



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

3 February 2021 *

(Reference for a preliminary ruling – Directive 97/7/EC – Article 9 – Directive 2011/83/EU – Article 27 – Directive 2005/29/EC – Article 5(5) – Annex I, point 29 – Unfair commercial practices – Concept of ‘inertia selling’ – Supply of drinking water)

In Case C-922/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 13 December 2019, received at the Court on 17 December 2019, in the proceedings

Stichting Waternet

v

MG,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, C. Toader (Rapporteur) and M. Safjan, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Stichting Waternet, by F.E. Vermeulen and F.H. Oosterloo, advocaten,
- MG, by R.K. van der Brugge, advocaat,
- the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,
- the Czech Government, by M. Smolek, J. Vláčil and S. Šindelková, acting as Agents,
- the Austrian Government, by A. Posch, acting as Agent,

* Language of the case: Dutch.

– the European Commission, by N. Ruiz García, M. van Beek and C. Valero, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 9 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19), Article 27 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64), and Article 5(5) of, and point 29 of Annex I to, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).
- 2 The request has been made in proceedings between Stichting Waternet, a water supply company, and MG, a consumer, concerning an action for payment of invoices relating to the consumption of drinking water supplied by that company.

Legal context

European Union law

Directive 97/7

- 3 Recital 16 of Directive 97/7 states:

'... the promotional technique involving the dispatch of a product or the provision of a service to the consumer in return for payment without a prior request from, or the explicit agreement of, the consumer cannot be permitted, unless a substitute product or service is involved'.

- 4 According to Article 9 of that directive, entitled 'Inertia selling':

'Member States shall take the measures necessary to:

- prohibit the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment,
- exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.'

Directive 2011/83

5 Recitals 14 and 60 of Directive 2011/83 state:

‘(14) This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract (for instance in the case of lack of consent). ...

...

(60) Since inertia selling, which consists of unsolicited supply of goods or provision of services to consumers, is prohibited by Directive [2005/29] but no contractual remedy is provided therein, it is necessary to introduce in this Directive the contractual remedy of exempting the consumer from the obligation to provide any consideration for such unsolicited supply or provision.’

6 Article 3 of that directive, headed ‘Scope’, provides, in paragraph 5 thereof:

‘This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.’

7 Article 27 of that directive, entitled ‘Inertia selling’, provides:

‘The consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services, prohibited by Article 5(5) and point 29 of Annex I to Directive [2005/29]. In such cases, the absence of a response from the consumer following such an unsolicited supply or provision shall not constitute consent.’

8 Article 31 of that directive, entitled ‘Repeals’, provides, in the first paragraph thereof:

‘... Directive [97/7 is] repealed as of 13 June 2014.’

Directive 2005/29

9 According to recitals 6, 16 to 18 and 23 of Directive 2005/29:

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

...

(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.
- (18) ... In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. ...

...

- (23) Since the objectives of this Directive, namely to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices, cannot be sufficiently achieved by the Member States and can therefore be better achieved at [Union] level, the [Union] may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to eliminate the internal market barriers and achieve a high common level of consumer protection.'

10 Article 3 of that directive, entitled 'Scope', provides:

'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.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

...'

11 Article 5(1) and (5) of that directive provides:

'1. Unfair commercial practices shall be prohibited.

...

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.'

12 According to Article 8 of Directive 2005/29, headed 'Aggressive commercial practices':

'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.’

13 Article 9 of that directive provides:

‘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.’

14 Point 29, included in the section headed ‘Aggressive commercial practices’ of Annex I to that directive, entitled ‘Commercial practices which are in all circumstances considered unfair’, is worded as follows:

‘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] (inertia selling).’

National law

The BW

15 The Burgerlijk Wetboek (Civil Code; ‘the BW’), in the version in force until 12 June 2014, provides, in Article 7:7(2) thereof, that the sending of unsolicited goods to a natural person not acting in the course of his or her trade, business or profession, and demanding payment for those goods, their return or their safekeeping, is prohibited. Where such goods are nevertheless sent, Article 7:7(1) of the BW, in the version in force until 12 June 2014, relating to the right to keep the goods free of charge, applies by analogy.

