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Provisional text

JUDGMENT OF THE COURT (First Chamber)

26 January 2017 (*)

(Reference for a preliminary ruling — Directive 93/13/EEC — Contracts concluded between sellers or suppliers and consumers — Unfair terms — Mortgage loan agreements — Mortgage enforcement proceedings — Limitation period — Function of the national courts — Res judicata)

In Case C-421/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia No 2 de Santander (Court of First Instance No 2, Santander, Spain), made by decision of 10 September 2014, received at the Court on 10 September 2014, in the proceedings

Banco Primus SA

v

Jesús Gutiérrez García,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, M. Berger, A. Borg Barthet, S. Rodin (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 September 2015,

after considering the observations submitted on behalf of:

- Banco Primus SA, by E. Vázquez Martín, abogado,
- the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,
- the European Commission, by J. Baquero Cruz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 Banco Primus SA and Mr Jesús Gutiérrez García concerning enforcement proceedings in respect of immovable property owned by the latter and used as security for a loan granted by Banco Primus.

Legal context

EU law

3 The 16th and 24th recitals of Directive 93/13 state:

‘Whereas ... the requirement of good faith may be satisfied by the trader where he deals fairly and equitably with the other party whose legitimate interests he should take into account;

...

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.’

4 Article 1(1) of that directive provides:

‘The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.’

5 Article 3 of that directive is worded as follows:

‘1. 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.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

...’

6 Article 4 of Directive 93/13 states:

‘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.’

7 Article 6(1) of that directive provides:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

8 Under Article 7(1) of the directive:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

Spanish law

9 Ley 1/2000, de Enjuiciamiento Civil (Law 1/2000 on the Civil Procedure Code), of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575), as amended by Ley 1/2013, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013 on the protection of mortgagors, restructuring of debt and social rent), of 14 May 2013 (BOE No 116 of 15 May 2013, p. 36373), then by Real Decreto-Ley 7/2013, de medidas urgentes de naturaleza tributaria, presupuestaria y de fomento de la investigación, el desarrollo y la innovación (Decree-Law 7/2013 on urgent

fiscal and budgetary measures and promoting research, development and innovation), of 28 June 2013 (BOE No 155 of 29 June 2013, p. 48767), then by Real Decreto-Ley 11/2014, de medidas urgentes en materia concursal (Decree-Law 11/2014 on urgent measures in the area of bankruptcy), of 5 September 2014 (BOE No 217 of 6 September 2014, p. 69767) ('the LEC').

10 Article 695 of the LEC, relating to the procedure for objecting to mortgage enforcement proceedings, reads as follows:

'1. In proceedings under this chapter, an objection to enforcement by the party against whom enforcement is sought may be admitted only if it is based on the following grounds:

...

(4) the unfairness of a contractual term constituting the basis for enforcement or which has enabled the amount due to be calculated.

...

4. An appeal may lie against an order ... rejecting an objection on the ground laid down in paragraph 1(4).

Save in those circumstances, no appeal shall lie against orders adjudicating upon the objection to enforcement referred to in the present article and the effects of those orders shall be confined exclusively to the enforcement proceedings in which they are made.'

11 Pursuant to Article 556(1) of the LEC, an objection to enforcement on one of the grounds set out in Article 695 of the LEC must be lodged within 10 days of notification of the enforcement order.

12 According to Article 557(1) of the LEC, relating to the procedure for objecting to enforcement based on instruments that are neither judicial nor arbitral:

'Where enforcement is ordered in respect of the enforceable orders referred to in Article 517.2(4), (5), (6) and (7), and for other enforceable orders mentioned in Article 517.2(9), the party against whom enforcement is sought may, within the periods and in the forms prescribed in the preceding article, object to enforcement only if he relies on one of the following grounds:

...

(7) The document contains unfair terms.'

13 Pursuant to Article 693(2) of the LEC, concerning the accelerated repayment of debts repayable in instalments:

‘The total amount owed by way of principal and interest may be claimed where it has been agreed that repayment in full is due in the event of non-payment of a number of instalments such that the debtor has failed to fulfil his obligation for a period of at least three months, and provided that such agreement is recorded in the instrument creating the mortgage.’

14 The First Transitional Provision of Law 1/2013 states:

‘This Law shall apply to judicial and extrajudicial mortgage enforcement proceedings in progress on the date of entry into force of the Law, provided that eviction has not taken place.’

15 Pursuant to the fourth transitional provision of that law:

‘1. The amendments to [Law 1/2000 of 7 January 2000 on the Civil Procedure Code] introduced by the present Law shall apply to enforcement proceedings already in progress at the date of entry into force of the present Law, only in respect of those enforcement measures still to be taken.

2. In any event, in enforcement proceedings in progress on the date of the entry into force of the present Law, in which the 10-day period for lodging an objection to enforcement laid down by Article 556.1 of [Law 1/2000 of 7 January 2000 on the Civil Procedure Code] has expired, the parties against whom enforcement is sought shall have a period of one month within which to submit an extraordinary application objecting to enforcement based on the existence of new grounds for opposition, set out in Article 557.1(7) and Article 695.1(4) of [Law 1/2000 of 7 January 2000 on the Civil Procedure Code].

