Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

13 July 2023 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Mortgage loan agreements – Term providing for a variable interest rate – Reference index based on the annual percentage rates of charge (APRC) of mortgage loans granted by credit institutions – Index established by a regulatory or administrative act – Information contained in the preamble to that act – Check relating to the requirement of transparency – Assessment of the unfair nature of the term)

In Case C-265/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia n. 17 de Palma de Mallorca (Court of First Instance No 17, Palma de Mallorca, Spain), made by decision of 19 April 2022, received at the Court on 20 April 2022, in the proceedings

ZR,

PI

v

Banco Santander, SA,

THE COURT (Ninth Chamber),

composed of L.S. Rossi, President of the Chamber, J.-C. Bonichot and O. Spineanu-Matei (Rapporteur), Judges,

Advocate General: L. Medina,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2023,

after considering the observations submitted on behalf of:

– PI and ZR, by F. Fuster-Fabra Toapanta and A. Rebollo Redondo, abogados,

– Banco Santander, SA, by J.M. Rodríguez Cárcamo and A.M. Rodríguez Conde, abogados,

– the Spanish Government, by A. Ballesteros Panizo, acting as Agent,

– the European Commission, by S. Pardo Quintillán and N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of, first, Articles 5 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22), and, secondly, Article 3(1), Article 4, Article 5 and Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between ZR and PI, on the one hand, and Banco Santander, SA, on the other, concerning the validity of the clause providing for periodic review of the interest rate applicable to a mortgage loan granted to ZR and PI by Banco Santander's predecessor in law.

Legal context

European Union law

Directive 93/13

3 Article 3(1) of Directive 93/13 provides:

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

4 Article 4 of that directive provides:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as

against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.'

5 Article 5 of that directive is worded as follows:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. The rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).'

Directive 2005/29

6 In accordance with Article 19 of Directive 2005/29, the Member States had to adopt and publish, at the latest by 12 June 2007, the laws, regulations and administrative provisions necessary to comply with that directive and forthwith to inform the European Commission thereof. Those provisions were to apply by 12 December 2007 at the latest.

Spanish law

7 Article 1258 of the Código Civil (Civil Code) provides:

'Contracts are concluded by mere consent and thereafter bind the parties not only to compliance with what has been expressly agreed but also to all of the consequences which, depending on their nature, are consistent with good faith, custom and the law.'

8 Directive 93/13 was transposed into Spanish law by ley 7/98, sobre condiciones generales de la contratación (Law 7/98 on general conditions of contract) of 13 April 1998 (BOE No 89 of 14 April 1998, p. 12304).

9 Article 7 of that law provides:

'The following general conditions shall be deemed not to be included in the contract:

(a) Those of which the consumer did not have a genuine opportunity to take full cognisance at the time when the contract was concluded or which were not signed, where this is necessary, in accordance with Article 5.

(b) Those that are illegible, ambiguous, obscure or incomprehensible, unless, in the case of the latter, they have been expressly accepted in writing by the contracting party and comply with the specific rules on the required transparency of contractual terms in the field concerned.'

10 Article 8 of that law provides:

'1. General conditions which infringe the provisions of this Law or any other rule ordering or prohibiting certain conduct, to the detriment of the contracting party, shall automatically be void, unless they provide for different consequences in the event of breach.

2. In particular, where a contract has been concluded with a consumer …, general conditions which are unfair shall be void.'

11 Article 4(1) of Ley 3/1991, de Competencia Desleal (Law 3/1991 on unfair competition) of 10 January 1991 (BOE No 10 of 11 January 1991, p. 959), provides:

‘Any conduct which is objectively contrary to the requirements of good faith is deemed to be unfair.

In relations with consumers and users, any conduct on the part of a trader or professional practitioner which is contrary to professional diligence, this being understood as the standard of special skill and care which a trader may be expected to exercise in the application of honest market practices, and which materially distorts or is capable of materially distorting the economic behaviour of the average consumer, or the average member of the group forming the subject of the practice, in the case of a commercial practice directed at a specific group of consumers, shall be deemed contrary to the requirements of good faith.

