



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 21 March 2018¹

Case C-109/17

Bankia SA

v

Juan Carlos Marí Merino

Juan Pérez Gavilán

María de la Concepción Marí Merino

(Request for a preliminary ruling from the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance No 5, Cartagena, Spain))

(Consumer protection — Directive 2005/29/EC — Unfair business-to-consumer commercial practices — Loan agreement secured by a mortgage — Re-evaluation of property before sale by auction — Review of unfair commercial practices in mortgage enforcement proceedings — ‘Adequate and effective means’ to combat unfair commercial practices — Interplay with Directive 93/13/EEC — Whether a national court may enforce a code of conduct on the basis of Directive 2005/29)

1. Is it necessary for an argument of unfair commercial practices to be raised by a court in mortgage enforcement proceedings, either *ex officio* or at the request of one of the parties, in order to ensure consumer protection as provided for by Directive 2005/29/EC?² This is the underlying issue in the case referred by the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance No 5, Cartagena, Spain).
2. The issue thus raised by the case before the referring court brings to mind similar issues dealt with by the Court in connection with Directive 93/13/EEC on unfair terms in consumer contracts.³ Therefore one aspect of the present Opinion will be an analysis of the levels of protection provided by those two consumer protection instruments.

¹ Original language: English.

² Directive 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).

³ Council Directive of 5 April 1993 (OJ 1993 L 95, p. 29). See, notably, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164.

I. Legal framework

A. EU law

3. Article 2(f) of Directive 2005/29 defines a ‘code of conduct’ as ‘an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors’.

4. Article 3 defines the scope of Directive 2005/29 as follows:

‘1. This 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.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

...

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.

...’

5. Article 10 of Directive 2005/29 (‘Codes of conduct’) provides:

‘This Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organisations referred to in Article 11 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article.

Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11.’

6. Article 11 of that directive deals with the enforcement of its provisions. It states:

‘1. 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.

Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

(a) take legal action against such unfair commercial practices;

and/or

(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

...

2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices;

or

(b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice,

even without proof of actual loss or damage or of intention or negligence on the part of the trader.

...'

7. Under Article 13 of Directive 2005/29 ('Penalties') 'Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive'.

B. Spanish law

1. Law on Unfair Competition

8. Articles 4, 5, 7 and 8 of the Ley de Competencia Desleal (Law on Unfair Competition) of 10 January 1991, as amended by Law No 29 of 30 December 2009, define the types of act that are to be considered as unfair in dealings between traders and consumers under Spanish law.

9. Article 32 of the Law on Unfair Competition governs the actions which may be brought against acts of unfair competition and lists, inter alia, the following: (i) action for a declaration of unfair competition; (ii) action seeking an order to cease and desist from the unfair competition; (iii) action for annulment of the effects of the unfair competition; and (iv) action for damages for the loss or damage caused by the unfair competition, where there is fault or intention on the part of the agent.

2. General Law on the Protection of Consumers and Users

10. The Ley General de Defensa de Consumidores y Usuarios (General Law on the Protection of Consumers and Users), as approved by Royal Legislative Decree 1/2007 of 16 November 2007 and amended by Law No 29 of 30 December 2009, defines commercial practices and lays down requirements for traders to provide certain information in their dealings with consumers.

3. Royal Decree-Law 6

11. Royal Decree-Law No 6 of 9 March 2012 established a code of good practice to which credit institutions could voluntarily subscribe ('the Code of Good Banking Practice'). That code promotes the involvement of the Spanish financial sector in alleviating the difficult economic and social situation in the wake of the 2008 crisis by restructuring debt secured by a mortgage over the debtor's home. This is done by dint of three measures: (i) restructuring the mortgage; (ii) reducing the capital to be repaid; and (iii) *datio in solutum*, that is to say, giving property in full settlement of the debt.

12. Article 5 provides that as soon as a credit institution agrees to be bound by the Code of Good Banking Practice, the provisions of the code become mandatory.

13. In accordance with Article 6, compliance with the Code of Good Banking Practice is to be monitored by a supervisory committee. Complaints based on a credit institution's alleged failure to comply with the code may be lodged with the Banco de España (Bank of Spain).

