

IRPH: SECOND TIME LUCKY? THE ECJ ONCE AGAIN ADDRESSES THE ABUSIVENESS OF CLAUSES LINKED TO OFFICIAL INDEXES

Following the referral of a second request for a preliminary judgment by the same Barcelona Court, in a Ruling dated 17 November 2021 the European Union Court of Justice ("ECJ") has expressly confirmed that arranging loans linked to an official index without providing customers with information on its evolution does not infringe consumer protection rules.

TO DATE, THE ECJ HAD AVOIDED MAKING A DECISION ON THE ABUSIVENESS OF INTEREST CLAUSES LINKED TO OFFICIAL INDEXES

It is no secret that among the arguments used by consumers to sue financial institutions is the possible abusiveness of interest clauses that refer to official indexes, such as the IRPH (the Spanish Mortgage Loan Benchmark Index) and the EURIBOR, infringing consumer protection rules (in particular, Directive 93/13 and its implementing legislation).

In this way, consumers sought to have the interest clause in question cancelled and avoid having to pay interest on their loans, which would jeopardise legal certainty on the financial market.

The dispute seemed to have been resolved when, in a Judgment dated 14 December 2017, the Plenum of the Supreme Court ("SC") concluded that provided the interest clause is clear and comprehensible from a grammatical perspective (which would be the case of a clause merely referring to an official index), it would be perfectly valid.

Despite this, in 2018 a Court of First Instance in Barcelona referred a request for a preliminary ruling on the matter, opening up the debate on interest clauses that referred to the IRPH for savings banks (and, by analogy, to any other official index)

In its Ruling of 3 March 2020, the ECJ avoided deciding the matter and opted to let the national courts have the last word regarding the validity of interest rate clauses referring to the IRPH and the consequences of a potential declaration of such clauses as abusive.

Key points of the Ruling of 17 November 2021

- The ECJ has confirmed that financial institutions are not obliged to supply information on an official index, provided the average consumer can understand how it works and assess the economic consequences from the publicly available information.
- Provided the national court can confirm: i) that the interest clause refers to an official index established by law, and ii) that the average consumer is in a position to understand how the index in question works, the interest clause cannot be considered to lack transparency.

REFERRAL OF A NEW REQUEST FOR A PRELIMINARY RULING DUE TO THE ABSENCE OF AN EXPRESS DECISION BY THE ECJ

Despite the categorical standard set by the SC in its judgment of 14 December 2017, the lack of express ECJ support for official indexes (such as the IRPH) gave rise to the same Barcelona Court sending a second request for a preliminary ruling to the ECJ in December 2020.

Specifically, the Court of First Instance referred six questions to the ECJ. The first two are the most relevant:

- Is it contrary to Directive 93/13 for a contract to fail to include a definition of the index or to fail to provide an information prospectus containing its past evolution?
- Does publication of the IRPH in the Official State Gazette (BOE) satisfy the professional's transparency requirements and information obligations?

The request for a preliminary ruling included a series of questions on the consequences of a potential declaration of abusiveness of an interest clause and the resulting supplementation of the contract, which are of lesser importance, given the court's decision that the clause was not abusive.

As we will explain below, the ECJ confirms the statement made in its previous Ruling of 3 March 2020, and once again leaves it for the national judge to take the final decision on the possible abusive nature of interest rate clauses.

However, in its Ruling of 17 November 2021 the ECJ did confirm that an interest rate clause referring to an official index is not abusive, subject to certain assumptions.

SUMMARY OF THE RULING OF 17 NOVEMBER 2021

The ECJ's position set out in the Ruling of 17 November 2021 can be summarised as finding that financial institutions are not obliged to include a definition or provide an information brochure explaining the past evolution of an official index, provided that, with the publicly available information, *"an average consumer, generally informed and reasonably attentive and perceptive, would be in a position to understand the specific way in which the benchmark index is calculated"*, and thus assess the economic consequences of that clause.

The ECJ decision focuses its attention on the figure of the "average consumer", which would be defined as a generally informed and reasonably attentive and perceptive consumer. And it leaves it for the national judge to evaluate whether or not this "standard subject" is in a position to understand how the benchmark index works.

If the national court can confirm: i) that the interest clause refers to an official index established by law, and ii) that the average consumer is in a position to understand how the index in question works, the interest clause cannot be considered to lack transparency.

WHERE WE ARE NOW

On occasion, it is worth asking whether waiting for the ECJ to issue a preliminary ruling on a question is worthwhile, given the lack of concrete

responses. The fact that the Barcelona Court of First Instance sent two successive requests for preliminary rulings, with essentially the same subject-matter, just goes to illustrate this.

The Ruling of 17 November 2021 once again leaves it for the national judge to ascertain whether he/she is dealing with an *average consumer, generally informed and reasonably attentive and perceptive*, who as such is *able to understand the specific way in which the benchmark index is calculated*.

Nonetheless, in view of the standard set by the SC in its judgment of 14 December 2017, the issue seems to be closed. In the case of official indexes, the average consumer is in a position to understand how they work based on the information that is published, meaning that the financial institutions do not have to supply information on the same to consumers before they take out the loan.

In any event, we still have to wait for the national judges to assimilate this interpretation, integrating the decisions of the ECJ and the SC, definitively closing the avenue of alleging the abusiveness of interest rate clauses linked to official indexes, such as the IRPH or the EURIBOR.

If this is indeed the case, the ECJ's decision will on this occasion have been worth the wait.

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