Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 31 May 2018 [1]

Joined Cases C-54/17 and C-55/17

Autorità Garante della Concorrenza e del Mercato
v
Wind Tre SpA, formerly Wind Telecomunicazioni SpA
and
Autorità Garante della Concorrenza e del Mercato
v
Vodafone Italia SpA, formerly Vodafone Omnitel NVcon interveners:
Autorità per le Garanzie nelle Comunicazioni,
Altroconsumo,
Vito Rizzo,
Telecom Italia SpA

(Requests for a preliminary ruling
from the Consiglio di Stato (Council of State (Italy))

(References for a preliminary ruling — Consumer protection — Unfair commercial practices — Aggressive commercial practices — Unsolicited supply — Directive 2005/29/EC — Article 3(4) — Scope — Telecommunications services — Directive 2002/21/EC — Directive 2002/22/EC — Preactivating services on a SIM card without informing the consumer)

1. EU law has a *general* system of protection against unfair business-to-consumer commercial practices, set out in Directive 2005/29/EC, [2] as well as other *sectoral* legislative instruments that safeguard the interests of consumers in particular market segments.

2. One of those sectoral instruments is Directive 2002/22/EC, [3] which protects the rights of users of communications services. Its relationship with the general consumer protection framework [4] is not unproblematic. To resolve those problems, the rule established by Directive 2005/29 is that its provisions are not to apply in the event of conflict with other EU-law rules regulating specific aspects of unfair commercial practices.

1 Original language: Spanish.

2 Directive 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 (OJ 2005 L 149, p. 22).

3 Directive of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('Universal Service Directive').

4 In addition to protection against unfair commercial practices, consumers may benefit from the protection afforded to them by other directives, such as those relating to distance contracts or unfair terms in contracts signed by them.

3. The disputes which have given rise to the present references for a preliminary ruling are concerned with ascertaining which legislative regime governs the marketing of mobile phones the SIM [5] cards of which come preinstalled with facilities or services about which consumers had not been informed at the time of sale.

4. In that context, the referring court asks, in essence: (a) whether that conduct constitutes an 'unsolicited supply' or an 'aggressive commercial practice' in the light of Directive 2005/29; (b) whether the conditions are met for the overriding application of *other* EU rules, pursuant to Article 3(4) of the aforementioned directive; and (c) whether it is possible to treat as other EU rules national provisions adopted within the framework which EU law entrusts to the Member States.

I. Legislative framework

A. EU law

1. Directive 2005/29

5. In accordance with Article 2:

'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;

…

(j) "undue influence" means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;

…'

6. Article 3 is worded as follows:

'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.

…

4. In the case of conflict between the provisions of this Directive and other [EU] rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

…'

5 SIM stands for subscriber identity module.

7. In accordance with Article 5:

'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 1 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.'

8. Article 7(1) reads:

'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.'

9. Article 8 provides:

'A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.'

10. Article 9 indicates the factors which have to be taken into account for the purposes of 'determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence …'

11. Annex 1, which lists the 'practices which are in all circumstances considered unfair', describes the following practice in point 29:

'Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).'

2. Directive 2002/21/EC[6]

12. Article 1(1) provides:

'This Directive establishes a harmonised framework for the regulation of electronic services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities [NRAs] and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the [Union].'

13. Article 2(g) defines the concept of 'national regulatory authority' in these terms:

'… the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives.'[7]

14. Article 3 provides:

'1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body.

2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. …

…

4. Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. …

5. National regulatory authorities and national competition authorities shall provide each other with the information necessary for the application of the provisions of this Directive and the Specific Directives. …

6. The Member States shall notify to the Commission all national regulatory authorities assigned tasks under this Directive and the Specific Directives, and their respective responsibilities.'

3. 'Universal Service' Directive

15. Article 1 provides:

'1. Within the framework of [the] … (Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the [Union] of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. …

2. This Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services. …

…

6 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2001 L 108, p. 33) ('Framework Directive').

7 In accordance with point l of the same provision, specific directives include the Universal Service Directive.

4. The provisions of this Directive concerning end-users' rights shall apply without prejudice to [Union] rules on consumer protection, in particular Directives 93/13/EEC [8] and 97/7/EC, [9] and national rules in conformity with [Union] law.'

16. According to Article 20:

'1. Member States shall ensure that, where subscribing to services providing connection and/or access to the public telephone network, consumers have a right to a contract with an undertaking or undertakings providing such services. The contract shall specify in a clear, comprehensive and easily accessible form at least:

(a) the identity and address of the undertaking;

(b) the services provided …;

…

(d) details of prices and tariffs …;

…'

17. Article 21(1) provides:

'Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to publish transparent, comparable, adequate and up-to-date information on applicable prices and tariffs, on any charges due on termination of a contract and on standard terms and conditions in respect of access to, and use of, services provided by them to end-users and consumers in accordance with Annex II. Such information shall be published in a clear, comprehensible and easily accessible form. ...'

B. National law. Legislative Decree No 206 of 6 September 2005 [10]

18. Article 19(3) reads:

'In the event of any contradiction, the provisions contained in the Directives or in other [Union] provisions and in the national implementing provisions regulating specific aspects of unfair commercial practices shall prevail over the provisions of this Title and shall apply to those specific aspects.'

8 Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

9 Directive 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), as amended by Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 271, p. 16).

10 Decreto Legislativo 6 settembre 2005, n. 206. Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n. 229 (Legislative Decree approving the 'Consumer Code pursuant to Article 7 of Law No 229 of 29 July 2003') (GURI No 235 of 8 October 2005) ('Consumer Code').

19. Article 27(1) provides:

'The Autorità Garante della Concorrenza e del Mercato [11] shall exercise the powers regulated by this article also in its capacity as authority responsible for implementing Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, [12] within the limits of the statutory provisions.'

20. Article 27(1-bis) states:

'even in the regulated sectors, … competence to intervene in relation to conduct by traders that constitutes improper commercial practice … shall reside exclusively with the [AGCM], which shall exercise that competence on the basis of the powers referred to in the present article, after seeking the opinion of the relevant regulatory authority ...'.

21. Section III ('Rights of end-users') of the Electronic Communications Code [13] contains a series of consumer protection provisions specifically in the communications sector, and confers on the Autorità per le Garanzie nelle Comunicazioni [14] the relevant regulatory power and the power to impose penalties.

II. Facts

22. The AGCM imposed penalties on the companies Wind Telecomunicazioni (now Wind Tre) and Vodafone Omnitel (now Vodafone Italia) respectively, on the ground that, in its view, they had engaged in an aggressive commercial practice by marketing SIM cards preinstalled with services [15] about which they had not informed consumers.

