Case C-699/23

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:

16 November 2023

Referring court:

Juzgado de Primera Instancia n.º 8 de Donostia – San Sebastián (Spain)

Date of the decision to refer:

13 November 2023

Applicant:

FG

Defendant:

Caja Rural de Navarra, S.C.C.

Subject matter of the main proceedings

Loan agreement secured by a mortgage – Arrangement fee – Unfairness

Subject matter and legal basis of the request

Article 267 TFEU – Request for a preliminary ruling on interpretation – Compatibility of the case-law of the Tribunal Supremo (Supreme Court, Spain) on arrangement fees with the case-law of the Court – Criteria

Questions referred for a preliminary ruling

1. Is the principle of transparency infringed where an arrangement fee is charged for the provision of services by a seller or supplier and the latter does not specify what those services consist of or the time spent on them, thereby preventing consumers from ascertaining, first, whether the charging of the fee corresponds to what was agreed, what is established in the schedule of prices or, in any event,

what is reasonable in view of the type of service; and, secondly, that there is no overlap between services, that the consumer is not paying for services which are already remunerated as part of the contractual interest and that the seller or supplier is not charging twice for any other service?

2. Is the principle of transparency infringed where the seller or supplier advertised the interest rate it was offering for mortgage loans aimed at consumers but did not also publicise the compulsory arrangement fee payable on conclusion of the advertised mortgage, in particular where that fee was a known, predetermined and invariable percentage of the loan granted, regardless of the amount of the loan?

3. If the services remunerated by means of the arrangement fee when the loan application is approved and the loan is taken out include: the examination of the application and steps taken in relation to it; collation and analysis of information about the applicant's creditworthiness and ability to pay the loan throughout its term; and assessment of the security submitted, but there is no charge for the same services where the loan application is refused, should the services in question be understood to be services inherent in banking activity and forming part of the banking safety protocol, whose cost should be borne by the institution, as was considered to be the case in Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property?

4. Were it to be found that the arrangement fee remunerates services that are paid for in addition to the compensatory interest because they are unconnected with the activity of the lender institution, should the lender institution therefore provide consumers with the relevant invoice corresponding to any supply of services containing a breakdown of those services and VAT?

5. Is the principle of transparency infringed where a seller or supplier that required payment of an arrangement fee as the price payable for a series of very specific services did not have a schedule with the price per hour of each service and did not provide that schedule to consumers, before the agreement was concluded, so that consumers, first, knew in advance what the final cost of their loan agreement would be and secondly, could compare the price of those services with the prices offered by other sellers or suppliers?

6. Is the principle of transparency upheld where a seller or supplier charged for a series of very specific services, which were essential to conclusion of the agreement that both parties wished to conclude, by deducting a percentage of the total amount of the loan granted, with the effect that an identical service, provided by the same number of people for the same period of time, was invoiced, as an 'arrangement fee', at different amounts depending on the amount of the loan granted in each case?

7. Is a transparency test incompatible with Article 4(2) of Directive 93/13/EEC where, according to that test, a term relating to an arrangement fee is considered to

be unfair or otherwise depending on whether its amount exceeds a specific figure drawn from statistics obtained online on the charging of arrangement fees?

8. Is national case-law compatible with Articles 6(1) and 7(1) of Directive 93/13/EEC where, according to that case-law, arrangement fees are found to be disproportionate or otherwise on the basis of the amounts, according to the statistics, of the arrangement fees then being charged in Spain, at a time when Spain did not review the fairness of terms containing arrangement fees?

9. Is the principle of effectiveness infringed by the fact that, under agreements concluded before the Kingdom of Spain transposed Directive 2014/17/EU into its domestic legal order, sellers or suppliers charge arrangement fees that remunerate the examination of the creditworthiness of the potential lender and the viability of the transaction whereas, after the transposition of that directive that examination can no longer entail any cost to the potential borrower?

