

**Case C-385/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

12 August 2020

**Referring court:**

Juzgado de Primera Instancia No 49 (Court of First Instance No 49),  
Barcelona (Spain)

**Date of the decision to refer:**

7 July 2020

**Applicants:**

EL

TP

**Defendant:**

Caixabank, S. A.

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**Subject matter of the main proceedings**

Unfair terms in contracts between a seller or supplier and a consumer – Judicial declaration of nullity – Costs of proceedings – Taxation of costs

**Subject matter and legal basis of the request for a preliminary ruling**

Compatibility of national legislation and case-law on taxation of procedural costs with Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The legal basis is Article 267 TFEU.

**Questions referred for a preliminary ruling**

1. Does the interpretation of Articles 251, 394(3) and 411 of the L[ey de]E[njuiciamiento]C[ivil] (Law on Civil Procedure) set out in the reasoned

decision of 1 October 2019, which equates the amount at issue in the proceedings with the financial interest of the dispute and, consequently, leads to a reduction of the fees that the consumer has paid his or her lawyer, on the basis of a fixed sum (EUR 18 000), established in law only in respect of an amount that cannot be estimated and not an amount that is unspecified, conflict with Articles 6(1) and 7(1) of the Directive, since it cannot restore the consumer to the factual and legal position which he or she would have been in if that term had not existed, even though there is, in the consumer's favour, a judicial declaration that the term is unfair, and since it does not remove an unreasonable procedural requirement relating to a limitation of costs where such removal would ensure that the consumer has the most suitable and effective means of legitimately exercising his or her rights?

2. Does Article 394(3) of the LEC in itself conflict with Articles 6(1) and 7(1) of the Directive and make it impossible or excessively difficult to exercise in court the rights which the Directive grants to consumers, since the limitation which that article imposes on consumers, in the sense that they have to bear a portion of their own procedural costs, means that the consumer cannot be restored to the factual and legal position which he or she would have been in if that term had not existed, even though there is, in the consumer's favour, a judicial declaration that the term is unfair, and since it does not remove an unreasonable procedural requirement relating to a limitation of costs where such removal would ensure that the consumer has the most suitable and effective means of legitimately exercising his or her rights?

#### **Provisions of EU law relied on**

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Twenty-fourth recital, Article 6(1) and Article 7(1).

Judgments of the Court of Justice of 9 December 2003 (C-129/00, EU:C:2003:656); of 5 December 2013 (C-413/12, EU:C:2013:800, paragraph 30); of 21 December 2016 (C-154/15, EU:C:2016:980, paragraphs 53 to 56) and 61; and of 13 September 2018 (C-176/17, EU:C:2018:711).

#### **Provisions of national law relied on**

Law on Civil Procedure (Ley de Enjuiciamiento Civil):

‘Article 243. Conduct of the taxation of costs

1. In all types and at all stages of proceedings, the taxation of costs shall be conducted by the registrar of the court which was seised of the trial or appeal, respectively, or, as the case may be, by the registrar responsible for enforcement.

...

The registrar shall reduce the amount of fees charged by lawyers and other professional practitioners who are not subject to a scale of costs or disbursements where the amount claimed exceeds the limit referred to in Article 394(3) and the party ordered to pay the costs has not been found to be a vexatious litigant.’

‘Article 394. Order for costs at first instance.

1. In declaratory proceedings, where a party has had all his claims dismissed, that party shall be ordered to pay the costs of the first-instance proceedings unless the court, giving reasons for doing so, finds that the case raised serious doubts on matters of fact or law.

...

3. Where, under paragraph 1 of this article, the unsuccessful party has been ordered to pay the costs, that party shall only be required to pay, of the portion of costs corresponding to lawyers and other professional practitioners who are not subject to a scale of costs or disbursements, a total sum which does not exceed one third of the amount at issue in the proceedings, in respect of each of the parties who obtained such an order; for those purposes alone, claims whose amount cannot be estimated shall be valued at EUR 18 000 unless the court orders otherwise on account of the complexity of the case.’

