SPAIN: REVOLVING CREDIT CARDS

Supreme Court Judgment of 4 May 2022

Have things become clearer or are we in the same place as before?

On 4 May 2022 the Supreme Court issued its third judgment on revolving credit cards, and the first in favour of banks.

The flood of reactions in the media prompted a press release from the Supreme Court's Technical Cabinet of the Supreme Court, which sought to contain the controversy surrounding the ruling. The press release asserts that the existing case law on the matter has not changed.

But are we really in the same place following the publication of this judgment? It is our understanding that we are not, but it is now up to the courts of appeal. The first judgements from minor Courts that have been released to the public seem to share our view.

Key issues

- First Supreme Court judgment on revolving cards in favour of banks.
- Clarification as to the benchmark for products prior to the publication of official data: the average APR of the product, as proved by the parties.
- The Judgment establishes that a 24.5% APR is not usurious when the average APR exceeds 20%.
- A press release sought to shift the benchmark from 20% to 23%–26%, thereby reducing the margin declared to be non-usurious.
- The first lower court precedents of this new stage share the criteria of the Judgment and rule in favour of the banks.

WHAT DOES THE JUDGMENT OF 4 MAY 2022 SAY?

In the judgment of 4 May 2022 (the "**Judgment**"), the Supreme Court's First Chamber reviews a judgment from the Albacete Court of Appeal, which held that the 24.5% APR of a revolving card taken out in 2006 was not usurious. Since the Bank of Spain did not publish official data on the interest rates of revolving cards at the time the card was taken out, the Court of Appeal drew on the evidence submitted by the parties to establish the benchmark, considering it proven that the average APR at the time was over 20% (the APR often exceeded 23%, and in some cases even 26%).

In this context, the court declared that the interest rate established by the entity (which was 122.5% of the average market APR, if we take the cited 20% as the benchmark) was not usurious.

The user of the card brought a cassation appeal before the Supreme Court in 2019; prior, therefore, to the publication of the judgment of 4 March 2020. The Albacete Court of Appeal's judgment had already clarified that the benchmark should be the average APR for the specific product, not the average APR for consumer loans, as had been declared in the judgment of 25 November 2015.

The Supreme Court's Judgment dismisses the cassation appeal. It accepts that the benchmark for determining whether the conditions of a card are usurious must be the average APR of the specific product and, in the absence of official data (the Bank of Spain did not start publishing such data until 2017), admits the submission of evidence in this regard by the parties.

On the basis of this premise, the Supreme Court holds that the Court of Appeal did not violate Supreme Court case law in declaring that the APR was neither substantially higher than the market APR, nor manifestly disproportionate in view of the circumstances of the case, and therefore confirms that the product was not usurious.

However, the Supreme Court does not explain in its Judgment why, with an apparently similar market interest rate in both cases (above 20%), the judgment of 4 March 2020 holds that a 26.82% interest rate is usurious, while in this case a 24.5% interest rate is deemed not to be.

In particular, leaving aside the uncertainty as to the benchmark interest rate used in this case (see below), the Judgment, like the previous judgment of 2020, does not establish a criterion or rule that allows for an objective determination of whether or not an interest rate is manifestly disproportionate to the benchmark interest rate and therefore usurious.

It is also striking that the Supreme Court should impose the costs on the user of the card. It suggests that the First Chamber considered there to be no doubts of fact or of law in the case resolved.

WHAT DOES THE TECHNICAL CABINET'S 19 MAY 2022 PRESS RELEASE SAY?

In the days following the publication of the Judgment there were a host of news stories reporting on the Judgment, with varying degrees of sensationalism in the headlines. Some pointed to a change in the First Chamber's approach to this product.

The Technical Cabinet of the First Chamber sought to end the controversy, blaming it on a "*misunderstanding of the judgment*. To this end, it issued a press release that began to circulate on 19 May 2022 and was officially published on the 23rd (the "**Press Release**").

The Press Release begins by indicating that the Judgment had not altered or qualified previous case law in any way. It clarifies that the First Chamber did not have the power to alter the facts considered proven by the Albacete Court of Appeal, since it considered the current average APR to have been proved.

