



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 June 2019*

(Reference for a preliminary ruling — Consumer protection — Directive 2005/29/EC — Unfair business-to-consumer commercial practices — Concept of an aggressive commercial practice — Consumer required to take a final transactional decision in the presence of the courier handing over the general terms and conditions of the contract)

In Case C-628/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 14 September 2017, received at the Court on 8 November 2017, in the proceedings

Prezes Urzędu Ochrony Konkurencji i Konsumentów

v

Orange Polska S.A.,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, C. Lycourgos, E. Juhász (Rapporteur), M. Ilešič and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2018,

after considering the observations submitted on behalf of:

- Orange Polska S.A., by K. Szczepanowska-Kozłowska, radca prawny, and M. Gajdus, adwokat,
- the Polish Government, by B. Majczyna, S. Żyrek and E. Borawska-Kędziarska, acting as Agents,
- the European Commission, by N. Ruiz García and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2019,

gives the following

* Language of the case: Polish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(j) and Articles 8 and 9 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 (OJ 2005 L 149, p. 22).
- 2 The request has been made in proceedings between the Prezes Urzędu Ochrony Konkurencji i Konsumentów (Chairman of the Office of Competition and Consumer Protection, Poland) and Orange Polska S.A. concerning the classification of a commercial practice as an ‘aggressive commercial practice’.

Legal context

European Union law

- 3 Recitals 7, 16 and 17 of Directive 2005/29 are worded as follows:
 - ‘(7) ... Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof.
 - ...
 - (16) The provisions on aggressive commercial practices should cover those practices which significantly impair the consumer’s freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence.
 - (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. The list may only be modified by revision of the Directive.’
- 4 Under Article 2 of that directive, entitled ‘Definitions’:
 - ‘For the purposes of this Directive:
 - ...
 - (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;
 - ...
 - (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;

(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 5 of that directive, entitled ‘Prohibition of unfair commercial practices’, which is included in Chapter 2 thereof, entitled ‘Unfair commercial practices’, provides:

‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

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

and

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

3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

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

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

or

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

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.’

6 Section 2, entitled ‘Aggressive commercial practices’, of Chapter 2 of Directive 2005/29 contains Articles 8 and 9 thereof.

7 Article 8 of that directive, itself entitled ‘Aggressive commercial practices’, states:

‘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.’

8 Article 9 of that directive, entitled ‘Use of harassment, coercion and undue influence’, is worded as follows:

‘In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

- (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 judgement, 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, including rights to terminate a contract or to switch to another product or another trader;
- (e) any threat to take any action that cannot legally be taken.’

9 Annex I to Directive 2005/29, entitled ‘Commercial practices which are in all circumstances considered unfair’, lists and defines ‘aggressive commercial practices’ in points 24 to 31 thereof.

Polish law

10 Under Article 8(1) and (2) of the Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym (Law of 23 August 2007 on combating unfair market practices) (Dz. U. No 171, item 1206), in the version applicable to the facts in the main proceedings:

‘1. A commercial practice is deemed to be aggressive if, by reason of impermissible 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 contractual decision that he would not have taken otherwise.

2. “Impermissible influence” means any form of exploitation of a position of power over a consumer, in particular the use or threat of physical or emotional violence in a way which significantly limits the average consumer’s ability to make an informed decision regarding a contract.’

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

11 The undertaking of which Orange Polska is the successor in law concluded contracts with consumers for the supply of telecommunications services, and altered the terms and conditions of those contracts using amendments, by means of distance selling through its online shop or by telephone (telesales).

12 The process for concluding or amending a contract using the online shop comprised the following steps:

- consultation of the website and taking cognisance of the trader’s offer by the consumer, who can access the standard-form contracts offered via a link;
- selection of a product or contract by the consumer;

