



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
CAMPOS SÁNCHEZ-BORDONA  
delivered on 30 January 2019<sup>1</sup>

**Case C-628/17**

**Prezes Urzędu Ochrony Konkurencji i Konsumentów  
intervener:  
Orange Polska S.A.**

(Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling — Consumer protection — Unfair business-to-consumer commercial practices — Directive 2005/29/EC — Concept of an aggressive commercial practice —

Model for concluding distance contracts for the supply of telecommunications services — Obligation on consumers to make a final commercial decision in the presence of the courier delivering the standard-form contract)

1. A new request for a preliminary ruling provides the Court of Justice with an opportunity to develop its case-law on consumer protection, this time within the context of Directive 2005/29/EC,<sup>2</sup> the application of which formed the subject matter of the recently delivered judgment in *Wind Tre and Vodafone Italia*.<sup>3</sup>

2. In line with the case-law established in that judgment, it is now necessary to determine whether the model for concluding distance contracts applied in Poland by a telecommunications undertaking, whereby the consumer is required to make the final decision on a transaction in the presence of the courier delivering the standard-form contract, of whose content the consumer has previously had an opportunity to take cognisance either online or by telephone, constitutes an aggressive commercial practice (in any event or only in certain circumstances).

### **I. Legislative framework**

#### **A. EU law: Directive 2005/29**

3. Under recitals 7, 16 and 17 of Directive 2005/29:

‘(7) ... Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof.

...

<sup>1</sup> Original language: Spanish.

<sup>2</sup> 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).

<sup>3</sup> Judgment of 13 September 2018 (C-54/17 and C-55/17, EU:C:2018:710).

- (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. Article 2 of that directive contains the following definitions:

'...

- (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 thereof ('Prohibition of 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 in 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. Article 8 of Directive 2005/29 ('Aggressive commercial practices') 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.'

7. Article 9 of that directive ('Use of harassment, coercion and undue influence') states:

'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 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, 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.'

#### ***B. National law: Law on combating unfair market practices<sup>4</sup>***

8. In accordance with Article 8(1) of the Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym (Law of 23 August 2007 on combating unfair market practices), 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.

<sup>4</sup> Dziennik Ustaw Rzeczypospolitej Polskiej of 2007, No 171, item 1206, as subsequently amended.

9. In accordance with Article 8(2) of that law, undue 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.

## II. Facts

10. According to the order for reference, Orange Polska concludes telecommunications services contracts with consumers via an online shop or by telephone (teleshopping), in accordance with a procedure the steps of which are:

- (1) the consumer visits a webpage and familiarises himself with the undertaking's offer. From there he can access the standard-form contracts offered by the company via a link;
- (2) the consumer selects a product or contract;
- (3) the consumer places an order. There is no requirement at this stage for the consumer to declare that he is familiar with the standard-form contract offered;
- (4) the order is confirmed;
- (5) the order is completed by courier. The courier delivers to the consumer a draft of the contract (in the case of a new service or a new customer) or an additional clause (in the case of an existing customer), together with all the annexes, terms of business, price lists and other documents that will become part of the contract following signature;
- (6) the contract is concluded and the item, if any, is delivered. On signing the contract or the additional clause, the consumer declares that he has taken cognisance of all the documents delivered and that he accepts the contents thereof. Signature must take place during the courier's visit. If not, the contract is not concluded and the consumer must visit a physical retail outlet or reorder either online or via the teleshopping route; and
- (7) the contract is activated.

11. By decision of 30 December 2010, the Urząd Ochrony Konkurencji i Konsumentów (Polish Office of Competition and Consumer Protection) declared that the practice described above is prejudicial to the collective interests of consumers, inasmuch as it limits their autonomy by requiring them to decide whether to sign the contract in the courier's presence and depriving them of the freedom to acquaint themselves with its contents.

