Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 29 June 2017 [1]

Case C-295/16

Europamur Alimentación SA
v
Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia

(Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 4 de Murcia (Administrative Court No 4 of Murcia, Spain))

(Reference for a preliminary ruling — Consumer protection — Directive 2005/29/EC — Unfair business-to-consumer commercial practices — Sales by a wholesaler to retailers — Jurisdiction of the Court — National legislation imposing a general prohibition on sales at a loss — Exceptions based on criteria not provided for in Directive 2005/29/EC)

I. Introduction

1. This request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 4 de Murcia (Administrative Court No 4 of Murcia, Spain) concerns the interpretation 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'). [2]

2. The request was submitted in the context of proceedings relating to an administrative penalty imposed on a trader engaged in wholesaling as a result of infringing the prohibition on selling at a loss provided for, save in two specific cases, by Spanish legislation on retail commerce.

3. Since the commercial practice forming the subject matter of the dispute does not directly concern consumers, but rather a wholesaler and retailers, and since it does not fall within the scope of Directive 2005/29, it will be necessary to examine, specifically, whether the Court can nevertheless rule on the questions referred for a preliminary ruling.

4. If the Court decides that it has jurisdiction, as I suggest it should, I think the answer to the questions submitted clearly follows from its case-law, according to which Directive 2005/29 precludes legislation of Member States imposing a general prohibition on unfair commercial practices such as selling at a loss, even if the legislation lays down exceptions, in so far as such exceptions do not comply with the conditions for prohibition set out in that directive.

1 Original language: French.

2 OJ 2005 L 149, p. 22.

II. Legal context

A. EU law

5. Recitals 6, 8 and 17 of Directive 2005/29 state:

‘(6) This Directive … approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors. … It neither covers nor affects the national laws on unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. …

…

(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. …

…

(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.’

6. Article 1 of Directive 2005/29 states that its purpose 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’.

7. Article 2(d) of that directive defines ‘business-to-consumer commercial practices’ within the meaning of the directive as ‘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’.

8. Article 3(1) provides that the directive ‘shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product’.

9. Article 4, entitled ‘Internal market’, states that ‘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’.

10. Article 5 of Directive 2005/29, entitled ‘Prohibition of unfair commercial practices’, is worded as follows:

‘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.'

B. Spanish law

1. Legislation on retail commerce

11. According to the preamble to Ley 7/1996 de Ordenación del Comercio Minorista (Law 7/1996 regulating retail commerce) of 15 January 1996[3] ('the LOCM'), one of the law's objectives is 'to redress the imbalance between large and small businesses and, in particular, to maintain free and fair competition. It goes without saying that the most immediate and tangible effects of free and fair competition manifest themselves in a continuous improvement of prices, quality and other conditions of the supply of goods and services to the public, which is, ultimately, the most effective way of achieving a benefit for the consumer'.

12. Paragraphs 1 and 2 of Article 14 of the LOCM, entitled 'Prohibition on selling at a loss', provide:

'1. Notwithstanding the provisions of the previous article [laying down the principle of free pricing], selling or offering to sell to the public at a loss shall be prohibited, except in the circumstances covered by Chapters IV [on sales of sale goods] and V [on clearance sales] of Title II of this Law, unless (i) the objective of the person doing so is to match the prices of one or more competitors with the ability materially to affect that person's sales, or (ii) the sale involves perishable goods which will shortly be unfit for use.

The provisions of the Law on unfair competition shall, in any event, be respected.

3 BOE No 15 of 17 January 1996, p. 1243.

2. For the purposes of the previous paragraph, a sale shall be deemed to be at a loss where the price applied to a product is lower than the purchase price appearing on the invoice, following deduction of the proportional share of any discounts appearing on the invoice, or than the replacement cost, if lower, or than the actual cost of production if the goods were manufactured by the retailer, plus the amount of any indirect taxes levied on the transaction.'

13. That prohibition on selling at a loss also applies 'to entities engaging in wholesaling, whatever their legal nature', pursuant to the sixth additional provision of the LOCM, inserted in 1999.[4]

14. The LOCM was implemented by the Autonomous Community of the Region of Murcia by means of a regional law adopted in 2006.[5] Article 54 of that law provides for a fine of EUR 3 001 to 15 000 for serious infringements. In order to determine whether a 'serious infringement' has been committed, the law refers to the LOCM, Article 65(1)(c) of which classifies selling at a loss as a serious infringement. The criteria to be taken into account in calculating the amount of the fine are listed in Article 55 of the regional law, which mentions, in particular, the seriousness of the harm 'caused to the interests of consumers'.