In accordance with the provisions of Article 558 et seq. and Article 695 of [Law 1/2000 of 7 January 2000 on the Civil Procedure Code], the time limit of one month shall start to run from the day following the entry into force of the present Law, and the effect of the lodging by the parties of the application objecting to enforcement shall be to suspend proceedings until the application has been adjudicated upon.

The present transitional provision shall be applicable to all enforcement proceedings that have not led to the buyer’s taking possession of the property in accordance with the provisions of Article 675 of [Law 1/2000 of 7 January 2000 on the Civil Procedure Code].

3. Likewise, in enforcement proceedings in progress in which, on the entry into force of the present Law, the 10-day period for objecting to enforcement laid down by Article 556.1 of [Law 1/2000 of 7 January 2000 on the Civil Procedure Code] has already started to run, the parties against whom enforcement is sought shall enjoy the same period of one month provided for in the previous paragraph in order to submit an application on the basis of the existence of any of the grounds for objecting to

enforcement provided for under Articles 557 and 695 of [Law 1/2000 of 7 January 2000 on the Civil Procedure Code].

4. Publication of the present provision shall be considered full and valid notification for the purposes of notifying and calculating the periods provided for in paragraphs 2 and 3 of the present article, without its being necessary in any circumstances expressly to make an order in that respect.

...’

16 Furthermore, Article 136 of the LEC provides:

‘Once the time limit for carrying out a procedural step has elapsed, the step in question shall become time-barred and the opportunity to carry it out shall be lost. The Court Clerk shall leave a record of the elapse of the time limit in an official document and shall order the measures to be adopted or shall serve notice to the court so the corresponding decision can be ordered.’

17 Article 207(3) and (4) of the LEC adds:

‘3. Final decisions become *res judicata* and the court hearing the case in which they were delivered shall in any event abide by their terms.

4. Once the period for lodging an appeal against a decision has elapsed without any appeal having been brought, the decision shall become final and *res judicata* and the court hearing the case in which it was delivered shall in any event abide by its terms.’

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

18 On 12 June 2008, Banco Primus granted a loan to Mr Gutiérrez García which was secured by a mortgage on his home. The loan was granted for a term of 47 years, and was repayable in 564 monthly instalments. Following the failure of Mr Gutiérrez García to pay seven successive monthly instalments in repayment of the loan, the bank triggered the accelerated repayment procedure on 23 March 2010 in accordance with Clause 6a of the loan agreement. Banco Primus sought payment of the outstanding total principal plus ordinary and default interest and costs. It also proceeded to auction the mortgaged property. Since there were no bidders for the property at the auction which took place on 11 January 2011, on 21 March 2011 and by enforceable decision the referring court awarded the property to Banco Primus at a price which represented 50% of its estimated value. On 6 April 2011, Banco Primus sought to obtain possession of the property, which was deferred as a result of three successive incidents, including the one which led to the adoption of the order of 12 June 2013 which deemed Clause 6 of the loan agreement, relating to default interest, to be unfair. The adoption of the decision of 8 April 2014, following the third objection, terminated the suspension of the eviction.

19 On 11 June 2014, Mr Gutiérrez García lodged, before the referring court, an extraordinary application objecting to the mortgage enforcement proceedings on the ground that Clause 6 of the loan agreement was unfair.

20 Following that opposition, the referring court, after having suspended the eviction proceedings by a decision of 16 June 2014, expressed doubts relating to the unfairness, within the meaning of Directive 93/13, of certain terms of the loan agreement other than the term concerning default interest, namely:

- Clause 3 relating to ordinary interest, which provides for the calculation thereof on the basis of a formula, by which the outstanding loan principal and interest accrued is divided by the number of days in a financial year, namely 360 days, and
- Clause 6a relating to accelerated repayment, pursuant to which Banco Primus may demand the immediate repayment of the principal, of the interest and other costs, in particular in the event that the borrower fails to pay, on the agreed date, any amount owed by way of principal, interest or amounts advanced by the bank.

21 However, that court found, first of all, that Mr Gutiérrez García's opposition was filed out of time, since it was made after the limitation period laid down by the Fourth Transitional Provision of Law 1/2013 had expired.

22 The referring court found, secondly, that Article 207 of the LEC, which governs the principle of *res judicata*, precludes it from re-examining the unfair nature of the terms of the loan agreement at issue in the main proceedings, since the lawfulness of that agreement, with regard to Directive 93/13, had already been ascertained in the context of the decision of 12 June 2013, which has become final.

23 Moreover, the referring court noted that, even if Clause 6a of the loan agreement at issue in the main proceedings were be found to be unfair, the case-law of the Tribunal Supremo (Supreme Court, Spain) would prevent it from finding that term to be null and void and from rejecting it, since Banco Primus did not apply that term in the case at hand. Rather, it complied with the requirements of Article 693(2) of the LEC in waiting for Mr Gutiérrez García to default on payment of seven monthly instalments before triggering the accelerated repayment procedure.

