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Interest applicable to revolving credit cards and interest rate clauses linked to Spanish savings banks mortgage rate index (IRPH) – Case-law criteria

Legal flash
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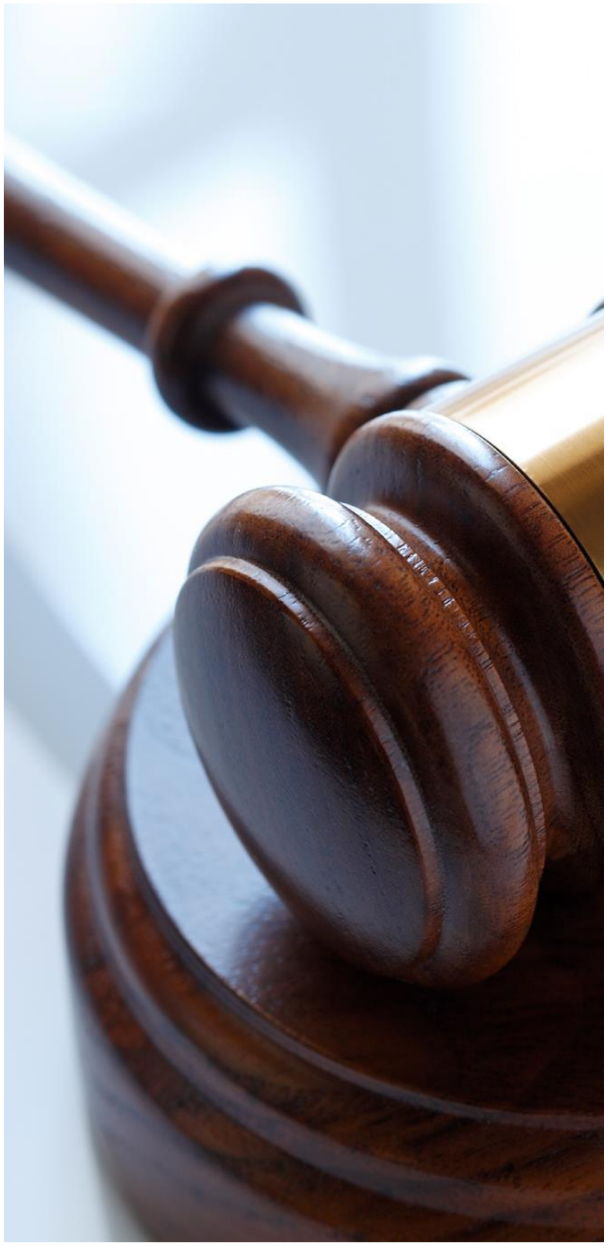

In March, we discussed two important decisions in the Spanish consumer finance field:

- In one decision, the Supreme Court upheld the annulment of a revolving credit card agreement on the grounds that its high interest rate breached the *Spanish Law of Usury*. For more details, see our legal flash "*Supreme Court judgment 149/2020 on interest rate applicable to revolving credit cards*."
- In the other decision, the Court of Justice of the European Union ("CJEU") concluded that the national courts must review the transparency of the variable and remunerative interest rate clauses linked to the Spanish Mortgage Rate Index ("IRPH") for savings banks. For more details, see our legal flash "*Monitoring abusiveness of variable interest rate clauses linked to Spain's savings banks mortgage rate index (IRPH)*."

This time, to assess the legal impact of these two important decisions on the court proceedings concerned, we will examine the criteria now followed by Spanish courts when resolving cases of this nature.

Interest rate applicable to revolving credit cards

Background

We refer to *Supreme Court judgment 149/2020, of March 4, 2020* (the "**Supreme Court judgment**").

Following the claim filed by a consumer against Wizink Bank, S.A. in relation to a revolving credit card agreement that established an initial interest rate of 26.82% APR (annual percentage rate), the Supreme Court held that this agreement breaches the *Spanish Law of Usury.* This was based on the grounds that the interest rate is notably higher than the regular interest rate for a transaction of a similar nature and clearly disproportionate for the debtor. Therefore, the judgment declared the agreement to be void, ordering the debtor to return all the outstanding principal, without having to pay related interest or fees.

The court also pointed out the possibility for control over stipulated interest rates to take place via the control of contents and transparency, which are part of the control of general terms and conditions for consumer contracts.

For more details, see our legal flash of March 17 *"Supreme Court judgment 149/2020 on interest rate applicable to revolving credit cards."*

Criteria for practical application employed by Spanish judges

In the wake of the Supreme Court judgment, national courts have ruled on revolving credit card claims by applying a plurality of criteria that we detail below in which, while taking the legal guidelines of the Supreme Court as a benchmark, they adopt a different approach in some respects.