4. Law on Civil Procedure

14. The enforcement of mortgages and other enforceable titles in Spain is regulated by the Ley de Enjuiciamiento Civil (Law on Civil Procedure). The version applicable to the facts in the main proceedings is the one amended by Law No 13 of 3 November 2009⁴ and by Act No 1 of 14 May 2013.⁵

15. Article 517 of the Law on Civil Procedure lists enforceable titles, such as authenticated public documents.

16. Article 552 provides for the review by a court of its own motion of applications for enforcement of non-judicial instruments, but only in relation to unfair clauses in the enforceable instrument concerned.

17. Article 670 governs the acceptance of the best offer, payment and acquisition of property by the creditor in case of auction. The provision seeks to ensure that in the majority of cases at least 70% of the starting price at auction are paid by the highest bidder or the party seeking enforcement. In circumstances where the party seeking enforcement does not avail itself of the option of being awarded the property, the property will be awarded to the highest bidder, even if its bid is less than 70% of the starting price. In that case, the bid must be higher than 50% of the property's valuation or at least cover the amount owed.

18. Article 671 of the Law on Civil Procedure covers situations where no bids are made at auction. In that case, the creditor may, within a period of 20 days following closure of the auction, ask to be awarded the property. Where the property is the debtor's habitual residence, it will be awarded at an amount equal to 70% of what would have been the starting price at auction or, if the amount owed to the creditor for all purposes is lower than that percentage, at an amount equal to 60% thereof. Where the creditor does not exercise that right, the court may, upon application by the debtor, order the cessation of the mortgage enforcement.

19. Article 682 governs the preconditions for bringing mortgage enforcement proceedings. It provides that recourse to such proceedings is only possible where the instrument creating the mortgage determines the price at which the persons concerned set the value of the property or mortgaged asset, so that it may serve as the starting price in the auction. The starting price may in no case be less than 75% of the value indicated in the assessment used for the grant of the loan.

20. The first paragraph of Article 695 provides an exhaustive list of grounds of objection to the forced sale of mortgaged property. These are: (i) extinction of the guarantee or the obligation guaranteed; (ii) an error in the amount owed where the debt guaranteed results from an indebted account necessitating closure of the account between the party requesting enforcement and the party opposing

⁴ Amending procedural legislation in view of the establishment of a new Office of the Judiciary.

⁵ On measures to protect mortgagees, debt restructuring and social rents.

enforcement; (iii) in the case of enforcement envisaged with regard to movable property with a mortgage or seized without possession, the previous existence, in respect of the same property, of another seizure, a movable or immovable mortgage, or a sequestration; and (iv) an unfair contractual term constituting the basis for enforcement or establishing the amount due.

21. In turn, Article 698(1) of the Law on Civil Procedure provides that any other complaints that may be made by the debtor, including those concerning nullity of title, maturity, certainty, extinguishment or the amount of the debt, will be settled by an appropriate judgment, without having the effect of staying or terminating the mortgage enforcement proceedings.

II. Facts, procedure and the questions referred

22. In 2006 Juan Carlos Marí Merino, María de la Concepción Marí Merino and Juan Pérez Gavilán ('the debtors') entered into a loan agreement secured by a mortgage on the following terms: EUR 166 000 of capital, a 25-year repayment term and a valuation of the mortgaged asset at EUR 195 900.

23. In January 2009 the loan capital was increased, and the repayment term was extended to 34 years and 4 months.

24. In October 2013, when the outstanding debt was EUR 102 750, the terms of the loan agreement were amended a second time at the request of the debtors, after they had defaulted on the required repayment instalments for a period of 375 days. In order to facilitate repayment of the loan capital, a repayment period of 40 years was agreed in respect of the remaining debt of EUR 102 750 and an extrajudicial sale was authorised. Moreover, it was documented that the property was the debtors' habitual residence. The modification of the loan agreement entailed a re-evaluation of the mortgaged asset which, in a declining market, was estimated at a value of EUR 57 689.90.

25. After the debtors had defaulted on nine further repayment instalments, the bank initiated mortgage enforcement proceedings in March 2015 by lodging an application with the referring court seeking an order for payment against the debtors and, in the event of a failure to repay their debt, for the mortgaged asset to be auctioned and the proceeds of that auction to be used to pay the amount owed, plus interests and costs. For the purposes of the auction, the starting price indicated by the bank was EUR 57 684.90.