16 Article 7:7(2) of the BW, in the version applicable as from 13 June 2014, provides that no payment obligation is to arise for a natural person acting for purposes which are outside his or her trade, business or profession in the event of the unsolicited supply of goods, financial products, water, gas, electricity, district heating or digital content not supplied on a tangible medium, irrespective of the fact that the digital content is identifiable and effective control can be exercised over that content, or of the unsolicited provision of services, for the purposes of Article 193i(f) of Book 6 of the BW, in the version applicable as from 13 June 2014. The lack of response by a natural person acting for purposes which are outside his or her trade, business or profession in such a case of

unsolicited supply of goods or services does not amount to acceptance. Where such goods are nevertheless sent, Article 7:7(1) of the BW, in the version applicable as from 13 June 2014, relating to the right to keep the goods free of charge, applies by analogy. That latter provision applies irrespective of whether the sender has representation.

The Law on Water

- 17 Article 3 of the Wet houdende nieuwe bepalingen met betrekking tot de productie en distributie van drinkwater en de organisatie van de openbare drinkwatervoorziening (Drinkwaterwet) (Law laying down new provisions relating to the production and supply of water and the organisation of the public supply of water (Law on Drinking Water)) of 18 July 2009 (Stb. 2009, p. 370; ‘the Law on Water’) provides that responsibility for the adequate and lasting public supply of water within a distribution area lies with the owner of the drinking water company which is competent, and, in accordance with Article 8 of that law, obliged to supply water within that distribution area.
- 18 Under Article 5 of that law, the competent minister is to define, for each drinking water company, a distribution area in which the owner of the drinking water company is competent, and, in accordance with Article 8 of that law, obliged to supply water within that distribution area.
- 19 Article 8 of the Law on Water is worded as follows:
- ‘1. The owner of a drinking water company is obliged, within the distribution area allocated to it, to make an offer to connect to the distribution network it manages any person who makes a request to that end.
2. The owner of a drinking water company is also obliged, within the distribution area allocated to it, to make an offer to supply water through the network it manages to any person who makes a request to that end.
3. The owner of a drinking water company shall apply reasonable, transparent and non-discriminatory conditions.
- ...’
- 20 Article 9(1) of that law provides that the owner of a drinking water company is to conduct a policy designed to avoid any disconnection from the supply of water for small users. According to Article 9(2) of that law, the competent minister lays down the detailed rules relating to the disconnection of a small user’s water supply and to preventive measures seeking to prevent as far as possible such a disconnection.
- 21 In accordance with Article 11 of the Law on Water, the owner of a drinking water company is to apply cost-covering, transparent and non-discriminatory rates.
- 22 According to Article 12 of the Law on Water:
- ‘1. The drinking water company’s budget shall specify the way in which the various costs, including the maximum capital costs that may be charged, are passed on in the rate.
2. Before 1 October of each year, the owner of a drinking water company shall submit to the [competent] Minister a report on the costs – including capital costs – passed on during the

previous calendar year in the water supply rates and the operating results for the year in question. The report shall be accompanied by an unqualified opinion issued by a chartered accountant. The Minister shall send the report to the two chambers of the Staten-Generaal (States General) before the end of the calendar year.

3. If the report referred to in paragraph 2 shows that the operating results exceed the capital costs determined for the year in question on the basis of Article 11(2), the owner of a drinking water company shall ensure that the excess is offset in the pricing for the following calendar year.'

23 Article 13 of that law provides:

'1. In the interests of the public supply of water, other detailed rules shall be laid down by, or pursuant to, a general administrative decision as far as concerns:

(a) the costs on which the rate referred to in Article 11 is based;

(b) the elements and calculation method of the rates referred to in Article 12.

2. If the provisions of Article 11 or Article 12 or the detailed rules referred to in paragraph 1 are not complied with, the [competent] Minister may issue a recommendation to the owner of a drinking water company. The recommendation shall state the reasons why the provisions of Article 11 or Article 12 or the rules referred to have not been complied with as well as the pricing changes required in order to comply with them. The recommendation shall specify the period within which it must be complied with.'