12. On 27 October 2014 that administrative decision was annulled by the Sąd Okręgowy w Warszawie (District Court, Warsaw, Poland). By judgment of 4 March 2017, the Sąd Apelacyjny w Warszawie (Appeal Court, Warsaw, Poland) confirmed the judgment of the court of first instance.

13. The Prezes Urzędu Ochrony Konkurencji i Konsumentów (Chairman of the Office of Competition and Consumer Protection) brought an appeal on a point of law against the judgment on appeal before the Sąd Najwyższy (Supreme Court, Poland), which has decided to make a reference for a preliminary ruling.

### III. The question referred

14. The referring court states that it ‘is inclined to share the view of both lower courts’ but has interpretative doubts regarding the classification of the conduct at issue in the dispute.

15. In its opinion, there is no aggressive commercial practice if the trader has not exerted any pressure on the consumer but simply hopes that the latter will make a final decision about a contract which he provisionally agreed to conclude when he gave his consent at the stage of placing the order, after he had accessed the documents containing the conditions governing the provision of the telecommunications services in question.

16. In the view of the referring court,

1. The contract conclusion model at issue does not entail any impairment of the consumer’s decision-making autonomy, since the latter already makes a decision in principle (albeit a provisional and non-binding one) at the stage of placing the order via the trader’s webpage or when speaking to an adviser by telephone.
2. The consumer’s freedom to make or refuse to make the corresponding declaration of intent is also not impaired during the courier’s visit, in the course of which the consumer must either ratify his decision by signing the contract or refuse to conclude it.
3. The condition that the consumer ‘[must] take a transactional decision which he would not have taken otherwise’ would be satisfied if the supplier sent the consumer, via the courier, a contract or standard-form contract containing terms and conditions different from those in respect of which he had previously made a declaration of cognisance. Only in those circumstances would any pressure be exerted by the presence of a courier waiting for a quick decision which the consumer would not have taken otherwise, because the contractual terms which he had agreed with the trader would be different from those ultimately presented to him.

17. Lastly, the referring court states that, account being taken of the conditions laid down in Article 9 of Directive 2005/29, and in the absence of any physical or verbal threats, the visit by the courier at a time and place agreed with the consumer does not constitute a practice which can be classified as aggressive per se.

18. On those grounds, the Sąd Najwyższy (Supreme Court) has referred the following question, lodged on 8 November 2017, to the Court of Justice for a preliminary ruling:

‘Is Article 8, in conjunction with Articles 9 and 2(j), of Directive 2005/29 ... 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 contract;
- (b) only where the consumer has not previously and individually received all standard forms (for example, at his email 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?’

#### **IV. Procedure before the Court of Justice and arguments of the parties**

19. Written observations have been lodged by Orange Polska, the Polish Government and the [European] Commission, all of which attended the hearing held on 28 November 2018.

20. Orange Polska submits that a system for the conclusion of distance contracts whereby the consumer makes his decision on the basis of the documents made available to him online and the contract is concluded at the time of the courier's arrival cannot be classified as an aggressive commercial practice. In its view, 'undue influence' must be understood as being a deliberate influence which a seller or supplier exerts over a consumer in such a way as to induce him, by illegal or contradictory methods, to make commercial decisions which he would not make otherwise.

21. The Polish Government, in common with the Commission, takes the view that, in the light of the wording of the list included in Annex I to Directive 2005/29, the conduct at issue is not such as to constitute an unfair (aggressive) commercial practice in all circumstances. Instead, it is necessary to take into account the particular circumstances of each case, considered as a whole, the assessment of which falls to the national court.

22. The Polish Government and the Commission argue that it is for the Court of Justice to provide the referring court with criteria for interpretation that take into account Article 2(j) and Articles 8 and 9 of Directive 2005/29. In accordance with those provisions, the expression 'undue influence' used in that directive should not be confined to 'impermissible influence', which is the 'unfortunate' expression used in the Polish version.