2. Legislation on unfair competition

15. According to the preamble to Ley 3/1991 de Competencia Desleal (Law 3/1991 on unfair competition) of 10 January 1991[6] ('the LCD'):

'[This] law reflects the need to adjust competition legislation to the values that have been crystallised in our economic constitution. Under the Spanish Constitution of 1978 our economic system rests on the principle of freedom to conduct a business and, consequently, at an institutional level, on the principle of free competition. This gives rise to the duty, on the part of the ordinary legislature, to create the necessary mechanisms to prevent the risk of that principle being distorted by unfair practices which have the potential to disrupt the functioning of the market as far as competition is concerned.

This constitutional imperative is complemented and reinforced by the requirement deriving from the principle, enshrined in Article 51 of the Constitution, that the consumer should, as the weaker party in the typical market relationship, be protected.

This new aspect of the problem, which traditionally has not played a part in the law on unfair competition, has provided an additional and highly significant impulse towards enacting the new legislation.'

16. Article 17 of the LCD, entitled'Sale at a loss', states:

'1. In the absence of legal or regulatory provisions to the contrary, prices may be freely set.

2. Notwithstanding the foregoing, underselling or a sale at below the purchasing cost shall be deemed unfair in the following circumstances:

(a) Where it is liable to mislead consumers about the pricing of other goods or services in the same establishment.

(b) Where it has the effect of discrediting the image of another product or establishment.

4 Provision inserted in the LOCM by Article 56(1)(8) of Ley 55/1999 de Medidas fiscales, administrativas y del orden social (Law 55/1999 laying down tax, administrative and social measures) of 29 December 1999 (BOE No 312 of 30 December 1999, p. 46095), 'Law 55/1999'.

5 Ley 11/2006 Sobre régimen del comercio minorista de la región de Murcia (Law 11/2006 on retail commerce in the Region of Murcia) of 22 December 2006 (BORM No 2 of 3 January 2007, p. 141), 'Regional Law 11/2006'.

6 BOE No 10 of 11 January 1991, p. 959.

(c) Where it is part of a strategy aimed at removing a competitor or a group of competitors from the market.'

3. Law 29/2009

17. Directive 2005/29 was transposed into Spanish law by Ley 29/2009 por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios (Law 29/2009 amending the statutory rules governing unfair competition and advertising in order to improve the protection of consumers and users) of 30 December 2009[7] ('Law 29/2009').

18. That law amends the LOCM and the LCD, among others. The abovementioned provisions of those laws[8] remain unchanged.

19. The referring court observes that Law 29/2009 inserted a third paragraph in Article 18 of the LOCM, under which sales promotions 'shall be deemed unfair in the circumstances referred to in Article 5 of the [LCD]'.[9]

20. It also makes clear that Law 29/2009 amended Article 4 of the LCD to include the criteria for classifying a commercial practice as 'unfair', set out in Article 5 of Directive 2005/29. Furthermore, it states that the new wording of Articles 5 and 7 of the LCD reproduces that of, respectively, Article 6 ('Misleading actions') and Article 7 ('Misleading omissions) of that directive.[10]

III. Main proceedings, questions referred for a preliminary ruling and procedure before the Court

21. Europamur Alimentación SA ('Europamur') is a wholesaler selling household and food products to supermarkets and local shops. Since it is part of a collective purchasing mechanism, Europamur can offer its customers, who are small retailers, products at competitive prices, enabling them to compete against superstores and large distribution chains.

22. By decision of 23 February 2015, the Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia (Directorate-General for Commerce and Consumer Protection of the Autonomous Community of the Region of Murcia, Spain), formerly the 'Dirección General de Consumo, Comercio y Artesanía de la Comunidad Autónoma de la Región de Murcia' (Directorate-General for Consumer Affairs, Commerce and Craft Industries of the Autonomous Community of the Region of Murcia, 'the regional authorities'), imposed a fine of EUR 3 001 on Europamur for breach of the prohibition under Article 14 of the LOCM on account of having sold certain products marketed by it at a loss.

7 BOE No 315 of 31 December 2009, p. 112039.

8 See points 11 to 16 of this Opinion.

9 See Article 4 of Law 29/2009. I note that that article also inserts a reference to provisions of the LCD in Article 22 (on multi-level sales), Article 23 (on the prohibition of pyramid sales) and Article 32 (on sales incorporating free gifts or bonuses) of the LOCM, as amended.

