

## Recomendación para la cita:

**F. Esteban de la Rosa, “The Treatment of Unfair terms in the process of foreclosure in Spain. Mortgage Enforcement Proceedings in the Aftermath of the ECJ’s “Ruling of the Evicted”, Zeitschrift für Europäisches Privatrecht 2015, 2, pp.366-388.**

### **THE TREATMENT OF UNFAIR TERMS IN THE PROCESS OF FORECLOSURE IN SPAIN** *Mortgage Enforcement Proceedings in the Aftermath of the ECJ’s “Ruling of the Evicted”*

**Fernando Esteban de la Rosa\***

#### **Übersicht**

- I. Introduction
- II. The Aziz judgment
  - 1. The facts and the prejudicial questions
  - 2. The judgment and its reasoning
- III. The changes in the Spanish legislation
  - 1. Legislative measures adopted before the Aziz Ruling
  - 2. Legislative measures adopted after the Aziz Ruling
    - A. Measures to protect debtors in the foreclosure process
    - B. Amendments derived from the Aziz Ruling
- IV. The Spanish Judges before the Aziz Ruling
  - 1. The role of Aziz Ruling in the judicial development of the Spanish system
  - 2. The treatment of acceleration clauses
  - 3. The treatment of default interest clauses
- V. Conclusions

*The Spanish system of foreclosure has suffered great changes as a consequence of the Aziz Ruling (Judgment of the ECJ, 1st Chamber, 14 March 2013, C-415/11). Changes to formally adapt Spanish legislation to the doctrine of the Aziz Ruling have taken place through Act 1/2013. However, the role that national judges have assumed in the application of the Ruling and in the development of subsequent judicial practice is especially noteworthy. The judicial branch has sought to use the Aziz Ruling to bring about deep reform of the system, applying de facto solutions without pre-existing legal norms, proposing progressive and ethical interpretations according to the doctrine established by the ECJ, and referring preliminary questions to the ECJ to counter new Spanish legislation. This article highlights the impact of the Ruling on Spanish legislation and judicial practice one year after it was delivered.*

---

\* Dr Fernando Esteban de la Rosa is Professor of Private International Law in the School of Law at University of Granada. The author would like to thank Ms. Ozana Olariu for her cooperation and help preparing this work.

*Der vorliegende Beitrag untersucht die tatsächliche Bedeutung für die gesetzgeberische und richterliche Praxis der Entscheidung Aziz ein Jahr nach ihrem Erlass. Die formelle Anpassung des spanischen Rechts an die Anforderungen, die aus diesem Urteil entstammen, erfolgte mit Gesetz 1/2013. Gleichwohl muss besonders gewürdigt werden, dass die Richterschaft sich bemüht hat, anhand der Aziz-Rechtsprechung eine grundlegende Änderung des Systems durchzuführen, sei es durch die Anwendung von de facto-Lösungen oder durch den Vorschlag von fortschrittlichen und ethischen Lösungen auf Grundlage der vom EuGH etablierten Doktrin. Auch wurden dem EuGH zahlreiche Vorlagefragen gestellt, die die Unionsrechtskonformität der neuen spanischen Rechtsakte betreffen.*

## **I. Introduction**

On 14 March 2013 the Court of Justice of the European Union delivered its judgment in case C-415/11 responding to the two preliminary questions of the Juzgado de lo Mercantil No 3 of Barcelona (Commercial Court No 3, Barcelona). The judgment declared that the Spanish foreclosure procedure does not comply with all the requirements set by Directive 1993/13/EC on Unfair Terms in Consumer Contracts. The Court also enumerated criteria to evaluate the unfair character of several clauses frequently encountered in loan mortgage contracts, such as acceleration clauses in long-term contracts, default interest clauses and clauses under which the lender unilaterally determines the amount of the unpaid debt.

The Aziz Ruling may be analysed from different perspectives. The Ruling follows the line of reasoning set forth by previous ECJ judgments, in which Luxembourg considered that there are certain limitations to the national procedural autonomy of Member States meant to ensure the effective protection of individual rights acquired under European law. EU procedural rules cannot be less favourable than those governing similar domestic situations (principle of equivalence), and they must not render impossible in practice or excessively difficult the exercise of rights conferred (principle of effectiveness).<sup>1</sup> The ECJ recalls that the jurisdiction of the Court extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of the Directive bearing in mind that it is for that national court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. Accordingly, the ECJ has offered criteria to be used in determining the unfair character of some clauses that are frequently found in loan contracts.

That having been said, one can hardly ignore the context of the financial and economic crisis taking place at the time the ECJ ruled in this case or the social demand for legislative reform of foreclosure procedure so as to allow unemployed or vulnerable persons to keep their habitual residences, stop mass evictions and pass a new Act establishing *non-recourse debt*.<sup>2</sup> The scarce reform up to that date had not been considered as sufficient. From this point of view, the Aziz Ruling has been long awaited in Spain and has given

---

<sup>1</sup> See ECJ Judgment 26 October 2006, Case C-168/05 Mostaza Claro, p. 24; ECJ Judgment 6 October 2009 Case C-40/08 Asturcom Telecomunicaciones, p 38; ECJ 14 June 2012, Case C-618/10, Banco Español de Crédito SA.

<sup>2</sup>File No. 120/000019.BOCG, Congreso de los Diputados, Series B, No 102-1 of 21 of December 2012, pp. 1-3.

rise to a lot of expectations, considering the significant number of users of the foreclosure procedure and the likelihood that the Ruling could affect the Spanish legislation to a large extent. Since the Ruling, mass media and public debates have raised the question of the extent to which the Ruling affects the rights of persons subject to the foreclosure procedure.

This article has the aim of evaluating the Ruling's impact on both Spanish legislation and judicial practice in matters arising out of mortgage loans and mortgage enforcement. As we will see, its influence has been remarkable in adopting new legislative measures meant to adapt Spanish law to the requirements set forth by European Law. Aziz has increased and generalized the protection of debtors in mortgage procedures: a positive development considering that most of the loans were granted to consumers. Aziz has also left its mark on current judicial practice - many judgments refer to it and apply the criteria that it establishes. In this vein, Spanish judicial practice post-Aziz shows that the full effects of the Ruling are yet to be revealed. The numerous related preliminary questions submitted by Spanish judges to the ECJ, following the Aziz Ruling, are a clear reflection of the Ruling's impact. The impact of Aziz Ruling is set to go beyond the entry into force of the new European Directive 2014/17/EU of the European Parliament and the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, amending Directives 2008/48/EC and 2013/36/EU, and Regulation (EU) No 1093/2010. Even though art 28 of the new Directive contains several provisions related to this matter, it only includes recommendations<sup>3</sup> and has very little impact on loan clauses thus leaving Aziz's authority on the matter practically unaltered.

This article shall be divided in three parts. The first part shall summarise the changes in the foreclosure procedure that Spanish legislation has adopted as a consequence of the Aziz Ruling, also highlighting the main reforms that have been undertaken in the context of the financial crisis. The impact of this key judgment shall also be scrutinised insofar as it has affected judicial activity, with special emphasis on how Spanish judges are applying the judgment's criteria in order to change how unfair terms in mortgage loans are considered and interpreted. However, before proceeding to the substantial part of the analysis, let us briefly recall the facts, the key prejudicial questions that triggered the decision, and the reasoning of the Aziz Ruling.

## **II. The Aziz judgment**

### **1. The facts and the prejudicial questions**

---

<sup>3</sup> According to this provision: (1) Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.

