Hard Cases

'Inertia Selling' Within Electronic Communications Services. The Role of National Regulatory Authorities in Light of the 'Speciality Principle'

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Abstract

The European Court of Justice (ECJ) (Joined Cases C-54/17 and 55/17) was called upon to clarify whether marketing SIM cards with pre-activated functions, charged to the user if not deactivated, when the user is not informed in advance of the existence of those services, nor of their costs, falls within the definition of 'inertia selling' as described in the Annex I of Directive 2005/29/EC. This notwithstanding the fact that the electronic communications sector is regulated by specific EU sources (the so-called Framework Directive and Universal Service Directive). This contribution aims at evaluating the approach of the ECJ in interpreting EU rules devoted to protect consumers against aggressive commercial practices in a particularly sensitive market like that of telecommunication services.

I. Facts of the Case and Ruling

It all started with two sanctions that the *Autorità Garante della Concorrenza e del Mercato* (AGCM), the Italian Competition Authority empowered to tackle unfair commercial practices, imposed in 2012 on two of the main Italian mobile services providers (Wind and Vodafone).

By two decisions[1] the AGCM sanctioned Wind and Vodafone for marketing 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.

The AGCM intervened in response to complaints from consumers who had been charged fees for unsolicited services and for internet connections made without their knowledge.[2]

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[1] AGCM decisions nos 23356/2012 and 23357/2012, available at www.agcm.it, related respectively to Wind and Vodafone.

[2] The AGCM was called upon both by individual consumers and by Altroconsumo, the main Italian consumer organization.

Reasons for such an intervention were essentially that the conduct fell within the category of 'aggressive commercial practices' as described by Arts 24, 25 and 26, para 1 of the Italian Consumer Code.[3]

The AGCM, thus, imposed an administrative fine proportioned with the seriousness and the length of the conduct, as prescribed by Art 27 of the Italian Consumer Code (resulting in fines of two hundred thousand euro on Wind and two hundred fifty euro on Vodafone).

Wind and Vodafone appealed to the *Tribunale amministrativo regionale Lazio-Roma* (Regional Administrative Court in Rome), claiming AGCM's lack of competence, holding that, by virtue of the principle of speciality laid down in Art 3, para 4 of Directive 2005/29/EC[4] (and repeated in Art 19, para 3 of the Italian Consumer Code), the practices at stake were subject to special legislation that empowers the AGCom,[5] exclusively, to inspect, prohibit and sanction businesses within electronic communication services. The Court sided with the claimants, asserting that the abovementioned general regulations on business malpractice were not applicable to the case, and, as a result, the AGCM was not competent to intervene.

The AGCM appealed before the *Consiglio di Stato* (Italian Supreme Administrative Court), claiming, in particular, that the principle of speciality should be understood as meaning that the special legislation could only play a role in case of divergence from the general rules and provided that such special legislation covered specific aspects of unfair business practices, by regulating circumstances similar to those defined by the general rules, but providing different solutions. In the course of this second proceeding the issues at stake proved to be complex, deserving peculiar attention; therefore the case was referred to the *Adunanza Plenaria* (the Plenary of the Court), by asking what was the correct interpretation of Art 27, para 1-*bis* of the Italian Consumer Code, regulating the competence of Administrative bodies. The question arose, indeed, whether that provision might be regarded as giving exclusive competence to the AGCM with reference to unfair commercial practices, even when the conduct at stake is covered by specific sectoral rules under EU law.

The Plenary argued that the conduct at stake might fall under the definition of 'commercial practice that is in all circumstances considered aggressive', implicating the competence of AGCM, since it results in impairing or even removing the consumers' freedom of choice regarding the use of and payment

[3] Decreto legislativo 6 September 2005 no 206.

[4] European Parliament and Council Directive 2005/29/EC 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 [2005] OJ L149/22.

[5] *Autorità per le Garanzie nelle Comunicazioni* (National Regulatory Authority (NRA) for Electronic Communications).

for pre-installed services, which could lead to that practice being regarded as demanding immediate or deferred payment for products unsolicited by the consumer. Therefore, even if infringement of information obligations in the electronic communications sector may fall within the AGCom's competence, in the light of the principle of speciality, the AGCM had the competence to intervene, because the conduct could be considered an 'aggressive commercial practice'.

When the case was brought back the case to the Sixth Chamber of *Consiglio di Stato*, a doubt arose whether Art 27, para 1-*bis* of the Italian Consumer Code, as interpreted by the Plenary, was compatible with EU law.[6] The proceedings were stayed and referred to the ECJ, which was called upon to rule on several preliminary questions concerning the interpretation of: (i) Arts 3, para 4, 8, 9 and Annex I, pt 29 of Directive 2005/29/EC (so-called Unfair Commercial Practices), (ii) Arts 3 and 4 of Directive 2002/21/EC (so-called Framework Directive)[7] and (iii) Arts 20 and 21 of Directive 2002/22/EC (so-called Universal Service Directive).[8]

These questions may be gathered into two essential issues, which will be discussed in the following.

First: whether selling 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, may be deemed to be within the definition of 'aggressive commercial practice' under Arts 8 and 9 of Directive 2005/29/EC or of 'inertia selling' within the meaning of Annex I, pt 29.