- placing of the order by the consumer, who does not declare that he has taken cognisance of the standard-form contract selected;
 - confirmation of the order by the consumer;
 - completion of the order using the services of a courier undertaking. The courier delivers to the consumer a draft of the contract or amendment, together with all the documents that are part of that contract or amendment, namely annexes, terms of business and price lists, pre-signed by the trader;
 - conclusion of the contract or amendment and delivery of any goods at the moment the contract or amendment is signed in the presence of the courier. The consumer declares that he has taken cognisance of the documents delivered and that he accepts the content thereof, it being specified that, if there is no signature, the consumer must visit a physical retail outlet or reorder either online or by telephone; and
 - activation of the contract.
- 13 The process for concluding or amending a contract by telephone was conducted in a similar manner, but involving a telephone call between the consumer and the trader's operator.
- 14 By decision of 30 December 2010, the Chairman of the Office of Competition and Consumer Protection considered that the practice in question constituted an unfair commercial practice prejudicial to the collective interests of consumers within the meaning of the Law on combating unfair market practices, in the version applicable to the facts in the main proceedings, and ordered the cessation of that practice. According to that decision, that practice required consumers to make a decision concerning the contract and the standard-form contracts in the presence of the courier, without allowing them freely to take cognisance of their content.
- 15 By judgment of 27 October 2014, the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Competition and Consumer Protection Court, Poland) annulled that decision.
- 16 The Chairman of the Office of Competition and Consumer Protection brought an appeal against that judgment, which was dismissed by judgment of 4 March 2017 of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland).
- 17 The Chairman of the Office of Competition and Consumer Protection brought an appeal on a point of law against that judgment before the Sąd Najwyższy (Supreme Court, Poland).
- 18 Considering that an interpretation of Directive 2005/29 is necessary for the purposes of resolving the dispute before it, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- 'Is Article 8 [of Directive 2005/29], in conjunction with Articles 9 and 2(j) [thereof], to be interpreted as meaning that the use of standard forms for the conclusion of distance contracts relating to the provision of telecommunications services, under which a consumer is required to make the final business decision in the presence of the courier handing over the standard-form contract (general terms and conditions), an aggressive commercial practice by a trader owing to undue influence:
- (a) always, where the consumer, during the courier's visit, is unable freely to take cognisance of the content of the standard-form [contracts];

- (b) only where the consumer has not previously and individually received all standard forms (for example, at his e-mail address or home address), even if he himself had the opportunity, prior to the courier's visit, to take cognisance of their content on the trader's website;
- (c) only if the additional findings were to point to unfair actions on the part of the trader, or on his behalf, for the purpose of restricting the consumer's decision-making freedom in regard to the business decision which he has to make?'

Consideration of the question referred

- 19 By its question, the referring court asks, in essence, whether Article 2(j) and Articles 8 and 9 of Directive 2005/29 are to be interpreted as meaning that the application by a trader of a model for concluding or amending contracts for the supply of telecommunications services, such as that at issue in the main proceedings, under which the consumer must take the final transactional decision in the presence of a courier who delivers the standard-form contract, without being able freely to take cognisance of the content of that contract while the courier is present:
- constitutes an aggressive commercial practice in all circumstances;
 - constitutes an aggressive commercial practice through the exertion of undue influence where not all the standard-form contracts were sent to the consumer individually beforehand, for example by email or to his home address, even if that consumer had the opportunity, prior to the courier's visit, to take cognisance of their content; and/or
 - constitutes an aggressive commercial practice through the exertion of undue influence where the trader or its courier adopt unfair conduct limiting the consumer's freedom of choice.
- 20 Regarding, in the first place, the question whether the model for concluding the contracts at issue in the main proceedings constitutes an aggressive commercial practice in all circumstances, it should be borne in mind that Chapter 2 of Directive 2005/29, entitled 'Unfair commercial practices', contains two sections, namely Section 1, relating to misleading commercial practices, and Section 2, relating to aggressive commercial practices.
- 21 Article 5 of that directive, which appears in Chapter 2 thereof, prohibits unfair commercial practices in paragraph 1 thereof and establishes the criteria for determining whether a commercial practice is unfair in paragraph 2 thereof.
- 22 That article specifies, in paragraph 4 thereof, that, in particular, commercial practices that are 'misleading' within the meaning of Articles 6 and 7 of Directive 2005/29 are unfair, as are those that are 'aggressive' within the meaning of Articles 8 and 9 of that directive.
- 23 Article 5(5) of Directive 2005/29 provides, in addition, that Annex I thereto contains the list of those commercial practices which are in all circumstances to be regarded as unfair and that that list, which applies in all the Member States, may be modified only by revision of that directive.
- 24 In that regard, recital 17 of Directive 2005/29 specifies that, in order to provide greater legal certainty, only the practices listed in that Annex I are to be deemed unfair in all circumstances without having to be assessed on a case-by-case basis against the provisions of Articles 5 to 9 of that directive.
- 25 As Annex I to Directive 2005/29 constitutes a full and exhaustive list, the commercial practice at issue in the main proceedings cannot be classified as an aggressive commercial practice in all circumstances for the purposes of that directive unless it corresponds to one of the situations listed in points 24 to 31 of that annex.

