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COURT OF JUSTICE ON MORTGAGE FLOORS: NULLITY OF ABUSIVE CLAUSES MUST BE GUARANTEED RETROACTIVELY

Contractual aspects are always subject to innumerable jurisprudence and the falling of interest rates and benchmarks in mortgage loan agreements has raised several problems. One of the solutions implemented by financial institutions constitutes the adoption of so-called “floor clauses”, which the Spanish courts considered abusive, albeit without taking into account their full effects. In this respect, the compatibility of Spanish jurisprudence with the Directive on unfair terms was judged by the European Court of Justice (“ECJ”), on December 21, 2016, in response to preliminary rulings.

In Spain several credit institutions adopted clauses which provide that, even if interest rates fall below a certain threshold (or “floor”) defined in the agreement, the consumer must continue to pay minimum interest equivalent to that threshold, without being able to benefit from a lower rate.

The Spanish Supreme Court (*Tribunal Supremo*), in 2013 and 2015, declared the invalidity of the ‘floor clauses’, but decided to exclude the retroactive effects of the nullity on the basis of the principle of legal certainty (*ex nunc*).

In this context, two Spanish lower courts asked the ECJ whether the *Tribunal Supremo’s* jurisprudence was compatible with Directive 93/13/CEE on unfair terms.

The ECJ’s response was clear: Rules protecting consumers are of public policy nature and national courts shall reaffirm the legal consequences arising from the abusive nature of any such clauses, thus precluding the ability to modify the scope of the clauses or to limit the nullity effects. The ECJ held that «while it is for the Member States to define the detailed rules under which the unfairness of a contractual clause is established (...), the fact remains that such a finding must allow the restoration of



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the legal and factual situation that the consumer would have been in if that unfair term had not existed».

National courts are entitled to hold that their judgments were not to affect situations in which judgments with the force of *res judicata* had been given, or in cases in which consumers have not brought their claims in respect of the domestic procedural rules, such as the rules on reasonable limitation periods or time-limits. Notwithstanding this, it is for the ECJ and not for the Member States to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of an EU rule.

Consequently, the ECJ decided that the national courts should not follow the *Tribunal Supremo's* decision on the limitation of the effects, as it contravenes EU law. So, «the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts».

The ECJ case law enhances the Court's role as guardian of the EU law, reaffirming the freedom of the judiciary to use the preliminary references mechanism even when it contravenes the national Supreme Courts established case law.

We believe that the effect of such precedent is limited in the Portuguese legal order, at least in the banking sector. It should be recalled that EU law respects the autonomy of national procedural law, as long as the principles of equivalence and effectiveness are complied with. However, this judgment is of major practical importance in all areas of the economy.

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