CASSATION AND PROCEDURAL INFRACTION No.: 2678/2015

Residing judge: Hon. Rafael Sarazá Jimena

Lawyer of the Administration of Justice: IL. Luis Ignacio Sánchez Guiu

**SUPREME COURT**

**Civil Chamber**

**PLENARY SESSION**

**Ruling no. 608/2017**

Hon.

Francisco Marín Castán, president

José Antonio Seijas Quintana

Antonio Salas Carceller

Francisco Javier Arroyo Fiestas

Ignacio Sancho Gargallo

Francisco Javier Orduña Moreno

Rafael Sarazá Jimena

Eduardo Baena Ruiz

Pedro José Vela Torres

Maria Ángeles Parra Lucán

Madrid, 15 November 2017

This court has sat in plenary session for the extraordinary appeal for procedural infringement and the cassation appeal on judgment 157/2015 of 14 April, issued on appeal by the Eighth Section of the Provincial Court of Madrid, as a result of the proceedings of ordinary trial no. 1201/2013 of Madrid Court of First Instance 84, on nullity of multicurrency mortgage loan.

The appeal was lodged by XXX and YYY, represented by the lawyer Sharon Rodríguez de Castro Rincón and assisted by counsel Patricia Gabeiras Vázquez.

The defendant is Caixabank S.A., represented by the lawyer Adela Cano Lantero and assisted by counsel Francisco Javier Fernández Bermudez.

The presiding judge was the Hon. Rafael Sarazá Jimena.

**BACKGROUND**

**FIRST**. - *Processing in the first instance*

**1**. - The lawyer Sharon Rodríguez de Castro, on behalf of XXX and YYY, filed an ordinary claim against Barclays Bank S.A. through which a ruling was requested:

"[...] in which:

"a) The partial nullity of the agreement subscribed in a public deed is declared, where reference is made to currencies, declaring integrally that the amount owed is the outstanding balance of the mortgage referenced in Euros, resulting from decrease of the borrowed amount of 260,755 Euros by the amount amortised as principal and interest also in Euros, consequentially condemning Barclays to all the expenses deriving from this declaration.

"b) Subsidiarily, and in the case of not declaring the partial nullity of the aforementioned clauses, considering that a conventional loan could not subsist, it is in the interest of this party to declare the total nullity of the "multicurrency" loan agreement with mortgage guarantee signed by the parties in a public deed dated 31 July 2008 and order the entity to grant a traditional mortgage loan in Euros applying the same conditions agreed in the deed in relation to interest, set at LIBOR + 0.82, to avoid the ruling being unenforceable, given that market conditions may make it impossible for my clients to access external financing to repay the amount of principal that my client would be obliged to pay back owing to the declaration of total nullity.

"c) Subsidiarily, resolve the contract in its part referring to the financial instrument pertaining to the multicurrency mechanism, condemning the payment of compensation for the damages caused, consisting of the loss suffered by reason of said mechanism up to the judgment date following the criteria established in the expert report provided for breach of the obligations of diligence and of good faith that are the responsibility of the bank and the supervening loss due to the contract.

"For settlement purposes, the amount due is considered to be the outstanding balance of the mortgage referenced in Euros, according to the expert opinion provided, subtracting from this amount the amounts paid in Euros by way of principal and interest from that date, thereby cancelling the increased debt due to Yen/Euro parity variation. The cancelled amounts will constitute the damages and losses suffered by my clients, condemning Barclays to all the expenses deriving from this declaration.

"d) Subsidiarily, discharge the "multicurrency" part of the outstanding debt in application of the "*rebus sic stantibus*" clause, or according to the guidelines indicated above or the best opinion of the Judge, and this in case it is considered that the defendant entity could not foresee the radical and resulting change in the economic circumstances leading to the signing of the product.

"e) Order the defendant to pay the costs incurred in these proceedings".

**2**. - The claim was filed on 1 October 2013 and distributed to Madrid Court of First Instance 84 and was registered with no. 1201/2013. Once it was admitted for processing, the defendant was summoned.

**3**. - The lawyer Adela Cano Lantero, on behalf of Barclays Bank S.A., answered the summons, requesting its dismissal and the express imposition of costs to the claimant.

**4**. - After following the corresponding procedures, the Magistrate-judge of Madrid Court of First Instance 84, dictated sentence 103/2014 on 12 May, with the following operative part:

"I accept the claim presented by XXX and YYY against Barclays Bank S.A., and as a consequence:

"a) I declare the partial nullity of the mortgage loan signed by the parties in the public deed of 31 July 2008 identified in this resolution, in all its contents related to the multicurrency option.

"b) I declare that the effect of the partial nullity entails the consideration that the amount owed by the claimants is the outstanding balance of the mortgage referenced in Euros resulting from the amount loaned to date (260,755.00 Euros) reduced by, also in Euros, the amount paid by way of principal and interest and that the contract must subsist without the contents declared null, understanding that the loan of 260,755 Euros and the payments should also be made in Euros, using the same interest rate reference fixed in the deed (LIBOR to one month +0.82), as explained in this resolution.

"c) I condemn the defendant Barclays Bank S.A. to pay all the expenses deriving from the above declaration and to bear the expenses that could derive from its effective fulfilment.

"d) I order the defendant to pay the procedural costs."

**SECOND**. - *Processing in the second instance*

**1**. - The judgment of first instance was appealed by the representation of Barclays Bank S.A. The representation of XXX and YYY objected to the opposing appeal brought.

**2**. - The resolution of this appeal was given by the Eighth Section of the Provincial Court of Madrid, which processed it under number 537/2014 and after following the corresponding procedures issued judgment 157/2015 of 14 April, the operative part of which states:

"WE RULE: To accept the appeal filed by the legal representation of "Barclays Bank, S.A.U." against the judgment of 12 May 2014 issued in civil proceedings 1201/2013 of the Madrid Court of First Instance 84, revoking this resolution in full; agreeing, instead, to dismiss the claim made by the procedural representation of XXX and YYY against "Barclays Bank S.A.U", which is absolved of each and every one of the petitions

contained therein, condemning the claimants to the payment of the costs arising in the instance; without making express imposition of those originated in this appeal.

"The acceptance of the appeal supposes the return of the deposit constituted by the appellant, in accordance with the provisions of Additional Provision 15 of Organic Law 6/1985 of 1 July, of the Judiciary, introduced by Organic Law 1/2009, of 3 November, supplementary to the Law on the reform of procedural legislation for the implementation of the new judicial office".

**THIRD**. - *Interposition and processing of the extraordinary appeal for procedural infringement and cassation appeal*

**1**. - Lawyer Sharon Rodríguez de Castro Rincón, representing XXX and YYY, filed an extraordinary appeal for procedural infringement and cassation appeal.

The grounds for the extraordinary appeal for procedural infringement were:

"Sole. - For procedural infraction under section 4 of article 469.1 of the LEC (Spanish Law of Civil Procedure), for infringement of article 24.1 EC, for infraction of the fundamental right to effective legal protection as incompatible with an arbitrary, illogical or unreasonable judicial pronouncement, having infringed article 218.2 of the LEC."

The grounds for the cassation appeal were:

"First. - Infringement of article 2.2 and of article 79 of the Securities Market Act and developed in Royal Decree 217/2008".

"Second. - Infringement of article 6.3 of the Civil Code."

"Third. - Infringement of article 6.3 of the Civil Code in relation to articles 1266, 1265 and 1300 of the Civil Code".

"Fourth. - Opposition and ignorance in the appealed judgment of the jurisprudential doctrine of the Supreme Court. In particular infringement of the doctrine collected in ruling 798/2007 of 11 July, and that of 129/2012, of 5 March, RJ 2010/390 that declare that the nullity of this contract can also be reached by omission (Article 1269 CC). Documents n° 6 and 7."

"Fifth. - Infringement of applicable norms to resolve the disputed issues: Infringement of article 80.1 and 82 of the TRLCU (Consolidated text of the General Law for the Defence of Consumers and Users)."

"Sixth. - Infringement of article 79 of the LMV (Securities Market Act) insofar as the standard of diligence and good faith and information regarding financial investments has been breached, and therefore the responsibility for the damages and losses caused to the financial entity must be imputed".

**2**. - The proceedings were sent by the Provincial Court to this Chamber, and the parties summoned to appear before it. Once the proceedings were received in this Chamber and the parties brought before it through the representation of the lawyers mentioned in the heading, an order dated 31 May 2017 was issued which admitted the appeals and agreed to transfer it to the party appealed against in order to formalise their defence.

**3**. - Caixabank S.A., as the successor of Barclays Bank S.A., filed a notice opposing the appeal.

**4**. - As an oral hearing was not requested by all the parties, voting and plenary decision was set for 20 September 2017.

**5**. - Before the date appointed for the deliberation, voting and ruling of the appeal, the claimants submitted a brief requesting that a preliminary ruling be submitted to the European Union Court of Justice.

**6**. - On the day set aside for the deliberation, a ruling was issued giving the parties a hearing so that they could make arguments on the importance that the doctrine contained in the judgment of the European Union Court of Justice case C-186/16, *Andriciuc*, issued that day could have in the resolution of the appeal.

**7**. - Both parties submitted briefs making the arguments they considered convenient. Caixabank S.A. also requested that a preliminary ruling be submitted to the European Union Court of Justice.

**8**. - Once the briefs were presented, the deliberation was resumed and the appeal was voted on and the appeal judged.

## LEGAL FOUNDATION

**FIRST**. - *Background of the case*

**1**. - The most relevant background items to analyse the issues raised in the appeals have been defined by the court as follows:

i) XXX and YYY, architect and administrator, on the one hand, and Barclays Bank S.A. (hereinafter, Barclays), on the other, agreed a loan with a mortgage guarantee, with a duration of 28 years, documented in a public deed of 31 July 2008. The deed was drafted in accordance with the draft provided by Barclays, which expressly states in the deed itself that "it contains general conditions of the contract".

Barclays did not provide written information to the borrowers prior to signing the loan. Specifically, it did not provide them with an information brochure or binding offer.