(2) Member States may require that, where the creditor is permitted to define and impose charges on the consumer arising from the default, those charges are no greater than is necessary to compensate the creditor for costs it has incurred as a result of the default.

(3) Member States may allow creditors to impose additional charges on the consumer in the event of default. In that case Member States shall place a cap on those charges.

(4) Member States shall not prevent the parties to a credit agreement from expressly agreeing that return or transfer to the creditor of the security or proceeds from the sale of the security is sufficient to repay the credit.

(5) Where the price obtained for the immovable property affects the amount owed by the consumer Member States shall have procedures or measures to enable the best efforts price for the foreclosed immovable property to be obtained. Where after foreclosure proceedings outstanding debt remains, Member States shall ensure that measures to facilitate repayment in order to protect consumers are put in place.

The case arose out of a Spanish enforcement proceeding involving Mr Mohamed Aziz, a Spanish resident of Moroccan nationality, evicted in January 2011 after failing to make payments on his 138.000 euro loan. His bank, Catalunya caixa, took enforcement measures and on 20 July 2010 a judicial auction of the immovable property was arranged. Although no bid was made, in accordance with the provisions of the Spanish Code of Civil Procedure (CCP), the *Juzgado de Primera Instancia* No 5 of Martorell consented to the vesting of that property at 50% of its value. That court also fixed 20 January 2011 as the date on which possession of the property was to pass to the vestee. Mr Aziz was, as a consequence, evicted from his home.

On 11 January 2011, Mr Aziz applied to the *Juzgado de lo Mercantil* No 3 de Barcelona for a declaration seeking the annulment of the enforcement proceeding on the basis of the annulment of clause 15 of the mortgage loan agreement, on the ground that it was unfair. According to the case-file submitted to the Court, clause 6 of the loan agreement provided for an annual default interest rate of 18.75%, automatically applicable to sums not paid when due, without prior notice. Furthermore the same clause 6a conferred on the Bank the right to call in the totality of the loan on expiry of a stipulated time-limit where the debtor failed to fulfil his obligation to pay any part of the principal or the interest on the loan. In addition, clause 15, the determination of the amount due, stipulated not only that Catalunya caixa had the right to bring enforcement proceedings to reclaim any debt but also, for the purposes of those proceedings, that it could immediately quantify the amount due by submitting an appropriate certificate indicating that amount, in this case certified by a notary and amounting to EUR 139.764.76, corresponding to the unpaid monthly instalments, including contractual and default interest.

On 8 August 2011, the *Juzgado de lo Mercantil No 3 de Barcelona* referred a number of prejudicial questions to the ECJ with the objective of determining whether certain aspects of Spanish mortgage enforcement procedure, as stated in articles 695 and following of the Spanish CCP, when consumers are involved, were compatible with the Unfair Terms in Consumer Contracts Directive 93/13/EC (Directive 93/13). According to this, it asked the following prejudicial questions:

1) Whether the system of levying execution, in reliance on judicial documents, on mortgaged or pledged property provided for in Article 695 ff. of the Spanish CCP, with its limitations regarding the grounds of objection, may be nothing more than a clear limitation of consumer protection.

2) How is the concept of disproportion to be understood with regard to:

a) the use of acceleration clauses in contracts planned to last for a considerable time – in this case 33 years – for events of default occurring within a very limited specific period;  
b) the setting of default interest rates which are not consistent with the criteria for determining default interest in other consumer contracts (consumer credit);

c) the unilateral establishment by the lender of mechanisms for the calculation and determination of variable interest – both ordinary and default interest – which are linked to the possibility of mortgage enforcement and do not allow a debtor who is subject to enforcement to object to the quantification of the debt in the enforcement proceedings themselves but require him or her to resort to declaratory proceedings in which a final decision will not be given before enforcement has been completed or, at least, the debtor will have lost the property mortgaged or charged by way of guarantee – a matter of great

importance when the loan is sought for the purchase of a dwelling and enforcement gives rise to eviction from the property?

## 2. The judgment and its reasoning

As to the first preliminary question, the First Chamber ruled that the Directive must be interpreted as precluding legislation of a Member State, such as that in issue in the main proceedings, which –whilst failing to provide in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based – does not permit the court before which declaratory proceedings have been brought and which has jurisdiction to assess the unfairness of such a term to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.

The judgment first invokes the principle of the procedural autonomy of the Member States. The judgment did not consider that the principle of equivalence was not fulfilled. However, it was necessary to verify if the Spanish legislation fulfilled the principle of effectiveness.<sup>4</sup>In the present case, according to the case-file submitted to the Court, pursuant to Article 695 of the CCP in force at that time, objections to enforcement in mortgage enforcement proceedings may only be raised by the defendant in a very limited number of circumstances.<sup>5</sup>And at the same time, according to art. 698 CCP, any other application made by the debtor, including claims concerning nullity of title, maturity, certainty, extinguishment or the amount of the debt, is to be settled by an appropriate judgment, without having the effect of staying or terminating the judicial enforcement proceedings provided for in the chapter concerned.<sup>6</sup>In addition, according to Article 131

---

<sup>4</sup> See also Cases C-168/05 *Mostaza Claro* [2006] ECR I-10421, para. 24 and C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 38.

<sup>5</sup> Article 695 CCP provided the following:

‘(1) In the proceedings referred to in this chapter, an objection to enforcement by the defendant may be accepted only where it is based on the following grounds: 1. extinguishment of the security or secured obligation, on condition of production of a certificate from the register, showing the annulment of the mortgage or as appropriate of the non-possessory pledge (registered pledge), or of a notarial instrument attesting receipt of payment or annulment of the security; 2. an error in determining the amount due, where the secured debt is the closing balance of an account between the creditor seeking enforcement and the party against whom enforcement is sought. The party against whom enforcement is sought shall produce his copy of the statement of account and the objection shall be accepted only if the balance shown in that statement differs from the balance submitted by the creditor seeking enforcement. 3. ... the existence of another guarantee or mortgage ... registered before the security which is the subject of the proceedings, together with the corresponding registration certificate.

(2) If an objection is lodged under the preceding paragraph, the registrar shall stay enforcement and summon the parties to a hearing before the court that ordered the enforcement. There shall be at least four days between the summons and the date of the hearing in question. At that hearing, the court shall hear the parties, admit the documents that are submitted and issue the decision that it considers reasonable within two days in the form of an order’.

<sup>6</sup> Article 698 of the Code of Civil Procedure provides:

‘(1) Any application made by a debtor, third-party debtor or other interested party, which is not covered by the preceding articles, including applications concerning nullity of title, maturity, certainty, extinguishment or the amount of the debt, shall be settled by an appropriate judgment, without ever having the effect of staying or terminating the judicial enforcement proceedings provided for in the present chapter. (2) Upon submission of the application referred to in the preceding paragraph or in the course of the subsequent proceedings, and in order to secure the effectiveness of the decision to be taken in those proceedings, retention of all or part of the amount to be paid to the creditor in accordance with the procedure laid down in the present chapter may be requested. The court shall order such retention on the basis of the documents

of the Law on Mortgages, preliminary registrations of an application for annulment of a mortgage or the other entries in the register, not based on one of the cases which may lead to staying enforcement, are to be cancelled pursuant to the order on annulment referred to in Article 133 of that law, provided that such entries postdate the marginal note regarding the issue of the security certificate.<sup>7</sup>

The judgment considers that the Spanish rules of procedure impair the protection sought by the Directive, in so far as they render it impossible for the court hearing the declaratory proceedings to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision.<sup>8</sup>

In providing an answer to the second question, the ECJ delivered general criteria applicable to evaluate unfair terms, and particularly criteria for the clauses submitted. As general criteria, the ECJ considered that Article 3(1) of the Directive must be interpreted as meaning that the concept of ‘*significant imbalance*’, to the detriment of the consumer, must be assessed in light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his or her disposal, under national law, to prevent continued use of unfair terms, should also be carried out; in order to assess whether the imbalance arises ‘*contrary to the requirement of good faith*’, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.

