



Press and Information

Court of Justice of the European Union

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Judgment in Case C-618/10

Banco Español de Crédito SA v Joaquín Calderón Camino

A national court cannot revise the content of an unfair term in a contract concluded between a seller or supplier and a consumer

Where it finds that a term is unfair, the national court is required solely to set that term aside

In Spain, an application may be made to a court for an order for payment of an outstanding and payable pecuniary debt, not exceeding €30 000, where proper evidence as to the amount of that debt is provided. In the case where such an application is brought in accordance with those requirements, the debtor must pay his or her debt or may object to that payment within a period of 20 days, in which case a decision on the matter is taken within the framework of ordinary civil proceedings. Spanish legislation does not, however, authorise the courts before which an application for an order for payment had been brought to hold, of their own motion, that unfair terms contained in a contract concluded between a seller or supplier and a consumer are void. Thus, an examination to determine whether the terms in such a contract are unfair is permissible only in the case where the consumer objects to payment.

Furthermore, where a Spanish court is authorised to find that an unfair term included in a consumer contract is void, the national legislation allows it to modify the contract by revising the content of that term in such a way as to remove its unfair aspects.

In May 2007, Mr Calderón Camino entered into a loan agreement for the sum of €30 000 with the Spanish bank Banesto for the purchase of a car. The nominal interest rate was fixed at 7.950%, the APR (Annual Percentage Rate of Charge) at 8.890% and the rate of interest on late payments at 29%.

Although the term of the agreement was fixed at 5 June 2014, Banesto took the view that it had expired before that date because, in September 2008, reimbursement of 7 monthly repayments had not yet been made. Thus, on 8 January 2009, the bank submitted before the Juzgado de Primera Instancia No 2 de Sabadell (Spain) an application for an order for payment in the amount of €29 381.95, corresponding to the unpaid monthly repayments plus the interest agreed upon by the parties and costs.

That court issued an order in which it held, of its own motion, that the term relating to interest for late payment was void on the ground that it was unfair. It also reduced the rate of interest for late payment from 29% to 19% and ordered Banesto to recalculate the amount of interest.

The Audiencia Provincial de Barcelona (Spain), before which the appeal against that order has been brought, asks the Court of Justice, first, whether the Directive on unfair terms¹ precludes legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for order for payment has been brought to assess, of its own motion, whether a term included in a consumer contract is unfair. Secondly, the Spanish court seeks to ascertain whether the Spanish legislation allowing courts not only to set aside but also to revise the content of unfair terms is compatible with that directive.

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

In its judgment delivered today, first, the Court holds that the national court is required to assess, of its own motion, whether a contractual term in a consumer contract is unfair, where it has available to it the legal and factual elements necessary for that task. The Court notes that the Spanish legislation does not allow a court before which an application for an order for payment has been brought to assess of its own motion – even though it already has all the legal and factual elements necessary for that task available to it – whether terms contained in a contract concluded between a seller or supplier and a consumer are unfair. In those circumstances, the Court takes the view that such a procedural arrangement is liable to undermine the effectiveness of the protection which the Directive on unfair terms intended to confer on consumers.

In the light of the order for payment procedure, its progress and its special features, viewed as a whole, there is a significant risk that the consumers concerned will not lodge the objection required for a finding that an unfair term is void. Certain factors are liable to discourage consumers from submitting an objection (the particularly short period provided for such an objection, the costs which legal proceedings would entail and the amount of such costs in relation to the amount of the disputed debt, lack of knowledge of their rights, the incomplete nature of the information available to them on account of the limited content of the application for the order for payment submitted by the sellers or suppliers). Thus, in order to deprive consumers of the protection intended by the Directive, it is sufficient for sellers or suppliers to initiate an order for payment procedure instead of an ordinary civil procedure.

In those circumstances, the Court concludes that the Spanish procedural legislation is not compatible with the Directive in so far as it makes impossible or excessively difficult, in proceedings initiated by sellers or suppliers against consumers, the application of the protection which the Directive intends to confer on those consumers.

Following that clarification, the Court points out, second, that, according to the Directive, an unfair term included in a contract concluded between a seller or supplier and a consumer does not bind the latter and that the contract containing such a clause remains binding for the parties on the same terms if it is capable of continuing in existence without that unfair term. The Court accordingly holds that the Directive precludes the Spanish legislation in so far as that legislation allows a national court, in the case where it finds that an unfair term in a contract is void, to revise the content of that term.

The Court takes the view that such a power, were it granted to the national court, would be liable to eliminate the deterrent effect on sellers or suppliers of the straightforward non-application of the unfair terms vis-à-vis consumers. For that reason, that power would ensure less effective protection of consumers than that resulting from non-application of those terms. If it were open to the national court to revise the content of unfair terms, sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could, nevertheless, be modified by the court in such a way as to safeguard their interests.

Consequently, where they find that there is an unfair term, national courts are required solely to exclude the application of such a term in order that it does not produce binding effects with regard to the consumer, without having the power to revise the content of that term. The contract containing the term must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible.

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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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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Press contact: Christopher Fretwell ☎ (+352) 4303 3355

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