I. **Nullity on grounds of usury: thesis and effects**

The most recent Supreme Court judgments[1] that are recurrently cited in the rulings of courts of first instance and provincial courts of appeals, handed down between March and June 2020, focus on three elements when determining the existence of usurious interest rates:

a) The interest rate: the courts agree that the interest to be analyzed in a revolving credit card agreement is the APR, not the nominal rate.

[1] Supreme Court judgment 628/2015 of November 25, 2015, and Supreme Court judgment 149/2020, of March 4, 2020.

b) The reference to the regular interest rate: in line with the Supreme Court judgment, this data must be obtained from the statistics published by the Bank of Spain, on the date of execution of the agreement and with reference to the category of the challenged credit, i.e., the product acquired by the consumer.

Several courts of first instance have agreed in this respect, considering that revolving credit card agreements are different in nature from traditional credit cards and that the Bank of Spain's statistics for revolving loans reveal high interest rates[2].

Other judges, however, have taken consumer credit operations into consideration as a reference category, when the interest rate for this type of transaction is much lower than the result of taking the APR as the benchmark[3].

c) The APR is notably higher than the regular interest rate**:** on this point, the Supreme Court judgment determined that a deviation of 6.82% from the average rate for this type of product, indicated as 20%, was usurious.

The following relevant conclusions can be drawn from the decisions analyzed[4] when determining excess interest:

- Comparisons must be made with similar transactions, thereby discarding consumer loans, since these products differ considerably[5].

- There are some discrepancies as to the rate that can be effectively considered as usurious. Therefore, while the Supreme Court judgment (along with some of the other rulings and appeals cited)[6] states that "*the higher the index to be taken as a benchmark for the regular interest rate, the less scope there is to increase the price of the loan transaction without committing usury,*" Cádiz Provincial Court of Appeals[7] purports that "*what actually happens is the opposite, i.e., the disproportion between the average rates and the potentially usurious rates does not have to be significant when the*

[2] We highlight Judgment 69 of First Instance Civil Court No. 2 of Bilbao, of March 11, 2020; and Judgment 76 of Cádiz Provincial Court of Appeals, of April 15, 2020.

[3] Judgment 126 of Asturias Provincial Court of Appeals, of March 12, 2020, considers an average interest rate for consumer loans of 9.36% APR at the time the agreement was executed. This same reference is adopted in Judgment 35 of First Instance Civil Court 71 of Madrid, of March 9, 2020.

[4] We highlight Judgment 76 of Cádiz Provincial Court of Appeals, of April 15, 2020; and Judgment 53 of First Instance Civil Court No. 21 of Palma de Mallorca, of April 16, 2020.

[5] Judgment 188 of León Provincial Court of Appeals, 18 March 2020, highlighting the issue that "*in 2006, when the credit card agreement in question was signed, the Bank of Spain's statistical bulletin did not exist.*"

[6] Judgment 38 of First Instance Civil and Criminal Court No. 7 of Lorca, of March 23, 2020; and Judgment 141 of Girona Provincial Court of Appeals, of May 4, 2020.

[7] Judgment 76 of Cádiz Provincial Court of Appeals, of April 15, 2020.

average rates are not high (for example, when comparing average rates of 5% with a rate of 10% that, in doubling the average rate, is undoubtedly usurious, even though it is just five points higher). In the opposite case, if the average rates are higher, they will require a greater margin of proportional increase to be classed as usurious."

Despite these nuances, and from a quantitative point of view, most of the decisions that have been issued since the Supreme Court judgment rule in line with that court's criteria, using the same parameters and declaring excesses of more than 5%—and even lower rates—to be usurious.[8]

However, although there are judges who find in favor of consumers by applying the average interest rate of consumer loans at the time of signing the agreement (around 10%, and therefore the APR represents more than double[9]), in other cases the doctrine established by the Supreme Court judgment has been questioned, claiming that an excess of 5% in the APR is not usurious, as it already stands at an average of 20% in this type of product.[10]

The effects of the judgments in favor of the consumer follow a consistent trend: the annulment of the agreement, in practice converting the usurious loan into a free loan, with the return of the consideration exchanged.

II. Annulment on grounds of lack of transparency: thesis and effects

As mentioned above, the Supreme Court judgment allowed for the possibility that the review of the clause establishing the remunerative interest could also be carried out via the inclusion and transparency reviews applied when analyzing standard terms in agreements executed with consumers.

Indeed, we have found that in some of the most recent of the judgments quoted, the claimant files alternative pleadings for annulment on grounds of the lack of transparency and unfair nature of the clause.

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[8] Judgment 38 of First Instance Civil and Criminal Court No. 7 of Lorca, of March 23, 2020; Judgment 126 of Asturias Provincial Court of Appeals, of March 12, 2020; Judgment 120 of Burgos Provincial Court of Appeals, of March 31, 2020; Judgment 85 of Badajoz Provincial Court of Appeals, of May 11, 2020; and Judgment 168 of Cantabria Provincial Court of Appeals, of April 23, 2020.