To this question, the European Court of Justice (ECJ) answered in the affirmative, stating that the term 'inertia selling' within the meaning of Annex I, pt 29 of the Directive 'must be interpreted as including, subject to verifications by the referring court, conduct such as that at issue in the main proceedings' (below, section II).

Based on such an interpretation, the second issue, which deals with the principle of speciality as a tool to solve conflicts between EU rules, comes into

[6] As the Advocate General highlights in his Opinion in the Case (para 31) the European Court of Justice recognizes the possibility for a single chamber to make a reference for a preliminary ruling in which it takes a position not necessarily the same as that advocated by the Plenary of the same institution, although not called into question by any of the parties involved. See Case C-689/13 *Puligienica Facility Esco SpA (PFE)* v *Airgest SpA*, Judgment of the Court (Grand Chamber) of 5 April 2016, available at www.eur-lex.europa.eu, where 'Article 267 TFEU must be interpreted as precluding a provision of national law, in so far as that provision is interpreted to the effect that, where a question concerning the interpretation or validity of EU law arises, a chamber of a court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus precluded from itself making a request to the Court of Justice for a preliminary ruling' (para 36).

[7] European Parliament and Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33.

[8] European Parliament and Council Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51.

play. A doubt arose whether conduct constituting inertia selling (as recognized by the first answer) should be assessed and sanctioned subject to the Unfair Commercial Practices Directive (2005/29/EC). If it were, the National Regulatory Authority (NRA) charged with regulatory tasks in the specific sector of electronic communications networks and services, would not be competent to sanction such conduct. In other words, the question was whether the existence of a regulatory body, entrusted by an EU source of law (the Framework Directive, 2002/21/EC) to deal with commercial practices within the electronic communications networks and services sector, prevents the AGCM from exercising jurisdiction over aggressive commercial practices.

The ECJ ruled that

> 'Art 3.4 of Directive 2005/29/EC must be interpreted as not precluding national rules under which conduct constituting inertia selling, within the meaning of Annex I, pt 29 of Directive 2005/29/EC, 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 penalize such conduct'.

These two issues will be investigated starting from the substantive problem of the identification of the conduct carried out by the communication and network services providers and whether it should be included within the definition of 'aggressive commercial practice' laid down in Directive 2005/29/EC on Unfair Commercial Practices.

II. 'Inertia Selling' and Its Insight

Legal antinomies exist insofar as different sources of law are potentially applicable to the case. Sometimes, as in the present case, antinomies also give rise to a conflict of competence over different administrative bodies entrusted with the task to supervise compliance with different sets of rules.

To solve such a conflict, the ECJ first had to verify whether the conduct at stake was potentially subject to the scope of Directive 2005/29/EC, garrisoned by the Italian Authority for competition (AGCM).

Directive 2005/29/EC, devoted to 'Unfair Commercial Practices', enacted a general set of rules, in the aim both to enhance competition in the internal market and to protect consumers' contractual freedom.[9] In order to approximate the

[9] For an overview of Directive 2005/29/EC and its first-decade impact, through a selection of main practical concerns, see W. van Boom, A. Garde and O. Akseli, *The European Unfair Commercial Practices Directive. Impact, Enforcement Strategies and National Legal Systems* (Farnham: Ashgate, 2014); see also B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Oxford: Hart Publishing, 2011) for a comparative

laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests, the EU adopted a multifaceted technique to design the scope of intervention against potentially harmful conduct.[10] Such a design played an important role in guiding the ECJ to the interpretative solution finally adopted in the case at issue.

At first, the European legislature chose to broadly define unfair commercial practices, by indicating (Art 5, para 1) two elements that must be recognized in order for the conduct to fall within the definition. The practice must be 'contrary to the requirements of professional diligence' (letter a), and 'materially distort' or be 'likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed' (letter b). Such an open-ended clause encompasses both unfair and aggressive practices, referring to subsequent Art 8 to define 'aggressive commercial practices'. Once again, the technique used at EU level is that of broadly indicating the harmful effects triggered by the conduct: aggressive practices are those able to 'significantly impair the average consumer's freedom of choice or conduct with regard to the product', resulting in a contractual choice that the consumer would not have taken otherwise.

Art 8 identifies some details on aggressiveness, mentioning the use of 'harassment, coercion, including the use of physical force, or undue influence' as possible means of pressure on the consumer. Finally, Art 9 provides for details on how to assess those behaviors.[11] The key concept is, in a single word, that of *pressure*.

Considering that the unfairness test has to be carried out at the national level, taking into account its context and 'all its features and circumstances', it wouldn't be a very difficult task for National Courts and Administrative Authorities to identify a practice as aggressive. The risk of uncertainty being for sure the

overview on the transposition of the Directive into English, German, Dutch, Belgian and French national law.

[10] A technique scholars call 'pyramid' regulation' or 'in concentric circles': see M. Libertini, 'Clausola generale e disposizioni particolari nella disciplina delle pratiche commerciali scorrette' *Contratto e impresa*, 74-75 (2009).

