

**IN THE COURT OF JUSTICE OF THE EUROPEAN UNION****CASE C-154/15****GUTIÉRRIEZ**

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**WRITTEN OBSERVATIONS OF THE UNITED KINGDOM**

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The United Kingdom is represented by Liam Christie of the European Law Group, Government Legal Department, acting as Agent, and by Sarah Ford, Barrister.

Submitted by

and

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## **A. INTRODUCTION**

1. By an order dated 1 April 2015 the Juzgado de lo Mercantil n° 1 de Granada (Spain) (“the referring court”) referred to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling two questions concerning Articles 6(1) and 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (“the Directive”).
2. The questions arose in the context of proceedings commenced by the Applicant, Francisco Gutiérrez Naranjo, against the Defendant, BBK Bank Cajasur, S.A.U., concerning a general contractual condition relating to the application of a minimum interest rate (floor clause) in a mortgage loan.
3. These are the Written Observations of the United Kingdom submitted pursuant to Article 23 of the Protocol on the Statute of the Court of Justice.

## **B. FACTUAL BACKGROUND**

4. The United Kingdom’s understanding of the factual background is as follows.
5. A judgment of the Tribunal Supremo (Supreme Court) of 9 May 2013 held that clauses restricting the minimum interest rate applicable to mortgage loans granted to consumers were unfair on the grounds of lack of transparency. The Tribunal Supremo applied a temporal limitation such that its judgment did not have retroactive effect. Spanish provincial courts have since been determining in individual cases whether or not to apply a temporal limitation.
6. In the domestic proceedings giving rise to the reference, the Applicant seeks an injunction to prevent the use of a minimum interest rate clause in his mortgage loan agreement. Further, the applicant claims that the term is unfair on the grounds of lack of balance and lack of proportion.

The Applicant seeks recovery of sums paid from the date of entry into the mortgage loan agreement.

### C. APPLICABLE PRINCIPLES

7. The system of protection established by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the trader as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the trader without being able to influence the content of those terms (***Pereničová and Vladislav Perenič***, EU:C:2012:144, paragraph 27).
8. In view of that weak position, Article 6(1) of the Directive requires Member States to lay down that unfair terms “*shall, as provided for under their national law, not be binding on the consumer*”. This is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (***Pereničová and Vladislav Perenič***, paragraph 28).
9. National courts which find that terms of a contract are unfair are required under Article 6(1) of the Directive to draw all the consequences that follow under national law, so that the consumer is not bound by those terms (***Pereničová and Vladislav Perenič***, paragraph 30). The objective is to restore the balance between the parties while in principle preserving the validity of the contract as a whole (***Pereničová and Vladislav Perenič***, paragraph 31).
10. The Directive does not seek to harmonise the penalties applicable in the event of a term being found unfair. However, Article 7(1) of the Directive requires Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers (***Invitel***, EU:C:2012:242, paragraph 35).

11. The rationale behind the requirement that unfair terms will not be binding on consumers is to dissuade sellers and suppliers from using such terms. It would undermine the dissuasive effect and sellers and suppliers would still be tempted to use such terms if the national court were permitted to revise the content of unfair terms in such a way as to safeguard the interests of sellers or suppliers (**Banco Español de Crédito** EU:C:2012:349, paragraph 69).
12. However, it is not incompatible with the Directive for a national court to delete an unfair term and substitute for it a supplementary provision of national law where invalidity would otherwise lead to unfavourable consequences for the consumer (**Kásler** EU:C:2014:282 paragraphs 82 to 84; **Unicaja Banco, SA** EU:C:2015:21, paragraph 33). Similarly, the national court need not disapply an unfair term if the consumer does not wish to assert its unfair and non-binding status (**Pannon** EU:C:2010:441). These matters do not undermine the dissuasive effect of Articles 6(1) and 7(1) of the Directive.
13. Finally, in the absence of harmonisation, national rules governing domestic proceedings concerning unfair terms in consumer contracts are a matter for the national legal order of the Member State concerned, provided that they are no less favourable than those governing similar domestic actions (the principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (**Banco Popular Español SA** EU:C:2013:759, paragraph 45).

#### **D. THE FIRST QUESTION**

14. By its first question, the referring court essentially asks whether it is compatible with Article 6(1) of the Directive for a national court to grant temporal limitation of its judgment on an unfair contract term such that it does not have retroactive effect.

