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Judgment of the Court in Case C-450/22 | Caixabank and Others (Review of Transparency in Collective Actions)

Mortgage loans: the transparency of ‘floor’ clauses may be reviewed in the context of a collective action concerning the entire banking system of a country

In its review, the court may take account of changes in the perception of the average consumer in relation to those clauses

‘Floor’ clauses are standard terms that were contained in variable-rate mortgage loan agreements concluded with consumers by a significant number of financial institutions in Spain. Those clauses set a threshold (or ‘floor’) below which the variable interest rate could not fall, even if the reference rate (generally the Euribor) fell below it. Several thousands of lawsuits were filed in Spain claiming the illegality of ‘floor’ clauses in the light of the Directive on unfair terms^{1 2}.

The Spanish association of users of banks, savings banks and insurance (**ADICAE**) brought a collective action **against 101 financial institutions operating in Spain**. ADICAE aims at stopping the use by those institutions of the ‘floor’ clauses and at obtaining the reimbursement of the payments made under them. Following calls in the national media, **820 consumers** supported the collective action.

Having lost the case twice, the banks appealed to the Spanish Supreme Court. That court has doubts about the suitability of the collective proceedings to carry out a review of the transparency of the ‘floor’ clauses in order to ascertain whether they are unfair, especially given the numerous consumers and financial institutions involved. It also raises the difficulty of using the criterion of the average consumer in order to review transparency in this case, because the ‘floor’ clauses were aimed at various specific categories of consumers.

The Court notes that **there is nothing in the directive to indicate that judicial review of transparency is excluded in the context of a collective action**. That **review** must simply be **adapted** to the specific features of collective actions and focus on the standard contractual and pre-contractual practices followed by the seller or supplier with regard to the average consumer.

The Court points out that, in the present case, **the first of the two conditions to which the bringing of a collective action against several sellers or suppliers is subject is satisfied**: the action is brought against **sellers or suppliers in the same economic sector** (in this case, that of credit institutions). **The organisational challenges** raised by the complexity of the case – arising from the considerable number of institutions and consumers – **must not undermine the effectiveness of the individual rights conferred on consumers by the directive**.

The Court notes that **the second condition also appears to be satisfied** because, subject to checks by the Spanish Supreme Court, **the ‘floor’ clauses in question seem similar**. The Court adds that such similarity cannot be excluded merely because the contracts in which they appear were concluded at different times or under different rules.

Next, the Court points out that **it is precisely the heterogeneity of the public concerned which makes it necessary to have recourse to the figure of the average consumer**, whose **overall perception** is relevant for the purposes of the review of transparency. However, **that perception may have changed**, with the result that the **Spanish Supreme Court will have to ascertain whether** the collapse in interest rates characteristic of the 2000s or the delivery of its judgment of 9 May 2013 finding that ‘floor’ clauses were not transparent could have led to a **change**, over time, **in the average consumer’s level of attention and information at the time when a mortgage loan agreement was concluded**.

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 EU law or the validity of an EU 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 and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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¹ [Council Directive 93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts (the directive).

² In a judgment of 9 May 2013, the Spanish Supreme Court held, in the context of a collective action brought by a consumer association against several banking institutions, that the ‘floor’ clauses examined were not transparent, because the consumers had not been informed properly about the economic and legal burden placed upon them. The clauses were declared void. However, in view of the serious economic repercussions that the retroactive restitution of overpayments would have on the banking sector, the Spanish Supreme Court decided to limit the temporal effects of the declaration of invalidity to overpayments made after the delivery of its judgment. However, the Court of Justice ruled that limitation incompatible with the Directive (see judgment of the Court of 21 December 2016, *Gutiérrez Naranjo and Others*, Joined Cases [C-154/15](#), [C-307/15](#) and [C-308/15](#); see also Press Release [No 144/16](#)).