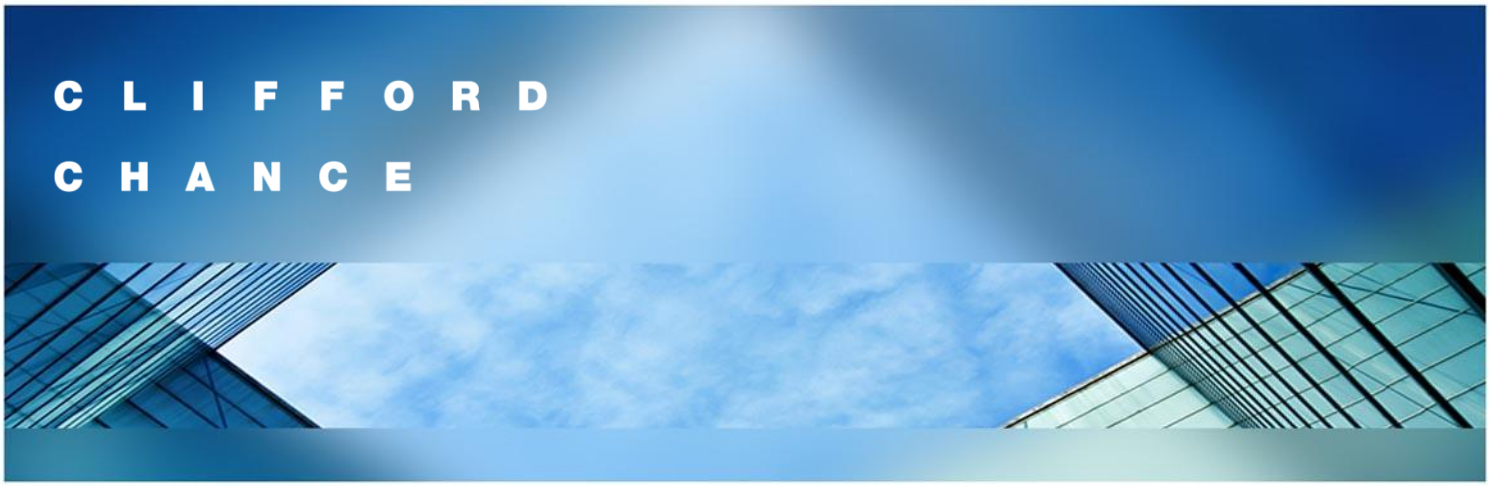

IRPH: THE ECJ DOES NOT MAKE A STATEMENT ON THE ABUSIVE NATURE OF THE INTEREST CLAUSE, BUT POINTS OUT ITS CRITERION ON THIS ISSUE

On 3 March 2020, the ECJ published its decision in relation to the preliminary question referred by a Barcelona Court in relation to the abusive nature of an interest rate linked to the IRPH (Mortgage Loan Reference Index) for Savings Banks.

Although the judgment maintains the framework defined by the Supreme Court in past judgments, it does qualify it somewhat.

The Court finds that it is legitimate to judge whether or not the clause is abusive, even it refers to an official index and even if it is an essential element of the agreement (remuneration of the loan). It does not however decide whether or not the clause is abusive, preferring to leave that decision to the national judge.

In this Client Briefing we will be explaining the content of the judgment.

Key points of the decision

- If finds that it is legitimate to judge the lack of material transparency of a clause that refers to an official index and that is related to an essential element of the agreement.
- It does not say whether the clause is abusive, preferring to leave that decision to the national judge, depending on the circumstances of the case, although it makes its contrary position clear.
- In the case of nullity, it leaves the door open to the modification of the agreement, if it is decided that it cannot survive without the clause.
- It rejects the idea of limiting the effects of a potential declaration of nullity.

Brief review of the issue. What is the IRPH and what is the problem that has arisen?

One of the range of arguments that consumers have used to sue financial institutions, was the allegation that the clauses that reference consumer loan interest to official indexes, were abusive.

Apart from the IRPH (the average rate of real estate loans granted by credit institutions), other official indexes such as the EURIBOR or the LIBOR have found themselves under the spotlight.

The intention is obvious: the consumer is looking for the cancellation of the interest clause, as abusive, and, as a result, not to have to pay interest on the loan.

Some Provincial Courts had found in favour of the claimants in relation to the IRPH: the clause referring to this official index could be considered abusive if the consumer had not been able to understand how the index worked (it is relatively little-known), or even verify the procedure for calculating it.

However, in late 2017, the Supreme Court backed the application of the IRPH. In a judgment by the Plenary Session dated 14 December 2017, it declared that a reference to an official index did not imply the conclusion that the clause is null because it is abusive. Provided that the clause is clear and understandable, from a grammatical standpoint, it will be perfectly valid.

Despite such a categorical decision from the Supreme Court, a Barcelona First Instance Court had no hesitation in referring a question to the ECJ for a preliminary ruling, regarding the abusive nature of an interest clause referenced to the IRPH for Savings Banks (this index was replaced in 2013 by the IRPH for financial institutions in general).

The ECJ decision.

The position of the ECJ, as set out in the decision, can be summarised in the following points, each addressed separately.

1. There is nothing to prevent an analysis of whether an interest clause that refers to the IRPH as the reference index for the purpose of determining the applicable interest is abusive or not.

