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Recent developments in European Consumer Law

WEDNESDAY 27 MARCH 2019

Confusing Grand Chamber judgment on 'accelerated repayment clauses' in mortgage loan contracts (C-70/17 and C-179/17)

Yesterday the Grand Chamber of the EU Court of Justice gave judgment in two Spanish cases on so-called 'accelerated repayment clauses' (*vencimiento anticipado*): [Joined Cases C-70/17 and C-179/17, *Abanca v García Salamanca Santos and Bankia v Lau Mendoza*](#). We have discussed Advocate-General Szpunar's extensive Opinion in these cases [in an earlier blog post](#).

Summary of the preliminary references

In short, both cases pertain to the consequences of a finding of unfairness of a clause allowing for the **early termination** of a mortgage loan contract - also referred to as an 'acceleration clause' or 'early maturity clause'. Spanish procedural law provides that on the basis of such a clause, the bank can call in the **entire loan** and initiate enforcement proceedings against the debtor. After *Aziz*, the minimum time period for access to mortgage enforcement proceedings was changed to **3 months instead of 1 month**. Early termination is still allowed, **if agreed by the parties**. Thus, it is not a default provision.

The question the Spanish Supreme Court put before the CJEU in *Abanca* was whether the national court could consider only the 1-month period as unfair, so the rest of the 'early maturity clause' would remain valid. In that event, the bank could still claim the full amount in the enforcement proceedings, as long as it respected the statutory 3-month period.

In *Bankia*, a Court in First Instance in Barcelona questioned the case-law of the Supreme Court that allowed continuation of the enforcement proceedings, because this was arguably more favourable to consumers. According to the Barcelona Court, the enforcement proceedings should be terminated after the clause was found to be unfair. The bank could only claim termination of the contract in ordinary court proceedings, which would possibly result in a favourable outcome for consumers.

Thus, the preliminary reference in *Bankia* challenged the Supreme Court's approach. The Spanish Government even contested the admissibility, on the ground that the Supreme Court had already made a preliminary reference on this issue.

Summary of AG Szpunar's Opinion

AG Szpunar's clear and elaborate analysis of the issue led to his conclusion that it is not possible for the national court to "replace" the 1-month period in the 'early maturity clause' with the statutory 3-month period. Once the clause is found to be unfair, it must be struck out in its entirety. This would mean there is no longer a basis for enforcement of the full amount and therefore, the bank no longer has access to mortgage enforcement proceedings. However, the decision should ultimately be left to the consumer, who can then decide if she wants to avail herself of the protection offered to her.

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As we have noted in [our blog post](#), AG Szpunar rightly observed that when the 'early maturity clause' is struck out, this does not extinguish the creditor's rights. The **loan agreement is still valid**. The creditor can still claim unpaid instalments due and/or seek termination of the agreement in ordinary court proceedings.

The CJEU's judgment: rejection of the Spanish Supreme Court's approach?

Yesterday's preliminary ruling is a Grand Chamber judgment, yet it is much less clear than the AG's Opinion. On the one hand, the CJEU holds that the mere removal of the 1-month period from 'early maturity clauses' is "tantamount to revising the content of those terms by altering their substance", which undermines the dissuasive effect (para 55).

On the other hand, the CJEU expressly leaves the door open for substitution with the statutory 3-month period, if the consumer would otherwise be exposed to unfavourable consequences (para 61). What makes this part of the judgment confusing, is not only that it is **doubtful** whether the use of an ordinary procedure rather than the special mortgage enforcement procedure does entail "a deterioration of the procedural position of the consumer" (para 62).

[NB: In this respect, it is confusing that the CJEU refers to "the ordinary enforcement procedure", where a declaratory action is meant (cf. para 35).]



Source: bufeterosales.es

Also and more strikingly, the judgment seems to be based on the **erroneous presumption** that removal of the 'early maturity clause' could potentially mean that the continued existence of the mortgage loan contract is no longer possible (para 60). It seems obvious that the invalidity of the clause at stake does not require the national

court to annul the contract in its entirety. Whilst the CJEU reinforces its case law on the modification, revision or replacement of unfair contract terms, in particular *Kásler* (paras 53-60), it is not relevant for the present cases. The exception of *Kásler* does not apply here, as - again - AG Szpunar already observed.

The only way forward for the national court is to exclude the application of the terms at stake (cf. para 63). The CJEU's judgment suggests that in that event, the supplementary application of the 3-month period is not possible, and the Spanish Supreme Court's approach must be rejected. We hope this will be clarified in another case on this issue that is still pending: C-486/16.

The 'early maturity clause' must be removed in its entirety, **unless the consumer objects**. The role of the consumer, who must be consulted in the matter, is indeed an important point. The consumer must be heard in case of non-application of unfair terms, as well as - presumably - in case of substitution of unfair terms, although the CJEU does not say this explicitly. As noted in [our previous blog post](#), the consumer can be informed by the court about the advantages and disadvantages of the mortgage enforcement procedure vs. the ordinary procedure. She can then consent to maintaining the 'early maturity clause', although this seems to be an unlikely scenario.

Posted by [Anna van Duin](#) at [18:11](#)



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