[11] According to Art 9, '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 behavior; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; (e) any threat to take any action that cannot legally be taken'. See, for an Italian standpoint on aggressive commercial practices and relative case law, M.A. Caruso, *Le pratiche commerciali aggressive* (Padova: CEDAM, 2010) and L. Di Nella, 'Le pratiche commerciali «aggressive»', in G. De Cristofaro ed, *Pratiche commerciali scorrette e codice del consumo. Il recepimento della direttiva 2005/29/Ce nel diritto italiano* (decreti legislativi nn. 145 e 146 del 2 agosto 2007) (Torino: Giappichelli, 2008), 286.

sworn enemy of effectiveness,[12] the drafting choice has been to help interpreters by listing – in Annex I – typical aggressive practices into a so-called black list (of commercial practices to be 'considered in all circumstances unfair'). This is where inertia selling deserved specific attention: to define it, the EU legislator gleaned from market practice some typical examples of coercing conduct, able to force the consumer's consent. Section 29 of Annex I refers to

> '(d)emanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer (…)'.

The above mentioned definitions and 'supporting list' have been transposed into the Italian Consumer code,[13] triggering a discussion among scholars about the relationship between the broad definition of unfair commercial practice (transposed into Art 20, para 2), the rules on aggressive commercial practice (transposed into Arts 24 and 25) and the black list of practices considered in all circumstances misleading or aggressive (transposed into Art 26). On the one side, it has been argued that, at first, the interpreter should verify whether the conduct falls within one of those exemplified by the black list. If not, it must be ascertained if the conduct meets the requirement provided for by the definition of (misleading or) aggressive practice. Only if the conduct fails this second test, should the interpreter resort to the open-ended definition.[14]

On the other side, it has been claimed that the interpreter should verify first that the conduct at stake meets the requirements provided by the open-ended

[12] Effectiveness plays a pivotal role not only within the jurisdictional processes, guiding the ECJ in the interpretation of EU Law, but also at legislative level, pushing the EU legislature in drafting rules and principles to be then applied at national level. On the crucial impact the principle of effectiveness has in order to pursue consumer protection against unfair commercial practice, see F.P. Patti, ' 'Fraud' and 'Misleading Commercial Practices': Modernizing the Law of Defects in Consent' *European Review of Contract Law*, 312-315 (2016). On the meaning, extension and crystallization of the principle of effectiveness in EU contract law, see N. Reich, 'The Principle of Effectiveness and EU Contract Law' *Osservatorio del diritto civile e commerciale*, 337 (2013). See also S. Pagliantini, 'Effettività della tutela giurisdizionale, 'consumer welfare' e diritto europeo dei contratti nel canone interpretativo della Corte di giustizia: traccia per uno sguardo d'insieme' *Nuove leggi civili commentate*, 804 (2014).

[13] Although the Italian legislature transposed almost literally the mentioned rules, some mismatches have been highlighted as triggering interpretative issues. See F. Massa, 'Art 20', in V. Cuffaro ed, *Codice del consumo e norme collegate* (Milano: Giuffrè, 5th ed, 2019), 156-158. On the Italian implementation of Directive 2005/29/EC, and its defects, see G. De Cristofaro, 'L'attuazione della direttiva 2005/29/CE nell'ordinamento italiano: profili generali', in Id, *Pratiche commerciali scorrette* n 11 above.

[14] The open-ended definition laid down into Art 20 would have, thus, a subsidiary function: G. De Cristofaro, 'La Direttiva 2005/29/CE. Contenuti, *rationes*, caratteristiche', in Id, *Le pratiche commerciali sleali tra imprese e consumatori: la direttiva 2005/29/CE e il diritto italiano* (Torino: Giappichelli, 2007), 10; C. Granelli, 'Le "pratiche commerciali scorrette" tra imprese e consumatori: l'attuazione della direttiva 2005/29/CE modifica il codice del consumo' *Obbligazioni e contratti*, 776, 777 (2007).

clause of Art 20. Which is to say that the practice does not meet the acceptable standards of professional diligence and it is able to significantly impair the average consumer's freedom of choice. Only by combining those elements and the prescriptions laid down by the black lists may the interpreter identify a prohibited commercial practice, as the lists only provide for presumptively (misleading and) aggressive practices.[15]

The latter approach appears to be more suitable within the investigations carried out by the AGCM, which does not limit its analysis to a comparison between the suspect conduct and those on the list, but verifies that, on a case-by-case basis, the requirements of infringement of professional diligence and ability to distort the consumer's consent are met.[16]

On the contrary, the ECJ's answer to the first preliminary question, aiming at qualifying the conduct put in place by Wind and Vodafone, seems to have endorsed the former approach, following, on the method, the Opinion of the Advocate General in the case.[17] According to the Advocate General, once the conduct qualifies as unsolicited supply as per Annex I, pt 29, there is no need for further investigation.

