



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 September 2018*

(References for a preliminary ruling — Consumer protection — Directive 2005/29/EC — Unfair commercial practices — Article 3(4) — Scope — Articles 5, 8 and 9 — Aggressive commercial practices — Annexe I, point 29 — Commercial practices which are aggressive in all circumstances — Inertia selling — Directive 2002/21/EC — Directive 2002/22/EC — Telecommunication services — Sale of SIM (Subscriber Identity Module) cards containing certain pre-installed and pre-activated services — Failure to give prior information to consumers)

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

REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 22 September 2016, received at the Court on 1 February 2017, in the proceedings

Autorità Garante della Concorrenza e del Mercato

v

Wind Tre SpA, formerly Wind Telecomunicazioni SpA (C-54/17),

Vodafone Italia SpA, formerly Vodafone Omnitel NV (C-55/17),

interveners:

Autorità per le Garanzie nelle Comunicazioni (C-54/17)

Altroconsumo,

Vito Rizzo (C-54/17),

Telecom Italia SpA,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Rosas, C. Toader, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2018,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

- Wind Tre SpA, by G. Roberti, I. Perego and M. Serpone, avvocati,
- Vodafone Italia SpA, by F. Cintioli and V. Minervini, avvocati,
- Telecom Italia SpA, by M. Siragusa and F. Caronna, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by F. Meloncelli and S. Fiorentino, avvocati dello Stato,
- the European Commission, by A. Cleenewerck de Crayencour, L. Nicolae and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 May 2018,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 3(4), Articles 8 and 9 and Annex I, point 29 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (OJ 2005 L 149, p. 22), Articles 3 and 4 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) ('the Framework Directive'), and Articles 20 and 21 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('the Universal Service Directive').
- 2 The requests have been made in two sets of proceedings between, in Case C-54/17, the Autorità Garante della Concorrenza e del Mercato (the Italian competition authority, 'the AGCM') and Wind Tre SpA, formerly Wind Telecomunicazioni SpA, ('Wind') and, in Case C-55/17, the AGCM and Vodafone Italia SpA, formerly Vodafone Omnitel NV, ('Vodafone') regarding decisions of the AGCM penalising those companies for having used unfair trading practices.

Legal context

EU law

Directive 2005/29

3 Recitals 10, 17 and 18 of Directive 2005/29 state:

‘(10) It is necessary to ensure that the relationship between this Directive and existing [EU] law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. ... This Directive accordingly applies only in so far as there are no specific [EU] law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at [EU] level and prohibits traders from creating a false impression of the nature of products. ... This Directive consequently complements the [EU] acquis, which is applicable to commercial practices harming consumers’ economic interests.

...

(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) It is appropriate to protect all consumers from unfair commercial practices; ... 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, ... The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.’

4 Article 1 of Directive 2005/29 provides that ‘the purpose of this Directive is to contribute to the proper functioning of the internal market and 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’.

5 Article 2 of that directive reads as follows:

‘For the purposes of this Directive:

(a) “consumer” means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

...

(c) “product” means any good or service, ...

(d) “business-to-consumer commercial practices” (hereinafter also referred to as “commercial practices”) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

(e) “to materially distort the economic behaviour of consumers” means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

...

(h) “professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity;

...

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

...’

6 Article 3 of Directive 2005/29 is worded as follows:

‘1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

...

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

...’

7 Article 5 of that directive, entitled ‘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 ...

...

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 a list of those practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

8 Article 8 of that directive, entitled '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.'

9 Article 9 of the same directive, entitled 'Use of harassment, coercion and undue influence' contains a list of factors which have to be taken into account 'in determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence ...'

10 Annex I of Directive 2005/29, which lists the commercial practices considered in all circumstances to be unfair, under the title 'aggressive commercial practices', refers in point 29 to the following practice:

'Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC [of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) as amended by Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 271, p. 16)] (inertia selling).'