For the purposes of this Law, economic behaviour of the consumer or user shall mean any decision by which the consumer or user chooses to act or to refrain from acting in relation to the:

(a) Selection of a tender or supplier.

(b) Purchase of goods or services and, where appropriate, the terms and conditions of that purchase.

(c) Payment of the price, in whole or in part, or any other form of payment.

…’

12 Article 7 of that law, entitled ‘Misleading omissions’, is worded as follows:

‘1. The omission or concealment of information necessary to enable the addressee to make or be capable of making a decision on his or her economic behaviour with due knowledge of the facts is deemed to be unfair. It is also unfair for information to be given which is unclear, unintelligible or ambiguous, for information not to be given at the proper time, and for the commercial purpose of that practice not to be disclosed, where this is not apparent from the context.

2. For the purposes of determining the misleading nature of the acts referred to in the preceding paragraph, regard shall be had to the factual context in which those acts occur, account being taken of all the characteristics and circumstances thereof and the limitations of the means of communication used.’

13 The Banco de España (Bank of Spain) adopted circular 8/1990, a entidades de crédito, sobre transparencia de las operaciones y protección de la clientela (Notice 8/1990, to credit institutions, on the transparency of transactions and the protection of customers) of 7 September 1990 (BOE No 226 of 20 September 1990, p. 27498). It was amended, inter alia, by circular 5/1994, a entidades de crédito (Notice 5/1994, to credit institutions) of 22 July 1994 (BOE No 184 of 3 August 1994, p. 25106). Following its amendment by Notice 5/1994, Notice 8/1990 established certain official indices or reference rates for mortgage loans. The latter included various average rates for mortgage loans of a term of greater than three years, for the acquisition of a residential property on the private housing market (the Índices de Referencia de Préstamos Hipotecarios (Mortgage Loan Reference Indices (‘the IRPHs’)), including the IRPH relating to loans granted by the banks (‘the IRPH of the banks’) and the IRPH relating to loans granted by all credit institutions (‘the IRPH of credit institutions’).

14 The preamble to Notice 5/1994, the amending notice referred to in the preceding paragraph, contained the following passage:

‘The average rates selected are, in the final analysis, annual percentage rates of charge [APRC]. The average rates of mortgage loans from banks and all entities for the acquisition of a residential property on the private housing market are entirely APRCs, since they also include the effect of fees. Consequently, using them simply and directly as contractual rates would have the effect of putting the [APRC] for the mortgage transaction above the market rate. In order to bring the [APRC] for that transaction into line with the market rate, it would be necessary to apply a negative margin the value of which would vary depending on the transaction fees and the frequency of payments.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 On 12 May 2006, ZR and PI, on the one hand, and Banco Santander’s predecessor in law, on the other, entered into a mortgage loan agreement for the sum of EUR 197 934.54.

16 In accordance with Article 3 *bis* of that agreement (‘the term at issue’), the interest rate is variable, with a new rate to be determined at the end of each 12-month period, for the following 12 months, until the end of that agreement. The new interest rate is set in relation to a ‘reference rate’, namely the IRPH of credit institutions, increased by 0.20 percentage points, or at a ‘substitute reference rate’, namely the IRPH of banks, increased by 0.50 percentage points.

17 Paragraph 3 of the term at issue defines the reference rate as follows:

‘The reference rate shall be the [IRPH of credit institutions], defined as the simple average of the average interest rates weighted by the principal amounts of mortgage-secured loan transactions of a term equal to or greater than three years, concluded for the purposes of acquiring a residential property on the private housing market, which were initiated or renewed by all [entities, namely] banks, savings banks and mortgage credit companies in the month to which the index relates, the rate taken for reference being the last of the average rates published by the Bank of Spain in the [BOE] prior to the start of each new interest period and within the three calendar months preceding that period.’

18 Paragraph 3 defines in similar terms the substitute reference rate that applies where the reference rate has not been published.