On the merits, however, in the case at issue, according to the Advocate General, following the definition of unsolicited supply, a service does not qualify as unsolicited supply simply by supplying an unsolicited service. Rather, the trader must also demand payment for what it supplied. To the Advocate General, the conduct at issue does not meet the latter requirement, simply corresponding to an undue demand,

> 'the sole complaint against the operator being the failure to provide the information that the services were pre-loaded on the SIM card'.[18]

Failure of matching the definition of inertia selling by Annex I, pt 29 opens the investigation to the broader definition of aggressive commercial practice (Arts 8 and 9 of Directive), which, however, does not exhibit the characteristics thereby provided: to the Advocate General, the conduct at issue lacks the requirement of 'pressure', rather corresponding to the failure of disclosing information.[19]

However, the arguments on the method are the only ones that the ECJ

[15] M. Libertini, n 10 above, 86; M. Rabitti, 'Art 20. Le pratiche commerciali scorrette', in E. Minervini and L. Rossi Carleo eds, *Le modifiche al codice del consumo* (Torino: Giappichelli, 2009), 147; C. Castronovo and S. Mazzamuto, *Manuale di diritto privato europeo* (Milano: Giuffrè, 2007), III, 466.

[16] As occurred in the case at issue: see AGCM decisions nos 23356 and 23357, n 1 above. Such an approach seems also more successful also among Italian scholars: F. Massa, n 13 above, 156-158.

[17] See Opinion of Advocate General Campos-Sánchez Bordona (para 44), available at www.eur-lex.europa.eu.

[18] ibid paras 56-58.

[19] ibid paras 62-70.

shares with the Advocate General. On the merits, the Court does not endorse the above mentioned arguments.

Stressing the indications offered by recital 17 of Directive 2005/29/EC, the ECJ argues that, comparing the conduct at issue with those of the black list, there is no need for a case-by-case assessment against the provisions of Arts 5 to 9 (20 to 26 of the Italian Consumer Code).[20]

Because the subjective scope of application of Directive 2005/29/EC was undisputed,[21] the Court immediately searched for a 'coverage' within the list of 'practices aggressive in all circumstances', particularly by abovementioned point 29 of Annex I, devoted to 'inertia selling'.

Before having been normatively defined, inertia selling had obviously an 'economic pedigree': it is a well-known marketing strategy practice where suppliers deliver goods or perform services for a consumer without the consumer's knowledge or request and then follow it up with invoices demanding payment. Businesses benefit from such a strategy, as many consumers will prefer to keep the unsolicited goods or services rather than to return them at a later stage.[22]

The EU legislature chose to focus the normative definition on the substance of the (non)bargain:[23] the trader demands payment from a consumer for a product or service which has been provided to that consumer without the consumer soliciting it. In other words: the business imposes services (to be paid) to the consumer. The ECJ easily paved its way to find the match it was searching for by saying that 'it is sufficient (...) to establish whether the provision of those services at issue can be considered unsolicited by the consumer'.

The ECJ recalled the underlying rationale of the key word 'unsolicited': a

[20] In so doing, the ECJ follows a direction already expressed recently: see Case C-310/15 *Vincent Deroo-Blanquart* v *Sony Europe Limited*, Judgment of 7 September 2016, para 29; Case C-435/11 *CHS Tour Services GmbH* v *Team4 Travel GmbH*, Judgment of 19 September 2013, para 38, and the previous case-law there cited, all available at www.eur-lex.europa.eu.

[21] See E. Bargelli, 'La nuova disciplina delle pratiche commerciali tra professionisti e consumatori: ambito di applicazione (art. 18, lett. a)-d) e art. 19, comma 1°, c. cons.)', in G. De Cristofaro ed, *Pratiche commerciali scorrette* n 13 above, 95.

[22] In his editorial, T. Wasserman, 'Inertia: A marketer's best friend' 42 *Brandweek*, 28 (2001) evocatively describes inertia selling as a marketing strategy: 'though always ethically dubious, inertia selling still survives today. Companies hawk everything from healthcare memberships to credit cards using a form of inertia selling called opt-out marketing; meaning if you do not expressly say you do not want something, you will get it and then have to pay for it. But for marketers, inertia is mostly a good thing. It would probably be a lot tougher, for instance, if people took the time to read Consumer Reports, clip coupons and bake their own bread. Instead, people are notoriously lazy and that is not likely to change any time soon. Marketers should thank their lucky stars for inertia. That is, if they can get properly motivated to do so'.

[23] For some comparative C. Van Heerden, 'Unsolicited goods or services in terms of the Consumer Protection Act 68 of 2008' 4 *International Journal of Private Law*, 553 (2011) investigates how the concept of unsolicited goods and services is dealt with in the South African Consumer Protection Act. And, for a German overview, J. Schmidt, ' 'Inertia selling' de lege lata und de lege ferenda – die Reform im europäischen und deutschen Recht' *Zeitschrift fiir das Privatrecht der Europäischen Union*, 73 (2014).

consumer soliciting a product is a consumer making a free choice. A choice is free only where 'the information provided by the trader to the consumer is clear and adequate'.[24] And, the Court reasoned, what information would be crucial for the business to provide to the consumer if not the price? A fully informed transactional decision requires a full understanding of what is the price for the product (or service).[25]

Pre-activating functions on the SIM cards without informing the consumer of the existence of the functions or of the costs associated with them means of course jeopardizing the formation of a free consent to the transaction.

