

REASONING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION REGARDING, AMONG OTHER ISSUES, FORMALISATION COSTS AND ARRANGEMENT FEES FOR MORTGAGE LOANS

In this Legal Briefing, we analyse the reasoning of the judgment of the Court of Justice of the European Union (the "**Court**") of 16 July 2020 (the "**Judgment**"), in relation to the following issues concerning financing contracts entered into with consumers: (i) formalisation costs; (ii) arrangement fees; (iii) the limitation of actions for restitution; and (iv) the allocation of costs in legal proceedings resulting in a declaration of invalidity of a contractual term on the grounds of unfairness.

1. Judicial reasoning used in the Judgment

A. Formalisation costs

In this Judgment, the Court ruled that in the event of a declaration of invalidity in respect of an unfair contractual term that requires the consumer to pay the full costs of setting up and cancelling a mortgage, that term should not be enforceable against the consumer. In other words, it would be deemed not to have been included and could, therefore, entail, where appropriate, the obligation to refund the relevant amounts to the consumer.

However, the Court held that the fact that an unfair contractual term must be understood as never having existed justifies the application of the provisions of national legislation governing the allocation of the costs of setting up and cancelling a mortgage in the absence of agreement between the parties. If those provisions attribute to the consumer all or some of those costs (as is the case, for example, with the property conveyance tax and stamp duty imposed on the transaction), the Court has stated that the rules established by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (the "**Directive**") allow non-reimbursement to the consumer for the part of the costs which he must pay in accordance with the allocation of costs provided for by the national legislation.

B. Arrangement fees

Contrary to what it has stated regarding the costs of formalisation, the Court's decision is not as conclusive regarding the treatment of the arrangement fee, stating that it is for the national court to determine whether or not it forms the main subject matter of the financing contract by reference to the nature, general scheme and provisions of the financing contract

in particular, as well as its legal and factual context. However, it held that the fact that an arrangement fee is included in the total cost of a loan (i.e. the APR) does not mean that it is an essential term.

Notwithstanding the above, the Judgment states that the clause must comply with the requirement of transparency, an aspect that must be examined separately by the national judge. Case law that considers that this clause is in itself transparent is contrary to the Directive. However, the term may not be declared unfair if the financial institution can prove that the commission is in respect of services actually provided and costs actually incurred.

C. Limitation of actions for restitution

In this Judgment, the Court found that European Union law does not preclude national legislation from establishing a limitation period for actions seeking the restorative effects of a declaration of invalidity in respect of unfair terms. This is true, provided that the principles of equivalence and effectiveness are respected and that it is, therefore, not excessively difficult for the consumer to assert the restorative effects of the declaration of invalidity. In this respect, the Court has held that a period of five years is in keeping with the principle of effectiveness from the point of view of its duration, although the period cannot begin to run from the signing of the contract, and regardless of whether the consumer was or could reasonably have been aware of the unfairness of the term.

D. Allocation of legal costs

Finally, regarding the award of costs in legal proceedings which result in the declaration of the invalidity of a contractual term on the grounds of unfairness, the Court has ruled that the regulation contained in the Directive and the principle of effectiveness are contrary to the system provided for in Article 394 of the Code of Civil Procedure, as that article was applied in this particular case. In this case, the financial institution was not ordered to pay the costs, because the consumer was not reimbursed for all the costs that he had claimed.

The Court held that this situation creates a significant obstacle that is capable of deterring consumers from exercising their right to effective judicial review of the potentially unfair nature of contractual terms.

2. Conclusion

In this Judgment, the Court has strengthened its case law on the interpretation of the Directive in relation to consumer mortgage loans, without such conclusions necessarily having to be applied to the area of corporate lending. The Judgment includes relevant guidelines to be followed by national courts in this area.

This Briefing has been prepared by Patricia Alonso-Lamberti Rizo and Alma Martínez Losada, lawyers in the Corporate/M&A practice.

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For more information,
please contact:

Pedro Marques da Gama

Corporate/M&A Partner

pgama@perezllorca.com

Tel: + 34 91 423 20 80