23. The Polish Government considers that the decisive factor is whether, before the courier's visit, the consumer was able to access the contract documents on a fully free and informed basis. The option to withdraw at a later stage has no bearing on the existence of an aggressive commercial practice.

24. The Commission recognises that the need to sign a contract in the presence of a courier may entail a degree of pressure on the consumer. However, that possibility is not sufficient to support the conclusion that this process always constitutes an aggressive commercial practice, since the existence of such a practice is dependent on the presence of factors capable of unduly influencing the consumer's decision.

25. Factors of this kind would be those mentioned by the referring court in paragraphs (b) and (c) of the question it has referred for a preliminary ruling, although none of these would, per se, support a finding as to the presence of an aggressive commercial practice, which would be subject to an examination of the potential impact of the practice in question on the consumer's decision.

26. In the Commission's view, online selling and telephone selling call for separate analyses to determine who the average consumer is in each case and to ascertain whether any undue influence has been exerted. Lastly, it must be considered whether the mere decision to request a courier visit for the purposes of signing a contract is capable of constituting a 'commercial decision' within the meaning of Directive 2005/29.

#### **V. Analysis**

##### ***A. Preliminary considerations***

27. The referring court asks, in essence, whether the commercial practice which it describes in its order may be classified as aggressive because it exerts 'undue influence' within the meaning of Article 8 of Directive 2005/29, read in conjunction with Article 9 and Article 2(j) thereof.



28. In particular, the referring court wishes to ascertain whether that system for the conclusion of distance contracts constitutes an aggressive commercial practice (a) in any event or (b) only where one of the following two circumstances is present:

1. the consumer ‘has not previously and individually received all standard forms ..., even if he himself, prior to the courier’s visit, had the opportunity to take cognisance of their content on the trader’s website’;
2. there are other indications that the seller or supplier, whether on his own account or via third parties, has carried out ‘unfair actions ... for the purpose of restricting the consumer’s decision-making freedom in regard to the business decision which he has to make’.

29. The issue raised is as I have just described it, if account is taken of the literal wording of the question. I add this caveat because the language versions of the question are not consistent, in particular in their translation of paragraph (a) thereof.

30. The Spanish version of that paragraph states: ‘siempre, *si* el consumidor durante la visita del mensajero no puede tomar conocimiento con libertad del contenido del contrato tipo’.<sup>5</sup> In the same vein, the Italian version says: ‘sempre, *qualora* il consumatore, al momento della visita del corriere, non possa consultare liberamente il contenuto dei modelli contrattuali’.<sup>6</sup> The German version reads: ‘immer, *wenn* der Verbraucher beim Besuch des Kuriers den Inhalt der Vertragsmuster nicht ungehindert zur Kenntnis nehmen kann’.<sup>7</sup> The Portuguese version has: ‘*sempre que* o consumidor não possa, por ocasião da visita do mensageiro, tomar livremente conhecimento do conteúdo do modelo do contrato’.<sup>8</sup>

31. On the basis of those language versions, there would be no question as to whether the contract conclusion model at issue constitutes an aggressive commercial practice in any event, that is to say ‘always’ and automatically, or only ‘where’ a particular circumstance is present, that is to say where the consumer cannot freely take cognisance of the content of the contract. As in paragraphs (b) and (c) of the question referred, the referring court would be raising the issue in relation to a specific circumstance.

32. The French version of the question referred, however, states: ‘*toujours, parce que*, durant la visite du livreur, le consommateur ne peut pas prendre connaissance librement du contenu des modèles [de contrat] qui lui sont remis’.<sup>9</sup> This translation appears to be the most faithful to the Polish original, in which paragraph (a) of the question begins ‘zawsze, *gdź*’ (‘always, because’). Paragraphs (b) and (c), on the other hand, start with the words ‘tylko, *gd*’ (‘only when’). The orthographical proximity between the words ‘*gdź*’ and ‘*gd*’ prompts the Commission to conclude that the use of the former is an erratum, because the term ‘*gd*’ applies to all three cases.<sup>10</sup>

33. In my opinion, this cannot be regarded as an erratum. First and foremost, of course, because it is reasonable to presume that the referring court drafted its question with precision and care. In particular, however, because, on the two occasions on which it uses the word ‘*gd*’ (paragraphs (b) and (c)), it does so after the word ‘tylko’ (only), while ‘*gdź*’ is preceded in paragraph (a) by the word ‘zawsze’ (always). If this were an erratum and the appropriate word in paragraph (a) were also ‘*gd*’

<sup>5</sup> Emphasis added.