The Court points out that, considering the 'average consumer' as a benchmark,[26] the choice of browsing the internet or using the voice mail might not be considered free if the consumer is not aware of the costs of such actions. Furthermore, those services could technically work even without the consumer noticing it (eg, the mobile phone establishing a connection automatically).

On top of that, the Court considers immaterial that the consumer could make the 'opposite choice' of deactivating the services, depending on his/her ability and knowledge of technical opportunity.

These being the arguments offered, one could ask why the ECJ did not also make some effort to analyze the aspect of the demand for payment of the supplied services, which is still a structural part of the definition of inertia selling.[27] To the ECJ, unsolicited services for which there is a cost qualify as inertia selling if they are technically connectable without the consumer's knowledge.

Such a focus on the sole requirement of 'inertia', rather than on the demand for payment may be explained in light of the 'policy argument' that closes the part of the ruling dedicated to the first issue. The Court recalls that Directive 2005/29/EC aims to achieve a high level of consumer protection, assuming consumers are in a weaker position particularly with regard to information

[24] The Court cites the Case C-428/11 *Purely Creative and Others*, Judgment of 18 October 2012, available at www.eurlex.europa.eu, where '(c)lear and sufficient consumer information is important where the trader wishes to ensure that consumers can identify a prize and assess its nature' (para 53).

[25] Reference is made (at para 47) to the Case C-611/14 *Canal Digital Danmark A/S*, Judgment of 26 October 2016, where '(i)n so far as the price is, in principle, a determining factor in the consumer's mind, when it must make a transactional decision, it must be considered necessary information to enable the consumer to make such a fully informed decision' (para 55).

[26] The investigation on the consumer's technical capability is a task left to the referring court. Indeed, according to Recital 18 of Directive 2005/29/EC, such analysis consists of establishing the typical reaction of the average consumer in circumstances such as those at issue in the main proceedings.

[27] Any case of aggressive practice present two features: a structural nature (the conduct incisive on the freedom of choice through threats, coercions or physical or psychological pressures) and a functional nature (the effect of the conduct being that of – even potentially – convincing the consumer to make a transactional decision which he or she would not have taken otherwise). See E. Labella, *Pratiche commerciali scorrette e autonomia privata* (Torino: Giappichelli, 2018), 42-44.

asymmetry; this is particularly true in a sector as technical as that of electronic communications by mobile telephony, where 'it cannot be denied that there is a major imbalance of information and expertise between the parties'.[28]

Therefore, the Court cuts off the analysis of Arts 8 and 9 of Directive 2005/29/EC, simply verifying that conduct whereby a telecommunications operator sells SIM cards on which services are pre-loaded without first informing the consumer of that pre-loading or of the cost of those services corresponds to the category of inertia selling, triggering the competence of the AGCM.

In analyzing the conduct at issue, the ECJ adopted an extensive approach (omitting to check the general requirements of Arts 8 and 9), pursuing a policy of utmost consumer protection. This is not surprising; aggressive commercial practices present a striking example of the abuse that businesses might inflict to their weaker counterparties (consumers), and rules about unfair commercial practices play a pivotal role in granting effective protection to consumers.[29]

III. The 'Speciality Principle' in the Light of (Effective) Consumer Protection

The Wind and Vodafone litigation concerns the roles of administrative independent bodies charged with the task of policing unfair commercial practices that are able to harm consumers.

Given the answer to the first issue – ie, the challenged conduct qualifies as unsolicited supply of services (inertia selling) under Directive 2005/29/EC – the second issue arises whether this body of rules should 'take a step back', ceding to other EU rules and descending national provisions regulating the specific sector of telecommunications.

The issue arises as under Art 3, para 4 of Directive 2005/29/EC (as, then, under Art 19, para 3 of the Italian Consumer Code)

> 'in the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects'.

This provision crystallizes one of the bases of EU Law, ie the principle of speciality, which serves not one, but several functions.

[28] Indeed, A. Fachechi, 'Gli orientamenti dell'Autorità garante della concorrenza e del mercato in materia di pratiche commerciali scorrette (Anno 2016)' *Concorrenza e mercato*, 413-414, observes that unsolicited services are commonly supplied (as ancillary to those already provided under 'basic' contracts) within the markets of telephone, gas and electricity and often through teleselling marketing strategies. The supply of unsolicited services is a technique commonly used to promote transactions: see G. De Cristofaro, 'Le «forniture non richieste»', in Id, *Pratiche commerciali scorrette* n 13 above, 433.

[29] F.P. Patti, n 12 above.

Firstly, this broad rule may be seen as a tool to solve a pathology: as a rule of selective reference to those (other) provisions of EU law which deal with very specific aspects, it comes into play only in a situation of 'conflict', providing a remedy against a pathology.[30]

In a quite different direction, the principle of speciality might be intended as a glue of the EU Law system, essential to enable the coherence and the harmony of its interpretation mechanism.[31]

In fact, from a broader perspective, the speciality principle must be seen in connection with that of legality: to serve the public interest (here we may think of consumer protection), a legal system cannot but limit powers given by the legislature to different administrative bodies. To do so, powers are specifically defined and are conferred to achieve specific goals: those which must be abided by respective institutions.[32]

The abovementioned functions are not mutually exclusive, but rather compound one another, designing the speciality principle as a flexible tool able to fulfil different interpretative objectives, the first of which is effectiveness in implementing a policy goal (here consumer protection against aggressive commercial practices).