23. The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) before which the two undertakings appealed against the AGCM's decision, upheld the application after stating that the AGCM was not competent to penalise conduct (the supply of unsolicited services) falling within the scope of the penalising powers exercised by the AGCom.

24. The AGCM challenged the judgment at first instance before the Sixth Chamber of the Consiglio di Stato (Council of State, Italy), which stayed the proceedings and referred a question on the matter to the Plenary.

25. On 9 February 2016, the Plenary of the Consiglio di Stato (Council of State) held in favour of the AGCM's competence. In summary, it took the view:

– that the act complained of constituted 'a commercial practice that is in all circumstances considered aggressive' within the meaning of Article 26 of the Consumer Code;

11 Authority responsible for competition compliance and enforcement of market rules ('AGCM').

12 OJ 2004 L 364, p. 1.

13 Legislative Decree No 259 of 1 August 2003 (GURI No 214 of 15 September 2003), which transposes, inter alia, the Framework Directive and the Universal Services Directive.

14 The Communications Regulator ('AGCom')

15 The orders for reference use the term '*preloaded services*' to describe the functionalities available on the SIM card, which the user then had to *activate* by performing the operations necessary to access them. The term *preactivated* services can be used in the same sense.

– that, even though that practice also entailed a failure to fulfil obligations imposed by sectoral rules (such as the Electronic Communications Code), it constituted a specific case of progressive harmful conduct, with the result that the original failure to fulfil obligations had given rise to a broader and more serious class of infringement provided for in the Consumer Code and therefore punishable by the AGCM.

26. The Plenary reached that conclusion on the basis of an interpretation of the principle of specialty which deviated from the case-law previously applicable. It justified the change on the ground that it was dictated by that principle, as set out in Directive 2005/29, non-compliance with which had been criticised by the Commission in proceedings for failure to fulfil obligations brought against Italy.

27. The case having been referred back to the Sixth Chamber of the Consiglio di Stato (Council of State), the latter has in each of the two disputes submitted the same questions to the Court of Justice for a preliminary ruling.

III. Questions referred

28. The questions are worded as follows:

‘(1) Do Articles 8 and 9 of Directive 2005/29 … preclude an interpretation of the corresponding national implementing provisions (namely: Articles 24 and 25 respectively of the Consumer Code) which considers that the conduct of a mobile telephone operator in failing to provide information regarding the pre-loading on to SIM cards of specific telephony services (that is, answering or internet-enabling services) may be classified as “undue influence” and, therefore, as an “aggressive commercial practice” likely “significantly” to curtail the average consumer’s freedom of choice or of action, particularly in circumstances in which no further different material conduct is imputed to that mobile telephone operator?

(2) Can point 29 of Annex 1 of Directive 2005/29 … be interpreted as meaning that there is an “unsolicited supply” where a mobile telephone operator asks its customers to pay for telephone answering or internet-enabling services, and does so in a situation with the following features:

– at the time when the mobile phone contract was entered into, the telephone operator is said to have not properly informed the consumer that the answering and internet-enabling services were pre-loaded on to the SIM card, with the result that those services could potentially be used by the consumer without specifically configuring them;

– in order actually to make use of such services, the consumer must, however, perform the necessary procedures (for instance, dial the number of the answering service or activate the commands that enable internet access);

– there is no complaint about the technical and operational processes whereby the services are actually used by the consumer, nor about the information relating to those processes and the actual cost of the services, the sole complaint against the operator being the abovementioned failure to provide the information that the services were pre-loaded on to the SIM card?

(3) Does the *raison d’être* of the “general” Directive 2005/29/EC as the “safety net” for consumer protection, and recital 10 in the preamble and Article 3(4) of that directive as well, preclude national rules which bring within the scope of general Directive 2005/29/EC on improper commercial practices the evaluation of performance of the specific obligations laid down by sectoral Directive 2002/22/EC for consumer protection, thereby excluding action by the authority empowered to penalise violations of the sectoral directive in all cases in which the prerequisites establishing an improper/unfair commercial practice may also be satisfied?

(4) Must the speciality principle established by Article 3(4) of Directive 2005/29/EC … be construed as governing relations between legislative systems (general system and sectoral systems), or relations between provisions (general provisions and special provisions) or relations between authorities responsible for regulating and monitoring the relevant sectors?

(5) Can the concept of "conflict" in Article 3(4) of Directive 2005/29/EC be regarded as applicable only in circumstances in which there is a radical contradiction in law between the provisions of the legislation on improper commercial practices and the other provisions derived from EU law that govern specific sectoral aspects of commercial practices, or is it sufficient that the latter provisions lay down rules that differ from the provisions on improper commercial practices in relation to the particular features of the sector, such as to give rise to a conflict of laws ("Normenkollision") in a specific case?

(6) Does the term "[Union] rules" in Article 3(4) of Directive 2005/29/EC relate solely to the provisions contained in European regulations and directives and to the provisions directly transposing them, or does it also encompass the legislative and regulatory provisions implementing principles of EU law?

(7) Do the speciality principle, established in recital 10 in the preamble and Article 3(4) of Directive 2005/29/EC and Articles 20 and 21 of Directive 2002/22/EC, Articles 3 and 4 of Directive 2002/21/EC as well, preclude an interpretation of the corresponding national provisions to the effect that, whenever, in a regulated sector containing sectoral 'consumer' rules, in which the sectoral authority is empowered to regulate and impose penalties, conduct that could be covered by the term "aggressive practice" within the meaning of Articles 8 and 9 of Directive 2005/29/EC, or the term "in all circumstances considered aggressive" within the meaning of Annex I of Directive 2005/29/EC, is identified, the general rules on improper practices must always apply, even when there are sectoral rules adopted to protect consumers and based on provisions of EU law, that fully regulate those same "aggressive practices" and practices "in all circumstances considered aggressive" or, at any rate, those same "improper practices"?'

IV. Procedure before the Court of Justice

29. The references for a preliminary ruling were registered at the Court of Justice on 1 February 2017, after which the decision was taken to join the two cases.

30. Written observations have been submitted by Wind Tre, Vodafone Italia, Telecom Italia, the Italian Government and the Commission, which parties also attended the public hearing held on 8 March 2018.

V. Analysis

A. Preliminary considerations

31. I should point out that the standing of the Sixth Chamber of the Consiglio di Stato (Council of State) to make a reference for a preliminary ruling in which it takes a position not necessarily the same as that advocated by the Plenary of that institution, although not called into question by any of the parties, has been recognised by the Court of Justice. [16]

16 Judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 36), which states that a reference for a preliminary ruling is admissible where 'a chamber of a court of first instance … does not concur with the position adopted by decision of that court sitting in plenary session' on a question concerning the interpretation or validity of EU law.

