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Court of Justice of the European Union

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Judgment in Case C-125/18

Marc Gómez del Moral Guasch v Bankia SA

The Spanish courts must verify that the contractual term in mortgage loan agreements providing for the application of a variable interest rate based on the index of the Spanish savings banks is plain and intelligible

If they find that that term is unfair, they may, in order to protect the consumer from particularly unfavourable consequences liable to arise from the annulment of the loan agreement, replace that index with a supplementary index provided for by Spanish law

In its judgment of 3 March 2020, **Gómez del Moral Guasch (C-125/18)**, the Court, sitting as the Grand Chamber, held that **a contractual term in a mortgage loan agreement concluded between a consumer and a seller or supplier, pursuant to which the interest rate to be paid by the consumer varies according to the reference index based on the mortgage loans granted by the Spanish savings banks ('the reference index') – that index being provided for by Spanish law – falls within the scope of the Unfair Terms Directive.**¹ Indeed, **that term does not reflect mandatory statutory or regulatory provisions within the meaning of Article 1(2) of that directive.** The Court also stated that **the Spanish courts must verify that the term is plain and intelligible, irrespective of whether or not Spanish law has implemented the option open to Member States, under Article 4(2) of the directive, of providing that the assessment of the unfairness of a term is not to relate, inter alia, to the definition of the main subject matter of the contract. If those courts find that such a term is unfair, they may, in order to protect the consumer from particularly unfavourable consequences liable to arise from the annulment of the loan agreement, replace that index with a supplementary index provided for by Spanish law.**

That judgment concerns a request for a preliminary ruling from the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain). Mr Marc Gómez del Moral Guasch brought an action before that court concerning the alleged unfairness of a contractual term governing the variable ordinary and remunerative interest rate in the mortgage loan agreement he had concluded with the banking institution Bankia SA. Under that term, the interest rate to be paid by the consumer varies according to the reference index. That reference index was provided for by the national legislation and was able to be applied to mortgage loans by credit institutions. However, the Spanish court states that the indexing of the variable interest rates calculated on the basis of the reference index was less favourable than that calculated on the basis of the average Euro Interbank Offered Rate (Euribor), which was used in 90% of mortgage loans taken out in Spain and involved an additional cost of around € 18 000 to € 21 000 per loan.

In the first place, the Court recalled that terms reflecting mandatory statutory or regulatory provisions are excluded from the scope of the directive.² Nevertheless, the Court observed that, subject to verification by the Spanish court, **the national legislation applicable in the present case did not require, for variable-interest-rate loans, the use of an official reference index, but merely established the conditions to be satisfied by 'the reference indices or rates' in order for them to be able to be used by credit institutions.** Therefore, the Court concluded that a contractual term in a mortgage loan agreement, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation

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

² Article 1(2) of the directive.

that may be applied by credit institutions to mortgage loans, falls within the scope of the directive, where that national legislation does not provide either for the mandatory application of that index independently of the choice of the parties to the contract or for the supplementary application thereof in the absence of other arrangements established by those parties.

In the second place, the Court looked at the powers of the national courts when verifying the transparency of a contractual term relating to the main subject matter of a contract. Article 4(2) of the directive states that assessment of the unfair nature of the terms is not to relate, inter alia, to the definition of the main subject matter of the contract, in so far as the terms are in plain, intelligible language.³ The Spanish court had doubts as to whether a national court could verify whether or not a term such as that at issue did meet the transparency requirement laid down in the directive even where that provision of the directive had not been transposed into domestic law. In that regard, the Court noted that contractual terms must always satisfy the requirement for plain, intelligible drafting.⁴ According to the Court, that requirement applies also when a contractual term falls within the scope of the abovementioned provision and even if the Member State concerned, in the present case Spain, has failed to transpose that provision into its legal system. It follows that **the courts of a Member State are always required to verify that a contractual term relating to the main subject matter of a contract is plain and intelligible.**

In the third place, the Court finds that, in order to comply with the transparency requirement for the purposes of the directive,⁵ **a contractual term setting a variable interest rate in a mortgage loan agreement not only must be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations.** Information that is particularly relevant in that regard include (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate in the official journal of the Member State concerned, and (ii) the provision by the seller or supplier of data relating to past fluctuations of the index on the basis of which that same rate is calculated.

In the fourth place, with regard to the powers of the national court relating to a possible finding that a contractual term is unfair within the meaning of the directive, the Court has recalled that it⁶ does not preclude the national court from removing, in accordance with the principles of contract law, an unfair term in a contract concluded between a seller or supplier by replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences. In general, the consequence of such an annulment of the contract would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts. In the present case, the Spanish legislature, since the conclusion of the loan agreement at issue, has introduced a 'replacement' index which, subject to verification by the referring court, is supplementary. In these circumstances, the Court considered that **the directive⁷ does not preclude the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with the replacement index applicable in the absence of an agreement to the contrary between the parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is**

³ Article 4(2) of the directive, which refers to terms relating the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other.

⁴ Article 5 of the directive.

⁵ Articles 4(2) and 5 of the directive.

⁶ Article 6(1) of the directive.

⁷ Articles 6(1) and 7(1) of the directive.

removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.

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.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

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