19 It is also stated in the term at issue that the reference rate and the substitute reference rate are described in Annex VIII to Notice 8/1990.

20 On 13 February 2020, ZR and PI brought an action before the Juzgado de Primera Instancia n. 17 de Palma de Mallorca (Court of First Instance No 17, Palma de Mallorca, Spain), the referring court, seeking a declaration that the term at issue is null and void owing to its unfair nature and an order that Banco Santander pay compensation for the damage which ZR and PI claim to have suffered as a result of the application of that term.

21 ZR and PI submit before that court that the fact that the term at issue refers, for the purposes of the annual review of the interest rate on their loan, to the IRPHs, while providing for a small increase in those rates, namely 0.20 percentage points in the case of the IRPH of credit institutions or 0.50 percentage points in the case of the IRPH of banks, is misleading. Such a presentation, consisting in a relatively limited increase, would encourage prospective borrowers to enter into a

loan where the rate can be revised by reference to an IRPH rather than by reference to the average Euro Interbank Offer Rate ('the Euribor index'), whereas, with a much higher mark-up, which may even be 2%, a reference to the Euribor index would result in the application of a lower revised interest rate. That follows from the fact that, unlike the Euribor index, the IRPHs are calculated on the basis of rates which take fees into account. According to the applicants in the main proceedings, the damage which they claim to have suffered as a result of the application of the term at issue amounts to EUR 39 799.25.

22 The defendant in the main proceedings challenges that claim as regards both the assertion that the term at issue is unfair and the assessment of the alleged damage. It also maintains that that term was individually negotiated and that it is lawful in principle, since the IRPHs are official and public indices, and therefore accessible to consumers, who may therefore be aware of the relevant data as regards their method of calculation and historical evolution by referring to the data in the agreement at issue in the main proceedings.

23 In the course of the proceedings before the referring court, the applicants in the main proceedings also submitted that the term at issue should be declared void on the ground that, since that term designates an IRPH as the reference rate for the periodic review of the interest rate of the loan concerned, the term at issue should have provided for applying a negative margin, as required by Notice 5/1994, and not a positive margin.

24 The referring court makes clear that the preamble to Notice 5/1994 has no normative value. However, that court considers that the preamble shows that the administrative authority which is the author of that notice took the view that the marketing of products including a reference to an IRPH should be accompanied by the application of a negative margin.

25 As regards the presentation of the term at issue, the referring court observes that the agreement at issue in the main proceedings does not mention the information in that preamble concerning the application of a negative margin to the IRPHs in order to align them with the market rate.

26 As regards the effects of the term at issue, that court states that the reference to an IRPH is inherently unfavourable to the borrowers, in so far as such an index consists in an average of the interest rates of all the current loan transactions concerned, those rates already being made up in part of fees and increases.

27 Consequently, the referring court considers that the lack of information given to borrowers as regards the content of the preamble to Notice 5/1994, and therefore the characteristics of the IRPHs, but also, more generally, the respective levels of the IRPHs and the Euribor index, might be contrary to good faith and give rise to an imbalance to the detriment of consumers, warranting the classification of the term at issue as unfair.

28 Furthermore, it considers that the lack of information as regards the content of the preamble to Notice 5/1994, combined with the application of a positive margin slightly lower than those applied for loans the rates of which are set by reference to the Euribor index, could constitute a commercial ploy, intended to give the impression that the interest burden will be more favourable. On the contrary, the communication to the prospective borrowers of the information set out in the preamble to Notice 5/1994 would enable them to take an informed decision.

29 In that context, the referring court contemplates the possibility that the inclusion of the term at issue in the loan agreement at issue in the main proceedings may be regarded as an unfair

commercial practice, within the meaning of Article 5(1)(b) of Directive 2005/29, since it would materially distort or be likely to materially distort the economic behaviour of the average consumer as a result of the lack of information concerning the need to apply a negative margin where the reference rate is an IRPH. In that regard, it notes that, in accordance with the case-law of the Court of Justice, the existence of an unfair commercial practice, within the meaning of Directive 2005/29, in relation to a contractual term is a factor in assessing whether that term is unfair.

