Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

14 November 2024*

(Reference for a preliminary ruling – Consumer protection – Directive 2005/29/EC – Article 2(j), Articles 5, 8 and 9 – Concept of 'average consumer' – Unfair business-to-consumer commercial practices – Concept of 'aggressive commercial practice' – Cross-selling of a personal loan and an insurance product not related to that loan – Orientation of the information provided to the consumer – Concept of 'framing' – Commercial practice consisting of simultaneously proposing to a consumer an offer for a personal loan and an offer for an insurance product not related to that loan – No cooling-off period between the signature of the loan contract and that of the insurance policy contract – Directive (EU) 2016/97 – Article 24)

In Case C-646/22

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 10 October 2022, received at the Court on 13 October 2022, in the proceedings

Compass Banca SpA

v

Autorità Garante della Concorrenza e del Mercato,

intervening parties:

Metlife Europe Dac,

Metlife Europe Insurance Dac,

Europ Assistance Italia SpA,

THE COURT (Fifth Chamber),

composed of I. Jarukaitis, President of the Fourth Chamber, acting as President of the Fifth Chamber, E. Regan and Z. Csehi (Rapporteur) Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

* Language of the case: Italian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Compass Banca SpA, by F. Caronna, D. Gallo, E.A. Raffaelli, M. Siragusa, E. Teti, G. Vercillo and A. Zoppini, avvocati,

– Europ Assistance Italia SpA, by P. Fattori, A. Lirosi and A. Pera, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. Collabolletta and P. Gentili, avvocati dello Stato,

– the European Commission, by D. Recchia, N. Ruiz García and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 April 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(j) and Articles 8 and 9 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), and of Article 24(3) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ 2016 L 26, p. 19).

2 The request has been made in proceedings between Compass Banca SpA and the Autorità Garante della Concorrenza e del Mercato (Competition and Market Authority, Italy) ('the AGCM') in regard to that authority's decisions concerning a commercial practice of that company.

Legal context

European Union law

Directive 2005/29

3 Recitals 7, 11, 13, 14, 17, 18 and 21 of Directive 2005/29 state:

'(7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. …

…

(11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. It also sets rules on aggressive commercial practices, which are currently not regulated at Community level.

…

(13) In order to achieve the Community's objectives through the removal of internal market barriers, it is necessary to replace Member States' existing, divergent general clauses and legal principles. The single, common general prohibition established by this Directive therefore covers unfair commercial practices distorting consumers' economic behaviour. In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution. The general prohibition is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices.

(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. … The full harmonisation approach adopted in this Directive does not preclude the Member States from specifying in national law the main characteristics of particular products such as, for example, collectors' items or electrical goods, the omission of which would be material when an invitation to purchase is made. …

…

(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; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of [Council] Directive [84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17)], to examine the effect on a notional, typical consumer. 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, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. … The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

…

(21) Persons or organisations regarded under national law as having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings. While it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made.'

4 Article 1 of Directive 2005/29, entitled 'Purpose', states:

'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, entitled 'Definitions', provides:

'For the purposes of this Directive:

…

(b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

…

(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;

…

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

(k) "transactional decision" means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

…'

6 Article 3 of that directive, entitled ‘Scope’, provides, in paragraphs 4 and 9:

‘4. 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.

…

9. In relation to “financial services”, as defined in Directive 2002/65/EC [of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16)], and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.’

7 Article 4 of Directive 2005/29, entitled ‘Internal market’, provides:

‘Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.’

8 Article 5 of that directive, entitled ‘Prohibition of unfair commercial practices’, which is included in Chapter 2 thereof, entitled ‘Unfair commercial practices’, provides:

‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

…

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.’

9 Chapter 2, Section 1, entitled ‘Misleading commercial practices’, contains Articles 6 and 7 of that directive. Article 6, entitled ‘Misleading actions’, provides in paragraph 1(e):

‘A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

…

(e) the need for a service, …’

10 Article 7 of that same directive, entitled ‘Misleading omissions’, states at paragraphs 1 and 2 thereof:

‘1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

…’

11 Chapter 2, Section 2, entitled ‘Aggressive commercial practices’, of Directive 2005/29 contains Articles 8 and 9 thereof.

12 Under Article 8 of that directive, entitled ‘Aggressive commercial practices’:

‘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.’

13 Article 9 of that directive, entitled ‘Use of harassment, coercion or undue influence’, provides:

‘In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

(a) its timing, location, nature or persistence;

(b) the use of threatening or abusive language or behaviour;

(c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;

(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;

(e) any threat to take any action that cannot legally be taken.'

14 Article 11 of the same directive, entitled 'Enforcement', provides, in the first subparagraph of paragraph 1 thereof:

'Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.'

15 Annex I to Directive 2005/29, entitled 'Commercial practices which are in all circumstances considered unfair', lists and defines 'aggressive commercial practices', in points 24 to 31 thereof, as follows:

'24. Creating the impression that the consumer cannot leave the premises until a contract is formed.

25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.

26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 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)] and [Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37)].

27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.

28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of [Council] Directive 89/552/EEC [of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23)].

29. 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 (inertia selling).

30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

– there is no prize or other equivalent benefit,

or

– taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.'

