

## NULLITY OF ABUSIVE CLAUSES: CONSUMER REFUNDS IN THE SPOTLIGHT

When does the term that a consumer has to claim back amounts paid to a financial institution under a clause declared null and void or abusive start to expire? This is the question that the Spanish Supreme Court ("SC") recently put to the Court of Justice of the European Union ("CJEU"). The reply could introduce a major new development in consumer banking litigation.

### Where do we start?

In recent years, the Spanish courts have been overwhelmed with consumer actions claiming the nullity of clauses contained in loan agreements, due to their abusive nature, and claiming the return of what they paid under these clauses.

These lawsuits, which until now had only received encouragement from the courts, could be facing a time limit, derived from an elementary principle of legal certainty.

### The difference between a nullity action and an action for reimbursement

With regard to complete nullity, we can distinguish between two actions: (i) an action for a declaration of nullity of a contract clause and (ii) an action ordering the reversal of the effects of the clause declared null and void.

An action for a declaration of nullity asks a court to declare that the clause is legally null and void.

The action for reimbursement is designed to reverse the effects the null and void clause may have caused, that is, recovery of what was paid.<sup>1</sup>

The action for a declaration of nullity is not subject to a limitation period. However, a majority of the courts believe that the return is subject to a time limit of five years, which is the limitation period for bringing the action.<sup>2</sup>

### Key points

- The expiry of actions for reimbursement (which is different to the declaration of nullity) has been recognised by a majority of Spanish courts
- The SC asks the CJEU about the date on which the limitation period (five years) starts for actions to recover amounts paid under an abusive clause.
- The questions submitted by the SC to the CJEU will not necessarily give rise to a conclusive decision from the CJEU
- The request for a preliminary ruling is in the context of an expenses clause. But the reply could *a priori* be extrapolated to other abusive clauses, or even to other nullity actions.

<sup>1</sup> On this issue, from a technical perspective, "Nulidad de pleno derecho y prescripción", DEL OLMO, P. in Almacén del Derecho (10 March 2021).

<sup>2</sup> Article 1964 of the Civil Code, which establishes the term for bringing personal actions.

## Effects of this doctrine in terms of abusive clauses

If the action for reimbursement is subject to a limitation period, there is a possibility that the judicial recognition of the nullity of a null and void clause will not be accompanied by a refund of the amounts paid under the clause to the consumer.

As a result, if the action for reimbursement -which seeks the refund of amounts paid by the consumer- had expired when the claim was filed, the Court could declare the clause null and void, but would not be able to oblige the bank to return what it received by virtue of the same.

## What do the Spanish courts say about it?

Although there are exceptions, the majority of the Provincial Courts have recognised the difference between the expiry of an action for nullity and the expiry of action for reimbursement.

But the practical scope of this judicial doctrine depends above all on the moment when the term for bringing the action begins to expire, that is, the "*dies a quo*" of the limitation period, of five years.

Leaving aside the "negationist" stance, which conflates the action for reimbursement and the action for nullity (i.e., implying that the action for reimbursement never expires, as the action for nullity does not expire), which the SC and CJEU seem to have settled, the courts have adopted three approaches:

- Those that maintain that the period begins to expire as of the final judgment declaring the nullity of a specific clause.
- Those that argue that the period begins to expire the moment the payments were made by the consumer.
- Those that believe that the period starts when a higher authority (the Supreme Court or CJEU) establishes its case-law doctrine regarding the nullity of the clause.

The first stance violates the principle of legal certainty, as it is comparable to the "negationist" position: if the consumer does not have a deadline for bringing a declaratory action -because it cannot expire-, and the action for reimbursement remains an option for five years after the declaratory action, it would not expire either. The consumer would only lose the chance to sue in the (highly unlikely) event of the nullity action being filed first and then the action for reimbursement coming after five years had passed. This is absurd; the logical thing is for both actions to be brought at the same time.

The second, radically opposing position would favour the financial institutions as it would imply neutralising the possibility of the return of payments made by consumers prior to 2016, unless the claim was filed before then.