The Barclays salesperson that assisted them in processing the loan lacked the necessary knowledge to adequately explain the nature and risks of the product offered because they had not received the necessary training to give such explanations.

ii) The loan was classified as a "multicurrency loan with mortgage guarantee" and was granted to refinance a mortgage loan and a personal loan that the borrowers had previously arranged in Euros. A small part of the amount borrowed was used to cover the expenses arising from the granting of the new loan.

iii) The amount of the loan was declared as 44,346,603 Japanese Yen (JPY). The equivalent value in Euros (260,755 Euros), which was expressly set out in the clause of the deed indicating the amount of the loan, was deposited in the current account of the claimants and was used to cancel the two previous loans. The change from Yen to Euros was made at the currency purchase rate set by the bank.

iv) The monthly instalment amount was initially set up until the first revision of the interest rate as 161,084 JPY. It was foreseen that the amount would vary depending on the interest rate revisions (clause 2.II.a) and that if the interest rate was not modified, the amount payable for the repayment of principal and interest would not change (financial clause 2.II.g).

v) Clause 2.II.I established two payment procedures in case the loan was represented in foreign currency. The borrowers could place in the bank, two working days in advance, the equivalent value in Euros according to the Barclays selling rate or, alternatively, place in the bank, on the due date of each payment obligation, an amount of the currency in which the loan capital is represented equal to the instalment fee.

The borrowers received their income in Euros, so they used the first of the payment procedures, i.e., payment in Euros.

vi) The applicable interest rate was set for the first month at the nominal rate of 1.47% per annum (APR 1.55%). This rate would be revised monthly to be set at the agreed reference interest rate (one-month LIBOR rate) plus a differential of 0.82 percentage points for currency amortisations. There was no express provision in the deed on the use of another reference interest rate or other differential in the event that the instalments were paid in Euros, which was treated as any another currency.

vii) Financial clause 1.I.c) established:

"The present loan is agreed as multicurrency, so that the loan can be represented in each of the maintenance periods as currency and interest in any of the currencies indicated below, as long as they are negotiated in the Madrid currencies market, at the request of the borrower and subject to the conditions established in this contract: US dollar, Japanese yen, Swiss franc, British pound sterling and euro. The conversion of the currency, in case the borrowing party chooses a currency different from the previous one in any such period, does not constitute novation or modification of the loan. The borrower must repay the complete instalment and interest payments in the currency in which the loan is represented at that time.

"Currency changes may only be made on the start date of each of the currency and interest maintenance periods in which the present credit operation is divided. To this end, the borrowing party must indicate its desire to the BANK at least five days before the expressed start date by signing the template document attached to this deed and delivering it to the office of the BANK as indicated in clause 8 of this deed.

"The principal of the loan will be represented in the new currency chosen by the borrowing party and its amount will be obtained via quotation of the loan's previous currency represented in relation to the new currency according to the currency exchange rates of the Spanish Foreign Exchange Market two business days before the start date of the currency and interest maintenance period, in which the exchange will be made using the selling rate of the BANK for the previous currency and the buying rate of the BANK for the new currency."

The currency and interest maintenance periods were of monthly duration. To exercise the currency exchange option, the borrowers had to be up to date in the payment of the loan instalments. The currency exchange would generate the corresponding currency exchange fee in favour of the bank.

viii) The figures in the account of the borrowers were made in Euros.

ix) The causes for early termination established in financial clause 6.bis.1 included the following:

"f) If the appraised value of the property becomes less than 125% of the equivalent Euro value of the principal of the guaranteed loan remaining to be paid at any moment and the borrower does not increase the guarantee within two months.

"g) If, due to fluctuations in exchange rates and the nominal value of the loan in the foreign currency, the equivalent value calculated in Euros of the capital pending amortisation on each payment date of the entire capital and interest instalments is 20% more than the result of applying the exchange value of the currency to the same amount [...] unless the borrower reimburses the difference or, to cover the difference, extends with a first-rate mortgage or provides other sufficient collateral in the opinion of the Bank [...]."

x) In additional stipulation 1 the borrowers stated that they were aware of the risks derived from the exchange of currency, given that the principal and interest had to be returned in the currency expressed in clause 1 or in the one chosen in the successive monthly revisions, and to which is added:

"Consequently, the borrowing party assumes, consciously and expressly, all the risks arising from the representation of the loan in foreign currency, acknowledging that they have received from Barclays Bank S.A. the information necessary for the evaluation of said risks by the borrower, expressly exonerating Barclays Bank S.A. of any responsibility in this respect."

xi) As a guarantee of loan repayment, a mortgage was constituted on the family home of the claimants, valued at 738,104.10 Euros for auction purposes. The mortgage liability was set at 325,943.75 Euros (which was the equivalent value in Euros of the borrowed amount, 260,755 Euros, plus 25% in currency fluctuation insurance) plus the agreed interest of six months, the delay of two years and other sums for expenses.

xii) The annual interest rate ranged between a maximum of 1.75% and a minimum of 0.93%, although the applicable rate was stable at around 0.93% - 0.99% from 31 October 2009.

xiii) To meet the first monthly instalment, the claimants paid 1,019.66 Euros (interest at 1.47% per annum). As significant milestones, in November 2009 this sum amounted to 1,180.72 Euros (0.97% interest). The amount in Euros that the claimants paid for each instalment remained more or less in those ranges until May 2010, when it rose to 1,361.68 Euros (0.98% interest). A new significant increase took place in August 2010, when the amount paid rose to 1,432.13 Euros (0.96% interest). In June 2012 it rose to 1,540.95 Euros (0.96% interest). The continuous rise in instalment payments was produced by the depreciation of the euro against the yen, despite the drop in the interest rate applicable with respect to the one in force when the loan was arranged.

xiv) The Euro equivalence of the capital pending amortisation reached a maximum of 404,323.94 Euros on 24 August 2012. This figure represents a 55% increase over the initial amount. The Euro equivalence of the capital pending repayment has never decreased during the life of the loan with respect to its initial Euro equivalence, despite the payment of the loan instalments comprising capital and interest.

xv) In view of the inability of the claimants to meet the payment of the instalments, from July 2012 the parties began negotiating to modify the terms of the mortgage loan, in which it was provisionally agreed that the claimants would pay a monthly fee of 700 Euros per month. The negotiations went on until September 2013 but did not result in a definitive agreement.

xvi) In October 2013, Barclays filed a claim for foreclosure against the claimants, based on the mortgage constituted as collateral for the multicurrency loan, which gave rise to procedure 400/2013 brought before Torrelaguna Court of First Instance no. 2, in which enforcement was authorised for payment of pending capital of 293,802.19 Euros, plus ordinary and late-payment interest accrued and the amount calculated for interest that may accrue during execution and costs.

xvii) During the processing of the litigation, Barclays S.A. was merged by absorption into Caixabank S.A. (hereinafter, Caixabank).

**2**. - The borrowers filed the claim against Barclays that gave rise to the present litigation on 30 September 2013. In it they requested, as a main claim, the declaration of partial nullity of the mortgage loan in the clauses relating to the denomination in foreign currency and to the exchange of currency, and the declaration that the amount owed was the result of reducing the capital lent in Euros (260,755 Euros) by the amount already paid by way of principal and interest.

They based the request for partial nullity, firstly, on Article 6.3 of the Civil Code, for violation of peremptory norms, considering as such the Order of 5 May 1994, on transparency of the financial conditions of mortgage loans and articles 79 and following of the Securities Market Act.

As a second basis for the partial nullity, the claim considered that the multicurrency clause violates the General Law for the Defence of Consumers and Users and the Law on General Conditions of Contract because it does not meet the requirements of specification, clarity, simplicity, respect for balance and good faith and also involves the fictitious assumption of the risks inherent in the product, the lack of clarity and transparency about the effects of the clause and the establishment of causes for early termination due to the exchange risk that are only established in favour of the bank.

Finally, the omission of the banking entity and the error invalidating the consent of the claimants were alleged as grounds for nullity, pursuant to the provisions of articles 1265, 1266 and 1269 and concordant of the Civil Code.

In the event that it is considered that the loan could not subsist without the "multicurrency" clause, it was requested that the contract be totally nullified and Barclays ordered to grant a traditional mortgage loan in Euros at an interest rate equivalent to Euribor plus 0.82 points.

As a subsidiary to the nullity, a contractual resolution action would be exercised for breach of the obligations of diligence and good faith of the sued banking entity with respect to the part referring to the financial derivative, through which Barclays would be ordered to indemnify, by way

of damages, the patrimonial loss suffered on the criteria established in the expert evidence provided with the claim.

The last of the actions exercised, also as a subsidiary, sought the cancellation of part of the outstanding debt in application of the *rebus sic stantibus* clause.

**3**. - In its response to the claim, Barclays rejected that the Securities Market Act was applicable to the contract, because it denied that the multicurrency mortgage was a hybrid product that covered a derivative, and considered that the structure and operation of the derivatives are completely unrelated to the operation of the loan.

It also rejected the application of the General Law for the Defence of Consumers and Users and the Law on General Conditions of Contract, because the clauses of the loan had been negotiated individually and drafted with respect to the requirements of clarity, simplicity and specificity.

It argued that nullity based on errors in consent could not bear fruit because the legal and jurisprudential requirements for acceptance of the omission and/or the error in consent were not met.

Regarding the action for termination of the contract, it considered that the legal requirements for such action were not met, since Barclays complied with all the obligations imposed by the banking regulations, the partial resolution that was claimed was legally unfeasible and the claimant had breached its payment obligations.

Finally, it argued that the requirements for application of the *rebus sic stantibus* clause were not met.