10 See Article 1 of Law 29/2009.

23. The reasons given by the regional authorities for their decision included various considerations relating to consumer protection.[11] Furthermore, when setting the amount of the fine, the regional authorities took into account the criterion of 'serious harm caused to the interests of consumers' set out in Article 55 of Regional Law 11/2006. However, they did not specify how Europamur's conduct had actually harmed the interests of consumers, given that, in keeping with the most widely held interpretation of Article 14 of the LOCM, selling at a loss is, of itself, liable to cause harm to consumers and users.

24. Europamur appealed against that decision claiming, inter alia, that it was necessary to ensure that small retailers are able to align their prices with those of their competitors, that the rules on evidence deriving from Article 17 of the LCD should have been observed with respect to it, and that the impugned conduct did not harm consumers in any way. It also argued that the penalty imposed was contrary to EU law, since Directive 2005/29 had been inadequately transposed into domestic law by Law 29/2009, in so far as that law had failed to amend the wording of Article 14 of the LOCM.

25. In its defence, the regional authorities submitted, in particular, that the penalty system under the LOCM, which was specifically designed to protect the interests of consumers, is wholly separate from the LCD, which is instead aimed at the relationships between economic operators, so that it is not necessary for the circumstances referred to in Article 17 of the LCD to be present for the prohibition contained in Article 14 of the LOCM to be applicable. They also stated that there was no conflict between domestic legislation and EU legislation.

26. Against that background, by decision of 27 April 2016, received at the Court on 25 May 2016, the Juzgado de lo Contencioso-Administrativo No 4 de Murcia (Administrative Court No 4 of Murcia) therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Directive [2005/29] be interpreted as precluding a provision of national law, such as Article 14 of [the LOCM], which is stricter than the directive in question in that it contains an initial prohibition, which also covers wholesalers, on selling at a loss, treating such a practice as an infringement of administrative law and therefore imposing a penalty in respect of it, account being taken of the fact that, in addition to regulating the market, the Spanish legislation is intended to protect the interests of consumers?

(2) Must Directive [2005/29] be interpreted as precluding Article 14 of [the LOCM] even though that provision of national law permits selling at a loss to be excluded from the general prohibition where (i) the infringing party shows that the objective of selling at a loss was to match the prices of one or more competitors with the ability materially to affect that party's sales or (ii) the sale involves perishable goods which will shortly be unfit for use?'

27. Written observations were submitted by Europamur and the European Commission. At the hearing on 6 April 2017, Europamur, the Spanish Government and the Commission presented oral argument.

11 Thus, the authorities observed that discounts 'must not undermine the ability of consumers and users to give proper contractual consent in respect of the real level of pricing of a particular operator or establishment'. They also drew attention to 'the social implications of the infringement, which affects all traders and consumers in the Region of Murcia … as the infringing party has … economic objectives, including, amongst others, that of creating offers on products such as those at issue here which act as bait or as a hook in order to persuade consumers to purchase goods or services at the same establishment and with the covert intention of discouraging or eliminating competition'.

IV. Analysis

A. The wording of the national legislation at issue in the main proceedings

28. In the statement of reasons for its decision to refer, the Juzgado de lo Contencioso-Administrativo No 4 de Murcia (Administrative Court No 4 of Murcia) states that the LOCM aims to protect consumers, including where, as in the main proceedings, a wholesaler sells goods to small retailers, since such transactions between traders have an impact on consumers. In practice, the consumer who shops at a small retailer benefits from collective purchasing through the wholesaler, without which the retailer would not be competitive as against the clearly superior purchasing power of the big chains and superstores.

29. The referring court does not give the specific reasons why the application of Article 14 of the LOCM, which prohibits selling at a loss, was extended in order to apply to entities engaged in wholesaling, pursuant to the sixth additional provision inserted in the LOCM by Law 55/1999, and, as far as I am aware, the preamble to Law 55/1999 does not provide any clues in that regard. The decision to refer simply states that 'the [LOCM]'s consumer protection objective is warranted in that if a wholesaler sells at a loss, this affects the consumer and has an impact on his behaviour in relation to the consumer product or goods in question'.

