

European Union, CJEU, Aziz, Judgement of 14 March 2013

Deciding bodies and decisions

Juzgado de Primera Instancia of Sabadell
Constitutional Court
Juzgado de Primera Instancia Madrid
Juzgado de lo Mercantil n.3 de Barcelona
Court of Justice of European Union

Area of law

Consumer protection

Subject matter

invalidity of unfair contract clauses
ex officio power of judge
effective remedy - interim relief

Summary Facts Of The Case

The Code of Civil Procedure (Ley de Enjuiciamiento Civil 1/200, hereinafter CCP) regulates enforcement proceeding in Book III (arts. 517 – 520). The law provides for a comprehensive and unified regulation based on an executive title, with special norms that regulate mortgage foreclosures (arts. 681-698). In this case, the Spanish CCP provides for some limitations as regards the grounds of objection available to debtors; any other ground of objection to the executory enforcement can only be sought through declaratory proceedings, which however cannot have a suspensive effect over the foreclosure proceedings. These limitations are justified by the privileged protection granted the mortgage creditor in order to obtain a quick sale of the mortgaged goods in order to repay the loan. Such a result would not be achieved with the inclusion of wide set of grounds of objection and the related possibility of suspending the mortgage foreclosure. The effectiveness of the procedure could therefore be hampered by such an inclusion. These provisions raised doubts in Spanish courts regarding the compliance with the Constitution, namely art. 24 on right of defence. The Constitutional Court evaluated such a question of constitutionality with its seminal decision AATC n. 41/1981, 18 December 1981, affirming, as regards arts. 579, 695 and 698 CCP, that while the mortgage foreclosure is a proceeding where there are strong limits to the adversarial process, this does not mean that it hampers the right of defence of the debtor. This structure is justified by the specificities of the executive title and it is not deemed to be contrary to any constitutional rights, in particular art. 24 of the Spanish Constitution. In the middle of the financial crisis a lower court again seized the Constitutional Court regarding the constitutionality of the procedure. In particular, the Juzgado de Primera Instancia n. 2 of Sabadell raised on 7 October 2010 a question of constitutionality. The first instance court asked if the summary enforcement proceedings adopted in mortgage foreclosure violated the Constitution, and in particular Art. 9.3 on the prohibition of arbitrary action by public authorities, Art. 24.1 on the

right to effective judicial protection and Art. 47, on the right to enjoy decent and adequate housing. The Constitutional Court deemed the question as inadmissible, with decision ATC 113/2011, of 19 July 2011. The Court affirmed that the order of referral was on the one hand too generic and abstract to evaluate whether the challenged provisions were really relevant to the main proceedings, and on the other hand the order was requesting an indirect reform of the regime, which goes beyond the remit of the Constitutional Court. As a matter of fact, the Constitutional Court pointed out that “It is only for the legislative power to decide on the Code of Civil Procedure and thus the issue was treated as a ‘political question’.”

In the meantime the Juzgado de lo Mercantil n. 3 of Barcelona received the claim of Mr Aziz for the declaration seeking the annulment of the enforcement proceeding based on the annulment of clause 15 of the mortgage loan agreement, on the ground that it was unfair. Mr Aziz, Spanish resident of Moroccan nationality, was in fact evicted in January 2011 from his house after failing to make payments on his 138,000 euro loan with Catalunya Caixa. On this basis, on 8 August 2011 the Juzgado de lo Mercantil No 3 de Barcelona referred a number of preliminary references to the CJEU. The Spanish court asked the following questions:

“Whether the system of levying execution, in reliance on judicial documents, on mortgaged or pledged property provided for in Article 695 LEC, with its limitations regarding the grounds of objection, may be nothing more than a clear limitation of consumer protection.

How is the concept of disproportion to be understood with regard to:

- a) the use of acceleration clauses in contracts planned to last for a considerable time – in this case 33 years – for events of default occurring within a very limited specific period;
- b) the setting of default interest rates which are not consistent with the criteria for determining default interest in other consumer contracts (consumer credit);
- c) the unilateral establishment by the lender of mechanisms for the calculation and determination of variable interest – both ordinary and default interest – which are linked to the possibility of mortgage enforcement and do not allow a debtor who is subject to enforcement to object to the quantification of the debt in the enforcement proceedings themselves but require him or her to resort to declaratory proceedings in which a final decision will not be given before enforcement has been completed or, at least, the debtor will have lost the property mortgaged or charged by way of guarantee – a matter of great importance when the loan is sought for the purchase of a dwelling and enforcement gives rise to eviction from the property?”

The ruling of the CJEU was then decided on 14 March 2013. Although the CJEU addressed both questions, this case sheet will focus on the first one. After having invoked the principle of procedural autonomy of the Member States, the CJEU went further in addressing the equality and effectiveness test, without mentioning expressly the Charter of Fundamental Rights. In particular, when looking at the effectiveness test, the Court found that the Spanish procedural law impairs the protection of consumers as the court hearing the declaratory proceedings could not grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision. Nor can the compensation that the consumer may receive – in case of dismissal of the enforcement proceedings after the declaration of unfairness of the contractual term on which the mortgage is based - be deemed complete and sufficient, and thus constitute an adequate or effective means of preventing the continued use of that term.

