Case C-39/24

Request for a preliminary ruling

Date lodged:

15 January 2024

Referring court:

Juzgado de Primera Instancia e Instrucción No 6 de Ceuta (Spain)

Date of the decision to refer:

2 January 2024

Applicant:

Justa

Defendant:

Banco Bilbao Vizcaya Argentaria, S. A.

[…] [Referring court, procedure and parties] […]

ORDER

[…]

FACTS

1 It was decided in the specified case that the proceedings should be stayed because the parties and the Public Prosecutor's Office were given the opportunity to refer a question to the Court of Justice of the European [Union] ('the Court of Justice') for a preliminary ruling.

2 The period granted to the parties and the Public Prosecutor's Office to submit what they consider useful as regards the relevance of the referral by this court of that question for a preliminary ruling – the documents in the case file having been lodged and their content reproduced – has elapsed.

LAW

3 […]

4 […].

5 […]

[Request for application of the urgent procedure or expedited procedure rejected by the referring court]

6 […]

[Possible request for a preliminary ruling on costs in the present proceedings which the referring court declines to make]

7 […]

8 […]

[Article 267 TFEU and other provisions of EU law on the making of a reference for a preliminary ruling and recommendations of the Court of Justice to national courts and tribunals in relation to initiation of preliminary ruling proceedings]

9 The following EU Directives are applicable to the present case:

– *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Articles 3, 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.*

10 The following national legislation applies to the present case:

– Orden de 5/5/1994 sobre transparencia de las condiciones financieras de los préstamos hipotecarios (Order of 5 May 1994 on the transparency of financial conditions for mortgage loans), point 4, Annex II, and Article 5.

– *Ley 5/2019 de 15 de marzo, que regula los contratos de crédito inmobiliario (Law 5/2019 of 15 March 2019 regulating mortgage loan agreements)*, Article 14 on transparency.

– *Real Decreto Legislativo 1/2007 de 16 de noviembre, Texto Refundido de la Ley General para la Defensa de Consumidores y Usuarios (Royal Legislative Decree 1/2007 of 16 November 2007, Recast text of the General Law for the Protection of Consumers and Users)*, Articles 8(b) and (d), 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 for credit institutions).

– *Ley 7/98 de 13 de abril, de condiciones generales de la contratación (Law 7/98 of 13 April 1998 on general contractual conditions)*, Articles 3, 8(1), 8(2), 5(5), 7 and 10.

– Código Civil (Spanish Civil Code), Article 1303 and other related provisions.

11 The matter at issue in the present proceedings is the contract term relating to an arrangement fee ('arrangement fee term'), in the mortgage loan contract notarised by the notary […], in which the applicant is named as the borrower and the defendant as the lending party, granted on 3 November 2005. Term 4.1 of that contract provided for an arrangement fee of 0.25% of the borrowed capital, which was settled and paid in relation to the notarised mortgage loan contract by the borrowing party to the banking institution, by means of a debit from a current account.

12 The *judgment of the Court of Justice of 16 July 2020, [Caixabank and Banco Bilbao Vizcaya Argentaria, C-224/19 and C-259/19, EU:C:2020:578 ('the judgment of 16 July 2020')*], ruled on arrangement fees, but not in the light of the specific legislation governing arrangement fees referred to above, and the judgment of the Court of Justice of 16 March 2023 [, *Caixabank (Loan arrangement fees)*, C-565/21, EU:C:2023:212 ('the judgment of 16 March 2023')] also ruled on the review of the unfairness of such a contract term. The *judgment of 16 July 2020* led most of the Audiencias Provinciales (Provincial Courts, Spain) in our country to proceed to annulment of the arrangement fee on mortgage loans and to order the banks to refund the amounts paid by customers plus interest. The criterion applied by the aforementioned judgment of the Court of Justice in order to annul the arrangement fee is that banks can receive that fee only if they are able to furnish evidence of a service provided to the loan customer justifying that charge. That judgment of the Court of Justice indicates that the arrangement fee does not define the essence of the contractual relationship, that the fact that it is included in the total cost of the loan is not because it forms part of the APR and does not imply that it is an essential contractual obligation, and that the arrangement fee would, in any event, be subject to an enhanced review of unfairness. The Court of Justice concludes by holding that a contract term requiring the consumer to pay an arrangement fee may create, to the detriment of the consumer, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, where the bank does not demonstrate that such a fee corresponds to services actually provided and to costs incurred by it. That case-law has been supported by *the judgments of 17 December 2020 of the Audiencia Provincial de Zaragoza (Provincial Court of Zaragoza), 5th Chamber, of 27 November 2020 of the Audiencia Provincial de Lérida (Provincial Court of Lérida), 2nd Chamber, and of 9 October 2020 of the*

Audiencia Provincial de Madrid (Provincial Court of Madrid), 11th Chamber. The abovementioned judgment of the Court of Justice of 16 March 2023 follows its earlier judgment of 16 July 2020, in not holding that the contract term of an arrangement fee can automatically pass the transparency test and finding that the following must be taken into account: (i) the wording of the term; (ii) the information provided by the institution to the borrower, including information that the institution is required to provide in accordance with sector-specific rules; (iii) the institution's advertising of such loans; and (iv) 'taking into account the level of attention which can be expected of an average consumer who is reasonably well informed and reasonably observant and circumspect'.