30 In those circumstances the Juzgado de Primera Instancia n. 17 de Palma de Mallorca (Court of First Instance No 17, Palma de Mallorca) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Given that the calculation of [the IRPH of credit institutions] includes any fees and margins applied, which are incorporated into the interest rate, thus making that rate more onerous for the consumer than the other [APRCs] on the market, and given that, … Notice 5/1994 – which represents the regulatory body's policy rule in this sphere – [requires] such margins to be negative, a requirement which financial institutions have widely failed to disclose and fulfil, is a complete departure from the regulatory body's policy rule contrary to Articles 5 and 7 of Directive [2005/29]?

(2) If it is shown that departing from the aforementioned policy rule is contrary to Articles 5 and 7 of Directive [2005/29], in accordance with the case-law of the Court … in Case C-689/20, does that unfair practice constitute an element in the evaluation and assessment of the unfairness of the clause in question and is it contrary to Articles 3 and 4 of Directive 93/13?

(3) If … Notice 5/1994, which is specific to the financial sector but not common knowledge to the general public, was not taken into account in any way, and if the fact of its not being taken into account is declared to be contrary to Article 7 of Directive [2005/29], does this constitute an element in the assessment of unfairness under Article 6(1) of Directive 93/13 [and does this] warrant the application of a transparency check to the aforementioned index comprising a "reference rate plus margin"?

(4) Do [Article 3(1), Article 4 and Article 5] of Directive [93/13] preclude national case-law … according to which a failure to apply a negative margin [to the IRPH] does not constitute an unfair practice, despite the requirement to do so laid down in the preamble to [Notice 5/1994], and [having regard to] the fact that [loans whose variable rates are calculated by reference to the] IRPH, which is less advantageous than all the existing [APRCs], [have] been marketed as if [they] were [products] as advantageous as [loans whose variable rates are calculated by reference to] the Euribor [index], even though [no account is taken of] the requirement to add a negative margin [to the IRPH] and, [consequently], contracts may cease to be concluded because the clauses providing for [the application of the IRPH] are considered to be void, banks may in future refrain from using those clauses because marketing this service [to] vulnerable consumers may affect [their] economic behaviour and it may be found that these clauses must be excluded from commercial contracts because they are unfair in view of the fact that they have been included [for the calculation] of the interest [rates], contrary to Directive [2005/29]?

(5) Is it contrary to Article 6(1) of Directive [93/13] for a disclosure and unfairness check not to be carried out [in respect of a clause providing for the variable interest rate of a loan agreement to be determined by reference to the IRPH] in the case where a margin has been covertly imposed, given that, in an offer made by a bank, the margin must be negative, and for consumers not to have been made aware at the pre-contractual information stage of the economic behaviour of the interest applied to their loan, contrary to Directive [2005/29]?'

Consideration of the questions referred

The admissibility of the first to third and fifth questions

31 By its first question, the referring court asks the Court, in essence, whether a variable-rate loan agreement concluded between a seller or supplier and a consumer, of which the clause laying down the detailed rules for periodic review of the interest rate takes as a reference an official index to which an increase is applied, thereby departing from the information contained in the act by which the competent authority established that index – which stated, on the contrary, that, in view of its method of calculation, it is necessary to apply a negative margin in order to align the APRCs of the loan with the market rate – is compatible with Articles 5 and 7 of Directive 2005/29.

32 By its second and third questions, that court asks for certain clarifications in the event that the first question is answered in the negative.

33 Lastly, by its fifth question, the referring court raises the issue of the interpretation of Article 6(1) of Directive 93/13 in the context of the conclusion of a loan agreement, the interest rate of which is presented in a misleading way, which does not comply with the requirements of Directive 2005/29.

34 It is settled case-law that questions concerning EU law referred by a national court enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 26 and the case-law cited).

