
URÍA MENÉNDEZ

The Judgment of the Court of Justice of the
European Union of 19 October 2017 on the
Spanish regulation on sales at a loss

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The Judgment of the Court of Justice of the European Union of 19 October 2017 in Case C-295/16

The Court of Justice of the European Union (“**ECJ**”) issued on 19 October 2017 its Judgment in Case C-295/16, *Europamur Alimentación, S.A. v Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia*, holding that certain Spanish regulation on sales at a loss is contrary to EU law as it entails a general prohibition on offering or carrying out sales of goods at a loss and it provides for exceptions to that prohibition which are not included in the EU legislation (the “**ECJ Judgment**”).

The ECJ Judgment entails, in practice, the disapplication of Article 14 of Law 7/1996, on Retail Trade Regulation (“**LOCM**”) and the equivalent provisions of regional laws (jointly, the “**Spanish legislation on the prohibition of sales at a loss**”).¹

The content of the ECJ Judgment and its main implications with regard to the fines imposed pursuant to the Spanish legislation on the prohibition of sales at a loss is outlined below.

1. BACKGROUND

The ECJ Judgment was issued within the context of a request for a preliminary ruling made by the Contentious-Administrative Court No 4 of Murcia. This Court was reviewing an appeal filed by the wholesaler Europamur Alimentación, S.A. against a fine imposed by the regional Government of Murcia for a breach of the prohibition against sales at a loss established in Article 14 LOCM and its regional equivalent in Law 11/2016 on Retail Trade Regulation of the Region of Murcia.

In the framework of these proceedings, the appellant argued that the Spanish legislation on the prohibition of sales at a loss was contrary to the provisions of Directive 2005/29/CE of 11 May 2005

¹ Article 14 LOCM is a provision enacted pursuant to the exclusive competence of the State to regulate commercial competition law, as it follows from Article 149(1)(6) of the Constitution.

concerning unfair business-to-consumer commercial practices in the internal market (“**Directive 2005/29**”) and the case-law of the ECJ that interprets the Directive.

The Court then referred to the ECJ the pertinent preliminary questions that were admitted by the ECJ under Case C-295/16. The Opinion of the Advocate General was issued on 29 June 2017,² and the Judgment was handed down on 19 October 2017.

2. CONTENT OF THE JUDGMENT

The ECJ, in line with the Advocate General’s Opinion, has provided a clear answer to the questions asked. It has stated that Directive 2005/29 “*must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which contains a general prohibition on offering for sale or selling goods at a loss and which lays down grounds of derogation from that prohibition that are based on criteria not appearing in that directive*”.

The core of the reasoning of the ECJ is based on the following arguments:

- (i). Directive 2005/29 has brought about a complete harmonisation of the rules on unfair business-to-consumer commercial practices, and Member States may not therefore adopt stricter measures than those provided for in the Directive itself (paragraph 29 of the Judgment).
- (ii). The Spanish legislation on the prohibition of sales at a loss has as one of its objectives, according to the preamble to the LOCM, the **protection of consumers’ interests** (paragraph 35 of the Judgment).
- (iii). Therefore, Article 14 LOCM must be regarded as a **transposition of Directive 2005/29** (paragraph 31 of the Judgment).
- (iv). Given that the sixth additional provision of the LOCM extends that prohibition to cover wholesalers, the conclusion reached by the ECJ is also applicable to **wholesale trade** (paragraph 31 of the Judgment).
- (v). The Spanish legislation on the prohibition of sales at a loss regards this practice as an unfair commercial practice in itself, while it does not allow further analysis in the light of the unfairness criteria set out in Articles 5 to 9 of Directive 2005/29 (paragraph 40 of the Judgment).

² Opinion of Advocate General Henrik Saugmandsgaard Øe of 29 June of 2017 [ECLI:EU:C:2017:506].

