



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion 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

**Advocate General Campos Sánchez-Bordona proposes that the Court of Justice declare that the mere omission to provide the user with information on the pre-installation of voicemail and internet-access services on a SIM card intended to be inserted into a smartphone does not constitute an unfair commercial practice if that user has previously been informed about the terms of access and the cost of those services**

In 2012, the Autorità Garante della Concorrenza e del Mercato (the Italian Authority responsible for competition compliance and enforcement of market rules; 'the AGCM') imposed fines on the companies Wind Telecomunicazioni (now Wind Tre) and Vodafone Omnitel (now Vodafone Italia) respectively, on the ground that, in its view, they had engaged in an aggressive commercial practice by marketing SIM cards which, being destined for use in smartphones, were pre-installed with voicemail and internet-access services about which they had not informed consumers.

The Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy), before which the two companies appealed against the decision of the AGCM, upheld the application after stating that the AGCM could not penalise conduct (the supply of unsolicited services) falling within the competence of the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority; 'the AGCom').

The Consiglio di Stato (Council of State, Italy), which is hearing the appeals,<sup>1</sup> is in essence asking the Court of Justice whether the conduct of the telephone operators can be classified as an 'unsolicited supply' or 'aggressive commercial practice' for the purposes of Directive 2005/29<sup>2</sup> and, furthermore, whether the provisions of the directive must cede to other EU rules and, if so, to national provisions enacted in implementation of those rules.

In today's opinion, Advocate General Manuel Campos Sánchez-Bordona considers that **the mere omission to provide the user with information on the pre-installation**, on a SIM card intended to be inserted into a smartphone, of voicemail and internet-access services **does not constitute an unfair commercial practice if that user has previously been informed about 'the technical and operational processes whereby [those] services are actually used ... and the actual cost of those services'**, which it is for the referring court to ascertain.

While it is not inconceivable that there has been an unsolicited supply of services, classified as unlawful in Directive 2005/29, the average consumer is usually aware that the services at issue are activated when dialling the number of the answering service or activating the commands that

<sup>1</sup> Following the judgments of the Plenary of the Consiglio di Stato (Council of State) of 2016, which stated that the AGCM had competence and that the act complained of constituted 'a commercial practice that is in all circumstances considered aggressive'.

<sup>2</sup> 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).

enable internet access. Their use by the consumer might amount to implicit acceptance of their supply. In any case, the Advocate General warns that the unsolicited supply of a service does not in itself constitute an unfair commercial practice, but rather the trader must also unlawfully demand payment for that service. In order to determine whether the payment demanded in the case in the main proceedings was unlawful or not, the Advocate General points out that the national court will have to check the extent to which the information provided on the cost of the services allows the average consumer to surmise that the SIM card that he had purchased was capable of providing him with those services, leaving no doubt about the fact that those services were pre-installed and, consequently, about the costs associated with the use of those services.

The Advocate General subsequently notes that, in the light of Directive 2005/29, a commercial practice is 'aggressive' when, through the trader's active conduct consisting in harassment, coercion or undue influence, it gives rise to a decision which the consumer would not have taken otherwise. The Advocate General considers that the omission of information of which the telephone operators in these cases are accused is not covered by any of those situations.

In the event that the Court of Justice should find that the conduct alleged against the telephone operators constitutes an unfair commercial practice, the Advocate General takes the view that Directive 2005/29 would not be called into question by other rules of EU law, such as the Universal Service Directive.<sup>3</sup> In that regard, the Advocate General emphasises the fact that **Directive 2005/29 is to be applied to any unfair commercial practice, independently from the economic sector concerned, in the interests of better consumer protection.** However, in accordance with Directive 2005/29 itself, other EU rules shall prevail over the application of the directive in the event of conflict on specific aspects of unfair commercial practices. The Advocate General considers that in the cases in the main proceedings, **there is no conflict between Directive 2005/29 and the Universal Service Directive**, but rather a situation is at hand which requires their **joint application**, given that, in order to determine whether the supply has been solicited by the consumer (Directive 2005/29), clarification will be required as to whether the information provided meets the requirements of the Universal Service Directive, which does not classify unsolicited supply as unlawful conduct but defines the information that electronic communications undertakings must provide to consumers.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**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 European Union 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 Opinion is published on the CURIA website on the day of delivery.*

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<sup>3</sup> 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).