32. As regards the substance of the dispute, all the parties agree that the seven questions raised by the referring court can be grouped into two:

The first (Questions 1 and 2) is intended to determine whether the conduct of the telephone operators can be classified as an 'unsolicited supply' or an 'aggressive commercial practice' for the purposes of Directive 2005/29/EC.

— The second (Questions 3 to 7) seeks to ascertain whether, pursuant to Article 3(4) of Directive 2005/29/EC, the provisions of that directive must cede to other EU rules and, if so, to national provisions enacted in implementation of those rules.

B. The concepts of 'aggressive commercial practice' and 'unsolicited supply' (Questions 1 and 2)

33. It must be established first whether the conduct at issue constitutes an 'unfair commercial practice' prohibited by Article 5(1) of Directive 2005/29/EC. [17]

1. Summary of the parties' observations

34. Wind Tre submits, in relation to Question 1, that, account being taken of Articles 2(j), 8 and 9 of Directive 2005/29/EC, it is not possible to classify as an 'aggressive commercial practice' what, in its opinion, is simply an 'omission to provide information' on the pre-installation of services on a SIM card.

35. As regards Question 2, Wind Tre states that point 29 of Annex I to Directive 2005/29/EC is not applicable, since the user has to perform certain operations in order to access the services. Furthermore, there has been no criticism of the pre-installation of those services per se, nor any debate about the appropriateness of the information on the existence, features and price of those services themselves.

36. Vodafone Italia does not regard as an 'aggressive commercial practice' the mere act of omission consisting in marketing SIM cards preinstalled with basic services for the consumption of which only consumers that use those services consciously and voluntarily are charged. Neither is there any factual evidence of the existence of undue pressure or influence.

37. Telecom Italia submits, in relation to Question 1, that the prerequisite of an 'aggressive commercial practice' is that the trader should engage in positive conduct, other than mere actions or omissions with respect to information, capable of forcing the will of the average consumer by prompting him to take commercial decisions without being convinced that they are to his advantage. In its opinion, the mere act on the part of a trader of omitting to provide substantive information cannot therefore be classified as 'undue influence'.

38. On Question 2, Telecom Italia states that, in the circumstances of this case, there cannot be said to be an 'unsolicited supply'.

17 It is common ground that the conduct at issue in these disputes is a 'commercial practice' within the meaning of Article 2(d) of Directive 2005/29/EC. I do not consider it essential to go into the reasons for that classification, given that, in accordance with the case-law of the Court of Justice, that directive has a particularly broad scope *ratione materiae*, a fact demonstrated by the situations mentioned by Advocate General Saugmandsgaard Øe in his Opinion in *Dyson* (C-632/16, EU:C:2018:95, point 75, footnote 23).

39. The Italian Government suggests that Questions 1 and 2 should be examined together, on the basis of the AGCM's legal classification of the facts. In its view, Directive 2005/29/EC provides a sufficiently clear definition of the elements constituting aggressive commercial practices, characterising them not only by reference to their impact on the consumer's ability to acquire the knowledge that would enable him to make a reasoned decision, but also and above all by reference to their tendency to force the will of the consumer.

40. For the Italian Government, aggressive commercial practices require the concurrent presence of functional and structural conditions. The latter include undue influence within the meaning of Article 2(j) of Directive 2005/29/EC, which may arise from the conscious exploitation by the undertaking, to its own advantage, of inconsistent information.

41. In the opinion of the Italian Government, the lack of information in evidence in the context of selling the SIM card is not comparable with the omission of information referred to in Article 7 of Directive 2005/29/EC (misleading commercial practice). It is immaterial that the undertaking in question did not engage in any further material conduct, inasmuch as, given that the services were preactivated, it did not need to in order to be guilty of conduct which would previously have been defined as the 'exploitation of a position of power'.

42. The Commission accepts that this case involves an 'unsolicited supply' within the meaning of point 29 of Annex I to Directive 2005/29/EC. The objectionable behaviour consists not so much in having made available to the consumer certain services which the latter might or might not activate, as in having preinstalled — that is to say, effectively, in having imposed — those services without informing the consumer in a clear and appropriate fashion.

43. On that premiss, the Commission considers that there is no point in answering Question 1. In the alternative, however, it submits that, in order to classify the behaviour as an aggressive commercial practice within the meaning of Articles 8 and 9 of Directive 2005/29/EC, it is important to consider not only the factors mentioned in the second of those provisions, but also all factors relevant to the case, a task which falls to the national court.

2. Assessment

44. Reversing the order proposed by the referring court, I consider it appropriate to start by examining whether the conduct at issue satisfies the definition of 'unsolicited supply'. If it did, it would fulfil one of the two conditions necessary for it to be capable of being classified as 'in all circumstances … unfair', to use the expression that appears in Article 5(5) of Directive 2005/29/EC, which refers to the (black) list of practices contained in Annex I to that directive. If, in addition, the supplier unlawfully demanded payment for that service, the second of the conditions laid down in that list would be fulfilled, thus making it unnecessary to analyse whether that conduct is caught by other provisions of Directive 2005/29/EC.

(a) The concept of 'unsolicited supply'

45. According to point 29 of Annex I to Directive 2005/29/|EC, '[d]emanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer […] (inertia selling)' constitutes, in accordance with Article 5(5) of the same directive, an unfair commercial practice 'in all circumstances'.[18] That conduct thus presupposes that the products have not been solicited and, at an active level, that the trader demands payment for them (or their return or safekeeping in the case of goods).[19]

46. In accordance with recital 17 of Directive 2005/29/EC, commercial practices which are considered to be unfair in all circumstances do not require 'a case-by-case assessment against the provisions of Articles 5 to 9 [of Directive 2005/29/EC]'.

47. It follows from the actual wording of the second question referred for a preliminary ruling in this case that 'the telephone operator is said to have not properly informed the consumer that the answering and internet-enabling services were pre-loaded on to the SIM card, with the result that those services could potentially be used by the consumer without specifically configuring them'. It is claimed that there was therefore a 'supply' of two (voicemail and internet-enabling) services which users could subsequently access. It was a supply which, from what has been said, could not be described as one about which consumers were 'informed'. The question is whether that fact in itself would also make that supply an 'unsolicited supply'.

