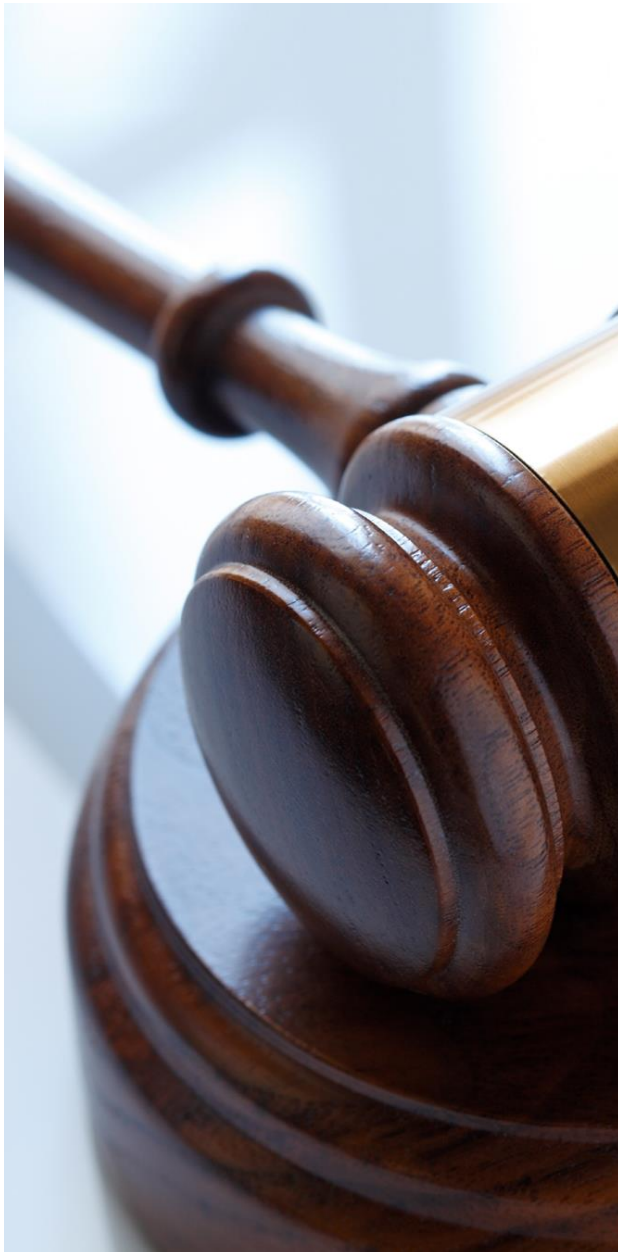


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# Abusiveness of early maturity clauses in mortgage loans: upcoming new developments

Legal flash

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The Court of Justice of the European Union (“CJEU”) will soon resolve the questions raised by the Spanish Supreme Court (“SC”) and other Spanish courts regarding the scope of the declaration of nullity of early maturity clauses in mortgage loan agreements with consumers.

Because of the raising of those questions, the Spanish courts have suspended many mortgage enforcement procedures while they wait for the CJEU to establish criteria.

Given the imminent CJEU ruling, we must prepare for and analyze the potential procedural scenarios arising from the ruling, particularly if the CJEU rejects the SC's doctrine, as this would mean the dismissal of the affected mortgage enforcement procedures.



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## Early maturity clauses in Spanish SC and CJEU case law

Since 2008, the SC has been recognizing the validity of clauses allowing the early maturity of loan agreements due to the debtor's default, provided the agreement clearly stated the cases in which early maturity could take place, without it being left to the lender's discretion.<sup>1</sup>

Subsequent CJEU case law, precisely that from 2013,<sup>2</sup> established that, for these clauses inserted in the general conditions when the undersigned is a consumer to be considered valid, the power to accelerate the maturity of the agreement 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*".

The quoted CJEU case law led to the Spanish courts systematically declaring null all such early maturity clauses (stipulated as general conditions) in mortgage loan agreements that established this consequence in case of any non-payment by the debtor—which was usually foreseen in these kinds of clauses—without considering the seriousness of the non-compliance in relation to the term and the amount of the loan.

