



Press and Information

Court of Justice of the European Union

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Judgment in Joined Cases C-54/17

Autorità Garante della Concorrenza e del Mercato ('AGCM') v Wind Tre SpA
and C-55/17, AGCM v Vodafone Italia Spa

The sale of SIM cards on which services that can incur fees have been pre-loaded and pre-activated constitutes an aggressive unfair commercial practice when the consumers are not informed of that fact in advance

Such conduct constitutes, in particular, 'inertia selling', which may be penalised by a national authority other than the authority provided for by EU law on electronic communications

In 2012, Autorità Garante della Concorrenza e del Mercato (the Italian competition authority, 'the AGCM') imposed penalties on the companies Wind Telecomunicazioni (now Wind Tre) and Vodafone Omnitel (now Vodafone Italia) for selling SIM (Subscriber Identity Module) 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 user did not expressly ask for them to be deactivated. AGCM accused the two companies of not having sufficiently informed the consumers of the fact that those services had been pre-loaded and pre-activated and that they could incur charges. The internet browsing service could even result in connections without the user's knowledge, inter alia by means of 'always on' applications.

The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), before which Wind Tre and Vodafone Italia brought proceedings, annulled the AGCM's decisions stating that such sanctions fell within the competence of another authority, the Autorità per le Garanzie nelle Comunicazioni (the Communications Regulator, Italy; 'AGCom')

Hearing the cases on appeal, the Consiglio di Stato (Council of State, Italy) referred some preliminary questions to its Plenary. By judgments delivered in 2016 the Plenary stated that, under Italian law, the competence to sanction a mere infringement of information obligations in the electronics communication sector lay with the AGCom, while penalising a 'commercial practice that is in all circumstances considered aggressive' (such as, inter alia, 'inertia selling') fell within the AGCM's competence, even in the electronic communications sector.¹

The Consiglio di Stato questions, however, whether the interpretation given by the Plenary is compatible with EU law. It therefore decided to refer for a preliminary ruling questions on the interpretation, first, of the Unfair Commercial Practices Directive² (the objective of which is to achieve a high level of consumer protection) and, second, of EU law on electronic communications (more specifically the Framework Directive³ and the Universal Service Directive⁴ which aim to

¹ The Plenary of the Consiglio di Stato took into consideration the infringement proceedings brought against the Italian Republic by the European Commission for failure to transpose the Unfair Commercial Practices Directive in the electronic communications sector.

² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).

³ 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).

⁴ 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),

ensure the availability throughout the EU of good-quality publicly available services through effective competition and choice by giving the national regulatory authorities ('NRAs') — in Italy the AGCom — the task of ensuring a high level of protection for consumers in the specific sector of electronic communications). In particular, the Consiglio di Stato asks the Court of Justice whether the conduct of the telecommunications operators at issue can be characterised as 'inertia selling' or, more broadly, as 'aggressive commercial practice' within the meaning of the Unfair Commercial Practices Directive, and whether EU law on electronic communications precludes national legislation under which 'inertia selling' is covered by the Unfair Commercial Practices Directive with the result that the ARN is not competent to penalise such conduct.

By today's judgment the Court notes that for a service to be solicited the consumer must have made a free choice. **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** (which is for the national court to verify), **it cannot be considered that he freely chose the provision of those services.** 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. Similarly, it is irrelevant that the consumer could have had the services deactivated or deactivated them himself, since he had not been informed of their existence.

The Court notes that, although it is for the national court to establish the typical reaction of the average consumer, it is not clear that the average buyer of a SIM card might be aware of the fact that it contains pre-loaded and pre-activated services which can incur additional fees or of the fact that applications or the device itself may connect to the internet without his knowing, or that he is sufficiently technically capable of deactivating those services or those automatic connections on his device.

The Court concludes from this that, subject to verifications by the national court, **conduct such as that of which the telecommunications operators are accused constitutes 'inertia selling'** and, therefore, according to the Unfair Commercial Practices Directive, a **practice — and more precisely an aggressive practice — that is in all circumstances unfair.**

In addition, the Court states that **there is no conflict between the Unfair Commercial Practices Directive and the Universal Service Directive as regards the rights of end-users.** The latter directive requires the provider of services to include certain information in the contract while the former directive contains rules regulating specific aspects of unfair commercial practices, such as 'inertia selling'. As a result, the Court declares that EU law does not preclude national legislation under which 'inertia selling' must be assessed in the light of the provisions of the Unfair Commercial Practices 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.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Holly Gallagher 📞 (+352) 4303 3355