30. The referring court explains that Article 14 of the LOCM prohibits selling at a loss per se, without requiring the authorities responsible for imposing penalties to prove that the infringing party has harmed the interests of consumers for the purposes of Article 5 of Directive 2005/29, but that that national provision nonetheless allows the interested party to justify its actions on two specific grounds, namely, where the objective of those actions was to match the prices of competitors materially affecting that party's sales, or where the goods sold at a loss were perishable.

31. The applicant in the main proceedings submits that such a reversal of the burden of proof, whereby the onus is on the alleged infringer to demonstrate that the conduct complained of was fair, is not consistent with Directive 2005/29, since selling at a loss is not included in the list of commercial practices deemed to be unfair in all circumstances set out in Annex I to that directive.

32. The referring court notes that even if the trader involved were to prove that the sale at a loss in question did not meet any of the criteria for determining whether a commercial practice is unfair, laid down in Directive 2005/29,[12] the sale would nevertheless be prohibited under Article 14 of the LOCM and would therefore attract a penalty, unless the trader could establish one of the two grounds for justification set out in that provision.

33. Lastly, the court observes that Article 14 of the LOCM, which was not amended during the transposition of Directive 2005/29, 'retains the ambiguous statement that "the provisions of the [LCD] shall, in any event, be respected"', even though the rules on the prohibition of sales at a loss provided for in Article 17 of the LCD conflict with the rules set out in the LOCM.[13]

12 Specifically, lack of professional diligence, distortion of consumers' behaviour and misleading or aggressive practices, under Article 5(1) and (4) of that directive.

13 The referring court states that Article 17 of the LCD, unlike Article 14 of the LOCM, does not deem all sales at a loss to be unfair; only those satisfying the conditions set out in Article 17 (namely, misleading consumers, discrediting the image of a product or establishment, or seeking to oust competitors) are deemed to be unfair, with the result that it is necessary to prove that the sale is unfair in order to be able to impose a penalty.

B. Admissibility of the request for a preliminary ruling

34. In the light of the facts of the main proceedings and the legislative provisions at issue, the Spanish Government and the Commission submitted objections concerning the applicability of Directive 2005/29.

35. I must state at the outset that I consider this request for a preliminary ruling, which raises novel issues relating to the particular combination of national rules,[14] to be admissible, having regard to the information provided by the referring court from which it is apparent that the interpretation sought is necessary for the court to be able to determine the case, even though the dispute concerns sales at a loss between traders, which do not therefore fall within the scope of that directive. This is because, under the relevant provisions of Spanish law, such a situation is comparable to sales by traders to consumers, which do fall within the scope of the directive.

36. I note, *in the first place*, that it is common ground that the Court has repeatedly held that *sales at a loss*, such as those at issue in the main proceedings, are 'commercial practices' within the meaning of Article 2(d) of Directive 2005/29 and are therefore subject to the rules laid down by that directive.[15]

37. *In the second place*, despite the Spanish Government expressing the opposite view at the hearing, I consider that the national provisions applicable to the main proceedings, particularly Article 14 of the LOCM, indeed seem to have *consumer protection* as their objective, so that they fall within the scope of Directive 2005/29, in accordance with the relevant case-law of the Court.[16]

38. As the referring court points out, it is apparent from the preamble to the LOCM that one of the express objectives of that law is to ensure consumer protection.[17] The majority view expressed in the case-law of the Spanish courts seems to confirm that aim, particularly as regards Article 14 of the LOCM concerning the prohibition on selling at a loss, mentioned in the questions referred for a preliminary ruling.[18] Moreover, the administrative decision forming the subject matter of the main proceedings was expressly based on that same objective.[19]

39. Even if, as the Spanish Government submitted at the hearing, consumer protection was not the main aim pursued by the Spanish legislature when the LOCM was adopted, I do not think that would be relevant to the determination of whether or not a national provision fell within the scope of Directive 2005/29. The Court has indeed held that, since Directive 2005/29 carries out a complete harmonisation of the rules concerning unfair business-to-consumer commercial practices, a government cannot validly argue that a national provision falls outside the scope of the directive in

14 This case raises a new point of law concerning the admissibility of the request, in that it involves determining whether the Court is required to answer the question whether EU law precludes a national provision (Article 14 of the LOCM) which clearly falls within the scope of Directive 2005/29 but which, by means of another national provision (the sixth additional provision of the LOCM), is made to apply to a situation not covered by the scope of that directive. In that connection, see point 41 et seq. of this Opinion.