<sup>6</sup> Emphasis added.

<sup>7</sup> Emphasis added.

<sup>8</sup> Emphasis added.

<sup>9</sup> Emphasis added.

<sup>10</sup> Paragraph 21, footnote 2, of the Commission’s observations.

(when), the referring court would be asking whether the model at issue constitutes an aggressive commercial practice *whenever a given circumstance is present*, which would be the same as saying *in that event alone*. The question then would be why the referring court does not also use ‘tylko’ (only) in paragraph (a), as it does in paragraphs (b) and (c).

34. Without any need to resort to the presence of the alleged erratum, the circumstance described in paragraph (a) makes complete sense as standing in contrast to the situations mentioned in the remaining two paragraphs. While the latter refer to very precise and specific situations (the consumer has not previously and individually received all the standard-form contracts; there are indications of unfair actions), paragraph (a) mentions a factor which, in the context of the reference for a preliminary ruling, would be inherent in the practice described, that is to say, the requirement that the contract be signed in the presence of the courier, the effect of which, given the urgency characteristic of the activity of couriers, is almost by definition to render the consumer ‘unable freely to take cognisance of the content of the standard-form contract’. This is not, therefore, a circumstance which may or may not exist but a state of being which is inherently attendant upon the situation described and the expression of which can for that reason be justifiably said to be an *explanation* of why the contract conclusion model at issue might *always* (‘zawsze’) be an aggressive commercial practice. This is reflected, rightly in my view, in the French version of the question referred, which I shall address now.

## **B. Substance**

35. Recital 7 of Directive 2005/29 specifically states that, in the application of the latter, ‘full account should be taken of the context of the individual case concerned’. In the same vein, and in accordance with Article 8 of that directive, in order for a commercial practice to be classified as aggressive, it is essential to examine it in such a way as to ‘take ... account of all its features and circumstances’.

36. As is argued by the Polish Government<sup>11</sup> and the Commission,<sup>12</sup> the Court of Justice must confine itself to providing the referring court with guidelines on the interpretation and application of Directive 2005/29 which, without replacing the referring court’s own findings, will assist the latter in its task, which cannot be delegated, of classifying the contract conclusion model at issue. As I have already said, that classification falls exclusively to the referring court.<sup>13</sup>

37. On that premiss, I shall analyse the various issues raised by the question referred.

### *1. Aggressive commercial practice in all circumstances?*

38. It is not difficult to discharge the duty of restraint incumbent on the Court of Justice in this case when it comes to commenting on paragraph (a) of the question referred.

39. After all, the question raised in that paragraph is confined to ascertaining whether the contract conclusion model used by Orange Polska, as described by the referring court, can ‘always’, that is to say ‘in all circumstances’, be regarded as an aggressive commercial practice.

<sup>11</sup> Paragraphs 15 and 16 of the Polish Government’s observations.

<sup>12</sup> Paragraphs 28 and 29 of the Commission’s observations.

<sup>13</sup> It is already a standing principle that ‘Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. The Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions’. Inter alia, judgment of 13 July 2017, *Ingsteel and Metrostav* (C-76/16, EU:C:2017:549), paragraph 25.



40. Under Article 5(4) of Directive 2005/29, an ‘aggressive commercial practice’ is an ‘unfair commercial practice’ if — and only if — it exhibits the characteristics set out in Articles 8 and 9 of that same directive.