A very helpful and promising tool, thus; however, the Italian vicissitude of the AGCM competence in regulated markets showed it to be problematic as well.[33]

As anticipated, the EU legislator, aware of the significance and the proliferation of unfair commercial practices, provided for a rule (Art 3, para 4 of Directive 2005/29/EC) on the prevalence of other EU rules regulating specific aspects of unfair commercial practices.

However, when Art 19, para 3 of the Italian Consumer Code came to be implemented, the relationship between general and sectoral norms gave rise to

[30] This is an extreme situation, when the rule set by Art 3, para 4 reacts to a normative contrast. According to the Advocate General (Opinion, para 98), such a perspective cannot exhaust the role of the speciality principle.

[31] In this direction seems to work Recital 10 of Directive 2005/29/EC, where '(i)t is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. (…) This Directive accordingly applies only insofar as there are no specific Community 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 Community level and prohibits traders from creating a false impression of the nature of products. (...) This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers' economic interests'.

[32] According to J.H. Jans, 'European Law and the Inapplicability of the 'Speciality Principle' 1 *Review of European Administrative Law*, 35 (2008), '(w)hen exercising public law powers, administrative authorities may not further public interests other than those with a view to which the power was conferred'.

[33] To understand in brief how this chain of events developed, see A. Ciatti Càimi, 'Art 27', in E. Capobianco et al eds, *Codice del consumo annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2018), 111-113.

opposite interpretations, supported by different branches of Administrative Courts. To sum up, The Administrative Supreme Court (*Consiglio di Stato*) argued that, according to the principle of speciality, in fields where a sectoral regulation exists, the general rules (and so the competence of the AGCM) must cede, the former prevailing.[34] Later on, the Administrative Court of first instance supported the opposite view, under which general and sector-specific regulations must be intended as complementary, the general rules laid down in the Italian Consumer Code providing for an additional protection, aimed at increasing that offered by sectoral rules.[35] Moreover, the Plenary of *Consiglio di Stato*, with regard to the telecommunication market, argued that compliance with the principle of speciality requires that, to avoid overlap between regulations, the general norm must cede where a sectoral norm regulates the case in a more specific way.[36] A broad discussion arose among Italian scholars on the uncertainty such a jurisprudence triggered, along with a strong concern that the speciality principle, by sector and not by single norms might put in jeopardy the actual scope of the general regulation laid down into the Italian Consumer Code.[37]

Furthermore, in 2013, the European Commission started an infringement proceeding by virtue of Art 258 TFUE against Italy for not having correctly implemented the Directive 2005/29/EC, and precisely for having mistakenly interpreted its Art 3, para 4 devoted to the speciality principle.

Pushed by these circumstances, in 2014 the Italian legislator inserted[38] paragraph (*comma*) 1-*bis* into Art 27 of the Italian Consumer Code,[39] definitively

[34] Consiglio di Stato 3 December 2008 no 3999, available at www.personaedanno.it, opinion on financial intermediation.

[35] Tribunale Amministrativo regionale Lazio-Roma 8 November 2009 no 8400 and Tribunale Amministrativo regionale Lazio-Roma 15 June 2009 no 5620, all available at www.giustiziaamministrativa.it.

[36] Consiglio di Stato (Plenary) 11 May 2012 nos 11, 12, 13, 15 and 16, all available at www.giustiziaamministrativa.it.

[37] G. De Cristofaro, 'Art 19', in Id and A. Zaccaria eds, *Commentario breve al diritto dei consumatori* (Padova: CEDAM, 2013), 144. For an overview on the mentioned debate see L. Lorenzoni, 'Il riparto di competenze tra autorità indipendenti nella repressione delle pratiche commerciali scorrette' *Italian Antitrust Review*, 83 (2015) and P. Fusaro, 'Il riparto di competenze tra Autorità amministrative indipendenti nella recente giurisprudenza del Consiglio di Stato', available at www.federalismi.it, 3 April 2013, 1-29.

[38] By Art 1, para 6, letter *a*), of decreto legislativo 21 February 2014 no 21.

[39] '*Anche nei settori regolati, ai sensi dell'articolo 19, comma 3, la competenza ad intervenire nei confronti delle condotte dei professionisti che integrano una pratica commerciale scorretta, fermo restando il rispetto della regolazione vigente, spetta, in via esclusiva, all'Autorità garante della concorrenza e del mercato, che la esercita in base ai poteri di cui al presente articolo, acquisito il parere dell'Autorità di regolazione competente. Resta ferma la competenza delle Autorità di regolazione ad esercitare i propri poteri nelle ipotesi di violazione della regolazione che non integrino gli estremi di una pratica commerciale scorretta. Le Autorità possono disciplinare con protocolli di intesa gli aspetti applicativi e procedimentali della reciproca collaborazione, nel quadro delle rispettive competenze*' (Also within regulated markets, the competence to investigate and sanction those conducts which may be considered unfair commercial practices, in compliance with the rules in force, is given to the Antitrust Authority, which obtains the

prescribing that the AGCM has exclusive competence over unfair commercial practices even in regulated sectors, whereby the specific regulatory authority must give its – non-binding – opinion.