15 See order of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154, paragraphs 20 to 22 and the case-law cited), in which the Court pointed out that selling at a loss, which 'serves the purpose of attracting consumers to the business premises of a trader and encouraging them to make purchases', 'forms part of an operator's commercial strategy and relates directly to its promotion and sales development'. In its judgment of 4 May 2017, *Vanderborght* (C-339/15, EU:C:2017:335, paragraph 23), the Court recalled that Article 2(d) gives a 'particularly wide definition' to the concept of 'commercial practices'.

16 See, in particular, judgment of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraphs 28 to 33); and orders of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154, paragraph 17); and of 8 September 2015, *Cdiscount* (C-13/15, EU:C:2015:560, paragraph 29).

17 After citing a passage from the preamble, the referring court states that 'one of the *stated objectives* of the LOCM is consumer protection' (my emphasis) and reasserts that analysis at the end of the first question referred for a preliminary ruling. Also see points 11 and 28 of this Opinion.

18 According to the referring court, the position taken by virtually all the Tribunales Superiores de Justicia (High Courts of Justice) in the Spanish autonomous communities suggests that it is 'in order to give better protection to consumers and users in respect of the matters which it covers [that the LOCM, particularly Article 14] is much more restrictive than [the LCD, particularly Article 17] so far as the practice of selling at a loss is concerned'.

19 See point 23 and footnote 11 of this Opinion.

that it essentially envisages objectives other than consumer protection.[20] It has also accepted that national legislation may have an impact on the relations between economic operators, while intending to protect consumers, and thus fall within the scope of Directive 2005/29.[21] That seems to me to be the situation in the present case.

40. In any event, it is for the referring court and not the Court to establish the content and objectives of the provisions of national law applying to the main proceedings,[22] so that the Court is bound by the view expressed in that regard by the national court and not by the observations submitted before it.[23]

41. However, *in the third place*, I take the view that the foregoing considerations are not sufficient to enable the Court to find that it has jurisdiction to answer the questions raised in this case,[24] since the commercial practice at issue in the main proceedings has the particular feature of concerning not sales to consumers directly, but *sales by a wholesaler to retailers*, who themselves resell to consumers.

42. Like the Spanish Government and the Commission, I note that the scope of Directive 2005/29 is confined to unfair commercial practices by undertakings which directly harm consumers' economic interests, as indicated by both the title of the directive and a number of its provisions.[25] It therefore does not apply as such to unfair commercial practices which harm 'only' competitors' economic interests or which, as in the main proceedings, relate to a transaction between traders.[26]

43. However, according to settled case-law, the Court may find that it has jurisdiction to answer questions referred to it for a preliminary ruling even if the provisions of EU law in respect of which an interpretation is sought do not apply to the facts in the main proceedings, where those provisions have been directly and unconditionally rendered applicable by domestic law. Where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from that measure should be interpreted uniformly. Accordingly, the Court is required to ascertain whether there are sufficiently precise indications to enable that reference to EU law to be established, in the light of the information provided in that regard in the request for a preliminary ruling.[27]

44. It is also apparent from the Court case-law that, even if the legislation transposing a directive into national law did not reproduce verbatim the provisions of EU law forming the subject matter of the questions referred, the Court may have jurisdiction to give a preliminary ruling, where the order for reference acknowledges that any interpretation given by the Court of those provisions would be binding for the resolution of the dispute in the main proceedings by the referring court.[28]

20 See judgment of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraphs 25 to 28), concerning claims by the Austrian Government that the national provision at issue in the main proceedings essentially envisaged objectives relating to maintenance of the pluralism of the press.

21 See order of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154, paragraph 18). In that regard, also see recital 8 of Directive 2005/29, which states that the directive indirectly protects legitimate businesses from their competitors who do not play by the rules it lays down.

22 In the context of a reference for a preliminary ruling, it is not for the Court to rule on the interpretation of the domestic law of a Member State, or to decide whether the referring court's interpretation of it is correct (see, in particular, order of 30 June 2011, *Wamo*, C-288/10, EU:C:2011:443, paragraph 26 et seq.; judgments of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391, paragraphs 24 and 25; of 21 September 2016, *Etablissements Fr. Colruyt*, C-221/15, EU:C:2016:704, paragraph 15; and of 4 May 2017, *HanseYachts*, C-29/16, EU:C:2017:343, paragraph 34).

23 See, in particular, judgments of 8 June 2016, *Hünnebeck* (C-479/14, EU:C:2016:412, paragraph 36), and of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraph 25).