- (vi). The Spanish legislation on the prohibition of sales at a loss provides for two **derogations** from the prohibition that do not comply with the unfairness criteria of the Directive, so the derogations are also inconsistent with the Directive 2005/29 (paragraph 40 of the Judgment).
- (vii). Given that selling at a loss is not included among the practices regarded as unfair under all circumstances, listed in Annex I to the Directive, the ECJ Judgment expressly states that the imposition of a penalty for infringement of the prohibition of selling at a loss must be preceded by a **case by case analysis of the unfairness of the sale** under the criteria set out in Articles 5 to 9 of Directive 2005/29 (paragraph 42 of the Judgment).
- (viii). Administrative authorities may not impose a penalty based on a **presumption** which the trader is required to rebut. That, in itself, is a more restrictive measure than those provided for in the Directive (paragraph 42 of the Judgment).

These arguments lead the ECJ to hold that a provision like the one in Article 14 LOCM is contrary to EU law.

3. SCOPE OF THE ECJ JUDGMENT

In general, a decision taken within a preliminary reference like the one analysed here will have the following scope:

- (i). It binds all the entities subject to the rule being interpreted; here, Directive 2005/29, in connection with the Spanish legislation on the prohibition of sales at loss.
- (ii). As the ECJ Judgment does not expressly limit the effects of the preliminary ruling, the interpretation of the ECJ concerning Directive 2005/29 in connection with the Spanish legislation on the prohibition of sales at loss is understood to be valid from the date on which Directive 2005/29 entered into force.

As a result, the ECJ Judgment does not bring about a repeal of the Spanish legislation on the prohibition of sales at a loss, but binds both the administrative authorities and the courts, which must disregard these rules. This duty to disregard the offending legislation is a consequence of the **primacy of EU law**.

The ECJ Judgment casts its effects on past, present and future proceedings as we explain in the following section.

4. IMPACT ON PENALTIES FOR SALES AT A LOSS

With regard to future proceedings, it can be argued that the displacement of the Spanish legislation on the prohibition of sales at a loss would impede further penalties from the administrative authorities until a new regulation is enacted. This future regulation shall respect and take into consideration the unfairness criteria set out in Directive 2005/29.

In what concerns future and pending cases, when deciding the specific impact of the ECJ Judgment on the penalties imposed (or those pending to be imposed), it would be necessary to review all the circumstances on a case-by-case basis. Some general conclusions follow, which should not be extended to each case without that individualised analysis.

In general, the following distinction may be made between cases, depending on the finality of the administrative act imposing the penalty:

- (i). In the pending infringement proceedings, it would be necessary to file **complementary submissions** requesting the shelving of the proceedings in light of the ECJ Judgment.
- (ii). In the proceedings where a resolution imposing penalties has been issued but an administrative appeal is still possible, it would be necessary to **file an administrative appeal** requesting the annulment of the penalty.
- (iii). If the penalty has been appealed before the Contentious-Administrative Courts, it would be necessary to file **pleadings attaching the ECJ Judgment** and requesting that the appeal be upheld.
- (iv). In the proceedings in which the administrative act is final, either because it was not appealed at the time or because the administrative act has been confirmed by the Courts, there are two possible scenarios:
 - Where there is a final judgment dismissing an appeal against the administrative act, the analysis should be whether the requirements for a **liability claim against the State** are met, pursuant to Law 40/2015, of 1 October, on the Legal Regime of the Public Sector, provided that the infringement of EU law was pleaded as it is now held by the ECJ.

- If the finality of the act imposing the penalty results from the fact that no appeal was filed, then the possibility of applying for a **voluntary review** could be explored, pursuant to Law 39/2015, of 1 October, on the Common Administrative Procedure of the Public Administrations.

In any event, please note that each file will require an individualised analysis of the factual and legal circumstances in order to plan an appropriate legal strategy.

5. CONTACT LAWYERS



Borja Sainz de Aja Tirapu

Partner. Madrid office

+ 34915864538

borja.sainzdeaja@uria.com



Patricia Vidal Martínez

Partner. Madrid office

+ 34915860753

patricia.vidal@uria.com



Manuel Vélez Fraga

Partner. Madrid office

+ 34915860337

manuel.velez@uria.com

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