48. In my opinion, the high level of consumer protection which Directive 2005/29/EC, according to Article 1 thereof, seeks to achieve militates in favour of interpreting the concept of 'solicited supply' in such a way as to support the classification of 'unsolicited' as one in connection with which the consumer has not even been acquainted with the very fact of its existence, let alone with information as essential, for example, as the aforementioned price for its performance.[20]

49. A supply of services or goods must be preceded by appropriate information such as to enable the consumer, in the words of Article 7 of Directive 2005/29/EC, 'to take an informed transactional decision'.[21] The most fundamental information is, obviously, that relating to the goods or services which the trader has an obligation to deliver or supply: their description must match what the consumer has 'solicited 'or what the trader has offered to him. In any event, whether 'solicited' or offered, the subject of the information is defined by what the two parties have agreed.

50. Because of the enhanced protection which Directive 2005/29/EC wishes to afford to consumers, the possibility of implicit acceptance of a supply about which the consumer has not been explicitly informed is permissible only on an exceptional basis.

18 See the judgments of 14 January 2010, *Plus Warenhandelsgesellschaft* (C-304/08, EU:C:2010:12, paragraph 45); and of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraph 34).

19 Although point 29 of Annex I to Directive 2005/29 refers to a number of actions which are feasible only in relation to goods (for example, their return or safekeeping), it also covers services as a subcategory of the term *product*, which is defined in Article 2(c) as 'any goods or service'.

20 See, inter alia, the judgment of 26 October 2016, *Canal Digital Danmark* (C-611/14, EU:C:2016:800, paragraph 55).

21 In this vein, the judgment of 7 September 2016, *Deroo-Blanquart* (C-310/15, EU:C:2016:633), states in paragraph 40 that 'the information, before concluding the 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)'.

51. In this case, the SIM cards are sold with a view to being inserted in smartphones. That being so, an averagely informed consumer is unlikely to be unaware, as the referring court states, that 'dial[ling] the number of the answering service or activat[ing] the commands that enable internet access' will launch the operation of those two services. This, logically, presupposes that such a consumer also knew or should have known that those services had been installed on the telephone device. Since he could not have been unaware of that fact, the use of the two services by the consumer might amount to implicit acceptance of its supply. [22]

52. As the Commission has submitted, however, [23] some mobile phone applications may entail automatic consumption of internet traffic without intervention by the user, or even behind his back. [24] It is true that this can be avoided by using the so-called 'opt-out' action to reconfigure the telephone device. This, however, requires knowledge and skills which, to my mind, are not in keeping with the profile of the 'average consumer' [25] referred to in Directive 2005/29/EC.

53. Much as it may be for the referring court to make this determination, in the light of the facts which it ultimately finds to have been established, it is my view that a consumer should not reasonably have any cause to suspect that his electronic device is equipped with a service about the existence of which he has not been informed and the deactivation of which calls for a reconfiguration operation he almost certainly will not know how to perform.

54. In principle, therefore, it is not inconceivable that there has been an 'unsolicited supply [of services]' in this case.

55. This in itself, however, is not sufficient for the conduct at issue to be capable of classification as an 'unfair commercial practice' within the meaning of point 29 of Annex I to Directive 2005/29/EC.

56. After all, it is not enough for the supply in question not to have been 'solicited' by the consumer. The trader must also *demand* payment for that service.

57. In my opinion, the *demand for payment* contained in that provision cannot but be an *undue demand*, to the extent that it is the result of a non-consensual supply, which it is where that supply has not even been asked for.

58. In this case, however, according once again to the information provided in the order for reference, it seems that *the demand for payment from consumers may itself have been consensual*, even though the pre-installation of the services at issue and, therefore, their actual supply were not. The referring court states in this regard that 'there is no complaint about the technical and operational processes

22 The wording of the referring court's question on this issue may give rise to some confusion. After saying that the services at issue 'were preloaded', the Consiglio di Stato (Council of State) points out that, 'in order actually to make use of such services, the consumer must, however, perform the necessary procedures'; elsewhere, it says that 'those services could potentially be used by the consumer without specifically configuring them'. Paragraph 13.1 of the order for reference in Case C-54/17, on the other hand, states 'the transition from pre-installation of the services on the SIM card purchased by the consumer to actual enjoyment of the services requires autonomous action on the part of the same user', which action, in the context of paragraph 13.1, would be different from the act of dialling the number of the answering service or activating the commands that enable internet access. It is for the referring court to clarify this point.

23 Paragraphs 56 and 57 of the Commission's written observations.

24 In addition to the application-updating processes that take place in the background, some location-tracking functions can be activated inadvertently (a fact which may also entail risks from the point of view of the right to privacy).

25 This is the name given to a consumer who is 'reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors', according to the judgment of 12 May 2011, *Ving Sverige* (C-122/10, EU:C:2011:299, paragraph 22). This is not by any means a 'statistical test', as recital 18 of Directive 2005/29 makes clear. In order 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', according to the judgment of 26 October 2016, *Canal Digital Danmark* (C-611/14, EU:C:2016:800, paragraph 39).

whereby the services are actually used by the consumer, *nor about the information* relating to those processes *and the actual cost of the services*, the sole complaint against the operator being the aforementioned failure to provide the information that the services were pre-loaded on to the SIM card'. [26]

59. If that statement is consistent with what actually happened, the operator provided the consumer, in a manner which the referring court finds *unobjectionable*, with sufficient information not only on the technical and operational *processes* for accessing the pre-installed services, but also on their price. In those circumstances, the average consumer, even one who cannot be expected to have the technical knowledge mentioned above, would be able to surmise that the SIM card he had purchased was capable of providing him with services about the costs of which there would otherwise have been no reason for him to be informed.

60. It is for the national court to determine to what extent the information on the prices of the voicemail and internet-access services was provided in such a way as to leave no doubt about the fact that those services were pre-installed and that using them incurred a charge of which the consumer was or should have been aware precisely because of the information given to him when he bought the SIM card. On that basis, the 'demand for payment' for the supply of those two services, preceded by the provision of appropriate information as to their price, could not fall within the scope of point 29 of Annex I to Directive 2005/29/EC.

(b) The concept of 'aggressive commercial practice'

61. Is the omission of information on the pre-activation of the services at issue, 'in circumstances in which no further different material conduct is imputed to [the] mobile telephone operator', an 'aggressive commercial practice' capable of 'significantly impair[ing] the average consumer's freedom of choice'?

62. Article 8 of Directive 2005/29/EC defines as 'aggressive' a commercial practice which, account being taken of all the features and factual circumstances of the case, uses certain techniques to arrive at a particular outcome.

63. That outcome has to take the form of an impairment, actual or potential, to the consumer's freedom of choice with regard to the product so 'significant' as to give rise to or be likely to give rise to a decision which the consumer would not have taken otherwise. In accordance with that provision, that objective must have been achieved by 'harassment, coercion, including the use of physical force, or undue influence'.