**4**. - The judgment of the Court of First Instance accpeted the claim for partial nullity for the following reasons:

i) The reference index, Libor, was almost unknown to a retail client due to its lack of exposure in our media and had been the subject of actions in several English speaking countries for its manipulation.

ii) The risk of currency fluctuation is an essential risk with a very important economic impact on the life of the contract. The borrower tends to think, unless it is otherwise explained, that the capital they owe is the sum prefixed in Euros and that it will only be modified downwards when discounting the payments. However, the capital is a yen representation of the Euros borrowed that is recalculated every month based on the exchange rate.

iii) Supported by the expert report provided with the claim, it was considered that the determination of the consideration that the borrowers must meet worked as an implicit derivative, which entailed the application of the Securities Market Act as it was a product included in its article 2.2.

iv) Written pre-contractual information was non-existent. The profile of the clients was not questioned or any type of test carried out. The deed in which the loan contract was formalised did not provide transparent and quality information.

v) The contents referring to the multicurrency option did not meet transparency standards and should be considered null and void for being unfair. They affected the habitual residence of the claimants, who were in a clear situation of imbalance in the face of the content of certain stipulations.

vi) Articles 89 of the Consolidated Text of the General Law for the Defence of Consumers and Users (hereinafter TRLCU for the Spanish acronym), 48 of Law 26/1988, on discipline and intervention of credit institutions, and the Order of 5 May 1994, for not guaranteeing adequate information and protection to the mortgage debtors, the non-delivery of an informative prospectus and the binding offer, were violated. Articles 79 and 79 bis of the Securities Market Act and Royal Decree 217/2008 were also violated.

However, as it was necessary to declare the nullity requested due to the effect of the abuse, this nullity was not linked to the application of Article 6.3 of the Civil Code, as it is a jurisprudential issue that is doubtful and not decisive for the content of the resolution.

vii) The proven facts also demonstrate the error of the consent given by the claimants and the omission of the bank in the multicurrency contents, although the main reason for nullity is the abuse of those clauses, because the impossibility alleged by the defendant of applying the partial nullity of the contracts when the errors of the consent are assessed is not met.

viii) The partial nullity of the contract was declared, limited to the foreign currency related contents, because the total nullity of the contract would be contrary to the purpose of consumer protection of Directive 93/13/EEC and the jurisprudence of the CJEU (judgment of 30 April 2014, Case C-26/13). The contract allows us to understand that the loan was of 260,755 Euros and it was possible that the payments were effected in Euros.

ix) For these reasons, the judgment, in its ruling, declared the partial annulment of the mortgage loan for "all content relating to the multicurrency option", as a result of which "the

amount owed by the claimants is the outstanding balance of the mortgage referenced in Euros, calculated by reducing the amount borrowed (260,755 Euros) by the amount repaid to date, also in Euros, by way of principal and interest and the contract must stand without the content declared void, understanding that the loan was of 260,755 Euros and that payments must also be made in Euros, using the same interest rate fixed in the deed (LIBOR to one month + 0.82%)."

**5**. Barclays appealed the sentence. The Provincial Court upheld the appeal.

The main arguments on which the decision of the Provincial Court was based are as follows:

i) The mortgage loan with a multicurrency clause in a foreign currency cannot be conceptualised as a derivative financial instrument or those referred to in Article 2 of the Securities Market Act, as amended by Law 47/2007 which transposed Directive 2004/39/EC and therefore the MiFID norm, since it is not a negotiable value. It is simply a lending operation where the capital of the loan has been consigned in a foreign currency and therefore comes with an additional risk, of not only the rise or fall of interest rates, but also of exchange rate movements. It is therefore not a complex product.

ii) The double risk arising from the fluctuation of the currency and interest rate variation can be alleviated, mitigated or even eliminated with the possibility offered to the borrower in the contract itself to modify its clauses, opting within the time specified (five days prior to the end of each interest period) for any of the agreed currencies. The ruling states:

"In short, the declaration of nullity sought and accepted in the ruling of the court, with the effects inherent to it, could be obtained by the claimants applying the objectives and mechanisms offered to them in the contract itself, (contrary to the case contemplated in the STJUE of 30 April 2014), from the first month of its validity by replacing the currency initially selected with any of the others offered, including the euro which, in turn, entailed the Euribor reference; however, despite the variation experienced by the yen with respect to the rest of these currencies and especially the euro, they never resorted to this mechanism, opting only to request a shortage in the payment of the corresponding monthly instalments in April 2012."

iii) The rule *pacta sunt servanda* requires that parties to a contract fulfil their obligations even though they are more expensive than they had anticipated, both for increasing costs of execution as well as for a decrease in the value of the consideration to which they are entitled.

iv) In relation to the application of the *rebus sic stantibus* principle, the statement argues that application of technical resolution or contract review requires, among other conditions, that the altered circumstances are unforeseeable, which is not true when uncertainty is the determining

basis of the contractual regulation, as in the case in question, and which can be remedied through the mechanism of the monthly currency exchange.

**6**. - The claimants have filed an extraordinary appeal for procedural infringement based on one motive and cassation appeal based on six motives. All have been admitted.

**7**. - The day indicated for deliberation, the ECJ published judgment of 20 September 2017, the *Andriciuc* case, C-186/16. The court agreed to hear the parties to allow them to argue the importance of the doctrine contained in that judgment.

This doctrine is especially important in resolving the appeal as it specifically rules on the issue which, in the opinion of this court is the most relevant of the various issues raised in the appeal, namely that of the transparency required for the clauses relating to mortgage loans denominated in foreign currency, as can be seen by reading the conclusions of the Advocate General of the ECJ on the matter. For this reason, the hearing procedure was granted to the parties.

As said judgment will be cited frequently throughout the text, we will refer to it as the STJUE of the *Andriciuc* case.

**Extraordinary appeal for procedural infraction**

**SECOND**. - *Formulation of the extraordinary appeal for procedural infraction*

**1**. - The sole motive for the extraordinary appeal for procedural infraction is given this heading:

"For procedural infraction under section 4 of article 469.1 of the LEC, for infringement of article 24.1 EC, for infraction of the fundamental right to effective legal protection as incompatible with an arbitrary, illogical or unreasonable judicial pronouncement, having infringed article 218.2 of the LEC".

**2**. - The arguments on which the motive is based are, briefly, that the Provincial Court has dispensed with absolute evaluation of a means of proof that can be considered fundamental and errs by confusing the economic consequences of nullity with the consequences of exercising the option of currency exchange and does not take into account a series of facts not discussed.

**THIRD**. - *Court decision. Dismissal of the motive*

**1**. - It is not appropriate to judge the reason why the Provincial Court does not modify the facts established in the first instance. What it does is a new legal assessment of them.

The Provincial Court not taking into account some of the facts set out in the petition is not an error in the assessment of evidence, but a legal assessment consisting of considering some facts irrelevant and linking directly the legal infractions that are the subject of the appeal.

**2**. - The affirmation of the Provincial Court that "the declaration of nullity sought and accepted in the ruling of the court, with the effects inherent to it, could be obtained by the claimants applying the objectives and mechanisms offered to them in the contract itself […]from the first month of its validity by replacing the currency initially selected with any of the others offered", while certainly leading to different interpretations, should also be understood as a legal assessment on the scope of the risks of the loan, rather than as an affirmation of concrete facts derived from a probative valuation because, as mentioned, the Provincial Court does not rectify the relevant facts established by the judgment of the Court of First Instance.

Such affirmation must be contextualised, putting it in relation to other parts of the judgment, such as the one that which states that the risk derived from the fluctuation of the currency can be alleviated, mitigated or even eliminated with the exchange of currency offered in the contract.

**Cassation Appeal**

**FOURTH**. - *Formulation of the first, second and sixth motives*

**1**. - The first ground of appeal is headed as follows:

"Infringement of article 2.2 and article 79 of the Securities Market Act and developed in Royal Decree 217/2008."

**2**. - The infraction was allegedly committed by the Provincial Court ignoring Supreme Court doctrine concerning the nature and rules applicable to this product, contained in judgment 323/2015 made by it on 30 June, and judgment of the ECJ on 30 May 2013, case *Genil 48 S.L.*, C-604/2011. Such statements prove that the multicurrency mortgage is a complex financial instrument as it contains an embedded derivative, and as such is subject to Securities Market Act regulations. These regulations have been violated by Barclays for not having complied with the protocol of information, risk assessment and classification of customers required by this law in Articles 79 et seq.

**3**. - The second ground of appeal is headed as follows:

"Violation of Article 6.3 of the Civil Code."

**4**. - This legal offence was allegedly committed by the Provincial Court not having declared the nullity of the contract as of right despite having violated peremptory norms such as the Securities

Market Act (several paragraphs of article 79), article 48.2 of the Law on Discipline and Intervention of credit institutions and the order of 5 May 1994, 17.1 on the Universal Declaration of Human Rights and 47 on the Constitution.

**5**. - The sixth ground of appeal is headed as follows:

"Infringement of article 79 of the LMV (Securities Market Act) through breach of the standard of diligence and good faith regarding information on financial investments and therefore the financial institution can be held accountable for the damages caused."

**6**. - In the development of this ground it is alleged that the decision of the Provincial Court would be contrary to jurisprudential doctrine which states that serious breach of the standard of diligence and good faith and information on financial investments constitutes the legal title of imputation of liability for the damages and losses produced.

**7**. The connection between the alleged legal violations in these motives suggests their joint resolution.

**FIFTH**. - *Decision of the court. A mortgage loan in foreign currency is not a financial instrument regulated by the Securities Market Act. Change in jurisprudential doctrine established in Case 323/2015, of 30 June.*

**1**. - The plenary judgment of this court 323/2015, of 30 June, ruled that a mortgage loan in foreign currency (and specifically, that commonly known as "multicurrency mortgage"), is a complex derivative financial instrument related to foreign currency, and therefore included in the scope of the Securities Market Act. This law, after the reform operated by Law 47/2007, of 19 December, transposes Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 relating to markets in financial instruments (MiFID Directive).

**2**. - The subsequent ECJ ruling of 3 December 2015, *Banif Plus Bank* case, C-312/14, stated, however, that article 4, paragraph 1, item 2 of the aforementioned MiFID directive must be interpreted as meaning that "for the purposes of this provision, certain exchange transactions carried out by a credit institution under clauses of a loan contract denominated in foreign currencies, such as the one at issue in the main proceedings, which consist in determining the amount of the loan based on the buying rate of the currency applicable at the time of the disbursement of the funds and in determining the amounts of the monthly payments based on the selling rate of this currency applicable at the time each monthly payment is calculated, do not constitute an investment service or activity".