The Framework Directive

11 According to Article 1(1) of the Framework Directive, that directive 'establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services, and certain aspects of terminal equipment to facilitate access for disabled users. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the [European Union].'

12 Article 2(g) of the Framework Directive defines 'national regulatory authority' ('NRA') as 'the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives'. According to Article 2(l), the Universal Service Directive is one of the Specific Directives.

13 Article 3 of the Framework Directive regulates the assignment of tasks to the NRAs and the conditions that the Member States must guarantee to ensure those tasks are carried out.

14 Article 8 of the Framework Directive, entitled 'Policy objectives and regulatory principles', provides, in paragraph 4(b):

'The [NRAs] shall promote the interests of the citizens of the European Union by inter alia:

...

- (b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved’.

The Universal Service Directive

- 15 Under Article 1 of the Universal Service Directive:

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

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

...

4. The provisions of this Directive concerning end-users’ rights shall apply without prejudice to [EU] rules on consumer protection, ..., and national rules in conformity with [EU] law.’

- 16 Article 20(1) of the Universal Service Directive provides that ‘Member States shall ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, have a right to a contract with an undertaking or undertakings providing such connection and/or services’. This provision also contains a list of the factors that such a contract must specify, such as the services provided and details of prices and tariffs.

- 17 Article 21(1) of that directive, entitled ‘Transparency and publication of information’, states:

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

Italian law

- 18 Decreto Legislativo No 206 — Codice del consumo, a norma dell’articolo 7 della legge 29 luglio 2003, No 229 (Legislative Decree No 206 on the Consumer Code under Article 7 of Law No 229 of 29 July 2003), of 6 September 2005 (Ordinary Supplement to GURI No 235 of 8 October 2005), in its version applicable to the facts in the main proceedings (‘the Consumer Code’), contains an Article 19 entitled ‘Scope’, which provides:

‘1. This Title shall apply to unfair business-to-consumer commercial practices implemented before, during and after a commercial transaction in relation to a product, ...

...

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

- 19 Article 20 of the Consumer Code prohibits unfair commercial practices in terms essentially identical to those set out in Article 5 of Directive 2005/29.
- 20 Articles 24 and 25 as well as Article 26(1)(f) of that code refer to aggressive commercial practices and essentially reproduce the wording in Articles 8 and 9 and Annex 1, point 29, respectively, of that directive.
- 21 Article 27(1-bis) of the Consumer Code, as inserted by Article 1(6)(a) of decreto legislativo No 21 — Attuazione della direttiva 2011/83/UE sui diritti dei consumatori, recante modifica delle direttive 93/13/CEE e 1999/44/CE e che abroga le direttive 85/577/CEE e 97/7/CE (Legislative Decree No 21 implementing Directive 2011/83/EU on consumer rights, amending Directives 93/13/EEC and 1999/44/EC and repealing Directives 85/577/EC and 97/7/EC), of 21 February 2014 (GURI No 58 of 11 March 2014, p. 1), is worded as follows:

‘Even in the regulated sectors, under Article 19(3), competence to intervene in relation to conduct by traders that constitutes improper commercial practice, without prejudice to compliance with the legislation in force, shall reside exclusively with the [AGCM], which shall exercise that competence on the basis of the powers referred to in the present article, after seeking the opinion of the relevant regulatory authority. This rule is without prejudice to the competence of the regulatory authorities to exercise their own powers in the event of infringement of the legislation not amounting to an unfair commercial practice. The authorities may regulate, by means of memorandums of understanding, the application and procedural aspects of their collaboration within the limits of their respective competences.’