64. The omission of information of which the telephone operators in this case are accused does not fall within the scope of any of those techniques, bearing in mind the factors which Article 9 of Directive 2005/29/EC lists for the purposes of ascertaining whether a commercial practice employs harassment, coercion or undue influence. [27] I take the view that both harassment and coercion — and, of course, the use of physical force — entail active conduct which is not present in the case of an omission of information.

26 My emphasis. The hearing provided an opportunity to look more closely at this aspect of the case, in the context of the arguments put forward by Wind Tre in its written observations, footnote 30 of which gives an account of the price and tariff details set out in the SIM card information leaflets provided to buyers and distributors respectively, as well as on the product packaging.

27 These are: '(a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behaviour; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract …; (e) any threat to take any action that cannot legally be taken'.

65. It might be thought, however, that any omission which has a conclusive bearing on the consumer's decision is capable of exercising 'undue influence'. However, the influence to which Articles 8 and 9 of Directive 2005/29/EC refer is not that which arises simply from the act of being misled — that is to say as provided for in Article 7 of that directive — but that which actively entails, through the application of *pressure*, the forced conditioning of the consumer's will. [28]

66. The Italian Government submits that, in addition to the omission to provide information on the pre-installed services, the very fact of the pre-installation and the consequent obligation to pay that is incumbent on the consumer who has used the services amount to the exploitation of a position of power by the trader.

67. It is my view, however, that, in the same way as the capacity to influence inherent in an omission must not be confused with 'undue influence' within the meaning of Article 8 of Directive 2005/29/EC, a distinction must also be drawn between two aspects of the position of power:

– on the one hand, the exploitation of a position of power which allows the trader to infringe the consumer's freedom when it comes to buying a product;

– on the other hand, the position of power held in law by a trader who, following the conclusion of the contract, may claim from the consumer the consideration which the latter undertook to provide on signing the contract.

68. An 'aggressive commercial contract' is one whereby the trader, taking advantage of the weaker position which the consumer occupies in relation to itself, [29] and availing itself of a position of power which it has acquired illegitimately — by harassment, coercion, physical force or proactive influence — impairs the consumer's freedom by prompting him to conclude a contract to which he would not consent were it not for the existence of that unlawful advantage.

69. It is precisely because the conclusion of a contract entails the assumption of certain obligations which one party may legitimately enforce in law against the other that Directive 2005/29/EC protects the consumer's freedom in such a way as to enable him to enter into contracts on an informed basis by committing himself only to obligations which, in the exercise of that freedom, he is prepared to assume. The Directive therefore affords protection not against legal obligations already freely entered into by the consumer, but against the assumption of such obligations as a consequence of an unfair commercial practice.

70. Consequently, for the purposes of ascertaining whether the omission to provide information on the installation of preactivated services constitutes an aggressive commercial practice, the relevant criterion is whether, by that omission, the trader has impaired the consumer's freedom of choice to such an extent as to force him to accept contractual obligations which, in other circumstances, he would not accept. On the other hand, it is not relevant whether, under the contract already concluded, the trader is able to assert against the consumer the rights that derive from that contract (such as, for example, payment for the services concerned). What matters, ultimately, is that the trader should not be able to enforce a position of (legal) power arising from a contract in the first place.

71. My view, in short, is that the conduct at issue in this dispute does not exhibit the characteristics of aggressive commercial practices within the meaning of Articles 8 and 9 of Directive 2005/29/EC.

28 In accordance with Article 2(j) of Directive 2005/29/EC, this is conduct consisting in the 'exploit[ation of] a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision'. It is not therefore enough for the consumer to be misled by being made to believe wrongly that he is acting freely and on an informed basis; he must be forced to enter into the contract against his will.

29 Judgment of 16 April 2015, *UPC Magyarország* (C-388/13, EU:C:2015:225, paragraph 53).

C. The relationship between Directive 2005/29/EC and other provisions regulating specific aspects of unfair commercial practices (Questions 3 to 7)

72. Technically, my proposed answer to the first two questions referred for a preliminary ruling makes it unnecessary to examine the remaining questions. I shall, however, examine these in the alternative.

1. Summary of the parties' observations

73. Wind Tre looks separately at the scope of the principle of specialty, the concept of 'conflict' and the notion of '[EU] rules' respectively.

74. On the principle of *lex specialis*, it states that, where a matter is exhaustively regulated by national provisions (such as, for example, those transposing the Universal Service Directive or those adopted by the NRA), these alone are applicable, to the exclusion of general consumer protection legislation.

75. For Wind Tre, 'conflict' refers to cases not of contradiction but of 'overlapping' between consumer protection provisions some of which are distinguished by their specialised nature.

76. The '[EU] rules', according to Wind Tre, include those adopted by the NRAs, in the exercise of their consumer protection functions, in order to specify the obligations set out in national legislation transposing Articles 20 and 21 of the Universal Service Directive.

77. Vodafone Italia submits that Directive 2005/29/EC, the Universal Service Directive and the Framework Directive make it impossible for the 'safety net' provided for in Directive 2005/29/EC to be applied at the same time where, in a given factual context (rather than in an entire sector), there is exhaustive sectoral legislation deriving from EU law.

78. In the alternative, Vodafone Italia argues that those same directives also make it impossible for the AGCM to replace the sectoral legislation in its entirety with parallel rules which are incompatible with the specific aspects of that sectoral legislation.

79. For Telecom Italia, the application of Directive 2005/29 is not automatically excluded because there are other EU legislative instruments which regulate specific aspects of unfair commercial practices. Each situation must be examined on a case-by-case basis in order to ascertain whether it is fully regulated by specific legislation, in which case the latter will be exclusively applicable.

80. Telecom Italia takes the view that the concept of '[EU] rules' must be understood in a broad sense as including not only the rules contained in regulations, in directives and in transposing provisions, but also the acts adopted by the Member States in order to give effect to EU law.

81. For the Italian Government, Article 27(1-bis) of the Consumer Code does not introduce any new criteria or create an exception to the application of the principle of specialty provided for in Article 3(4) of Directive 2005/29/EC. The referring court, in confusing the relationship between regulations, on the one hand, and the distribution of powers, on the other, raises a false issue, that is to say the non-application of the Universal Service Directive to specific aspects of unfair commercial practices.

82. The Italian Government recalls that the distribution of internal powers is a matter for the Member States and that the objective pursued by Article 27(1-bis) of the Consumer Code was to resolve the uncertainty which had arisen in Italy in 2012 with respect to the authority competent to deal with irregular commercial practices in the regulated sectors. In pursuit of the same objective, the AGCom

and the AGCM, on 23 December 2016, signed a Memorandum of Understanding on unfair commercial practices, the provisions of which confirm that Article 27(1-bis) of the Consumer Code does not extend to the analysis of sectoral infringements in the field of application of the general rules laid down in Directive 2005/29/EC.