As particular criteria, the ECJ judgment considered that it is for the referring court to assess terms concerning acceleration, in long-term contracts, by taking account of events of default occurring within a limited specific period. Advocate General Kokott relevantly stated in points 77 and 78 of her Opinion that the referring court should assess:

- Whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation of essential importance in the context of the contractual relationship in question,
- Whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan,
- Whether that right derogates from the relevant applicable rules, and

---

submitted if it considers the grounds asserted to be sufficient. If the party seeking retention clearly lacks adequate funds, the court may first require him to provide a sufficient security in respect of default interest and any compensation for other damage the creditor may suffer. (3) If the creditor provides a reasonable security for the amount ordered to be retained as a result of the proceedings referred to in the first paragraph, the retention shall be revoked.

<sup>7</sup> Art. 131 Law of Mortgage provides: ‘Preliminary registrations of an application for annulment of a mortgage or the other entries not based on one of the cases which may lead to staying of enforcement shall be cancelled pursuant to the order on annulment referred to in Article 133, provided that such entries postdate the marginal note regarding the issue of the security certificate. The act concerning receipt of payment of the mortgage may not be registered unless the abovementioned marginal note has already been cancelled by order of the court to that effect.’

<sup>8</sup> See, to that effect, ECJ Judgment of 13 March 2007, Case C-432/05, Unibet, para. 77.

- Whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.

Secondly, regarding the term concerning the fixing of default interest, it should be recalled that, in the light of paragraph 1(e) of the annex to the Directive, read in conjunction with Articles 3(1) and 4(1) of the Directive, the national court must assess in particular (as stated by the Advocate General in points 85 to 87 of her Opinion):

- First, the rules of national law which would apply to the relationship between the parties, in the event of no agreement having been reached in the contract in question or in other consumer contracts of that type, and
- Second, the rate of default interest laid down, compared with the statutory interest rate, in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and that it does not go beyond what is necessary to achieve them.

Finally, with regard to the term concerning the unilateral determination by the lender of the amount of the unpaid debt, linked to the possibility of initiating mortgage enforcement proceedings, it must be held that, taking into account paragraph 1(q) of the annex to the Directive and the criteria contained in Articles 3(1) and 4(1) thereof, the referring court must in particular assess:

- Whether and, if appropriate, to what extent, the term in question derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of defence.

### **III. The Changes in the Spanish Legislation**

#### **1. Legislative measures adopted before the Aziz Ruling**

During the last few years Spanish legislation has experienced several changes in the field of mortgage loans and foreclosure, mainly taking into consideration the fundamental social need derived from the exponential increase in mortgage enforcement in Spain. The main purpose has been to protect vulnerable persons from losing their habitual residence. Among the relevant legislation is: Act 41/2007, of 7 December,<sup>9</sup> amending art. 4 Act 2/1994 of 30 March, aimed to prevent debtors' insolvency by restructuring the debt through the novation of the financial conditions of the loan and art. 693 CCP, so as to allow the revival of the mortgage loan if foreclosed because of non-payment of any fee when the real property is the habitual place of residence of the debtor; Royal Decree 1975/2008 of 28 November instituting a temporary and partial moratorium for

---

<sup>9</sup>Ley 41/2007, de 7 de diciembre, por la que se modifica la Ley 2/1981, de 25 de marzo, de Regulación del Mercado Hipotecario y otras normas del sistema hipotecario y financiero, de regulación de las hipotecas inversas y el seguro de dependencia y por la que se establece determinada norma tributaria. BOE 294, 8 December 2007.

unemployed and self-employed persons;<sup>10</sup> Royal Decree-Law 6/2010,<sup>11</sup> modifying article 607 CCP so as to extend the limits of immunity for seizure of goods of the debtor taking into account the debtor's family situation; Royal Decree Law 27/2012 of 15 November,<sup>12</sup> introducing the novelty of immediate suspension of the evictions of families: in particular, risk of exclusion for a period of two years and granting a mandate to the Government to adopt urgent measures to encourage the creation of a social housing fund for mortgagees displaced from their main residence as a result of non-payment of the mortgage loan and who lack other resources or access to housing; Royal Decree Law 6/2012<sup>13</sup>, establishing mechanisms that intend to allow the restructuring of the mortgage debt for debtors in extreme difficulty as well as introducing more flexibility in real guarantees through a Good Practice Code. The Andalusian Autonomous Community Decree-Law 6/2013, of 9 April,<sup>14</sup> similarly contemplates, for three years as maximum, a so called statement of social interest against the compulsory expropriation of houses by Banks to cover the housing needs of people living in dire social circumstances because they are involved in eviction proceedings for mortgage enforcement.<sup>15</sup>

Other reforms targeted at ensuring more transparency in the process of granting a loan, in particular, Act 2/2009 of 31 March,<sup>16</sup> on consumer protection from abusive practices through transparency; and Act 2/2011, of 4 March,<sup>17</sup> subjecting the grant of loans to certain conditions. According to these conditions, the creditworthiness of the borrowers must be assessed on the basis of sufficient information, which may include both data provided by the borrower and automated data files on insolvency; and consumers must have access to all the contractual information needed to evaluate the financial product.

Some of the adopted measures have sought to guarantee a more equitable balance between the parties and set the "rules of the game", providing, for instance, new rules on auction so as to improve the position of the debtor. As established in Royal Decree Law 8/2011, of 1 July,<sup>18</sup> a higher minimum threshold is set for cases where seizures may be executed following an auction of the habitual residence in a mortgage enforcement in which the value obtained is insufficient to settle the debt. And arts. 669, 670 and 671 CCP

---

<sup>10</sup>Real Decreto 1975/2008, de 28 de noviembre, sobre las medidas urgentes a adoptar en materia económica, fiscal, de empleo y de acceso a la vivienda. BOE 290, 2 December 2008.

<sup>11</sup>Real Decreto-ley 6/2010, de 9 de abril, de medidas para el impulso de la recuperación económica y el empleo. BOE 89, 13 April 2010.

<sup>12</sup>Real Decreto-ley 27/2012, de 15 de noviembre, de medidas urgentes para reforzar la protección a los deudores hipotecarios. BOE 276, 16 November 2012.

<sup>13</sup>Real Decreto-ley 6/2012, de 9 de marzo, de medidas urgentes de protección de deudores hipotecarios sin recursos. BOE 60, 10 March 2012.

<sup>14</sup>Decreto-Ley 6/2013, de 9 de abril, de medidas para asegurar el cumplimiento de la Función Social de la Vivienda. Boletín Oficial de la Junta de Andalucía 69, 11 April 2013.

<sup>15</sup> As this Decree-Law may be considered in contradiction with the Spanish Constitution, the Government submitted this question through the procedure known as the "recurso de inconstitucionalidad" to the Constitutional Court. This has established the suspension of this legislative measure and recently, by order of 14 January 2014, has maintained the suspension.