10.Must Article 3(1) of Directive 93/13/EEC be interpreted as meaning that it precludes national case-law such as that laid down by the Supreme Court in its judgment 816/2023 of 29 May 2023, which establishes that the test of the fairness of a term relating to an arrangement fee does not require the term to specify what services are remunerated by means of the arrangement fee or the price at which they are invoiced, and that a review of fairness merely ascertains whether the term clearly sets out the amount payable by the consumer and whether that amount exceeds the threshold above which it would be found to be disproportionate.

Provisions of European Union law relied on

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: twelfth, thirteenth, nineteenth, twentieth and twenty-fourth recitals and Articles 3, 4, 5, 6 and 7

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market: Article 7

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property: Part B of Annex II, Section 4, point 3, first sentence

Provisions of national law relied on

Under the rules on banking transparency in Spanish law, arrangement fees are afforded a specific treatment different from that of other banking fees. The Orden de 5 de mayo de 1994 sobre transparencia de las condiciones financieras de los préstamos hipotecarios (Order of 5 May 1994 on transparency in the financial conditions of mortgage loans) provided as follows in paragraph 4 of Annex II:

‘1. Arrangement fee – All expenses relating to the examination of the loan application, the granting or processing of the mortgage loan, or other similar expenses inherent in the activity of the lending entity incurred in granting the loan, must be included in a single fee, known as the arrangement fee, and shall be payable only once. The amount, form and date of payment thereof shall be specified in that term. …

2. Other fees and subsequent costs. – In addition to the “arrangement fee”, the following alone may, by agreement, be charged to the borrower: … (c) Fees which, having been duly notified to the Bank of Spain in accordance with the provisions of the Decree of 12 December 1989 and regulations implementing the same, correspond to the supply of a specific service by the entity other than merely the ordinary administrative loan’.

The differentiated treatment of arrangement fees compared with other banking fees was retained in the original wording of Ley 2/2009, de 31 de marzo, por la que se regula la contratación con los consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito (Law 2/2009 of 31 March 2009 governing the conclusion of mortgages or loans with consumers and intermediation services with a view to the conclusion of loan or credit agreements). Article 5 provided as follows as regards transparency obligations relating to the schedules of fees and costs:

‘1. Undertakings shall be free to fix their schedules of fees, terms and conditions and costs chargeable to consumers without any restrictions other than those pertaining to unfair terms that are laid down in this Law, in the Law of 23 July 1908 and in Royal Legislative Decree 1/2007 of 16 November 2007. The schedules of fees or remuneration and chargeable costs, including for consultancy, shall specify the circumstances in which, and, where appropriate, the frequency with which, the foregoing will be payable. Fees or remuneration and charged costs must correspond to services actually provided or to costs incurred. Under no circumstances may fees or costs be charged for services not definitively and expressly agreed or requested by the customer.

2. Notwithstanding the foregoing: … (b) In relation to residential mortgage loans and credits, the arrangement fee, which shall be payable only once, shall include any costs incurred in examining, granting or processing the mortgage loan or credit and other similar costs inherent in the undertaking’s activity that arise from the granting of the loan or credit. The arrangement fee for loans or credits denominated in foreign currency shall also include any currency exchange fees corresponding to the initial disbursement of the loan or credit. All other fees and costs chargeable to consumers that the undertaking applies to such loans must correspond to the provision of a specific service other than the grant or ordinary administration of the loan or credit.’

Those statutory provisions are now contained in Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario (Law 5/2019 of 15 March 2019

governing mortgage loan agreements), Article 14 of which, on the transparency rules for the marketing of mortgage loans, provides as follows:

‘3. Costs may only be charged or fees be received for services connected with loans where they have been definitively requested or expressly agreed by a borrower or potential borrower and correspond to services actually provided or provable costs incurred.

4. Where an arrangement fee is agreed, it shall be payable only once and shall include all the costs of examining, processing and granting the loan and other similar costs inherent in the activity of the lender arising from grant of the loan. The arrangement fee for loans denominated in foreign currency shall also include any currency exchange fees corresponding to the initial disbursement of the loan.’