**3**. - The arguments that served as the basis for this decision of the ECJ were, briefly, that the transactions in the main proceedings are not covered by this section A of the MiFID Directive (paragraph 55) given that they constitute exchange activities that are purely incidental to the granting and repayment of a consumer loan denominated in foreign currencies. These transactions are limited to the conversion, on the basis of the buying or selling rate of the currency considered, of the amounts of the loan and of the monthly payments expressed in that currency (account currency) to the national currency (payment currency) (paragraph 56). Such operations have no other function than to provide methods of implementing key payment obligations of the loan agreement, namely, the provision of capital by the lender and the repayment of principal and interest by the borrower. The purpose of these operations is not to carry out an investment, since the consumer only aims to raise funds for the purchase of a consumer good or the provision of a service and not, for example, to manage currency risk or speculate on currency exchange (paragraph 57).

Nor would they fall under the concept of "proprietary trading" as referred to in section A, point 3 of Annex I of the MiFID Directive (paragraph 58), nor fall under the category of "ancillary services" of Annex I, section B of the MiFID Directive (paragraph 62), as this will only happen if the credit or loan to an investor is granted to carry out a transaction in one or more financial instruments, where the company granting the credit or loan is involved in the operation (paragraph 63) and such exchange operations are not linked to an investment service (paragraph 67), nor refer to one of the financial instruments in Annex I, section C of the said Directive (paragraph 68).

In addition, a loan agreement denominated in foreign currency cannot distinguish between the loan itself and an operation of future foreign currency sales, because the sole purpose of this is the implementation of the essential obligations of this contract, namely the payment of principal and due payments, meaning that an operation of this type does not in itself constitute a financial instrument (paragraph 71).

The terms of such a loan agreement relating to the conversion of a currency therefore do not constitute a separate financial instrument of the transaction which is the subject of this contract, but only an inseparable mode of implementation (paragraph 72), which differentiates this assumption from that subject of the judgment of 30 May 2013, case *Genil 48 S.L.*, C-604/2011 (paragraph 73).

Finally, the value of the currencies that must be taken into account for the calculation of the reimbursements is not determined in advance, given that it is made on the basis of the selling price of these currencies on the due date of each monthly payment (section 74).

**4**. - The appellants have requested a preliminary ruling from the CJEU on whether the multicurrency mortgage object of this appeal is a loan that includes an embedded financial derivative within the meaning set out in MiFID and IAS 39 incorporated into Community law by Regulation (EC) 1126/2008, of 3 November 2008.

They consider that the ECJ ruling of 3 December 2015, case *Banif Plus Bank*, C-312/14, has not clarified the issue, since the loan in the main proceedings for which the question ruling was raised, does not have the same characteristics as the subject of this appeal, so the factual assumption is different.

**5**. - It is not appropriate to raise the question for several reasons. The first is that Regulation (EC) 1126/2008 is not relevant to resolving this appeal, not only for preliminary reasons, but also because of the matter dealt with, the adoption of certain international accounting standards.

The second and fundamental is that, whether or not there are differences between the loan in the main proceedings in which the issue was raised that resulted in the ECJ ruling of 3 December 2015, case *Banif Plus Bank*, C-312/14, and the loan that is the subject of this appeal, the reasons why the ECJ, in that judgment, considered that the operation was not regulated by MiFID are fully applicable to the loan subject of this appeal: the currency trading operations ancillary to a loan not intended as an investment do not constitute a financial instrument operation separate from the subject of this contract (the loan), but only an inseparable mode of execution of the loan, and the value of the currencies to be taken into account for the calculation of repayment is not determined in advance but is realised on the basis of the exchange rate for these currencies on the date of delivery of the loan capital or the expiration of each monthly fee.

**6**. - That for the purposes of accounting standards, specifically IAS 39, a loan denominated or indexed in foreign currencies constituting a hybrid financial instrument, as it combines a non-derivative contract principal and an implicit derivative whereby the cash flows of the contract principal are modified according to an exchange rate, does not suppose constitution of a financial instrument for the purposes of MiFID and article 2.2 of the Securities Market Act. The ECJ ruling of 3 December 2015, case *Banif Plus Bank*, C-312/14, has affirmed not.

**7**. - Judges and courts must apply European Union law in accordance with the jurisprudence of the European Union Court of Justice (article 4.bis of the Organic Law of Judicial Power). Since the question of what is meant by financial instrument, product or investment service for the purposes of enforcement on the stock market is a matter governed by EU law (specifically, the MiFID Directive) this court must modify the jurisprudential doctrine established in Case 323/2015 of 30 June, in

plenary session of this court, and declare that the mortgage loan denominated in foreign currencies is not a financial instrument regulated by the Securities Market Act.

**8**. – The above implies that financial institutions granting these loans are not required to perform customer evaluation and information activities provided for in the securities market regulations. But it does not preclude that these entities, when offering and granting these so-called loans, represented in or linked to foreign currencies, from being subject to the obligations arising from the other obligations, such as bank transparency.

Also, when the borrower has the legal consideration of consumer, the transaction is subject to the rules protecting consumers and users, and in particular, Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter: Directive on unfair terms). This was the understanding of the ECJ in paragraphs 47 and 48 of the judgment in the *Banif Plus Bank* case.

**9**. - Since the regulations on the securities market do not apply, the decision of the Provincial Court does not violate articles 2.2 and 79 of the Securities Market Law, which is the infraction denounced in the first and sixth grounds.

Neither does it infringe article 6.3 of the Civil Code in connection with article 79 of the Securities Market Act, for the same reasons.

**10**. - In any case, and for the purpose of arguing the inadmissibility of raising a preliminary question to the ECJ in relation to the resulting effect of the breach of these rules, which the appellants claim to be radical nullity, the judgment of the ECJ of 30 May 2013, case *Genil 48. S.L.*, C-604/2011, affirms in section 57 that "although Article 51 of Directive 2004/39 provides for the imposition of measures or administrative sanctions on the persons responsible for an infringement of the provisions adopted to implement the Directive, this does not require that Member States should establish contractual consequences for contracts that do not respect the obligations arising from the provisions of national law implementing Article 9 paragraphs 4 and 5 of Directive 2004/39, nor what those consequences might be". Consequently, "in the absence of relevant rules in EU law, it is for the domestic legal system of each Member State to determine the contractual consequences of failure to comply with these obligations, respecting the principles of equivalence and effectiveness [see Judgment of 19 July 2012, *Littlewoods Retail* case (C-591/10), paragraph 27]".

**11**. - The second ground also alleged violation of article 6.3 of the Civil Code in relation to article 48.2 of the Law on Discipline and Intervention of Credit Institutions and the order of 5 May 1994.

This objection cannot be accepted because, as we stated in judgments 716/2014, of 15 December, and 323/2015, of 30 June, relative to non-compliance of imposed duties of information on products and investment services, the Law on Discipline and Intervention of Credit Institutions and the Order of 5 May 1994 does not mention the nullity of bank contracts in which the bank has breached the duties of information, but of administrative sanctions.

Failure to comply with the duties of information that this regulation imposes on banks is relevant, as will be seen below, when carrying out the control of transparency for terms not negotiated in contracts concluded with consumers.

**12**. - Regarding the right to decent housing that is included in articles 17.1 of the Universal Declaration of Human Rights and 47 of the Constitution, it is a social right of legal assistance. While it is not argued that such right is effectively developed by the infra-constitutional legal system applicable in this litigation, and that it respects its essential content, its infringement cannot be analysed independently of the violation of those legal norms that develop them.

**SIXTH**. - *Formulation of the fifth ground of appeal*

**1**. - The fifth ground of appeal is titled as follows:

"Violation of rules to resolve the issues in dispute: Infringement of article 80.1 and 82 of the TRLCU."

**2**. - The arguments presented in the development of the reason consist, briefly, in that the judgment of the Provincial Court infringes article 80.1 of the TRLCU and case law interpreting it for not accepting that the disputed clauses do not meet incorporation control.

It is alleged that the judgment also infringes the control of transparency required by article 4.2 of Directive 93/13, of ECJ ruling of 30 April 2014 (*Käsler and Káslerné Rabai* case, Case C-26/13) and the judgment of the First Chamber of the Supreme Court 241/2013, dated 9 May, as it lacks clear and understandable information about the consequences of multicurrency clauses, and that these do not allow consumers to know their legal status or the economic burden they really assume. Specifically, it does not indicate that the capital to be repaid is not what was delivered in Euros, but that which is calculated in yen, so the amount owed may be constantly re-evaluated depending on the evolution of the exchange rate, so that despite the loan instalments being paid they will not effectively reduce the debt in Euros if the value in yen has appreciated. Nor can the implications of opting for a currency exchange be understood.

And finally, the infraction would have been committed by not declaring the unfair nature of the clauses because if the client had known the foreseeable economic cost of the contract as the bank did, they would never have given their consent.

**3**. Since the acceptance of this ground would suppose the acceptance of the main claim (the partial nullity of the contract), it must be analysed against the third and fourth grounds, which support a subsidiary claim, for the cancellation of the contract for consent error.

**SEVENTH**. - *Court decision (I). Rejection of claims regarding the infringement of rules incorporating the general conditions*

**1**. - The demand has exercised, among others, an action aimed at declaring the partial annulment of the multicurrency mortgage, specifically the clauses relating to its denomination in yen, for being unfair as they do not meet transparency standards. The claimants did not request that such general conditions be considered as not incorporated, but declared void for unfairness.

The debate both at first and second instance has focused on controlling the unfairness of such clauses, and more specifically whether they meet transparency standards.

**2**. - Violation of articles 5 and 7 of the Law on General Conditions of Contract (hereinafter LCGC for its Spanish acronym) could constitute grounds for cassation appeal if the demand had brought an action to declare that the clauses relating to the designation currency were not incorporated into the mortgage loan contract as that would not have met the inclusion requirements in those precepts, the Provincial Court would have ruled on this issue and misapplied such legal precepts or improperly denied such application.