26. The debtors later lodged an objection to the enforcement, submitting that the contract serving as the legal basis for that enforcement contains unfair terms. The debtors considered that the term providing for an extended repayment term and for a new valuation of the mortgaged property was unfair. The debtors submitted that the extension of the repayment term was used merely to induce them to agree to the considerably decreased valuation of the mortgaged property, which was to their detriment. This significantly worsened their position, and their agreement to the loan modification was thus based on a fundamental error regarding the meaning of the conditions of the contract. As a second ground of objection, the debtors argued that the conditions were met for them to be discharged from their debt by giving the property for payment and remaining there as tenants, pursuant to the Code of Good Banking Practice on account of the economic situation with which they were faced. In addition, they requested that the enforcement proceedings be stayed.

27. This has led the referring court to wonder whether the loan modification carried out by the bank in October 2013 constitutes an unfair commercial practice, and whether Directive 2005/29 is applicable.

28. Entertaining doubts as to the correct interpretation of the relevant provisions of Directive 2005/29, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Must Directive 2005/29 be interpreted as meaning that national legislation such as that currently regulating Spanish mortgage enforcement — Article 695 et seq. in conjunction with Article 552(1) of the [Law of Civil Procedure] — which does not provide for the review by the courts, of their own motion or at the request of one of the parties, of unfair commercial practices, is contrary to Article 11 of that directive because that national legislation hinders or prevents review by the courts of contracts or acts which may contain unfair commercial practices?
- (2) Must Directive 2005/29 be interpreted as meaning that national legislation such as the Spanish law which does not ensure actual compliance with the code of conduct if the party seeking enforcement of a debt decides not to apply that code (Articles 5 and 6 of Royal Decree-Law No 6 of 9 March 2012, read in conjunction with Article 15 thereof) is contrary to Article 11 of that directive?
- (3) Must Article 11 of Directive 2005/29 be interpreted as precluding Spanish national legislation which does not allow a consumer, during mortgage enforcement proceedings, to request compliance with a code of conduct, in particular as regards the giving of a property in payment and extinguishment of the debt — Point 3 of the Annex to Royal Decree-Law No 6 of 9 March 2012, Code of Good [Banking] Practice?

29. Written observations in the present proceedings have been submitted by Bankia, the Spanish Government, Ireland and the Commission, all of whom presented oral argument at the hearing held on 7 February 2018.

III. Analysis

30. All three questions referred essentially turn on the correct interpretation of Article 11 of Directive 2005/29.

31. More specifically, by its first question the referring court asks whether the obligation imposed on Member States by Article 11 of Directive 2005/29 to put in place ‘adequate and effective means’ to combat unfair commercial practices precludes national legislation that does not allow for enforcement of the directive’s provisions in the context of mortgage enforcement proceedings.

32. By its second and third questions, the national court asks whether those adequate and effective means must also ensure enforcement of compliance with a code of conduct. In other words, the referring court seeks clarification regarding the legal remedies available to the consumer on the basis of Directive 2005/29 in circumstances where a trader does not comply with a code of conduct.

33. After providing an analysis of ‘adequate and effective means’ within the meaning of Article 11 of Directive 2005/29, I will, in response to the first question referred, address the issue of whether the directive’s provisions must also be enforced in the context of mortgage enforcement proceedings in order to ensure the directive’s effectiveness. Thereafter, I will deal with the second and third questions referred together and discuss the role of codes of conduct in combating unfair commercial practices foreseen by Directive 2005/29.

A. *The first question referred*

1. *Preliminary remarks*

34. The importance of consumers in the creation of an internal market has long been acknowledged in EU law.⁶ Not only must consumer protection requirements be taken into account when defining and implementing EU policies and activities,⁷ a range of specific EU consumer legislation has also been enacted.⁸ That legislation is motivated by two main objectives. The first is to provide a high level of consumer protection in order to give consumers the confidence to seek out the best deals in any Member State, and the second is to create a framework that facilitates cross-border trade and eases access to markets beyond the nation State, thereby encouraging competition.

35. All EU consumer legislation is characterised by the tension between encouraging consumers on the one hand, and businesses on the other, to enter into cross-border transactions. While a high level of consumer protection encourages consumers, businesses are rather put off by too much ‘red tape’. This dichotomy has resulted in a fragmented legal framework consisting of various legal instruments providing different forms and levels of consumer protection.