Directive 2016/97

16 Article 24 of Directive 2016/97, headed 'Cross-selling', provides in paragraphs 3 and 7:

'3. Where an insurance product is ancillary to a good or a service which is not insurance, as part of a package or the same agreement, the insurance distributor shall offer the customer the possibility of buying the good or service separately. This paragraph shall not apply where an insurance product is ancillary to an investment service or activity as defined in point 2 of Article 4(1) of Directive 2014/65/EU [of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349)], a credit agreement as defined in point 3 of Article 4 of Directive 2014/17/EU of the European Parliament and of the Council [of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34)], or a payment account as defined in point 3 of Article 2 of Directive 2014/92/EU of the European Parliament and of the Council [of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ 2014 L 257, p. 214)].

…

7. Member States may maintain or adopt additional stricter measures or intervene on a case-by-case basis to prohibit the sale of insurance together with an ancillary service or product which is not insurance, as part of a package or the same agreement, when they can demonstrate that such practices are detrimental to consumers.'

Italian law

Consumer Code

17 Article 20 of decreto legislativo n. 206, recante codice del consumo a norma dell'articolo 7 della legge di 29 luglio 2003, n. 229 (Legislative Decree No 206 on the Consumer Code within the meaning of Article 7 of Law No 229 of 29 July 2003), of 6 September 2005 (Ordinary Supplement to GURI No 235 of 8 October 2005) ('the Consumer Code'), which transposed Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides:

'A commercial practice shall be unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed at a particular group of consumers.'

18 Article 24 of that code, entitled 'Aggressive commercial practices', which transposes the requirements set out in Article 8 of Directive 2005/29, provides:

'1. 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.

…'

Legislative Decree No 209 of 7 September 2005

19 Article 120-*quinques* of decreto legislativo n. 209 – codice delle assicurazioni private (Legislative Decree No 209 establishing the Private Insurance Code) of 7 September 2005 (Ordinary Supplement to GURI No 239 of 13 October 2005), entitled 'Cross-selling', is worded as follows:

'1. Where a distributor offers an insurance product together with an ancillary product or service which is not insurance, as part of a package or the same agreement, the insurance distributor shall inform the other contracting party whether it is possible to buy the different components separately and, if so, shall provide an adequate description of the different components of the agreement or package as well as separate evidence of the costs and charges relating to each component.

2. In the circumstances referred to in paragraph 1 and where the risk or insurance coverage resulting from the agreement or package proposed to the other contracting party is different from those of the various components taken separately, the insurance distributor shall provide an appropriate description of the different components of the agreement or the package and shall explain the way in which their interaction modifies the risk or insurance coverage.

3. Where an insurance product is an ancillary product to a good or a service which is not insurance, as part of a package or the same agreement, the insurance distributor shall offer the other contracting party the possibility of buying the good or service separately. The present paragraph shall not apply where the insurance product is ancillary to an investment service or

activity within the meaning of Article 1(5) of the Consolidated Law governing the activities of a financial intermediary, to a credit agreement within the meaning of Article 120-*quinquies*(1)(c) of the Consolidated Law on Banking or to a payment account within the meaning of Article 126-*decies* of the Consolidated Law on Banking.

4. In the cases referred to in paragraphs 1 and 3, the insurance distributor shall explain to the other contracting party the reasons why the insurance product which forms part of the overall package or of the same agreement is considered appropriate for meeting his or her demands and needs.

5. In the cases referred to in paragraphs 1 and 3, in the light of the objective of protecting insured persons, the [Istituto per la vigilanza sulle assicurazioni (IVASS) (supervisory authority for the insurance sector, Italy)] may, in respect of the activity of insurance distribution, apply the interim and prohibition measures provided for in the present code, including the power to prohibit the sale, as part of a package or the same agreement, of insurance with a service or product other than insurance, irrespective of whether the insurance or the other product or service is ancillary in nature, where that practice is detrimental to consumers. As regards insurance investment products, those powers shall be exercised by IVASS and the [Commissione Nazionale per le Società e la Borsa (Consob) (National Companies and Stock Exchange Commission, Italy)) according to their respective powers.

6. The provisions of the present article shall not apply to the distribution of insurance products which offer coverage for different types of risks.

7. These provisions shall be without prejudice to the application, where appropriate, of the provisions of the Consumer Code …'

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

20 Compass Banca, established in Italy, proposed to its customers, between January 2015 and July 2018, that they take out various personal loans as well as insurance products that provided coverage for certain risks that were not necessarily related to those loans. It follows from the order of reference that even if taking out insurance was not a precondition for granting a personal loan, it was nevertheless offered in conjunction with that loan.

21 On 13 September 2018, the AGCM opened an investigation in order to determine whether that commercial practice was 'unfair' within the meaning of Directive 2005/29.

22 During the course of that investigation, Compass Banca submitted a proposal for commitments relating to a series of specific measures designed to make it clearer to the consumer that it was not mandatory to take out insurance that was not related to a personal loan. Those measures included the extension, to all customers, of an unconditional right to cancel their insurance policy contract, without affecting their loan contract. Compass Banca, by contrast, refused the AGCM's request that customers should have a seven-day cooling-off period between the date of signing of the loan contract and that of the signing of the insurance policy. It considered that measure to be disproportionate and asymmetrical, in so far as it did not apply to all competitors.

23 On 11 March 2019, Compass Banca submitted a new proposal for commitments, which contained other measures intended, in its view, to have an effect similar to the introduction of a cooling-off period of seven days requested by the AGCM, such as the obligation to contact its customers seven days after the signing of their insurance policy contract in order to ask them to confirm whether they wished to keep the insurance policy taken out under that contract, while adding that it would cover the cost of the insurance premium for the period corresponding to those seven days.

