

Acknowledgement of receipt and pre-closure letter for a multiple complaint about the alleged infringement of Directive 93/13/EEC on unfair terms in consumer contracts and the case law of the Court of Justice of the European Union through the judgments of the Spanish Supreme Court of 12 November 2020 concerning the IRPH index

Reference number CHAP (2021) 00759.

The European Commission has received a substantial number of complaints about the possible incompatibility of the case law of the Spanish Supreme Court (Tribunal Supremo) on references to the IRPH¹ index in mortgage loan agreements concluded between consumers and banks with the case law of the Court of Justice of the European Union (CJEU) on Council Directive [93/13/EEC](#) on unfair terms in consumer contracts.

The services of the European Commission have registered these complaints in the Central Complaints Register CHAP under the reference number CHAP (2021) 00759, which should be referred to in any correspondence concerning this matter.

Given the large number of complaints received in this matter, the services of the European Commission, in order to acknowledge receipt of these complaints and inform all complainants of the results of the assessment of their complaints as efficiently as possible, and taking into account the potential public interest in this case, have decided to publish all communications with regard to these complainants on the dedicated page of the [Europa website](#).

The Commission services treat complaints in a confidential manner by default. Only if a complainant opts for non-confidential treatment in the complaint form, may the Commission departments disclose the identity and any of the information submitted by that complainant to the authorities of the Member State against which the complaint has been made. The disclosure of the complainant's identity by the Commission departments may, in some cases, be indispensable to the handling of the complaint.

A [specific privacy policy statement](#) applies in relation to the handling of complaints.

The services of the European Commission have assessed the complaints in light of the applicable European Union law and in line with the enforcement priorities set in the [Commission Communication 'EU law: Better Results through Better Application'](#)².

The complainants consider that the judgments of the Tribunal Supremo of 12 November 2020 on IRPH clauses are contrary to Directive 93/13/EEC on unfair terms in consumer contracts and the case law of the Court of Justice of the European Union (CJEU), in particular the judgment of 3 March 2020 in Case C-125/18 *Gómez del Moral Guasch*.

It is for the courts of the Member States to analyse and assess the transparency and unfairness of not individually negotiated contractual terms in individual cases. This follows, for example, from Cases C-125/18 *Gómez del Moral Guasch*, paragraph 52, and C-26/13 *Kásler and Káslerné Rábai*, paragraph 74, as well as Joined Cases C-224/19 y C-259/19 *Caixabank*, paragraph 68, as

¹ Índice de Referencia de Préstamos hipotecarios – reference index for mortgage loans.

² C(2016)8600, OJ C 18/02 of 19.1.2017.

regards the possible lack of transparency of a term, and also from Cases C-243/08 *Pannon GSM*, paragraphs 42 and 43, C-421/14 *Banco Primus*, paragraph 57, as well as Joined Cases C-224/19 y C-259/19 *Caixabank*, paragraphs 73 and 77, regarding the possible unfairness of a term. It should be added that, when assessing contract terms in concrete cases, national courts are obliged to take into account the case law of the CJEU (See, for example, Joined Cases C-224/19 and C-259/19 *Caixabank*, paragraphs 73 and 77), in this case in particular the judgment in Case C-125/18 *Gómez del Moral Guasch*.

If following a judgment of the CJEU in response to a question referred for a preliminary ruling doubts remain as to the interpretation of Directive 93/13/EEC, the courts of the Member States may make further requests for a preliminary ruling to seek clarification on issues that have not been clarified in the previous judgments. That is actually the case with regard to the IRPH clauses and the relationship between the lack of transparency and the unfairness of contract terms, since there are currently two references for a preliminary ruling pending before the CJEU.

Indeed, the judge of the Court of First Instance No 38 of Barcelona, which raised the questions in the preliminary ruling procedure C-125/18 *Gómez del Moral*, has submitted a new question for a preliminary ruling in order to clarify further aspects of the interpretation of Directive 93/13/EEC. The decision of this court in Barcelona to submit the new questions to the CJEU dates from 2 December 2020 and can be accessed on the internet in the Spanish official legal database, CENDOJ, with the following reference: Roj: AJPI 34/2020 (ECLI:ES:JPI:2020:34A). The request has been registered by the CJEU under the reference C-655/20. In addition, in January 2021, the judge of the Court of First Instance No 2 of Ibiza referred a request for a preliminary ruling to the Court of Justice of the European Union (CJEU), asking sixteen questions related to the IPRH clause and the interpretation to be given to Directive 93/13/EEC. This decision is also available in CENDOJ under the following reference: Roj: AJPI 2/2021 (ECLI:ES:JPI:2021:2A).

The Commission trusts that the answers that the CJEU will give to the new questions will provide more clarity in this matter and thus help resolve the matter brought up by complainants in case CHAP (2021) 00759.

Where preliminary ruling proceedings under Article 267 TFEU are pending on the matter in question and the action that the Commission may take would not allow speeding up the resolution of the case significantly, the European Commission will not, in principle, consider it appropriate to open infringement proceedings against the Member State concerned in accordance with Article 258 TFEU³.

In view of the two requests for a preliminary ruling from Spanish courts pending before the CJEU on the matter, and irrespective of the assessment of the judgments of the Supreme Court of 12 November 2020, the Commission services do not consider it appropriate to open an infringement procedure against Spain at this stage.

If it results from a preliminary ruling that national rules or case law do not comply with EU law, the Commission will follow up on such ruling. In that respect, after the CJEU has handed down

³ See European Commission Communication: 'EU law: Better results through better application'.

the rulings in the abovementioned cases, should there be evidence that the courts of a Member State are not respecting those rulings, resulting in a breach of EU law of a sufficiently consistent and general nature, the European Commission may open infringement proceedings in accordance with Article 258 TFEU against the Member State concerned.

Following the above considerations, the Commission services intend to close the multiple complaint CHAP (2021) 00759 in the near future without prejudice of possible follow-up after the rulings of the CJEU in the pending cases. However, if the complainants have additional information suggesting that Spain has committed an infringement of Union law not covered by the above assessment, they have the possibility to submit this information within four weeks of the date of this communication on this website. Such information can be sent to JUST-CHAP@ec.europa.eu.

If no new information is received within four weeks, or if the new information received does not lead to a different conclusion, the Commission services may close the case. Closure of this complaint will be without prejudice of any actions which the Commission may undertake after the rulings of the CJEU in the pending cases have been handed down.