36. Directive 2005/29 is a framework instrument setting out general principles for business-to-consumer interactions, supplemented where necessary by specific sectoral legislation.⁹ The directive is a maximum harmonisation instrument: save for explicit derogations provided for in Directive 2005/29,¹⁰ a high common level of consumer protection must be ensured throughout the Member States.¹¹

37. Directive 2005/29 seeks to establish that level of consumer protection in business-to-consumer interactions throughout the European Union by creating a far-reaching control mechanism over commercial practices potentially affecting consumers’ economic behaviour.¹² This is done by setting up a system of penalties in order to deter traders from taking recourse to unfair commercial practices and to bring an end to existing unfair practices.¹³

38. The directive is characterised by a particularly wide scope *ratione materiae*.¹⁴ A ‘commercial practice’, under Article 2(d) of Directive 2005/29, encompasses ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader.’ Moreover, the directive is applicable to commercial practices in business-to-consumer conduct before, during and after a commercial transaction in relation to any goods or service.¹⁵

6 See Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (OJ 1975 C 92, p. 1). See also Article 38 of the Charter of Fundamental Rights of the European Union, codifying previous case-law.

7 See Article 12 of the TFEU.

8 There are currently around 90 pieces of EU legislation that deal with consumer protection issues.

9 See Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final.

10 See Article 3(9) of Directive 2005/29.

11 See recital 11 of Directive 2005/29.

12 See recital 11 and Article 5(1) of Directive 2005/29.

13 See Articles 11 and 13 of Directive 2005/29 and, to that effect, judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraphs 57 and 58.

14 See judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraph 34 and the case-law cited.

15 See Article 3(1) of Directive 2005/29, read in conjunction with Article 2(c) thereof. See also judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraph 36.

39. There are three types of unfair commercial practices that are prohibited under Article 5 of Directive 2005/29. In general, commercial practices are considered unfair if they are both contrary to the requirements of professional diligence and they influence or are likely to influence a consumer's transactional decision.¹⁶ More particularly, misleading and aggressive commercial practices are prohibited.¹⁷ Lastly, the directive provides a 'blacklist' of unfair commercial practices that are prohibited in all circumstances.¹⁸ Unlike the first two types of unfair commercial practice, practices listed in Annex I are considered unfair in all circumstances and do not require an individual assessment in each case.

40. The task of ensuring enforcement of the directive's provisions falls to the Member States, which are to put in place 'adequate and effective means' to combat unfair commercial practices in accordance with Article 11 of Directive 2005/29. It is the interpretation of this requirement and the obligations resulting therefrom for the Member States with which the first question referred is concerned.

2. 'Adequate and effective means' within the meaning of Article 11 of Directive 2005/29

41. In accordance with Article 11 of Directive 2005/29, 'adequate and effective means' may consist in legal action against unfair commercial practices or administrative recourse with the possibility of judicial review. The courts and administrative authorities entrusted with the task of ensuring compliance with the directive must have the power to bring an end to an unfair commercial practice or, as the case may be, to prohibit the practice in question from the outset. Furthermore, under Article 13, Member States must provide for an appropriate system of penalties for professionals who employ unfair commercial practices.

42. However, no specific obligation on the part of the Member States can be determined from the wording or context of those provisions as to the type of procedure, such as mortgage enforcement proceedings, within which unfair commercial practices must be reviewed.

43. As the Court has consistently held, Directive 2005/29 therefore leaves the Member States discretion as to the choice of national measures intended to combat unfair commercial practices, on condition that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive.¹⁹

44. The referring court, however, contends in its request for a preliminary ruling that the means to combat unfair commercial practices put in place by the Spanish legislature are not effective because they do not allow for the review of unfair commercial practices in summary proceedings, such as mortgage enforcement proceedings.

45. The principle of effectiveness requires that the provisions of EU law conferring rights on individuals are implemented effectively and that national procedural law must not render the application of EU law impossible or excessively difficult.²⁰

¹⁶ See Article 5(2) of Directive 2005/29.

¹⁷ See Article 5(4) and Articles 6 to 9 of Directive 2005/29.

¹⁸ See Article 5(5) of Directive 2005/29, read in conjunction with Annex I thereto.

¹⁹ See judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraph 57 and the case-law cited.

²⁰ See judgment of 30 May 2013, *Jörös*, C-397/11, EU:C:2013:340, paragraph 29.

46. Directive 2005/29 limits itself to imposing penalties on traders and does not as such guarantee the right to a contractual remedy for consumers. Unlike Article 6(1) of Directive 93/13²¹ which expressly provides as a legal consequence invalidation of the term in question or, where appropriate, invalidation of the entire contract, no such provision can be found in Directive 2005/29.

