

IN THE COURT OF JUSTICE OF THE EUROPEAN UNION**Case C-109/17****BANKIA S.A.****Applicant****V****JUAN CARLOS MARI MERINO
JUAN PEREZ GAVILAN
MARIA CONCEPCION MARI MERINO****Defendants**

WRITTEN OBSERVATIONS OF IRELAND

Dated this 4th day of July 2017

To the President and Members of the Court of Justice of the European Union

Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, Ireland, represented by Maria Browne, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8, acting as Agent, accepting service via e-Curia with an address for service at the Embassy of Ireland, 28 route d'Arlon, Luxembourg, assisted by Miss Margaret Gray, Barrister-at-Law, of the Bar of Ireland, has the honour of submitting these written observations.

1. This reference for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") was made on 20 February 2017 (lodged on 3 March 2017) by the Juzgado de Primera Instancia N.º 5 de Cartagena, Kingdom of Spain ("the Referring Court"). The referred questions concern the interpretation of certain provisions of Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market (OJ 2005 L 149 p.22) ("the Directive"), in particular, Article 11 thereof.

THE ORDER FOR REFERENCE

2. Ireland refers to the facts as described in the Order for Reference. In brief outline, the questions arose in mortgage enforcement proceedings before the Referring Court, in which the applicant, Bankia S.A. ("the Bank"), lodged an application with the Referring Court seeking, firstly, an order for payment against the Defendants, the borrowers ("the Borrowers") and, second, in the event that the Borrowers should not pay off the debt, an order that the mortgaged asset be auctioned and the proceeds paid in satisfaction of the amount owed, plus interest and costs.
3. On 8 March 2016, the Borrowers lodged an objection to the enforcement, on the following grounds. Firstly, that the contract serving as an instrument for the enforcement contains unfair terms, since there was a novation of the mortgage loan on 18 October 2013 both increasing the term and varying the valuation of the property, considerably decreasing it to the Borrowers detriment. Second, that the conditions are met for them to be discharged from the debt by giving the property for payment, remaining there as a tenant, pursuant to the Spanish Code of Good Banking Practice, as established in Royal Decree-Law 6/2012. The Borrowers further requested a stay on enforcement.
4. The Referring Court sought submissions from the parties on the following: (i) the possible existence of an unfair commercial practice by the Bank in the novation; (ii) the binding nature of the Code of Good Banking Practice, and whether it may be characterised as a code of conduct in accordance with the Directive; and (iii) whether there should be a review of unfair practices in the pending proceedings objecting to mortgage enforcement,

in circumstances where Spanish law provides for such objections to be made by separate proceedings.

5. The Bank submitted as follows: (i) its conduct is not unfair, but merely seeks to adjust the value of the asset to the change in the Spanish property market, and that devaluation is more damaging to its right to receive payment than to the Borrowers' rights; (ii) the Code of Good Banking Practice is not binding, and the Borrowers have not argued or established that they have requested the application of Royal Decree-Law 6/2012 to the Bank seeking enforcement, or that the factual requirements of the code have been met; and (iii) the Borrowers (as consumers) must have recourse to the applicable ordinary declaratory proceedings in order to assert the possible existence of an unfair practice.
6. The Borrowers submitted that: (i) the amendment of the asset's valuation seriously impaired their rights, and, correspondingly, reinforced the Bank's dominant position so that the commercial party's action in modifying the valuation of the property taking advantage of the debt restructuring is contrary to the requirements of professional diligence and deceptive; (ii) the Code of Good Banking Practice is binding; and (iii) for the purposes of the objection to the enforcement, the way in which unfair terms are addressed may be transposed to the treatment of unfair practices, and the amendment to the valuation should, thereby, be deemed not to have been made.
7. In light of that, the Referring Court highlighted the following points leading to its request for a preliminary ruling.
8. Firstly, the Spanish mortgage enforcement procedure lays down a legal regime for objecting to that procedure on the basis of review of unfair terms, but not of unfair commercial practices. A consumer wishing to assert the existence of an unfair commercial practice must do so in declaratory proceedings which are separate to the enforcement proceedings.
9. In those particular circumstances, the Referring Court hearing the mortgage enforcement proceedings is unable to do a number of things: it is unable to assess whether the Bank's previous conduct considerably reducing the property's valuation is an unfair practice; unable to determine the consequence of declaring such conduct an unfair practice; and unable

to order interim measures, in particular, a stay of the mortgage enforcement proceedings pending the determination of any declaratory proceedings that are instituted, in order to ensure that its final decision is fully effective.

