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Advocate General's Opinion in Case C-450/22 | Caixabank e.a. (Judicial review of transparency in a collective action)

Advocate General Medina: the transparency of 'floor clauses' in mortgage loan contracts can be reviewed in the context of a collective action

That is so even in the case of an action brought against over a hundred Spanish financial institutions

'Floor clauses' were standard terms contained in variable rate mortgage loan agreements concluded with consumers by a significant number of financial institutions in Spain. Those clauses set a threshold (or 'floor') below which the variable interest rate could not fall, even if the reference rate (generally the Euribor) fell below it. When the reference rates fell significantly below that threshold, the consumers realised they could not benefit from that decrease and still had to pay the minimum interest rate (usually between two and five percent), despite having a variable rate mortgage. Individual consumers and consumer associations have filed several thousands of lawsuits in Spain claiming the illegality of 'floor clauses' in the light of the Directive on unfair terms, ¹ as well as the restitution of the overpaid interest. ²

The Spanish Association of Users of Banks, Savings Banks and Insurance (**ADICAE**) brought a collective action against 101 financial institutions operating in Spain. ADICAE aims at stopping the use by those institutions of 'the floor clauses' ('action for an injunction') and at obtaining the reimbursement of the payments made under them ('action for recovery'). Following calls in the national media, **820 consumers** supported the collective action.

Having lost the case twice, the banks appealed to the Spanish Supreme Court. That court has doubts about the suitability of the collective proceedings to carry out a review of the transparency of the 'floor clauses' in order to ascertain whether they are unfair, especially given the numerous consumers and financial institutions involved.

Advocate General Laila Medina points out that nothing in the directive suggests that the review of transparency is precluded in the context of a collective action. Moreover, **the judicial review of transparency in collective proceedings is appropriate and possible**. It just has to be adapted to the specificities of collective actions, such as their level of abstraction, and focus on the standard contractual and pre-contractual practice of the professional towards the average consumer. Excluding the examination of the transparency of contractual terms in the context of collective proceedings would defeat the purpose of collective actions and be incompatible and inconsistent with EU legislation aimed at strengthening the judicial protection of the collective interests of consumers.

That judicial review is also possible when the proceedings are brought against a significant number of financial institutions and involve a large number of contracts, as long as the professionals belong to the same economic sector, the contractual terms are similar and the right of each financial institution to effective judicial protection is guaranteed. Advocate General Medina underlines that the Spanish Supreme Court has to determine whether there is a sufficient degree of similarity to allow the collective action to proceed. In order to do so, it can take into account that the professionals are all banking institutions and that all the clauses challenged are standard 'floor clauses' included in mortgage contracts and whose effect is to exclude the variation of the interest rate below a certain level. According to the Advocate General, all those elements could be a strong indication of sufficient

similarity.

The Advocate General considers that it is possible to use **the average consumer standard to carry out the transparency review in the case pending before the Spanish Supreme Court**, as this objective standard of assessment is irrespective of the characteristics or the number of consumers involved.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ [Council Directive 93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts.

² In a judgment of 9 May 2013, the Spanish Supreme Court held, in the context of a collective action brought by a consumer association against several banking institutions, that the 'floor clauses' examined were not transparent, because the consumers had not been informed properly about the economic and legal burden placed upon them. The clauses were declared void. However, in view of the serious economic repercussions that the retroactive restitution of overpayments would have on the banking sector, the Supreme Court decided to limit the temporal effects of the declaration of invalidity to overpayments made after the delivery of its judgment. However, the Court of Justice ruled that limitation incompatible with the Directive (see Judgment of the Court of 21 December 2016, *Gutiérrez Naranjo and Others*, joined cases [C-154/15](#), [C-307/15](#) and [C-308/15](#); see also [Press Release No 144/16](#)).