- 26 However, a simple reading of those points enables it to be established that no such correspondence exists. Moreover, no such correspondence has been alleged in the main proceedings.
- 27 It must therefore be concluded that the application by a trader of a model for concluding contracts for the supply of telecommunications services under which the consumer must take the final transactional decision in the presence of a courier who delivers the standard-form contract, without being able freely to take cognisance of the content of that contract while the courier is present, does not constitute a practice that can be classified as an aggressive commercial practice in all circumstances.
- 28 Regarding, in the second place, the question whether the model for concluding contracts at issue in the main proceedings constitutes an aggressive commercial practice in the circumstances indicated in the second and third indents of the question referred, it is apparent from Article 8 of Directive 2005/29 that a commercial practice is to be regarded as aggressive if 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 a product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.
- 29 Article 9 of that directive sets out a series of factors to be taken into consideration in order to determine whether a commercial practice uses harassment, coercion or undue influence.
- 30 It should be added that, according to recital 7 of Directive 2005/29, full account should be taken of the context of the individual case concerned in applying that directive, which entails, in Article 8 thereof, an obligation to take account of all the features of the conduct of the trader in the factual context concerned. It should also be borne in mind that the meaning of consumer is of the utmost importance for the purposes of interpreting the provisions of Directive 2005/29. According to 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 (judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 51 and the case-law cited).
- 31 Consequently, a commercial practice cannot be classified as aggressive within the meaning of Directive 2005/29 until a factual and case-specific assessment of its features has been carried out in the light of the criteria set out in Articles 8 and 9 of that directive.
- 32 In that regard, it must first be pointed out that, of the grounds set out in Article 8 of Directive 2005/29, the request for a preliminary ruling in the present case concerns only undue influence.
- 33 The concept of 'undue influence', defined in Article 2(j) of Directive 2005/29, covers the exploitation 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. As the Advocate General noted in point 45 of his Opinion, undue influence is not necessarily impermissible influence but influence which, without prejudice to its lawfulness, actively entails, through the application of a certain degree of pressure, the forced conditioning of the consumer's will.
- 34 It should also be borne in mind that Article 8 of Directive 2005/29 defines the concept of an 'aggressive commercial practice' in particular by the fact that it impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to a product. It follows that for a service or product to be solicited, the consumer must have made a free choice. That supposes, in particular, that the information provided by the trader to the consumer is clear and adequate (see, to that effect, judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 45).

- 35 The information provided, before the conclusion of a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer (judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 46 and the case-law cited).
- 36 Account should also be taken of the fact that the objective pursued by Directive 2005/29 is, inter alia, to achieve a high level of consumer protection against unfair commercial practices and that that objective is based on the assumption that, in relation to a trader, the consumer is in a weaker position, particularly with regard to the level of information, especially in a sector as technical as the telecommunications services sector, in which it cannot be denied that there is a major imbalance of information and expertise between the parties (see, to that effect, judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 54).
- 37 Although it is ultimately for the referring court to give a ruling on the nature of the commercial practice at issue in the main proceedings, the Court may provide the referring court, on the basis of the information set out in the request for a preliminary ruling, with considerations that may be useful for the purposes of classifying that practice.
- 38 Regarding, first of all, the question, indicated in the second indent of the question referred, whether a commercial practice involving the conclusion or the amendment of a contract during the courier's visit, such as that at issue in the main proceedings, constitutes an aggressive practice solely on the ground that the consumer has not received all the standard-form contracts individually beforehand, the following should be noted.
- 39 It is apparent from the description set out in the order for reference that, in the context of the commercial practice at issue in the main proceedings, the consumers had access via the trader's website to the offers available and to the standard-form contracts and that, in the case of telesales, the telephone call between the consumer concerned and the trader's operator also enabled the consumer to obtain that information.
- 40 It follows that, since the consumer has had the opportunity, prior to the courier's visit, to take cognisance of the content of the standard-form contracts available on the trader's website, that consumer has been put in a position freely to make his contractual choice. Accordingly, the fact of the consumer being required to take the final transactional decision in the presence of a courier, without having been sent all the standard-form contracts beforehand, cannot be considered to be an aggressive practice.
- 41 Nonetheless, it is for the referring court to verify whether that consumer was able to make an informed decision by making sure that he did indeed have the opportunity to access, either by means of the information available on the trader's website or by any other means, the content of the various standard-form contracts prior to the courier's visit.
- 42 In that regard, according to the principles recalled in paragraph 30 above, it is necessary to take account of the particular features specific to each of the trader's sales channels. In particular, as the Advocate General noted in point 62 of his Opinion, in the case of a sale by telephone, the quality of the information obtained by a given consumer during a telephone conversation may not be comparable to the quality of the information available online. Accordingly, it must be ascertained whether the information which a consumer making use of that sales channel was able to access is sufficient to guarantee freedom of choice on his part.