One of the main arguments raised by the financial institutions in the lawsuits questioning the validity of the reference to the IRPH was that it was impossible to analyse the potentially abusive nature of a clause that referred to an official index, because article 1.2 of Directive 93/2013 ruled out such a possibility.

The ECJ redefines the object of the debate and focuses the discussion on the review of the clause, moving it away from the review of the official index, as such.

The European Court confirms that the interest clause falls within the sphere of Directive 93/2013 (and, therefore, abusive nature can be judged), because the official index (IRPH) is not mandatorily applicable, being freely chosen by the parties. Therefore, article 1.2 of Directive 93/2013 does not apply, and a revision of this clause cannot be ruled out.

The possibility of analysing the clause (not the official index), in terms of transparency, had already been recognised in the judgment of 14 December 2017 from the First Chamber of the Supreme Court.

2. There is nothing to prevent a national judge analysing the transparency of the interest clause, even if it does refer to an essential element of the agreement, such as the remuneration of the loan.

Another of the arguments used by the financial institutions was the impossibility of analysing the abusive nature of an interest clause when its wording was clear and understandable, as the revision of clauses that regulate the main provisions of the agreement was ruled out (by the Directive).

The ECJ advocates a broad interpretation of the examination and asserts that the courts of a Member State are obliged in any event to judge the transparency of any contract clause.

In the Court's opinion, this clarity and understandability cannot be reduced to a formal and grammatical plane; it must be interpreted in broad terms, reaching a second level of transparency: it has to be verified that the consumer genuinely had the opportunity to ascertain the economic significance of his/her decision when deciding to take out the loan.

Once again, the ECJ modulates (or, rather, subverts) the regulation contained in Directive 93/2013. With the restriction discussed, the Community legislator was looking to protect the principle of free will and contractual freedom, securing the integrity of the essential terms of the agreement.[1]

3. The analysis of the transparency of the clause must be carried out on a case-to-case basis.

The European Court did not go into whether or not the clause was abusive.

The ECJ referred this decision to the national judge, in each case. Such judge will have to analyse the specific circumstances of each case, in order to determine whether the transparency requirements are met.

Nonetheless, the ECJ makes its opinion on this matter clear: the main elements of the IRPH were accessible to all consumers because the index is regulated in specific provisions (Order of 5 May 1994 and Circular 8/1990) and is published in the Official State Gazette. Meanwhile, the financial institution is obliged to provide information to its customers on the recent evolution of the index.

In relation to this second aspect, the ECJ judgment does not require such information to be expressly stated in the loan agreement (as the Advocate General's conclusions had noted). In reality, the judgment is not clear on this point. However, it would seem to be indicating that the information actually supplied to the customer should be revised in each case (which is why it then goes on to analyse the consequences of a potential declaration of nullity).

[1] See, in this regard, the ECJ Judgment of 30 April 2014, which establishes the difference between the essential terms and ancillary terms.

In this regard, the Court could have been content to verify that the evolution of the index is public and accessible to any consumer, which would make it unnecessary to analyse the circumstances of the specific case.

4. The ECJ leaves the door open for the modification of the agreement, but leaves the final decision in the hands of the national judge.

The ECJ judgment envisages the possibility of the loan agreement being modified if the interest clause is found to be abusive and the agreement cannot survive without it. Just as when it issued its decision on the early maturity clause, the ECJ leaves it up to the national judge to decide in each case, first of all, on the nullity of the clause and, secondly (if it is declared null and void) on whether or not the agreement can survive without the clause establishing the remuneration of the lender.

In the event the conclusion of the national judge is that the agreement cannot survive without the interest clause (this would only happen if there is no rate applicable by default or if it is the one that is most detrimental to the consumer -the ECJ's position is that nullity cannot be to its detriment-), the judgment indicates the possibility of the agreement being modified to include an official index, as a replacement index. However, unlike what happens in the case of early maturity, when it comes to the interest rate there is no legislation establishing a rate that is applicable by default (apart from the legal monetary interest rate, which would be detrimental to the consumer).

5. The ECJ prohibits limiting the effects of nullity.

Finally, the judgment rejects the possibility of limiting the effects of the nullity of the clause with a view to mitigating the impact that a potential declaration of nullity could have on the Spanish financial market.

On this point, once again, the ECJ overlooks the fact that determining the effects of nullity is a matter of the internal law of member states, falling within the exclusive remit of the national judges.

Where we stand.

The judgment does not analyse the transparency of the IRPH as an official index. Neither does it address the validity of the clause that refers to the IRPH.

Although the ECJ finds that the judgment on abusiveness will depend on each specific case (in particular, on the information available to the consumer), at the same time it points out that the consumer knows how this rate is calculated, as it is regulated in legislative provisions.

The ECJ could also have highlighted that the consumer has access to data on its evolution, which is very much the case. Had it done so, it would have shut down the debate on the abusive nature of the clause.

This reasoning is applicable EURIBOR, a fortiori. In addition to being an index that is calculated in line with regulations that are accessible to the consumer, it is published periodically and the information on its evolution is even easier for consumers to access, given that it is widely covered in the media.

In any event, the issue of whether or not contract clauses referring to an official index are abusive remains unresolved. We will have to wait to hear from the Supreme Court.

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