‘Article 251. Rules for calculating the amount at issue.

The amount at issue shall be fixed on the basis of the financial interest of the claim, which shall be calculated in accordance with the following rules:

1. If a specified sum of money is claimed, the amount of the claim shall be represented by that sum, and if no sum is specified, even in relative terms, the claim shall be deemed to be for an unspecified amount.

...

8. In proceedings concerning the existence, validity or effectiveness of a debt instrument, their value shall be calculated in respect of the total amount owed, even if that amount is payable in instalments. That rule of valuation shall be applicable in proceedings concerning the creation, amendment or extinguishment of a debt instrument or of an individual debt, provided that another rule laid down in this article does not apply.’

‘Article 253. Expression of the amount of the claim in the application.

...

3. If the applicant is unable to calculate the amount of the claim, even in relative terms, because the subject of the action has no financial interest since it is not possible to calculate that interest in accordance with any of the statutory rules for

determination of the amount of the claim, or because, although an applicable calculation rule exists, that amount could not be determined at the time when the action was lodged, the action shall be conducted in accordance with the rules applicable to ordinary proceedings.’

‘Article 411. Permanence of jurisdiction.

Any alterations which occur after the commencement of proceedings in relation to the domicile of the parties, the location of the property in dispute or the subject matter of the action shall not alter jurisdiction and competence, which shall be determined in accordance with what is established at the outset of pending proceedings.’

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 EL and TP (‘the applicants’) brought an action before the referring court seeking a declaration of partial nullity of the deed of loan secured by a mortgage which they had concluded with Caixabank, S. A. (‘the defendant’).
- 2 In the section of the application relating to the amount of the claim, the applicants stated that that amount was unspecified, in accordance with Article 253 of the Law on Civil Procedure (Ley de Enjuiciamiento Civil; ‘LEC’). The registrar stated the following in the reasoned decision allowing the action to proceed: ‘with respect to the type of proceedings, the applicant, in compliance with Article 253(2) LEC, has stated that the value of the claim is unspecified, from which it follows that the proceedings must be conducted in accordance with the ordinary procedure, as provided for in Article 249 LEC’.
- 3 On 29 November 2018, the referring court gave judgment in which it ruled that the mortgage loan deed was partially void as regards the clauses relating to foreign currency, and ordered the defendant to bear the costs.
- 4 Following that judicial declaration of nullity on grounds of unfairness, an ancillary procedure was commenced for taxation of the costs of the proceedings; that procedure was conducted by the registrar. By reasoned decision of 1 October 2019, the registrar allowed the petition for taxation of costs lodged by the defendant. The reasoned decision found that the amount to be used as the basis for calculating the proportion of the fees charged by the applicant’s lawyer which had to be borne by the defendant was EUR 30 000, and that the amount to be used as the basis for calculating the court agent’s fees was EUR 18 000. As regards the applicant’s lawyer’s fees, those amounts are derived from guideline 15 of the guidelines of the Ilustre Colegio de la Abogacía de Barcelona (Barcelona Bar Association) relating to cases involving an unspecified amount, and, as regards the court agent, from the provisions of Article 394(3) of the LEC.
- 5 The applicants appealed to the referring court for a review of the reasoned decision of 1 October 2019, arguing that the national legislation and case-law on

which that decision to tax the costs was based are incompatible with the EU legislation on unfair terms.

- 6 Since the referring court has uncertainties concerning the resolution of that appeal, it decided to stay the proceedings and to refer the present questions to the Court of Justice for a preliminary ruling.

