

European Union, CJEU, Sanchez Morcillo, judgement of 4 April 2014

Deciding bodies and decisions

Tribunal of Aviles

Constitutional Court

Audencia Provincial de Castellon

Court of Justice of European Union

Area of law

Consumer protection

Subject matter

ex officio power of judge

invalidity of unfair contract clauses

Executive proceedings - grounds of opposition

Summary Facts Of The Case

On May 14th 2013 the reform of several provisions of the Spanish Code of Civil procedure and related Laws was enacted by Ley 1/2013, which aimed at reinforcing the protection of mortgage debtors, with particular attention being paid to vulnerable categories. The Law was enacted as an implementation of the CJEU decision in Case C-415/11 Mohammed Aziz.

With the amendment, the Spanish legislator introduced a new ground of objection based on the unfairness of the contractual terms within the foreclosure proceeding. This ground of objection leads to an incidental and separate procedure within the executive one. The incidental procedure is an oral one: the parties may only submit the documents that they consider pertinent, as provided by art. 695.2 CCP. If the judge deems the ground as well-founded, the enforcement is suspended and the execution is terminated. If the judge deems the ground unfounded, the enforcement will continue. As provided by art. 695.4 CCP, the order declaring the unfairness of the clause and the dismissal of the execution or non-application of the unfair term is subject to appeal. On the contrary, the order rejecting the objection is not subject to appeal.

This different treatment as regards the possibility of appeal against the decision of the judge within the foreclosure proceeding, led to a set of questions of constitutionality presented by the Tribunal of Lower Instance of Aviles. These questions questioned if art. 695.4 CCP was compatible with the principle of equality, and its specific procedural application, namely the principle of equality of arms, which the Constitutional Court deemed included in the substance of Art. 24.1 SC.

The Spanish Constitutional Court however left the question unresolved in light of procedural rules. The amparo de constitucionalidade required that in order to deem such a request admissible, the

court should specify or justify to what extent the outcome of the decision depends on the validity of the provision in question (the so-called *juicio de relevancia*). The Spanish Constitutional Court found that the Tribunal of Aviles did not justify the connection between the specific provision and the solution of the proceedings. Thus, the Constitutional Court deemed the questions inadmissible in decisions AATC 70/2014 and 71/2014, of 10th March 2014 and AATC 111/2014, 112/2014, and 113/2014, of 8th April 2014.

In the meantime, the Audiencia Provincial de Castellon received an appeal against the decision of the Court of First Instance n. 3 of Castellon. The First Instance decision rejected the objection of a consumer regarding the enforcement of a notarial act which allowed the Bank (in the specific case Banca Bilbao) to demand payment of the entire loan together with ordinary and default interest and the enforced sale of the mortgaged property. Although neither the debtor alleged as ground of opposition the existence of unfair terms, nor the First Instance Court raised the possible existence of unfair terms, the Audiencia Provincial deemed that the relevant provisions applicable to the case, namely the above mentioned art. 695.4 CCP (as allowing for appeal only in case of dismissal of the execution based on the unfairness of the title) could be incompatible with the objective of consumer protection pursued by Directive 93/13 and with the right to an effective remedy guaranteed by art. 47 CFREU.

Although not all the questions of constitutionality addressing the same provision were decided by the Constitutional Court, on April 2nd 2014 the Audiencia Provincial de Castellon made a preliminary reference to the Court of Justice of the European Union, which addressed the same issue. In its reference it posed the following questions:

“Is it compatible with Article 7(1) of Directive 93/13 a procedural rule, such as that laid down in Article 695(4) CCP, which, as regards the right to an appeal against a decision determining the outcome of an objection to enforcement proceedings in relation to mortgaged or pledged assets, to permit an appeal to be brought only against an order discontinuing the proceedings or disapplying an unfair clause and to exclude an appeal in other case?

Does the principle of the right to an effective remedy, to a fair trial and to equality of arms, guaranteed by Article 47 of the Charter, preclude a provision of national law, such as that laid down in Article 695(4) CCP?”

The Court of Justice of the EU decided the case on a very short time and the decision was published on July 17th 2014. The Court addressed the case by taking the two questions together and focused its analysis on the principle of the effectiveness of EU law.