- 22 The decreto legislativo No 259 — Codice delle comunicazioni elettroniche (Legislative Decree No 259 on the electronic communications code) of 1 August 2003 (Ordinary Supplement of GURI No 214 of 15 September 2003; ‘the Electronic Communications Code’), contains a series of consumer protection provisions specifically in the communications sector and confers on the Autorità per le Garanzie nelle Comunicazioni (the Communications Regulator, Italy; ‘AGCom’) the relevant regulatory power and the power to impose penalties. In particular, Article 70 of that code transposes Article 20 of the Universal Service Directive and Article 71 of that code transposes Article 21 of that directive. In addition, the Electronic Communications Code gives the AGCom particular *ex ante* regulatory tasks and *ex post* monitoring duties to protect consumers in the sector, with Article 98 of that code giving it, inter alia, prerogatives regarding sanctions.

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

- 23 By two decisions of 6 March 2012, the AGCM penalised Wind and Vodafone for similar practices whereby those companies marketed SIM (Subscriber Identity Module) cards with pre-loaded and pre-activated functionalities, such as internet browsing services and voicemail services, the use of which was charged to the user if they were not deactivated at his express request, without that user having been informed in advance of the existence of those services or of their cost.
- 24 The AGCM considered that such practices, whereby the companies had automatically activated the services in question on those SIM cards without first obtaining the consumer’s permission, thus exposing them to possible debts they were not aware of, fell within the category of aggressive commercial practices within the meaning of Articles 24 and 25 and 26(1)(f) of the Consumer Code. As a result, it imposed a EUR 200 000 fine on Wind and a EUR 250 000 fine on Vodafone.

- 25 Wind and Vodafone appealed against those decisions before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).
- 26 By judgments of 18 February 2013, that court upheld the appeals and annulled the contested decisions on the ground of the AGCM's lack of competence. The court considered that, in the light of the principle of specification provided for in Article 19(3) of the Consumer Code and laid down in Article 3(4) of Directive 2005/29, and considering that the practices at issue were covered by special legislation that gave the AGCom, exclusively, powers to inspect, prohibit and sanction with regard to electronic communication services, the general regulations on business malpractice, in this instance Articles 24 and 25 and Article 26(1)(f) of the Consumer Code, were not applicable and, as a result, the AGCM was not competent to penalise the practices at issue.
- 27 The AGCM lodged an appeal against those judgments before the Consiglio di Stato (Council of State, Italy) — the referring court — claiming, in particular, that the principle of speciality should be understood as meaning that the special legislation could only be applied in the event of divergence from the general rules and provided that that special legislation covered specific aspects of unfair business practices, by regulating circumstances similar to those defined by the general rules, but which differ because of some factor making them special.
- 28 The Sixth Chamber of the Consiglio di Stato (Council of State) decided to refer some preliminary questions to the Plenary of the Consiglio di Stato (Council of State) concerning, in essence, the interpretation of Article 27(1-bis) of the Consumer Code. It wished to know, *inter alia*, whether that provision could be regarded as giving exclusive competence to the AGCM with regard to unfair commercial practices even when the conduct at issue is covered by specific sectoral rules under EU law.
- 29 By judgments delivered on 9 February 2016, the Plenary of the Consiglio di Stato (Council of State) stated, in essence, that the competence to sanction a 'commercial practice that is in all circumstances considered aggressive' lay with the AGCM in accordance with the principle of speciality provided for in Article 3(4) of Directive 2005/29, even in the electronic communications sector. In that regard, it was noted that, although infringement of information obligations may fall within the AGCom's competence, in the present case that infringement involves an aggressive commercial practice since it has the effect of impairing or even removing the consumers' freedom of choice regarding the use of and payment for pre-installed services, which could lead to that practice being regarded as demanding immediate or deferred payment for products unsolicited by the consumer.
- 30 The court also based its position on the infringement proceedings that had been brought against the Italian Republic by the European Commission. In those proceedings, the Italian Republic was accused of failing to apply properly, in its national law, the principle of the special rule set out in Directive 2005/29, which governs the coordination between the general rules and the specific sectoral rules and, particularly, of having failed to transpose that directive in the electronic communications sector.
- 31 The Sixth Chamber of the Consiglio di Stato (Council of State) harbours doubts, however, as to whether Article 27(1-bis) of the Consumer Code, as interpreted by the Plenary of the Consiglio di Stato (Council of State), is compatible with EU law.
- 32 The referring court notes that establishing the competent authority for imposing a sanction depends on whether the conduct at issue can be categorised as 'aggressive commercial practices' or 'aggressive commercial practices in all circumstances'. In that regard, it notes that the act of which the companies in question are accused is having omitted to properly inform consumers. By contrast, the finding of an 'aggressive commercial practice' or an 'aggressive commercial practice in all circumstances' within the meaning of Articles 24 and 25 and Article 26(1)(f) of the Consumer Code is based on the logical inference that that omission of information on the pre-loading of services on SIM cards was likely to significantly impair the conscious freedom of choice or behaviour of the average

