

JUDGMENT OF THE COURT (Eighth Chamber)

7 September 2016 (*)

(Reference for a preliminary ruling — Consumer protection — Unfair commercial practices — Directive 2005/29/EC — Articles 5 and 7 — Combined offer — Sale of a computer equipped with pre-installed software — Material information relating to the price — Misleading omission — Consumer unable to obtain the same model of computer not equipped with software)

In Case C-310/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 17 June 2015, received at the Court on 25 June 2015, in the proceedings

Vincent Deroo-Blanquart v Sony Europe Limited, successor in law to Sony France SA,

THE COURT (Eighth Chamber),

composed of D. Šváby, President of the Chamber, J. Malenovský and M. Safjan (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure, after considering the observations submitted on behalf of:

- Deroo-Blanquart, by P. Rémy-Corlay, avocat,
- Sony Europe Limited, successor in law to Sony France SA, by P. Spinosi, avocat,
- the French Government, by D. Colas and J. Traband, and by S. Ghiandoni, acting as Agents,
- the Belgian Government, by J.-C. Halleux and J. Van Holm, acting as Agents,
- the Czech Government, by M. Smolek and J. Vlášil, and by S. Šindelková, acting as Agents,
- the European Commission, by D. Roussanov, M. Van Hoof and K. Herbout-Borczak, 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 5 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. The request has been made in proceedings between Mr Vincent Deroo-Blanquart, domiciled in France, and Sony Europe Limited ('Sony'), successor in law to Sony France SA, established in France, regarding a commercial practice consisting of the sale of a computer equipped with pre-installed software.

Legal context

EU law

3 Recitals 13, 14, 17 and 18 of Directive 2005/29 state:

‘(13) ... The single, common general prohibition established by this Directive ... covers unfair commercial practices distorting consumers’ economic behaviour. ... The general prohibition is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices.

(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. ...

...

(17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. ...

(18) ... 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 ...’

4 Article 2 of that directive, headed ‘Definitions’, provides:

‘For the purposes of this Directive:

...

(c) “product” means any good 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;

...

(h) “professional diligence” means 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;

(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;

...’

5 Article 3 of that directive, entitled ‘Scope’, states in paragraph 1:

‘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.’

6 Article 4 of the same directive, entitled ‘Internal market’, provides:

‘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.’

7 Article 5 of Directive 2005/29, which is entitled ‘Prohibition of unfair commercial practices’, is worded as follows:

‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

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

and

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

...

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

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

or

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

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. ...’

8 Article 6 of that directive, entitled ‘Misleading actions’, states in paragraph 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:

...’

9 Article 7 of that directive, entitled ‘Misleading omissions’, states:

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

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

...

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;

...

(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;

...’

10 Annex I to Directive 2005/29, which contains a list of commercial practices which are considered unfair in all circumstances, includes, in point 29, among aggressive commercial practices, the following practice:

‘Demanding immediate or deferred payment ... of products supplied by the trader, but not solicited by the consumer ... (inertia selling)’.

French law

11 Article L. 111-1 of the Consumer Code, in the version applicable to the main proceedings, provided:

‘All business suppliers of goods or services must, prior to conclusion of the contract, ensure that the consumer is made aware of the essential characteristics of the goods or services.’

12 The first paragraph of Article L. 113-3 of that code, in the version applicable to the main proceedings, provided:

‘Any seller of goods and any supplier of services must, by marking, labelling, notice or any other appropriate method, provide the consumer with information on prices, on any limitation of contractual liability and on special terms of sale, in accordance with the procedures laid down by decrees of the Minister ...’

13 Article L. 120-1 of the Consumer Code, in the version applicable to the main proceedings, stated:

‘Unfair commercial practices shall be prohibited. A commercial practice is unfair when it is contrary to the requirements of professional diligence and when it materially distorts or is likely to materially distort the economic behaviour of a reasonably well-informed and reasonably observant and circumspect consumer in respect of a product or service.

...

II. —The misleading commercial practices defined in Articles L. 121-1 and L. 121-1-1 and the aggressive commercial practices defined in Articles L. 122-11 and L. 122-11-1, in particular, shall constitute unfair commercial practices.’

14 Article L. 121-1 of that code, in the version applicable in the main proceedings, was worded as follows:

‘I. — A commercial practice is misleading if it is undertaken in one of the following circumstances:

...

2 When it is based on false allegations, information or presentations or is likely to mislead ...

...

II. — A commercial practice is also misleading where, taking account of the limitations of the communication medium and surrounding circumstances, it omits, hides or provides material information in an unintelligible, ambiguous or untimely manner, or fails to identify its true commercial purpose where it is not already apparent from the context.