13 The *judgment of the Tribunal Supremo (Supreme Court, Spain) 816/2023, First Chamber, Case 919/2019, of 29 May 2023*, stated that an absence of evidence of the associated services remunerated by the arrangement fee does not [automatically] invalidate an arrangement fee, in so far as it finds that such an absence of evidence is not an essential condition pertaining to validity of the arrangement fee according to the Court of Justice. It is, therefore, necessary to carry out a transparency and substance analysis, but with a clear starting point: the services paid for by the arrangement fee are inherent in the granting of the mortgage loan itself and are listed or identified in sector-specific rules.

14 The *judgment of the Supreme Court 816/2023, of 29 May 2023*, analyses the judgment handed down by the Court of Justice and, in that regard, highlights the following:

1.- That the arrangement fee forms part of the main subject matter of the contract must be ruled out, since the concept of an essential element in the loan contract, from the point of view of the borrower, must be maintained as a strict one, and only remunerative interest must be considered as such.

The Supreme Court therefore holds that national case-law should be amended to the effect that where the arrangement fee is not one of the essential elements of the contract, for the purposes of *Article 4(2) of Directive 93/13/EEC* of 5 April 1993 on unfair terms in consumer contracts, it may be subject to a substantive review (unfairness).

2.- An arrangement fee must remunerate the costs of examining the application and the granting or processing of the mortgage credit or loan. Therefore, the arrangement fee is not, in itself, unfair.

3.- An arrangement fee term, in addition to being clear and intelligible as regards its drafting, must go beyond the review of substantive transparency in the case of a contract concluded with consumers or users. To that effect, in order to rule on the lawfulness of that term, the national court must:

– Determine the economic consequences for the consumer of such a term, which will enable an understanding of the nature of the services provided in return for the fees established in that term.

– Ascertain that there is no overlap between the various costs provided for in the contract or between the services they remunerate.

– Ascertain that the financial institution has provided the mandatory information in accordance with national law and has included that information in its offer or prior advertisement for the type of contract entered into; the national court must also determine whether it is possible for the consumer to have obtained sufficient knowledge, from that information or advertising, of the economic content and functioning of the arrangement fee term within the contract, in other words, to understand the reasons justifying the remuneration represented by the arrangement fee, even if the lender is not obliged to specify the nature of all the services provided in exchange for the arrangement fee in the contract.

– Assess the particular attention paid to such a contract term by the average consumer, in so far as it provides for the payment in full of a substantial sum from the time the loan or credit is granted.

4.- For the purposes of examining the possible unfairness of the contract term, [the] Supreme Court states that the Court of Justice considers that:

– As regards good faith, it must be verified that the creditor, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.

– As regards significant imbalance, it cannot be asserted that a contract term providing for an arrangement fee in the context of a mortgage loan or credit does not, under any circumstances, respect the balance between the parties' rights and obligations arising under the contract, but it must be determined that the cost is not disproportionate to the amount of the loan or that the services which are remunerated by that fee are not already included in other items charged to the consumer (paragraphs 51, 58 and 59).

15 In relation to the national legislation applicable to the information to be provided to the consumer by the lender in mortgage loan or credit contracts, and specifically with regard to the arrangement fee, the *judgment of the Supreme Court of 29 May 2023* states as follows:

1.- In the rules on banking transparency, the arrangement fee is treated in a specific manner, different from that of other bank fees.

The Order of 5 May 1994 on the transparency of the financial conditions for mortgage loans (under which the contract at issue was concluded) provides as follows, in point 4 of Annex II thereto:

'4. Fees.

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 caused by 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 charges.- In addition to the "arrangement fee" only the following may be agreed at the borrower's expense: […]

(c) Fees which, having been duly notified to the Bank of Spain in accordance with the provisions of the Orden de 12 de diciembre de 1989 y en sus normas de desarrollo (Order 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 management of the loan'.