47. Importantly, Directive 2005/29 on the contrary specifically provides that application of the directive is to be without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.²² As pointed out by the Spanish Government, the finding that an unfair commercial practice exists therefore cannot create any direct legal effects on the contractual relationship between a trader and a consumer.²³

48. Rather, the intended effect of Directive 2005/29 is the imposition of penalties on a trader who has taken recourse to an unfair commercial practice. Therefore, in order to effectively implement that directive, Member States are only under the obligation to provide for an appropriate system of penalties for traders who take recourse to unfair commercial practices.²⁴

49. Spanish law provides that the existence of unfair commercial practices may be established via declaratory proceedings. These declaratory proceedings, however, do not have a suspensory effect on mortgage enforcement proceedings; nor can the court hearing the case adopt any interim measures.

50. This leaves the question whether it is necessary, in order to ensure the effectiveness of Directive 2005/29, either to enable courts to impose penalties in mortgage enforcement proceedings on the basis of the directive or to make provision for such proceedings to be stayed in the event of declaratory proceedings to establish the existence of an unfair commercial practice.

3. Application of Directive 2005/29 in mortgage enforcement proceedings

51. The Court has consistently held, with regard to the principle of effectiveness, that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies.²⁵

52. The subject matter of mortgage enforcement proceedings is the execution of an enforceable instrument deriving from a mortgage. Such proceedings imply that the property concerned has previously been mortgaged as security and that the creditor has at its disposal an enforceable instrument, validated by a notarial instrument and registered at the land registry, upon which that creditor may rely in the event of the debtor's failure to fulfil his repayment obligations as *ultima ratio*. Enforcement proceedings are meant to provide an expeditious and effective means to enforce legal rights on the basis of a validated enforceable instrument.²⁶

21 Article 6(1) of Directive 93/13 reads as follows:

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

22 See Article 3(2) of Directive 2005/29.

23 See also, to that effect, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 45, and order of 8 November 2012, *SKP*, C-433/11, EU:C:2012:702, paragraph 30. For a detailed discussion of the issue see Opinion of Advocate General Trstenjak in *Pereničová and Perenič*, C-453/10, EU:C:2011:788, points 82 to 85.

24 See, to that effect, judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraph 58.

25 See judgment of 30 May 2013, *Jörös*, C-397/11, EU:C:2013:340, paragraph 32 and the case-law cited.

26 See, for a more detailed discussion, my View in *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2110, points 60 to 64. See also Opinion of Advocate General Kokott in *Aziz*, C-415/11, EU:C:2012:700, point 55.

53. In the interest of procedural economy, the Spanish legislature has limited the grounds of objection to mortgage enforcement. Apart from objections relating to the validity of the mortgage itself, review by the court is restricted to whether the enforceable instrument contains unfair contractual clauses, a provision which was added following the judgment of the Court in *Aziz*.²⁷

54. Indeed, in that case, brought in the context of Directive 93/13, the Court held, in line with established case-law, that to deny the possibility of reviewing the fairness of a contractual term in mortgage enforcement proceedings could unfairly prejudice the consumer as he might only be able to obtain subsequent protection of a purely compensatory nature which the Court held to be incomplete and insufficient.²⁸ Consequently, it held that the national legislation in question was precluded by EU law.²⁹

55. The referring court implies in its request for a preliminary ruling that the same reasoning should apply with respect to unfair commercial practices, as declaratory proceedings do not have a suspensory effect. If enforcement were achieved against the property prior to delivery of the judgment in the declaratory proceedings, it might then be unfeasible to give effect to a decision handed down against the trader which would unfairly prejudice the consumer. Presumably, this is why the Commission also believes that the case-law deriving from *Aziz* should be extended to the case at hand.³⁰

56. However, the case at hand must be distinguished from that line of case-law.

57. The rights conferred on the consumer by Directive 2005/29 differ from those conferred by Directive 93/13. The latter provides that the finding of an unfair contractual term must result in the invalidation of the term in question or, where appropriate, the entire contract.³¹ Directive 93/13 thus provides for a legal remedy that has direct consequences for the contractual relationship between a trader and a consumer. That is why the Court of Justice was inclined to give effect to this possibility in mortgage enforcement proceedings, especially since the case concerned the consumer's home.³²

58. Directive 2005/29, on the other hand, makes no provision for individual contractual remedies for the consumer and, as explained above, finding the existence of an unfair commercial practice can, on the basis of the directive, only lead to the imposition of penalties on the trader in question.³³ Such a finding therefore cannot prevent the enforcement of the mortgage and the outcome of the declaratory proceedings will have no contractual consequences. Even if the judgment in the declaratory proceedings were to be handed down subsequent to the enforcement of the debt, the consumer would not be unfairly prejudiced thereby. As a matter of fact, the decision in the declaratory proceedings does not affect the legal position of the consumer in the mortgage enforcement proceedings at all.