But as that claim was not made and there being no ruling on the application or non-application of articles 5 and 7 of the LCGC, it is not possible to enter a motive for annulment alleging infringement of various legal precepts that underlie the action exercised. This court cannot review the correct application of legal precepts that have not been taken into consideration by the Provincial Court, whether to apply them or to deny their applicability, without the current appellants have adequately denounced through the relevant channel an omission of pronouncement or the lack of exhaustiveness of the judgment of the Provincial Court.

**EIGHTH**. - *Decision of the court (II). Control of transparency of the clauses relating to the denomination of the loan in foreign currency and the exchange between currencies*

**1**. - The motive of the appeal is also based on the legal offence that was allegedly committed in the application of the legal precepts governing the control of unfairness of the non negotiated clauses and, more precisely, control of transparency, particularly articles 80.1 and 82 of the TRLCU, developing the provisions of the Directive on unfair terms, such as article 4.2 of the Directive.

**2**. - The ECJ ruling of 3 December 2015, *Banif Plus Bank* case, C-312/14, which excluded the application of MiFID to such banking products, said:

"47. That said, it should be noted that some provisions of other acts of Union Law on the protection of consumers may be relevant in a case such as that of the main proceedings.

"48. This is particularly true of the provisions of Directive 93/13 which establish a control mechanism on the unfair terms provided for in the system of consumer protection established by this Directive (to this effect see, Käsler and Káslerné Rabai, C 26/13, EU:C:2014:282, paragraph 42)."

**3**. - In this ruling of the *Käsler* case, the ECJ declared the origin for performing a transparency control on non-negotiated clauses governing the principal object of the loan agreement denominated in foreign currencies.

**4**. - Additionally the STJUE in the *Andriciuc* case declares the origin for performing a transparency control on the clauses governing the principal object of the contract and the adequacy between price and remuneration on the one hand, and the services or goods that are to be provided as a counterpart on the other hand, for loan contracts denominated in foreign currencies.

**5**. - The first question to be resolved is to reject the claim of the respondent stating that the disputed clauses were subject to individual negotiation and, therefore, fall outside the scope of application of article 3 of the Directive on unfair terms.

None of instance rulings mention the existence of such negotiation. The mortgage loan deed states it was drafted according to the draft provided by Barclays and "contains general contract conditions". It is also not established that it was the borrowers who make the initial selection of the currency in which the loan was represented.

The fact that there was negotiation of the loan amount, in Euros, (which the borrowers needed to refinance), of the repayment period, including the presence of the "foreign currency" element which justified a lower interest rate than was usually granted in the market for loans in Euros (which is what made the loan attractive), does not suppose there was negotiation of the wording of the contract clauses and, specifically, how this "foreign currency" element operated in the economy of the contract (exchange rates for delivery of capital, instalment payments and

changing between currencies, practical implications of the risk of currency fluctuation, recalculation of the Euro equivalent of the capital denominated in foreign currencies depending on fluctuation, consolidation of the equivalence in Euros, or the other currency chosen, the outstanding principal, with the revaluation resulting from currency fluctuation, in case of changing between currencies, etc.) and the legal and economic position assumed by each party in the execution of the contract.

**6**. - There is no need to raise a question for a preliminary ruling with the ECJ on these points of the dispute, as claimed by CaixaBank, because making such a request arises from unaccredited facts and claim that a question arises, the purpose of which would be to conduct a legal assessment of the facts of the dispute, which corresponds to this court, rather than an interpretation of an EU rule over which there is doubt, which is what would justify raising a question to the ECJ.

On this issue, paragraph 28 of the ECJ judgment of 11 September 2008, *Cepsa* case, C-279/06, citing other previous rulings, states:

"It must be borne in mind that, under Article 234 EC, based on a clear separation of the functions of the national courts and the Court of Justice, the latter is competent only to rule on the interpretation or validity of a Community rule as from the facts provided by the national court and that, instead, it is for the national court to apply the rules of Community law to a specific case. Accordingly, the Court of Justice has no jurisdiction to rule on the facts of the case or to apply Community rules which it has interpreted to national measures or situations, these matters being the exclusive jurisdiction of the national courts [...]."

**7**. - Neither can we accept the second objection brought by the banking entity, expressed in the processing of allegations on the STJUE of the *Andriciuc* case, in the sense that the stipulations questioned fall outside the scope of the Directive on unfair clauses by application of article 1.2.

This provision provides:

"The contractual terms which reflect mandatory statutory or regulatory provisions, and the provisions or principles of international conventions, especially in the field of transport, to which the Member States or the Community are party, are not subject to the provisions of this Directive."

The reason, according to the bank, this provision should be applied is that those provisions are limited to reflect the principle of monetary nominalism of article 1170 of the Civil Code in relation to articles 1753 and 1754 of the Civil Code and 312 of the Commercial Code.

**8**. - The objection must be rejected. It is undeniable that in a contract with resulting monetary obligations it is necessary to fix the currency in which the payment obligations set out in the contract must be met. But the clauses contested in the demand are not limited to only reflecting the legal

provisions cited by the respondent. Nor the specific wording that has been given to those clauses in the deed and the absence of pre-contractual and contractual information about its importance for the legal and economic position of the parties in the development of the contract are the result of the transposition of these legal regulations to the contract. What CaixaBank seems to support is that the disputed clauses are not limited to fixing the currency in which the obligations derived from the contract must be fulfilled.

As a result of the foregoing, this issue also does not require a preliminary ruling as requested by CaixaBank. The interpretation of the nature of the norms of national law is not the remit of the ECJ.

**9**. - After determining the applicability of the rules of consumer and user protection developed by the Directive on unfair terms, paragraph 35 of the STJUE in the *Andriciuc* case states that the clauses defining the main object of the contract, as referred to in article 4.2 of the Directive on unfair terms, are those that regulate the essential features of the contract and, as such, characterise it. And in paragraph 38 adds:

"[...] via a credit agreement, the lender agrees, principally, to make a certain amount of money available to the borrower, and the latter undertakes, in turn, principally to repay, usually with interest, this amount in the planned time scales. The essential features of this contract relate therefore to an amount of money that must be defined in relation to the currency of payment and the reimbursement stipulated. Therefore, as paragraphs 46 et seq of the conclusions of the Advocate General point out, the fact that a loan is to be repaid in a particular currency does not refer, in principle, to an accessory payment method, but to the very nature of the debtor's obligation, which is why it is an essential element of the loan contract."

**10**. - The provisions challenged in the claim, which set the nominal currency and the functional currency of the contract, the mechanisms for calculating equivalence between them, and which determine the exchange rate of the currency in which the unamortised capital is represented, shape both the obligation to pay the capital loaned by the lender and the repayment obligations of the borrower, either by the periodic repayment instalments of the capital and interest by the borrower, or by a single repayment of the capital pending amortisation in case of early expiration of the contract. For this reason, they are clauses that define the main object of the contract, over which there is a special duty of transparency on the part of the proffering party when it comes to contracts concluded with consumers.

**11**. According to these ECJ rulings, it is not only necessary that clauses are written in clear and understandable language, but also that the adherent can have a real understanding of them, so that

an informed consumer can foresee, on the basis of precise and understandable criteria, their economic consequences.

**12**. - Specifically, the second paragraph of the ruling in the STJUE *Andriciuc* case, regarding the requirement of transparency derived from article 4.2 of the Directive in relation to a loan denominated in foreign currencies, states:

"Article 4, paragraph 2 of Directive 93/13 must be interpreted as meaning that the requirement for a contractual clause to be written clearly and understandably supposes that, in the case of credit agreements, financial institutions must provide borrowers sufficient information for them to make informed and prudent decisions. In this regard, this requirement implies that a provision under which the loan has to be repaid in the same foreign currency in which it was contracted has to be understood by the consumer at the formal and grammatical level, as well as in its specific scope, so that an average consumer, informed and reasonably observant and circumspect, can not only know the possibility of appreciation or depreciation of foreign currency in which the loan was contracted, but also assess the economic consequences, potentially significant, of said clause on their financial obligations."

**13**. - The jurisprudence of this court, based on article 4.2 of the Directive on unfair terms and articles 60.1, 80.1 and 82.1 of the TRLCU, has also demanded that the general conditions of contracts concluded with consumers meet the requirement of transparency referred to in the cited rulings of the ECJ.

This jurisprudential line starts with judgment 834/2009 of 22 December and becomes more clearly defined with judgment 241/2013 of 9 May, and on to more recent judgments 171/2017 of 9 March and 367/2017 of 8 June.

**14**. - These rulings have established the doctrine that, in addition to the incorporation filter provided in articles 5 and 7 of the LCGC, transparency standards should apply to the general conditions in contracts concluded with consumers, as an abstract parameter of validity of the predisposed clause, when the general condition refers to essential elements of the contract.

This control of transparency aims to ensure that the adherent can understand with simplicity both the economic burden that the contract actually represents, that is, the patrimonial sacrifice made in exchange for the economic benefit they want to obtain, as well as the legal burden thereof, i.e., the clear definition of their legal position both in the typical elements that make up the contract entered into, as well as the allocation of the risks during its execution.

**15**. - The general conditions that deal with essential elements of the contract require extra information that allows the consumer to adopt their decision to contract with full knowledge of the

economic and legal burden involved by entering into the contract, without the need for a thorough and detailed analysis of the contract.

This excludes that the legal position may worsen for the consumer, or the economic burden that the contract implies, as they had perceived it, could be aggravated by the inclusion of a general condition that exceeds the requirements of incorporation, but whose legal or economic significance pass inadvertently to the consumer because they were not provided with clear and adequate information about the legal and economic consequences of said clause.

**16**. - The fact that the MiFID regulation is not applicable to these mortgage loans denominated in foreign currencies does not prevent the mortgage loan in foreign currencies from being considered a complex product for the purpose of control of transparency derived from the application of the Directive on unfair terms, due to the difficulty the average consumer has in understanding some of their risks.

