

The Supreme Court Reformulates Its Doctrine on the Retroactive Repayment of Floor Clauses Following the ECJ's Judgment

The Supreme Court dismissed the appeal by BBVA regarding the retroactive repayment of floor clauses in its first decision since the European Court of Justice (ECJ) judgment dated 21 December 2016, which held that unfair clauses in consumer contracts are void and, therefore, the compensatory effects connected with a clause being declared to be unfair cannot be subject to a time limit, which had been Spanish case law up to that point.

The ECJ cited Council Directive 93/13/EEC of 5 April 1993 when declaring that **national case law cannot impose a time limit on the compensatory effects connected with a clause being declared to be unfair in a contract between professional and consumer and thereby limit those compensatory effects solely and exclusively to the amounts unduly paid pursuant to the floor clause following the judicial ruling that the clause is unfair.**

With regard to the fact that recent ECJ case law, which is binding on member states, had established that the time limit on the effects arising from the declaration that the floor clauses are void entails a deprivation of consumers' rights when securing the return of money unduly paid to the bank, and therefore represents incomplete and insufficient consumer protection, the Supreme Court used its judgment to reformulate its doctrine on the point and remove the time limit on the retroactivity of repayments that had applied since 2013.

The court gave its decision in the appeal on cassation of Banco Bilbao Vizcaya Argentaria, S.A. (BBVA) against the judgment of the Barcelona Provincial Appeal Court which held that the floor clause included in a contract between BBVA and a consumer was void, striking it out and ordering the bank to refund to the consumer all the money paid under the offending clause. At that time, the ECJ had not given its judgment, which was handed down in December 2016, and BBVA relied on the case law of the Supreme Court applied up to that point, that is, the return of the money unduly paid under floor clauses was not retroactive. Following the ECJ's judgment of 21 December which, as stated above, overturned the Supreme Court's case law, the parties were allowed to make submissions. Thereafter, the Supreme Court decided BBVA's appeal, adapting its case law to conform with the ECJ's decision as regards the repayment of money collected pursuant to the floor clause.

Consequently, **the Supreme Court modified its case law on the retroactive effects of the invalidity of floor clauses** and, considering the fact that the Provincial Appeal Court's judgment conformed with the later decision of the ECJ, it dismissed BBVA's appeal. Although the ground of appeal, namely that the return of money paid unduly was limited to the time the court declared the floor clause unfair, had been in line with Supreme Court case law, this was no longer the case given that national courts are bound by the ECJ's decisions.