59. What is more, in the case at hand the alleged unfair prejudice vis-à-vis the consumer does not lie in the enforcement of the mortgage as such, but rather in the new valuation of the property used to calculate the starting price at auction. The debtors fear that their property will not achieve as high a bid at auction as it would have with a higher starting price. As was pointed out by the Spanish Government at the hearing, the damage claimed by the debtors is merely hypothetical until the auction is completed. The mortgage or the amount of the debt is not in dispute: rather, the issue is

²⁷ Judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164.

²⁸ See judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 60.

²⁹ See judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraphs 63 and 64.

³⁰ Even though this seems to contradict the Commission Staff Working Document 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices' (SWD(2016) 163 final), in which the Commission states that Directive 2005/29, unlike Directive 93/13, does not have any contractual consequences (point 1.4.5).

³¹ Article 6(1) of Directive 93/13.

³² See, to that effect, judgment of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 62 et seq.

³³ See judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 45, and order of 8 November 2012, *SKP*, C-433/11, EU:C:2012:702, paragraph 30. For a detailed discussion of this issue, see Opinion of Advocate General Trstenjak in *Pereničová and Perenič*, C-453/10, EU:C:2011:788, points 112 to 125.

the amount of debt that will still be outstanding after the auction has been completed and its proceeds have been off-set against the existing debt. Should the court hearing the declaratory proceedings determine that there has been an unfair commercial practice, damages can be awarded following the enforcement of the mortgage. The result for the debtors would be the same even were the enforcement proceedings to be stayed pending the outcome of the declaratory proceedings.

60. To the extent that Directive 2005/29 stipulates that Member States must make provision for an accelerated procedure in combating unfair commercial practices, such a procedure is only foreseen for circumstances where the courts are called upon to order the cessation of an ongoing unfair commercial practice, not where an unfair commercial practice is being assessed *ex post*.³⁴

61. Therefore, in my view, the fact that declaratory proceedings do not have a suspensory effect does not render the application of Directive 2005/29 impossible or excessively difficult, even in circumstances where it is not possible to review unfair commercial practices in mortgage enforcement proceedings.

62. However, a certain *caveat* exists where the question of reviewing a contractual term as to its unfairness in accordance with Directive 93/13 is raised, either by the court of its own motion or by one of the parties, as is the case in the main proceedings.³⁵

63. In assessing the fairness of a contractual term, all the circumstances attending the conclusion of the contract in question must be taken into consideration. A finding that a commercial practice is unfair is one element among others on which the competent court may base its assessment.³⁶ Therefore, in so far as it is necessary in order to properly assess the unfairness of a contractual term in the light of Directive 93/13, review of unfair commercial practices must also be possible in mortgage enforcement proceedings.³⁷ However, it is not necessary in that context for the court hearing the mortgage enforcement proceedings to be able to declare a commercial practice unfair within the meaning of Directive 2005/29 and to impose the corresponding penalties. Neither the declaration nor the imposition of penalties can have any bearing on the enforcement proceedings.

64. Furthermore, as was emphasised by the Court in *Pereničová and Perenič*, the finding that an unfair commercial practice exists is not such as to establish ‘automatically and on its own’ that the contested contractual term is unfair, and therefore has no direct and immediate consequence on whether the contract is valid within the meaning of Article 6(1) of Directive 93/13.³⁸ In accordance with Directive 93/13, a range of additional criteria must be fulfilled. For instance, the term in question must not be the result of individual negotiations between the trader and the consumer.³⁹ In the main proceedings however, it seems to me that the contract term in question may have been the result of negotiations. The debtors asked for an extension of the loan repayment term and the bank agreed to that extension, on condition that the mortgaged property be re-evaluated. Therefore the *caveat* described above does not seem to apply to the case before the referring court. In any case, even where a national court finds that an unfair commercial practice exists, it must give due consideration to *all* the requirements laid down by Directive 93/13 in relation to the unfairness of a contractual term.