...

In all commercial communications constituting an invitation to purchase and aimed at the consumer which mention the price and the characteristics of the good or service offered, the following are considered to constitute material information:

1 The main characteristics of the goods or services;

...

3 The price inclusive of taxes and the cost of delivery to the consumer, or the manner in which such cost is calculated, where it cannot be established in advance;

...

III. Section I is applicable to practices aimed at traders.’

15 The first paragraph of Article L. 122-1 of the Consumer Code, in the version applicable in the main proceedings, provided:

‘It is prohibited to refuse to sell a product or to provide a service to a consumer without a legitimate reason or to make the sale of one product conditional upon the purchase of a set quantity or upon the accompanying purchase of another product or another service or to make the provision of a service conditional upon the provision of another service or the purchase of a product.’

16 The first paragraph of Article L. 122-1 of the Consumer Code, in the version applicable from 19 May 2011 to 30 June 2016, provided:

‘It is prohibited to refuse to sell a product or to provide a service to a consumer without a legitimate reason or to make the sale of one product conditional upon the purchase of a set quantity or upon the accompanying purchase of another product or another service or to make the provision of a service conditional upon the provision of another service or the purchase of a product where such conditions constitute unfair commercial practices within the meaning of Article L. 120-1.’

17 The first paragraph of Article L. 122-3 of that code, in the version applicable in the main proceedings, was worded as follows:

‘The supply of goods and services not previously solicited by the consumer where it involves a demand for payment is prohibited. No obligation may be imposed on a consumer to whom goods or services are supplied in breach of that prohibition.’

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

18 It is apparent from the case-file in the main proceedings that, on 27 December 2008, Mr Deroo-Blanquart acquired a Sony laptop in France – model VAIO VGN-NR38E – which was equipped with pre-installed software including Windows Vista Home Premium operating system and various other software applications.

19 When using that computer for the first time, Mr Deroo-Blanquart refused to subscribe to the operating system’s ‘end-user licence agreement’ (EULA), displayed on that computer’s screen, and requested, on 30 December 2008, reimbursement from Sony of the part of the purchase price of the computer corresponding to the cost of the pre-installed software.

20 By letter of 8 January 2009, Sony refused to process that reimbursement, submitting that the VAIO computers with pre-installed software form part of a single and non-separable offer. Following discussions, Sony offered, on 15 April 2009, to cancel the sale and to reimburse Mr Deroo-Blanquart the entirety of the sale price, namely EUR 549, subject to the return of the equipment purchased.

21 Mr Deroo-Blanquart declined that offer and, by a document lodged on 17 February 2011, issued proceedings against Sony before the tribunal d’instance d’Asnières (District Court,

Asnières, France) for payment, inter alia, of EUR 450 as a lump sum for the pre-installed software, and of EUR 2 500 for the damage suffered as a result of unfair commercial practices.

22 By judgment of 13 September 2012, the tribunal d'instance d'Asnières (District Court, Asnières) dismissed all of Mr Deroo-Blanquart's claims.

23 Mr Deroo-Blanquart appealed against that judgment before the Cour d'Appel de Versailles (Court of Appeal, Versailles, France).

24 By judgment of 5 November 2013, the Cour d'Appel de Versailles (Court of Appeal, Versailles) upheld the judgment under appeal, holding that the sale at issue did not constitute the unfair commercial practice of coercive selling, which is not permitted under any circumstances, an unfair commercial tying practice, or a misleading or aggressive commercial practice.

25 Mr Deroo-Blanquart brought an appeal against the judgment of the Cour d'Appel de Versailles (Court of Appeal, Versailles) before the Cour de cassation (Court of Cassation, France).

26 After noting that the applicable provisions of national law fall within the scope of Directive 2005/29, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 5 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2006 concerning unfair business-to-consumer commercial practices in the internal market be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with pre-installed software constitutes a misleading unfair commercial practice where the manufacturer of the computer has, via its retailer, provided information on each item of pre-installed software, but has not specified the cost of each individual component?

(2) Must Article 5 of Directive 2005/29 be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with pre-installed software constitutes an unfair commercial practice where the manufacturer leaves the consumer no choice other than to accept the software or cancel the sale?

(3) Must Article 5 of Directive 2005/29 be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with pre-installed software constitutes an unfair commercial practice where the consumer is unable to obtain a computer which is not equipped with software from the computer manufacturer?'

