

THE SPANISH SUPREME COURT, SITTING IN PLENARY SESSION, CONFIRMS THAT LOANS LINKED TO AN OFFICIAL INDEX CANNOT BE ABUSIVE

The judgment handed down by the Plenary Session of the Supreme Court on 14 December 2017 has reversed the position taken by several Provincial Courts, which had found that loans linked to certain official rates (including as, in this case, the IRPH – the average rate for housing loans granted by financial institutions in Spain-) could be abusive where the client has not been properly informed. The Supreme Court has now established that a clause referring to an official interest rate is not abusive.

BACKGROUND

This is the first time in recent years that the Supreme Court has handed down a decision of this significance against consumers in a financial dispute. It is a categorical judgment, handed down in Plenary Session (12 Judges), with a dissenting opinion from two senior judges who, while considering that the IRPH is not a transparent index, confirm the validity of the EURIBOR in this regard, which was the replacement index established in the agreement.

THE JUDGMENT OF THE SUPREME COURT ON 14 DECEMBER 2017

The Judgment begins by declaring that the interest clause linked to an official index will be considered a general contract clause unless the financial institution demonstrates that it was expressly negotiated with the consumer and, as such, must be subject to transparency monitoring when the agreement is signed with a consumer.

The Court then goes on to explain what a variable interest loan is and what rules regulate the official rates, in particular the Order of 5 May 1994. It concluded that the parties did not set out in the agreement how the applicable interest shall be calculated, but merely referred to an official index, legally defined and regulated. Article 4 of the Consumers Act

Content

- The official mortgage market indexes
- The clause merely contains a reference to an official rate
- The civil jurisdiction cannot judge the index as such
- The clause is transparent

excludes general conditions reflecting legal or administrative provisions from its scope.

The Court unequivocally held that a civil action is no place for and cannot analyse whether the index can be manipulated by financial institutions or weigh up the degree of influence of such institutions in the determination of the index. It is the Government that is responsible for ensuring that an official index is in line with the regulations, not the civil courts.

All that the Civil Judge can monitor is the transparency of the clause in question. On this point, they concluded that the clause was clear and comprehensible. Given the importance of the clause, the consumer must have been aware that the interest rate was formed by adding a spread to the official rate cited in the agreement. With regard to the argument that the consumer is not able to understand the mechanism for calculating the index, the Court declared that the lender is not obliged to provide an explanation because the index is prepared under the supervision of the Bank of Spain; it is sufficient that the agreement include a basic definition of IRPH.

Finally, the Court rejected the argument that the IRPH was abusive simply because, unlike the EURIBOR, the customers were not familiar with this index, which was more onerous at that time than EURIBOR. When signing the agreement the parties had no way of knowing how the two indexes would evolve during the lifetime of the agreement.

The Judgment concludes by declaring that the conclusion reached by the Provincial Court, which not only declared the clause on the link to the IRPH abusive, but also ignored the replacement index (EURIBOR), leaving the loan without interest, must be revoked.

It must be noted that two of the senior judges issued a dissenting opinion, as they thought that the appellant's argument on the unknown nature of the IRPH for consumers should have led the Court to declare the clause abusive and applied the EURIBOR, as the replacement rate.

DECISION

The Court concluded by majority that the interest rate clause, referred to an official index, is not abusive.

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