The Regulation on the policy for water disconnection for small users

24 According to Article 2 of the Regeling van de Staatssecretaris van Infrastructuur en Milieu, nr. IENM/BSK-2012/14677, houdende regels met betrekking tot het afsluiten van kleinverbruikers van drinkwater (Regeling afsluitbeleid voor kleinverbruikers van drinkwater) (Regulation of the Secretary of State for Infrastructure and the Environment, No IENM/BSK-2012/14677, laying down rules on water disconnection for small users (Regulation on the policy for water disconnection for small users)) of 17 April 2012 (Stcrt. 2012, No 7964):

'The owner of a drinking water company shall not disconnect a small user's water supply for non-payment until the procedure laid down in Articles 3 and 4 has been followed.'

25 Article 3 of that regulation, entitled 'Written reminder', provides:

'1. If a small user fails to respond to an initial demand for payment by the owner of a drinking water company within the period prescribed, that owner shall be required to send at least one written reminder to the small user concerned on that subject.

2. In the aforementioned written reminder, the owner of a drinking water company shall:

(a) remind the small user of debt management advice possibilities;

- (b) offer, with the small user's written consent, to provide his or her contact details, his or her customer number and information on the amount of his or her debt to a body responsible for debt management advice, unless the small user is not a natural person; and
- (c) state that the small user may not be deprived of water if he or she presents a medical certificate as referred to in Article 6(d), without prejudice to the circumstances set out in points (a) to (c) of that article.'

26 Article 4 of that regulation provides:

'The owner of a drinking water company shall endeavour to contact the small user in order to draw his or her attention to the possibilities of avoiding late payments, putting an end to late payments and obtaining confirmation as to whether or not an authorisation within the meaning of Article 3(2)(b) has been granted.'

The Decree on Water and the Water Regulation

27 The Besluit houdende bepalingen inzake de productie en distributie van drinkwater en de organisatie van de openbare drinkwatervoorziening (Drinkwaterbesluit) (Decree laying down provisions relating to the production and supply of water and the organisation of the public supply of water (Decree on water)) of 23 May 2011 (Stb. 2011, p. 293), adopted pursuant to the Law on Water, and the Regeling van de Staatssecretaris van Infrastructuur en Milieu, nr. BJZ2011046947, houdende nadere regels met betrekking tot enige onderwerpen inzake de voorziening van drinkwater, warm tapwater en huishoudwater (Drinkwaterregeling) (Regulation of the State Secretary for Infrastructure and the Environment, No BJZ2011046947, concerning certain aspects of the supply of drinking water, hot tap water and water for household use (the Water Regulation)) of 14 June 2011 (Stcrt. 2011, p. 10842), contain detailed rules on the method of calculation of costs and specify which costs can be passed on in the price and in which manner. The competent minister is to ensure compliance with those rules. The drinking water company is to publish each year a list of the prices that will apply to the supply of water in the following calendar year and specify, at the same time, the manner in which those prices are calculated the basis of costs.

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

- 28 Stichting Waternet is a water supply company which is exclusively responsible for the supply of drinking water in the municipality of Amsterdam (Netherlands), where the dwelling occupied by MG since September 2012 is located.
- 29 MG did not inform Stichting Waternet of his move as new occupant into that dwelling. The previous occupant also failed to indicate that he was moving out and continued to pay water supply invoices for that dwelling until 1 January 2014. On 12 November 2014, Stichting Waternet sent MG a welcome letter and, from 18 November 2014, sent him invoices for the supply of water from 1 January 2014. MG has not paid any of the invoices for the period from 1 January 2014 to 18 November 2016.
- 30 Stichting Waternet therefore brought an action before the Kantonrechter (Cantonal Court, Netherlands) seeking an order that MG pay the sum of EUR 283.79, together with interest at the statutory rate and costs and, in the alternative, an authorisation to disconnect the water supply of

that dwelling. That court dismissed Stichting Waternet's claim for payment on the ground that the supply of drinking water amounted to 'inertia selling' for the purposes of Article 7:7(2) of the BW, in the version applicable as from 13 June 2014. Conversely, it upheld its alternative claim, on condition that MG did not expressly indicate, within 14 days of service of the judgment, his intention to be supplied with water. MG concluded a water supply contract with Stichting Waternet on 18 November 2016.