35 To that end, in order to enable the Court to give an interpretation of EU law that is useful to the national court, the request for a preliminary ruling must, under Article 94(c) of the Rules of Procedure of the Court of Justice, contain a statement of the reasons which prompted the referring court to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings (judgment of 26 January 2023, *Ministerstvo na vatreshnite raboti (Recording of biometric and genetic data by the police)*, C-205/21, EU:C:2023:49, paragraph 55 and the case-law cited).

36 The first to third and fifth questions referred presuppose that Directive 2005/29 is applicable to the dispute in the main proceedings.

37 In that regard, it should be borne in mind that a new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (judgments of 16 December 2010, *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:779, paragraph 32, and of 26 March 2015, *Commission* v *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraph 32).

38 Therefore, as regards directives more specifically, it is, as a general rule, only legal situations existing after the expiry of the period prescribed for transposition of a directive which fall, *ratione temporis*, within the scope of that directive (see, to that effect, judgment of 15 January 2019, *E.B.*, C-258/17, EU:C:2019:17, paragraph 53 and the case-law cited).

39 In accordance with Article 19 of Directive 2005/29, the Member States had to adopt and publish, by 12 June 2007 at the latest, the provisions necessary to comply with that directive and those provisions were to be applied by 12 December 2007 at the latest.

40 In practice, the Kingdom of Spain and the Commission stated at the hearing that Directive 2005/29 had finally been transposed into Spanish law by ley 29/2009, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios (Law 29/2009 amending the statutory rules governing unfair competition and advertising in order to improve the protection of consumers and users), of 30 December 2009 (BOE No 315 of 31 December 2009, p. 112039).

41 It follows from the foregoing that Directive 2005/29 was not applicable on the date of conclusion of the contract at issue in the main proceedings, which took place on 12 May 2006.

42 Consequently, the interpretation of that directive has no bearing on the outcome of the dispute in the main proceedings, with the result that the first to third questions and, in part, the fifth question, which relate, directly or indirectly, to that interpretation, are inadmissible.

43 As regards the fifth question, in so far as it concerns the interpretation of Article 6(1) of Directive 93/13, the request for a preliminary ruling does not provide the information required by Article 94(c) of the Rules of Procedure, which is intended to enable the Court to give a useful answer to the referring court, since that request does not set out the reasons which prompted that court to enquire about the interpretation of that provision.

44 Consequently, the fifth question is also inadmissible in its entirety.

The fourth question

45 By its fourth question, the referring court seeks, in essence, to ascertain whether Article 3(1), Article 4 and Article 5 of Directive 93/13 must be interpreted as precluding national case-law according to which a term in a variable-rate loan agreement, which takes an IRPH as the reference index, is not unfair by applying an increase to it, contrary to the information set out in the preamble to Notice 5/1994.

46 As a preliminary point, it should be noted that, first, the order for reference does not contain any information as to the exact content of the national case-law referred to in that question, with the result that the Court does not have before it the information necessary to give an answer in the light of that case-law.

47 Secondly, it follows from the reasoning in the order for reference that that question concerns not only the fact that the term at issue does not provide for the application of a negative margin to the IRPH designated as the reference index, in order to take account of the effects of the method of calculating the IRPHs as described in the preamble to Notice 5/1994, but also the lack of information given to borrowers during the pre-contractual phase as to the existence and content of the aforementioned information, which is corroborated in particular by the reference to Article 5 of Directive 93/13, a provision which concerns the requirement of transparency.

48 Thirdly and lastly, it also follows from that reasoning that, first, the term at issue refers to Notice 8/1990 in so far as the latter describes the IRPHs in Annex VIII thereto and, secondly, that the preamble containing the information relating to the effects of the method for calculating the IRPHs appears not in that notice but in Notice 5/1994, both of which were the subject of an official publication.