³⁴ See the third subparagraph of Article 11(2) of Directive 2005/29.

³⁵ In the main proceedings, the debtors have also argued that the contractual term providing for a new valuation of the mortgaged property is unfair.

³⁶ See judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraphs 42 to 44 and the case-law cited.

³⁷ See, to that effect, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 43; see also, for a detailed discussion, Opinions of Advocate General Trstenjak in *Pereničová and Perenič*, C-453/10, EU:C:2011:788, points 115 to 125, and of Advocate General Kokott in *Margarit Panicello*, C-503/15, EU:C:2016:696, point 128.

³⁸ See judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraphs 44 to 46.

³⁹ See Article 3(1) of Directive 93/13.

65. In order to conduct such a review it is sufficient that provision is made for a review of contractual terms on the basis of Directive 93/13, as in Article 695 of the Law on Civil Procedure. It is not necessary to provide a separate grounds for objecting to the enforcement of the mortgage on the basis of Directive 2005/29. Where an unfair commercial practice translates into an unfair contractual term, the possibility to review such a practice is provided within the context of assessing a contractual term on the basis of Directive 93/13 and the rights conferred on consumers by the latter directive are given due effect.

66. Consequently, Article 11 of Directive 2005/29 does not preclude national legislation, such as that at issue in the main proceedings, which does not provide for the review by the courts, of their own motion or at the request of one of the parties, of unfair commercial practices in mortgage enforcement proceedings.

B. The second and third questions referred

67. By the second and third questions referred, the national court seeks clarification regarding the legal remedies available to the consumer on the basis of Directive 2005/29 in circumstances where a trader does not comply with a code of conduct.

68. All the parties which have submitted written observations contend that codes of conduct cannot be enforced on the basis of Directive 2005/29.

69. Traditionally, codes of conduct are used in some Member States to define norms and standards of behaviour for traders on a voluntary basis within a specific sector. The purpose of such self-regulatory codes is either to explain details of legislative requirements to consumers in a way they can understand or to establish certain sectoral standards where this is not provided for in legislation.⁴⁰ Accordingly, codes of conduct are also intended to combat improper business-to-consumer conduct and their objective somewhat overlaps with that of Directive 2005/29. Crucially, however, codes of conduct are self-regulatory instruments. Control of conduct is exercised only among the members of a given sector who have signed up to be bound by a particular code. Directive 2005/29, on the other hand, requires Member States to enforce its provisions by force of law and in a universal manner.

70. Against this background, what is the role of codes of conduct in relation to Directive 2005/29 and can compliance with a code of conduct be enforced on the basis of the directive?

71. Directive 2005/29 defines a ‘code of conduct’ as ‘an agreement or set of rules not imposed by law, regulation or administrative provision which defines the behaviour of traders’.⁴¹ As pointed out by Ireland, codes of conduct are thus defined as non-binding and not having the status or force of law. From the outset, it thus seems contrary to such a definition to enforce compliance with a code of conduct through the courts.

⁴⁰ See Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final, point 72.

⁴¹ See Article 2(f) of Directive 2005/29.

72. Directive 2005/29 envisages a role for codes of conduct in assessing the existence of unfair commercial practices. On the one hand, the blacklist, set out in Annex I to Directive 2005/29, of commercial practices that are to be considered unfair in all circumstances contains two commercial practices which relate to codes of conduct. First, a claim by a trader to be a signatory to a code of conduct when he is in fact not and, second, claiming that a code of conduct has an endorsement from a public or other body which it does not have, automatically leads to the finding that an unfair commercial practice exists.⁴²

73. On the other hand, in assessing whether or not an unfair commercial practice exists on the basis of Articles 5 to 9 of Directive 2005/29, the norms and standards of behaviour provided in codes of conduct are one of the elements to be taken into consideration. Notably, codes of conduct can provide evidence as to the requirements of professional diligence in a given sector.⁴³

74. However, Directive 2005/29 imposes further requirements for the existence of an unfair commercial practice. The mere fact that a trader has not complied with a code of conduct cannot on its own and automatically lead to the finding that an unfair commercial practice exists. The directive requires an assessment, having regard to the facts of each particular case, of whether the commercial transaction at issue is unfair in the light of the criteria set out in Articles 5 to 9 thereof.⁴⁴