consumer with regard to the services associated with the SIM cards, and on the fact that that omission did not comply with the level of professional diligence that may be required of telephony operators, in the light of the imbalance in the relationship between traders and consumers.

33 It also notes that the sectoral rules established by the Electronic Communications Code provide a series of provisions to protect consumers specifically in the electronic communications sector by assigning the AGCom the relevant regulatory and enforcement powers and by providing, in particular, for the sanctioning of breach by operators of certain obligations to give information to users concerning the provision of services.

34 In those circumstances, the Consiglio di Stato (Council of State) decided, in Cases C-54/17 and C-55/17, to stay the proceedings and ask, in identical wording, the Court the following questions:

- (1) Do Articles 8 and 9 of Directive 2005/29 ... preclude an interpretation of the corresponding national implementing provisions (namely: Articles 24 and 25 respectively of the Consumer Code) which considers that the conduct of a mobile telephone operator in failing to provide information regarding the pre-loading on to SIM cards of specific telephony services (that is, answering or internet-enabling services) may be classified as “undue influence” and, therefore, as an “aggressive commercial practice” likely “significantly” to curtail the average consumer’s freedom of choice or of action, particularly in circumstances in which no further different material conduct is imputed to that mobile telephone operator?
- (2) Can point 29 of Annex 1 of Directive 2005/29[, transposed into national law by Article 26(1)(f) of the Consumer Code,] be interpreted as meaning that there is [“inertia selling”] where a mobile telephone operator asks its customers to pay for telephone answering or internet-enabling services, and does so in a situation with the following features:
 - at the time when the mobile phone contract was entered into, the telephone operator is said to have not properly informed the consumer that the answering and internet-enabling services were pre-loaded on to the SIM card, with the result that those services could potentially be used by the consumer without specifically configuring them;
 - in order actually to make use of such services, the consumer must, however, perform the necessary procedures (for instance, dial the number of the answering service or activate the commands that enable internet access);
 - there is no complaint about the technical and operational processes whereby the services are actually used by the consumer, nor about the information relating to those processes and the actual cost of the services, the sole complaint against the operator being the abovementioned failure to provide the information that the services were pre-loaded on to the SIM card?
- (3) Does the *raison d’être* of the “general” Directive 2005/29 as the “safety net” for consumer protection, and recital 10 in the preamble and Article 3(4) of that directive as well, preclude national rules which bring within the scope of general Directive 2005/29/EC on improper commercial practices the evaluation of performance of the specific obligations laid down by [the Universal Service Directive] for consumer protection, thereby excluding action by the authority empowered to penalise violations of the sectoral directive in all cases in which the prerequisites establishing an improper/unfair commercial practice may also be satisfied?
- (4) Must the speciality principle established by Article 3(4) of Directive 2005/29 ... be construed as governing relations between legislative systems (general system and sectoral systems), or relations between provisions (general provisions and special provisions) or relations between authorities responsible for regulating and monitoring the relevant sectors?