24 See, by analogy, judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraphs 34 and 35).

25 See, in particular, recitals 6 to 8, Article 1, Article 2(d) and Article 3(1) of Directive 2005/29.

26 See, in particular, Opinion of Advocate General Trstenjak in *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:161, point 43 et seq.); order of 30 June 2011, *Wamo* (C-288/10, EU:C:2011:443, paragraph 22); judgment of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraph 30); and order of 8 September 2015, *Cdiscount* (C-13/15, EU:C:2015:560, paragraph 26).

27 See, in particular, judgments of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638, paragraph 45 et seq.); of 7 November 2013, *Romeo* (C-313/12, EU:C:2013:718, paragraph 21 et seq.); order of 12 May 2016, *Sahyouni* (C-281/15, EU:C:2016:343, paragraph 27 et seq.); and judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 53 et seq.).

28 See, to that effect, judgment of 7 January 2003, *BIAO* (C-306/99, EU:C:2003:3, paragraph 90 et seq.).

45. In this case, I think there is a genuine interest in having the Court provide an interpretation of the provisions of Directive 2005/29, since it is apparent from sufficiently precise indications given by the referring court that the provisions of that directive were rendered applicable — although mistakenly, in my view[29] — by domestic law to situations, such as that at issue in the main proceedings, which do not fall within the scope of the directive.[30]

46. Admittedly, it is apparent from the order for reference that the national provisions applied by the decision at issue in the main proceedings — namely Article 14 of the LOCM, which prohibits sales at a loss in the retail trade, and the sixth additional provision of the LOCM, which extends that prohibition to cover wholesalers — were not amended, without clear reasons, by Law 29/2009 transposing Directive 2005/29 into Spanish law.[31]

47. However, it can be inferred from the fact that other provisions of the LOCM were amended by Law 29/2009 that the national legislature took a conscious decision to retain the wording of Article 14 and of the sixth additional provision during transposition, most likely because it considered those provisions to be consistent with Directive 2005/29. My view is that the decision to retain national provisions constitutes a measure to transpose a directive, in the same way as a substantive amendment, such as the rewording or removal of provisions of domestic law.

48. Furthermore, I observe that the disputed penalty was based on Article 14 of the LOCM, expressly mentioned in the questions referred, and that if the main proceedings had concerned sales not between a wholesaler and retailers, but directly between a trader and consumers, there would have been no doubt about the Court's jurisdiction to answer those questions. The uncertainty existing in this case is solely due to the extension of the scope of Article 14 to cover sales between traders, pursuant to the sixth additional provision of the LOCM. It is apparent from the decision to refer that the implications of the requested interpretation of Directive 2005/29 are legally the same in both scenarios, since the direct consequence of the Court finding that the directive precludes national rules such as those provided for in Article 14 of the LOCM would be that the contested decision and therefore the fine imposed were not well founded under Spanish law.

49. In addition, the referring court notes that the second subparagraph of Article 14(1) of the LOCM contains an express reference to the provisions of the LCD,[32] as does, inter alia, Article 18(3) of the LOCM as amended by Law 29/2009.[33] Law 29/2009 reworded a number of articles of the LCD, particularly with a view to incorporating into the LCD the criteria for classifying a commercial practice as 'unfair' within the meaning of Directive 2005/29.[34] The applicant in the main proceedings specifically argues that those criteria ought to have been observed by the competent regional authorities.[35]

29 See point 53 et seq. of this Opinion.

30 By contrast, at the hearing, the Commission stated that it had not encountered sufficiently precise indications to support the view that the Spanish legislature had intended to extend the rules on protection laid down by Directive 2005/29 to cover transactions between traders.

31 The reasons why those provisions were not amended is not apparent from the decision to refer and it seems to me that the preamble to Law 29/2009 does not contain any considerations concerning, in particular, the legal rules governing sales at a loss. In its oral argument, the Spanish Government asserted, without citing any relevant sources, that the legislature did not amend Article 14 of the LOCM during the transposition of Directive 2005/29 because it considered that article to fall outside the scope of consumer protection.

32 It is noted that, in the light of its preamble, the LCD also aims to protect consumers (see point 15 of this Opinion).

33 See point 19 and footnote 9 as well as point 33 of this Opinion.

34 See point 20 of this Opinion.

35 At the hearing, Europamur claimed that, according to the preamble to Law 29/2009, the objective of that law was to unify the legal rules governing unfair commercial practices, regardless of whether the recipient of the goods in question is a trader or a consumer, and that it was therefore necessary for the provisions of the LOCM and the LCD to be read together.

