

## Case law

### Case Details

**National ID:** link

**Member State:** Spain

**Common Name:** "Asociación de Usuarios de Servicios Bancarios" (Ausbanc Consumo) v "Caixa d'Estalvis de Catalunya"

**Decision type:** Other

**Decision date:** 17/10/2003

**Court:** Juzgado de Primera Instancia (Court of first instance, Barcelona)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:**

### Directive Articles

Unfair Contract Terms Directive, [Article 2](#) Unfair Contract Terms Directive, [Article 3, 1.](#) Injunctions Directive, [Article 3](#) Injunctions Directive, [Article 4](#)

### Headnote

1. The Spanish legislation has taken into account the difference between actions on collective consumers' interests and diffuse consumers' interests, depending on whether the consumers affected could be determined or not, with different requirements on the persons that could bring both legal actions.
2. The requirement that a consumer association was representative of a significant number of consumers (art. 11.3 of the Law on Civil Procedure) it is not applicable to a collective action of cessation.
3. A clause to round off for the annual calculation of the interests for mortgaged loans, always rounded up to benefit the bank, should be considered an unfair term.

### Facts

The association of consumers for banking services known as "Ausbanc" brought a collective action of cessation against the bank "La Caixa de Estalvis" to avoid the use of a standard term included in variable rate mortgages, which was used to calculate the interest of reference in the yearly revisions of the interests of those loans. According to this clause, the interest had to be always rounded up in favor of the bank (literally "rounding up the multiple closer to a quarter per cent"). The consumer association demands the elimination of this "unfair contract term", the refund of the amounts that the bank had charged on the basis of this clause, the publication of the judgment in the Official Bulletin of the Commercial Register and in a national newspaper. "Ausbanc" estimates the amount of the lawsuit could be above a million euros. The court accepts the claim of the consumers association.

### Legal issue

There are two main issues looked at in detail in this judgment, and an important change is introduced by an order from the court into the common banking practice of the rounding up of the type of interest. On the one hand, the consumers association complies with the requirements to bring a collective or diffuse action of injunction and on the other hand, the line of argument of the unfair nature of such clause.

The defendant bank understands that the consumers association "Ausbanc", is not representative enough to comply with the art. 11.3 of the Law on Civil Procedure of 2000, which is required to bring this type of action. It quotes following this line of argument the norm of the Law 39/2002 that transposes the Directive 1998/27 on injunctions into the Law of Civil Procedure and the Law on the protection of consumers. The court does not consider correct this line of argument because of the following reasons. To begin with, the judge is inclined to interpret bringing an action as included in the art. 11.2 and not in the 11.3 of the Law on Civil Procedure. Then continues stating that in those two paragraphs the distinction between collective and diffuse interests has been made clear, verbatim: "Our legislator establishes the difference according to whether the people affected are perfectly determined or could be easily determined (collective interests) or on the other hand they are undetermined or it was difficult to determine (diffuse interests)". The difference between the two is that to protect the collective interests is not needed that the actions of the consumers are representative according to the law, whereas in the case of diffuse interests it is required that they are. The judgment interprets that the claiming association represents actually a collective interest, since the people affected have a legal contractual relationship with the defendant and not purely contingent, so it would be very easy for the defendant to identify them. Therefore, the judgment considers that to bring this action to be representative is not required.

To ground this conclusion, the judgment lists in detail five additional reasons on the basis of which this consumers association is allowed to bring this collective injunctions:

- 1) Former judgments have allowed "Ausbanc" to bring the cessation actions in identical clauses against other banks (SAP Madrid 10 October 2002, First Instance Judgment of Madrid number 2, of 25 October 2002, First Instance Judgment of Palma de Mallorca number 14, of 27 November 2002).
- 2) The consumers associations cannot be deprived of legitimization on the basis of the requirements established by the RD 825/1990 of 22nd June, since these are rules of inferior legal status and previous to what is established in the Law of Civil Procedure and the Law on Consumers Protection. That rule refers to administrative requirements for associations (belonging to consultative bodies as a criteria for being considered representative), that cannot limit the access to the jurisdiction, since as the Constitutional Court has established (Judgment 107/1992), only through legal rules in Acts and not just regulations, that have to be interpreted in a restrictive way, can the access to the jurisdiction be limited.
- 3) The failure to comply with some of the requirements of art. 21 of the Law 26/1984 on consumers protection stops a consumers association from obtaining the benefits recognized by that law (free of charge processes, subsidies, etc.) but it cannot prevent the exertion of a constitutional right as it is the protection of the consumers' interests.
- 4) It cannot be demanded a special degree of representation when there are rules as the art. 25.1 of the General Law on Advertising and the art. 19.2.b of

the Law on Unfair Competition which allow individuals to bring collective actions. And the Constitutional Court has recognized that an individual can bring an action for the violation of the honor of a group (Judgment 214/1991, of 11 November).

5) It would be paradoxical that very small associations were legitimized to bring these actions simply because they belong to a federation or confederation that in turn was represented in the council of consumers and a bigger association that does not belong to the council for not having integrated itself into a federation or a confederation was not.

Finally, according to the judgment, the reference of the defendant to the Law 39/2002 of transposition of the Directive on injunctions does not contribute to her case, since the new provision included in it (art. 10 ter of the Law 26/1984 on the protection of consumers and users) does not modify what has been said, since the art. 20 of the very same Law 26/1984, which has not been modified by the aforementioned Law 39/2002, does not demand any requisite to the associations of consumers. Besides, regarding the new list of foreign associations legitimized to bring legal actions in Spain (art. 10 ter of the Law 26/1984, as modified by the Law 39/2002 = art. 4 of the Directive 98/27/EC on injunctions), not even the fact that it is not included in that list would determine its lack of legitimization, since to evaluate the requisites is a task for the courts. Taken all this into account it is understood that the association "Ausbanc" is totally legitimized.

As for the second big question, that is, whether the standard term on the rounding up of interests always benefiting the bank is or not unfair, the judgment responds in an affirmative way, repeating the line of argument that was given already in the judgment of the Appeal Court of Madrid of 10 October 2002: a) That rounding up is not an essential element of the contract and therefore it is subjected to the legal sphere of the Law 7/1998 on standard contract terms. b) The existence of administrative rules on banking accountability does not prevent the function of controlling of the courts in the interest of the consumers. c) It is an unfair term, because it goes against the good faith by creating an objective overpricing when producing the liquidation, it causes an unjustified damage and unbalance, since it could have been agreed a more balanced system to round off (like rounding up or rounding down depending on the proximity of the digit to the whole number). Therefore, it is a void clause in application of the art. 10 bis of the Law 26/1984, of the art. 12.2 of the Law 7/1998 and of the Directive 1993/13/ECC on unfair contract terms.

#### **Decision**

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