The following also apply to this dispute: 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 consolidated text of the General Law for the protection of consumers and users and other supplementary laws) (Article 8(b) and (d) and Articles 60, 80, 82 and 83); Ley 26/88, de 29 de julio, sobre disciplina e intervención de entidades de crédito (Law 26/88 of 29 July 1988 on discipline and intervention in relation to credit institutions); Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación (Law 7/1998 of 13 April 1998 on general conditions of contract) (Article 3, Articles 8(1) and (2) and 5(5) and Articles 7 and 10); and the Spanish Civil Code (Article 1303).

Brief summary of the facts and procedure in the main proceedings

1 On 22 January 2010, the applicant concluded a mortgage loan agreement with the defendant for a maximum sum of EUR 168 200, payable in 360 monthly instalments over a repayment term of 30 years. The terms of the agreement included Clause Four on the arrangement fee, worded as follows: ‘The loan shall give rise to an arrangement fee of zero point three five percent of the initial amount of the loan granted, payable by the borrower only once on conclusion of this agreement.’ The applicant accordingly paid EUR 588.70 by way of the arrangement fee on conclusion of the agreement.

2 On 6 April 2022, the applicant lodged an application with the referring court seeking, inter alia, a declaration that the aforementioned arrangement fee was unfair.

The essential arguments of the parties in the main proceedings

3 The applicant asserts that the arrangement fee is unfair. He argues specifically that the case-law of the Supreme Court (contained in its judgment 816/2023 of 29 May

2023 (ES:TS:2023:2131) in particular) is incompatible with the case-law of the Court (in particular, judgments of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, and of 16 March 2023, *Caixabank (Loan arrangement fees)*, C-565/21, EU:C:2023:212).

4 The defendant submits that the arrangement fee is not unfair. Specifically, it contends that the aforementioned Supreme Court case-law is fully concordant with the above-referred case-law of the Court, and that the Court has resolved the uncertainty that existed in relation to arrangement fees.

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

5 In its judgment of 16 July 2020, *CaixaBank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), the Court ruled on arrangement fees in Spain in response to a request for a preliminary ruling from first-instance courts. Specifically, the Court held as follows in points 2 and 3 of the operative part:

‘2. Articles 3, 4(2) and 5 of Directive 93/13 must be interpreted as meaning that contractual terms falling within the concept of “main subject matter of the contract” must be understood as being those that lay down the essential obligations of that contract and which, as such, characterise it. By contrast, terms ancillary to those which define the very essence of the contractual relationship cannot fall within that concept. The fact that an arrangement fee is included in the total cost of a mortgage loan does not mean that it is an essential obligation of that loan. In any event, a court of a Member State is required to review the clarity and intelligibility of a contractual term relating to the main subject matter of the contract whether or not Article 4(2) of that directive has been transposed into the legal order of that Member State.

3. Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in a loan agreement concluded between a consumer and a financial institution which requires the consumer to pay an arrangement fee may create, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties as arising from that agreement, contrary to the requirement of good faith, where the financial institution does not demonstrate that that fee corresponds to services actually provided and to costs it has incurred, which is a matter for the referring court to verify.’

6 However, according to the Supreme Court, the Court’s judgment was shaped by a distorted account of Spain’s national legislation and of the Supreme Court’s own case-law. The Supreme Court therefore decided to make a request for a preliminary ruling to the Court (Case C-565/21).

7 In that request for a preliminary ruling, the Supreme Court stated, first, regarding the account of national legislation, that the Court had been provided only with the content of legislation according to which bank fees must be justified by a service actually provided, but that other legislation, regulating the arrangement fee and

establishing a regime for arrangement fees that is substantially different from that of other bank fees, had been omitted. Secondly, as regards the account of its case-law, the Supreme Court stated that the Court of Justice had been informed that there was 'national case-law establishing that the term referred to as the arrangement fee automatically satisfies the transparency test', whereas in reality no such case-law existed.

8 According to the Supreme Court, what it in fact held in judgment 44/2019 was that the contractual term relating to the arrangement fee is not unfair if it passes the transparency test, which is to say, when it is written in clear and intelligible language, within the broad meaning afforded by the case-law of the Court of Justice.

9 As regards the test of transparency of the contractual term at issue, the Supreme Court pointed out that according to its judgment 44/2019 legislation regulating the arrangement fee was intended to ensure such transparency (grouping all charges that could correspond to the steps taken in granting the loan into a single fee payable only once, informing consumers of its existence before concluding the contract, and inclusion in the calculation of the APRC).