Before any intervention of the Spanish legislator to amend the procedural system, the Juzgado de lo Mercantil n. 3 of Barcelona decided the case on 2 May 2013. Following the CJEU judgment, the court held that national judges (in executive proceedings) not only have the power, but they are required to assess of their own motion whether a contractual term falling within the scope of the Directive is unfair. Hence, the court declared three clauses of the mortgage contract to be null and void on the ground that they were unfair, though only one of those clauses had been challenged

by the applicant. At the same time, the Commercial Court acknowledged that, according to the right to a fair trial enshrined in Art. 47 CFREU, the parties must be given the opportunity to discuss the elements examined of its own motion by the judge. Therefore the parties were given the chance to discuss all the clauses that could be considered unfair.

Immediately after the decision of the CJEU, Spanish lower courts started to implement directly its reasoning in their decisions. In particular, the Juzgado de Primera Instancia n. 13 of Madrid, on 15 March 2013, granted the suspensive effect of executory proceeding in case the consumer started a declaratory proceeding, implicitly disapplying the provision of art 698 CCP.

The Spanish legislator then directly intervened, amending the procedural law with Ley 1/2013 of 14 May 2013. As mentioned above, when the CJEU decided the Aziz case it opened up two possible solutions for the Spanish legislator in order to make the procedural system compliant with the Directive 93/13/EEC: (1) including a new ground of objection based on the unfairness of the contractual terms in the foreclosure proceedings; or (2) giving the judge in the declaratory proceeding the possibility to adopt as a precautionary measure, the suspension of the foreclosure proceedings. The Ley 1/2013 adopted the first solution, including a new ground of objection based on the unfairness of contractual terms within those contained in art. 695.1 CCP.

Notes on the remedies dimension

Although the starting point of the case was the absence of the possibility for consumers to raise an objection on the ground of unfairness of the contractual clause, the CJEU addressed the Spanish procedural system as a whole, analysing the relationship between the declaratory and mortgage foreclosure proceedings. The result is the introduction of a new remedy, capable of establishing a stronger connection between enforcement and declaratory proceedings. In particular, the CJEU finds that judges shall have the power to order an interim stay of the enforcement proceedings in order to grant effective protection to consumers.

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Impact on Jurisprudence

See that the decision had an impact on foreign jurisprudence:

Poland

Judgment of the Supreme Court of 15 January 2016, I CSK 125/15 - General reference to the premises of abusiveness set forth in the Aziz case is mentioned in this case. As a consequence, the Court came to the conclusion that a clause limiting the consumer's protection in the case of impossibility of performance, due to unexpected circumstances (also those being within the seller's control) is abusive. Beyond paraphrasing the reasoning in Aziz, no more direct links to this decision have been established by the Supreme Court.

Judgment of the Court of Appeals in Warsaw of 10 April 2013, VI Aca 1191/12 - Reference to the

Aziz case (in the same manner as Supreme Court in I CSK 125/15 case) as a basis for a criterion of assessment as to whether a particular term has an abusive character. The Court of Appeals implies in its reasoning that the clauses under examination would not be accepted by the reasonably acting consumer. The case dealt with two clauses: (1) shifting the entire burden of changes of VAT rate after conclusions of the contract to the consumer and (2) excluding the consumer's right to cancel the contract in the cases when the actual area of the flat the object of the contract deviates from the area agreed initially agreed to by up to 5%. The Court did not draw any more links to the Aziz case in this judgment.

Judgment of the Regional Court for the Capital City Warsaw of 27 June 2014, XVI GC 2056/12 - The Court made the same use of the Aziz decision – referring to the general means of identifying abusive clauses described by CJEU. The Court examined a clause specifying the basis of the liability of an insurance company for damage caused to the shipped item, eventually not finding it abusive.

Bulgaria

Supreme Court of Cassation, n. 1112/2015, 10 August 2015. The Supreme court addressed the appeal of the Commission for Consumer protection against the decision of the Sofia Appeal court regarding the unfairness of a clause included in the General terms and conditions of contracts for the use the electricity distribution grids of a business company. Although not citing it expressly, the Supreme court adopted the test defined in CJEU case Aziz.

Impact on Legislation / Policy

The Ley 1/2013 adopted the first solution, including a new ground of objection based on the unfairness of contractual terms within those contained in art. 695.1 CCP, which then read as follows:

“(1) In proceedings under this chapter, an objection to enforcement by the party against whom enforcement is sought may be admitted only if it is based on the following grounds:

1. Extinction of the security or the secured obligation, [...]
2. An error in determining the amount due, [...]
3. In the case of enforcement against movable property mortgaged or property subject to a non-possessory pledge, the existence of another pledge, [...]
4. The unfairness of a contractual term constituting the grounds for enforcement or that has determined the amount due.”

Sources - Internal or external national courts case law

Audiencia Provincial de Burgos, decision 10 April 2013

Agreement of Junta Sectorial de Jueces de Primera Instancia, Mercantil y Registro Civil del Partido Judicial de Alicante of 23 April 2013