The Press Release confirms the general understanding: on the basis of the average APR considered proven by the Albacete Court of Appeal (which the First Chamber could not go into because no extraordinary appeal had been lodged), the Judgment states that "*the card's rate was very close to the average rate in transactions with which it most specifically shares characteristics*" and that, consequently, it was not usurious.

In other words, the Press Release explains that the average APR for the financial year in question (in this case, 2006) is a matter of fact, which is up to the parties to prove and the judge to assess in each case, on which the Supreme Court cannot decide.

However, what is not an assessment of fact is the Supreme Court's assessment in the Judgment (supporting the appellate court's judgement) that, taking into account the average APR that was proved in the proceedings, the agreed APR could not be considered usurious.

WHAT HAS CHANGED WITH THE THIRD SENTENCE ON REVOLVING CARDS?

Despite the assurance of the Technical Cabinet, it seems obvious that we are not in the same place as we were at the beginning of May 2022.

First, the Judgment confirms once and for all what the benchmark is for revolving cards taken out before the publication of official data for such cards by the Bank of Spain: the average APR that the lower courts determine on the basis of the evidence submitted in the proceedings. The fact that no data was published on the average APR for revolving cards at that time does not exempt the judge from assessing what that average APR was, based on the evidence examined. The judge cannot apply the average APR for personal loans. On this point, the Supreme Court, consistent with the judgment of 4 March 2020, amends the legal doctrine emanating from the 2015 judgment.

This clarification requires many of the plenary agreements adopted by court of appeal judges to be adjusted (including those of Madrid, 8 October 2020, and Cantabria, 12 March 2020).

Furthermore, the Judgment points to a possible approach to the admissible margin over the average APR. It confirms that an agreed APR that constitutes 122.5% of the average APR for the product is not usurious.

The Press Release indicates that the average APR considered by the Supreme Court was between 23% and 26%, but this is not what we can draw from the literal wording of the Judgment:

> "[…] **the APR applied by banks to deferred payment credit card transactions was often higher than 20%**, and it was also common for the rates for revolving cards obtained from large banks to exceed 23%, 24%, 25% and even 26% per year […]"

In other words, it follows from the literal wording of the Judgment that the benchmark in the case in question was an APR "*in excess of 20%*". The clarification regarding rates that exceed 23% is made solely in respect of "*large banks*".

Applying the judgment of 4 March 2020 means taking the average APR of the product as the benchmark rate, but nowhere is it said that the issuer of the card must be taken into account, nor does it appear that the nature and size of the issuer are relevant factors from an economic perspective to be taken into account. Moreover, the Bank of Spain does not make such a distinction in its official data.

Therefore, if the Judgment of 4 May 2022 did not entail the "*amendment*" or the "*qualification*" of the case law established by the judgment of 4 March 2020, the benchmark should be the average APR "*in excess of 20%*", which would lead to the conclusion that an agreed APR of up to 122.5% of the average APR is not usurious.

In any case, taking into account that the Judgment does not determine a specific average APR, as well as the absence of an objective rule to determine when an interest rate is manifestly higher than the benchmark rate and therefore usurious, and the content of the press release, the actual impact of the Judgment will depend on how it is taken by the courts of appeal.

The first known judgments of this new stage (Judgment 904/2022 of Section 15 of the Barcelona Provincial Court and 172/2022 of Murcia Court of First Instance No. 8) have taken on board the content of the Judgment of 4 May 2022 and concluded that the productwas not usurious. It is still too early to deduce a general criterion, but this is undoubtedly a good start.

CONTACTS

Iñigo Villoria
Partner

T +34 91 590 9403
E inigo.villoria
@cliffordchance.com

María Luisa Alonso
Counsel

T +34 91 590 7541
E marialuisa.alonso
@cliffordchance.com

Laura del Campo
Associate

T +34 91 590 9479
E laura.delcampo
@cliffordchance.com

Miguel Barredo
Lawyer

T +34 91 590 7593
E miguel.barredo
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, Paseo de la Castellana 110,

28046 Madrid, Spain