<sup>16</sup>Ley 2/2009, de 31 de marzo, por la que se regula la contratación con los consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito. BOE 79, 1 April 2009.

<sup>17</sup>Ley 2/2011, de 4 de marzo, de Economía Sostenible. BOE 55, 5 March 2011.

<sup>18</sup>Real Decreto-ley 8/2011, de 1 de julio, de medidas de apoyo a los deudores hipotecarios, de control del gasto público y cancelación de deudas con empresas y autónomos contraídas por las entidades locales, de fomento de la actividad empresarial e impulso de la rehabilitación y de simplificación administrativa. BOE 161, 7 July 2011.



have been modified, enabling a greater concurrency of bidders to participate in an auction, ensuring 70% of the value (instead of 50%).

Despite the considerable number of norms meant to regulate the foreclosure system, no comprehensive reform was included in the political/legislative agenda, nor have the laws adopted overtime managed to be adequate for and proportionate to the exigencies of the real situation. The collage of consecutive Acts has done nothing more than create uncertainty.

## **2. Legislative measures adopted after the Aziz Ruling**

### **A. Measures to protect debtors in the foreclosure process**

Reform following the Aziz Ruling materialized through Act 1/2013, of 14 May, of measures regarding protection of mortgage debtors, restructuring of debt and social rent<sup>19</sup>. This Act has introduced different measures with the aim of improving the protection of debtors, particularly those who are especially vulnerable.

Despite the high expectations prior to its adoption, the Act failed to deliver as promised, as it does not answer all the social demands, particularly those related to *non-recourse debt*. The new Act does not recognize the extinction of the debt once the debtor has lost their house. There has been little if no change to the principle according to which the debtor is personally responsible for the outstanding portion of the debt still tied to the mortgage enforcement, even if some judgments of Spanish Courts seemed to recognize this right.<sup>20</sup> It is important to remark that the Aziz Ruling did not recognize such a right. And the position of European Law in relation to this right is quite cautious. According to the new European Law, although this measure is contemplated in the new European Directive 2014/17/EU, its applicability is conditioned to the previous agreement of the parties (art. 28.4).

Although the public demand to end the debtor's unlimited personal liability has not been considered, the position of the debtor in the procedure has been improved, by modifying the "rules of the game" with the aim of reducing the remaining debt. The new Act facilitates access of bidders to auctions and the requirements imposed on them are reduced, so that, for example, it reduces the necessary guarantee to bid from 20 to 5 per cent of the appraised value of goods (art. 647.1.3 CCP). Also it doubles, in the same sense, the period to consign the price of the award for the bidder of an auction (art. 670.1 CCP). Certain improvements in the auction procedure are introduced, establishing that the appraised value for the property shall be no less than 75 per cent of the appraised value that was used to grant the loan (art. 682.1.1<sup>st</sup> CCP). Previously, there was no limit to the type of auction. In the event that the auction ends without any bidder, the percentage of

---

<sup>19</sup>Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social. BOE 116, 15 May 2013. See the analysis in Francisco Lledó Yagüe, "Algunas notas de interés en la tramitación de la ley 1/2013 de 14 de mayo de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de la deuda y alquiler social. Y reflexiones a vuela pluma sobre cuestiones técnicas que plantea la ley", in I. Sánchez Ruiz de Valdivia y M. Olmedo Cardenete, *Desahucios y ejecuciones hipotecarias. Un drama social y un problema legal*, Valencia, Tirant lo Blanch, 2014, pp. 119-164.

<sup>20</sup> See Order of 17 February 2010, Second Section of the Court of Appeal of Navarra. There was also a Popular legislative initiative to this aim. File No. 120/000019, Congress of Deputies, Series B, No. 102-1 of 21.12.12, pp. 1-3.

the allocation of the property increases. Specifically, it rises from 60 per cent to a maximum of 70 per cent, only for cases of main residence (art. 671 CCP). There is a special provision to the effect that if, after the foreclosure, an outstanding debt remains to be paid, part of the payment of the remaining debt will be cancelled during the subsequent enforcement proceedings, provided that certain payment obligations are fulfilled.<sup>21</sup> All of these measures may be seen as efforts oriented in the same sense indicated by art. 28.5 of the new European Directive 2014/17/EU.

The new Act also provides for immediate suspension for a period of two years for evictions of families at particular risk of exclusion. This measure, exceptionally and temporarily, will affect any prosecution of foreclosure or extrajudicial sale. In these cases, without altering the foreclosure process, the Act prevents the eviction. The application of this special regime requires certain conditions to be fulfilled. These include the requirement that the resulting mortgage payment exceed 50 per cent of the total net income of all family members, or that the loan or mortgage loan is secured by the debtor's one and only piece of real property in which he or she is domiciled, provided that the loan was granted for its acquisition. For these particularly vulnerable debtors, the debt will not accrue more delay interest than the result of adding two per cent of the outstanding debt to the compensatory interests.<sup>22</sup> Chapter IV of the new Act also offers different solutions against foreclosure to those under exclusion risk, provided certain requisites are met.

#### B. Amendments derived from the Aziz Ruling

The ECJ ruling of March 14, 2013 allowed the Spanish system to adjust to the Directive 1993/13/EC, either by entering a plea of express opposition based on the unfairness of contractual terms in foreclosure proceedings or by giving the judge competence to declare the unfair character of a clause and adopt, as a precautionary measure, the suspension of the foreclosure proceedings. The Spanish legislator has preferred the first option. Act 1/2013 includes a new ground of opposition in art. 695.1 CCP, founded on "the unfairness of contractual terms as basis for execution or determinant of the amount due." It functions as an incidental and separate procedure within the executive procedure. The changes to the CCP reflect the main conclusions reached in a conference on the implications of the ECJ's Aziz ruling on this issue, which was chaired by the President of the Civil Chamber of the Spanish Supreme Court.

Once the unfairness of a mortgage loan term has been discovered, enforcement is suspended. There is no written phase of the trial, although the parties may submit any documents that they consider pertinent during the oral phase (art. 695.2 CCP). The judge shall decide the dismissal of execution when the abusive clause triggered said execution. Otherwise, the enforcement will be ordered to continue with the non-application of the declared unfair term (art. 695.3.II CCP). As identified in the final paragraph of art. 695.4 CCP *per a contrario*, the order declaring the unfairness of the clause and the dismissal of the execution or non-application of the unfair term is subject to appeal. Once the resolution has become irrevocable, however, the effect of *res judicata* with respect to the resolution goes beyond the execution process. By contrast, according to current Spanish law, the order rejecting to the cause of opposition is not subject to appeal, although its

---

<sup>21</sup> The debtor covers the whole outstanding debt by paying, at least, 65% in five years, or 80% in ten years (art. 579.2 CCP).

