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## Monitoring abusiveness of variable interest rate clauses linked to Spain's savings banks mortgage rate index (IRPH for Saving Banks). Judgment of the Court of Justice (Grand Chamber) of March 3, 2020.

Legal Flash

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**The Court of Justice of the European Union (“CJEU”) has handed down its judgment on the preliminary ruling request submitted by the First-Instance Court no. 38 of Barcelona, on the potentially abusive nature of clauses in consumer mortgage loan agreements linking variable interest rates to the Spanish Mortgage Rate Index (IRPH) for Savings Banks.**

**The CJEU has concluded that the transparency of these clauses must be reviewed by the national courts.**

**The CJEU has also ruled that if such clauses are declared void, a national court can replace the affected reference index by another applicable legal index, as long as the mortgage loan agreement is not capable of continuing in existence if the disputed clause is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.**



In its [judgment of March 3, 2020](#) (case C-125/18), the CJEU decided on the preliminary ruling request submitted by the First-Instance Court no. 38 of Barcelona regarding the potentially abusive nature of clauses in consumer mortgage loan agreements linking variable interest rates to the Spanish Mortgage Rate Index (IRPH) for Savings Banks (“**IRPH for Savings Banks**”)<sup>1</sup> in a loan mortgage agreements between a Spanish financial institution and a consumer for financing the acquisition of a home (the “**Controversial Clause**”).

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## Preliminary ruling request submitted to CJEU

To summarize, the following questions were submitted to the CJEU in the request for a preliminary ruling<sup>2</sup>:

- Can the IRPH for Savings Banks be subjected to a transparency review in light of [Council Directive 93/13/EEC of April 5, 1993, on unfair terms in consumer contracts](#) (“**Directive 93/13**”). Specifically, is the court required to assess whether the Controversial Clause is understandable for the consumer, considering that, although the IRPH is ruled by regulatory or administrative provisions, including it in the contract is not mandatory and, therefore, it would not be excluded from the scope of application of Directive 93/13 as established in its article 4.2<sup>3</sup>. [Spanish Supreme Court judgment of December 14, 2017](#) (ES:TS:2017:4308) is relevant here because it expresses its opinion to the contrary, since that court ruled that Spain’s IRPH for Credit Institutions<sup>4</sup> did not fall within the scope of application of Directive 93/13.

Along the same lines, the request from the Spanish court was seeking a preliminary ruling on whether Directive 93/13, especially its article 8<sup>5</sup>, allows a national court to determine that the Controversial Clause should be excluded from the scope of that EU law based on its article 4.2 (i.e., to decline assessment of whether the clause is abusive

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<sup>1</sup> The Spanish Reference Index for Mortgage Loans (IRPH by its initials in Spanish) has three variants, namely the IRPH for Banks, the IRPH for Savings Banks, and the IRPH for Credit Institutions. It was introduced as an official index by [Bank of Spain Circular 8/1990 of September 7, for Credit Institutions, on transaction transparency and customer protection](#) (*Circular número 8/1990 del Banco de España, de 7 de septiembre, a Entidades de Crédito, sobre transparencia de las operaciones y protección de la clientela*).

<sup>2</sup> The request for a preliminary ruling was submitted by means of the [decision of First-Instance Court no. 38 of February 16, 2018](#) (ES:JPI:2018:3A).

<sup>3</sup> The literal wording of article 4.2 of Directive 93/13 is: “*Assessment of the unfair nature of the clauses must relate neither to the definition of the main object of the contract nor to the adequacy of the price and remuneration, on the one hand, nor to the services or goods supplied in exchange, on the other, provided these clauses are in plain intelligible language.*”

<sup>4</sup> Once Spanish Ministerial Order 2899/2011 entered into effect, the IRPH for Savings Banks was no longer an official reference index, and under [Additional Provision 15 of Spanish Act 14/2013, of September 27, on support for entrepreneurs and their internationalization](#) it was replaced, unless agreed otherwise, by the IRPH for Credit Institutions in Spain as a whole.

<sup>5</sup> The literal wording of Article 8 of Directive 93/13 is: “*Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive to ensure the maximum degree of protection for the consumer.*”



in nature), considering that Directive 93/13 has not been transposed into Spain's legal system, which offers a more complete level of protection by allowing review of clauses that affect the main object of the agreement, e.g., the clause on interest rates.

- > Is it necessary to send information or advertising for the consumer to understand the Controversial Clause, and if so, how extensive does that information need to be?
- > What would the consequences of not including such information be? Does it represent lack of clarity on the Controversial Clause for purposes of Directive 93/13 or unfair treatment by the professional?
- > What should the consequences of eventually voiding the Controversial Clause be, applying a replacement index to the agreement, typically the Euribor, or no longer applying the interest, keeping only the obligation to repay the loan's principal on the stipulated dates?