Complementarity between regulations won the battle, at least at the legislative level.

Notwithstanding the clear literal meaning of Art 27, para 1-*bis*, the case at issue shows that the Administrative Supreme Court felt the need for a further (and hopefully definitive) clarification. It was still unclear to the referring court what to do when presented with a 'contrast between EU rules' triggering the applicability of the speciality principle, as Directives 2002/21/EC and 2002/22/EC – regulating the market of telecommunications – also contain rules on information that the trader must disclose to consumers. The case at issue seems thus a test case for understanding the relationship between general and sectorial regulation, between Antitrust and Sectorial Authorities.

On this issue, the ECJ endorsed the Advocate General's Opinion, which remarkably dissected the question in two sub issues.

The first issue to solve is to what the speciality principle applies: is it a criterion to choose between sets of rules (sectorial choice), and, thus, where a regulation dedicated to unfair commercial practices into a specific market exists, the general rules are cut off? Intuitively, the answer is no: the speciality principle, as laid down into Art 3, para 4 works between single norms, preferring those regulating 'specific aspects' in the sectorial market.[40]

Second: what is the nature of the norms in potential conflict? A contrast able to be solved by the principle of speciality is only that between EU rules, and not between national rules. In other words: only EU sources of law might generate a contrast.[41]

Finally, what degree of divergence rises to 'contrast' in our context? Here again, the ECJ endorses the Opinion of the Advocate General[42] by arguing that

opinion of the relevant regulatory authority. Still, competence to investigate and sanction those conducts which do not represent unfair commercial practices is of the relevant regulatory authority. The Authorities may regulate the application and procedural aspects of their mutual collaboration through memoranda of understanding, within their respective competences).

[40] The Advocate General stresses (Opinion, para 100) that not only the literal meaning supports a strict interpretation, but also 'the fact that Directive 2005/29/EC has established 'a high common level of consumer protection' as a result of the 'high level of convergence achieved by the approximation of national provisions through this Directive'. (...) (A)ny non-application of its provisions 'runs the risk of breaching the safety net established by that directive where the other EU rules – those with primacy – do not guarantee as high a level of consumer protection' (citing Opinion on Case C-632/16 *Dyson Ltd and Dyson BV* v *BSH Home Appliances NV*, paras 81-85).

[41] In line with the Opinion of Advocate General (paras 115-118) in which a noteworthy observation: 'here EU law allows Member States to regulate specific aspects of unfair commercial practices in a potentially stricter fashion than Directive 2005/29/EC, the latter's replacement will come not from the national provision enacted pursuant to that option but from the (sectoral) directive permitting this' (para 120).

[42] Opinion of Advocate General (paras 124-126).

a mere divergence does not correspond to a 'contrast'; rather, a conflict exists

> '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'.[43]

Applying those criteria to the case at issue means thus investigating whether the Universal Service Directive and the Framework Directive (EU sectorial regulations, empowering the NRA – AGCom in Italy) contain norms on aggressive commercial practices such as inertia selling, offering incompatible normative solutions.

This exercise requires a little effort: bearing in mind that both the Framework Directive[44] and the Universal Service Directive[45] do not provide for full harmonization of consumer-protection aspects, although it is true that Art 20, para 1 of Universal Service Directive requires providers of electronic communications services to include certain information in the contract;[46] once again a clear norm (Art 4, para 1 of Universal Service Directive) states that provisions of that directive concerning end-users' rights apply without prejudice to Union rules on consumer protection and national rules in conformity with Union rules. Because the applicability of Directive 2005/29/EC is not affected by the provisions of the Universal Service Directive, there might be no conflict.

No conflict means that general and sectorial rules contrasting aggressive commercial practices must be seen as compatible and complementary in light (and with the aim) of ensuring not only a high level of coherence and harmony within the interpretation of EU Law, but also, let's say mostly, to ensure that consumer protection is effective. For sure, the general rules on unfair commercial practices provide for a higher level of protection, which may not be set aside by extensively interpreting a principle of EU Law which, as said, aims at reaching a high level of functioning of the entire EU system.

The principle of speciality, as identified above, operates not only at the

[43] ECJ, para 61.

[44] The Universal Service Directive, concerning the provision of electronic communications networks and services to end-users, aims 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.

[45] According to the Framework Directive, the NRAs, in carrying out their tasks, are required to promote the interests of citizens of the Union by ensuring a high level of protection for consumers (Art 8, para 4 letter *b*).

[46] Pursuant to its Art 20, para 1, 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.

theoretical level: it has (to have) its practical implementation. This trivial remark calls into question another very basic principle of EU law – that of proper co-operation. With respect to the relationship between the EU and Member States, the constitutional principle of loyal co-operation, as laid down in Art 4, para 3 of the TEU,[47] implies a mutual legal obligation on the EU and its Member States 'to assist each other in carrying out the tasks which flow from the Treaties'.[48] Broadly intended, as is often the case when different (autonomous) legal systems are strictly connected to one another, it imposes a great and widespread effort to put in place any measure useful to reach the common goals (here, the most effective consumer protection).[49]

Applied to the case at hand, the obligation of loyal co-operation could tie the administrative bodies charged with powers of decision making within the same area – that of consumers' protection against the telecommunications providers (ie, AGCM and AGCom).

