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Court of Justice of the European Union

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Judgment in Case C-415/11
Mohamed Aziz v Catalunyacaixa

Spanish legislation infringes EU law to the extent that it precludes the court which has jurisdiction to declare unfair a term of a loan agreement relating to immovable property from staying the mortgage enforcement proceedings initiated separately.

Spanish legislation lists the grounds, which are very limited, upon which a debtor may object to mortgage enforcement proceedings. Those grounds do not include the existence of an unfair term in the mortgage loan agreement. Thus, that fact can be relied upon only in separate declaratory proceedings which do not have the effect of staying the mortgage enforcement proceedings. In addition, in the Spanish enforcement proceedings, the final vesting of immovable property in a third party – such as a bank – is, in principle, irreversible. Consequently, if the court hearing the declaratory proceedings declares a term of a loan agreement unfair and accordingly annuls the mortgage enforcement proceedings after enforcement has taken place, that judgment can enable that consumer to obtain only *subsequent* protection of a purely compensatory nature, the person evicted being unable to recover ownership of his property.

In July 2007, Mr Aziz, a Moroccan national residing in Spain, concluded with the bank Catalunyacaixa a loan agreement to the value of €138,000 secured by a mortgage over his family home. He stopped paying his instalments with effect from June 2008. After having called upon him to pay without success, the bank initiated enforcement proceedings against him. When Mr Aziz failed to appear, execution was ordered. An auction of his immovable property was arranged, but no bid was made, with the result that, in accordance with the Spanish legislation, ownership of the property was vested in the bank at 50% of its value. On 20 January 2011, Mr Aziz was evicted from his home. Shortly beforehand, he applied for a declaration seeking annulment of a term of the mortgage loan agreement, on the ground that it was unfair and, accordingly, of the mortgage enforcement proceedings.

In that context, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) before which the case was brought, decided to ask the Court of Justice, first, about the compatibility of Spanish law with the Unfair Terms in Consumer Contracts Directive¹, since Spanish law makes it extremely difficult for the court to ensure effective protection of the consumer and, second, about the essential characteristics of the concept of ‘unfair term’ within the meaning of that directive.

In today’s judgment, the Court answers, first, **that the Unfair Terms in Consumer Contracts Directive precludes national legislation, such as the Spanish legislation at issue, which does not allow the court hearing the declaratory proceedings – that is, the proceedings seeking a declaration that a term is unfair – to adopt interim measures, in particular, the staying of the enforcement proceedings, where they are necessary to guarantee the full effectiveness of its final decision.**

As a preliminary point, the court recalls that, in the absence of harmonisation of the national mechanisms for enforcement, the grounds of opposition allowed in mortgage enforcement proceedings and the powers conferred on the court hearing the declaratory proceedings are a

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

matter for the national legal order of each Member State. However, that legislation may not be any less favourable than that governing similar situations subject to domestic law (principle of equivalence) and it must not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness).

With regard to the latter principle, the Court considers that the Spanish procedural system impairs the effectiveness of the protection which the directive seeks to achieve. That is so in all cases where enforcement is carried out in respect of the property before the court hearing the declaratory proceedings declares the contractual term on which the mortgage is based unfair and, accordingly, annuls the enforcement proceedings. **Since the court hearing the declaratory proceedings is precluded from staying the enforcement proceedings, that declaration of invalidity allows the consumer to obtain only subsequent protection of a purely compensatory nature. That compensation is thus incomplete and insufficient, and would not constitute either an adequate or effective means of preventing the continued use of those terms. That applies all the more strongly where, as in this case, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of the home.** It would thus be sufficient for sellers or suppliers to initiate mortgage enforcement proceedings in order to deprive consumers of the protection intended by the directive. The Court therefore holds that the Spanish legislation does not comply with the principle of effectiveness, in so far as it makes impossible or excessively difficult, in mortgage enforcement proceedings initiated by sellers or suppliers against consumer defendants, to apply the protection which the directive confers on those consumers.

Second, when examining the concept of the unfair term², the Court states that the ‘significant imbalance’ arising from such a term must be assessed taking into account the rules which would apply under national law in the absence of an agreement by the parties in that regard. To that end, an assessment of the legal situation of the consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out. In order to determine whether the imbalance arises ‘contrary to the requirement of good faith’, it must be assessed whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.

In the light of those criteria, it is for the national court to assess whether the **default interest clause** inserted in the contract signed by Mr Aziz is unfair. That clause provides for annual default interest of 18.75%, automatically applicable to sums not paid when due, without the need for any notice. The national court must in particular compare that rate with the statutory interest rate³, and determine whether it is appropriate for securing the attainment of the objectives pursued in Spain and does not go beyond what is necessary to achieve them.

Equally, the **acceleration clause** of the contract concerned allows the bank to call in the totality of the loan after a single failure to meet a due payment of principal or interest. The national court must in particular assess whether that right is conditional upon the non-compliance by the consumer with an essential obligation of the contract and whether such non-compliance is sufficiently serious in the light of the term and amount of the loan.

Finally, the **clause on unilateral quantification of the unpaid debt** stipulates that the bank may immediately quantify that amount in order to initiate mortgage enforcement proceedings. The national court must assess whether and, if appropriate, to what extent, that term makes it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence.

² According to the directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

³ In Spain, the statutory interest rate in 2007 was 5%.

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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