[9] Judgment 188 of León Provincial Court of Appeals, of March 18, 2020.

[10] Judgment 69 of First Instance Civil Court No. 2 of Bilbao, of March 11, 2020, which establishes that "*a deviation of around 5% cannot be established as being notably higher than the regular rate and manifestly disproportionate to the circumstances of the case.*" First Instance Civil Court No. 4 of Granada, in its Judgment 34, of March 13, 2020, determines that an APR that is 2.15% higher than the statistical mean for this type of revolving credit card operations is not notably higher. Likewise, Barcelona Provincial Court of Appeals, in its Judgment 99, of March 5, 2020, expressly states that to determine whether the interest rate is usurious, the rate for revolving credit cards should be taken into consideration and not the rate for consumer loans.

In the field of revolving credit cards, the control of contents is gaged according to whether there is an actual opportunity to know the content of interest rate clauses.

This monitoring mechanism is incremented by the transparency control, to determine whether the essential elements of the agreement can effectively be understood, including the APR. The clause determining the APR could contain a myriad of figures and concepts. This is why the CJEU[11] requires institutions to reinforce the content of the information provided, to enable the consumer to make a fully informed contracting decision.

If a clause establishes a fixed fee, consisting of a percentage of the loan amount, there are courts that consider this sufficient to approve the transparency control[12].

In any case, the annulment of the APR interest rate on grounds of unfairness would, in principle, entail its removal, thus making the loan free of charge, since it would subsist without that specific clause.

Variable interest rate clauses linked to Spain's savings banks mortgage rate index (IRPH)

Background

In its *judgment of March 3, 2020,* case C-125/18 (the "**CJEU judgment**"), the CJEU decided on the preliminary ruling request submitted by the First Instance Civil Court No. 38 of Barcelona regarding the potentially unfair nature of clauses in consumer mortgage loan agreements linking variable interest rates to the IRPH for Savings Banks (the "**controversial clause**"), in a mortgage agreement between a Spanish financial institution and a consumer to finance the acquisition of a home.

The CJEU concluded, in summary, that the reference to the IRPH index as a benchmark interest rate is not the result of applying a mandatory legal or regulatory provision and determined that the national courts must examine the clear and understandable nature of a contractual clause that refers to the main purpose of the agreement, like the interest rate clause.

Therefore, the answer was partially deferred to the interpretation of the Spanish courts.

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[11] CJEU judgment of Case C-92/11, of March 21, 2013; and CJEU judgment of Case C-26/13, of April 30, 2014.

[12] Judgment 31 of First Instance Civil and Criminal Court No. 4 of Roquetas de Mar, of April 20, 2020; and Judgment 53 of First Instance Civil Court No. 21, of April 16, 2020.

The CJEU additionally recalled that, if these courts should declare this type of clause to be unfair due to a lack of material transparency, the clause in question will be void, thus entailing its removal from the agreement. If the agreement cannot remain valid without the voided clause, to the extent that the termination of the agreement would be more harmful to the consumer than its persistence, the court be allowed to replace the voided benchmark index by another legal index.

For more details, see our legal flash of March 3, *"Monitoring abusiveness of variable interest rate clauses linked to Spain's savings banks mortgage rate index (IRPH for Saving Banks)."*

Criteria for practical application in national case law

After the publication of the CJEU judgment, the question arose as to what the Spanish courts' responses would be to applications for annulment of the controversial clause and, in particular, how they would analyze the different elements that would have to contain information aimed at the consumer to pass the transparency control, as specified by the CJEU judgment.

The second derivative would be to determine whether the courts are declaring the agreement to be void, or if instead, they are replacing the annulled index with a legal index.

I. **Annulment of the controversial clause**

a) Consumer information and clarity of the controversial clause

Based on the transparency control established by the case law of the Spanish Supreme Court, some lower courts have determined the annulment of the controversial clause based on the clear and intelligible nature of its content, i.e., whether the consumer understands the costs implied in accepting the IRPH for Savings Bank as the interest rate[13].

In this regard, the profile of the borrower taken as a reference is the average consumer (objective assessment) and not the specific borrower applying for the annulment of the controversial clause (subjective assessment).

[13] According to Judgment 71 of the First Instance Civil Court No. 6 of Orihuela, of March 13, 2020, the clarity and intelligibility of the clause must "*allow the average consumer, as described in paragraph 51 of this judgment, to evaluate this cost.* "

b) Pre-contractual information provided to the consumer

While this aspect is considered crucial by some judges for assessing the transparency of the controversial clause, for others, it represents an avoidable criterion.