10. The Referring Court also noted (at paragraphs 33 and 34 of the Order for Reference) that if a review of the practice was allowed under EU law, and, thereby, a declaration made that the alteration of the property's valuation was void, it could follow that the Borrowers' civil liability would be extinguished. Further, if the Code of Good Banking Practice were held to be binding, the Borrowers could rely on giving property in payment in order to put an end to the mortgage enforcement and their personal liability.
11. Against that background, the Referring Court formulated three questions for this Court, as regards which Ireland sets out its suggested responses below.

THE DIRECTIVE

12. Before addressing those questions posed by the Referring Court, it is necessary, in the first instance, to consider, briefly, the structure and content of the Directive, and, in particular, the following relevant provisions.
13. A number of recitals are instructive, including:
 - a. Recital (20): *"It is appropriate to provide for a role for codes of conduct, which enable traders to apply the principles of this Directive effectively in specific economic fields. 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. The control exercised by code owners at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. With the aim of pursuing a high level of consumer protection, consumers' organisations could be informed and involved in the drafting of codes of conduct."*
14. Article 1 sets out the purpose of the Directive, as follows:

"The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection

by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests."

15. Article 2, which sets out definitions, provides as follows, that for the purposes of the directive:

"(d) 'business-to-consumer commercial practices' means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

(e) 'to materially distort the economic behaviour of consumers' means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

(f) 'code of conduct' means 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; ..."

16. Importantly, Article 3(7) of the Directive, falling under the heading of "Scope", provides as follows:

"(7) This Directive is without prejudice to the rules determining the jurisdiction of the courts."

17. Article 5 of the Directive prohibits unfair commercial practices, a commercial practice being considered 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. In particular, commercial practices will 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.

18. Article 6(1) of the Directive regards professional conduct as misleading if it is likely to deceive the average consumer, even if the information is factually correct, and, in those cases is likely to cause him to take a transactional decision that he would not have taken otherwise, in that it affects the main characteristics of the product or the consumer's rights. Article 6(2) regards as misleading non-compliance with forms of conduct contained in a code of conduct.
19. Article 7(2) provides that *"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."*
20. Article 10 deals with Codes of Conduct as follows:

"This Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owns 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."

21. Article 11 deals with Enforcement, and given its centrality to these proceedings, is set out in full as follows:

"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.*

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 10. These facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.

It shall be for each Member State to decide:

- (a) whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector; and*
- (b) whether these legal facilities may be directed against a code owner where the relevant code promotes non-compliance with legal requirements.*

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.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

- either with interim effect, or*
- with definitive effect,*

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision:

(a) to require publication of that decision in full or in part and in such form as they deem adequate;

(b) to require in addition the publication of a corrective statement.

3. The administrative authorities referred to in paragraph 1 must:

(a) be composed so as not to cast doubt on their impartiality;

(b) have adequate powers, where they decide on complaints to monitor and enforce the observance of their decisions effectively;

(c) normally give reasons for their decisions.

Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given. Furthermore, in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or importer or unreasonable failure to exercise the said powers can be the subject of judicial review."

THE QUESTIONS REFERRED AND IRELAND'S RESPONSES

Question One

22. By Question One, the Referring Court asks as follows:

"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 Ley de Enjuiciamiento Civil (Code of Civil Procedure) – which does not provide for the review by the courts, of their own motion or even 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?"