83. In relation to Question 4, the Italian Government submits that, in order for the principle of specialty to apply, there must be a conflict between the general and the specific rules: in this case, that principle renders the general consumer protection rules inapplicable.

84. The Italian Government considers Questions 5 and 7 to be inadmissible for being hypothetical, since, it says, the conduct at issue does not constitute an aggressive commercial practice.

85. So far as Question 6 is concerned, the Italian Government submits that the concept of [EU] rules includes only the special provisions of regulations and directives, as well as provisions directly transposing the latter.

86. The Commission contends, with regard to Question 3, that Article 3(4) of Directive 2005/29/EC implies that, in the event of conflict between a provision of that directive and a rule of EU law regulating specific aspects of unfair commercial practices, the latter prevails only in relation to those specific aspects. Directive 2005/29/EC applies in parallel in matters concerned with the other aspects of those practices.

87. According to the Commission, the Universal Service Directive does not contain rules regulating specific aspects of unfair commercial practices of that type within the meaning of Article 3(4) of Directive 2005/29/EC.

88. The Commission takes the view, in connection with Question 4, that Article 3(4) of Directive 2005/29/EC establishes a criterion governing the relationship between provisions, rather than between types of discipline (general and sectoral), and does not affect the relative competences of the national authorities.

89. On Question 5, the Commission considers that, as the Universal Service Directive contains no rules regulating specific aspects of unfair commercial practices within the meaning of Article 3(4) of Directive 2005/29/EC, two of the essential conditions for the application of the latter provision are not satisfied, making an exhaustive interpretation of the concept of 'conflict' unnecessary. There is therefore no need to answer Question 5.

90. As regards Question 6, the Commission points out that the AGCom has adopted detailed rules which go beyond transposition of the Universal Service Directive. In its opinion, the legal cohesion of Article 3(4) of Directive 2005/29/EC would be put in jeopardy if that provision were recognised as relating not to the EU *acquis* but to a legal situation which is not only national but also hypothetical and in the future, which would be contrary to the requirement of legal certainty.

91. With respect to Question 7, the Commission considers that, inasmuch as the Universal Service Directive and the Framework Directive do not penalise the aggressive practice consisting in an 'unsolicited supply' as referred to in point 29 of Annex I to Directive 2005/29/EC, there is no need to answer that question.

2. Assessment

(a) The restrictive nature of the rule of inapplicability laid down in Article 3(4) of Directive 2005/29/EC

92. Article 3(4) of Directive 2005/29/EC states that, in the event of conflict between the provisions of that directive 'and other [EU] rules regulating specific aspects of unfair commercial practices', the latter are to prevail and apply 'to those specific aspects'.

93. That rule of prevalence highlights the purpose served by Directive 2005/29/EC of providing 'protection for consumers where there is no specific sectoral legislation at [EU] level'.[30] It seeks ultimately to establish a genuine system of protection for consumers' rights in all sectors.[31]

94. The real purpose of Directive 2005/29/EC, in my view, is not so much — or not primarily — to make up for the shortcomings of other EU consumer protection rules, as to stand at the centre of a general system of protection comprising, in addition to its own provisions, those already in existence in certain sectors regulated by EU law.

95. That general system is intended to 'ensure that the relationship between [Directive 2005/29/EC] and … [the] detailed [EU-law] provisions on unfair commercial practices [that] apply to specific sectors is coherent'.[32] A spirit of cohesion and harmony must therefore prevail in the interpretation and application of both sets of rules.

96. From the exchange of argument and evidence between the parties, and from the national court's order for reference itself, it would seem to follow, however, that the relationship between those two sets of rules can be viewed only in terms of conflict and exclusion, as if the key to the regime defined by the relationship between Directive 2005/29/EC and other rules were confined to the provision contained in Article 3(4) of that directive.

97. It is true that Directive 2005/29/EC has recourse, to the detriment of its own applicability, to 'specific [EU-]law provisions regulating specific aspects of unfair commercial practices, such as [the] information requirements and rules on the way the information is presented to the consumer'.[33] To my mind, however, this is an extreme approach based on an equally extreme scenario that fails to take into account all the cases of *peaceful coexistence* between Directive 2005/29/EC and other rules of EU law.

98. Article 3(4) of Directive 2005/29/EC establishes a rule of *selective* reference by Directive 2005/29/EC to those (other) provisions of EU law which deal with very specific aspects, such as consumer information requirements. A reference, moreover, that is *restrictive* in scope, inasmuch as it is strictly confined to 'those specific aspects', as that provision states. And a reference, finally, that is *extreme*, since it comes into play only in a situation of 'conflict'. It is a reference which might be said to be intended to remedy a *pathology* in the system rather than to specify its *physiology*.

30 Recital 10 of Directive 2005/29/EC.

31 The Commission expresses the idea thus: Directive 2005/29/EC 'constitutes the main general body of EU legislation regulating misleading advertising and other unfair practices in business-to-consumer transactions', and, having 'a broad scope of application, applying to all business-to-consumer transactions …, provides for a high level of consumer protection in all sectors' and works 'as a safety net which fills the gaps which are not regulated by other EU sector-specific rules'. See paragraph 1 of its Communication to the European Parliament, the Council and the Economic and Social Committee on the application of the Unfair Commercial Practices Directive [COM(2013) 138 final].

32 Recital 10 of Directive 2005/29/EC.

33 *Ibidem.*

99. So far as concerns that extreme approach — which, I would emphasise, is not the only approach and doesn't have to be the customary one —, I would submit, in keeping with the statements contained in recital 10 of Directive 2005/29/EC, that the terms of Article 3(4) of that directive militate in favour of a restrictive interpretation of the reference made in that provision to 'other [EU] rules', which can only be those that 'regulate *specific aspects* of unfair commercial practices.[34] Directive 2005/29/EC cedes to those rules strictly in so far as reference is made to the *regulation of those specific aspects*.

100. In my opinion, however, the literal sense of Article 3(4) of Directive 2005/29/EC is not the only reason why the reference to other legislative provisions should be interpreted strictly. There is also the fact that Directive 2005/29/EC has established 'a high common level of consumer protection' as a result of the 'high level of convergence achieved by the approximation of national provisions through this Directive'.[35] As Advocate General Saugmandsgaard Øe has highlighted,[36] any non-application of its provisions 'runs the risk of breaching the safety net established by that directive where the other EU rules — those with primacy — do not guarantee as high a level of consumer protection'.[37]

101. Consequently, the reference prescribed by Article 3(4) of Directive 2005/29 must be strictly confined to EU legislation regulating specific aspects of unfair commercial practices. It must come into play, moreover, only where that legislation is in *conflict* with Directive 2005/29 itself, which calls for detailed analysis.