**17**. - In our judgment 323/2015 of 30 June, we explained why the risks of this type of mortgage loan exceed those of variable interest mortgage loans requested in Euros. We stated in that ruling:

"To the risk of interest rate variation is added the risk of currency fluctuation. But, in addition, this currency fluctuation risk does not exclusively mean that the Euro amount of the periodic amortisation fee, including capital and interest, may increase if the chosen currency appreciates against the euro. [...] The exchange rate of the chosen currency is applied, in addition to the Euro amount of the periodic instalments, to fixing the Euro amount of the capital pending amortisation, so that the fluctuation of the currency assumes a constant recalculation of the borrowed capital. This means that, despite having made the periodic repayment instalments, including repayment of the loaned capital and payment of interest accrued from the previous amortisation, the borrower not only has to pay larger Euro instalments, but also owes the lender a capital in Euros greater than the one they received when arranging the loan.

"This form of loan used to finance the acquisition of an asset that is mortgaged as a guarantee by the lender, is an added difficulty in the client obtaining a complete picture of the correlation between the financed asset and the liability that finances it, because the possible fluctuation of the value of the acquired asset is added to the fluctuation of the liability contracted to acquire it, not only because of the variability of the interest, linked to an unusual reference index, the Libor, but because of the fluctuations of the currencies, such that, in recent years, while the value of real estate bought in Spain has suffered a sharp depreciation, the currencies most used in these "multicurrency mortgages" have appreciated, resulting in higher lender fees and in many cases a larger Euro amount is now owed than when the mortgage loan was agreed, in absolute disproportion to the value of the property financed through signing up for this type of loan."

**18**. We also state in that judgment, as confirmation of the complex nature of this type of contract due to the existence of risks that need a clear explanation, that Directive 2014/17/EU of the European Parliament and of the Council, of 4 February 2014, on credit agreements concluded with consumers for real estate for residential use, in its fourth consideration, refers to the existing problems "in relation to the irresponsibility in the granting and contracting of loans, as well as the potential margin of irresponsible behaviour among the participants in the market" and that "some of the problems observed derived from loans taken out by consumers in foreign currency because of the advantageous interest rate offered, without adequate information or understanding of the exchange rate risk involved". The thirtieth consideration in the preamble to the Directive adds that "due to the significant risks associated with borrowing in foreign currency, it is necessary to establish measures to ensure that consumers are aware of the risks they assume and that they have the possibility to limit their exposure to exchange rate risk during the term of the loan [...]."

For these reasons, articles 11.1.j, 13.f and 25.6 of the Directive impose certain enhanced reporting obligations on the risks associated with the denomination of the loan in a foreign currency.

This Directive is not applicable to this case, but its regulation shows the problems that exist in the contracting of loans in foreign currency and the need for the borrower to receive sufficient information on the role of the foreign currency in the economy of the contract, as well as on their legal position and the risks inherent to this type of loan.

The obligation of transparency in the contracting of these loans is pre-existing from the entry into force of this Directive since it derives from the regulation of the Directive on unfair terms. The difference supposed in this matter by Directive 2014/17/EU is in the establishment of a detailed regulation of the information that must be provided and in formalising the documentation in which such information has to be presented as well as the concrete form in which it must be delivered.

**19**. - ECJ case law, in implementation of the Directive on unfair terms, stated the importance that pre-contractual information is provided to customers for compliance with the requirement of transparency in contracting with consumers via general conditions, because it's at that stage when the contracting decision is adopted. In this regard the ECJ rulings of 21 March 2013, Case C-92/11, *RWE Vertrieb* case, paragraphs 44 and 49 to 51, and of 30 April 2014, and *Kásler y Káslerné Rábai* case, Case C-26/13, paragraph 70 were pronounced.

As does the STJUE in the *Andriciuc* case, whereby paragraph 48 states:

"Moreover, it is settled case-law of the Court of Justice that it is of fundamental importance for the consumer to have, prior to entering into a contract, information on the contractual conditions and the

consequences of entering into that contract. The consumer decides if they want to be bound by the conditions written beforehand by the professional based mainly on that information (rulings of 21 March 2013, RWE Vertrieb, C 92/11, EU:C:2013:180, paragraph 44, and of 21 December 2016, Gutiérrez Naranjo et al, C 154/15, C 307/15 and C 308/15, EU:C:2016:980, paragraph 50)."

**20**. This ruling specifies how these information obligations are specified in the case of foreign currency loans:

"49. In the present case, as regards loans in foreign currencies such as those at issue in the main proceedings, it should be noted, as recalled by the European Systemic Risk Board in its ESRB/2011/1 Recommendation of 21 September 2011, on the granting of loans in foreign currency (ESRB/2011/1) (OJ 2011, C 342, p.1), that financial institutions should provide borrowers with sufficient information so that they can make informed and prudent decisions, and understand at least the effects on the instalments of a sharp depreciation of the legal tender of the Member State where the borrower is domiciled and of an increase in the foreign interest rate (Recommendation A- Borrowers awareness of risk, point 1) .

"50. Thus, as points 66 and 67 of the conclusions of the Advocate General pointed out, on the one hand, the borrower must be clearly informed that, by entering into a loan contract denominated in a foreign currency they are exposed to an exchange rate risk that will be, eventually, difficult to assume from an economic point of view in case of devaluation of the currency in which they receive their income. On the other hand, the professional, in the present case the bank, must show the possible variations of the exchange rates and the risks inherent in taking out a loan in a foreign currency, especially in the event that the borrowing consumer does not receive their income in this currency. Consequently, it is for the national court to verify that the professional communicated to the consumers concerned all the relevant information enabling them to assess the economic consequences of a clause such as the one at issue in the main proceedings concerning their financial obligations."

**21**. - In the present case, the needed pre-contractual information did not exist for borrowers to properly know the nature and risks associated with the clauses relating to the foreign currency in which the loan was denominated, since they were not given any written information prior to the signing of the loan, and the salesperson of Barclays who attended them lacked the training necessary to adequately explain these points of the contract.

**22**. - The argument put forward by Barclays is not accepted whereby it claims it was not required to comply with the reporting obligations imposed by the Order of 5 May 1994 because the reform operated by Law 41/2007, of 7 December, in article 48.2 of Law 26/1988 on discipline and intervention of credit institutions, which stated that "information on the transparency of loans or mortgages, provided that the mortgage is on a dwelling, will be provided regardless of the amount

thereof", would only apply to future standards of bank transparency, which was not issued until several years later.

Since reporting obligations on mortgage loans where the mortgage is on housing were already developed by the Order of 5 May 1994, the legal amendment meant that from its entry into force, the rules on transparency were going to be enforceable in any mortgage where the mortgage is on a dwelling, without having to wait for the issue of a new regulation on transparency in mortgage loans, as claimed by Barclays.

**23**. - In order to determine the information that Barclays had to supply to the claimants, the differentiation between the currency in which the loan was denominated is particularly relevant, since it established the capital borrowed and the amount of the amortisation instalments, which we can call "nominal currency", and the currency in which the amount of the loan was effectively delivered to the claimants and in which the monthly instalments were paid, the euro, which we can call "functional currency". In the clause in which the capital loaned was specified, denominated in a foreign currency, its equivalence in Euros was also fixed.

**24**. The claimants sought the loan to pay a certain amount of money in Euros, specifically the amount required to settle previous loans denominated in Euros, the conditions of which were considered less favourable than the loan denominated in foreign currencies that Barclays offered at a lower interest rate.

The mortgage loan deed provided that the borrowed capital would be placed in the account of the borrowers in Euros, which it was, and the exchange rate applied to find the equivalence of the capital denominated in the foreign currency (Japanese yen) from the capital that was actually delivered in Euros, which was the exchange rate for the sale of that currency set by the bank. Therefore, the amount of the loan capital denominated in the initial currency, the Japanese yen, was the equivalent, at the exchange rate set, of the amount that the borrowers needed in Euros.

The valuation of the mortgaged property contained in the deed was made in Euros and the fixing of the mortgage guarantee extension was also made in Euros.

The borrowers received their income in Euros. Although the clauses prepared by Barclays provided for the possibility of making amortisation payments in foreign currency or in Euros and established in the latter case the applicable exchange rate (exchange rate for buying the currency set by the bank at a determined moment), this second option was the only one that could be

effectively fulfilled in the execution of the contract since the borrowers obtained their income in Euros.

The figures in the account of the borrowers, in which the bank delivered the borrowed capital and in which the borrowers consigned the amortisation instalments, were made in Euros.

Faced with the non-payment of the instalments, the bank cancelled the loan early and fixed the balance owed in Euros. The amount in Euros that Barclays claimed as unpaid capital, after the borrowers had been paying the monthly repayment instalments for several years, exceeded the amount of Euros that was paid into the account of the borrowers when the loan was granted.

Likewise, the bank requested the execution of the mortgage in Euros, despite the fact that in our legal system it is possible to execute this in foreign currency (Article 577 of the Civil Procedure Law).

**25**. - The foregoing shows that Barclays was required to inform the claimants about the risks arising from the changes in the nominal currency of the loan, the Japanese yen, with respect to the functional currency, the Euro, in which the benefits derived from its execution (that is, the effective delivery of the capital to the borrowers, the effective payment by the borrowers of the monthly instalments and the claim by the bank of the outstanding capital to be repaid when the loan was paid in advance, through a procedure of foreclosure).

**26**. - In particular, Barclays did not adequately explain to the borrowers that fluctuations in the price of the foreign currency in relation to the euro could not only cause fluctuations in the amount of the loan instalments, but that the increase in their amount could be so considerable as to put their ability to pay at risk in the event of a sharp depreciation of the euro against the foreign currency.

This information was necessary for the borrowers to have taken a well-founded and prudent decision and to have understood the effects on the instalments of a sharp depreciation of the currency in which they received their income. This is stated by the STJUE in sections 49 and 50 of the *Andriciuc* case.

Not only did Barclays not give them that information, but financial clause 2.II.g of the mortgage loan deed distorted the understanding of that risk, since it established that if the interest rate was not modified, the amount payable under the amortisation of principal and interest would not suffer any variation.

On this issue, it is relevant that when the loan was arranged, at which time the applicable interest was 1.47% per annum, the borrowers paid a first monthly fee of 1,019.66 Euros, while in June 2012, despite the fact that the interest rate had fallen to 0.96% per annum, the amount of the monthly fee rose to 1,540.95 Euros.