24 By decision of 2 April 2019, confirmed on 3 July 2019, the AGCM rejected that proposal for commitments.

25 By decision of 27 November 2019 communicated to Compass Banca on 23 December 2019, the AGCM stated that Compass Banca had implemented an 'aggressive' and, therefore, 'unfair' commercial practice, within the meaning of Directive 2005/29, consisting in the 'obligatory combination of personal finance agreements and insurance products not related to the credit'. It prohibited the continuation of that practice and imposed a fine on Compass Banca of EUR 4 700 000.

26 Compass Banca brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) challenging the decisions of the AGCM mentioned in paragraphs 24 and 25 above, which, by judgment No 9516 of 2021 dismissed that action.

27 Compass Banca brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy), which is the referring court.

28 Compass Banca submits that the AGCM has considered its commercial practice as 'aggressive' and, therefore, as 'unfair', within the meaning of Directive 2005/29, on the sole ground that it consisted in the cross-selling of personal loans and insurance products, without furnishing actual evidence of that 'aggressive' nature, in the light of the specific features of that practice or circumstances of the case. Compass Banca infers from this that the AGCM has unjustifiably and unacceptably reversed the burden of proof, requiring Compass Banca to demonstrate that its commercial practice is not, in fact, 'aggressive' within the meaning of that directive.

29 The AGCM argues that, by cross-selling personal loans and insurance products, Compass Banca has significantly influenced and limited the freedom of choice of its customers. It finds that Compass Banca has failed, in particular, to provide information to its customers about the optional nature of the insurance product and adds that such a practice would not have been regarded as 'aggressive' if the customers concerned had been given a seven-day cooling-off period between the date on which the contract relating to the personal loan was signed and the date on which the contract relating to the insurance product was signed.

30 The referring court asks, first of all, whether the concept of 'average consumer' within the meaning of Directive 2005/29 attaches sufficient importance to the theory of 'bounded rationality', which requires the need for greater consumer protection. According to that theory, people often act without obtaining all the necessary information. Thus, in so far as consumers are subject, in particular, to biases of 'framing', in the terminology of the cognitive sciences, they are likely to alter their preferences according to the manner in which contractual offers are made to them and, consequently, to take irrational decisions as compared to those that would be taken by a person who is reasonably well-informed, and reasonably observant and circumspect.

31 Next, it asks whether the practice at issue in the main proceedings must be regarded as being an 'aggressive' and, therefore, 'unfair' commercial practice, within the meaning of Directive 2005/29, in so far as commercial offers made to consumers for a loan contract and an insurance product are presented with a bias of 'framing' such as to make them believe that the grant of a personal loan is conditional upon taking out insurance.

32 Lastly, the referring court asks whether Article 24(3) of Directive 2016/97, relating to the cross-selling of insurance products with other products, precludes the AGCM from prohibiting a commercial practice such as that adopted by Compass Banca.

33 In those circumstances the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should the concept of "average consumer" referred to in Directive [2005/29], understood as a consumer who is reasonably well-informed and reasonably observant and circumspect – given that it is vague and flexible – be worded according to the best science and experience and thus refer not only to the classic concept of *homo economicus*, but also to the findings of the [theory of] bounded rationality, which ha[s] shown how people often act by limiting the information they need through decisions which appear "irrational" when compared with those that would be taken by a hypothetically observant and circumspect person; findings that impose a need for greater consumer protection where – as is increasingly the case in modern market dynamics – there is a risk of cognitive influence?

(2) Can a commercial practice in which, due to the framing of the information, a choice may appear obligatory and with no alternatives be considered inherently aggressive, taking account of Article 6(1) of [that directive], which regards as misleading a commercial practice that, in any way "including overall presentation" deceives or is likely to deceive the average consumer?

(3) Does [Directive 2005/29] justify the power of [the AGCM] (once the risk of psychological influence has been identified in relation to [first] the fact that a loan applicant is normally in need, [second] the complexity of the contracts presented for signature by the consumer, [third] the concurrent nature of the combined offer and [fourth] the short period granted to take up the offer) to allow a derogation from the principle of the possibility of cross-selling insurance products and unrelated financial products by requiring a seven-day [cooling-off] period between the signing of the two contracts?

(4) In view of the repressive power in respect of aggressive commercial practices, does Directive [2016/97], and in particular Article 24(3) thereof, preclude [the AGCM] from adopting a decision on the basis of Article 2(d) and (j) of Directive 2005/29/EC, Articles 4, 8 and 9 of that directive, and the national implementing legislation, after a commitments application is rejected following the refusal of an investment services company – in the case of the cross-selling of a financial product and an unrelated insurance product (and where there is a risk of the consumer being influenced owing to the actual circumstances of the case, which can also be inferred from the complexity of the documents to be examined) – to grant the consumer a seven-day cooling-off period between the combined offer being made and the insurance contract being signed?

(5) Could the characterisation of the mere combining of two products – one financial product and one insurance product – as an aggressive practice result in an unlawful regulatory measure, and would this place on the trader (rather than on the AGCM, as it should be) the burden – a difficult one to discharge – of demonstrating that that combining of two products is not an aggressive practice in breach of Directive 2005/29 (especially as, under that directive, Member States may not adopt stricter rules than those provided for therein, even in order to achieve a higher level of consumer protection), or, on the contrary, does such a reversal of the burden of proof not exist, provided that, on the basis of objective evidence, there is deemed to be a real risk that the consumer in need of a loan will be influenced by a complex combined offer?'