49 In the light of the foregoing, it must be held that, by its fourth question, the referring court asks, in essence, whether Article 3(1), Article 4 and Article 5 of Directive 93/13 must be interpreted as meaning that, in order to assess the transparency and potential unfairness of a term in a variable-rate mortgage loan agreement that designates as the reference index, for the periodic review of the interest rate applicable to that loan, an index established by a notice the subject of an official publication, to which an increase is applied, the content of the information contained in another notice – indicating the need to apply to that index, in view of its method of calculation, a negative margin in order to align that interest rate with the market rate – is relevant.

50 It must be stated that, according to the Court's settled case-law, the relevant jurisdiction of the Court extends to the interpretation of the concepts in Directive 93/13 and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions thereof, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account (see, to that effect, judgment of 16 January 2014, *Constructora Principado*, C-226/12, EU:C:2014:10, paragraph 20 and the case-law cited, and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 52 and the case-law cited).

51 As regards, in the first place, the requirement of transparency of contractual terms, as is clear from Article 4(2) and Article 5 of Directive 93/13, it should be recalled that information, before concluding a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he or she wishes to be bound by the terms previously drawn up by the seller or supplier (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 48 and the case-law cited).

52 Consequently, since the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his or her level of knowledge, that requirement must be understood in a broad sense (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 44 and the case-law cited).

53 Specifically, the requirement that a contractual term must be drafted in plain intelligible language requires, in the case of loan agreements, financial institutions to provide borrowers with sufficient information to enable them to take prudent and well-informed decisions (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 51). In that regard, it is for the national court, when it considers all the circumstances surrounding the conclusion of a contract, to ascertain whether all the information likely to have a bearing on the extent of his commitment have been communicated to the consumer, enabling him or her to estimate in particular the total cost of the loan (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 47 and the case-law cited).

54 First, whether the terms are drafted in plain intelligible language enabling an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect

consumer, to estimate such a cost and, secondly, the mention or failure to mention in the loan agreement the information regarded as being essential with regard to the nature of the goods or services which are the subject matter of that contract play a decisive role in that assessment (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 47 and the case-law cited).

55 As regards, in particular, a contractual term providing, under a mortgage loan agreement, for that loan to be remunerated by interest calculated on the basis of a variable rate established, as in the case in the main proceedings, by reference to an official index, the transparency requirement must be understood as requiring, in particular, that an average consumer, who is reasonably well-informed and reasonably observant and circumspect, is in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 51 and the case-law cited).

56 The relevant factors which the national court must take into account when carrying out the necessary checks in that regard include not only the content of the information provided by the lender in the negotiation of the loan agreement concerned, but also the fact that the main elements relating to the calculation of the reference index are easily accessible, on account of their publication (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraphs 52, 53 and 56).

57 In the present case, it is apparent from the order for reference that, first, the reference index at issue in the main proceedings was established by Notice 8/1990, which was published in the *Boletín Oficial del Estado*. Secondly, it is stated in the term at issue that that index is described in Annex VIII to that notice and that it is from the Bank of Spain.

58 It is for the referring court to satisfy itself that the information thus provided was sufficient to enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, actually to become aware of the method of calculating the reference index referred to in the term at issue.

59 As regards the question whether actual knowledge of the method for calculating the reference index referred to in the term at issue, set out in Annex VIII to Notice 8/1990, was sufficient to enable an average consumer to understand that method and to understand its economic consequences, without also informing him or her of the information in the preamble to Notice 5/1994, it is necessary for the referring court to take account of the significance, for that consumer, of that information for correctly assessing the economic consequences of the conclusion of the mortgage loan agreement at issue in the main proceedings. In that regard, the fact that the institution which issued Notice No 5/1994 considered it appropriate, by that preamble, to draw the attention of credit institutions to the level of the IRPHs in relation to the market rate and the need to apply a negative margin in order to align them with that rate may be a relevant indication that such information is useful to consumers.

60 The fact that that information, although published in the *Boletín Oficial del Estado*, appears in the preamble to Notice 5/1994 and not in the notice establishing the contractual reference index, to which the term at issue referred, namely Notice 8/1990, is also relevant to the referring court's assessment. It is, in particular, for that court to determine whether obtaining that information required the performance of a step which, falling within the scope of legal research, could not reasonably be expected of an average consumer.

