the consumer needs or provides it in an unclear, unintelligible, ambiguous or untimely manner and where this causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise.

55. In so far as the price is, in principle, a determining factor in the consumer's mind, when it must make a transactional decision, it must be considered necessary information to enable the consumer to make such a fully informed decision.

56. Furthermore, it follows from Article 7(4) of that directive that a commercial practice, which is categorised beforehand as an invitation to purchase, must contain a number of key items of information, which are listed in that article and are considered to be material, which the consumer needs in order to take an informed transactional decision. In the absence of that information, which includes the price, an invitation to purchase is therefore deemed to be misleading (see, to that effect, [judgment of 12 May 2011 in Ving Sverige, C-122/10, EU:C:2011:299, paragraph 24](#)).

57. As stated in paragraph 39 of the present judgment, it is for the referring court to determine whether the commercial practices at issue are misleading, taking into account the perception of an average consumer who is reasonably well informed and reasonably observant and circumspect, having regard to social, cultural and linguistic factors.

58. The national court, by taking into account, in accordance with Article 7(1) to (4)(c) of Directive 2005/29, the factual context of the commercial practice at issue, the medium used to communicate, in particular the limitations of that medium, as well as the nature and characteristics of the product in question, must therefore assess on a case-by-case basis, whether omission of material information, such as the price, caused or could cause the consumer to take a transactional decision that he would not have taken otherwise (see, to that effect, [judgment of 12 May 2011 in Ving Sverige, C-122/10, EU:C:2011:299, paragraphs 52, 53 and 58](#)).

59. It is for the referring court, in particular, to verify that the information relating the total price of the subscription for the commitment period, although mentioned in the commercial communication, was not hidden or provided in an unclear, unintelligible, ambiguous or untimely manner, thus preventing an average consumer from understanding that a subscription involved costs other than those relating to



the monthly charge and, consequently, from taking an informed transactional decision.

60. As regards the use of a television advertisement, the referring court must take account of the time constraints that apply to that communication medium. In that regard, it must also be noted that, under Article 2(i) of that directive, in relation to invitations to purchase, the characteristics of the product must be indicated in a way appropriate to the means used. It follows from this, therefore, that the same degree of detail cannot be required in the description of the product irrespective of the form — radio, television, electronic or paper — which the commercial communication takes (see [judgment of 12 May 2011 in Ving Sverige, C-122/10, EU:C:2011:299, paragraph 45](#)). Moreover, it is clear that the time available for the consumer to assess the information provided to him in a television advertisement is also limited.

61. Likewise, regarding the reference made to the trader's website, where the six monthly charge is indicated, it must be pointed out that, in accordance with Article 7(3) of that directive, account is to be taken, in deciding whether information has been omitted, of the limitations of space and time of the medium of communication used and of the measures taken by the trader to make that information available to consumers by other means.

62. However, as is clear from the wording of Article 7(1) and (2) of Directive 2005/29, read in the light of the objective pursued by that directive, consisting of ensuring a high level of consumer protection, the limitations of time and space imposed by the communication medium used must be weighed against the nature and characteristics of the product in question, in order to determine whether the trader concerned in fact found it impossible to include the information at issue or to provide it in a clear, intelligible and unambiguous manner in the initial communication.

63. It follows that, where, having regard to the intrinsic characteristics of the product at issue and the limitations relating to the communication medium used, it was impossible to provide all the material information concerning that product, the commercial practice may mention only some of them, if the trader refers to its website for the rest, provided that that website contains the material information relating to the main characteristics of that product, the price and other conditions, as required under Article 7 of Directive 2005/29.

64. In the light of those considerations, the answer to the third question is that Article 7 of Directive 2005/29 must be interpreted as meaning that, where a trader has opted to state the price for a subscription so that the consumer must pay both a monthly charge and a sixmonthly charge, that practice must be regarded as a misleading omission if the price of the monthly charge is particularly highlighted in the marketing, whilst the six-monthly charge is omitted entirely or presented only in a less conspicuous manner, if such failure

causes the consumer to take a transactional decision that he would not have taken otherwise. It is for the referring court to assess, taking into account the limitations of the communication medium used, the nature and characteristics of the product and the other measures that the trader has actually taken to make material information about the product available to the consumer.

#### **The fourth and fifth questions.**

65. Having regard to the answer given to the second and third questions, there is no need to answer the fourth and fifth questions.

