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Beyond selling at a loss: unfair commercial practices in consumer law sanctioning

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The incompatibility of the Spanish prohibition on selling at a loss with the Unfair Commercial Practices Directive is just one salient example of the fact that our law has not adequately resolved the breadth of transposition of this directive. Private law has been transposed, but creating new niches of powers whilst neglecting the fact that the most important responsibility for the application of this legislation lies with regional consumer protection authorities.

(1) The Judgment of the Court (Fifth Chamber) of 19 October 2017 in Case C-295/16, in response to a request for a preliminary ruling from the Murcia Judicial Review Court No. 4[1] in proceedings between Europamur Alimentación SA ('Europamur') and the Directorate-General for Trade and Consumer Protection (Region of Murcia)[2], has just ruled that a national provision which contains a general prohibition on offering for sale or selling goods at a loss (art. 14 of the Spanish Retail Trading Act[3] ('*LOCM*')) is incompatible with 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 ('UCP Directive').

[1] *Juzgado de lo Contencioso-Administrativo Núm. 4 de Murcia.*

[2] *Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia.*

[3] *Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista.*

This ruling will have longer lasting effects on Spanish law than the simple conclusion that the rules on sales at a loss have ceased to be a niche for the sanctioning policies of regional fair trading offices. According to the Court, the UCP Directive "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
(1) that prohibition that are based on criteria not appearing in that directive". The UCP Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to *products*. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature.

This is not the first time that the Court of Justice of the European Union ('CJEU') takes an uncompromising interpretative stand in respect of national provisions which, using consumer
(2) protection as an excuse, introduce niches of infringement or prohibition which do not respect the standards of this Directive (hence, Judgments of the Court of 12 May 2011, *Ving Sverige*; 17 January 2013, *Köck*; 7 March 2013, *Kamera Express*; and 7 September 2016, *Sony Europe*).

The Spanish legal system governing unfair business-to-consumer commercial practices is disjointed and complex. On a first level, niches of competition law infringement, consisting of unfair business-to-consumer practices, are created in the Spanish Unfair Competition Act[4] ('*LCD*') (arts. 4(1)(II) and (III), 5, 6, 7, 8 and 21-31), which aim to incorporate both the two general clauses of the UCP
(3) Directive (arts. 5 and 7 *LCD*) and the blacklist of practices contained in Annex I to the UCP Directive. However, the *LCD* is a private enforcement system (art. 33) and the regions with powers in consumer and commercial matters cannot use classes of competition law infringement as factual requirements of an administrative law infringement, unless provided for by law through a referral.

On a second level, arts. 19 and 20 of the Spanish Consumer and User Protection (Recast) Act[5] ('*LCU*') imperfectly accommodate harmonised rules. According to art. 19(2), unfair commercial practices are subject to the *LCD*, the *LCU* itself and the *LOCM*, which, as we shall see, is untrue. For the second time, art. 19 refers to the *LCD* and again art. 20, without realizing that no consequence
(4) is derived from this referral for the purposes of consumer protection policy, except to recall that consumer protection organisations and agencies have standing to sue for injunction under the *LCD*. Also interesting is art. 49 *LCU*, which sets out the list of consumer protection infringements. It should be noted that this national statute is only basic, and regions may (and do) lengthen and multiply the classes of infringement, thereby affecting the conduct which according to the Directive are "business-to-consumer commercial practices". Art. 49 of this national statute

[4] *Ley 3/1991, de 10 de enero, de Competencia Desleal.*

[5] *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias.*

is respectful in this regard, but at the same time it addresses the issue by means of a metarule
(4) [art. 49(1)(l)] that classifies as a singular infringement of consumer protection legislation "the use of unfair commercial practices with consumers and users".

Art. 49(1)(l) *LCU* follows a curious classification method. It is likely that it falls short of the principle of legality's requirements. But, on the other hand, it makes a content referral that can only make sense if each case of unfair commercial practice included in the *LCD* - and which substantially transposes the Directive in correct terms - defines an individualised class of consumer protection
(5) infringement. Outside of the referral - and here the obsessive referrals of arts. 19 and 20 *LCU* to the *LCD* also make sense - there would be no banned or classed practices. This is so to the extent that the blacklist of practices contained in Annex I to the UCP Directive cannot serve to complete the referral if the conduct is not already reputed by the *LCD* to be unfair practices.

Of course, this is what the national statute does. Regions may have addressed this in other ways,
(6) but if they operate with the same legislative drafting, the integration procedure is the same as that proposed.

The *LOCM* is also called on by art. 19(2) *LCU*, as defining and regulating unfair business-to-consumer commercial practices. And, in fact, the *LOCM* contains many classes of conduct that are consistent with the EU concept of "business-to-consumer commercial practices" and which art. 20(2)(II) *LCU* defines, in line with the UCP Directive, as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, directly
(7) connected with the promotion, sale or supply of a good or service to consumers and users, before, during or after a commercial transaction." Without being exhaustive, the *LOCM* regulates (and basically bans or limits) commercial practices in arts. 8(2), 14, 18, 20, 21, 22, 23, 24, 28, 30, 34, 50, etc. Types of administrative law infringements are also provided, the factual requirement thereof being business-to-consumer commercial practices regulated in the body of the statute; hence arts. 64(c), (e), (h) (another metarule), 65(c), (e), (i), (j), (l), etc.

Virtually no factual requirement for prohibition/limitation or any legal class of infringement under the *LOCM* is respectful of the UCP Directive, because all conduct banned by Spanish law
(8) has been delimited as a *prima facie* restriction or prohibition that is not subject to the balancing standards imposed by the UCP Directive. The same can be said with regard to regional interior trading laws.

Given this confusing panorama of Spanish national law (to which should be added the abracadabra of regional consumer law sanctioning), it seems that this is the moment to explain what the balancing standards contained in the UCP Directive are to consider a class of prohibited conduct
(9) as unfair and, therefore, as an administrative law infringement of this kind. A commercial practice is unfair if "it is contrary to the requirements of professional diligence and it *materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer* whom it reaches or to whom it is addressed, or of the average member of the group when

a commercial practice is directed to a particular group of consumers. The economic behaviour of consumers is materially distorted if the operator uses a commercial practice *to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise".*

(9)

A commercial practice shall be regarded as misleading if "it contains false information and is therefore untruthful or in any way, including overall presentation, *deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements*, and in either case *causes or is likely to cause him to take a transactional decision that he would not have taken otherwise*". For its part, an omission shall be regarded as misleading "if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, *it omits material information* that the average consumer needs, according to the context, to take an informed transactional decision and thereby *causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader *hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information* as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise". The information listed in Art. 7(4) shall be regarded as material. For its part, a commercial practice shall be regarded as unfair inasmuch as aggressive "if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise".

(10)

Regional operators, the only ones competent to manage the sanctioning policy related to consumer protection, will have to apply these balancing factors - which they will have to take basically from arts. 4, 5 and 7 *LCD* - and prove that the commercial practice considered meets these standards. It should be noted that they will almost never be able to prove or argue that, outside the blacklist cases, the consumer would not have taken in the alternative the purchase decision he has taken, as evidenced by the spurious prohibition of loss selling, which has no influence on the consumer's purchase option.

(11)