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# Recent developments in European Consumer Law

THURSDAY, 22 DECEMBER 2016

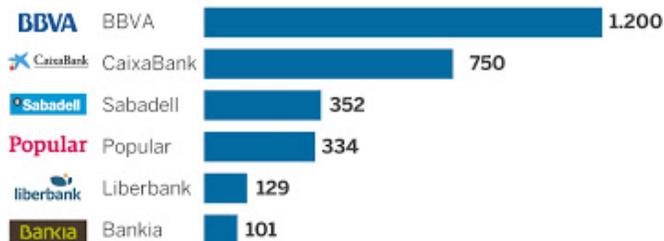
## Spanish 'floor clauses' (cláusulas suelo) - EU Court of Justice steps in: nullity is nullity

[Judgment](#) of the EU Court of Justice in Joined Cases C-154/15, C-307/15 and C-308/15 (*Gutiérrez Naranjo v. Cajasur Banco, Palacios Martínez v. BBVA and Banco Popular Español v. Irlés López*)

Yesterday the EU Court of Justice gave its long-awaited judgment in the joined cases from Spain on the infamous 'floor clauses' (*cláusulas suelo*). It is a real Christmas present to Spanish consumers and house-owners: the CJEU has "overruled" national case law that limits the temporal effects of the declaration of nullity of an unfair term. Nullity is nullity. The impact of this judgment on the Spanish banking sector is huge: banks will have to pay back an estimated amount of 3.000 to 5.000 million euros (source: [El País](#)). The judgment has already been called a "*formidable varapalo judicial a la banca*", a tremendous judicial blow to the banks.

### BANCOS ESPAÑOLES MÁS AFECTADOS POR LA SENTENCIA SOBRE CLÁUSULAS SUELO

Cifras en millones de euros que deberán devolver



Fuente: Elaboración propia. BPI y las entidades. EL PAÍS

'Floor clauses' in mortgage loan agreements establish a minimum rate below which the variable rate of interest cannot fall. Until the Spanish Supreme Court

(*Tribunal Supremo*) found them to be unfair in 2013 due to a lack of transparency, they were widespread. The biggest question for Spanish consumers after yesterday's judgment, which has been widely covered in Spanish media, is: [how much money do we get back?](#)

The reason why they ask this question, is the Supreme Court's decision to limit

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the temporal effects of its judgment to after the date of its publication, 9 May 2013, both in respect of collective actions for an injunction and individual actions by consumers claiming repayment. Only the amounts overpaid on the basis of 'floor clauses' after that date had to be paid back. One of the considerations of the Supreme Court was that retroactive (i.e. restitutory) effect of the invalidity of the clauses at issue would give rise to serious economic repercussions. Lower courts in Spain, however, doubted whether the Supreme Court's approach was compatible with Directive 93/13/EEC on unfair terms in consumer contracts. Last July, [we reported on this blog](#) that it was permissible in the opinion of the Advocate General. The CJEU has now decided otherwise, which means that Spanish consumers can also claim repayment of the amounts overpaid to the banks on the basis of 'floor clauses' during the period before 9 May 2013, from the beginning of their contract.

For the readers of this blog, the judgment may not be entirely unexpected. The CJEU refers extensively to its previous case law about the interpretation of "not binding on the consumer" under Article 6(1) of Directive 93/13. It reiterates that it is for the national court "purely and simply" to exclude the application of an unfair term (para. 57). The national court may not revise the content of unfair terms, "lest it contribute to eliminating the dissuasive effect of the straightforward non-application with regard to the consumer of those unfair terms" (para. 60). The determination of unfairness "must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed" (para. 61). Thus, the national court must impose the repayment of amounts that prove not to be due, which entails "a corresponding restitutory effect" (para. 62). The absence of such restitutory effect would call into question the dissuasive effect that Articles 6(1) and 7(1) of Directive 93/13 are designed to attach to a finding of unfairness.

The CJEU then proceeds to consider that national (case) law may not alter the scope and, therefore, the substance of the protection guaranteed to consumers by the Directive. The Supreme Court was entitled to hold that its judgment did not affect situations in which a judgment with the force of *res judicata* had been given. While it is compatible with EU law to lay down reasonable time-limits for bringing proceedings, only the CJEU can decide upon a temporal limitation of the effects of a rule of EU law. National (case) law may not adversely affect the substance of the right that consumers acquire under that rule. The temporal limitation made by the Supreme Court is tantamount to depriving any consumer having concluded a mortgage loan contract before 9 May 2013 containing a 'floor clause' of the right to obtain repayment in full of the overpaid amounts. The CJEU concludes that national case law, such as that following from the Supreme Court's judgment of 9 May 2013, ensures only limited protection for consumers. Such protection is incomplete and insufficient and does not constitute either an adequate or an effective means of preventing the continued use of 'floor clauses'.

The CJEU rejects the argument brought forward by, among others, the Spanish government that the question of the effects of the finding of unfairness as regards 'floor clauses' does not fall within the scope of Directive 93/13, because

► [2010](#) (92)

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that finding would afford a higher level of consumer protection than guaranteed by the Directive. The review of the substantive unfairness of a clause relating to the main subject-matter of the contract, where the consumer did not have the necessary information on the conditions and consequences of that contract before entering into it, falls within the scope of the Directive.

The CJEU brushes aside the Supreme Court's considerations in one fell swoop. It does not matter whether the 'floor clauses' were in themselves lawful, that their use had long been tolerated on the market, that the banks had complied with the regulatory requirements for information, or that there could be serious economic repercussions. The judgment was a bombshell: "*Ahora mismo sale gratis disparar contra la banca*" ("Right now, the banks have been made fair game"; source [ABC](#)). It is perceived as [yet another setback](#) for the Spanish banking sector. A string of preliminary references to the CJEU, starting with the well-known [Aziz](#) case, has strengthened the judicial protection of consumers against unfair contract terms. Still, yesterday's judgment comes as a [surprising end](#) to a long-running battle between Spanish consumers and the banks, supported by the government. It remains to be seen how the European judgment will be implemented at the national level; most banks [do not seem eager to accept an obligation to automatically repay all their clients](#).

Posted by [Anna van Duin](#) at 08:56



Labels: [Aziz](#), [cjeu](#), [consumer credit](#), [consumer protection](#), [ex officio](#), [information](#), [mortgage](#), [transparency](#), [unfair contract terms](#)

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