

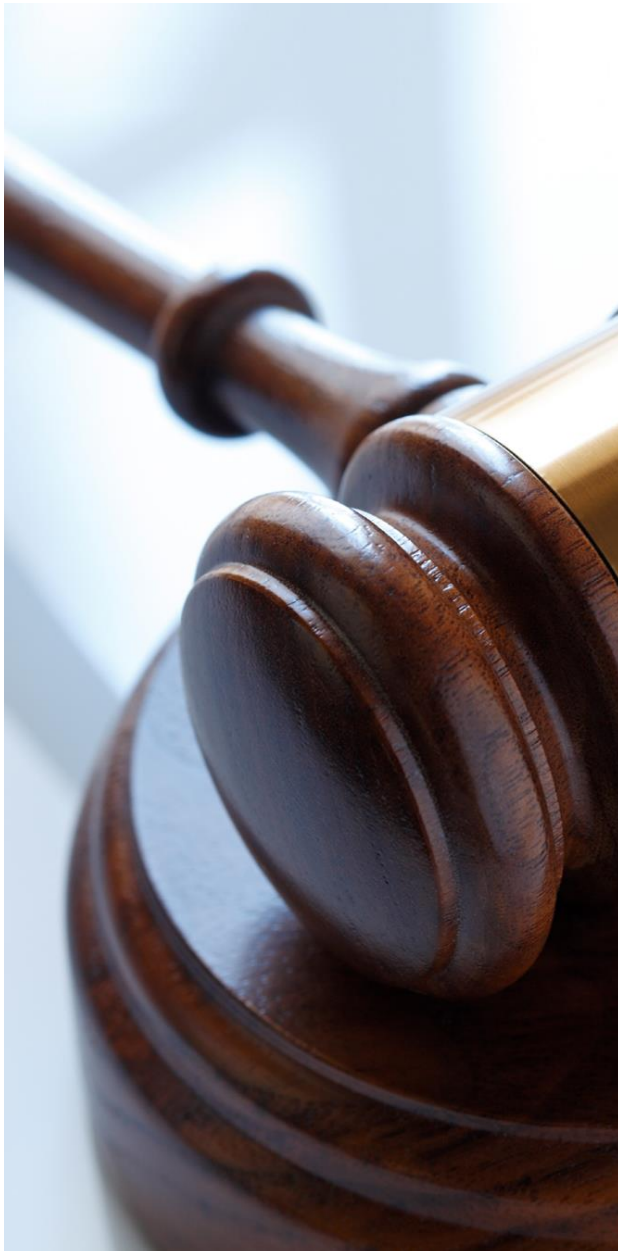


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Monitoring abusiveness of accelerated repayment clauses in mortgage loans Judgment of CJEU (Grand Chamber) of March 26, 2019

Legal flash

March 2019



The Court of Justice of the European Union (“CJEU”) has resolved the preliminary matters raised by the Spanish Supreme Court (“SC”) and by First Instance Court No. 1 of Barcelona regarding the scope of the declaration of nullity of accelerated repayment clauses in mortgage loan agreements with consumers.

The CJEU has concluded that declaring an accelerated repayment clause unfair invalidates it entirely and precludes it from being maintained in part by removing the elements that make it unfair.



In its [judgment of March 26, 2019](#) (cases C-70/17 and C-179/17), the CJEU adjudicated on two requests for preliminary rulings referred by the SC and by the Court of First Instance No.1 of Barcelona relating to the effects of declaring accelerated clauses in mortgage loan contracts unfair.

As we explained in our [legal flash of February 2019, regarding oversight of unfair accelerated repayment clauses in mortgage loan contracts](#), the referrals were aimed at confirming the interpretation of the CJEU's case law as ruled by the [SC in its judgment no. 705/2015 of December 23, 2015 \(ES:TS:2015:5618\)](#), in which the SC held that:

- > an accelerated repayment clause that was unfair in the terms it had been established (in case of any default by the borrower) did not entail invalidity of the accelerated repayment clause; therefore,
- > the mortgage could still be enforced for the entire amount of the loan pending repayment (together with interest), where enforcement has not been unfair.