50. In that specific context, the referring court considers that 'the question arises [in this case] as to whether Directive 2005/29 [must be construed as meaning that it] precludes interpreting Article 14 of the LOCM in such a way[, in line with the majority view of the Spanish Courts,] that selling at a loss is of itself prohibited and subject to a penalty, without any requirement to establish the existence of misleading omissions, aggressive commercial practices or unfair commercial practices in general' even though '[D]irective [2005/29] does not include selling at a loss in its list of commercial practices which are unfair in all circumstances'. [36]

51. My view is that the provisions of Directive 2005/29 which were, at least in part, reproduced in the relevant rules of Spanish law should be given a uniform interpretation by the Court, in order to forestall possible differences of interpretation in that regard and given that the reply to the questions referred seems to be decisive for the resolution of the dispute in the main proceedings.

52. In the light of all the foregoing, I am of the opinion that the request for a preliminary ruling is admissible and that the Court should find that it has jurisdiction to answer the questions referred to it in this case.

C. Whether national legislation such as that at issue in the main proceedings is permissible in the light of Directive 2005/29

53. By the two questions it submits for a preliminary ruling, which I think should be examined together, the referring court essentially asks whether Directive 2005/29 precludes national legislation, such as that at issue in the main proceedings, which imposes a general prohibition on selling at a loss, including in transactions between wholesalers and retailers, except where the infringing party proves that the objective of selling at a loss was to match the prices of one or more competitors with the ability materially to affect that party's sales or where the sale involves perishable goods which will shortly be unfit for use.

54. My observations on this point will be relatively brief as I think it is clearly apparent from the relevant case-law of the Court that the questions referred must be answered in the affirmative.

55. The Court has already ruled that Directive 2005/29 must be interpreted as precluding any national provision which imposes a general prohibition on offering for sale or selling at a loss, without any need to determine — having regard to the facts of each particular case — whether the commercial transaction at issue is 'unfair' in the light of the criteria set out in Articles 5 to 9 of that directive and without conferring a discretion in that regard on the courts having jurisdiction, in so far as the provision pursues objectives relating to consumer protection. [37]

56. On that last point, I would simply recall that, in this case, the referring court considers, unlike the Spanish Government in its oral argument, that the objective of the LOCM is, in particular, to protect consumers, which indeed seems to me to be apparent from the preamble to that law. [38]

57. In ruling as it did, the Court noted, first of all, that since Directive 2005/29 fully harmonises the rules relating to unfair business-to-consumer commercial practices, Member States may not adopt stricter rules than those provided for in the directive, as expressly provided for in Article 4 thereof, even in order to achieve a higher level of consumer protection. [39]

36 Also see point 32 of this Opinion.

37 See order of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154, paragraphs 30 and 31).

38 Also see points 11 and 38 of this Opinion.

39 See, in particular, judgment of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraph 30); order of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154, paragraph 24); and judgment of 10 July 2014, *Commission* v *Belgium* (C-421/12, EU:C:2014:2064, paragraph 61).

58. The Court has also pointed out that Article 5 of that directive sets out the criteria which determine the circumstances in which a commercial practice must be considered to be unfair and therefore prohibited. In addition, it has stated that Directive 2005/29 establishes, in its Annex I, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) thereof, are regarded as unfair 'in all circumstances', with the consequence that, as recital 17 of that directive [40] makes clear, only those commercial practices can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the directive. [41]

59. Lastly, the Court has found that since the practices of offering for sale or selling goods at a loss do not appear in Annex I to Directive 2005/29, they cannot be prohibited 'in all circumstances', but can be prohibited only following a specific assessment allowing the unfairness of those practices to be established. [42]

60. Like Europamur and the Commission, I take the view that this reasoning and the conclusion flowing from it are clearly capable of being applied to the present case. As regards the national provision at issue in the main proceedings, namely Article 14 of the LOCM, it is apparent from the decision to refer that the effect of that provision is to impose a general prohibition on selling at a loss, without it being necessary for the authority responsible for penalising infringers to prove that the commercial transaction at issue is 'unfair' in the light of the criteria set out in Articles 5 to 9 of Directive 2005/29. [43] Such a prohibition is contrary to the requirements of that directive, in accordance with the abovementioned case-law of the Court. [44]