(b) The conditions governing the rule of inapplicability

(1) The categories of legislation forming the subject of the specialty relationship provided for in Article 3(4) of Directive 2005/29

102. By its fourth question, the referring court seeks to ascertain whether the principle of specialty set out in Article 3(4) of Directive 2005/29 'govern[s] relations between legislative systems …, or relations between provisions … or relations between authorities responsible for regulating and monitoring the relevant sectors?' The same question of substance is raised in Questions 3 and 7, although from a different perspective in each case.[38]

103. In my opinion, an interpretation of recital 10 of Directive 2005/29 in conjunction with Article 3(4) thereof supports the inference that the EU legislature's intention was to apply that principle not so much on a *sectoral* basis as on a *legislative* basis and in relation to all sectors.

104. As the Commission has stated, unlike Article 3(9) of Directive 2005/29 (under which the conditions laid down by that directive in the field in which it applies may be made stricter by the Member States in the financial services and immovable property sectors), paragraph 4 of that article refers exclusively to the situation of potential conflict 'between the provisions of this Directive and

34 Emphasis added.

35 Recital 11 of Directive 2005/29/EC: 'The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. It also sets rules on aggressive commercial practices, which are currently not regulated at [EU] level'.

36 Opinion in *Dyson* (C-632/16, EU:C:2018:95, points 81 to 85).

37 *Ibidem*, point 82.

38 Question 3 touches on the organic dimension of the issue (that is to say, the effects of that principle on the distribution of competences between the administrative authorities), whereas Question 7 addresses that same issue from the perspective of the relationship between general and sectoral legislation. It is assumed, therefore, that the principle of specialty ultimately governs the latter.

other [EU] rules regulating specific aspects of unfair commercial practices'. It is therefore a cross-cutting provision governing all sectors of economic activity, as befits a directive the primary purpose of which is to apply to any unfair commercial practice, irrespective of the economic sector concerned and in the interests of better consumer protection.[39]

105. Of the specific aspects that may be regulated by 'other [EU] rules', recital 10 of Directive 2005/29 mentions 'information requirements and rules on the way the information is presented to the consumer'.

106. These are, after all, very *specific* matters which may be found in provisions of various categories and need not be incorporated into a normative scheme in the form of a body of rules regulating a sector of activity. There is therefore no scope for opposition between a general system of consumer protection as represented by Directive 2005/29 and the various sectoral consumer protection frameworks, such as that established in the sphere of interest here by the Universal Service Directive.

107. In order for the application of the provisions of Directive 2005/29/EC to cede to that of others, there does not have to be a sectoral system of consumer protection legislation. In actual fact, as a general system of protection, that established by Directive 2005/29 does not, as such, cede to any system at all. Only some of its provisions cede, and only to the extent that there are others (whether or not forming part of a specific system of protection) which regulate 'specific aspects of unfair commercial practices', and that they do so, moreover, in the context of *conflict*. In short, this means that the non-application of Directive 2005/29 in those circumstances is exclusively confined to the sphere of 'specific aspects'.

108. Examples of the 'specific aspects' referred to in Article 3(4) of Directive 2005/29 are given in recital 10 of that directive in the form of a reference to 'information requirements and rules on the way the information is presented to the consumer'. And indeed Articles 20 and 21 of the Universal Service Directive, mentioned by the referring court, duly relate to the information that must appear in contracts concluded with undertakings providing connection to a public communications network or to electronic communications services.

109. In those circumstances, I take the view that the provisions of Directive 2005/29 concerning the information which has to be provided, generally, to consumers must, in the field of electronic communications services, cede to the application of the specific provisions included in the Universal Service Directive. They do so, however, only to this extent and without rendering inapplicable the entirety of Directive 2005/29, Article 3(4) of which, I would reiterate, confines the non-application of that directive to the 'specific aspects' regulated in other provisions. The other condition laid down by that provision (legislative conflict), with which I shall deal directly, must also be fulfilled.

110. This, in short, is the substance of the exception provided for in Article 3(4) of Directive 2005/29.[40] That exception is of course subject, let me say again, to fulfilment of the condition that there should be a relationship of *conflict* between Directive 2005/29/EC and any provision that might take its place.

39 This view is also expressed by Advocate General Saugmandsgaard Øe in his Opinion in *Dyson* (C-632/16, EU:C:2018:95, point 81), for whom the significant factors in this regard are the objective, stated in Article 1 of Directive 2005/29, of ('... contribut[ing] to the proper functioning of the internal market and achiev[ing] 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') and the definition of the scope of the Directive as set out in Article 3(1) thereof ('... unfair business-to-consumer commercial practices … before, during and after a commercial transaction in relation to a product').

40 It is, therefore, a relatively modest exception which is at the same time counterbalanced by the provision contained in Article 1(4) of the Universal Service Directive, inasmuch as the provisions of the latter directive 'concerning end-users' rights *shall apply without prejudice to [EU] rules on consumer protection*, in particular [the] Directives [preceding Directive 2005/29]' (emphasis added).

111. To sum up, the relationship of specialty established in Article 3(4) of Directive 2005/29/EC is directed at rules or provisions rather than systems of sectoral legislation. It is, moreover, unconnected with the designation of which administrative authorities are responsible for applying the corresponding legislation, since the distribution or attribution of powers between them is a matter for the Member States.

112. Proceeding on the premiss that that relationship operates strictly between rules, it remains to be clarified which rules these are.

(2) Contradictory rules

113. By its sixth question, the national court expresses uncertainty as to whether the reference in Article 3(4) of Directive 2005/29/EC to 'other [EU] rules' includes only 'the provisions contained in European regulations and directives and … the provisions directly transposing them, or … also encompass[es] the legislative and regulatory provisions implementing principles of EU law'.

114. Article 3(4) of Directive 2005/29/EC originally provided for situations involving conflict between 'the provisions of this Directive and other Community [now 'EU'] rules'.

115. Strictly speaking, Community or EU rules are those adopted by the EU institutions, that is to say the 'legal acts' listed in Article 288 TFEU. I do not therefore consider it appropriate to include national rules in this category, be they the 'legislative and regulatory provisions implementing principles of EU law'[41] to which the Consiglio di Stato (Council of State) refers, or national provisions transposing directives.