Consideration of the questions referred

The first question

Admissibility

34 Compass Banca expresses doubts as to the admissibility of the first question in so far as, in that question, the concept of 'average consumer' is defined differently from the definition usually used, since it takes into consideration the risk of cognitive influence on consumers, which renders the question hypothetical. Given that the contested decisions in the case at issue in the main proceedings were adopted on the basis of the national provisions transposing Article 8 of Directive 2005/29 and not Article 6 of that directive, taking such a risk into account is not relevant.

35 In that regard, it should be borne in mind that, according to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 7 February 2023, *Confédération paysanne and Others (In vitro random mutagenesis)*, C-688/21, EU:C:2023:75, paragraph 32).

36 The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 7 February 2023, *Confédération paysanne and Others (In vitro random mutagenesis)*, C-688/21, EU:C:2023:75, paragraph 33).

37 In the present case, by its first question, the referring court seeks from the Court an interpretation of the concept of 'average consumer' in order to determine whether a commercial practice known as 'framing', consisting in simultaneously presenting an offer for a personal loan and an offer for an insurance product not related to that loan, without granting the consumer a cooling-off period between the date on which the contracts related to those offers are signed – and which, due to a bias of framing is likely to give an average consumer the impression that it is obligatory

for him or her to subscribe to those two offers ('the commercial practice of framing') – must be regarded as constituting an aggressive commercial practice within the meaning, in particular, of Articles 8 and 9 of Directive 2005/29 and, therefore, an unfair commercial practice within the meaning of Article 5 of that directive.

38 For the purposes of determining whether a commercial practice is 'aggressive' within the meaning of that directive, Article 8 thereof makes express reference to the concept of 'average consumer'.

39 Accordingly, it is not obvious that the interpretation of EU law that is sought bears no relation to the actual facts or the subject matter of the dispute in the main proceedings, or that the problem raised by the referring court is hypothetical. Moreover, the Court of Justice has before it all the factual and legal material necessary to give a useful answer to the first question.

40 It follows that the first question is admissible.

Substance

41 As a preliminary point, it should be recalled that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the question referred to it (judgment of 8 September 2022, *IRnova*, C-399/21, EU:C:2022:648, paragraph 22).

42 In the present case, it is apparent from the order for reference that, by its first question, the referring court seeks to ascertain whether, for the purposes of interpreting the concept of 'average consumer' within the meaning of Directive 2005/29, in particular in Article 8 thereof, reference should be made not only to '*homo economicus*', that is to say, in essence, to a perfectly rational economic actor in his or her decision-making, but also to the most recent studies relating to the theory of 'bounded rationality', according to which a consumer's ability to make a decision 'conflicts with the limitations imposed on cognitive capacity by the number of stimuli received, the ability to sustain attention over time and the ability to memorise all the information received'.

43 In those circumstances, it is appropriate to consider that, by its first question, the referring court asks, in essence, whether Directive 2005/29 must be interpreted as meaning that the concept of 'average consumer', within the meaning of that directive, must be defined not only by reference to a consumer who is reasonably well-informed and reasonably observant and circumspect, but also taking into account the fact that an individual's decision-making capacity is impaired by constraints, such as cognitive biases.

44 As a preliminary point, it should be recalled that Article 5(2) of Directive 2005/29 refers to the concept of 'average consumer', in order to determine whether a commercial practice which is contrary to the requirements of professional diligence is such as to have sufficient effect to justify its prohibition as an unfair commercial practice or whether it must be held that, since it is likely only to mislead a very credulous or naive consumer, it avoids such a prohibition.

45 That same concept is reproduced in Articles 6 to 8 of Directive 2005/29 which, as follows from Article 5(4) thereof, specify the way in which the two criteria set out in Article 5(2) of the same directive, in order to classify a practice as unfair, are to apply to certain specific types of unfair commercial practices.

46 As regards the interpretation to be given to the concept of 'average consumer', it follows from recital 18 of the same directive that while it is appropriate to protect all consumers from unfair commercial practices, the Court has ruled in advertising cases since the enactment of Directive 84/450 that it was necessary to examine the effects of the commercial practices on a 'notional, typical consumer'.

47 It is also apparent from recital 18 that, in line with the principle of proportionality, and in order to permit the effective application of the protections contained in it, Directive 2005/29 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.

48 It follows, as the Court has held in the context of Directive 93/13, that that reference to the concept of 'average consumer' is an objective criterion and is independent of the specific knowledge which the person concerned may have or the information actually available to him or her. Furthermore, neither the less circumspect consumer than that average consumer, nor the more circumspect consumer than the latter, corresponds to that criterion (see, in to that effect, judgment of 21 September 2023, *mBank (Polish register of unlawful terms)* C-139/22, EU:C:2023:692, paragraphs 60, 61 and 66).

49 That said, it should be recalled that Directive 2005/29 aims to achieve a high level of consumer protection by approximating the provisions of the Member States on unfair commercial practices harming consumers' economic interests (judgment of 19 December 2013, *Trento Sviluppo and Centrale Adriatica*, C-281/12, EU:C:2013:859, paragraph 31). That objective is supported by recitals 7, 11, 13 and 14 of that directive, the terms of which prohibit commercial practices directly aimed at influencing consumers' transactional decisions, distorting their economic behaviour or preventing them from making informed and therefore effective choices.

50 In addition, although recital 18 of that directive defines the concept of 'average consumer', it also follows from that recital that that concept is not statistical and that the national courts and authorities have to exercise their own faculty of judgment, having regard to the case-law of the Court, to determine the typical reaction of the average consumer in a given case.