**27**. - An average consumer, normally informed and reasonably observant and circumspect, can understand that currencies fluctuate and therefore the instalments of a loan denominated in a foreign currency, but in which the actual payments are made in Euros, may vary according to the fluctuation of the price of the currency. But they would not necessarily know, without adequate information, that the variation in the amount of the instalments due to currency fluctuation may be so considerable as to jeopardise their ability to meet the payments. Hence, the STJUE, from paragraphs 49 and 50 of the *Andriciuc* case, require adequate information on the consequences that this risk may have, especially in cases where the borrower consumer does not receive their income in that currency.

**28**. - Barclays also failed to inform the claimants of other significant risks of this type of loan. The fluctuation of the currency assumes a constant recalculation of the loaned capital, since the equivalence in the functional currency, the euro, of the amount in the nominal currency, the foreign currency, of the capital pending amortisation varies as the exchange rate fluctuates. A considerable devaluation of the functional currency in which the borrower obtains their income, signifies a significant increase in the equivalence amount of the capital pending amortisation in that currency.

In relation to this risk, it is significant that while the Euro equivalence of the loaned capital was 260,755 Euros, fixed in the loan deed granted on 31 July 2008, that figure amounted to 404,323.04 Euros in August 2012, despite the fact that the borrowers had made the loan repayment instalments, including capital and interest, for almost four years.

This risk affects the obligation of the borrower to repay all the capital pending amortisation in a single payment, either because the bank uses the power to terminate the loan early when any of the causes established in the contract occur (including some which are not attributable to the borrower and associated with the currency fluctuation risk, as we will see later), or because the borrower wants to pay off the loan early to cancel the mortgage and transfer their home free of burden.

**29**. - In the case subject of the appeal, the materialisation of this risk has determined that despite the fact that the borrowers have made the monthly repayment instalments for several years, the euro having devalued considerably against the yen at the time the bank exercised its power to

terminate the loan early, the borrowers owe the lender a capital in Euros significantly greater than they received when the loan was arranged.

**30**. - This risk of recalculation of the Euro equivalent amount of the capital pending amortisation in the foreign currency brings other risks too, of which the claimants were also not informed. These risks were related to the faculty that permitted the lending bank to resolve the loan early and demand the payment of the capital pending amortisation if, as a result of the fluctuation of the currency, the appraised value of the property was lower than the 125% of the equivalent value in Euros of the principal of the guaranteed loan pending amortisation at any moment, and if the borrower did not increase the guarantee within two months, or if the equivalent calculated in Euros of the capital pending amortisation went above certain limits, unless the borrower reimbursed the difference or extended the mortgage to cover it.

**31**. - While the risk of some increase in the amount of the amortisation instalments due to the fluctuation of the currency in the case of loans denominated in foreign currencies or indexed to currencies could be foreseen by the average consumer without the need for the bank to inform them, the same is not true of the risks described in the previous paragraphs.

The perception of an average consumer who arranges a loan is that as they make repayment instalments including capital and interest, the amount of capital pending amortisation, and with it the economic burden that the loan entails for the consumer, will decrease.

However, in the case of loans denominated in foreign currencies such as the one that is the object of this appeal, although the borrowers paid the amortisation instalments for several years, the equivalence in Euros of the capital pending amortisation increased considerably and with this the economic burden of the loan on the consumer.

The average consumer cannot foresee, without timely information, that despite paying the loan instalments and despite the fact that the asset on which the mortgage is constituted retains its value, the bank can terminate the loan early as a result of currency fluctuation.

**32**. - This Euro equivalence of the capital pending amortisation and of the repayment instalments is what is truly relevant in assessing the economic burden of the consumer whose functional currency is the euro, which is what the borrower needs to use since the capital obtained in the loan will be allocated to pay a debt in Euros and because the income with which they must meet the amortisation instalment payments or the capital pending amortisation in case of early termination, is obtained in Euros.

**33**. - For these reasons, it is essential that the information given by the bank to the customer address the possible economic burden in case of currency fluctuation, in Euros, both for the payment of the amortisation instalments and the payment of the capital pending amortisation required in case of early termination of the loan.

They must also be informed of the importance of the exercise of the faculty of early termination of the loan by the bank for the devaluation, above certain limits, of the euro against the foreign currency, because it also poses a serious risk to the consumer that, in spite of not having committed a breach of contract, they would be obliged to return all the capital pending amortisation in one payment.

**34**. - In the case under appeal, some of the risks for which the claimants were not adequately informed have materialised and caused them serious harm. The borrowers have not only had to pay amortisation instalments that are approximately 50% higher than that initially paid, in spite of the reduction in interest rate, and have reached a point where they have not been able to continue meeting the amortisation instalments, but also, with the bank having executed its ability to terminate the loan early due to non-payment of the instalments, the amount that has been claimed from the borrowers, in Euros, as outstanding capital in the foreclosure process, significantly exceeds the Euro amount that was paid into their account for the loan.

**35**. - The omitted information was fundamental in the claimants opting for one type of loan or another by comparing their respective advantages and disadvantages. Or to even have decided not to take out a new loan to cancel the previous ones and to have chosen to continue paying the loans they had previously arranged, at a higher interest rate than the one initially offered by the multicurrency loan but in which there was no such risk of currency fluctuation. In addition, by maintaining the previous loans, they would have saved the expenses incurred when arranging the new mortgage loan.

It should not be forgotten that the foreign currency loan was requested precisely to pay off these previous loans, because with the limited information available to the borrowers, the foreign currency loan appeared to be more favourable to their interests than the pre-existing loans.

**36**. - Barclays claims that the loan deed was granted before a notary and contains adequate information on the nature of the loan and the risks associated with it. It also argues that the deed contained a clause in which the borrowers expressed to know the exchange risks involved in the loan, assumed the risks of the loan being represented in a foreign currency and acknowledged

having received the necessary information from Barclays to evaluate these risks, thus exonerating Barclays of any responsibility.

**37**. - In judgment 464/2013, of 8 September, we declared that the reading of the public deed and, in its case, the comparison of the financial conditions of the binding offer with that of the respective mortgage loan, do not in themselves replace the fulfilment of the duty of transparency.

**38**. - In the case under appeal, it has been established that Barclays did not provide the borrowers with the informative prospectus and the binding offer required in the Order of 5 May 1994. Therefore, where the notary affirms in the deed "that I have examined the binding offer relating to this loan and have not found any discrepancy between its financial terms and the financial clauses of this deed", this can only mean that Barclays showed a binding offer to the notary that it had not provided to the borrowers, as it has acknowledged in this litigation, in which it has even denied that it had an obligation to deliver it.

**39**. - In ruling 138/2015, of 24 March, we call attention to the moment in which the involvement of the notary takes place, at the end of the process leading to the agreement of the contract, at the moment the loan mortgage deed is signed, which does not seem the most appropriate for the borrower to revoke their decision to agree the loan.

Certainly, in ruling 171/2017, of 9 March, we said that "in the contracting of mortgage loans, it can be an element in which the work of the notary authorising the operation can be enhanced, in that they can ensure the transparency of this type of clause (with all the requirement of clarity in the information it carries) and finally comply with the information requirements that underlie the duty of transparency. [...]".

But in ruling 367/2017, of 8 June, we affirm that such a statement does not exclude the need for sufficient pre-contractual information that affects the transparency of the clause inserted in the contract that the consumer has decided to sign. When adequate pre-contractual information has been provided, the notarial involvement serves to complement the information received by the consumer on the existence and transcendence of the floor clause, but cannot by itself substitute the necessary pre-contractual information, which CJEU jurisprudence has considered fundamental for the consumer to understand the economic burdens and the resulting legal situation for them from the clauses predisposed by the employer or professional.

**40**. - In addition to the foregoing, the deed also does not state the nature of the risks associated with the denomination in foreign currency of the loan. Barclays predisposed a general condition in which

the borrowers stated that they were aware of the currency exchange risks involved in the loan, without ever specifying what those risks were.

This statement, as proven in the process, did not conform to reality because Barclays did not provide the claimants with any written information prior to the signing of the loan and the Barclays salesperson that attended them lacked adequate training on the product that would allow them to give information about its nature and risks.

**41**. - We have already stated on previous occasions the ineffectiveness of the predisposed statements that consist of declarations not of will but of knowledge or the confirmation of certain facts, that are revealed as formulas predisposed by the professional, empty of real content and contradicted by the facts. This court has stated this in all judgments mediated between 244/2013, of 18 April, and 335/2017, of 25 May.

**42**. - Also the CJEU, in the field of consumer credit and in relation to the information obligations of the credit institution to its customers established in Directive 2008/48/EC of the European Parliament and of the Council, of 23 April 2008, relating to consumer credit agreements, stated in its judgment of 18 December 2014, *Bakkaus* case, 449/13, paragraphs 31 and 32, that if a clause predisposed by the company stating the consumer acknowledges having received the information about the contract implies recognition by the consumer of full and proper compliance with the pre-contractual obligations borne by the lender under national law thus results in an inversion of the burden of proving compliance with those obligations that could prejudice the effectiveness of the rights recognised to the consumer by the Directive, for which the provisions of this oppose the fact that, by reason of a standard clause, the judge must consider that the consumer has recognised the full and proper compliance with the pre-contractual obligations incumbent on the lender, so that this clause originates an inversion of the burden of proving compliance with those obligations that could prejudice the effectiveness of the rights recognised by the Directive.

**43**.- The lack of transparency of the clauses relating to the denomination in foreign currency of the loan and the equivalence in Euros of the repayment instalments and of the capital pending amortisation, is not innocuous for the consumer but causes a serious imbalance, going against the requirements of good faith, since, by not knowing the serious risks involved in contracting the loan, they could not compare the offer of the multicurrency mortgage loan with those of other loans, or with the option of maintaining the loans already granted and that were cancelled through the multicurrency loan, which generated new expenses for the borrowers, the payment of which came from the amount obtained with the new loan.

The economic situation of the borrowers worsened severely when the risk of fluctuation materialised, such that not only the periodic instalment payments increased drastically, but the Euro equivalence of the capital pending amortisation increased instead of decreasing while they were paying regular instalments, which was detrimental to them when the bank exercised its power to terminate the loan early and demand the capital pending amortisation in a foreclosure process, which turned out to be superior to the amount they had received from the lender when arranging the loan.