Also, and as a consequence of the above CJEU case law, Spanish law introduced important consumer protection measures in the mortgage market. Regarding foreclosure proceedings, in addition to other changes, Act 1/2013, of May 14, on measures to reinforce the protection of mortgage debtors, debt restructuring and social renting, amended two articles of the Spanish Act on Civil Procedure ("LEC"):

- the wording of paragraph 2 of article 693 of LEC was amended to read: "*The total debt amount, i.e., capital and interest, can be claimed if repayment in full has been agreed in case of non-payment of a minimum of three monthly installments or a number of installments meaning that the debtor has not met his or her obligation for at least three months, and if such agreement is stated in the mortgage deed.*"

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<sup>1</sup> SC Judgment 506/2008, of June 4 (ES:TS:2008:506). In SC Judgment 39/2011, of February 17 (ES:TS:2011:515), the SC reaffirmed this doctrine.

<sup>2</sup> CJEU Judgment of March 14, 2013 (case C-415/11). CJEU Judgment of July 8, 2015 (case C-90/14) and, recently, CJEU Judgment of January 26, 2017 (case C-421/14) adopted the same position.



- > article 695 of LEC introduced a new reason to object to mortgage foreclosure: “*the abusive nature of a contractual clause constituting the basis for foreclosure or that has determined the amount due.*”

Probably anticipating the problems arising from a possible nullity of the early maturity clauses in mortgage foreclosures, the SC clarified its doctrine in 2015<sup>3</sup> and considered that the abusiveness of an early maturity clause because of the terms on which it has been established (here, in the case of debtor default) did not lead to the nullity of early maturity, which in itself was not unlawful. Therefore, it limited the scope of the declaration of nullity to partial nullity of the clause and maintained the validity of the agreed early maturity in a way that, under the mentioned article 693 (2) of LEC, a mortgage foreclosure on the total amount of the loan pending payment (plus interest) would still be possible if the foreclosure was exercised in non-abusive conditions. That is, if:

- > the default was on a minimum of three monthly installments; and
- > the creditor’s exercising the power to accelerate the maturity of the mortgage loan was justified, in line with the CJEU’s criteria, i.e., the essential nature of the defaulting of an obligation and the consumer’s real possibility to avoid this consequence.

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## The questions raised before the CJEU

Three first instance courts and the SC itself have asked the CJEU whether the SC’s interpretation of the TJUE doctrine mentioned in the previous section **Error! Reference source not found.** is in line with community law. That is, to summarize:

- > whether it is possible to consider the nullity exclusively of the part of the early maturity clause that establishes maturity based on the non-payment of a certain number of installments and maintain the validity of the agreed early maturity, deferring the decision on validity or abusiveness to the moment that power is exercised; and
- > whether, once nullity is declared because of abusiveness of the early maturity clause in a mortgage loan agreement, and with the supplementary application of domestic law (specifically, article 693 (2) of LEC), it is possible to continue with the mortgage

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<sup>3</sup> Supreme Court Judgment 705/2015, of December 23 (ES:TS:2015:5618). SC Judgment 79/2016, of February 18 (ES:TS:2016:626).



foreclosure proceedings in a way that the proceedings are more favorable for the debtor.

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### Current situation of mortgage enforcement proceedings in Spain

Due to the mentioned questions raised with the CJEU, most of the Spanish courts where mortgage enforcement proceedings are being processed, and in which the possible abusiveness of the early maturity clauses in the loan agreements has been raised, have agreed to suspend all these proceedings until the CJEU issues its judgements on the questions. In fact, several provincial courts<sup>4</sup> have issued rulings to that effect.

However, there have been isolated cases in which, despite the provincial courts' rulings, a lower court has resolved on the validity of the early maturity clause and, considering the clause was abusive, has decided to dismiss the mortgage foreclosure proceedings.

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### Opinion of CJEU Advocate General Maciej Szpunar

In the framework of the cases the CJEU is examining in relation to the mentioned questions, Maciej Szpunar, CJEU advocate general ("AG"), in his opinion of September 13, 2018<sup>5</sup> rejected the doctrine the SC established in 2015, based on the following arguments:

- > The purpose of the early maturity clause is not maintained without a specific reference to the number of unpaid monthly installments that allow its application as claimed by the SC, a matter the SC has not proved.
- > In the legal framework presented by the SC, the procedural advantages offered by the mortgage foreclosure proceedings are obvious. However, it is not clear that those advantages benefit all consumers.