61. As regards the possible effect of the exceptions to the prohibition provided for in the national provision at issue, contemplated in the second question referred, [45] it is sufficient to note that the two grounds for derogation set out in Article 14 of the LOCM, [46] which the competent authorities and the Spanish courts may take into account in order to exempt from penalty a person having sold goods at a loss who relies on them, are based on criteria not appearing in Articles 5 to 9, [47] even though Directive 2005/29 carries out an exhaustive harmonisation. [48]

62. Moreover, I consider that the reversal of the burden of proof following from that national provision [49] is not consistent with the body of rules established by Directive 2005/29, which identifies a number of commercial practices which may in all circumstances be regarded as 'unfair' and specifies the conditions to be met to enable the competent authorities to classify practices not included in that list as unfair and to penalise them. [50]

40 According to that recital, having a 'full list' in that annex of the 'commercial practices which are in all circumstances unfair' makes it possible to 'provide greater legal certainty'.

41 See judgments of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 56 et seq.); of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraph 35 et seq.); order of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154, paragraphs 25 to 28); judgment of 3 April 2014, *4finance* (C-515/12, EU:C:2014:211, paragraph 30 et seq.); and order of 8 September 2015, *Cdiscount* (C-13/15, EU:C:2015:560, paragraph 38 et seq.).

42 See order of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154, paragraph 29).

43 The wording of the first question referred for a preliminary ruling by the national court emphasises the automatic nature of that prohibition. Also see points 30 to 32 and 50 of this Opinion.

44 See points 55 to 59 of this Opinion.

45 The referring court notes that the Belgian legislation at issue in the case giving rise to the order of 7 March 2013, *Euronics Belgium* (C-343/12, EU:C:2013:154), did not provide for those derogations from the prohibition on selling at a loss.

46 I recall that, pursuant to Article 14, a trader accused of having infringed the prohibition on selling at a loss may avoid the imposition of a penalty by demonstrating that the objective of selling at a loss was to match the prices of one or more competitors with the ability materially to affect that trader's sales or by relying on the fact that the sale involves perishable goods which will shortly be unfit for use.

47 Indeed, neither the need to match the prices of competitors nor the perishable nature of the goods sold at a loss are mentioned in those articles of Directive 2005/29.

48 On the nature of the harmonisation achieved by that directive, see, in particular, Opinion of Advocate General Trstenjak in Joined Cases *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2008:581, point 74 et seq.).

49 See points 30 to 32 of this Opinion.

50 Europamur rightly points out that the evidential onus requiring proof that the conduct complained of is not unfair, namely negative proof, is not provided for in Directive 2005/29 and constitutes a measure that is more restrictive than the measures set out in that directive, with the result that it is contrary to Article 4 thereof.

63. As the Commission made clear, the Court has already held that specific exceptions, enabling a general prohibition on a given practice to be circumvented, which are provided for in the legislation of a Member State cannot, 'because of their limited and pre-defined nature, … take the place of the analysis, which must of necessity be undertaken having regard to the facts of each particular case, of the "unfairness" of a commercial practice in the light of the criteria set out in Articles 5 to 9 of … Directive [2005/29], where … that practice is not listed in Annex I thereto.' [51]

64. Similarly, the Court has held that national legislation under which it is not until after the prohibition laid down for failure to comply with the prior authorisation requirement that the commercial practice is examined as to its unfairness is incompatible with the system established by Directive 2005/29, as that practice, because of its nature and in particular because of the time factor involved, is thus deprived of economic sense for the trader. [52] Accordingly, the examination in this case of whether a practice is unfair must precede the imposition of a penalty, except in the cases expressly referred to in Annex I to that directive.

65. Consequently, I am of the opinion that Directive 2005/29 must be interpreted as precluding national legislation such as that at issue in the main proceedings.

V. Conclusion

66. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Juzgado de lo Contencioso-Administrativo No 4 de Murcia (Administrative Court No 4 of Murcia, Spain) as follows:

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 precluding national legislation, such as that at issue in the main proceedings, which imposes a general prohibition on selling or offering to sell goods at a loss and which lays down grounds of derogation from that principle based on criteria not appearing in that directive.

51 Judgment of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 64 et seq.), and Opinion of Advocate General Trstenjak in Joined Cases *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2008:581, point 84 et seq.). Also see, to that effect, judgment of 11 March 2010, *Telekomunikacja Polska* (C-522/08, EU:C:2010:135, paragraphs 31 and 33).

52 See judgment of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraph 48 et seq.).