### **Essential arguments of the parties to the main proceedings**

- 7 The applicants submit that this request for a preliminary ruling is crucially important for ensuring the protection of consumers. In their opinion, the reduction of qualifying costs on the basis of the financial interest of the dispute (whether specified or unspecified from the outset) contravenes the principle of effectiveness, in so far as it places a considerable onus on the consumer in relation to costs, and also breaches the principle that unfair terms are non-binding, laid down in Article 6(1) of Directive 93/13/EEC, in that it enables a consumer to be required to pay costs derived from proceedings in which a term has been found to be unfair. The applicants refer to paragraph 61 of the judgment of the Court of Justice of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, EU:C:2016:980), which states that the consumer must be unaffected, which involves ‘restoring the consumer to the legal and factual situation that he would have been in if that term had not existed.’
- 8 Moreover, the applicants contend that that reduction could create discrimination vis-à-vis other consumers who are unaffected in proceedings in which a term is held to be void on the grounds of unfairness and vis-à-vis financial institutions, which in Spain have historically quantified their costs on the basis of the total value of the debt in mortgage enforcement proceedings. In relation to financial institutions, the applicants submit that that imbalance between the parties could amount to a breach of the principle of equivalence, according to which similar domestic legal situations (in this case, mortgage enforcement proceedings instigated by financial institutions) must be governed by equivalent rules which do not result in a less favourable situation, in this case, for the consumer. Lastly, the applicants argue that, rather than having a deterrent effect, a reduction of costs for the seller or supplier who drafted the unfair terms may encourage the inclusion of unfair terms in that seller or supplier’s contracts and subsequent mass litigation involving those terms.
- 9 The defendant submits that no request for a preliminary ruling should be made. The defendant argues that no doubts exist regarding the interpretation of a particular provision of EU law and that the rules governing the specific amount of procedural costs are clearly laid down in national law. The defendant further argues that the Court of Justice does not have jurisdiction to settle issues relating to procedural costs.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

- 10 First, the referring court states that, according to the case-law of the Tribunal Constitucional (Constitutional Court, Spain) and the Tribunal Supremo (Supreme Court, Spain), which was followed by the reasoned decision of the registrar of 1 October 2019, the amount at issue in the proceedings must be stipulated in the application, in other words at the time when proceedings are commenced. Once the amount at issue has been stipulated, provided that there is no disagreement between the parties, that element of the proceedings becomes permanent or set in stone and applies without any alteration in the other stages and at the other levels of jurisdiction; the parties are not permitted to alter the amount, which was definitively fixed at the commencement of the proceedings, by lodging appeals or by challenging the taxation of costs. The referring court has doubts as to the compatibility of that case-law with EU law.
- 11 In that connection, the referring court asks, where the applicant has indicated the amount of the claim as unspecified and this is not contested by the defendant, whether the fact that this is treated as constituting the applicant's own act which precludes the applicant from establishing the financial value of the claim during the procedure for challenging the taxation of costs, even though the financial interest of the claim is the criterion for fixing the amount at issue in the proceedings (Article 251 of LEC), infringes Articles 6(1) and 7(1) of Directive 93/13/EEC, since it is not possible to restore the consumer to the factual and legal position which he or she would have been in if that term had not existed, even though there is, in the consumer's favour, a judicial declaration that the term is unfair, and since it does not remove an unreasonable procedural requirement relating to a limitation of costs where such removal would ensure that the consumer had the most suitable and effective means of legitimately exercising his or her rights.
- 12 Second, the referring court has doubts concerning the compatibility of Article 394(3) of the LEC with Articles 6(1) and 7(1) of Directive 93/13/EEC. The referring court asks whether or not the reduction of costs permitted by that national provision is compatible with EU law, since such a reduction limits the consumer's scope for recovery of the costs of proceedings, which are derived from the unlawful and unfair conduct of the seller or supplier. The referring court requests clarification of whether that national provision is compatible with the principle of effectiveness, in other words, whether it makes it impossible or excessively difficult to exercise in court the rights which EU law grants to consumers, since the limitation which that provision imposes on consumers, whose rights have been recognised by the courts, means that consumers have to bear a portion of the financial costs of proceedings resulting from the unlawful conduct of a seller or supplier, which has also been recognised by the courts, meaning that consumers have to bear a share of their own procedural costs, something that does not appear to be reasonable.