75. Beyond the role of codes of conduct in assessing the existence of unfair commercial practices, Article 10 of Directive 2005/29, which was specifically mentioned by the referring court, provides that control of unfair commercial practices may also be exercised by code owners, in addition to legal action or a complaint mechanism before an administrative authority. Codes of conduct are thus intended to contribute to combating unfair commercial practices by creating additional means of control. The norms or standards of behaviour enshrined in codes of conduct are meant to help traders to apply the principles set out in that directive effectively in the course of their day-to-day business in their specific sector.⁴⁵ As is expressly stated in Article 10, recourse to such control by code owners ‘shall never be deemed the equivalent’ to judicial and administrative recourse and does not make the content of codes of conduct legally enforceable.

76. Importantly, even if it is established that an unfair commercial practice exists where a trader has not complied with a code of conduct, the only possible legal consequence of this under Directive 2005/29 is that a penalty will be imposed on the trader in question. As explained in points 47 to 49 above, and as has also been pointed out by the Commission and the Spanish Government regarding the enforcement of codes of conduct, no individual contractual remedy for the consumer is provided by the directive.

77. Since Directive 2005/29 does not create any individual contractual remedy whereby the consumer may enforce compliance with a code of conduct, it is for each Member State to determine the consequences of non-compliance with such a code as long as ‘adequate and effective means’ exist to combat unfair commercial practices.

⁴² See points 1 and 3 of Annex I to Directive 2005/29.

⁴³ See recital 20 of Directive 2005/29, which provides that ‘... In sectors where there are specific mandatory requirements regulating the behaviour of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector. ...’. See also, to that effect, Article 6(2)(b) of that directive.

⁴⁴ See, to that effect, recital 17 of Directive 2005/29 as well as judgments of 7 September 2016, *Deroo-Blanquart*, C-310/15, EU:C:2016:633, paragraph 29 and the case-law cited; of 17 January 2013, *Köck*, C-206/11, EU:C:2013:14, paragraph 35 and the case-law cited; of 19 September 2013, *CHS Tour Services*, C-435/11, EU:C:2013:574, paragraph 38 and the case-law cited; and of 19 October 2017, *Europamur Alimentación*, C-295/16, EU:C:2017:782, paragraph 34 and the case-law cited.

⁴⁵ See Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final, points 72 and 73.

78. Specifically with regard to the Code of Good Banking Practice, Spanish law makes provision for a complaint mechanism before the Banco de España (Bank of Spain). Complaints based on a credit institution's alleged failure to comply with the code can be lodged with the Bank of Spain which can then impose financial penalties and order the bank in question to adhere to the code. This is in line with the requirements imposed by Directive 2005/29 with respect to codes of conduct, as described above.⁴⁶

79. Consequently, the answer to the second and third questions referred must be that Directive 2005/29 does not preclude national legislation, such as that at issue in the main proceedings, which does not provide for any individual contractual remedy for the consumer in circumstances where a trader has not complied with a code of conduct.

IV. Conclusion

80. In the light of the considerations presented above, I propose that the Court answer the questions referred by the Juzgado de Primera Instancia No 5 de Cartagena (Court of First Instance No 5, Cartagena, Spain) as follows:

- (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') does not preclude national legislation, such as that currently regulating Spanish mortgage enforcement proceedings, namely Article 695 et seq. of the Ley de Enjuiciamiento Civil (Law on Civil Procedure), read in conjunction with Article 552(1) thereof, which does not provide for the review by the courts, of their own motion or at the request of one of the parties, of unfair commercial practices.
- (2) Directive 2005/29 does not preclude national legislation, such as the Spanish law at issue in the main proceedings, which does not provide for any individual contractual remedy for the consumer in circumstances where a trader has not complied with a code of conduct.

⁴⁶ In the case under consideration, Bankia and the Spanish Government are of the view that the Code of Good Banking Practice is not in fact a 'code of conduct' within the meaning of Directive 2005/29. Indeed, in accordance with Articles 5(4) and 15 of Royal Decree-Law 6/2012, the Code of Good Banking Practice is based on a legal instrument and, once a credit institution has agreed to adhere to it, it is legally binding. Therefore it seems that the Code of Good Banking Practice is not in fact a code of conduct within the meaning of the directive. However, this is a question of fact which is for the national court to determine, bearing in mind the definition of 'code of conduct' as provided in Article 2f of Directive 2005/29.