10 The Supreme Court also stated that its judgment 44/2019 listed other reasons that support the transparency of the term at issue: first, consumers interested in taking out a loan or mortgage generally know that, in the vast majority of cases, the bank charges an arrangement fee in addition to remunerative interest; secondly, in accordance with regulations on standardised information sheets, the bank is required to inform the potential customer about the existence of that contractual term, and this is often in fact one of the points covered by the banks' advertising; thirdly, it is a fee to be paid in full when first taking out the loan, which means that the average consumer pays special attention to it as a substantial part of the financial outlay involved in securing the loan; fourthly, based on the wording, placement and structure of the term, it can be concluded that it represents an essential element of the contract.

11 According to the Supreme Court, several decisions delivered by the Court of Justice could also be invoked in support of all of those arguments. First, it is settled case-law of the Court of Justice that, where the arrangement fee is known beforehand and where its amount or method of calculation is determined precisely along with the time at which it is payable, so as to make it possible to evaluate the economic consequences for the customer, and the existence of that fee is made clear, the transparency test must be deemed to have been satisfied, even if the services or formalities undertaken are not detailed, provided the nature of the services actually provided can be reasonably understood or inferred from the contract considered as a whole.

12 In that regard, in the view of the Supreme Court, reference could be made to the Opinion of Advocate General Hogan in Case C-621/17, *Kiss and CIB Bank*, EU:C:2019:411 (points 16, 37 and 38), as regards what is referred to as a

'disbursement commission'; judgment of the Court of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820 (paragraphs 38, 39 and 45); the judgment handed down by the Court in Cases C-224/19 and C-259/19 (paragraph 68); and the judgment of the Court of 3 September 2020 in *Profi Credit Polska*, Cases C-84/19, C-222/19 and C-252/19, EU:C:2020:631 (paragraph 75).

13 Secondly, according to the Supreme Court, where the services provided in return were carried out as part of the services provided in connection with the management or disbursement of the loan and the amount charged for them is not disproportionate, terms providing for this type of fee or commission do not adversely affect the consumer's legal position, nor do they cause, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations to the detriment of the consumer. In that regard, the judgment of the Court of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820 (paragraphs 54 to 56) could once again be relied on.

14 Finally, the Supreme Court requested the Court to take account of the fact that, following its judgment in Cases C-224/19 and C-259/19, a significant number of the Spanish courts had continued to apply the case-law of the Supreme Court concerning arrangement fees, taking the view that the premiss on which that judgment was based did not reflect Spanish law, whereas other Spanish courts had interpreted that judgment as declaring that the case-law of the Supreme Court was contrary to EU law on this matter.

15 On 16 March 2023, the Court delivered its judgment in Case C-565/21, *Caixabank (Loan arrangement fees)*, EU:C:2023:212.

16 On 29 May 2023, in judgment 816/2023 (ES:TS:2023:2131), disposing of the proceedings in which it had itself made the request for a preliminary ruling that gave rise to Case C-565/21, the Supreme Court laid down the criteria to be followed in order to determine, not in general terms but on a case-by-case basis, whether arrangement fees are valid.

17 The referring court in the present case considers that, in judgment 816/2023, the Supreme Court failed to take into account all the paragraphs of the judgment of 16 March 2023, *Caixabank (Loan arrangement fees)*, C-565/21, EU:C:2023:212, that address how the unfairness of arrangement fee terms should be reviewed. The referring court specifically criticises the Supreme Court judgment in so far as that court, taking as its premiss the self-evident truth that arrangement fees are not inherently unfair, focuses on only two aspects when it finds that the arrangement fee was not unfair in the case under analysis, namely:

– the fact that the services remunerated by means of that fee are not already included in other charges payable by the consumer; and

– the fact that the amount charged (EUR 845) is not disproportionate to a capital sum of EUR 130 000, since it represents 0.65% of the capital and, according to

statistics available on the Internet on the average amount of arrangement fees in Spain, that amount varies from 0.25% to 1.50%.