<sup>22</sup> See Luis Casero Linares, El proceso de ejecución hipotecaria en la Ley de Enjuiciamiento Civil, *op. cit.*, pp. 121-122.

effects are confined exclusively to the enforcement process to be issued. That is, in the executive process, rejecting the cause of opposition based on the unfairness of any provision of title, the debtor may still exercise nullity of action for abuse of that clause in ordinary declaratory proceedings under Art. 698 LEC, but without affecting the executive process. However, this new Spanish provision will have to be adapted to the doctrine established by the recent ruling of the ECJ of 17 July 2014, as the ECJ has considered the fact that the consumer does not have the possibility of an appeal, once its opposition to the execution has been rejected, to be in contradiction with the European Consumer Law.<sup>23</sup>

An important novelty, according to art. 552.1.II CCP, is that in the enforcement proceedings a judge must automatically analyse the fairness of the contract, even if not specifically asked to do so by the borrower. If the judge hearing the enforcement proceedings finds that the contract contains an unfair term, it must inform the parties and give them five days to make submissions on this. If a clause is found to be unfair, then the enforcement proceedings will not continue if the proceedings were based on such a clause. Although the court hearing the enforcement proceedings may stay the proceedings if it deems that a clause is unfair, this court does not have the competence to actually declare that clause to be unfair. The parties to the enforcement proceedings must initiate separate proceedings to argue their case concerning fairness/ unfairness of the clauses. This review does not preclude the possibility of invoking the unfair character of a term in a later phase of the procedure according to art. 695.1.4 CCP. This new ground for opposition is only available for consumers, as defined in the Royal Legislative Decree 1/2007, approving the consolidated version of the General Law for the Protection of Consumers and Users and other supplementary laws (TRLGDCU), according to which both natural and legal persons qualify as consumers.<sup>24</sup>

The law introduces the possibility for a notary to suspend the extrajudicial sale of a mortgaged property, when the parties can prove that a case is pending before the competent jurisdiction. Article 129 of the Mortgage Law, demands that the inappropriateness of the sale be declared due to the existence of unfair terms in the mortgage loan or that the terms found to be abusive be declared inapplicable. Furthermore, it expressly empowers the Notary Public to advise the parties on unfair terms in mortgage contracts. Undoubtedly, these particular amendments have been adopted as a clear result of the ECJ judgment of 14 March 2013.

---

<sup>23</sup>ECJ of 17 July 2014, case Juan Carlos Sánchez Morcillo, María del Carmen Abril García and Banco Bilbao Vizcaya Argentaria (First Chamber). According to this case “[a]rticle 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a system of enforcement, such as that at issue in the main proceedings, which provides that mortgage enforcement proceedings may not be stayed by the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer; in as much as the latter, the debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his or her objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disapplied.”

<sup>24</sup>On the special difficulties related to the identification of a consumer in the foreclosure procedure, see José María Fernández Seijo, *La defensa de los consumidores en las ejecuciones hipotecarias*, Barcelona, Bosch, 2013, pp. 39-45.

Chapter II contains certain measures to fine-tune the mortgage market, which are related to the Aziz Ruling. One especially relevant measure is that for mortgages on first residence, default interest shall not exceed three times the legal interest. According to the new art. 114.3 Mortgage Law:

*“Default Interest of loans or credits for the purchase of the habitual residence, secured by the mortgages on the same property, may not exceed three times the legal interest rate and may only accrue on the pending main debt. Such default interest cannot be capitalized under any circumstances, except in the case provided for in Article 579.2.a) of the Code of Civil Procedure.”*

It is important to mention the limited temporal effect of this provision. According to the second transitory provision of Act 1/2013:

*“The limitation of the default interest of mortgages on primary residences as provided for in Article 3 par. 2 shall apply to mortgage contracts entered into after the entry into force of this Act.*

*Also, this limitation shall apply to the default interest under loans guaranteed by mortgages on habitual residence, entered into before and accrued after the entry into force of the Act as well as those having accrued on that date provided the loan has not been cancelled.*

*In enforcement proceedings or extrajudicial sales commenced yet unfinished after the entry into force of this Act, should the executable amount be set beforehand, the Court Clerk or the notary public shall give 10 days to the performer to recalculate that amount as provided in the preceding paragraph.”*

The connection with the Aziz Ruling is also shown by the new art. 693.2 CCP, in connection with the treatment of acceleration clauses. According to this provision:

*“[T]he total amount owed for principal and interest may be claimed if early termination is agreed upon in case of non-payment of at least three monthly payments (previously only one was required) should the debtor fail to comply with his obligation of payment for a period at least equivalent to three months, and should this agreement be stated in the contract.”*

These provisions, as will be shown *infra*, seem to have the aim of establishing limits to judicial activism fed by the criteria set forth in Aziz and fuelled by the urge to safeguard the validity of certain mortgage loan clauses, especially those related to default interest<sup>25</sup> and acceleration clauses. Some of their provisions have been scrutinised by the Constitutional Court seized via an assertion of unconstitutionality,<sup>26</sup> and have given rise to new preliminary questions submitted to the Court of Justice of the European Union, as we will see below.

#### **IV. The Spanish Judiciary following the Aziz Ruling**

---

<sup>25</sup> See Luis Casero Linares, *El proceso de ejecución hipotecaria en la Ley de Enjuiciamiento Civil*, Barcelona, Bosch, 2013, p. 109.

<sup>26</sup> Inconstitutionality appeal n.º 4985-2013, against Act 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social. BOE 240, 7 October 2013.

## 1. The role of Aziz Ruling on Spanish judicial practice

The Aziz Ruling has had its greatest impact on Spanish judicial practice for the following reasons.

First, before the Spanish legislation had been amended to comply with the ruling, the Spanish courts, especially Judges of First Instance, had already relied on the Aziz Ruling to adapt the Spanish System to the Law of the European Union and to develop the ethical dimension of the judicial function.<sup>27</sup> According to this, they had suspended the enforcement of mortgage foreclosure procedures, even against the wording of art. 698 CCP.<sup>28</sup> During the post-Aziz period before the new Act was passed, judges reached a certain consensus on how to apply the law in the absence of legislative reform in accordance with which they made, for instance, orders related to the unfair character of default interest.<sup>29</sup> During this period, the judicial branch agreed, solely on the basis of the ECJ judgment, on the suspension of the execution procedure, as an interim measure applying in a declarative proceeding. After the new Act entered into force, this situation changed, meaning judges would not be allowed to act in this way. The prohibition contained in art. 698 LEC should, in my view, be considered in force.<sup>30</sup>

Secondly, the ECJ has enumerated criteria on how to evaluate unfair terms, with a somewhat fresh touch compared to the line followed by the Spanish courts until the Ruling. Spanish judges are nowadays mainly using the criteria established in the Aziz Ruling to determine the unfair character of clauses in mortgage loan contracts.<sup>31</sup> To increase the extent of the effect of applying these criteria, Spanish judges are relying upon the *Banco Español de Crédito Ruling of June 14, 2012*. There, the ECJ precluded the application of art. 83 of TRLGCU, which allowed a national court, in a case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term. Spanish judicial practice has taken this ruling into consideration to prevent the application of the aforementioned art. 83, even though this rule was not modified until March 2014. Art. 83 TRLGDCU has been reformed in order to adapt it to the doctrine set forth in *Banco Español de Crédito*. According to this reform, revision of the contract is no longer permitted.<sup>32</sup>

---

<sup>27</sup>Conclusions of the Jornada/ Conference organized by the Council of Judicial Power on the Impact of the Aziz Sentence.

<sup>28</sup>See Auto Juzgado de Primera Instancia nº 13 Madrid, 15 March 2013.

<sup>29</sup>See for instance, Agreement of Junta Sectorial de Jueces de Primera Instancia, Mercantil y Registro Civil del Partido Judicial de Alicante of 23 April 2013.

<sup>30</sup>See Francisco Pertíñez Vilchez, “Las cláusulas abusivas en los procesos de ejecución hipotecaria”, en I. Sánchez Ruiz de Valdivia y M. Olmedo Cardenete, *Desahucios y ejecuciones hipotecarias. Un drama social y un problema legal*, Valencia, Tirant lo Blanch, 2014, pp. 280-281.