Below we summarize the legal consequences of the implementation of the AG's opinion, if the CJEU confirms it:

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<sup>4</sup> Namely, the provincial courts of Barcelona, Madrid and Málaga.

<sup>5</sup> [\*Opinions on cases C-70/17 and C-179/17.\*](#)



- > The possible nullity of the early maturity clause will not lead to the nullity of the loan agreement or to the loss of the guarantee.
- > The possible nullity of the early maturity clauses will apply in full, meaning that it will be impossible for the creditor to declare early maturity of the loan, excluding cases established by law, regardless of the amount defaulted.
- > The judge will not have the power to supplement the contract and, particularly, will not have the power to resort to the supplementary application of article 693(2) of LEC to start or continue the mortgage foreclosure proceedings, as there is no early maturity agreement.

The AG's opinions are not binding for the CJEU, although, in practice, they tend to influence the CJEU's decision and are often confirmed totally or partially in the CJEU's judgements.

Once the AG's opinion has been issued, the CJEU usually takes about four months to resolve the related question. Given the unusual situation in Spain, where courts have suspended mortgage foreclosure proceedings, it would be reasonable to expect the CJEU to resolve these matters without delaying its usual deadlines; therefore, we expect it will announce its decision soon.

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## Possible scenarios depending on the position the CJEU adopts in its judgments on the referred questions

### CJEU confirmation of SC doctrine

If the CJEU considers that the partial nullity of the early maturity clause can be ordered, enabling the court to incorporate it under article 693 (2) of LEC, the suspension on the proceedings will be lifted, and the foreclosure can continue for the full amount due, i.e., principal and accrued interest, as a consequence of the early maturity of the loan, provided the requirements established by the SC in 2015 (see first section above) are met.

### CJEU rejection of SC doctrine

If the CJEU considers that nullity of the entire early maturity clause must be ordered, any ongoing mortgage foreclosure proceedings in which the early maturity clause has been declared abusive will be dismissed.



In particular, the court hearing the mortgage foreclosure proceedings would have to order them closed and shelved, since the claim for full payment of the pending installments was based on the power to declare the early maturity of the loan.

The order dismissing the proceedings can be appealed. Once the order refusing foreclosure or declaring dismissal becomes final, the creditor can assert its rights only in the relevant ordinary procedure

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### Alternatives to mortgage foreclosure proceedings

If the CJEU rejects the SC's doctrine, meaning that the entire early maturity clause is rendered null, it will be necessary to analyze the alternatives to mortgage foreclosure proceedings to which the creditor will have access under Spanish procedural law.

Alternatives that we highlight are the actions for a declaratory judgment (to declare loss of right to make use of the term according to article 1129 of the Spanish Civil Code or to declare termination of the loan agreement according to article 1124 of the Spanish Civil Code) and the actions for enforcement of judgment (including mortgage foreclosures limited to claims for unpaid installments and ordinary enforcement of the notarial deed of the loan agreement).

It will be necessary to assess their advantages and disadvantage on a case by case basis, as well as the possibilities they offer in relation to enforcement of the mortgaged asset, of the debtor's other assets, the interest accrued during the processing of the proceeding, its speed and cost.

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### Draft bill regulating mortgage loans

Given the situation of mortgage foreclosures in Spain and the possibility of a CJEU judgment contrary, fully or partly, to the SC's doctrine, the Spanish parliament is considering a draft bill regulating mortgage loans.<sup>6</sup>

The parliamentary processing of this bill is at an advanced stage, and the bill is likely to be passed soon.

Regarding early maturity of mortgage loans, the bill establishes that it will only take place when the payments due and unpaid equal (i) at least 12 months or 3% of the principal, if the default takes place in the first half of the term of the loan; or 15 months or 7%, if it takes place in the second half of the term of the loan. However, under the transitional regime established

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<sup>6</sup> Originally, the purpose of the bill was to transpose Directive 2014/17/EU of the European Parliament and of the Council of February 4, 2014, on credit agreements with consumers relating to residential immovable property.



in the bill, the regulation on early maturity will not apply to those early maturities that take place before the coming into force of the bill, regardless of whether a proceeding for mortgage foreclosure has been started or suspended.

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