



## PRESS RELEASE No 125/23

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Judgment of the Court in Case C-265/22 | Banco Santander (Reference to an official index)

### **Variable interest rates based on Mortgage Loan Reference Indices (IRPHs) in Spain: consumers must be sufficiently informed of the method for calculating such indices**

*It is for the national courts to check the significance and accessibility of information from the Bank of Spain concerning the level of reference indices in relation to the market rate and concerning the need to apply a negative margin in order to align the interest rate with the market rate*

Two consumers concluded with the predecessor in law of Banco Santander a variable rate mortgage loan agreement. According to a term of that agreement ('the term at issue'), a new rate of interest is set annually in relation to a 'reference rate', namely the IRPH of credit institutions, increased by 0.20 percentage points, or to a 'substitute reference rate', namely the IRPH of banks, increased by 0.50 percentage points.<sup>1</sup> It is also stated in that term that those two rates are described in a notice of the Bank of Spain for credit institutions dating from 1990.

The consumers brought an action before the Court of First Instance No 17, Palma de Mallorca (Spain) seeking a declaration that the term at issue is null and void owing to its unfair nature and an order that Banco Santander pay compensation for the damage which they claim to have suffered as a result of the application of that term.

The consumers consider it misleading to refer, for the annual review of the interest rate, to the IRPHs, while providing for a small increase in those rates. According to the consumers, such a presentation would encourage prospective borrowers to enter into that loan rather than another where the rate can be revised by reference to the average Euro Interbank Offer Rate ('the Euribor index'), whereas with a much higher mark-up, which may even be 2%, a reference to the Euribor index would result in the application of a lower revised interest rate. That follows from the fact that, unlike the Euribor index, the IRPHs are calculated on the basis of rates which take fees into account.

The consumers also submit that the term at issue is null and void as, given that the term designated an IRPH as the reference rate, the term should have provided for applying a negative margin, as required by another 1994 notice to credit establishments, and not a positive margin.

Banco Santander maintains, in particular, that the term at issue was individually negotiated and that it is lawful in principle, since the IRPHs are official and public indices, and therefore accessible to consumers.

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<sup>1</sup> The IRPH of credit institutions is defined in the agreement as the simple average of the average interest rates weighted by the principal amounts of mortgage-secured loan transactions of a term equal to or greater than three years, concluded for the purposes of acquiring a residential property on the private housing market, which were initiated or renewed by all entities (namely banks, savings banks and mortgage credit companies) in the month to which the index relates, the rate taken for reference being the last of the average rates published by the Bank of Spain in the Official Journal of the Spanish State prior to the start of each new interest period and within the three calendar months preceding that period. The substitute reference rate, which applies where the reference rate has not been published, is defined in similar terms.

The Spanish court makes clear that, even though the preamble to the 1994 notice does not have normative value, it shows the need, in the Bank of Spain's view, for the marketing of products including a reference to an IRPH to be accompanied by the application of a negative margin. The Spanish court considers that the lack of information given to borrowers as regards the content of the preamble to the 1994 notice, and therefore the characteristics of the IRPHs, but also, more generally, the respective levels of the IRPHs and the market rate, might by contrary to good faith and give rise to an imbalance to the detriment of consumers, warranting the classification of the term at issue as unfair. The Spanish court considers furthermore that the lack of information regarding the content of the preamble to the 1994 notice, combined with the application of a positive margin slightly lower than those applied for loans the rates of which are set by reference to the Euribor index, could constitute a commercial ploy, intended to give the impression that the interest burden will be more favourable. In the Spanish court's view, the communication to the prospective borrowers of the information set out in the preamble would enable the borrowers to take an informed decision. The Spanish court therefore asks the Court of Justice to interpret in that regard the directive on unfair terms.<sup>2</sup>

In today's judgment, the Court of Justice recalls that **it is for the national court to determine whether a particular contractual term is unfair in the circumstances of the case**. However, **the Court** provides the national court with **guidance** which the national court must take into account.

The Court finds that **in order to assess the transparency and potential unfairness of the term in question, the content of the information contained in the 1994 notice — indicating the need to apply to the reference index, in view of its method of calculation, a negative margin in order to align the interest rate with the market rate — is relevant. It is also relevant whether that information is sufficiently accessible for an average consumer.**

Concerning **the requirement for transparency**, the Court notes that, in the present case, first, the reference index at issue was established by the 1990 notice, which was the subject of an official publication. Secondly, it is stated in the term at issue that that index is described in an annex to that notice and that it is from the Bank of Spain. **It is for the Spanish court to satisfy itself that the information thus provided was sufficient to enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, actually to become aware of the method of calculating the reference index.**

**The Spanish court should ascertain the significance, for consumers, of the information in the preamble to the 1994 notice**, in order to be able to correctly assess the economic consequences of the conclusion of the mortgage loan agreement at issue. **That information, of which consumers were not informed, may be useful for the consumer given that the Bank of Spain considered it appropriate to draw the attention of credit institutions to the level of the IRPHs in relation to the market rate and the need to apply a negative margin in order to align them with that rate.**

The Court of Justice points out furthermore that, although that information was published in the Official Journal of the Spanish State, the information is contained in the preamble to the 1994 notice and not in the 1990 notice, to which the term at issue referred. **The national court must also therefore determine whether obtaining that information required the performance of a step which, falling within the scope of legal research, could not reasonably be expected of an average consumer.**

As regards **the possible unfairness of the term at issue**, Banco Santander must first of all prove that, as it maintains, **the term at issue was individually negotiated**. If that is not the case, the national court must assess, first, **the possible failure to observe the requirement of good faith** and, secondly, **the possible existence of a significant imbalance to the detriment of the consumer**, by analysing the contract while bearing in mind the guidance provided by the Court of Justice in its case-law.

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<sup>2</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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