<sup>31</sup> Among the more recent decisions, see Judgment Court of Appeal of Jaén (section first), of 27 March 2014; Judgment Court of Appeal Lleida (section second), of 20 March 2014; Judgment Court of Appeal Asturias (section first), 17 March, 2014; Judgment Court of Appeal Madrid (section 13<sup>a</sup>), 18 February 2014; Order of Juzgado de Primera Instancia e Instrucción Cáceres, 20 January 2014; Order of Juzgado de Primera Instancia de Mataró of 13 February 2014; Order of Court of Appeal Álava (section first), of 9 January 2014; Judgment of Juzgado de lo Mercantil of Palma de Mallorca of 3 January 2014; Judgment of Court of Appeal Las Palmas (section 4<sup>a</sup>), of 6 November 2013; Judgment of Court of Appeal Lleida (section 2nd), 17 October 2013; Judgment Court of Appeal Alicante (Section 9<sup>a</sup>), 12 June 2013; Order of Court of Appeal Granada of 5 April 2013; Judgment Court of Appeal Jaén (Section 1<sup>st</sup>) of 27 March 2014.

<sup>32</sup>According to the new provision, “Unfair terms are null and void and shall be discarded. To this end, the judge, after hearing the parties, shall declare the nullity of unfair clauses in the contract, which, however, continues to bind the parties if the contract is not rendered void of sense due to their exclusion.” The reform

Thirdly, the answers given in the Aziz Ruling have opened the eyes of many judges, traditionally reluctant to refer to the higher European Court, and enabled them to find solutions in ECJ judgments interpreting EU Law. Apart from Aziz, at least five new orders for preliminary rulings have been referred to the ECJ in the last year, several of which relate to the new legislative measures recently adopted by Act 1/2013, of 14 May.<sup>33</sup> The ECJ is somewhat assuming the role that the Spanish Constitutional Court has declined to take in granting adequate judicial protection.<sup>34</sup>

It is worth analysing how Spanish judicial practice may be influenced by the criteria adopted in the Aziz Ruling related to the consideration of unfair terms. We will examine in more depth the treatment of acceleration clauses and clauses related to default interest.

Finally, ECJ has given its answer as to the treatment of a term concerning the unilateral determination by the lender of the amount of the unpaid debt linked to the possibility of initiating mortgage enforcement proceedings. The Aziz Ruling has considered that the referring court must, in particular, assess whether and, if appropriate, to what extent, the term in question derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his or her disposal, to take legal action and exercise rights of defence. Clauses that allow the bank to unilaterally determine the liquid debt have been considered as valid until now by Spanish judges and courts.<sup>35</sup> To this end, courts have relied upon the fact that there is a provision of Spanish law that allows this kind of clause.<sup>36</sup> On the question of the

---

has taken place through Act 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre, BOE 76, 28 March 2014.

<sup>33</sup> See the Order of 5 November 2012 of Juzgado de Primera Instancia e Instrucción nº 1 of Catarroja and Order of 26 February 2013 of Juzgado de Primera Instancia nº 17 of Palma de Mallorca, resolved as joined cases (Case 537/12 and Case 116/13) by Order of the ECJ (1<sup>st</sup> Chamber) of 14 November 2013. See also Order of Juzgado de Primera Instancia e Instrucción de Miranda de Ebro of 17 February 2014; Order of Juzgado de Primera Instancia de Santander of 19 November 2013; Order of Juzgado de Primera Instancia e Instrucción de Marchena of 16 August 2013.

<sup>34</sup> See Order of the Spanish Constitutional Court of 19 July 2011. The Constitutional Court resolved that the lack of procedural contradiction within the mortgage enforcement proceedings does not amount to a lack of opportunity to defend oneself against the proceedings, given that the debtor has the possibility of initiating a subsequent declaratory judgment. But with this statement the TC seems to overlock the fact that the declaratory judgment does not lead to the suspension of the mortgage proceedings, and consequently does not stop the auction of the property. See María José Achon Bruñén, “Adecuación del procedimiento judicial hipotecario a la normativa europea: sentencia del TJ de 14 de marzo de 2013”, available at the following webpage, consulted June 23, 2014 <http://www.icalpalma.org/ley%20hipotecaria/Adecuacion%20del%20procedimiento%20judicial%20hipotecario%20a%20la%20normativa%20europea%20sentencia%20del%20TJUE%20de%2014%20de%20marzo%20de%202013.pdf>; Javier Domínguez Romero and Francisco José Infante Ruiz, Foreclosure System in Spain. About the Judgment of the European Court of Justice, 1st Chamber, 14 March 2013 (C-415/11), *GPR European Union Private Law Review*, 6/2013, p. 348.

<sup>35</sup> Judgment of the Spanish Supreme Court 16 December 2009; Order of Juzgado de Primera Instancia Mataró of 13 February 2014.

<sup>36</sup> According to art. 572.2 CCP: “An enforcement may also be dispatched for the amount of the balance resulting from transactions deriving from contracts executed by public deed or in a policy authenticated by a certified trade broker, provided that it has been agreed in the title that the amount due in case of enforcement shall be that resulting from the settlement carried out by the creditor in the manner agreed upon by the parties in the enforcement title itself. In such case, the enforcement shall be dispatched only if the creditor demonstrates that he has previously notified the enforcement to debtor and the guarantor, if appropriate, of the amount due resulting from the settlement.”

conformity of such clauses with the new doctrine established by the Aziz Ruling, the answer is not completely clear. The conformity could be based on the fact that Spanish law makes it possible for the debtor, in a mortgage proceeding, to oppose enforcement on the basis of *plus petition* under 695.1.2<sup>a</sup> CCP, where the debt has not been calculated correctly. The question remains open.

## 2. The treatment of Acceleration Clauses

The criteria that the Aziz Ruling has enumerated to evaluate the unfair character of the acceleration clauses included in loans may be seen as an important element to the judicial development by Spanish judges. According to Aziz, it is for the national court, “*on account of events of default occurring within a limited specific period, to assess in particular whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.*”<sup>37</sup>

As mentioned *supra*, acceleration clauses triggered by the non-payment of instalments have been the object of reform in art. 693.2 CCP. This modification was introduced by art. 7 of Act 1/2013 in the light of which any agreement providing for early termination of the mortgage loan because of non-payment of less than 3 monthly instalments, or the equivalent amount, shall be null or void should the agreement be concluded after entry into force of Act 1/2013. Acceleration clauses prior to the legislative modification allowed banks to call in the totality of the loan after a single failure to meet a payment of principal or interest that was due.<sup>38</sup> The criteria set forth by the ECJ to verify if a clause is unfair do not allow specifically for the determination of the number of instalments that need not have been paid to give way to the enforcement procedure. Nevertheless, it does provide for the need to take such non-compliance sufficiently seriously in light of the term and amount of the loan.

The Spanish legislator was silent on this matter. However, according to the procedural law reform, Art 693.2 CCP now provides for the possibility of claiming the remaining debt and interest if, where the debtor fails to pay at least three monthly instalments, a total payment would be stipulated in the acceleration clause. This new imperative procedural provision opens the gate to claiming the total amount of the mortgage loan antedated, not being thus possible to claim the payment of the unpaid debt before those three months have passed, independent of what the mortgage contract might provide.

Another question is the upper time limit of triggering an acceleration clause. As the wording of Art.693.2 CCP seems to consider those clauses as valid, the possible contradiction of this rule by EU law has been referred to the ECJ.<sup>39</sup> It is submitted that

---

<sup>37</sup> Judgment Aziz, p. 73.

