

Case C-346/23

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:

1 June 2023

Referring court:

Tribunal Supremo (Spain)

Date of the decision to refer:

17 May 2023

Defendant/appellant:

Banco Santander SA, successor to Banco Banif SA

Applicant/respondent:

Asociación de Consumidores y Usuarios de Servicios Generales-Auge, on behalf of its members: Andrea and Alberto

Subject matter of the main proceedings

(Freedom of establishment – Freedom to provide services – Markets in financial instruments – Directive 2004/39/EC – Right of appeal – Standing to bring proceedings of consumer associations – Transactions that cannot be regarded as of common, ordinary and widespread use or consumption)

Exceptional appeal for breach of procedure and appeal on a point of law lodged with the Tribunal Supremo (Supreme Court, Spain) against a judgment of the Audiencia Provincial de Granada (Provincial Court, Granada, Spain) by which that court dismissed the appeal brought by Banco Banif, SA (now Banco Santander SA) against the judgment at first instance granting in part the claims of the Asociación de Consumidores y Usuarios de Servicios Generales-Auge (Association of Consumers and Users of General Services – Auge; ‘Auge’), on behalf of its members Alberto and Andrea, in proceedings for a declaration that several contracts for the purchase of financial products are null and void on the ground of vitiated consent.

Subject matter and legal basis of the reference

(Request for a preliminary ruling on interpretation – Article 267 TFEU)

Question referred for a preliminary ruling

‘On the basis that consumer associations have standing to represent in legal proceedings investors/consumers claiming a breach of duty by an investment firm in the marketing of complex financial products, can that standing be restricted exceptionally by national courts, in the context of an individual claim, in cases involving high-worth investors who carry out transactions that cannot be regarded as being of ordinary and widespread use and who bring proceedings under the aegis of a consumer association with the result that they are able to benefit from a possible exemption from legal costs in very high-value court proceedings, avoiding the payment of court fees and avoiding paying the costs of the opposing party in the case of unfounded or even frivolous claims?’

Provisions of EU law cited

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID I): Article 52(2) (Right of appeal).

Judgment of the Court of Justice of 2 April 2020, *Reliantco Investments and Reliantco Investments Limassol Sucursala București*, C-500/18, EU:C:2020:264.

Judgment of the Court of Justice of 20 September 2018, *EOS KSI Slovensko*, C-448/17, EU:C:2018:745, paragraphs 35 and 36.

Provisions of national law cited

Article 8(1)(e) of 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 approving the recast text of the General Law for the Protection of Consumers and Users and other complementary laws), provides that consumers’ and users’ basic rights include, in particular, representation of their interests through legally constituted consumer and user associations, groups, federations or confederations.

Article 11(1) of the Ley de Enjuiciamiento Civil (Law on Civil Procedure) (LEC) provides that, without prejudice to the individual right of injured parties to bring proceedings, legally established consumer and user associations shall have *locus standi* to defend in a court of law the rights and interests of their members and of the association, as well as the general interests of consumers and users.

Under Disposición Adicional 2ª de la Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita (Second Additional Provision of Law 1/1996 of 10 January on legal aid), consumer associations are entitled to legal aid where the actions brought ‘relate directly to products or services of common, ordinary and widespread use or consumption’.

Pursuant to Article 36(2) of Law 1/1996, this means that, if the association is unsuccessful, it does not have to pay the costs of the opposing party, however high the value of the proceedings, nor would those costs be paid by the individual members whom that association represents in the proceedings.

Real Decreto 1507/2000 (Royal Decree 1507/2000) of 1 September, which establishes the catalogue of products and services of common, ordinary and widespread use, lists, in general terms, banking and financial services among those products and services (Annex I(c)(13)).

Both Article 11(2) of the Ley Orgánica del Poder Judicial (Basic Law on the Judiciary) and Article 247(2) of the Law on Civil Procedure provide, in the same terms, that the courts are to reject by way of a reasoned decision claims, proceedings or complaints brought as a clear abuse of rights or in circumvention of the law or procedure.