51 Consequently, as the Advocate General observed, in essence, in point 40 of his Opinion, determining the reaction of the average consumer to a specific commercial practice is not therefore 'supposed to be a merely theoretical exercise'. Considerations that are more realistic must also be taken into account, provided that they are compatible with the information provided in relation to that concept, by recital 18 of Directive 2005/29.

52 It is true that, according to that recital, the average consumer is a person who, on the one hand, is reasonably well-informed and, on the other, reasonably observant and circumspect. However, given that, in accordance with Article 7 of Directive 2005/29, it is for the trader to provide consumers with the material information that they need – according to the context – to take their decision, that 'reasonably well-informed' nature of the average consumer must be understood as referring to the information which can reasonably be presumed to be known to any consumer, taking into account the relevant social, cultural and linguistic factors, and not to the information

which is specific to the transaction in question. Consequently, that nature does not exclude the possibility that a commercial practice may materially distort the economic behaviour of the notional consumer on account of a lack of information on his or her part.

53 Similarly, the fact that the concept of 'average consumer' must be understood by reference to a consumer who is 'reasonably observant and circumspect' does not exclude taking into account the influence of cognitive biases on that average consumer, provided that it is established that such biases are likely to affect a reasonably well-informed and reasonably observant and circumspect person, to such an extent as to materially distort his or her behaviour.

54 Moreover, the Court has already noted that an average consumer may be deceived and that, consequently, he or she may make commercial choices neither with full knowledge of the facts nor in an effective manner (see, to that effect, judgment of 19 December 2013, *Trento Sviluppo and Centrale Adriatica*, C-281/12, EU:C:2013:859, paragraphs 34 and 38).

55 Furthermore, the Court has held, in the field of EU trade marks, that it should be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see, to that effect, judgment of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, paragraphs 25 and 26).

56 In addition, it has already established that an erroneous perception of a piece of information may have been suggested to the average consumer (see, to that effect, judgment of 26 October 2016, *Canal Digital Danmark*, C-611/14, EU:C:2016:800, paragraphs 40 and 41) and that it is unlikely that, in certain fields, the average consumer is technically capable of understanding all the details of any offer in order to make a choice in a fully rational way (see, to that effect, judgment of 13 September 2018, *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:710, paragraphs 50 and 52).

57 That said, although a consumer's decision-making capacity may be impaired by a series of constraints, such as cognitive biases, that does not mean that it must necessarily be considered that any risk of a cognitive bias occurring in the context of a commercial practice would necessarily have the effect of materially distorting the behaviour of that notional consumer: it is still necessary for it be duly established that, in the particular circumstances of a specific situation, such a practice is of such a kind as to affect the consent of a person who is reasonably well-informed and reasonably observant and circumspect, to such an extent as to materially distort his or her behaviour.

58 It is, in any event, for the national courts to determine the typical reaction of the average consumer in a given case (see, to that effect, judgment of 26 October 2016, *Canal Digital Danmark*, C-611/14, EU:C:2016:800, paragraph 39).

59 In the light of all the foregoing considerations, the answer to the first question is that Directive 2005/29 must be interpreted as meaning that the concept of 'average consumer', within the meaning of that directive, must be defined by reference to a consumer who is reasonably well-informed and reasonably observant and circumspect. Such a definition does not, however, exclude the possibility that an individual's decision-making capacity may be impaired by constraints, such as cognitive biases.

The second question

60 As a preliminary point, it should be noted, as is apparent from the request for a preliminary ruling, that the referring court seeks to ascertain by its second question whether a commercial practice of 'framing' may in all circumstances be regarded as 'aggressive', within the meaning of Directive 2005/29 and thus contrary to that directive for that fact alone. However, in that second question, the referring court also refers to the concept of 'misleading' commercial practices. As follows from Article 5(2) of that directive, aggressive and misleading commercial practices represent two categories of unfair commercial practice. Furthermore, the concept of a commercial practice which is in all circumstances regarded as unfair, is introduced in Article 5(5) of that directive.

61 It is appropriate, as a consequence, in accordance with the case-law of the Court cited in paragraph 41 above, to consider that, by the second question, the referring court asks, in essence, whether Article 2(j), Article 5(2) and (5) and Articles 8 and 9 of Directive 2005/29 must be interpreted as meaning that a commercial practice consisting in simultaneously proposing to the consumer an offer for a personal loan and an offer for an insurance product not related to that loan, constitutes a commercial practice which is in all circumstances aggressive or, at the very least, a commercial practice regarded in all circumstances as unfair, within the meaning of that directive.

62 In the first place, it should be recalled that Chapter 2 of Directive 2005/29, entitled 'Unfair commercial practices', contains two sections, namely Section 1 relating to misleading commercial practices and Section 2 relating to aggressive commercial practices.

63 Article 5 of Directive 2005/29, which appears in Chapter 2 of that directive, prohibits unfair commercial practices in paragraph 1 thereof, and establishes in paragraph 2 thereof the criteria for determining whether a commercial practice is unfair.

64 That article 5 specifies, in paragraph 4 thereof, that, in particular, commercial practices that are 'misleading' as set out in Articles 6 and 7 of Directive 2005/29 are unfair, as are those that are 'aggressive' as set out in Articles 8 and 9 of that directive.

65 Article 5(5) of that directive provides, in addition, that Annex I thereto contains the list of those commercial practices which are in all circumstances to be regarded as unfair and that that list, which is to apply in all the Member States, may be modified only by revision of that directive.