- (5) Can the concept of “conflict” in Article 3(4) of Directive 2005/29 be regarded as applicable only in circumstances in which there is a radical contradiction in law between the provisions of the legislation on improper commercial practices and the other provisions derived from EU law that govern specific sectoral aspects of commercial practices, or is it sufficient that the latter provisions lay down rules that differ from the provisions on improper commercial practices in relation to the particular features of the sector, such as to give rise to a conflict of laws (“Normenkollision”) in a specific case?
- (6) Does the term “[Union] rules” in Article 3(4) of Directive 2005/29 relate solely to the provisions contained in European regulations and directives and to the provisions directly transposing them, or does it also encompass the legislative and regulatory provisions implementing principles of [EU] law?
- (7) Do the speciality principle, established in recital 10 in the preamble and Article 3(4) of Directive 2005/29 and Articles 20 and 21 of [the Universal Service Directive], as well as Articles 3 and 4 of [the Framework Directive], preclude an interpretation of the national transposing provisions to the effect that, whenever, in a regulated sector containing sectoral “consumer” rules, in which the sectoral authority is empowered to regulate and impose penalties, conduct that could be covered by the term “aggressive practice” within the meaning of Articles 8 and 9 of Directive 2005/29, or the term “in all circumstances considered aggressive” within the meaning of Annex I of Directive 2005/29, is identified, the general rules on improper practices must always apply, even when there are sectoral rules adopted to protect consumers and based on provisions of EU law, that fully regulate those same ‘aggressive practices’ and practices “in all circumstances considered aggressive” or, at any rate, those same “improper practices”?
- 35 By order of the President of the Court of 23 February 2017, Cases C-54/17 and C-55/17 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

The first and second questions

- 36 As a preliminary point, it should be noted that it is clear from the order for reference and the documents submitted to the Court that the conduct of the telecommunications operators which is at issue in the main proceedings is the sale of SIM cards on which internet browsing services and voicemail services had been pre-loaded and pre-activated, the fees for using those services being charged to the user if the services were not deactivated at the user’s express request, without the user having been sufficiently informed, in advance, of the fact that those services had been pre-loaded and pre-activated, nor of their cost.
- 37 It is also clear from that order that, from the moment those SIM cards are first inserted into a mobile telephone or any other device allowing browsing on the internet, the internet browsing service could even result in connections without the user’s knowledge, inter alia by means of ‘always on’ applications. It is also clear from the AGCM’s decisions which gave rise to the disputes in the main proceedings that it was precisely in response to complaints from consumers who had been charged fees for unsolicited services and for connections made without their knowledge that the AGCM initiated the procedure which gave rise to the sanctions contested in these disputes.
- 38 In those circumstances, it should be noted that, by its first and second questions, the referring court asks, in essence, whether the term ‘aggressive commercial practice’ under Articles 8 and 9 of Directive 2005/29 or the term ‘inertia selling’ within the meaning of Annex I, point 29 of that directive must be interpreted as including conduct, such as that at issue in the main proceedings, whereby a

telecommunications operator sold SIM cards on which specific services such as internet browsing services and voicemail services had been pre-loaded and pre-activated, without first sufficiently informing the consumer of that pre-loading and pre-activation, nor of the cost of those services.