41. To take the view that the contract conclusion model used by Orange Polska ‘always’ entails an ‘aggressive commercial practice’ would be to regard that model as being an ‘unfair commercial practice’ in all circumstances (always). However, the only commercial practices that warrant the status of being unfair *in any event* are those set out in Annex I to Directive 2005/29, according to Article 5(5) thereof.

42. Since the 31 practices on the so-called ‘blacklist’ in Annex I do not include the one at issue in the main proceedings, if the Court of Justice were to conclude that the practice employed by Orange Polska is *always* an aggressive commercial practice, and consequently an unfair commercial practice, it would be doing the work of the legislature, contrary to the spirit and purpose of Directive 2005/29.<sup>14</sup> I therefore take the view that this paragraph of the question referred should be answered in the negative.

2. *Aggressive commercial practice, by reason of undue influence, in certain circumstances?*

43. The forms of conduct mentioned by the referring court in paragraphs (b) and (c) of its question, on the other hand, could give rise to ‘an aggressive commercial practice by reason of undue influence’ if, account being taken of the ‘context of the individual case concerned’ as a whole, the influence in question were considered to be undue.

44. Article 8 of Directive 2005/29 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*:

1. the *outcome* has to take the form of actual or potential impairment of the consumer’s freedom of choice with regard to the product which is so ‘significant’ as to give rise or be likely to give rise to a decision which the consumer would not have taken otherwise;<sup>15</sup>
2. the *techniques* listed in that provision as being such as to achieve that objective are ‘harassment, coercion, including the use of physical force, or undue influence’, only the last of which is mentioned by the referring court.

45. In the context of Directive 2005/29, ‘undue influence’ is not, in my view, ‘impermissible influence’ but influence which, without prejudice to its lawfulness, actively entails, through the application of pressure, the forced conditioning of the consumer’s will.<sup>16</sup>

46. In accordance with Article 2(j) of Directive 2005/29, undue influence consists in the use 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’.

<sup>14</sup> In the words of the judgment of 10 July 2014, *Commission v Belgium* (C-421/12, EU:C:2014:2064), paragraph 61, ‘national rules ... which place a general prohibition on practices not referred to in Annex I to Directive 2005/29, without providing for an individual analysis as to whether the practices are “unfair” in the light of the criteria laid down in Articles 5 to 9 of that directive, are not permitted under Article 4 thereof and run counter to the complete harmonisation objective pursued by that directive, even where they seek to achieve a higher level of consumer protection’.

<sup>15</sup> I refer to my Opinion in Joined Cases *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:377), point 63.

<sup>16</sup> *Ibidem*, point 65.

47. As I recalled in the Opinion in *Wind Tre and Vodafone Italia*,<sup>17</sup> a distinction must 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.

48. The 'aggressive commercial practice' is, of course, the first of those two, that is to say, the one whereby the trader, taking advantage of the weaker position which the consumer occupies in relation to itself,<sup>18</sup> 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.

49. 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 protects the consumer's freedom to enter into contracts on a fully informed basis by committing himself only to obligations which, in the exercise of that freedom, he is prepared to assume. That 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, whether or not that practice is, incidentally, a lawful practice.

50. There are many variables which, in accordance with Article 9 of Directive 2005/29, have to be taken into account in order to assess whether a commercial practice relies, so far as is relevant here, on undue influence. Of these, it is important to mention, as part of a non-exhaustive list, the timing, location, nature or persistence of the practice, the language used, the behaviour adopted, the exploitation of any misfortune or the imposition of onerous or disproportionate non-contractual barriers.

51. In the view of the referring court, there are three factors in this case which might mean that the seller or supplier exercises 'undue influence' over the purchaser:

- first, the fact that the consumer needs to make the final decision about a transaction in the presence of the courier delivering the standard-form contract to him (this, really, is the nub of the factual situation at issue);
- second, the fact that the consumer has not previously and individually received all the standard-form contracts, notwithstanding that he may have previously taken cognisance of them online (paragraph (b) of the question referred);
- third, the possible existence of unfair actions having the effect of impairing the decision-making autonomy of the consumer (paragraph (c) of the question referred).