116. The Italian Government, however, mentions the possibility of interpreting Article 3(4) of Directive 2005/29/EC extensively as meaning that it includes within its scope national provisions incorporating EU rules into national law. In the same vein, some of the parties[42] have pointed out that the NRAs are expected to enact very detailed sectoral legislation which would be relegated to Directive 2005/29/EC if it were not considered to fall within the scope of the concept of '[EU] rules'.

117. In my opinion, the interpretation I am advocating (which, to my mind, is drawn directly from Article 3(4) of Directive 2005/29/EC) is compatible with the concern expressed by the Italian Government and the other parties to the proceedings.

118. After all, the exhaustive nature of the harmonisation effected by Directive 2005/29/EC has been endorsed by the Court of Justice, in whose view that directive 'fully harmonises [the] rules [relating to unfair business-to-consumer commercial practices]', with the result that 'Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection'.[43]

41 Such 'legislative and regulatory provisions' could only be national, since, if they were, formally, EU provisions, the question would be meaningless.

42 Such as Wind Tre and Telecom Italia, in paragraphs 71 to 75 and 43 to 50 of their written observations. Telecom Italia states that a restrictive interpretation of that concept would lead to 'manifestly unacceptable results', such as the non-application of any national provision that regulates specific aspects of unfair commercial practices in terms which are stricter and confer more extensive rights than Directive 2005/29/EC.

43 Judgment of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 52).

119. This feature of exhaustiveness does not, however, have the effect of rendering inapplicable in principle any national legislation which regulates specific aspects of unfair commercial practices in a more detailed way than Directive 2005/29/EC. There is no need to include more detailed national provisions in the category of 'EU rules' in order to ensure that they are more applicable. It is sufficient to trace them back to the (sectoral) directive from which they originate and examine whether the latter itself must take precedence over Directive 2005/29/EC because the conditions laid down in Article 3(4) are satisfied.

120. In other words, where EU law allows Member States to regulate specific aspects of unfair commercial practices in a potentially stricter fashion than Directive 2005/29/EC, the latter's replacement will come not from the national provision enacted pursuant to that option but from the (sectoral) directive permitting this.

(3) The nature of the contradiction. Conflict or difference

121. The existence of other EU rules regulating specific aspects of unfair commercial practices is not in itself a sufficient basis on which the application of Directive 2005/29/EC must cede to such other legislative provisions. It is essential, moreover, that there should be a situation of 'conflict' between the latter and those of the aforementioned directive.[44]

122. The referring court wishes to ascertain whether the concept of conflict dealt with by Article 3(4) of Directive 2005/29/EC entails a 'radical contradiction' between one set of provisions and another or whether, on the contrary, it is sufficient for [the other provisions] to lay down 'rules that differ'. In other words, it wishes to ascertain whether Article 3(4) has in mind an insuperable legislative contradiction or simply the concurrent application of provisions.

123. In the exchange of argument and evidence on this issue, a wide variety of terms has been used (to the point, at times, of verbosity) to describe the relationship between one set of legal propositions and another: in addition to *radical contradiction* and *concurrent application*, use has been made of the terms *collision, superimposition*, *overlapping*, *cohabitation* and others of varying degrees of similarity.

124. In my opinion, the term ('conflict') chosen by the EU legislature denotes a relationship between the provisions in question which goes beyond a mere disparity or simple difference. To describe two situations as being in conflict is to say not only, of course, that there is a divergence between them, but also that it is a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end to the extent they are different.

125. That this is the sense in which Directive 2005/29/EC uses the term 'conflict' follows from the approach taken by the legislature: it did not opt for a unifying interpretation of the competing provisions but to give precedence to those which, under the conditions set out previously, are in opposition to the provisions of Directive 2005/29/EC.

126. Thus, in keeping with the argument put forward by Advocate General Saugmandsgaard Øe,[45] it seems to me that a conflict such as that provided for in Article 3(4) of Directive 2005/29 is present only where EU provisions other than those of Directive 2005/29/EC which regulate specific aspects of unfair business practices such as the information to be presented to consumers impose on undertakings in such a way as to leave them no margin for discretion obligations which are incompatible with those laid down in the latter directive.

44 The need for both of those conditions to be present was looked at by the Court of Justice in the judgment of 16 July 2015, *Abcur* (C-544/13 and C-545/13, EU:C:2015:481, paragraphs 79 to 81).

45 Opinion in *Dyson* (C-632/16, EU:C:2018:95, point 91).

(c) The application of those criteria to the dispute in the main proceedings

127. If Directive 2005/29 were applicable to the conduct of which the telephone operators in this case are accused because it falls within the scope of the unfair commercial practices defined in one of the provisions examined above (which I do not think it does), the conditions laid down in Article 3(4) of Directive 2005/29/EC as permitting its provisions to cede to other EU rules regulating specific aspects of unfair commercial practices would, in my view, not be satisfied.

128. I concur with the Commission that, in that scenario, Directive 2005/29/EC and the Universal Service Directive could feasibly be applied in parallel. While the former includes demands for payment for an 'unsolicited supply' within unfair commercial practices in any circumstances, the Universal Service Directive (Articles 20 and 21) defines the information which electronic communications services undertakings must provide to consumers but does not classify unsolicited supply as unlawful conduct, which forms the subject of the dispute in the main proceedings.

129. Consequently, the situation at issue, far from being defined by a conflict between those two directives, would be one in which they must be applied jointly, since, in order to determine whether or not the supply was solicited by the consumer (Directive 2005/29/EC), it must be ascertained, inter alia, whether the information that was provided to him complies with the requirements imposed on the undertaking by the Universal Service Directive.

VI. Conclusion

130. In the light of the foregoing, I propose that the Court's answer to the Sixth Chamber of the Consiglio di Stato (Council of State, Italy) should be as follows:

(1) 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, must be interpreted as meaning that:

– Article 5(5) in conjunction with point 29 of Annex I of the aforementioned directive does not permit the classification as an unfair commercial practice of the mere omission to provide the user with information on the pre-installation, on a SIM card intended to be inserted into a smartphone, of voicemail and internet-access services, if that user has previously been informed about 'the technical and operational processes whereby [those] services are actually used … and the actual cost of the services', which it is for the referring court to ascertain;

– Articles 8 and 9 of Directive 2005/29/EC must be interpreted as meaning that they do not permit the classification as an 'aggressive commercial practice' of conduct by a telephone operator such as that described above.

(2) In the alternative, Article 3(4) of Directive 2005/29/EC must be interpreted as meaning that the application of the provisions of that directive cede to other rules of EU law regulating specific aspects of unfair commercial practices only where there exists between the former and the latter a contradiction which cannot be resolved by the combination or coherent application of the two sets of provisions.