In short, the requests for preliminary rulings asked the CJEU:

- > whether it is possible to consider the nullity exclusively of the part of the accelerated repayment clause that establishes maturity based on the non-payment of a certain number of installments and maintain the validity of the agreed early maturity, with the judge for mortgage foreclosure proceedings assessing on a case-by-case basis whether the accelerated repayment clause is unfair; and
- > whether, once nullity is declared because of abusiveness of the accelerated repayment clause in a mortgage loan agreement, and with the supplementary application of national law (specifically, article 693.2 of Spanish Civil Procedure Act ["LEC"]¹), it is possible to continue with the mortgage foreclosure proceedings in a way that the proceedings are more favorable for the debtor rather than by handling the claim in other proceedings, e.g., ordinary foreclosure proceedings).

¹ The current drafting of article 693.2 of LEC establishes as a requirement for accelerated repayment the non-payment of a minimum of three monthly installments or of a number of installments meaning that the debtor has not met his or her obligation for at least three months. From June 16, 2019, when Act 5/2019, of March 15, regulating credit agreements relating to immovable property comes into force, when a loan is taken out by an individual and guaranteed by a home mortgage or its purpose is to acquire immovable property for residential use, accelerated repayment will only apply when the payments due and unpaid equal (i) at least 3% of the principal (if the default takes place in the first half of the term of the loan); or (ii) 7% (if the default takes place in the second half of the term of the loan). These requirements are understood to be met if the unpaid installments are equal to 12 or 15 months of non-payment, respectively.



In his [opinion of September 13, 2018](#), discussed in our February 2019 legal flash, CJEU Advocate General Maciej Szpunar rejected the SC's ruling handed down in 2015. Now, in its judgment of March 26, 2019, the CJEU has concurred with the advocate general's opinion and has ruled that:

“Articles 6 and 7 of Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts must be interpreted, first, as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance, and, second, as not precluding the national court from compensating for the invalidity of such an unfair term by replacing that term with the new wording of the legislative provision on which it was based, which is applicable where the parties to the contract so agree, provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed, and that the annulment of the contract in its entirety would expose the consumer to particularly unfavorable consequences.”

According to the CJEU, declaring an accelerated repayment clause to be abusive will mean its invalidity, and therefore, it will be impossible for the creditor to declare early maturity of the loan, excluding in cases established by law, regardless of the importance of that breached the obligation.

It would be different if, after an accelerated repayment clause has been ruled to be invalid, the mortgage loan contract could be held not capable of continuing to exist, which must be declared by the Spanish courts so the CJEU refrains from ruling. In that case, if invalidity of the mortgage loan contract exposed the consumer to particularly unfavorable consequences, the CJEU held that the national court could replace the unfair clause by the provision in article 693.2 Spanish Civil Procedure Act and, therefore, allow enforcement of the mortgage to continue.

After this judgment by the CJEU, the legal repercussions of the ruling on proceedings already under way will have to be considered on a case-by-case basis.

- > First, it will be necessary to consider whether the mortgage enforcement proceedings can continue in accordance with CJEU case law, applying article 693.2 LEC as well.
- > In any case, discontinuing mortgage enforcement proceedings would not entail loss of the mortgage guarantee nor preclude other legal proceedings from being instituted to secure recovery of the debt. Alternatives that we highlight are the actions for a declaratory judgment (to declare loss of right to make use of the term according to



article 1129 of the Spanish Civil Code or to declare termination of the loan agreement according to article 1124 of the Spanish Civil Code) and the actions for enforcement of judgments (including mortgage foreclosures limited to claims for unpaid installments and ordinary enforcement of the notarial deed of the loan agreement). It will be necessary to assess the advantages and disadvantages of each case, as well as the possibilities they offer in relation to enforcement of the mortgaged asset, of the debtor's other assets, the interest accrued during the proceedings' processing, its speed and cost.

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