- 39 In that regard, it should be noted, at the outset, that it is not contested that the disputes in the main proceedings concern business to consumer commercial practices within the meaning of Article 2(d) of Directive 2005/29 or that the services at issue fall within the concept of ‘product’ as defined in Article 2(c). In order to answer these first and second questions, it is therefore necessary to establish whether conduct such as that at issue in the main proceedings falls within the concept of ‘unfair commercial practices’ within the meaning of Article 5 of Directive 2005/29.
- 40 Article 5(2) sets the criteria by which it is to be determined whether a commercial practice is unfair and Article 5(4) states that, in particular, commercial practices will be unfair which are ‘misleading’ within the meaning of Articles 6 and 7 of that directive or ‘aggressive’ within the meaning of Articles 8 and 9 of that directive. Article 5(5) provides, in addition, that Annex I of the same directive contains a list of commercial practices which are in all circumstances considered unfair. In that regard, recital 17 of Directive 2005/29 expressly states that the practices listed in that annex will be deemed to be unfair without having to be subject to a case-by-case assessment against the provisions of Articles 5 to 9 (also see, to that effect, judgment of 7 September 2016, *Deroo-Blanquart*, C-310/15, EU:C:2016:633, paragraph 29 and the case-law cited).
- 41 The question arises, therefore, as to whether conduct such as that at issue in the main proceedings is covered by the practices listed in Annex I and, particularly, by point 29 of that annex.
- 42 Annex I, point 29 of Directive 2005/29 provides that ‘demanding immediate or deferred payment for ... products supplied by the trader, but not solicited by the consumer ... (inertia selling)’, in particular, falls within the category of aggressive commercial practices which are in all circumstances considered unfair.
- 43 Accordingly, in particular conduct whereby the trader demands payment from a consumer for a product or service which has been provided to that consumer without the consumer soliciting it, constitutes ‘inertia selling’ within the meaning of Annex I, point 29.
- 44 In the present case, given that neither the provision of the services at issue in the main proceedings nor the billing of those services, and thus a request for payment by the trader, are contested, it is sufficient, in order to answer the first and second questions, to establish whether the provision of those services at issue can be considered unsolicited by the consumer.
- 45 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 to significantly 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 (see, by analogy, judgment of 18 October 2012, *Purely Creative and Others*, C-428/11, EU:C:2012:651, paragraph 53).
- 46 It should also be recalled that 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 7 September 2016, *Deroo-Blanquart*, C-310/15, EU:C:2016:633, paragraph 40 and the case-law cited).
- 47 In addition, since the price is, in principle, a determining factor in the consumer’s mind when it must make a transactional decision, it must be considered information necessary to enable the consumer to make such a fully informed decision (judgment of 26 October 2016, *Canal Digital Danmark*, C-611/14, EU:C:2016:800, paragraph 55).

- 48 In the present case, it appears that the services at issue in the main proceedings were pre-loaded and pre-activated on the SIM cards without the consumer having been sufficiently informed of this beforehand, and that, in addition, the consumer was not informed of the costs connected with using those services; this, however, is for the referring court to verify. When the consumer has been neither informed of the cost of the services in question, nor even of the fact that they were pre-loaded and pre-activated on the SIM card that he bought, it cannot be considered that he freely chose the provision of those services.
- 49 In that regard, it is irrelevant that the use of the services in question required, in certain cases, conscious action on the part of the consumer. Indeed, without sufficient information on the costs of browsing the internet and using the voicemail, such action cannot be deemed to be establishing the existence of a free choice in the provision of these services. Moreover, the internet browsing service could have caused internet connections to be made without the consumer's knowledge, incurring fees without the consumer being aware of that fact.
- 50 Similarly, it is irrelevant that the consumer could have opted for deactivation of the services in question on the SIM card through the telecommunication operators concerned or could have configured his device to deactivate those services. Indeed, in the absence of clear and sufficient information on the existence of those pre-loaded and pre-activated services and their costs being communicated by those operators to the consumer, before purchase of the SIM card in question, it is at the very least unlikely that the consumer would genuinely be able to make use of such an option, at least before being billed for those services; that, however, is a matter for the referring court to verify.
- 51 Moreover, it should 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 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 22).
- 52 It is not clear that the average buyer of a SIM card might be aware of the fact that when he buys such a card it automatically contains pre-loaded and pre-activated voicemail services and internet browsing services which can incur additional fees, or of the fact that, when he inserts it in a mobile phone or any other device allowing browsing on the internet, applications or the device itself may connect to the internet without his knowing, or that he is sufficiently technically capable, on his own, of making the necessary configurations to deactivate those services or those automatic connections on his device. In accordance with recital 18, however, it is for the referring court to establish the typical reaction of the average consumer in circumstances such as those at issue in the main proceedings.
- 53 It follows from the foregoing that, subject to the verifications to be made by the referring court, the concept of 'inertia selling' within the meaning of Annex I, point 29 of Directive 2005/29 must be interpreted as covering conduct such as that at issue in the main proceedings.
- 54 The interpretation reached in the previous paragraph is, furthermore, supported by the objective pursued by Directive 2005/29. According to Article 1 of that directive, its objective, inter alia, is to achieve a high level of consumer protection. That objective, which is to protect consumers in full against unfair commercial practices, relies on the assumption that, in relation to a trader, the consumer is in a weaker position, particularly with regard to the level of information (see, to that effect, judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraph 53). In a sector as technical as that of electronic communications by mobile telephony, it cannot be denied that there is a major imbalance of information and expertise between the parties.
- 55 In those circumstances, it is not necessary to examine the practice in the light of Articles 8 and 9 of Directive 2005/29.