The legal situation was also aggravated, since there were causes for the early termination of the loan established in the event of depreciation of the euro against the currency in which the loan was denominated, although the cause for early termination that Barclays employed to effect its faculty was the non-payment of the instalments.

**44**. - The claimant also alleges, in line with what was declared by the Provincial Court in its judgment, that the clause that allowed the borrower to change loan denomination currencies (the clause refers to a change in the currency in which the principal of the loan is "represented") eliminated the risk derived from the fluctuation of the currency.

**45**. - It is true that the thirtieth consideration of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements concluded with consumers for real estate for residential use, after referring to the "significant risks linked to borrowing in foreign currency" states that "the risk could be limited by granting the consumer the right to convert the currency of the credit agreement, or through other procedures".

This provision is specified in article 23 of the Directive. But the requirement of means of limiting risk such as the possibility of changing the currency in which the loan's capital is represented, and in particular changing to the currency in which the borrower receives their income, does not relieve the bank of its obligations of pre-contractual information. This clause is not envisaged as an alternative to the obligation to inform the borrower of the risks. It is an issue of cumulative demands.

Moreover, the Directive contemplates the establishment, as a risk limitation mechanism, of the possibility of changing the currency in which the capital of the loan is represented in a normative context of reinforcement of the information that must be provided during the execution of the contract. Article 23.4 of the aforementioned Directive provides:

"With regard to consumers who have a loan in foreign currency, Member States shall ensure that the lender sends them regular warnings, on paper or other durable media, at least when the value of the amount

owed by the consumer of the loan or of the periodic instalments differs by more than 20% from the amount corresponding to the exchange rate applied between the currency of the credit agreement and the currency of the Member State in force on the date the credit agreement was signed. The warning shall inform the consumer of the increase in the amount owed by them, when applicable mention shall be made of the right to convert to an alternative currency and the conditions for this, and any other mechanism applicable to limit the exchange rate risk to which the consumer is exposed."

**46**. In addition, the presence of this clause does not by itself eliminate the risk linked to these foreign currency loans or the unfair nature of the clauses linked to the loan object of the litigation being denominated in a foreign currency. Even less so if the bank does not inform the client of the consequences related to this conversion of currency in which the loan capital is represented.

The conversion of the currency in which the capital is represented will be performed according to the exchange rate existing at the time this conversion takes place, so the revaluation of the currency is consolidated and, therefore, so is the increase in the Euro equivalence (or in the new currency) of the amount of the capital pending amortisation, since the increase produced as a result of the appreciation of the currency is transferred to the new chosen currency.

To make this conversion, the borrower must be up to date in the payment of the loan instalments and must also pay a commission to make use of this facility, as provided by the deed.

The borrower cannot make that change at any time, but only at the beginning of each new "period of interest and currency maintenance" into which the life of the loan is divided. In this case, those periods were monthly. But a significant devaluation of the functional currency with respect to the foreign currency can take place in a matter of weeks.

**47**. - Only the hypothetical risk of an appreciation of the foreign currency in the future is avoided. But if the borrower is unaware, because they have not been properly informed, that when they make use of this currency exchange facility they will consolidate the increase in value of the foreign currency in which the loan was denominated, it is possible that when they intend to make use of that power because the monthly reimbursement rate has increased significantly, the increase in the Euro equivalence of the amount in the foreign currency of the capital pending amortisation is already considerable.

**48**. - Only a borrower who receives adequate information from the bank during the execution of the contract or who has extensive knowledge of the foreign exchange market, who can foresee the future behaviour of the different currencies in which the capital of the loan can be represented, can profitably use that possibility of currency exchange provided in the contract.

If they do not receive this information about the currency market and do not have that knowledge, the borrower making use of this currency exchange possibility because it has appreciated significantly with respect to the functional currency, the euro, and the Euro amount to be paid monthly for loan repayment has increased, runs the risk of consolidating successive high amounts of capital pending amortisation whose Euro equivalence increases progressively, if the currency changes are made at the "peak" or close to the "peaks" of higher exchange of the currency in which the loan is represented with respect to the euro.

In this case, when the borrowers had difficulties to make the payment of the instalments due to the increase in their amount (July 2012), if they had changed the currency to the euro to "protect themselves", they would have consolidated a debt for capital pending amortisation of approximately 400,000 Euros (the equivalent at 24 August 2012 was 404,323.94 Euros), 55% higher than the initial capital in Euros, despite the payment of the amortisation instalments for four years. The operation would have been detrimental for the borrowers because they would have consolidated a capital of 400,000 Euros, and one year later, if the conversion had not been made, the Euro equivalence of that capital pending amortisation would have dropped below 300,000 Euros.

**49**. Therefore, the possibility of currency exchange, although it implies a certain mechanism of limiting the risk of fluctuation in cases of foreseeable appreciation of the currency in the near future, neither eliminates the risks associated with the possibility of depreciation of the euro against the currency chosen, nor exempts the proffering party from its obligations of transparency in the pre-contractual information that it provides to its potential clients and in the text of the clauses of the mortgage loan.

In order for it to have some effectiveness, the bank must provide prior clear and understandable information about the consequences of making use of that clause and offer the non-expert consumer adequate information during the execution of the contract.

**50**. - There is also no need to raise a preliminary ruling on this issue, because the CJEU is not being asked to interpret a rule of EU law but to make a concrete legal assessment of the facts at issue.

We refer to what was stated in paragraph 28 of the judgment of the CJEU of 11 September 2008, case C-279/06, *Cepsa* case, which we have transcribed in a previous section.

**51**. - No matter how much Barclays alleges the difference between the loan object of this appeal and the one which is the subject of the main proceedings in respect of which the questions were referred giving rise to the judgments of the CJEU, and in particular the STJUE of the *Andriciuc* case,

the doctrine established by the CJEU regarding the control of transparency of the clauses on foreign currency denomination of the loan is applicable to the case object of this appeal.

And the conclusion that emerges from this application is, as has been stated, that the disputed clauses do not meet the transparency standards that since ruling 241/2013, of 9 November, we have based on articles 60.2, 80.1 and 82.1 of the TRLCU and article 4.2 of the Directive on unfair terms, since the borrowers did not receive adequate information about the nature of the risks associated with the clauses relating to the denomination of the loan in foreign currency and its equivalence with the currency in which the borrowers receive their income, nor on the serious consequences associated with the materialisation of such risks.

**52**. - For these reasons, the appeal must be accepted since the legal infraction reported has occurred. The decision of the Provincial Court must be reversed, the appeal must be dismissed and the judgment of the Court of First Instance confirmed.

**53**. - The partial nullity of the contract is hereby declared, which supposes the elimination of the references to the currency denomination of the loan, which remains as a loan granted in Euros and amortised in Euros.

The total nullity of the loan contract entails serious harm for the consumer, who would be obliged to return all the capital pending amortisation in one payment, so that the exercise of the annulment for abuse of the non-negotiated clause can harm them more than the proffering party (judgment of the CJEU of 30 April 2014 (*Kásler and Káslerné Rábai* case, case C-26/13, paragraphs 83 and 84).

If the clause in which the amount of the capital of the loan appears, in foreign currency and its equivalence in Euros, were eliminated, as well as the exchange mechanism when the instalments are paid in Euros, the contract could not subsist, because for the execution of the contract, the denomination in a given currency is necessary, both of the amount that was lent by the bank and of the monthly instalments paid by the borrowers, which determines the amortisation that must be made of the outstanding capital.

**54**. - What has been done in this judgment constitutes, in reality, the substitution of the unfair clause for a contractual regime foreseen in the contract (which establishes the possibility that the capital is denominated in Euros) and that responds to the requirements of a national provision, as contained in precepts such as articles 1170 of the Civil Code and 312 of the Commercial Code, which

requires the denomination in a given monetary unit of the amounts stipulated in the pecuniary obligations, which is an inherent requirement of monetary obligations.

There is no problem of separability of the invalid content from the loan contract.

**55**. - This substitution of a contractual regime is possible when it comes to avoiding the total nullity of the contract in which the unfair clauses are contained, so as not to harm the consumer, since, otherwise, the purpose of the Directive on unfair clauses would be contravened.

This was stated by the CJEU in the judgment of 30 April 2014 (*Kásler and Káslerné Rábai* case, C-26/13), paragraphs 76 to 85.

**NINTH**.- *Costs and deposits*

**1**. - The acceptance of the cassation appeal means that there is no express imposition of the costs of that appeal. The dismissal of the extraordinary appeal for procedural infringement incurs the condemnation of the appellants to pay the levels of that appeal.

The acceptance of the cassation appeal supposes the dismissal of the appeal, therefore the appellant must be condemned to pay the levels of that appeal.

All this in application of articles 394 and 398 of the Law of Civil Procedure.

**2**.- The deposit constituted for the filing of the cassation appeal shall be returned, and the one for the filing of the extraordinary appeal for procedural infringement lost, in accordance with additional provision 15, sections 8 and 9, of the Organic Law of the Judicial Power.

**RULING**

For all the above, in the name of the King and the authority conferred by the Constitution, this court has decided

**1**. - To dismiss the extraordinary appeal for procedural infraction and accept the cassation appeal filed by XXX and YYY against judgment 157/2015, of 14 April, issued by the Eighth Section of the Provincial Court of Madrid, in appeal no. 537/2014.

**2**. - Reverse the aforementioned judgment, which we declare without value or effect and, instead, dismiss the appeal filed by Barclays Bank S.A. against judgment 103/2014, of 12 May, of Madrid Court of First Instance no. 84 and we condemn the appellant to the payment of the appeal costs.

**3**. - Not to expressly impose the costs of the cassation appeal. To order the appellants to pay the costs of the extraordinary appeal for procedural infringement.

**4**. - To return the deposit constituted to file the cassation appeal to the claimant, and to retain that constituted to file the extraordinary appeal for procedural infringement.

Dispatch the corresponding certification to the aforementioned court with the return of the remitted decrees and appeal.

Notify this resolution to the parties and insert in the legislative collection.

And thus it was agreed and signed.