The Court examined whether national procedural law respected the fundamental right to effective judicial protection laid down in Article 47 CFREU. Here, the Court affirmed that EU law does not generally require a second level of jurisdiction but in the specific case a right to appeal must be granted. This was due to the fact that the foreclosure proceeding had as its object the consumer's family home, and it is based on an enforceable notarial instrument that is not subject to an *ex ante* judicial scrutiny.

It is important to note that the Court analysed the Spanish procedural system as a whole: first it interpreted that the judge, pursuant art 552(1) CCP, has only a discretionary power to examine of its own motion the unfairness of contract clauses; secondly, it acknowledged that the consumer could claim the unfairness of the clause in a separate declaratory proceeding, but these proceedings may not affect the foreclosure proceedings in the absence of the possibility for the judge to make an order for interim relief with suspensive effect of the latter. The result of this system is that the consumer could only be granted a purely compensatory remedy. In the view of the Court, this resulted in a negative assessment of the Spanish system, as such a remedy could not be deemed to provide effective judicial protection for the consumer.

Further in its analysis of the specific legal provision, the Court stressed that the limitation of the consumer's right of appeal “accentuates the imbalance existing between the parties to the

agreement” and that remedying such an imbalance was the objective sought by the Unfair Contract Terms Directive, in particular through judicial scrutiny of unfair contract terms.

Thus the Court decided that:

“Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding a system of enforcement, such as that at issue in the main proceedings, which provides that mortgage enforcement proceedings may not be stayed by the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer, inasmuch as the latter, the debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disapplied.”.

The Spanish legislator reacted quickly to the decision and enacted on 5 September 2014 the Real Decreto Ley 11/2014 (hereinafter RDL 11/2014), which included a provision amending art. 695.4 CCP providing for an appeal by the debtor to the decision of the judge to dismiss a complaint based on the unfairness of the contractual clause. However, the legislator limited the extension of the appeal to the specific complaint based on EU law, without extending such a possibility to all grounds available to the debtor within a foreclosure proceeding.

The Audiencia Provincial de Castellón did not deem the legislative reform as fully implementing the decision of the CJEU. Thus, on 10 October 2014 notified to the parties its intention to present a second preliminary reference within the same proceeding. The Audiencia Provincial affirmed that the RDL 11/2014 still did not respect the rights recognized by Directive 93/13/EEC and thus a violation of various fundamental rights had occurred, including the right to effective judicial protection in terms of the right to equality of arms, the right to housing and the right to private and family life.

In order to justify the connection with EU law, the Audiencia Provincial pointed to the fact that the new wording of art 695.4 CCP could be in conflict with art 1(q) of the Annex to Directive 93/13/EEC, which states that unfair terms are those that have the purpose or effect of excluding or hindering the exercise of legal action or resources by the consumer.

Thus the question to the CJEU was the following:

“Must Article 7(1) of [Directive 93/13], read in conjunction with Articles 47, 34(3) and 7 of the [Charter] be interpreted as precluding a procedural provision of the kind laid down in Article 695(4) of [the amended LEC], applicable to appeals against a decision determining the outcome of an objection to enforcement proceedings in relation to mortgaged or pledged goods, which allows an appeal to be brought only against an order terminating the proceedings, disapplying an unfair term or rejecting an objection based on an unfair term, the immediate consequence of which is that more legal remedies on appeal are available to the seller or supplier seeking enforcement than to the consumer against whom enforcement is sought?”

The CJEU decided the case on 16 July 2015. The Court acknowledged that the amended procedural regime established by art 695.4 CCP allows the judge of the foreclosure proceeding to evaluate, before the conclusion of the execution procedure, the unfairness of a contractual clause, with the possibility of declaring the nullity of the proceedings. Moreover, the Court recognised that the amended provision allows the consumer to lodge an appeal against the decision which rejected the complaint based on the unfairness of the contractual clause; thus, it affirmed that art. 695.4 CCP guarantees consumers a complete and sufficient remedy, within the meaning of art. 7(1) of Directive 93/13/EEC.

With regard to the alleged violation of fundamental rights, the Court stressed that the system does not infringe the right to effective judicial protection. This was because the system provided not only

that the judge hearing the execution can evaluate, before the conclusion of the foreclosure proceeding, the unfairness of the contractual term, but also that a court of appeal can verify, as part of a double instance system, if the judge hearing the execution in the first instance made a correct analysis of such a clause.