- 43 It should, however, be added that the mere fact that the consumer has not actually had access to that information is not, per se, sufficient to classify the model for concluding contracts at issue in the main proceedings as an aggressive practice. Indeed, in order to conclude that such a practice exists, it is still necessary to identify conduct by the trader that may be regarded as undue influence within the meaning of paragraph 33 above.
- 44 Accordingly, a model for concluding or amending contracts during the courier's visit, such as that at issue in the main proceedings, does not constitute an aggressive commercial practice solely on the ground that not all the standard-form contracts were sent to the consumer individually beforehand, for example by email or to his home address.
- 45 Regarding, next, the circumstances indicated in the third indent of the question referred, it should be noted that, where the procedure for concluding or amending the contract is conducted in accordance with the description provided in the present case by the referring court, which includes the fact of the consumer having indeed been put in a position to take cognisance of the standard-form contracts, the mere fact of the courier asking the consumer to take his final transactional decision without having time to study, at his convenience, the documents delivered to him by that courier cannot constitute an aggressive commercial practice.
- 46 However, certain additional practices which might be adopted by the trader or its courier in the context of the process for concluding or amending the contracts concerned, the aim of which is to limit the consumer's freedom of choice, may also lead to the commercial practice being regarded as aggressive where they constitute conduct the effect of which is to put pressure on the consumer such that his freedom of choice is significantly impaired.
- 47 Thus, the fact of the courier insisting on the need to sign the contract or amendment which he delivers to the consumer may constitute an aggressive practice, in so far as such an attitude is liable to make that consumer feel uncomfortable and thus to confuse his thinking in relation to the transactional decision to be taken.
- 48 By way of example, the announcement that any delay in signing the contract or amendment would mean that the subsequent conclusion thereof would be possible only under less favourable conditions, or the fact that the consumer would risk having to pay contractual penalties or, in the event of the contract being amended, would risk the trader suspending the service, may fall within that category. The fact of the courier informing the consumer that, if he refuses to sign or delays in signing the contract or amendment that has been delivered to him, he could receive an unfavourable assessment from his employer could also fall within that same category.
- 49 In the light of the foregoing, the answer to the question referred is that Article 2(j) and Articles 8 and 9 of Directive 2005/29 must be interpreted as meaning that the application by a trader of a model for concluding or amending contracts for the supply of telecommunications services, such as that at issue in the main proceedings, under which the consumer must take the final transactional decision in the presence of a courier who delivers the standard-form contract, without being able freely to take cognisance of the content of that contract while the courier is present:
- does not constitute an aggressive commercial practice in all circumstances;
 - does not constitute an aggressive commercial practice through the exertion of undue influence solely on the ground that not all the standard-form contracts were sent to the consumer individually beforehand, for example by email or to his home address, where that consumer had the opportunity, prior to the courier's visit, to take cognisance of their content; and

- constitutes an aggressive commercial practice through the exertion of undue influence where the trader or its courier adopt unfair conduct, the effect of which is to put pressure on the consumer such that his freedom of choice is significantly impaired, such as conduct that makes that consumer feel uncomfortable or confuses his thinking concerning the transactional decision to be taken.

Costs

- 50 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 (Fifth Chamber) hereby rules:

Article 2(j) and Articles 8 and 9 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 must be interpreted as meaning that the application by a trader of a model for concluding or amending contracts for the supply of telecommunications services, such as that at issue in the main proceedings, under which the consumer must take the final transactional decision in the presence of a courier who delivers the standard-form contract, without being able freely to take cognisance of the content of that contract while the courier is present:

- does not constitute an aggressive commercial practice in all circumstances;
- does not constitute an aggressive commercial practice through the exertion of undue influence solely on the ground that not all the standard-form contracts were sent to the consumer individually beforehand, for example by email or to his home address, where that consumer had the opportunity, prior to the courier's visit, to take cognisance of their content; and
- constitutes an aggressive commercial practice through the exertion of undue influence where the trader or its courier adopt unfair conduct, the effect of which is to put pressure on the consumer such that his freedom of choice is significantly impaired, such as conduct that makes that consumer feel uncomfortable or confuses his thinking concerning the transactional decision to be taken.

[Signatures]