23. In essence, the Referring Court asks whether the particular Spanish law, which expressly prevents the review in mortgage enforcement proceedings of unfair commercial practices, is contrary to Article 11 of the Directive which provides, *inter alia*, that adequate and effective means exist, including recourse to courts or administrative authorities, to combat such unfair commercial practices.
24. On the facts of the case before the Referring Court and as is apparent from the terms of the question posed, the Spanish law expressly does not allow for such review in mortgage enforcement proceedings at all, either by a court of its own motion or at the request of one of the parties; in fact, it requires that an entirely separate set of proceedings be issued by the defendants to such mortgage enforcement proceedings. Ireland notes that potentially different principles may apply to the different situations of review by a court of such terms which is sought of its own motion, on the one hand, and review where it is expressly sought and argued by one of the parties. This will be addressed further below.
25. The answer to the question requires balancing the right to an effective judicial or administrative remedy for consumers in order to combat unfair commercial practices, on one side, with the need to afford a suitable margin

of discretion to Member States to organise their own judicial and administrative systems, particularly when adjudicating on *inter partes* disputes, and to enjoy an appropriate margin of procedural autonomy, on the other side.

26. Ireland agrees with the Referring Court that the interpretation and application of the Directive and, in particular, Article 11, is assisted by a consideration of the case-law addressing the closest corresponding provisions under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p.29).
27. While this Court did not have to address the substantive issues arising in Case C-503/15 *Panicello* (judgment of 16 February 2017) given that it considered the request for a preliminary ruling in that case to be inadmissible, Advocate General Kokott's Opinion considered that "*the principles developed in the context of Directive 93/13 with respect to the need for an ex officio [own motion] assessment of the presence of unfair terms must be transposed to Directive 2005/29 in so far as an assessment of the unfairness of contractual terms under Directive 93/13 must necessarily be carried out in the light of an assessment of the unfairness of commercial practices under Directive 2005/29*" (at paragraph 128).
28. From that starting point, the relevant principles have been developed as follows.
29. Firstly, it is well-established that a national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating, in this manner, for the imbalance which exists between the consumer and the seller or supplier, but only in circumstances where the national court has available to it the legal and factual elements necessary for that task (see Case C-243/08 *Pannon GSM*, paragraphs 31 and 32; Case C-168/05 *Mostaza Claro*, and Case C-618/10 *Banco Espanol*, paragraphs 42 and 43).
30. Second, Directive 93/13 precludes legislation of a Member State which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* (as a preliminary issue) or at any other stage during the proceedings, even

though it already has the legal and factual elements necessary in that regard, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, where that consumer has not lodged an objection (see Case C-618/10 *Banco Espanol*, paragraph 57; and Case C-473/00 *Cofidis SA*).

31. Third, Directive 93/13 precludes legislation of a Member State which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought to assess the unfairness of such a term, to grant interim relief, including a stay of those enforcement proceedings, where the grant of a stay is necessary to guarantee the full effectiveness of its final decision (see Case C-415/11 *Mohamed Aziz*, paragraph 64).
32. Ireland submits that the application of these principles when determining the scope of obligations upon a Member State to provide effective judicial and administrative remedies for consumers to enforce compliance with the provisions of the Directive is subject to the fundamental and necessary precondition that a national court can only be fixed with the obligation to review such compliance in circumstances where it the court has available to it "*the legal and factual elements necessary*" for that task.
33. Put another way, if it were intended that a court, in the absence of having the legal and factual elements necessary, were nonetheless obliged to conduct such a review, this would be to impose a close to impossible task upon it. It would be tantamount to placing upon the Court an obligation to take responsibility for, for example, in the field of examination of a mortgage instrument, an investigative role. Ireland submits that this would extend the Article 11 requirement to provide an effective means to combat unfair commercial practices beyond what was intended by the legislator.
34. Provided that the national legal system accommodates a mechanism whereby it is able to deal with the review of allegedly unfair commercial practices, Ireland submits that there is no additional requirement that a system must positively provide for specific procedures to facilitate that occurring.

35. Further, Ireland considers that there is a point of distinction between the need to facilitate the review of unfair commercial practices where this is raised by a party, but the national procedure prevents it from happening, and where it is (or ought to be) raised by a court of its own motion, and the national procedure also prevents that from happening. In the first situation, the issue has been squarely raised by one of the parties and is an issue to be determined. In the second situation, there is a fine line between requiring a court, in certain instances where it has the necessary legal and factual elements, to investigate of its own motion that a practice is unfair, and making a Court, in effect, a consumer protection agency, such that it could be required to act in a partisan way. Again, Ireland submits that this cannot be what the legislator intended.
36. Ireland's submission that a Court, in the absence of the necessary legal and factual elements, is not, and should not be obliged, to carry out a review of its own motion of unfair commercial practices and make a determination thereon, is supported by the following principles.
37. In the first instance, this Court has acknowledged that, in the specific context of the protection of consumers against unfair terms, there are legitimate limits to the principle of effectiveness. In Case C-34/13 *Kušionová*, this Court held (at paragraph 56) that:

“Although Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the parties to the contract (the judgments in Asbeek Brusse and de Man Garabito, C-488/11, EU:C:2013:341, paragraph 39 and case-law cited, and Pohotovost’, EU:C:2014:101, paragraph 40 and case-law cited), the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for the total inertia on the part of the consumer concerned (see, to that effect, the judgment in Asturcom Telecomunicaciones, C-40/08, EU:C:2009:615, paragraph 47).”
38. This is also the view expressed by Advocate General Sharpston in Case C-497/13 *Faber*, where, at paragraph 63 of her Opinion, she cites the judgment in *Kušionová* (paragraph 56) as follows:

"63. Thus, with regard to Directive 93/13, the Court has held that EU law requires national courts to examine of their own motion the unfairness of a contractual term where they have available to them the necessary legal and factual elements. That is because Directive 93/13 is 'based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge'. A consumer accepts terms prepared by a professional seller, on which he can have no influence. Thus, only positive action unconnected with that of the actual parties to the contract may correct such an imbalance. As a result, the Court has taken the view that, with respect to Directive 93/13, 'effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion'. For the same reasons, a national rule prescribing a limitation period for finding that a contract term is unfair is precluded. However, in the same context, the Court has added that the principle of effectiveness cannot be 'stretched so far as to make up fully for [the] total inertia on the part of the consumer concerned'."

39. In the second instance, in the context of adversarial proceedings, the Court cannot go beyond the dispute as defined by the parties. This is a fundamental principle recognised both at national and EU level. Again, Advocate General Sharpston relied upon this principle at paragraph 73 of her Opinion in Case C-497/13 *Faber*, where she held as follows:

"73. Furthermore, the requirement to examine ex officio the scope of application of Directive 1999/44 is subject to the same conditions as those which the Court has set out with respect to other consumer protection directives (the issue raised by questions 2 and 3). Thus, the legal and factual elements necessary for that task must be available to the national court, either because those elements already form part of the file or because the national court can obtain them in accordance with national procedural law. The national court may not go beyond the ambit of the dispute as defined by the parties. ..."

40. In the third instance, and as referred to above, the right to provide an effective remedy must, in certain circumstances, yield to the right to national procedural autonomy. As Advocate General Wahl said in his Opinion in

Case C-169/14 *Morcillo*, “... from the point of view of observance of the principle of procedural autonomy of the Member States ... the influence of EU consumer law on the procedural law of the Member States is not unlimited” (paragraph 1).

41. This general principle is expressly and specifically articulated in Article 3(7) of the Directive itself, where it is affirmed that: *“This Directive is without prejudice to the rules determining the jurisdiction of the courts”*.
42. In that regard, Ireland submits that, where there is a sufficient mechanism allowing for a court, where it has before it the necessary legal and factual elements for the task, to review unfair commercial practices in the context of mortgage enforcement, it is not necessary to provide that this review ought to proceed in those mortgage enforcement proceedings, provided, however, that such other review as may occur may not be rendered nugatory by the determination of those mortgage enforcement proceedings.

Question Two

43. By Question Two the Referring Court asks the following:

“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 ... is contrary to Article 11 of that directive?”

44. Ireland submits that the answer to Question Two is “no”; 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 is not contrary to the Directive. In Ireland’s view, if, to the contrary, this question were to be answered “yes”, it would have the effect of giving a mandatory and legal status to a code of conduct contemplated by Article 10 of the Directive, which would run counter to the other relevant provisions in the directive.
45. Further, it would have considerable, and unmanageable, implications for the administration of justice and the role of the Courts as arbiters of

disputes, and when entertaining an application for possession, as it would require the Courts to investigate issues of fairness or non-compliance generally with a code of conduct as referred to in Article 10 of the Directive.

