Case C-6/24

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

4 January 2024

Referring court:

Juzgado de Primera Instancia de La Coruña (Spain)

Date of the decision to refer:

19 December 2023

Applicant:

Abanca Corporación Bancaria, S. A.

Defendant:

WE

Subject matter of the main proceedings

Order for payment procedure in which a credit institution seeks to recover a monetary debt arising from a personal or unsecured loan agreement concluded with a consumer.

Subject matter and legal basis of the request

Whether to classify as unfair in the light of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) an acceleration clause relied upon to pursue a debt recovery claim via the order for payment procedure. How to interpret the scope of the case-law of the Court of Justice to the effect that, in order to examine whether such a term is unfair, it is necessary to take into consideration whether national law provides for adequate and effective means enabling a consumer subject to such a term to remedy the effects of the loan being called in.

Questions referred for a preliminary ruling

1 Is an acceleration clause which provides for the possibility of calling off or preventing acceleration within a certain period of time consistent with Articles 3(1) and (7) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, or does such a right have to be recognised in a specific provision of national law?

2 If the answer to the foregoing question is in the affirmative, what period of time would be reasonable?

Provisions of European Union law relied on

Directive 93/13, Articles 3(1), 4(1) and 7(1).

Judgments of the Court of Justice referred to in the reasoning in the request for a preliminary ruling.

Provisions of national law relied on

A) Ley General para la Defensa de los Consumidores y Usuarios (General Law for the Protection of Consumers and Users)

Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Royal Legislative Decree 1/2007 of 16 November 2007 approving the recast text of the General Law for the Protection of Consumers and Users and other related laws (BOE No 287 of 30 November 2007, p. 49181), established the recast text of Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios (General Law 26/1984 of 19 July 1984 for the Protection of Consumers).

According to Article 82 of the recast text approved by Royal Legislative Decree 1/2007:

‘1. All stipulations not negotiated individually and all practices not expressly agreed which, contravening the requirements of good faith, give rise, in a manner detrimental to the consumer or user, to a significant imbalance in the rights and obligations of the parties arising under the contract, shall be regarded as unfair terms.

…

3. The unfairness of a contractual term shall be assessed by reference to the nature of the goods or services forming the subject of the contract and in the light

of all the circumstances present at the time of its conclusion, as well as all of the other terms of the contract or of another contract on which the former depends.

4. Notwithstanding the provisions of the foregoing paragraphs, terms shall always be regarded as unfair if, in accordance with the provisions of Articles 85 to 90, both inclusive, they:

a) make the contract dependent on the wishes of the seller or supplier;

b) limit the rights of the consumer or user;

c) determine that there is to be no contractual reciprocity;

d) require the consumer or user to provide disproportionate guarantees or improperly impose on him or her the burden of proof;

e) are disproportionate in relation to the formation and performance of the contract; or

f) contravene the rules on jurisdiction and applicable law'.

B) Ley de Enjuiciamiento Civil (Law of Civil Procedure) ('the LEC')

As regards the order for payment procedure, Article 815(4) of Ley 1/200[0], de 7 de enero, de Enjuiciamiento Civil (Law 1/2000 of 7 January 2000 on the Code of Civil Procedure) provides:

'If the claim for recovery of a debt is based on a contract between a business or professional person and a consumer or user, the Letrado de la Administración de Justicia (judicial officer), before making an order for payment, shall notify the court so that the latter may examine whether any of the terms on which the application is based, or which have determined the amount payable, are unfair.

The court shall examine of its own motion whether any of the terms on which the application is based, or which have determined the amount payable, may be considered to be unfair. If the court finds that any of the terms may be considered to be unfair, it shall hear the parties within 5 days. After hearing the parties, the court shall rule as appropriate by means of an order within the next 5 days […]'.

In accordance with **Article 693(3)** thereof, which sits within the chapter dealing with the specific features of enforcement against assets mortgaged or pledged as security, a decision to call in a debt payable in instalments may be 'called off', but only in the context of enforcement against assets mortgaged or pledged as security and provided that the asset consists of the debtor's habitual residence. That same article, by referring to Article 24 of Ley 5/2019, de 15 de marzo, reguladora de los

contratos de crédito inmobiliario (Law 5/2019 on real estate credit agreements), explains how to determine the level of unpaid debt above which acceleration may be triggered. Those legal rules on minimum thresholds are concerned only with mortgage loans and do not apply to personal or unsecured loans.

C) Judgments of the Tribunal Supremo (Spanish Supreme Court) ('the TS') referred to in the reasoning in the request for a preliminary ruling.

Succinct presentation of the facts and procedure in the main proceedings

3 On 5 July 2022, the parties to the dispute, a credit institution and a consumer, concluded a loan agreement in the amount of EUR 10 600, repayable in 60 monthly instalments of EUR 231.53 per instalment, comprising capital and repayment interest, and with a final maturity date of 1 August 2027.