- 31 Stichting Waternet brought an appeal against the judgment of the Kantonrechter (Cantonal Court) to the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands), which dismissed that appeal on the ground that (i) there was no water supply contract between the parties in the main proceedings for the period from 1 January 2014 to 18 November 2016, (ii) the supply of water during that period amounted to 'inertia selling' for the purposes of Article 7:7(2) of the BW, in the version applicable as from 13 June 2014, and (iii) the fact that MG had consumed the water could not lead to a different finding.
- 32 Stichting Waternet accordingly brought an appeal on a point of law before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). That court is uncertain whether, in view of the current practice in the Netherlands and of the Netherlands legislation on the public supply of water, Stichting Waternet's commercial practice can be considered not to amount to 'inertia selling' of drinking water, prohibited by Article 5(5) of, and point 29 of Annex I to, Directive 2005/29, and by Article 9 of Directive 97/7 and Article 29 of Directive 2011/83.
- 33 First of all, the referring court notes that, in the Netherlands, since the public supply of water is regarded as an essential task of the public authorities, there is no competitive market in that sector, such that any water supply company is, on the one hand, entitled to supply water on an exclusive basis within a distribution area allocated to it and, on the other hand, obliged to make an offer of connection to those making a request to that end and not to disconnect that supply to a consumer's dwelling for non-payment. Moreover, that court states that such companies must, under the supervision of the public authorities, apply cost-covering, transparent and non-discriminatory rates.
- 34 Next, the referring court states that the average consumer in the Netherlands is deemed to know that the dwelling into which he or she is moving is connected to the public drinking water supply network and that the supply of drinking water is not free of charge.
- 35 Lastly, that court takes the view that the case in the main proceedings can be distinguished from the cases which gave rise to the judgment of 13 September 2018, *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:710), in that, in the case in the main proceedings, the consumer cannot choose the water supply company which will supply him or her with drinking water, the costs are invoiced once the consumer has actually consumed water, those costs cover expenditure, are transparent and non-discriminatory, and established under the supervision of the public authorities.

36 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Must Article 9 of [Directive 97/7] and Article 27 of [Directive 2011/83, read] in conjunction with Article 5(5) [of] and point 29 of Annex I to [Directive 2005/29], be interpreted as meaning that there is [inertia selling] of drinking water within the meaning of those provisions if the commercial practice of the drinking water company consists of the following:
- (i) the drinking water company is, by law, (a) exclusively authorised and obliged to supply drinking water within its distribution area by means of pipes, and is (b) obliged to make an offer to connect to the public drinking water supply those making a request to that end and to make an offer to supply drinking water;
 - (ii) the drinking water company maintains the connection between the consumer’s home and the public drinking water supply as it existed before the consumer came into occupation of the dwelling, as a result of which there is pressure in the water pipes in the consumer’s dwelling, and as a result of which the consumer, after performing an active and conscious act – consisting of turning on the tap or an equivalent act – can consume drinking water if desired, even after the consumer has indicated that he or she does not wish to enter into a contract for the supply of drinking water; and
 - (iii) the drinking water company charges costs in so far as the consumer has actually consumed drinking water by performing an active and conscious act, whereby the rates applied cover costs, are transparent and non-discriminatory and are monitored by the authorities?
- (2) Do Article 9 of the [Directive 97/7] and Article 27 of [Directive 2011/83, read] in conjunction with Article 5(5) [of] and point 29 of Annex I to [Directive 2005/29], preclude the assumption that a contract for the supply of drinking water is concluded between the drinking water company and the consumer if (i) the consumer, like the average consumer in the Netherlands, knows that there are costs associated with supplying drinking water, (ii) the consumer nevertheless consistently consumes drinking water over a long period of time, (iii) the consumer, even after receiving a welcome letter, invoices and reminders from the drinking water company, continues his or her water consumption, and (iv) the consumer, after judicial authorisation has been granted to terminate the dwelling’s drinking water connection, lets it be known that he or she does in fact wish to have a contract with the drinking water company?’

Consideration of the questions referred

The second question

37 By its second question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 9 of Directive 97/7 and Article 27 of Directive 2011/83, read in conjunction with Article 5(5) of, and point 29 of Annex I to, Directive 2005/29, regulate the formation of contracts and whether, in particular, they must be interpreted as meaning that a contract may be regarded as concluded between a water supply company and a consumer in the absence of the latter’s express consent.