66 In that regard, recital 17 of Directive 2005/29 specifies that, in order to provide greater legal certainty, only the practices listed in Annex I are in all circumstances to be regarded as unfair without the need to carry out a case-by-case assessment against the provisions of Articles 5 to 9 of that directive.

67 Since Annex I to Directive 2005/29 constitutes a complete and exhaustive list of the commercial practices regarded in all circumstances as unfair, a commercial practice such as the commercial practice of 'framing' at issue in the main proceedings can be classified as an aggressive commercial practice in all circumstances, or even, more generally, as a commercial practice regarded in all circumstances as unfair, within the meaning of that directive, only if it corresponds to one of the situations listed in that annex.

68 A reading of Annex I shows that no such correspondence, with none, moreover, having been adduced in the case in the main proceedings.

69 It must therefore be found that a commercial practice such as that of 'framing' at issue in the main proceedings, consisting in simultaneously proposing to the consumer an offer for a personal loan and an offer for an insurance product not related to that loan, does not constitute a practice which may be classified as an aggressive commercial practice in all circumstances, or even a commercial practice which is in all circumstances regarded as unfair, within the meaning of that directive.

70 However, given that, in the light of the information in the file sent to the Court, it cannot be excluded that the AGCM classified the practice at issue in the main proceedings as 'aggressive' following an in-depth analysis of the commercial practice at issue conducted in the light of the circumstances of the case, it is necessary, in the second place, and in order to provide a useful answer to the referring court, to examine whether a commercial practice of 'framing' may constitute an aggressive commercial practice within the meaning of Directive 2005/29, on the sole ground that it consists in simultaneously presenting to a consumer an offer for a personal loan and an offer for an insurance product not related to that loan, without granting the consumer a cooling-off period between the respective signing of the two contracts relating to those offers – even though that practice is likely to create a bias of framing – thus giving the consumer the impression that he or she must take out insurance in order to obtain a personal loan.

71 It is clear from Article 8 of Directive 2005/29 that a commercial practice is to be regarded as aggressive if 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 a product and thereby causes him or her, or is likely to cause him or her, to take a transactional decision that he or she would not have taken otherwise.

72 In the absence of a definition of the concepts of 'harassment' and 'coercion' within the meaning of Article 8, it is necessary, in order to define those concepts, to refer to the usual meaning which those terms have in everyday language, which precludes a commercial practice from leading to a form of harassment or coercion solely because it has the characteristics of a commercial practice of framing.

73 As regards the possibility that such a commercial practice may give rise to 'undue influence' within the meaning of Article 8, it should be recalled that the latter concept, which is defined in Article 2(j) of Directive 2005/29, covers the exploitation of a position of power in relation to the consumer in such a way as to apply pressure on that consumer, even without using or threatening to use physical force, in a way which significantly limits his or her ability to make an informed decision. As is apparent from the case-law of the Court, undue influence is not necessarily impermissible influence, but influence which, without prejudice to its lawfulness, actively entails, through the application of a certain degree of pressure, the forced conditioning of the consumer's will (judgment of 12 June 2019, *Orange Polska*, C-628/17, EU:C:2019:480, paragraph 33).

74 Thus, the application by a trader of a method of concluding or amending contracts may be classified as an 'aggressive commercial practice' on account of the exertion of undue influence by adopting unfair conduct which has the effect of applying pressure on the consumer in such a way that his or her freedom of choice is significantly impaired, such as behaviour liable to make that average consumer feel uncomfortable or to confuse his or her thinking (see, to that effect, judgment of 12 June 2019, *Orange Polska*, C-628/17, EU:C:2019:480, paragraph 47).

75 A practice consisting in simultaneously presenting to a consumer an offer for a personal loan and an offer for an insurance product not related to that loan without allowing that consumer a cooling-off period between the respective signing of the contracts relating to those offers does not, as such, imply the existence of acts of pressure, even if that practice is likely to create a bias of framing. Consequently, such a practice cannot, in itself, constitute 'undue influence' within the meaning of Article 8 of Directive 2005/29.

76 However, it must be recalled that Directive 2005/29 refers, among unfair commercial practices, not only to aggressive commercial practices, but also to misleading commercial practices, which are defined in Article 6(1)(e) of that directive as including commercial practices which in any way deceive or are likely to deceive the average consumer as regards, inter alia, the need for a service and which cause or are likely to cause him or her to take a transactional decision that he or she would not have taken otherwise.

77 In the case at issue in the main proceedings, it is therefore only if, during the course of the practice at issue, the trader, not only did not give the consumer a cooling-off period between the signing of the loan contract and that of the insurance contract, but also used harassment, coercion or undue influence, that such a practice could be classified as 'aggressive' within the meaning of Article 8 of Directive 2005/29. By contrast, even in the absence of harassment, coercion or undue influence, that practice could be classified as a 'misleading commercial practice' and, consequently, as an 'unfair commercial practice', if it satisfies the conditions stated in Articles 6 and 7 of that directive.

78 In that regard, it should be recalled that it follows from the case-law that it is essential to provide the consumer, even before the contract is concluded, with clear and adequate information (see, to that effect, judgment of 12 June 2019, *Orange Polska*, C-628/17, EU:C:2019:480, paragraph 34 and the case-law cited).

79 Indeed, simultaneously presenting two offers of separate services, even if those offers are not legally related, may require the provision of additional information to the consumer, precisely so that the consumer is not deceived concerning the absence of a link between those offers.