2.- This differentiated treatment between the arrangement fee and the other bank fees was maintained 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 which regulates the contracting with consumers of mortgage loans or credits and intermediation services for the conclusion of loan or credit contracts). Article 5 of that Law* provided as follows with regard to transparency obligations in relation to rates for fees and charges:

'1. Undertakings shall freely determine their schedules of fees, conditions and costs which may be passed on to consumers, without any restrictions other than those laid down in this Law, in the Ley de 23 de julio de 1908 (Law of 23 July 1908) and in Royal Legislative Decree No 1/2007, of 16 November 2007, as regards unfair terms.

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 firmly and expressly agreed or requested by the consumer.

2. By way of derogation from the provisions of the preceding subparagraph:

(a) In the case of mortgage loans or credits, the provisions on compensation for early repayment in the sector-specific legislation regulating the mortgage market shall be applicable, except in the case of mortgage loans or credits granted prior to 9 December 2007 for which the contract specifies the early repayment fee regime contained in Ley 2/1994, de 30 de marzo, sobre subrogación y modificación de préstamos hipotecarios (Law 2/1994 of 30 March 1994 on subrogation and modification of mortgage loans), in which case, that shall be applicable.

(b) In the case of residential mortgage loans or credits, the arrangement fee, which shall be payable only once, shall include all costs of examining the application, granting or processing the mortgage loan or credit or other similar costs inherent in the undertaking's activity caused by granting the loan or credit. In the case of loans or credits denominated in foreign currencies, the arrangement fee shall also include any foreign exchange fee corresponding to the initial payout of the loan or credit.

Other fees and charges payable by the consumer, which the undertaking charges in respect of those loans or credits, must correspond to the provision of a particular service other than the granting, or ordinary management, of the loan or credit.'

3.- At present, that legal regime is contained in *Law 5/2019 of 15 March 2019 regulating mortgage loan agreements, Article 14 of which*, relating to the rules on transparency in the marketing of real estate loans, provides as follows:

'3. Fees or costs may only be charged for services related to loans that have been firmly requested or expressly accepted by a borrower or potential borrower and provided that they relate to services actually provided or costs incurred that can be substantiated.

4. If an arrangement fee is agreed, it shall be payable only once and shall include all the costs of examining the application, processing or granting the loan or other similar costs inherent in the creditor's activity caused by granting the loan. In the case of loans denominated in foreign currency, the arrangement fee shall also include any foreign exchange fee corresponding to the initial payout of the loan.

In addition to the fact that, under the new legal regime, the different treatment of arrangement fees as compared with other fees applicable to mortgage loans or credits remains, it should be noted that this arrangement fee corresponds to expenses 'inherent' to the activity caused by the granting of the loan or credit, and therefore does not include any other type of expenses that are not inherent to the granting of the loan or credit'.

The *Supreme Court states very clearly in its judgment of 29 May 2023* that an unequivocal solution on the validity or invalidity of the term establishing an arrangement fee is not possible, as it depends on a case-by-case examination, on the basis of the evidence adduced.

16 In *judgment 816/23, cited above, the Supreme Court* held that the arrangement fee was valid on the basis of the following reasoning:

The financial institution complied fully with the Order of 5 May 1994 (legislation applicable *ratione temporis*). More specifically: (i) the fee comprises all the costs of examining the application, granting or processing the loan, inherent in the activity caused by granting the loan; (ii) it is presented under the title of

'arrangement fee' and not with names likely to cause confusion; (iii) the fee is payable only once, at the outset; (iv) its amount, form and date of settlement are specifically set out in the contract term. The amount charged is not disproportionate, as the fee consisted of 0.65% of the capital of the loan; with the average cost fluctuating generally between 0.25% and 1.5%.

17 It is, therefore, the courts and tribunals which will have to analyse, in accordance with the rules set out by the *Supreme Court in judgment 816/23*, whether each of the contract terms at issue passes the transparency and substance analysis, as the arrangement fee does not form part of the remuneration of the contract.

OPERATIVE PART

THIS COURT DECIDES:

18 To stay the proceedings.

19 To refer a question of jurisdiction to the Court of Justice of the European Union, seeking an answer to the following questions:

20 **One.** Does European legislation preclude the interpretation by the Supreme Court in relation to the arrangement fee, according to which the simple mention of the amount of the contract term in the mortgage instrument, and that the amount does not exceed the ceiling laid down, is sufficient for it to be held that the term is not unfair, in the light of *Article 4(2) of Directive 93/13/EEC*, on the ground of a lack of transparency, even though that term contains no indication of content or time?

21 **Two.** If the consumer is previously informed of the contract term in question and if that term is not understood to be included in the activity of bank lending, as indicated in *Directive* 2014*/17/EU of the European Parliament and of the Council*, and if it is considered to be unrelated to the remunerative interest, should invoices not be drawn up and should the services in question not be definitively specified before the charge is passed on to the consumer, and would such omission to do so not be contrary to European legislation by affecting the transparency of the contract term in question in a material sense?

[…][Closing procedural formulae]