The third approach seems to be the one preferred by the Supreme Court and the CJEU.

## The request for a preliminary ruling referred to the CJEU

The CJEU has, in a variety of judgments (for example, those of 9 and 16 July 2020 and 10 June 2021) recognised the distinction between a nullity action and an action for reimbursement. The former does not have a limitation period (by

definition). The second is subject to the term established by the different Member States, which cannot contravene the principle of effectiveness<sup>3</sup>.

However, we are still unaware as to when the limitation period for the action for reimbursement starts.

On 22 July 2021, the SC referred a request for a preliminary ruling on this issue to the CJEU.

The starting point for the SC ruling was that it is not contrary to EU law to establish a limitation period for an action for reimbursement. This conclusion was based on precedents issued by the CJEU in this area and it assumed it to be a settled matter.

The SC also rules out the limitation period being understood to start running down on the date the agreement is concluded or on the date on which the undue payments were made (pro-financial institution approach).

Consequently, there are two possible interpretations:

- That the start date of the limitation period is that of the judgment declaring the nullity of a clause ("pro-consumer approach"). The Court itself questions this solution, indicating that it could contravene the principle of legal certainty, because it would mean actions for reimbursement never expire.
- That the start date is determined by the judgments of the SC or, alternatively, the CJEU, who establish case-law doctrine on the issue (in that case, it would be the doctrine on the economic consequences of the nullity of the expenses and taxes clauses).

Even though the SC notes that the average consumer will not necessarily be aware of the SC or CJEU case law, it seems to opt for this alternative. If this is the case, the action for reimbursement (which will normally be filed with an action seeking a declaration of nullity) would have to be filed within five years of the corresponding judgment.

## **The limited purview of the CJEU decision**

The scope that the CJEU has to resolve a request for a preliminary ruling is limited. It can (and should) only reply to the questions put to it, on the basis of EU law, and which are the following:

- Whether it is contrary to EU law to leave the period for bringing an action for reimbursement open indefinitely (as the limitation of the action is determined by the need for a declaration in an action that is not subject to a limitation period). However, this may be a trick question, because such an interpretation would never be contrary to EU law on consumer protection; if anything, it would contravene the principle of legal certainty.
- Whether it is contrary to EU law to establish that the limitation period for the action for reimbursement starts on the date the case-law doctrine on nullity is set, as this is the moment at which the consumer would be in a position to sue. In that case, it also asks the CJEU what doctrine should be taken into account in the specific case of the expenses clause: that of the SC or that of the CJEU.

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<sup>3</sup> The CJEU judgment of 9 July 2020 found that it was contrary to EU law for national legislation to establish a three-year limitation period starting on the date of termination of the agreement. It established that at that point, the consumer was not necessarily in a position to bring the action.

If the CJEU finds that EU law **does not prevent** a court finding that the action for reimbursement can be brought as of the moment the case-law doctrine of the nullity of a clause is established, it is more than likely that it will take time to identify the relevant judgment in this regard.

In that case, the SC would have to complete the analysis and clarify at what point that doctrine was established - whether it was by virtue of the SC judgment of 10 January 2019, or at some other. It would make no sense, after having posed the question in the manner we have seen, for the SC to retrace its footsteps and declare that the consumer was not in a position to bring the action when the doctrine is established.

Nonetheless, there is also the possibility that the CJEU will interpret that it is **contrary** to EU law to place the start of the term for bringing action on the date the case-law doctrine on the same is set, in view of the fact that the average consumer will not be aware of the evolution of case law.

If this is the case, we would be back to square one and be dragged toward the action not being subject to a limitation period, something that -lest we forget- had already been rejected by both courts (SC and CJEU).

### **Scope of the CJEU ruling**

The request for a preliminary ruling has been issued in the context of an expenses clause. But the reply of the CJEU (and the subsequent development of this doctrine by the SC) could be extrapolated to other abusive clauses that generate the obligation to reimburse amounts. A priori, it would also be applicable to other nullity scenarios, such as usurious loans.

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