<sup>17</sup> Cases C-54/17 and C-55/17, EU:C:2018:377, points 67 to 70.

<sup>18</sup> Judgment of 16 April 2015, *UPC Magyarország* (C-388/13, EU:C:2015:225), paragraph 53.

52. Depending on the extent to which each of those factors manifests itself, it is not inconceivable that they may give rise to undue influence per se. Thus:

1. if the courier's conduct or attitude were particularly demanding or overbearing, this would be sufficient to support the view that, by his conduct, he had exerted undue influence over the consumer;
2. if the consumer has previously received information which is objectively limited, incomplete or biased or which is inconsistent with that later provided to him by the courier, this might be sufficient to support a finding as to the presence of misleading actions or omissions within the meaning of Articles 6 and 7 of Directive 2005/29, as well as, potentially, undue influence, if the seller or supplier is shown to be actively engaging in conduct designed unlawfully to condition the consumer's will;
3. lastly, any other unfair actions would also be sufficient, depending on their ability to condition the will of the consumer, if they were to facilitate the achievement on the part of the trader of the latter's desire to exert an impermissible influence.

53. It is also possible that an examination of each of those factors in isolation will show that none of them is present to such an extent as to exert an undue influence per se, although, as a whole, they achieve that very result through their interaction with each other.

54. It is for the national court, as I have already said, to assess on a case-by-case basis the actual impact which circumstances such as those described in the order for reference may have either individually or as a whole. In the order for reference, as I noted when summarising it,<sup>19</sup> the Sąd Najwyższy (Supreme Court) seems to incline to the absence of any aggressive practice, thus corroborating the views of the courts of first instance and appeal.

55. For my part, I would emphasise the difficulty for the Court of Justice of giving an answer which is at variance with the unanimous assessment (in this instance, the two lower courts and the court of cassation itself are of one voice) formed by the national courts in cases such as this, in which the weight of the features specific to the individual behaviours at issue is clear. So far as concerns the factual aspects of such behaviours, the [national] courts exercise exclusive jurisdiction and are, of course, better placed than the Court of Justice to gauge to what extent any aspect of the trader's behaviour has a notable impact on the attitude of the average consumer.

56. Nonetheless, for the purposes of lending the referring court some assistance in its task of interpreting Directive 2005/29 and applying it to this particular case, the considerations I shall set out below may be relevant.

*3. Factors that may be taken into account in forming a view on the undue influence exerted by the seller or supplier*

57. A distinction must be drawn between the case of online selling and that of telephone selling, given that, because of their respective characteristics, the position of the consumer takes on a distinct profile in each.

- In online selling, it is usually the consumer who decides of his own free will to visit the seller's or supplier's website, and there is nothing to stop him taking as much time as he feels necessary to familiarise himself with the offers available, their prices and other terms and conditions attaching to them and the arrangements for concluding the contract.

<sup>19</sup> Points 14 to 17 of this Opinion.

— In telephone selling, although it is not unheard-of for the consumer to take the initiative, it is not uncommonly the seller or supplier who contacts the consumer to propose that they conclude a contract.<sup>20</sup> The consumer is usually in a more passive position and the element of surprise may play a not insignificant role, thus potentially creating a degree of psychological pressure.<sup>21</sup>

58. What is more, those two scenarios are each likely to present a different profile for the ‘average consumer’, that is to say, someone who is reasonably well informed and reasonably observant and circumspect, account being taken of social, cultural and linguistic factors,<sup>22</sup> the context and the combination of circumstances in which the relationship between the seller or supplier and consumers takes place:

- a consumer who visits a website on his own initiative will have at least some degree of familiarity with IT procedures and will be able to negotiate these to the point of selecting an offer and managing the ordering process;
- in the case of offers received unexpectedly by telephone, on the other hand, the average consumer may be less informed and circumspect, since he need only be able to answer the phone. The degree of protection must be greater in this case.