Consideration of the questions referred for a preliminary ruling

The second and third questions

27 By its second and third questions, which it is appropriate to examine first and together, the referring court asks, in essence, whether a commercial practice consisting of the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model of computer not equipped with pre-installed software constitutes an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29.

28 In that regard, it must be recalled, as a preliminary point, that combined offers, which are based on the linking together of at least two different offers of products or services into a single offer, constitute commercial acts which clearly form part of an operator's commercial strategy

and relate directly to the promotion thereof and its sales development. It follows that they do indeed constitute commercial practices within the meaning of Article 2(d) of Directive 2005/29 and, consequently, come within its scope (see, to that effect, judgment of 23 April 2009, VTB-VAB and Galatea, C-261/07 and C-299/07, EU:C:2009:244, paragraph 50).

29 Furthermore, as recital 17 of Directive 2005/29 expressly states, only those commercial practices contained in the closed list set out in Annex I to that directive are in all circumstances regarded as unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of that directive (judgment of 19 September 2013, CHS Tour Services, C-435/11, EU:C:2013:574, paragraph 38 and the case-law cited).

30 However, the Court has held in that respect that combined offers are not included among the commercial practices listed in Annex I of Directive 2005/29 and that that directive precludes a general and pre-emptive prohibition of combined offers without any verification of their unfairness in the light of the criteria laid down in Articles 5 to 9 of that directive (judgment of 23 April 2009, VTB-VAB and Galatea, C-261/07 and C-299/07, EU:C:2009:244, paragraphs 57 and 62).

31 It is therefore in the light of the content and the general scheme of Articles 5 to 9 of that directive that the possible unfairness of commercial practices such as those at issue in the main proceedings must be examined (see, to that effect, judgment of 23 April 2009, VTB-VAB and Galatea, C-261/07 and C-299/07, EU:C:2009:244, paragraph 58).

32 In that regard, a commercial practice can be found to be unfair within the meaning of Article 5(2) of Directive 2005/29 only on the dual condition that, first, it is contrary to the requirements of professional diligence and, second, where it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product (see judgment of 19 December 2013, Trento Sviluppo and Centrale Adriatica, C-281/12, EU:C:2013:859, paragraph 28). In that context, it should be noted that, in accordance with recital 18, that 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.

33 This raises, initially, the question of whether a trader who, in circumstances such as those at issue in the main proceedings, offers for sale only computers equipped with pre-installed software contravenes the requirements of professional diligence, which is defined under Article 2(h) of Directive 2005/29 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.

34 It must therefore be ascertained whether the behaviour of the trader entails a possible violation of honest market practices or of the principle of good faith in the trader's field of activity, which in the present case is the manufacturing of computer equipment for the general public, in the light of the legitimate expectations of the average consumer.

35 In the present case, it is clear from the order for reference that, *inter alia*, the sale by Sony of computers with pre-installed software meets the expectations, as revealed by an analysis of the market concerned, of a significant proportion of consumers who prefer to purchase a computer already equipped and ready for immediate use, rather than to purchase a computer and software separately. Moreover, as is also apparent from the order for reference, prior to the purchase of the computer at issue in the main proceedings, Mr Deroo-Blanquart, as a consumer, was duly informed via Sony's retailer of the existence of pre-installed software on that computer and the

specific nature of each of those items of software. Finally, subsequent to the purchase, when using that computer for the first time, Sony offered Mr Deroo-Blanquart the possibility of either subscribing to the ‘end-user licence agreement’ in order to be able to use that software or cancelling the sale.

36 In that regard, the Court has already stated that, particularly if correct information is provided to consumers, a combined offer of different products or services can satisfy the requirements of fairness laid down in Directive 2005/29 (see, to that effect judgment of 23 April 2009, VTB-VAB and Galatea, C-261/07 and C-299/07, EU:C:2009:244, paragraph 66).

37 In that context, it should be recalled that circumstances such as those set out in paragraph 35 above, namely, *inter alia*, the facts that the consumer was correctly informed, that the combined offer met the expectations of a significant proportion of consumers and that it was possible for the consumer to accept all the elements of that offer or to cancel the sale, are likely to satisfy the requirements of honest market practices or of the principle of good faith in the field of the manufacturing of computer equipment for the general public, the trader thereby demonstrating care towards the consumer. Consequently, it is for the national court to take them into account in the context of its overall assessment of all the circumstances of the case in the main proceedings in light of the respect for the requirements of professional diligence.

38 Secondly, it is necessary to examine whether a commercial practice consisting of the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model of computer not equipped with pre-installed software causes or is likely to cause a material distortion of the economic behaviour of the average consumer with regard to the product, namely, pursuant to Article 2(e) of Directive 2005/29, to significantly undermine his ability to make an informed decision and to cause him consequently to take a transactional decision that he would not have taken otherwise.