According to the CJEU judgment, it would consist of the information made available to consumers concerning the evolution of the benchmark index for the two previous calendar years, together with the last value available.[14]

So, while some judges are faithful advocates of meeting this requirement[15], others do not share it to the same extent.[16] The latter who do not focus their attention on the characteristics and level of knowledge of the average consumer to access and understand an essential element of the agreement, such as the variable interest rate. To the extent that the information related to this essential element is public, it could be inferred that the average consumer, responding to the profile of a reasonably aware consumer, has access to the information and is therefore usually informed. In these cases, failure to provide that information would not determine a lack of transparency.[17]

c) Standard contractual terms

Some of the judges who have found in favor of not considering the IRPH an unfair clause, have defended—as one of the determining factors—the fact that the IRPH is not a standard term, thus excluding it from the scope of ***Council Directive 93/13/EEC of April 5, 1993, on unfair terms in consumer contracts***.

Therefore, based on this position and following the CJEU judgment, what can be reviewed by the courts is the way the controversial clause has been included in the contract, but not the index *per se*, nor how it is calculated, since this has been determined by legal provisions and its supervision is therefore in the hands of the public authorities.[18]

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[14] Judgment 143 of Madrid Provincial Court of Appeals, of May 22, 2020.

[15] Judgment of First Instance Civil Court No. 17 of Palma de Mallorca, of April 20, 2020.

[16] According to Granada Provincial Court of Appeals, in its Judgment 241 of May 11, 2020, "*control of the clause's transparency does not require the lender to explain how the benchmark rate is configured in all variable interest loans, nor how it has evolved and how it could evolve in the future.*" Likewise, Barcelona Provincial Court of Appeals, in its Judgment 634 of April 24, 2020, has upheld the validity of the IRPH for Savings Banks.

[17] We highlight Judgments of First Instance Civil Court No. 17 of Palma de Mallorca, of April 20 and June 8, 2020, respectively; and Judgment 634 of Barcelona Provincial Court of Appeals, of April 24, 2020.

[18] Judgment 634 of Barcelona Provincial Court of Appeals, of April 24, 2020.

d) Imbalance between parties

Finally, and more residually, there are also judges who have incorporated an additional element into their analysis: the financial institution's knowledge that the rate it was agreeing with the borrower was less beneficial and the fact that the consumer was less familiar with it, leading to a situation of imbalance between the parties.[19]

However, some courts have ruled that, in cases like the IRPH for Savings Bank, in which "*these are official rates fixed by the supervisory authority, the Bank of Spain, and prepared under its oversight,*" it would be difficult to argue that either of the contracting parties had suffered harm, since it was impossible to know what the future evolution of these indices would be.[20]

II. Effects of the annulment of the controversial clause

Given that legal doctrine and case law mainly asserts that a commercial loan cannot subsist without interest, certain judges[21] argue that the substitute rate should be applied (or the legally established rate in the absence of an agreed one), without it being possible for the judge to substitute it for the Euribor rate. Consequently, and unless otherwise agreed in the loan deed, the substitute rate would be the IRPH for Credit Institutions in Spain as a whole, in accordance with ***Additional Provision 15 of Spanish Act 14/2013, of September 27, on support for entrepreneurs and their internationalization***.[22]

However, several judges have upheld that the controversial clause is void before ordering the reciprocal return of the payments made by the parties and the replacement of the controversial clause by the Euribor benchmark index, including the return of the excess interest unduly charged by the bank as a result of not applying the Euribor rate.[23]

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[19] According to the Judgment 17 of First Instance Civil Court No. 17 of Palma de Mallorca, of April 20, 2020, "*the bank was aware of the residual nature of its use, since in the same year as the loan was agreed, over 80% of the mortgages granted were linked to the Euribor rate, with which the consumer was most familiar.*"

[20] We highlight Judgment 769 of Barcelona Provincial Court of Appeals, of May 12, 2020; Judgment 584 of Girona Provincial Court of Appeals, of May 21, 2020; and Judgment 347 of Cantabria Provincial Court of Appeals, of June 8, 2020.

[21] We highlight Judgment 261 of Tarragona Provincial Court of Appeals, of March 11, 2020; and Judgment of Seville Provincial Court of Appeals, of April 23, 2020.

[22] Once 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 Act 14/2013, of September 27, on support for entrepreneurs and their internationalization*, was replaced, unless agreed otherwise, by the IRPH for Credit Institutions in Spain as a whole.

[23] For example, Judgment 71 of First Instance Civil Court No. 6 of Orihuela, of March 13, 2020; Judgment 261 of Tarragona Provincial Court of Appeals, of March 11, 2020; Judgments 214 and 227 of First Instance Civil and Criminal Court No. 6 of Lleida, both of March 9, 2020; and Judgment 582 of First Instance Civil Court No. 17 of Palma de Mallorca, of April 20, 2020.

For additional information, please contact Cuatrecasas.