Brief summary of the facts and procedure

- 1 Between May 2007 and March 2009, Alberto and Andrea made five purchase orders for financial products (five bonds issued, in particular, by KBC, Lehman Brothers, BNP Paribas and Abbey) with Banco Banif SA (now Banco Santander SA) for amounts ranging from EUR 150 000 to EUR 300 000 and for a total amount of EUR 900 000.
- 2 All the purchases were made under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID I).
- 3 Auge, on behalf of its members Alberto and Andrea, brought an action against the bank, seeking a declaration that the abovementioned contracts for the purchase of financial products were null and void on the ground of vitiated consent, and an order that the investors be reimbursed the sum of EUR 481 634.14, plus fees, expenses and interest. That action was upheld in respect of the 2007 and 2008 purchase orders, and dismissed in respect of the 2010 order. Consequently, the investment firm was ordered to repay the applicants the sum of EUR 462 515.74, plus statutory interest from the date of the respective cancelled investments.
- 4 The defendant’s appeal was dismissed by the Provincial Court, Granada, which upheld the first-instance judgment, on the grounds that the defendant did not take the investment profile of the clients into account and did not provide them with

clear and complete pre-contractual information on the risks of the products they were contracting.

- 5 The defendant bank has lodged an exceptional appeal for breach of procedure and an appeal on a point of law against the judgment of the Provincial Court, Granada, which have been found admissible.

Principal arguments of the parties in the main proceedings

- 6 The appellant argues that Auge does not have standing to bring proceedings on behalf of its members, since the contracted products are not of common and widespread use, but on the contrary are speculative financial products of high economic value, which go beyond common consumer products.
- 7 It adds that the request for a preliminary ruling was not necessary because the legal standing of consumer associations is a matter for national law, to which EU law refers.
- 8 Auge, the respondent, submitted that, in its view, it was appropriate to make a reference for a preliminary ruling concerning the loss of a financial consumer's status as such due to the high amount and complexity of his or her investments and, therefore, of the right to bring legal proceedings through a consumer association against a banking institution.

Brief summary of the basis for the reference

- 9 The Supreme Court emphasises that it is relevant to the outcome of the appeals to rule on the disputed issue of Auge's standing to bring legal proceedings on behalf of the investors who are the subject of the action, who are its members, by bringing actions relating to compliance with the advisory obligations of investment firms under the MiFID I rules.
- 10 As a general rule, the Supreme Court has accepted that consumer associations have standing to bring proceedings to defend their members in actions covered by the MiFID I rules, including in proceedings to which Auge was a party.
- 11 However, in two specific judgments, the Supreme Court found that Auge, as a consumer association, did not have standing to defend the individual interests of consumers in relation to investments in speculative financial products of high economic value, since it considered that they were not products or services intended for consumers as such, because they are not of common, ordinary or widespread use, and in so far as, under Spanish law, that legal standing of consumer and user associations is linked to the protection of their rights where they are directly related to goods or services of common, ordinary and widespread use or consumption.

- 12 In those judgments, the Supreme Court reasoned that there are financial services that, due to their nature and circumstances – in view of their high amounts and speculative nature – go beyond the classification of ‘services of common, ordinary and widespread use’. That does not mean that the individual investors concerned cannot themselves bring proceedings to defend their rights, but that they are not justified in doing so through a consumer association in order not to pay the court fees required to bring proceedings and to avoid the risks of being ordered to pay the costs in the proceedings and on appeal.
- 13 The aim is thereby to avoid fraudulent or abusive use of that special standing of consumer associations, in disputes in which the status of consumer is weakened in view of the characteristics of the dispute and the amount in dispute, in order to take advantage of the right to legal aid that the law grants those associations when they assert the interests of their members in court.
- 14 The Supreme Court states that the Court of Justice has not expressly ruled on the discretionary powers of national courts as regards the standing of consumer and user associations to bring proceedings in respect of the exercise of rights based on the MiFID I rules.
- 15 Last, the Supreme Court has never denied the status of consumers to profit-seeking investors acting in a field that is beyond their commercial or professional activity, even if their investments have been complex or significant; it has only questioned the legal standing of such an association in certain specific cases in which it has held that, in view of its circumstances, there could be a circumvention of procedure consisting in avoiding paying court fees and the consequences of an order for the payment of costs, by not bringing proceedings personally but through a consumer association, all to the detriment of the opposing party and the Treasury.
- 16 It is therefore necessary to ask the Court of Justice whether, in certain circumstances, even if the size of an investment or its complexity does not deprive the investor of his or her status as a consumer, the capacity of a consumer association to represent him or her may be restricted where it is found that there may be a circumvention of procedure consisting in avoiding the payment of court fees and the consequences of an order for costs, by not bringing proceedings himself or herself but through a consumer association.