<sup>38</sup> This had been scrutinized and acknowledged to be valid by Supreme Court Rulings of 16 December 2009, 12 December 2008 and 24 October 2003.

<sup>39</sup> The Juzgado de Primera Instancia e Instrucción de Miranda de Ebro, in its Order of 17 February 2014, has asked the following question of the ECJ: Are articles 3.1, 4.1, 6.1 and 7.1 of Directive 93/13/CEE of

any clause providing for an inferior term shall be void. On the other hand, any term exceeding three months should be analysed on a case-by-case basis,<sup>40</sup> taking into account the seriousness of the non-compliance in light of the exact term and remaining amount to be paid, bearing in mind that the Spanish supplementary regulation sets the standard term at three months, but also taking into consideration the criteria delivered by the ECJ in the Aziz Ruling.

The doubts of the Courts in Spain, related to the application of the criteria offered by the Aziz Ruling, also extend to the consequences of the nullity of the clauses. In this respect, mention is also to be made of a recent preliminary question submitted to the ECJ in relation to the possible contradiction with the principles of equivalence and effectiveness when a national judge finds the existence of an unfair term and must make abstraction of its existence and act accordingly even when the creditor has waited the minimum time provided for in the national provision.<sup>41</sup>

Despite the existence of different types of acceleration clauses, the practical relevance of acceleration clauses that are triggered by non-payment of instalments is quite limited: normally, other types of acceleration clauses do not lead banks' creditors to bring forward enforcement proceedings. Notwithstanding, how the criteria laid down by the ECJ in the Aziz Ruling may be applicable to such acceleration clauses needs to be clarified.

Mortgage loans used to contain acceleration clauses on grounds other than non-payment. These clauses may be considered to be abusive for lacking precision and for bestowing upon banks a significant margin of discretion prejudicial to the consumer according to the criteria set forth by the ECJ, art. 1124 of the Spanish Civil Code and art. 82 of the General Law of Consumer and User Protection and related jurisprudence – the latter is limited to those clauses requiring fulfilment of an especially onerous established in the Aziz Ruling.

Acceleration clauses triggered by the lessening of the debtor's solvency – either moral or material – are also considered unfair because of their general character. Spanish jurisprudence has considered these kinds of term as abusive, as seen in the Supreme Court Ruling of 16 December 2009, where the Supreme Court found that the term was abusive due to its excessively general character of the clause allowing the bank to extinguish the contract for the mere fact that the consumer has experienced a lessening of solvency. Clearly, this clause is to be considered unfair according to the standard set by the ECJ in Aziz, as it cannot be conceived of as speaking about non-compliance of an essential obligation not sufficiently serious and constitutes an exception to the applicable norms.

The compatibility of acceleration clauses – triggered by non-payment to preferred creditors, included in mortgage loans that provide that the lender can extinguish the contract and claim the remaining debt should the debtor fail to pay tax on real property or insurance fees – with the criteria delivered by the ECJ in the Aziz Ruling is to be

---

5th April contrary to a national rule, such as art. 693, that allows the creditor to claim early the totally of the loan in a case where a debtor has not paid three months of fees on the loan, without considering other factors like the duration and quantity of the loan or other relevant reasons and also exclude the possibility of the debtor avoiding the effects of this early termination by subjecting this issue to the will of the creditor, with the exception of the mortgage of the habitual residence of the debtor?

<sup>40</sup>Also see Francisco Pertíñez Vilchez, "Las cláusulas abusivas en los procesos de ejecución hipotecaria", *cit.*, p. 284.

<sup>41</sup> See Order of Juzgado de Primera Instancia de Santander of 19 November 2013.



doubted. The Spanish Supreme Court found this kind of clause to be valid,<sup>42</sup> basing its reasoning on contractual autonomy. However, according to the criteria set forth in Aziz, the position pursued by the Spanish Courts does not seem to be adequate, given that, as already noted, in the absence of any kind of non-compliance with a sufficiently serious or essential obligation, national law provides for no such express consequence.

According to the Aziz Ruling, it is utterly difficult to find acceleration clauses triggered by the lending of a mortgage real estate to be fair. The validity of this clause was mainly based on art. 219.2 of the Regulation of Mortgages, which allows the judge to consider the loan as terminated upon request of the bank, if the mortgage real estate has been lent with the main purpose of diminishing the value against the creditor. It is presumed that this is the purpose if the real estate has been lent according to a capitalized rent no higher than 6% of the total amount of the loan. The Spanish Supreme Court has also considered this clause as valid.<sup>43</sup> It has been submitted that this clause may be considered as unfair due to the changes in the Spanish law derived from Act 29/1994, as according to this Act, the rental of even the habitual residence of the borrower will be extinguished after the auction has finalized with a winning bid through the foreclosure procedure (art. 13.2 Urban Rentals' Law). According to the Aziz criteria, this clause may be deemed as unfair in the majority of cases.

### **3. The treatment of default interest clauses**

Spanish law contained no provision on default interest and was only introduced in the aftermath of ECJ's ruling on the topic. After the Aziz Ruling, as judges had to control the unfair character of clauses also in the foreclosure procedure, the system developed through the agreement of judges, trying to unify criteria to determine which rate of interest may be considered as unfair in the clause of a mortgage loan.<sup>44</sup>

Article 114 of the Mortgage Law was modified by Act 1/2013, introducing a third paragraph containing a rule that sets a maximum limit of default interest for mortgage loans hired for the acquisition of a main residence at three times the legal interest. The new legislation on default interest establishes an imperative rule. Some authors are of the opinion that the new art. 114.3 of the Law of Mortgages and the Second Transitory Provision of Act 1/2013 have the effect of limiting the default interest to 3 times the legal interest.<sup>45</sup> As art. 114.3 Law of Mortgages could be seen as the national law applicable in default of agreement, in the sense established by Aziz Ruling,<sup>46</sup> this provision would help to legitimate default interest rates at 3 times the legal interest. This interpretation of the system has given rise to some doubts among the Spanish judiciary and provided the opportunity to refer an additional preliminary question to the ECJ.<sup>47</sup>

---

<sup>42</sup>Judgment of the Spanish Supreme Court of 12 December of 2008.

<sup>43</sup> Judgment of the Spanish Supreme Court of 16 December 2009.

<sup>44</sup>See the content of these agreements in Mateo Juan Gómez, Reflexiones sobre la Ley 1/2013 de protección a los deudores hipotecarios, Revista crítica de Derecho inmobiliario, Año nº 89, Nº 739, 2013, pp. 3125-3150. According to this, the agreements did not give the same result: 2.5 times the legal interest (Barcelona, Denia, Toledo, Granada); 3 times the legal interest (Elche, Santiago de Compostela, Murcia).

<sup>45</sup>Mateo Juan Gómez, Reflexiones sobre la Ley 1/2013 de protección a los deudores hipotecarios, *cit.*, pp. 3125-3150.

<sup>46</sup>See p. 74 Aziz Ruling.