80 In the present case, it is apparent from the order for reference that the presentation of the two offers at issue in the main proceedings could have made a consumer believe that it was not possible to obtain the loan without taking out the insurance product at issue in the main proceedings, particularly since certain risks relating to the loan were covered by that insurance policy, such as, inter alia, the deterioration of state of health which may impede compliance with the contractual obligations relating to the loan.

81 Furthermore, the referring court makes reference, in its third question, to the fact that a loan applicant is normally in need, to the complexity of the contracts presented for signature by the consumer, to the concurrent nature of the combined offer and to the short period granted to take up the offer concerned.

82 However, it is also apparent from the order for reference that Compass Banca claims to have duly informed the consumers concerned of the fact that the insurance product at issue in the main proceedings was not related to the personal loan and to have provided those consumers with the relevant documents, including those during the pre-contractual stage.

83 Ultimately, it is for the referring court to ascertain whether the commercial practice at issue in the main proceedings is capable of constituting an 'unfair commercial practice', in particular in so far as it may be classified as a 'misleading commercial practice', within the meaning of Articles 6 and 7 of Directive 2005/29, or as an 'aggressive commercial practice', within the meaning of Articles 8 and 9 of that directive.

84 In the light of all the foregoing considerations, the answer to the second question is that Article 2(j), Article 5(2) and (5) and Articles 8 and 9 of Directive 2005/29 must be interpreted as meaning that the commercial practice of simultaneously proposing to the consumer an offer for a personal loan and an offer for an insurance product not related to that loan, does not constitute either a commercial practice that is in all circumstances aggressive or even a commercial practice in all circumstances regarded as unfair, within the meaning of that directive.

The third question

85 By its third question, the referring court asks, in essence, whether Directive 2005/29 must be interpreted as precluding a national measure which allows a national authority, once it has been established that a commercial practice adopted by a particular trader is 'aggressive' or, more generally, 'unfair', to require that trader to grant that consumer a reasonable cooling-off period between the dates on which the insurance contract and the loan contract are signed.

86 In that regard, it should be noted that, under Article 1 of Directive 2005/29, the objective of that 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.

87 As is apparent from recital 14 of Directive 2005/29, since that approximation takes the form of full harmonisation of those provisions of the Member States, it must be held that that directive precludes those Member States from maintaining or adopting measures falling within that harmonised area which Directive 2005/29 does not lay down or authorise, even where such measures are designed to ensure a higher level of consumer protection (see, to that effect, judgment of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, EU:C:2010:660, paragraph 38).

88 Thus, as follows from the answer to the second question, a commercial practice such as the commercial practice of 'framing' at issue in the main proceedings does not constitute a commercial practice that is in all circumstances aggressive or even a practice in all circumstances regarded as unfair, within the meaning of Directive 2005/29.

89 It is true that, under Article 3(9) of that directive, as regards financial services within the meaning of Directive 2002/65, which include any credit or insurance service, Member States may impose requirements which are more restrictive or prescriptive than those provided for by Directive 2005/29 in the field in which that directive approximates the provisions in force.

90 However, first, such an option must be exercised in compliance with the mandatory provisions of EU law, where appropriate, in any other relevant instrument. Second, in order for an authority to be able, on the basis of that power, to impose requirements that are more restrictive or prescriptive than those provided for by Directive 2005/29, that option must have been implemented by the Member State concerned with the specificity, precision and clarity necessary

by the requirements of legal certainty (see, by analogy, judgment of 3 September 2020, *Subdelegación del Gobierno en Barcelona (Long-term residents)*, C-503/19 and C-592/19, EU:C:2020:629, paragraph 35 and the case-law cited).

91 Consequently, Directive 2005/29 precludes a national authority from providing, for the purposes of consumer protection, a general or preventive obligation to comply with a certain cooling-off period in the case of a commercial practice consisting in simultaneously presenting an offer for an insurance product and an offer for a loan contract, where neither such an obligation nor the power for such an authority to provide for such an obligation have been expressly provided for by national legislation.

92 By contrast, Directive 2005/29 does not preclude Member States from providing in their national legislation that a national authority may exercise, once it has been established, following a detailed examination of a given trader's commercial practice, that that practice is 'aggressive', and therefore more generally 'unfair' within the meaning of that directive, a power to issue directions to that trader.

93 Indeed, under the first subparagraph of Article 11(1) of Directive 2005/29, Member States must ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of that directive.

94 That said, it should be noted in particular that, first, Article 4 of Directive 2005/29 expressly states that Member States may not restrict the freedom to provide services for reasons falling within the field approximated by that directive. Second, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, when the Member States are implementing EU law, they must respect the rights guaranteed by that charter.

95 However, a measure taken by a national authority which, in order to put an end to an aggressive commercial practice, would require compliance with a reasonable cooling-off period between the dates on which a personal loan contract and an insurance contract are signed, would be liable to undermine the freedom to provide services and to restrict the freedom of the trader concerned to conduct his or her business.

96 Therefore, in accordance with the principle of proportionality, a national authority may have recourse to such a measure only if it is established that, having regard to the reasons which led that authority to classify the commercial practice at issue as 'aggressive' or, at the very least, 'unfair', there are no other equally effective means of putting an end to that practice which are less prejudicial to the freedom to provide services and the freedom of the trader concerned to conduct his or her business.