61 In the second place, as regards the assessment of the possible unfairness of a term such as the term at issue, Article 3(1) of Directive 93/13 provides that a term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

62 In that regard, it should be noted as a preliminary point that it is apparent from the order for reference that the defendant in the main proceedings maintains that the term at issue was individually negotiated. It is therefore a matter for the referring court to rule in that regard, taking into consideration the rules relating to the apportionment of the burden of proof laid down in the first and third subparagraphs of Article 3(2) of Directive 93/13, which provide inter alia that where the seller or supplier claims that a standard clause has been individually negotiated, the burden of proof in this respect lies with him or her.

63 In the assessment of whether a contractual term, which has not been individually negotiated, is unfair, which is for the national court to carry out pursuant to Article 3(1) of Directive 93/13, it is for that court to assess, having regard to all the circumstances of the case, first, the possible failure to observe the requirement of good faith and, secondly, the possible existence of a significant imbalance to the detriment of the consumer within the meaning of that provision (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 49 and the case-law cited).

64 In order to define those concepts, it should be recalled, first, concerning the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', that, having regard to the 16th recital of Directive 93/13, the national court must assess whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations (judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 60 and the case-law cited).

65 Secondly, in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties, in order to evaluate whether and, as the case may be, to what extent, the contract places that consumer in a legal situation less favourable than that provided for by the national law in force (see, to that effect, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 59). As regards a term relating to the calculation of interest of a loan contract, it is also relevant to compare the method of calculation of the rate of ordinary interest laid down in that term and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market at the date of conclusion of the agreement at issue in the main proceedings for a loan of a comparable sum and term to those of the loan agreement under consideration (judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 65).

66 It should also be borne in mind that the transparent nature of a contractual term, as required under Article 5 of Directive 93/13, is one of the elements to be taken into account in the assessment of whether that term is unfair (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 49). By contrast, it follows from Article 4(2) of that directive that the fact that a term is not drafted in plain intelligible language is not, in itself, capable of rendering it unfair (see, to that effect, order of 17 November 2021, *Gómez del Moral Guasch*, C-655/20, EU:C:2021:943, paragraph 37).

67 Finally, account must be taken of Article 4(1) of Directive 93/13 in so far as it states that the unfairness of a contractual term is to be assessed, inter alia, by referring to all the other terms of the contract. In that regard, since, in the words of the preamble to Notice 5/1994, the IRPHs include the effect of fees, it may be relevant to examine the nature of any fees stipulated in other terms of the agreement at issue in the main proceedings, in order to ascertain whether there is a risk of paying twice for certain services provided by the lender.

68 It is for the referring court to assess the situation at issue in the main proceedings in the light of the information referred to in paragraphs 51 to 67 above, after determining the facts of that case and the national legal framework.

69 In the light of all of the foregoing considerations, the answer to the fourth question is that Article 3(1), Article 4 and Article 5 of Directive 93/13 must be interpreted as meaning that, in order to assess the transparency and potential unfairness of a term in a variable-rate mortgage loan agreement that designates as a reference index, for the periodic review of the interest rate applicable to that loan, an index established by a notice the subject of an official publication, to which an increase is applied, the content of the information contained in another notice – indicating the need to apply to that index, in view of its method of calculation, a negative margin in order to align that interest rate with the market rate – is relevant. It is also relevant whether that information is sufficiently accessible for an average consumer.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 3(1), Article 4 and Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,

must be interpreted as meaning that, in order to assess the transparency and potential unfairness of a term in a variable-rate mortgage loan agreement that designates as a reference index, for the periodic review of the interest rate applicable to that loan, an index established by a notice the subject of an official publication, to which an increase is applied, the content of the information contained in another notice – indicating the need to apply to that index, in view of its method of calculation, a negative margin in order to align that interest rate with the market rate – is relevant. It is also relevant whether that information is sufficiently accessible for an average consumer.

[Signatures]

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* Language of the case: Spanish.