The Spanish court also clarified in its request that the IRPH, as the reference rate used in approximately 10% of the variable-rate mortgage loans granted in Spain, is actually less favorable for the consumer than the Euribor, which is used in 90% of those mortgage loans.

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## Conclusions of CJEU Advocate General

In his [conclusions of September 10, 2019](#), the CJUE's Advocate General Maciej Szpunar rejected the Spain's Supreme Court doctrine, and his views can be summarized as follows:

- > The Controversial Clause is within the scope of application of Directive 93/13, and its potentially abusive nature can be reviewed by a national court.
- > Directive 93/13 precludes a national court from applying its article 4.2 in order to abstain from assessing the potentially abusive nature of a contractual clause such as the Controversial Clause, drafted in plain, intelligible language and relating to the principal subject matter of the agreement, where that provision has not been transposed into its legal order by the national legislature.
- > The CJEU must specify the information that a bank must provide to consumers regarding the IRPH for Savings Banks in the context of monitoring transparency, in view



of the CJEU's case law related to the level of information required, in the context of interpreting articles 4.2 and 5 of Directive 93/13<sup>6</sup>.

- > By reviewing the transparency of the Controversial Clause, the national court must confirm that the consumer was in a position to evaluate the economic consequences for him or her arising from the loan agreement, and it must consider whether that agreement meets all of the information obligations established in national law.

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### CJEU judgment

In its judgment of March 3, 2020, the CJEU concurred with the Advocate General's conclusions and ruled, to summarize:

- > That a clause stipulating that the interest rate applicable to a loan is based on one of the official reference indexes established by national law, and which credit institutions may apply to mortgage loans, is within the scope of Directive 93/13.

The CJEU states that, according to its case law, the IRPH for Savings Banks as the reference index for a loan's interest rate has not resulted from applying a mandatory CJEU legal or regulatory provision.

- > That the national courts must assess the plain and intelligible nature of a contractual clause related to the main object of the agreement (such as the Controversial Clause), irrespective of whether or not article 4.2 of Directive 93/13 has been transposed into Spain's national legal system.
- > That the requirement on transparency for a contractual clause used to establish a variable interest rate for a mortgage loan means that *"that term not only must be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations."*

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<sup>6</sup> The Advocate General specified that to comply with that legislation, the information that the professional provides to the consumer "must: – first, be sufficient to enable the consumer to take his decision prudently and in full knowledge of the facts as regards the method of calculating the interest rate applicable to the mortgage agreement and its component elements, explaining not only the full definition of the reference index used by that calculation method but also the relevant provisions of the national legislation that governs that index; and – second, indicate past fluctuations in the reference index chosen."



The CJEU also adds that *“Information that is particularly relevant for the purposes of the assessment to be carried out by the national court in that regard includes (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and (ii) the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated.”*

- That if a mortgage loan agreement could not remain valid after voiding an abusive clause used to establish a reference index for calculating the loan’s variable interest, the national court is fully justified, considering the purpose of Directive 93/13, in allowing replacement of the index used, *“in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.”*

In relation to this, the CJEU applies the rulings from cases C-70/17 and C-179/17 by analogy in its [judgment of March 26, 2019](#), as discussed in our [Legal Flash of April 2019, on monitoring abusiveness of accelerated repayment clauses of mortgage loans](#).

- That it is not appropriate to establish temporal limits on the effects of this judgment.

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## Immediate effects of CJEU judgment

At this time, it is impossible to predict what the response will be from Spanish judges when faced with requests for voiding clauses such as the Controversial Clause, as it will have to be based on a case-by-case analysis of the various elements that, as specified by the CJEU, the information provided to the consumer is required to contain.

It is also unclear how the courts will respond in cases where clauses like these are eventually declared abusive by their lack of transparency. In fact, as the CJEU points out, declaring such a clause void would cause its elimination from the agreement. The question of whether the agreement can remain valid without the voided clause is a separate issue, because only in cases where termination of the agreement would be more harmful to the consumer than its persistence would the court be allowed to replace the voided reference index by another legal index.

In view of the Spanish Supreme Court's recent case law on mortgage loans ([judgment of September 11, 2019](#) (TS:2019:2761), discussed in our [Legal Flash of September 2019](#)), it would not seem unreasonable to expect that, just as a mortgage agreement cannot remain valid without its accelerated repayment clause, it would also be unable to remain valid if its clause on the interest to be paid to the lender became void.



Under those circumstances, and following the same lines of judicial reasoning, voiding the entire mortgage agreement would expose the consumer to especially harmful consequences so, in line with the CJEU's ruling, the Spanish court could replace the application of the reference index (in the case at hand, the IRPH for Savings Banks) by another legal index . This would mean that the payable interest would have to be recalculated based on use of that replacement index.

Following this CJEU judgment, a case-by-case analysis will have to be performed on the legal impact of this new case law on proceedings in progress in which the abusiveness of contractual terms such as the Controversial Clause is under dispute, as well as its impact on new cases that may be initiated based on this ruling.

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