56 Having regard to all the foregoing considerations, the answer to the first and second questions is that the term ‘inertia selling’ within the meaning of Annex I, point 29 of that directive must be interpreted as including, subject to verifications by the referring court, conduct such as that at issue in the main proceedings whereby a telecommunications operator sells SIM cards on which services such as internet browsing services and voicemail services are pre-loaded and pre-activated without first sufficiently informing the consumer of that pre-loading and pre-activation nor the cost of those services.

The third, fourth, fifth and sixth questions

57 In the light of the answer to the first and second questions, it must be considered that, by its third to sixth questions, which it is necessary to examine together, the referring court asks, in essence, whether Article 3(4) of Directive 2005/29 must be interpreted as precluding national rules under which conduct constituting inertia selling, within the meaning of Annex I, point 29 of Directive 2005/29, such as that at issue in the main proceedings, must be assessed in the light of the provisions of that directive, with the result that, according to that legislation, the ARN, within the meaning of the Framework Directive, is not competent to sanction such conduct.

58 In that regard, it should be borne in mind that Article 3(4) of Directive 2005/29 provides that, in the case of conflict between the provisions of that directive and other EU rules regulating specific aspects of unfair commercial practices, the latter are to prevail and apply to those specific aspects. As a result, as confirmed by recital 10, that directive applies only when there are no specific EU provisions regulating specific aspects of unfair commercial practices (see, *inter alia*, judgment of 16 July 2015, *Abcur*, C-544/13 and C-545/13, EU:C:2015:481, paragraph 79).

59 That provision expressly refers to conflicts between EU rules and not between national rules.

60 As the Advocate General noted in points 124 and 126 of his Opinion, the term ‘conflict’ refers to the relationship between the provisions in question which goes beyond a mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end.

61 Accordingly, a conflict such as that envisaged in Article 3(4) of Directive 2005/29 is present only where provisions, other than those of Directive 2005/29, which regulate specific aspects of unfair business practices, impose on undertakings, in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29.

62 In the light of those considerations, it must be ascertained whether EU law on electronic communications, and more particularly the Universal Service Directive and the Framework Directive, about which the national court has referred questions to the Court, regulate specific aspects of unfair commercial practices such as inertia selling within the meaning of Annex I, point 29 of Directive 2005/29.

63 In that regard, it must be noted that, pursuant to Article 1 of the Universal Service Directive, that directive, within the context of the Framework Directive, concerns the provision of electronic communications networks and services to end-users. Its aim is to ensure the availability throughout the EU of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. Article 1(2) of the Universal Service Directive provides that it establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services.