39 In that regard, it is clear from the order for reference, as was noted in paragraph 35 above, that the consumer was duly informed, prior to the purchase, that the model of computer at issue in the main proceedings was not marketed without pre-installed software.

40 As regards the clarification provided to the consumer, it must be highlighted that the information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier (judgment of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraph 70).

41 Thus, when examining the second condition laid down in Article 5(2) of Directive 2005/29, it is for the referring court to determine whether, in circumstances such as those at issue in the main proceedings, namely when a consumer has been duly informed, prior to the purchase, that the model of computer that is the subject matter of the sale was not marketed without pre-installed software and that he was therefore, in principle, free to choose another model of computer, or another brand, with similar technical specifications, sold without software or used with different software, the ability of that consumer to make an informed transactional decision was appreciably impaired.

42 In light of the above observations, the answer to the second and third questions is that a commercial practice consisting of the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model of computer not equipped with

pre-installed software does not in itself constitute an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29, unless such a practice is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product, a matter which is for the national court to determine by taking account of the specific circumstances of the case in the main proceedings.

The first question

43 By its first question, the referring court asks, in essence, whether, in the context of a combined offer consisting of the sale of a computer equipped with pre-installed software, the failure to indicate the price of each of those items of software constitutes a misleading commercial practice within the meaning of Article 5(4)(a) and Article 7 of Directive 2005/29.

44 In that regard, it must be recalled that Article 5(4)(a) of that directive provides that misleading commercial practices can take the form of misleading actions within the meaning of Article 6 of that directive or misleading omissions within the meaning of Article 7 thereof.

45 Therefore, pursuant to Article 7(1) of Directive 2005/29, a commercial practice is to 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 in order to make an informed transactional decision and thereby causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise. Article 7(4)(c) of that directive provides that information relative to the price inclusive of tax is considered to be material.

46 It is therefore clear from the wording of that provision that the price of a product offered for sale, that is to say the overall price of the product, and not the price of each individual component, is considered to be material information. It follows that that provision obliges the trader to indicate to the consumer the overall price of the product concerned.

47 In the present case, as is apparent from the order for reference, the overall price of the whole package, consisting of a computer equipped with pre-installed software, was communicated to Mr Deroo-Blanquart. However, the referring court seeks to ascertain whether, in the specific case of a combined offer relating to a computer and several pre-installed pieces of software, the prices of the various individual components making up the whole package that is the subject matter of such an offer are also likely to constitute material information.

48 In that regard, independently of the fact that information on the constituent elements of the overall price does not feature among the information that Article 7(4) of Directive 2005/29 considers to be material, it is important to highlight that, in accordance with recital 14 of that directive, key items of information which the consumer needs to make an informed transactional decision constitute material information.

49 Furthermore, it follows from Article 7(1) of that directive that the material nature of a piece of information must be assessed against the background of which a commercial practice forms part and taking account of all of its characteristics.

50 In the present case, as is clear from the order for reference, the computer that was the subject matter of the sale at issue in the main proceedings was, in any case, only offered for sale equipped with the pre-installed software. In view of the answer given to the second and third

questions, such a commercial practice does not constitute, in itself, an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29.

51 Consequently, with regard to the context of a combined offer consisting of the sale of a computer equipped with pre-installed software, failure to indicate the price of each of those items of software is not such as to prevent the consumer from taking an informed transactional decision or likely to cause the average consumer to make a transactional decision that he would not have taken otherwise. Thus, the price of each of those items of software does not constitute material information within the meaning of Article 7(4) of Directive 2005/29.

52 In light of the foregoing observations, the answer to the first question is that, in the context of a combined offer consisting of the sale of a computer equipped with pre-installed software, the failure to indicate the price of each of those items of software does not constitute a misleading commercial practice within the meaning of Article 5(4)(a) and Article 7 of Directive 2005/29.

Costs

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

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

1. A commercial practice consisting of the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model of computer not equipped with pre-installed software does not in itself constitute an unfair commercial practice within the meaning of Article 5(2) 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'), unless such a practice is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product, a matter which is for the national court to determine by taking account of the specific circumstances of the case in the main proceedings.

2. In the context of a combined offer consisting of the sale of a computer equipped with pre-installed software, the failure to indicate the price of each of those items of pre-installed software does not constitute a misleading commercial practice within the meaning of Article 5(4)(a) and Article 7 of Directive 2005/29.

[Signatures]