97 In the light of all the foregoing considerations, the answer to the third question is that Directive 2005/29 must be interpreted as not precluding a national measure which allows a national authority, once it has been established that a commercial practice adopted by a particular trader is 'aggressive' or, more generally, 'unfair', to require that trader to grant the consumer a reasonable cooling-off period between the dates on which the insurance contract and the loan contract are signed, unless there are other means less prejudicial to the freedom to conduct a business which are equally effective to put an end to the 'aggressive' or, more generally, 'unfair' nature of that practice.

The fourth question

98 By its fourth question, the referring court asks, in essence, whether Article 24(3) of Directive 2016/97 must be interpreted as precluding a national authority from requiring a trader, whose commercial practice of framing is regarded as 'aggressive' within the meaning of Articles 8 and 9 of Directive 2005/29 or, more generally, as 'unfair' within the meaning of Article 5(2) of that directive, in order to put an end to that practice, to grant the consumer a reasonable cooling-off period between the dates on which the contracts concerned were signed.

99 It must be noted at the outset that the fourth question refers to the cross-selling of a personal loan and an insurance product and that the distribution of insurance products is governed by Directive 2016/97.

100 In that regard, it should be borne in mind that under Article 3(4) of Directive 2005/29, 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.

101 Article 24 of Directive 2016/97 makes distributors of insurance products which are cross-sold with other products, subject to particular obligations.

102 Under Article 24(3) of Directive 2016/97, which is the only provision referred to by the referring court in the context of the fourth question, where an insurance product is ancillary to a good or service which is not insurance, as part of a package or the same agreement, the insurance distributor must offer the customer the opportunity to purchase the goods or services separately.

103 In accordance with Article 24(7) of Directive 2016/97, Member States may maintain or adopt additional stricter measures or intervene on a case-by-case basis to prohibit the sale of insurance together with an ancillary service or product which is not insurance, as part of a package or the same agreement, when they can demonstrate that such practices are detrimental to consumers. As the Advocate General observed in point 92 of his Opinion, that provision applies only if, first, the insurance product can be classified as the 'main' or 'principal' product and the other product or service as 'ancillary' or 'accessory' and, second, both products are 'offered as part of a package or the same agreement'.

104 That said, it should be noted that the rule in Article 24(3) of Directive 2016/97 does not govern specific aspects of unfair commercial practices, but merely requires, irrespective of any consideration of the fairness of the commercial practice at issue, that, if such products and/or services are 'cross-sold' to consumers, they must be able to purchase them separately.

105 Thus, Article 24(3) does not require the competent national authorities to go beyond what Directive 2005/29 calls for. Indeed, that provision merely requires that if such products and/or services are 'cross-sold', the customers also have the possibility to buy them separately.

106 Furthermore, as the Advocate General observed in point 95 of his Opinion, that provision does not require those authorities to do anything less than what they are entitled to do under Directive 2005/29.

107 In the light of all the foregoing considerations, the answer to the fourth question is that Article 24(3) of Directive 2016/97 must be interpreted as not precluding a national authority from requiring a trader, whose commercial practice of framing is regarded as 'aggressive' within

the meaning of Articles 8 and 9 of Directive 2005/29 or, more generally, as 'unfair' within the meaning of Article 5(2) of that directive, in order to put an end to that practice, to grant the consumer a reasonable cooling-off period between the dates on which the contracts concerned are signed.

The fifth question

108 By its fifth question, the referring court asks, in essence, whether Directive 2005/29 must be interpreted as meaning that the classification of a type of commercial practice in all circumstances as 'aggressive', within the meaning of Articles 8 and 9 of that directive or, more generally, in all circumstances 'unfair', within the meaning of Article 5(2) of that directive, leads to a reversal of the burden of proof on the trader contrary to EU law.

109 As is apparent from the answer to the second question, given in paragraph 84 above, a commercial practice such as that at issue in the main proceedings cannot be classified in all circumstances as an aggressive commercial practice, or more generally, as an unfair commercial practice in all circumstances, within the meaning of Directive 2005/29.

110 Therefore, taking into account that answer, there is no need to answer the fifth question.

Costs

111 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

1. **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 meaning that the concept of 'average consumer', within the meaning of that directive, must be defined by reference to a consumer who is reasonably well-informed and reasonably observant and circumspect. Such a definition does not, however, exclude the possibility that an individual's decision-making capacity may be impaired by constraints, such as cognitive biases.

2. **Article 2(j), Article 5(2) and (5) and Articles 8 and 9 of Directive 2005/29**

   must be interpreted as meaning that the commercial practice consisting in simultaneously proposing to the consumer an offer for a personal loan and an offer for an insurance product not related to that loan, does not constitute either a commercial practice that is in all circumstances aggressive or even a commercial practice in all circumstances regarded as unfair, within the meaning of that directive.

3. **Directive 2005/29**

   must be interpreted as not precluding a national measure which allows a national authority, once it has been established that the commercial practice adopted by a particular trader is 'aggressive' or, more generally, 'unfair', to require that trader to grant the consumer a reasonable cooling-off period between the dates on which the insurance contract and the loan contract are signed, unless there are other means less prejudicial to the freedom to conduct a business which are equally effective to put an end to the 'aggressive' or, more generally, 'unfair' nature of that practice.

4. **Article 24(3) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution**

   must be interpreted as not precluding a national authority from requiring a trader, whose commercial practice of framing is regarded as 'aggressive' within the meaning of Articles 8 and 9 of Directive 2005/29, or, more generally, as 'unfair' within the meaning of Article 5(2) of that directive, in order to put an end to that practice, to grant the consumer a reasonable cooling-off period between the dates on which the contracts concerned are signed.

[Signatures]