15. In the United Kingdom's submission the first question should be answered in the affirmative for the following reasons.
16. First, as is evident from the applicable principles set out above, Article 6(1) of the Directive is concerned with the penalties which are applicable as a matter of national law in order to achieve the result that an unfair term is non-binding on consumers.
17. A distinction must be drawn between the applicable penalty and the separate question of temporal limitation of a national court's judgment. The latter is an aspect of the court's inherent jurisdiction exceptionally to limit the effect of its judgments in order to serve the underlying objective of the courts, namely to administer justice fairly and in accordance with the law. Article 6(1) of the Directive is not concerned with temporal limitation.
18. Secondly, temporal limitation in exceptional circumstances does not undermine the dissuasive effect of the requirement that unfair terms are non-binding on consumers. Unfair terms will still be non-binding on consumers in the future, so sellers and suppliers will moderate their conduct and will not be tempted to continue to use such terms. Temporal limitation is therefore compatible with the objective of Articles 6(1) and 7(1) of the Directive.
19. Thirdly, temporal limitation will be compatible with the Directive provided that it is applied in a manner which is no less favourable than in similar domestic actions and it does not render it practically impossible or excessively difficult to exercise the rights conferred on consumers by the Directive. The principle of equivalence is a matter the Spanish government is best placed to address.
20. However, it is submitted that temporal limitation is clearly compatible with the principle of effectiveness, since it does not hinder the enforcement of EU rights. This could not conceivably be doubted in circumstances in which it is well established that the CJEU has the

power to grant temporal limitation of its own judgments where justice requires this (see, for example, **Skov and Bilka** EU:C:2006:6).

21. In **RWE Vertrieb AG**, EU:C:2013:180 the CJEU considered a request for temporal limitation of its judgment concerning unfair terms in consumer contracts. Although the CJEU did not consider the essential criteria for the grant of temporal limitation to be satisfied in the circumstances of that case, it did not state that the grant of temporal limitation would be incompatible with Article 6(1) of the Directive as a matter of principle.
22. Similarly, in **Schulz and Egbringhoff**, EU:C:2014:2317 at [62] the CJEU declined a request for temporal limitation because the risk of serious difficulties had not been established. Again, the CJEU did not express any reservations as to the compatibility of temporal limitation with the Directive on principle.
23. Since temporal limitation of the CJEU's own judgments is clearly compatible with EU law, it follows that temporal limitation of national courts' judgments must equally be compatible with EU law. Indeed, if the CJEU were to conclude otherwise, it would give rise to the anomalous outcome that it would be necessary to make a reference to the CJEU pursuant to Article 267 TFEU in order to obtain temporal limitation of a judgment on EU law.
24. For these reasons, the United Kingdom submits that the answer to the first question of the referring court is that it is compatible with Article 6(1) of the Directive for a national court to grant temporal limitation of its judgment on an unfair contract term such that it does not have retroactive effect.

## E. THE SECOND QUESTION

25. By its second question, the referring court essentially asks, firstly, whether an injunction restricting the use of unfair terms is compatible

with the grant of temporal limitation, and secondly, whether it is compatible with the Directive for a national court to specify the date from which sums paid pursuant to an unfair term must be reimbursed to the consumer.

26. The United Kingdom limits its observations to the second part of the Second Question, which it is submitted should be answered in the affirmative.
27. As already set out above, Article 6(1) of the Directive is limited to requiring Member States to ensure that unfair terms are non-binding on the consumer. It is not concerned with the availability of either damages or a restitutionary remedy for the imposition of an unfair term. These matters are not harmonised by the Directive and remain governed solely by national law.
28. It follows that it would be compatible with the Directive for the national court to specify the date from which sums paid pursuant to an unfair term must be reimbursed to the consumer provided that any such rule is applied in a manner which is no less favourable than in similar domestic actions and it does not render it practically impossible or excessively difficult for consumers to exercise the rights conferred on them by the Directive.

#### **D. CONCLUSION**

29. In conclusion, the United Kingdom submits that the Court should answer the questions of the referring court as follows:

“1. It is compatible with Article 6(1) of the Directive for a national court to grant temporal limitation of its judgment on an unfair contract term such that it does not have retroactive effect.

2. It is compatible with the Directive for a national court to specify the date from which sums paid pursuant to an unfair term must be reimbursed to the consumer.”



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21 July 2015



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