4 That agreement contained general condition 13, which provides:

'TERMINATION: Failure to comply with the obligations entered into under this agreement shall entitle the INSTITUTION to terminate the loan early and demand the immediate repayment of the capital owed, both past due and not yet due, as well as the payment of any other amounts owed, in the following cases: 1. – for non-payment if the following conditions are cumulatively met: a) the BORROWER owes part of the loan capital or interest, b) the amount of the instalments due and unpaid is at least equal to: (i) three per cent of the amount of the capital granted, if the default occurs within the [first] half of the term of the loan, (ii) seven per cent of the amount of the capital granted if the default occurs within the second half of the term of the loan, c) the lender has issued against the BORROWER an order for payment giving him or her a period of at least one month to comply with that order and informing him or her that, if the order is not discharged, the lender will claim the full reimbursement owed on the loan …'.

5 Pursuant to that clause, the credit institution terminated the loan on 1 September 2023 and, by an application for an order for payment made to the referring court on 13 October 2023, claimed the following amounts under the following headings: a) capital not yet due: EUR 8 776.33 b); unpaid capital: EUR 1 148.20; and c) unpaid ordinary interest: EUR 702.85.

The essential arguments of the parties in the main proceedings

6 The credit institution notes that the period of one month given to the borrower to comply with the order for payment is a precondition of the decision to call in the loan and not an option available after that decision has been notified.

Succinct presentation of the reasoning in the request for a preliminary ruling

7 The referring court considers, on the basis of the case-law of the national and EU courts (TS judgments 273/2020 of 9 June 2020, 506/2008 of 4 June 2008, 788/2021 of 15 November 2021 and 331/2023 of 28 February 2023; and judgments of the Court of Justice of 14 March 2013, C-415/11, *Aziz*, and of 26 January 2017, C-421/14, *Banco Primus*) and Spanish legislation, that acceleration clauses are not in themselves invalid but may be unfair depending on how they are drafted. According to the referring court, the criteria established by case-law as determining whether such clauses are unfair are the same whether the loan in question is a loan secured by mortgage or a personal loan (such as that in this case).

8 Specifically, according to paragraph 73 of the judgment of the Court of Justice of 14 March 2013, *Aziz* (C-415/11), concerning a mortgage loan:

‘In particular, with regard, first, to the term concerning acceleration, in long-term contracts, on account of events of default occurring within a limited specific period, it is for the referring court to assess in particular … (i) whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an **obligation which is of essential importance** in the context of the contractual relationship in question, (ii) whether that right is provided for in cases in which such **non-compliance is sufficiently serious** in the light of the term and amount of the loan, (iii) whether that right **derogates from the relevant applicable rules** and (iv) whether **national law provides for adequate and effective means** enabling the consumer subject to such a term to remedy the effects of the loan being called in’.

9 Those criteria were confirmed by the judgment of the Court of Justice of 26 January 2017, *Banco Primus* (C-421/14), in which it was added, in paragraph 67 thereof, that the examination of the potential unfairness of a contract concluded between a seller or supplier and a consumer ‘must be carried out in the light [in particular] of all the circumstances surrounding the conclusion of the contract’.

10 For its part, the judgment of the Court of Justice of 8 December 2022, *Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest* (C-600/21), made it clear in paragraph 35 thereof that the abovementioned criteria for assessing the unfairness of a contractual term are not to be interpreted as being ‘cumulative or … alternative, but must be understood as forming part of all the circumstances surrounding the conclusion of the contract at issue, which the national court must examine’.

11 The referring court considers that the acceleration clause forming the subject of the dispute in the main proceedings satisfies conditions (i) non-compliance with an essential obligation – because repayment of the sum loaned represents the essential obligation of the loan agreement, and (ii) the non-compliance is

sufficiently serious – because the amount not paid on time exceeds a certain limit (that laid down in Article 24(1)(b)(ii) of Law 5/2019).

12 Conversely, the referring court entertains doubts as to another condition laid down by case-law, which is the requirement of the Court of Justice that mechanisms should exist to enable the consumer to avoid acceleration. Thus, the referring court considers that, in addition to the aforementioned conditions (i) and (ii), it is necessary to comply with condition (iv) that national law provide for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in, or, according to TS judgments 705/2015 of 23 December 2015 and 79/2016 of 18 February 2016, that the consumer be enabled to avoid the implementation of such a term through diligent remedial conduct.

13 In this regard, it notes that the Spanish legal system (Article 693(3) of the LEC) permits acceleration to be 'called off' only in very restricted circumstances (only in the procedure for enforcement against assets mortgaged or pledged as security and where the asset against which enforcement is executed is the borrower's habitual residence). Thus, the referring court considers that, in other circumstances – such as those in the present case, in which the loan agreement is not secured by mortgage and the amount owed is being claimed via order for payment proceedings – the requirement laid down by the Court of Justice with respect to the existence of means enabling the consumer to cancel or prevent the acceleration of the loan need not be complied with.

14 The referring court has doubts as to whether, in order to comply with the requirement as to the existence of such a 'remedy' and to ensure that the acceleration clause is not unfair, the possibility of calling off the acceleration must be provided for **in a provision of law** (the fact that the aforementioned judgments of the Court of Justice refer to '**national law**' might mean that such a remedy must be provided for by the Member States, in accordance with Article 7(1) of Directive 93/13), or whether it is sufficient for that remedy to be provided for **in the contract itself.** In other words, if the acceleration clause allows the consumer to cancel an acceleration that has already been notified or to prevent it from taking place, provided that he or she pays the amount owed within a given period, would this be sufficient to comply with the requirement laid down by case-law? If so, the referring court seeks guidance to what would be a reasonable period for making the payment.