#### **The sixth and seventh questions**

66. By its sixth and seventh questions, which should be considered together, the referring court asks, in essence, whether Article 7(4) of Directive 2005/29 contains an exhaustive enumeration of the material information that must appear in an invitation to purchase and, if so, whether that provision rules out the possibility that such an invitation, which states the total price of the subscription for the commitment period, can be regarded as a misleading commercial practice.

67. Article 7 of that directive, relating to misleading omissions, provides, in paragraph (4), that, in the case of an invitation to purchase, the information that it lists shall be regarded as material, if not already apparent from the context.

68. Read in the light of recital 14 in the preamble to Directive 2005/29, which states that 'in respect of omissions, [that] directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision', that Article 7(4) must be interpreted as meaning that it contains an exhaustive list of the information that must be regarded as material in the context of an invitation to purchase.

69. Article 7(3) of that directive, however, which applies to invitations to purchase and which allows the limitations of space and time imposed by the communication medium used to be taken into account, along with any other measures taken by the trader to make the information available to consumers, should be taken into consideration (see, to that effect, [judgment of 12 May 2011 in Ving Sverige, C-122/10, EU:C:2011:299, paragraphs 66 and 67](#)).

70. It follows in particular from that provision that the extent of the information relating to the price is established on the basis of the nature and characteristics of the product, but also on the basis of the medium of communication used for the invitation to purchase and having regard to additional information possibly provided by the trader ([judgment of 12 May 2011 in Ving Sverige, C-122/10, EU:C:2011:299, paragraph 68](#)).

71. Finally, it should be noted that the fact that a trader provides, in an invitation to purchase, all the information listed in Article 7(4) of Directive 2005/29 does not preclude that commercial practice from being regarded as misleading within the meaning of Article 6(1) or Article 7(2) of that directive.

72. In the light of those considerations, the answer to the sixth and seventh questions is that Article 7(4) of

Directive 2005/29 must be interpreted as meaning that it contains an exhaustive list of the material information that must be included in an invitation to purchase. It is for the national court to determine whether the trader at issue has satisfied his duty to provide information, taking into account the nature and characteristics of the product but also the communication medium used for the invitation to purchase and additional information possibly provided by that trader. The fact that a trader provides, in an invitation to purchase, all the information listed in Article 7(4) of that directive does not preclude that invitation from being regarded as a misleading commercial practice within the meaning of Article 6(1) or Article 7(2) of that directive.

#### Costs

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

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

1. Article 7(1) and (3) 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') must be interpreted as meaning that, for the purposes of assessing whether a commercial practice must be regarded as a misleading omission, consideration should be given to the context in which that practice takes place, in particular the limitations of the communications medium used for the purposes of that commercial practice, the limitations of time and space imposed by that communications medium and any measures taken by the trader to make the information available to consumers by other means, even though that requirement is not expressly referred to in the wording of the national legislation in question.

2. Article 6(1) of Directive 2005/29 must be interpreted as meaning that a commercial practice which consists of dividing the price of a product into several components and highlighting one of them, must be regarded as misleading, since that practice would be likely, first, to give the average consumer the false impression that he has been offered a favourable price and, secondly, cause him to take a transactional decision that he would not have taken otherwise, which it is for the referring court to ascertain, taking into account all the relevant circumstances of the main proceedings. However, the time constraints that may apply to certain communication media, such as television commercials, cannot be taken into account when assessing whether a commercial practice is misleading under Article 6(1) of that directive.

3. Article 7 of Directive 2005/29 must be interpreted as meaning that, where a trader has opted to state the price for a subscription so that the consumer must pay both a monthly charge and a six-monthly charge, that practice must be regarded as a misleading omission if the price of the monthly charge is particularly highlighted in the marketing, whilst the six-monthly charge is omitted entirely or presented only in a less conspicuous manner, if such failure causes the consumer to take a transactional decision that he would not have taken otherwise. It is for the referring court to assess this, taking into account the limitations of the communication medium used, the nature and characteristics of the product and the other measures that the trader has actually taken to make material information about the product available to the consumer.

4. Article 7(4) of Directive 2005/29 must be interpreted as meaning that it contains an exhaustive list of the material information that must be included in an invitation to purchase. It is for the national court to determine whether the trader at issue has satisfied its duty to provide information, taking into account the nature and characteristics of the product but also the communication medium used for the invitation to purchase and additional information possibly provided by that trader. The fact that a trader provides, in an invitation to purchase, all the information listed in Article 7(4) of that directive does not preclude that invitation from being regarded as a misleading commercial practice within the meaning of Article 6(1) or Article 7(2) of that directive.

[Signatures]

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