Years ago, the Italian Constitutional Court, in a dispute on the liberalization of the transportation sector, argued that in cases where competition issues are at stake there should be no room for the principle of loyal co-operation with independent administrative authorities, because competition issues an exclusive competence of the State; thus, the cooperative model should be simply set aside, in favor of mechanisms of 'procedural participation'.[50] Scholars challenged such statements, not only because laconically expressed, but firstly because the principle of loyal co-operation, even where involving national dynamics, is recognized as a

[47] Art 4, para 3 of the Consolidated Version of the Treaty on European Union (2012) OJ C 326/13: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

[48] An introduction on the constitutional foundation of the principle of co-operation may be read in P. Van Elsuwege, 'The duty of sincere cooperation and its implications for autonomous Member State action in the field of external relations', in M. Varju ed, *Between Compliance and Particularism: Member State Interests and European Union Law* (Basel: Springer, 2019), 285.

[49] Legal systems and their complexity imply a strong interaction: a process which must always adopt a functional perspective, avoiding strict formalism. Loyal cooperation as a key tool to build a unitary system is the topic P. Perlingieri, *La leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008) addresses with a particular view on the fundamental rights of individuals. At national level, the constitutional principle of co-operation went through a difficult path, being in a first phase underestimated by the Italian Constitutional Court; after the constitutional reform of 2001, rebalancing competences and powers between State and Regions, the principle of loyal cooperation as recognized has its basis into the framework of 'cooperative regionalism' laid down into Title V of the Italian Constitution. See on this A. Gratteri, 'La faticosa emersione del principio di leale collaborazione nel quadro costituzionale', in E. Bettinelli and F. Rigano eds, *La riforma del Titolo V della Costituzione e la giurisprudenza costituzionale. Atti del seminario di Pavia svoltosi il 6-7 giugno 2003* (Torino: Giappichelli, 2004), 426-449.

[50] Corte Costituzionale 15 March 2013 no 41, available at www.federalismi.it.

general constitutional principle. The technical DNA characterizing administrative independent authorities seems not to be an argument for the efficiency of co-operation to be put at jeopardy.[51]

Here, the principle of co-operation, in conjunction with (and as a practical outcome of) the principle of speciality, requires the administrative bodies at stake to collaborate in respecting the boundaries set out in light of the speciality principle, and in communicating between each other in the aim of the unique goal they pursue.[52] To do so, a specific protocol of understanding has been enacted in 2016 to detail the activities which, addressing unfair commercial practices in the telecommunication sector, may be carried out through cooperation.[53]

IV. Concluding Remarks

It is pretty well known that the policy goal of consumer protection is a 'shared task' between all EU institutions: not only is it the subject of EU legislative action, but it is also managed at the jurisdictional level. And this is not the first time the ECJ played an important role in making EU law effective.

The law of unfair commercial practices is an important test for measuring the above-mentioned respective roles; the case at issue shows how important may be that the policy of consumer protection is effective.

The ECJ, in its dialogue with the Italian Supreme Administrative Court, gave an extensive interpretation of the notion of inertia selling, including in the definition laid down in Annex I to Directive on Unfair Commercial Practice the case of a provider which fails to inform consumers of pre-loaded paid services in the SIM cards sold. One may be disappointed with arguments offered by the Court to support such a ruling, lacking a deep analysis of any of the elements the Directive gives to the interpreters to identify a case of aggressive commercial practice. The feeling is that, on a policy ground, awareness of consumers, especially in the telecommunication sector, is a key aspect for an effective EU protection policy on those (nowadays) basic services. And (lack of) awareness was enough for the Court (not for the Advocate General in the case).

The ECJ gave, instead, a strict interpretation of the principle of speciality, resulting, on the one side, in the applicability of the general rules on unfair commercial practices; on the other side, in the competence of the Antitrust

[51] Challenges by A. Cardone, 'Autorità indipendenti, tutela della concorrenza e leale collaborazione: troppi "automatismi" a danno dell'autonomia?' *Rivista della Regolazione dei mercati*, 190 (2014). See also M. Giachetti Fantini, 'Autorità di regolazione dei trasporti, tutela della concorrenza e principio di leale collaborazione' *Federalismi.it*, 14 May 2014.

[52] See A.M. Slaughter, 'A Global Community of Courts' 44 *Harvard International Law Journal*, 191 (2003), where cooperation means also disregard the formal boundaries of sectorial sciences and national geographical borders, aiming at the function pursued (ie, solving the dispute at stake).

[53] Protocollo d'intesa AGCM - AGCom 23 dicembre 2016, available at www.agcm.it.

Authority to investigate and sanction businesses even within regulated markets, which are usually the realms of National Regulatory Authorities. Aggressive commercial practices remain a problem to be dealt with through the strongest rules and bodies.

Extensive, strict. Interpretative choices follow policy goals: in the present case, that of effective consumer protection.