59. Another relevant factor is the quality of the information provided to the consumer. As the Court of Justice recalled in *Wind Tre and Vodafone Italia*, the concept of an aggressive commercial practice is essentially defined ‘by the fact that it impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product[,] [from which it] follows that for a service to be solicited the consumer must have made a free choice[,] [which] supposes, in particular, that the information provided by the trader to the consumer is clear and adequate’.<sup>23</sup>

60. The Court of Justice has emphasised the fact that it is of fundamental importance for the consumer, ‘before concluding a contract, [to have information] on the terms of the contract and the consequences of concluding it’. It is on the basis, primarily, of that information that the consumer ‘decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier’.<sup>24</sup>

61. In the situation at issue here, one of the scenarios mooted by the referring court is that the consumer ‘[may not have] previously and individually received all standard forms (for example, at his email 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’.<sup>25</sup>

20 At the hearing, Orange Polska, without denying that it may have engaged in this commercial practice (cold calling), stated that the latter had later been prohibited in Polish law.

21 This is recognised, in the case of contracts concluded away from business premises, in recitals 21 and 37 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). However, the ‘psychological pressure’ inherent in that type of contract (which is offset by the right of withdrawal) is not, per se, of the same class as that present when a trader is seeking to exert undue influence over a consumer.

22 Thus, for example, judgments of 13 January 2000, *Estée Lauder* (C-220/98, EU:C:2000:8), paragraph 27, and of 12 May 2011, *Ving Sverige* (C-122/10, EU:C:2011:299), paragraph 22.

23 Judgment of 13 September 2018, *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:710), paragraph 45.

24 Judgment of 7 September 2016, *Deroo-Blanquart* (C-310/15, EU:C:2016:633), paragraph 40.

25 Paragraph (b) of the question referred.

62. We must, therefore, start from the premiss that the information posted online about the content of the standard-form contracts at issue is adequate and accurate and that the consumer can access it without too much difficulty. In the case of telephone selling, the referring court states<sup>26</sup> that the consumer can ask the operator for as much information as he considers necessary. In my view, however, it is difficult to imagine that the quality of the information provided during a telephone conversation will be comparable to that of the information obtained through online research.

63. The question, therefore, is, in particular, whether the consumer must have *all* the standard-form contracts offered by the seller or supplier at his home address or at his email address beforehand, and whether, if he does not, this constitutes an aggressive commercial practice.

64. In my opinion, the consumer must be presented with the various standard-form contracts available,<sup>27</sup> so that he may familiarise himself with them, but there is no need for the seller or supplier to have had them delivered to the consumer in person prior to the courier's visit.

65. Since the referring court's interest is focused on the precise moment when the consumer must make the final decision — that is to say, when the courier delivers to him the standard-form contract for which he opted during a telephone conversation or a visit to the seller's or supplier's webpage — that court will have to ascertain whether the fact that, at that moment, the consumer does not have all the standard-form contracts with him may mean that he is being forced to make a decision which he would not have made otherwise.<sup>28</sup>

66. This may be the case, for example, if the consumer has doubts as to whether the contract which is being presented to him for signature is the same as that which he was able to view online or which was described to him over the phone and yet the courier either cannot dispel those doubts or refuses to give him the opportunity to check the contract and presses him to sign it.

67. At the hearing, it became apparent that, for this work, Orange Polska uses ordinary courier services, that is to say, therefore, couriers who are unfamiliar with the telephony sector and unable to provide any information on contracts between consumers and telephony companies.

68. Whether the courier can dispel the consumer's doubts or not, the decisive factor will always be his attitude in the context of the situation in which the consumer finds himself as a result of the information available to him at the time when the contract is presented to him for signature.