<sup>47</sup>Order of Juzgado de Primera Instancia e Instrucción de Miranda de Ebro of 17 February 2014. The question asked is the following: Do articles 3.1, 4.1, 6.1 and 7.1 of Directive 93/13/EEC of 5 April (LCEur 1993, 1071) preclude a national provision such as Article 114 of the Mortgage Law (RCL 1946, 886),

In my opinion, the maximum limit should not preclude judges from considering even lower rates of interest as unfair terms according to the circumstances of each particular case. Clauses imposing default interest above the maximum established in art. 114.3 of the Law of Mortgages will be void. But it seems to be possible to consider lower rates of interest as unfair according to the circumstances of the case.<sup>48</sup>In fact, according to the Aziz Ruling, in order to evaluate the unfair character of such a clause one ought to compare the rate of interest in question with the statutory interest rate, in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and ensure that it does not go beyond what is necessary to achieve them. It seems that the rule established by the Aziz Ruling should orient the solution more towards a comparison of the agreed interest with the statutory rate of interest, more than the rule of art. 114.3 Law of Mortgages.

Doubts abound as to which will be the rule to be used once a default interest clause has been declared as void. In the conclusions of the seminar Jornada/ Conference organized by the “Council of Judicial Power on the Impact of the Aziz Sentence” scholars and judges alike debated whether the consequence would be to apply the interest rate contemplated by art. 114.3 Law of Mortgages or the statutory rate according to art. 1.108 Civil Code. It has been submitted that the natural consequence would be to apply art. 1.108 Civil Code, in order to integrate the content of the contract according to art. 83.2 TRLGDCU. In favour of this position, it can be said that art. 114.3 Law of Mortgages is an imperative rule not a dispositive one, and therefore, it cannot be applied in default of agreement.<sup>49</sup>

On the other hand, it is important to mention that some judges in Spain are considering that the consequence of a declaration of the nullity of the default interest clause is not either of those mentioned above but rather an interest rate of 0%.<sup>50</sup>In this regard, Spanish judgments are invoking the *Banco Español de Crédito* and the *Dirk Frederik Asbeek* Rulings,<sup>51</sup> according to which Article 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State, such as Art. 83 of TRLGDCU, which allowed a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term. As has been said, at the end of March 2014 art. 83 TRLGDCU was reformed in order to adapt it to the doctrine set forth in *Banco Español de Crédito*. According to this reform, revision of the contract is no longer permitted.<sup>52</sup>

---

which only allows the national court to assess the unfairness of a clause that sets the default interest, only if the interest rate exceeds the agreed 3 times the legal interest rate and no other circumstances?

<sup>48</sup>For more on this very opinion, see Francisco Pertíñez Vilchez, “Las cláusulas abusivas en los procesos de ejecución hipotecaria”, *cit.*, pp. 288-289.

<sup>49</sup>Applying the statutory rate of interest as default interest, see Judgment Court of Appeal Asturias (section first), 17 March, 2014; Judgment of Court of Appeal Las Palmas (section 4<sup>a</sup>), of 6 November 2013.

<sup>50</sup>Judgment of Court of Appeal Lleida (section second), of 20 March 2014; Judgment of Court of Appeal Madrid (section 13<sup>a</sup>), 18 February 2014; Order of Juzgado de Primera Instancia e Instrucción Cáceres, 20 January 2014; Order of Court of Appeal of Álava (section first), of 9 January 2014; Judgment of Court of Appeal Lleida (section 2<sup>nd</sup>), 17 October 2013; Judgment of Court of Appeal Alicante (Section 9<sup>a</sup>), 12 June 2013; Order of Juzgado de Primera Instancia e Instrucción of Cáceres of 8 July 2013.

<sup>51</sup>Judgment of 30 May 2013, Case C-488/11, Dirk Frederik Asbeek Brusse.

<sup>52</sup>According to the new provision, unfair terms are null and void and shall be discarded. To this end, the judge, after hearing the parties, shall declare the nullity of unfair clauses in the contract, which, however, continues to bind the parties if the contract is not rendered devoid of sense due to their exclusion. The

The Spanish doctrine has cast some doubts on the possibility of applying the 0% interest rate once the default interest rate has been considered as unfair. In this respect, it has been submitted that it would be possible to consider as a technically separate operation, on the one hand, the revision of the unfair clause and, on the other hand, the possibility of filling the gap left by the unfair term through an objective rule according to the law.<sup>53</sup> Statutory rates of interest would be, according to art. 1108 Civil Code, applicable to the quantification of damages for the delay in the absence of agreement. In my opinion, this solution may also be considered as consistent with the ratio followed by the Banco Español de Crédito Ruling, according to which revision of the clause should not result in a loss of *the dissuasive effect of the non application of unfair terms*.<sup>54</sup>

In any case, these doubts have also been submitted to the ECJ as a preliminary question.<sup>55</sup> On the same topic, some preliminary questions have been submitted asking the ECJ about the compatibility of the Second Transitory Provision of Act 1/2013 with the EU Law, which allows the applicant to recalculate the interest once the foreclosure proceedings have started.<sup>56</sup>

## V. Conclusions

The effect of the Aziz Ruling seems to be enduring, as its relevance seems to prevail even after the entry into force of the new European Directive 2014/17/EU of the European Parliament and the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, amending Directives 2008/48/EC and 2013/36/EU, and Regulation (EU) No 1093/2010. As stated in article 28, the impact on the foreclosure procedure and loan clauses will be minimal, thus leaving Aziz's authority on the matter practically unaltered.

---

reform has taken place through Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre, BOE 76, 28 March 2014.

<sup>53</sup>See Francisco Pertíñez Vilchez, "Las cláusulas abusivas en los procesos de ejecución hipotecaria", *cit.*, p. 292.

<sup>54</sup> P. 69 of the Banco Español de Crédito Ruling considers that "according to which if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (see, to that effect, the order in Pohotovost', paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers".

<sup>55</sup>Order of 16 August of Juzgado de Primera Instancia e Instrucción de Marchena. The question is as follows: If in accordance with Council Directive 93/13/EEC of 5 April 1993 (LCEur 1993, 1071) on unfair terms in consumer contracts, in particular with Article 6.1 of the Directive, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, where a National Judge appreciates the existence of an unfair term in mortgage loans relative to default interest should the judge proceed to declare the nullity of the clause and its non-binding effect or otherwise proceed to moderate the interest clause giving the mortgager or lender the opportunity to recalculate interest?

<sup>56</sup>See Order of Juzgado de Primera Instancia e Instrucción de Miranda de Ebro of 17 February 2014; Order of Juzgado de Primera Instancia de Santander of 19 November 2013; Order of Juzgado de Primera Instancia e Instrucción de Marchena of 16 August of 2013.

The Spanish system of foreclosure has suffered great changes as a consequence of the Aziz Ruling. After this key judgment, Spanish legislation underwent a long awaited reform that in some ways failed to live up to social expectations. The possibility for consumers to invoke the unfair character of a term during the foreclosure procedure, and empowering judges to revise the contract, *ex officio*, to look for unfair terms, are two of the major novelties produced *ex lege* after the impact of the Aziz Ruling. It is also noteworthy that the Spanish legislation has improved the “rules of the game” for consumers, allowing better prices for real estate through different measures.

On the other hand, the role assumed by national judges in the application of the Ruling and in the development of subsequent judicial practice is noteworthy. While legislatively speaking, an attempt was made to formally adapt and save the existing system, the judicial branch placed more emphasis on using the Aziz Ruling to effect deep reform of the system, applying *de facto* solutions without legal norm, proposing progressive interpretations according to the doctrine established by the ECJ and referring preliminary questions to the ECJ to counter the new Spanish legislation. Even if it is difficult to agree with all of the changes judges in Spain are developing, the impact of Aziz Ruling may be considered as very positive. The effects of the Aziz Ruling among judicial activists are still developing, and an answer to the many questions already raised by Spanish judges in the aftermath of the Aziz Ruling is much awaited. Pandora’s box is now wide open.