- 64 The Court has already noted that although, in carrying out their tasks, the NRAs, in accordance with Article 8(4)(b) of the Framework Directive, are required to promote the interests of citizens of the Union by ensuring a high level of protection for consumers, the fact remains that the Framework Directive and the Universal Service Directive do not provide for full harmonisation of consumer-protection aspects (judgment of 14 April 2016, *Polkomtel*, C-397/14, EU:C:2016:256, paragraph 32 and the case-law cited).
- 65 With regard to that protection, the Universal Service Directive provides, inter alia, in Article 20(1), that Member States are to ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, have a right to a contract with an undertaking or undertakings providing such connection and/or services. That provision lists the factors that the contract must specify in a clear, comprehensive and easily accessible form as a minimum.
- 66 However, although Article 20(1) of the Universal Service Directive requires, with regard to electronic communications, the provider of services to include certain information in the contract, neither this provision nor any other provision in that directive contains rules regulating specific aspects of unfair commercial practices, such as inertia selling, within the meaning of Annex I, point 29 of Directive 2005/29.
- 67 In addition, it should be noted that Article 1(4) of the Universal Service Directive provides that the provisions of that directive concerning end-users' rights are to apply without prejudice to Union rules on consumer protection and national rules in conformity with Union rules. It is clear from the expression 'without prejudice to Union rules on consumer protection' that the applicability of Directive 2005/29 is not affected by the provisions of the Universal Service Directive.
- 68 It follows that there is no conflict between the provisions of Directive 2005/29 and the rules laid down by the Universal Service Directive as regards the rights of end-users.
- 69 Accordingly, in circumstances such as those in the cases in the main proceedings, the relevant rules of Directive 2005/29 are applicable.
- 70 In the light of foregoing considerations, the answer to the third to sixth questions is that Article 3(4) of Directive 2005/29 must be interpreted as not precluding national rules under which conduct constituting inertia selling, within the meaning of Annex I, point 29 of Directive 2005/29, such as that at issue in the main proceedings, must be assessed in the light of the provisions of that directive, with the result that, according to that legislation, the ARN, within the meaning of the Framework Directive, is not competent to penalise such conduct.

The seventh question

- 71 By its seventh question the referring court asks, in essence, whether Article 3(4) of Directive 2005/29, Articles 20 and 21 of the Universal Service Directive and Articles 3 and 4 of the Framework Directive must be interpreted as precluding national rules pursuant to which, when there are, in a regulated sector, sectoral rules regulating consumer protection and conduct falling within the concept of 'aggressive commercial practice' or 'commercial practice that is in all circumstances considered aggressive' within the meaning of Directive 2005/29 is detected, that directive must still be applied even if that sectoral legislation exhaustively regulates that commercial practice.

- 72 It must be stated that this seventh question rests on the premiss that the Universal Service Directive and the Framework Directive exhaustively regulate consumer protection in the area of electronic communication and cover, inter alia, conduct covered by the concept of ‘aggressive commercial practice’ or the concept of ‘commercial practice that is in all circumstances considered aggressive’ within the meaning of Directive 2005/29.
- 73 However, as is clear from the analysis of the third to sixth questions, made in paragraphs 57 to 70 of this judgment, that premiss is incorrect. That being the case, there is no need to reply to the seventh question.

Costs

- 74 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 (Second Chamber) hereby rules:

- 1. The concept of ‘inertia selling’ within the meaning of Annex I, point 29 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) must be interpreted as including, subject to verifications by the referring court, conduct, such as that at issue in the main proceedings, whereby a telecommunications operator sells SIM (Subscriber Identity Module) cards on which services such as internet browsing services and voicemail services are pre-loaded and pre-activated without first sufficiently informing the consumer of that pre-loading and pre-activation, nor the cost of those services.**
- 2. Article 3(4) of Directive 2005/29 must be interpreted as not precluding national rules under which conduct constituting inertia selling, within the meaning of Annex I, point 29 of Directive 2005/29, such as that at issue in the main proceedings, must be assessed in the light of the provisions of that directive, with the result that, according to that legislation, the ARN, within the meaning of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, is not competent to penalise such conduct.**

[Signatures]