- 38 As a preliminary point, it is important to recall, first, that Directive 97/7 was indeed repealed on 13 June 2014, in accordance with Article 31 of Directive 2011/83. However, in the light of the period during which the facts referred to in paragraphs 28 and 29 of the present judgment took place, it is appropriate to take into account, in order to answer the second question, both the provisions of Directive 97/7 as well as those of Directive 2011/83.
- 39 Second, that question is relevant only if the legal relationship between Stichting Waternet and MG is not regulated entirely by national legislation, concerning both the supply of water by the trader and the costs associated with that supply payable by the consumer. It is for the referring court to determine whether that condition is met in the case in the main proceedings.
- 40 In the first place, it should be noted that the purpose of Directive 97/7 is to protect consumers in distance contracts and, in particular, to define the scope of the obligations which must be fulfilled by traders as regards the information to be communicated to consumers and the right of withdrawal of such consumers. By contrast, that directive does not cover the rules relating to the formation of distance contracts.
- 41 In the second place, it must be observed that it is clear from the wording of Article 3(5) of Directive 2011/83 that that directive does not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in that directive. It is also apparent from recital 14 of Directive 2011/83 that that directive should be without prejudice to national law regulating the conclusion or the validity of a contract, for instance in the case of lack of consent.
- 42 In the third place, as regards Directive 2005/29, Article 3(2) thereof provides that it is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.
- 43 In the present case, the referring court asks whether Article 9 of Directive 97/7 and Article 27 of Directive 2011/83, read in conjunction with Article 5(5) of, and point 29 of Annex I to, Directive 2005/29, regulate the conclusion of contracts.
- 44 In that regard, it must be stated that those provisions concern the effects of any finding that there is ‘inertia selling’, in that they seek, first, to prohibit the commercial practice consisting in such a supply, in accordance with Article 5(5) of, and point 29 of Annex I to, Directive 2005/29, and, second, to provide for an exemption for the consumer from the obligation to pay any consideration in the event of ‘inertia selling’.
- 45 It thus follows from the considerations set out in paragraphs 40 to 42 and 44 of the present judgment that, in the absence of harmonisation of the general aspects of contract law at EU level, the formation, conclusion and validity of contracts are regulated by national law. It is therefore for the referring court to determine, in the light of Netherlands law, whether a contract may be regarded as concluded between a water supply company and a consumer, in the absence of that consumer’s express consent.
- 46 In the light of the foregoing, the answer to the second question is that Article 9 of Directive 97/7 and Article 27 of Directive 2011/83, read in conjunction with Article 5(5) of, and point 29 of Annex I to, Directive 2005/29, do not regulate the formation of contracts, with the result that it

is for the referring court to assess, in accordance with national legislation, whether a contract may be regarded as concluded between a water supply company and a consumer in the absence of the latter's express consent.

The first question

- 47 By its first question, the referring court asks, in essence, whether the concept of 'inertia selling', within the meaning of point 29 of Annex I to Directive 2005/29, must be interpreted as covering a commercial practice consisting in maintaining the connection to the public drinking water supply network when a consumer moves into a previously occupied dwelling, in the absence of a request from that consumer to that effect.
- 48 As a preliminary point, it should be recalled that, as has already been stated in paragraph 39 of the present judgment, the answer to the first question is relevant only if the legal relationship between Stichting Waternet and MG is not regulated entirely by national legislation, concerning both the supply of water by the trader and the costs associated with that supply payable by the consumer, which it is for the referring court to determine.
- 49 Where appropriate, it is necessary to examine whether a commercial practice, such as the practice relating to the supply of drinking water at issue in the main proceedings, falls within the scope of Directive 2005/29.
- 50 Article 1 of that directive, read in the light of recital 23 thereof, provides inter alia that the purpose of that directive is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.
- 51 Consequently, national legislation falls within the scope of that directive only if it pursues aims relating to consumer protection (see, to that effect, order of 4 October 2012, *Pelckmans Turnhout*, C-559/11, not published, EU:C:2012:615, paragraph 20).
- 52 In that regard, it should be noted that the aims of the national legislation at issue in the main proceedings are not clear from the order for reference or from the documents before the Court. In those circumstances, it is for the referring court to determine whether Stichting Waternet's practice results from the application of national provisions which pursue aims relating to the protection of the economic interests of consumers and falls, therefore, within the scope of Directive 2005/29, or whether, on the contrary, it seeks to protect only other public interests, such as public health. It is only if, according to the referring court, in the light of the preceding paragraph of this judgment, Stichting Waternet's practice falls within the scope of Directive 2005/29 that it would be for it to determine whether that practice constitutes 'inertia selling'.
- 53 As regards the concept of 'inertia selling', point 29 of Annex I to Directive 2005/29 provides that, inter alia, 'demanding immediate or deferred payment for ... products supplied by the trader, but not solicited by the consumer ... (inertia selling)', falls within the category of aggressive commercial practices which are in all circumstances considered unfair.
- 54 Accordingly, in particular conduct whereby the trader demands payment from a consumer for a service which has been provided to that consumer without the consumer soliciting it, constitutes 'inertia selling' within the meaning of point 29 of Annex I (judgments of 13 September 2018, *Wind*