46. Firstly, Article 2 of the Directive expressly defines a 'code of conduct' as non-binding and not having the status or force of law, being *"an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State"*. While it is the case that traders may agree to be bound by such a code, there is a significant distinction between that point of fact and requiring a Court to ensure, in all cases, compliance with such a code where it is expressly defined as a non-binding, non-legal provision.
47. Second, the Directive draws a further distinction between the nature and content of a non-binding code of conduct, on the one hand, and harmonised listed unfair commercial practices, on the other, which are listed at Annex I to the Directive.
48. Third, the Directive provides that it is, in the first instance, for the owner of the code to comply with it and, where appropriate, to provide alternative remedies to ensure such compliance, in addition to court or administrative proceedings referred to in Article 11 of the Directive, again, setting apart codes of conduct from the review and assessment, by a national court, of the norms of unfair commercial practices set out in, for example, in Annex I to the Directive.
49. Further, at Article 11, sub-paragraph 4(b), the Directive makes clear that Member States have a discretion as to what status they ought to give such codes and what, if any, legal facilities ought to be available to ensure their compliance, providing that it shall be *"for each Member State to decide ... whether these legal facilities may be directed against a code owner where the relevant code promotes non-compliance with legal requirements."*
50. Whether a Member State chooses to do so is entirely within the lawful exercise of its discretion. That the Directive does not mandate that a code have such a legal status and require particular treatment and adjudication by a court, but, instead, would require being elevated to such status by specific national legislation and provisions ensuring that to be the case is

consistent with the view of such consumer codes adopted by the Irish courts.

51. For example, in his judgment in the Supreme Court in the proceedings in *Irish Life and Permanent PLC v Dunne and Dunphy* [2015] IEHC 46, Mr Justice Clarke, when considering the status of the Code of Conduct on Mortgage arrears (issued under s.117 of the Central Bank Act 1989) held, expressly, that the policy of the relevant legislation does not require the courts to assess in detail the compliance or otherwise by a regulated financial institution with the code. Mr Justice Clarke continued: *"If the Oireachtas [Irish parliament] had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the Court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law"* (at paragraph 5.20).
52. In addition, where such legal facilities may be provided, it appears that a Member State is required to provide specific remedies in relation to the unfair commercial practices, but this does not appear to be extended to codes of conduct (see, in particular, the requirements that Member States confer upon courts and tribunals powers enabling them to make particular orders, such as cessation of unfair commercial practices under Article 11(2) of the Directive).
53. Finally, and in the alternative to the above, even if a national court were to take account of, and review, the content of such a code vis-à-vis the commercial practices undertaken by the seller in question, there is a distinction between adjudicating upon whether or not there has been compliance, and ensuring actual compliance. Ireland submits that requiring a national court to ensure compliance is beyond the scope of Article 11 of the Directive.

Question Three

54. By Question Three the Referring Court asks as follows:

"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 Practice?”

55. Again, Ireland submits that the answer to this question is “no”: Article 11 does not preclude national legislation, such as that at issue in these proceedings, which does not allow a consumer, during mortgage enforcement proceedings, to request compliance with a code of conduct, in circumstances such as the present.
56. Ireland submits that this follows ineluctably from its response to Question Two, and relies upon its submissions in that regard.

CONCLUSION

57. In conclusion, Ireland invites the Court to respond to the questions posed by the Juzgado de Primera Instancia N.º 5 de Cartagena as follows:

Question One

National legislation, such as that in the current proceedings, which does not provide for the review by the courts, of their own motion or even at the request of one of the parties, of unfair commercial practices, is not contrary to Article 11 of Directive 2005/29, in circumstances where the review of unfair commercial practices may be raised in alternative proceedings. Further, any obligation in any case for a court to provide for such a review of its own motion only arises where a court has before it the legal and factual elements necessary to undertake that task.

Question Two

National legislation, such as the Spanish law in question which does not ensure actual compliance with the relevant code of conduct if the party seeking enforcement of a debt decides not to apply that code, is not contrary to Article 11 of Directive 2005/29.

Question Three

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 Practice) is not precluded by Article 11 of Directive 2005/29.

Dated this 4th day of July 2017

Signed: Juliana Quaney
On behalf of Maria Browne, Chief State Solicitor
Agent for Ireland

Signed: Tony Joyce
On behalf of Maria Browne, Chief State Solicitor
Agent for Ireland