69. If that information is inadequate or ambiguous, this may give rise to a misleading commercial practice, that is to say a practice, as defined in Article 7(1) of Directive 2005/29, which, 'in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, ... 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'.

<sup>26</sup> Paragraph 14 of the order for reference.

<sup>27</sup> Any other position would amount to an omission that might be conclusive from the point of view of the consumer's decision. If the latter had known about the existence of other, more favourable contracts, he might have opted for one of them rather than for the one selected, which he would probably have discarded. However, as I maintained in my Opinion in Joined Cases *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:377), point 65, this would not necessarily constitute the exertion of 'undue influence' by the seller or supplier, since 'the influence to which Articles 8 and 9 of Directive 2005/29 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'. I went on to say (footnote 28) that, 'in accordance with Article 2(j) of Directive 2005/29, 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.'

<sup>28</sup> According to the referring court, the courier brings at least the annexes, terms of business, price lists 'and other documents' that will become part of the contract following signature (paragraph 3 of the order for reference).



70. However, such misleading information will contribute towards an ‘aggressive commercial practice’ only if it enables the seller or supplier, or a third party acting on his behalf (in this case, the courier), to avail himself successfully of a position of strength which he has acquired through misleading actions or omissions and which he exercises unlawfully.

71. For the purposes of ensuring that the courier’s attitude does not have the potential to manifest itself in the exercise of undue influence, what matters is not so much the information provided to the consumer in the course of the previous steps of the purchasing procedure<sup>29</sup> as the need to ensure that the courier’s conduct is duly regulated in such a way as to eliminate or minimise the element of psychological pressure that may, in some circumstances, arise from the invitation to sign a contract.

72. Accordingly, if the courier in question is linked to the telephony undertaking, he should be able to help resolve any last-minute doubts that might be worrying the consumer, for example by providing the model standard-form contracts himself onsite or offering to make a further visit once the consumer has examined those contracts. It should also be ensured that under no circumstances will the courier press the consumer to sign by advising him that any refusal to sign or delay in doing so on his part might trigger some form of liability or cause any future contractual terms to be less advantageous.

73. If, on the other hand, as is the case here, the couriers in question have no connection with the telephony undertaking and are therefore unable to provide the consumer with information of any kind or to make any commitments on the company’s behalf, it should at the very least be ensured that the courier does not insist on the need for the consumer to sign the contract.

74. These are some of the factors which, in my opinion, should be taken into account in the assessment of the working relationship established between the seller or supplier and the courier undertaking acting on his behalf. It falls to the national court to weigh up those factors in order to determine whether the courier’s actions may, in the context in which the contract is signed, entail the exercise of undue influence (Article 8 of Directive 2005/29).

## VI. Conclusion

75. In the light of the foregoing, I propose that the Court should answer the question referred by the Sąd Najwyższy (Supreme Court, Poland) as follows:

‘Article 8 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, read in conjunction with Article 9 and Article 2(j) thereof, must be interpreted as meaning that:

- a model for the conclusion of distance contracts relating to the provision of telecommunications services whereby the consumer must make the final decision on a transaction in the presence of the courier delivering the standard-form contract, of whose terms and conditions the consumer may have been able to take full cognisance on the trader’s website or by telephone, does not constitute an aggressive commercial practice per se;

<sup>29</sup> I would say again that the quality of that information is of fundamental importance from the point of view of a misleading commercial practice but is not decisive per se when it comes to the establishment of an aggressive commercial practice (which, moreover, may be present even in a context of adequate and accurate information).



- if, following an examination of the circumstances of each case in context, the implementation of that contractual model is shown to significantly impair the consumer's freedom of choice through the medium of an undue influence of which the trader successfully avails himself in relation to the consumer, this will constitute an aggressive commercial practice;
- for the purposes of ensuring as far as possible that the courier's attitude does not have the potential to entail the exercise of undue influence, his conduct must be appropriately regulated so as to eliminate any element of psychological pressure on the consumer.'