With regard to equality of arms, the Court stated that art. 695.4 CCP effectively gives consumers a reasonable opportunity to exercise judicial actions based on the rights recognized in Directive 93/13/EEC upon conditions not manifestly disadvantageous in relation to the creditor (i.e. the professional). However, the court did not assume the competence of the national court, as the fact that under the Spanish legislation consumers do not have the right to bring an appeal against a decision rejecting their complaint based on grounds other than the unfairness of the contractual term, does not fall into the scope of that directive. For this reason, such legislation is not liable to jeopardise the effectiveness of consumer protection which by the directive seeks to provide.

Finally, as regards the alleged right to housing, the Court recalled that art. 34(3) CFREU does not guarantee the right to housing but the “right to social assistance and housing assistance” in the framework of social policies based on art. 153 TFEU with the result that that provision was not relevant in the present case.

Thus, the decision of the Court was the following:

“Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Articles 47, 34(3) and 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national provision of the kind at issue in the main proceedings, by which the consumer, as a mortgage debtor against whom enforcement proceedings are brought, may bring an appeal against the decision rejecting his objection to the enforcement only when the court of first instance has not upheld an objection based on the unfairness of the contractual term upon which the enforcement is based even though the sellers or suppliers may, by contrast, appeal against any decision terminating proceedings regardless of the ground of objection on which that decision is based.”

The Audencia Provincial de Castellon then decided the case on 3 September 2015. As mentioned above, the appeal presented by the consumer-debtor was not grounded on the unfairness of the clause; thus it fell into the number of grounds of objection that do not entail a right of appeal for the debtor under Spanish legislation. The Audencia Provincial was therefore dismissed the appeal as inadmissible.

Relation to the scope of the Charter

Although the AG in its Opinion contested the applicability of the Charter to the case, as outside the scope of EU law given that the latter does not govern national procedural rules, the CJEU upheld the request of the national court and examined the principle of effectiveness in relation to art. 47 CFREU. Thus the CJEU adopted a broad interpretation of Article 51(1) CFR as referred not only to the situations in which Member States enforce EU rules (implementation *stricto jure*), but also to those situations which fall within the scope of EU law.

The CJEU affirmed that the compensatory remedy available to the consumer, in case the executory proceeding ending with the sale of the house given as security, would be insufficient to provide effective judicial protection. Moreover, even though EU law does not in principle afford a right of access to a second level of jurisdiction, the limitation of the right to appeal on the basis of procedural law could not be justified where the enforcement proceedings relate to the consumer’s family home.

Notes on the remedies dimension

The case-law examined addresses the relationship between the declaratory proceedings and the executory ones in case of mortgage loans. In particular, the analysis of the CJEU addressed whether the consumer in the specific legal system is placed in a vulnerable position, and thus whether the procedural guarantees enable him to exercise his rights.

The CJEU analysed the procedural system and acknowledged the existence of a limitation of the consumer's right of appeal. Although the court affirmed that EU law does not require a right to appeal, in the legal context this limitation was deemed as an element that could worsen the existing imbalance between consumer and professional.

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Impact on Legislation / Policy

The Spanish legislator reacted quickly to the decision and enacted on 5 September 2014 the Real Decreto Ley 11/2014 (hereinafter RDL 11/2014), which included a provision amending art. 695.4 CCP providing for an appeal by the debtor to the decision of the judge to dismiss a complaint based on the unfairness of the contractual clause. Thus, the article reads as follows:

"4. An appeal may lie against the order discontinuing enforcement or disapplying an unfair term or rejecting the complaint on the ground laid down in paragraph 1(4) of the present article.

Save in those circumstances, no appeal shall lie against orders adjudicating upon the objection to enforcement referred to in the present article and the effects of those orders shall be confined exclusively to the enforcement proceedings in which they are made."

However, the legislator limited the extension of the appeal to the specific complaint based on EU law, without extending such a possibility to all grounds available to the debtor within a foreclosure proceeding.

Sources - EU and national law

Directive 93/13

Sources - CJEU Case Law

C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164