Tre and Vodafone Italia, C-54/17 and C-55/17, EU:C:2018:710, paragraph 43, and of 5 December 2019, *EVN Bulgaria Toplofikatsia and Toplofikatsia Sofia*, C-708/17 and C-725/17, EU:C:2019:1049, paragraph 64).

- 55 In that regard, it should be noted that Article 8 of Directive 2005/29 defines the concept ‘aggressive commercial practice’ in particular by the fact that it impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct with regard to the product. It follows that for a service 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 (judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 45 and the case-law cited).
- 56 The Court has also held that, since the price is, in principle, a determining factor in the consumer’s mind when he or she must make a transactional decision, it must be considered information necessary to enable the consumer to make such a fully informed decision (judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 47).
- 57 Moreover, 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). In accordance with recital 18, it is for the referring court to determine the typical reaction of the average consumer in a given case.
- 58 In the present case, it is apparent from the request for a preliminary ruling that the water supply company at issue in the main proceedings is obliged to provide the water supply service, which cannot be disconnected due to non-payment by the consumer, before a written reminder is sent to that consumer and that company has endeavoured to come into personal contact with the latter.
- 59 As regards the invoicing of water, the referring court states that, in order for costs to be incurred, a conscious act on the part of the consumer – consuming water – is necessary. In addition, each water supply company must apply, under the supervision of the public authorities, cost-covering, transparent and non-discriminatory rates that are proportionate to the water consumption.
- 60 The referring court also states that the average consumer in the Netherlands, who lives in a previously occupied dwelling, knows that that dwelling remains connected to the public drinking water supply network and that water is supplied against payment.
- 61 Those circumstances distinguish the case in the main proceedings from the cases which gave rise to the judgment of 13 September 2018, *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:710, paragraphs 49 and 56). After all, in that judgment, the Court held that it is irrelevant that the use of the services in question may, in certain cases, have required a conscious act on the part of the consumer and concluded that there was ‘inertia selling’ within the meaning of point 29 of Annex I to Directive 2005/29, since, in those cases, consumers had not received adequate information about certain services provided and their costs.

- 62 In the light of the foregoing, the answer to the first question is that the concept of ‘inertia selling’, within the meaning of point 29 of Annex I to Directive 2005/29, must be interpreted as meaning that, subject to verifications by the referring court, it does not cover a commercial practice of a drinking water supply company consisting in maintaining the connection to the public water supply network when a consumer moves into a previously occupied dwelling, since that consumer does not have the choice of the supplier of that service, that supplier charges cost-covering, transparent and non-discriminatory rates that are proportionate to the water consumption, and the consumer knows that that dwelling is connected to the public water supply network and that water is supplied against payment.

Costs

- 63 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 (Sixth Chamber) hereby rules:

- 1. Article 9 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts and Article 27 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, read in conjunction with Article 5(5) of, and point 29 of Annex I to, 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, do not regulate the formation of contracts, with the result that it is for the referring court to assess, in accordance with national legislation, whether a contract may be regarded as concluded between a water supply company and a consumer in the absence of the latter’s express consent.**
- 2. The concept of ‘inertia selling’, within the meaning of point 29 of Annex I to Directive 2005/29, must be interpreted as meaning that, subject to verifications by the referring court, it does not cover a commercial practice of a drinking water supply company consisting in maintaining the connection to the public water supply network when a consumer moves into a previously occupied dwelling, since that consumer does not have the choice of the supplier of that service, that supplier charges cost-covering, transparent and non-discriminatory rates that are proportionate to the water consumption, and the consumer knows that that dwelling is connected to the public water supply network and that water is supplied against payment.**

[Signatures]