24 Accordingly, in order to determine the extent of its powers in the light of Directive 93/13, the referring court, first, harbours doubts as to the compatibility of the Fourth Transitional Provision of Law 1/2013 with that directive and, second, as to whether, in complex mortgage enforcement proceedings, such as those at issue in the main proceedings, it is obliged by that directive, in spite of the requirements of Article 207 of the LEC, to examine of its own motion the terms of a loan agreement which has already been put to such an examination with regard to Directive 93/13 in the context of a decision which has become *res judicata*. Third, that court also seeks details as to the assessment criteria to be used to determine whether Clauses 3 and 6a of the loan

agreement at issue in the main proceedings are unfair and the consequences to be drawn from such a finding.

25 In those circumstances, the Juzgado de Primera Instancia No 2 de Santander (Court of First Instance No 2, Santander, Spain), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must the Fourth Transitional Provision of Law No 1/2013 be interpreted so as not to constitute an obstacle to the protection of the consumer?’

(2) Under Directive 93/13, and in particular Articles 6(1) and 7(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, is a consumer permitted to raise a complaint regarding the presence of unfair terms outside the period specified under national legislation for raising such a complaint, and is the national court required to examine such terms?

(3) Under Directive 93/13, and in particular Articles 6(1) and 7(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, is a national court required to assess, of its own motion, whether a term is unfair and to determine the appropriate consequences, even where an earlier decision of that court reached the opposite conclusion or declined to make such an assessment and that decision was final under national procedural law?

(4) In what way may the quality/price ratio affect the review of the unfairness of non-essential terms of a contract? When conducting an indirect review of such factors, is it relevant to have regard to the limits imposed on prices under national legislation? Is it possible that terms that are valid when viewed in abstract cease to be so where it is found that the price of the transaction is very high by comparison with the market standard?

(5) For the purposes of Article 4 of Directive 93/13, can circumstances arising after the conclusion of the contract be taken into account if an examination of the national legislation suggests that this is required?

(6) Must Article 693(2) [of the LEC] be interpreted so as not to constitute an obstacle to the protection of consumer interests?

(7) Under Directive 93/13, and in particular Articles 6(1) and 7(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, must a national court, when it finds there to be an unfair term concerning accelerated repayment, declare that that term does not form part of the contract and determine the consequences inherent in such a finding, even where the seller or supplier has waited the minimum time provided for in the national provision?’

26 The referring court requested the Court of Justice to determine the case pursuant to an expedited procedure in accordance with Article 105(1) of the Rules of Procedure of the Court of Justice. That request was rejected by order of the President of the Court of

11 November 2014, *Banco Primus* (C-421/14, not published, EU:C:2014:2367), on the ground that, inter alia, as indicated by the referring court to the Court of Justice in a letter of 29 September 2014, the former had stayed the enforcement proceedings by decision of 16 June 2014, with the result that Mr Gutiérrez García was not at immediate risk of losing his home.

Consideration of the questions referred

Admissibility

27 In its written observations, the Spanish Government expresses doubts as to the admissibility of the questions referred, on the ground that the Court of Justice would not be able to provide the referring court with answers which will be of use to it and enable it to determine the case before it. The mortgage enforcement proceedings have been definitely terminated and the referring court will no longer be able to take any measures in relation to them, since it closed those proceedings by ordering the eviction of the debtor and the other occupants by means of an order dated 8 April 2014 which has become *res judicata*.

28 Banco Primus does not expressly claim that the request for a preliminary ruling is inadmissible, but raises arguments similar to those on which that plea of inadmissibility is based.

29 In that regard, it is necessary to state at the outset that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 76 and the case-law cited).

30 The Court may refuse to rule on a question referred for a preliminary ruling by a national court 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 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 77 and the case-law cited).

31 That is not the case in this instance.

32 As stated by the Advocate General in point 30 of his Opinion, it is apparent, from the national legislation submitted by the referring court, that the mortgage enforcement proceedings at issue in the main proceedings have not been completed since possession has not been taken of the property, as the Spanish Government confirmed in its written observations. Accordingly, the Fourth Transitional Provision of Law 1/2013 provides that the provision is applicable ‘to all enforcement proceedings that have not led to the buyer’s taking possession of the property’.

33 In those circumstances, and taking into account the fact that it is for the Court to provide the referring court with an answer which will be of use to it and enable it to determine the case before it (see judgments of 28 November 2000, *Roquette Frères*, C-88/99, EU:C:2000:652, paragraph 18, and of 11 March 2010, *Attanasio Group*, C-384/08, EU:C:2010:133, paragraph 19), it must be concluded that it is not obvious from the arguments raised by the Spanish Government that the interpretation of EU law sought bears no relation to the actual facts of the main action or its purpose.

34 Consequently, and subject to the assessment of each of the questions referred, the request for a preliminary ruling at hand must be deemed admissible.

Substance

Questions 1, 2 and 3

35 By its first, second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 6 and 7 of Directive 93/13 must be interpreted as precluding a provision of national law, such as the Fourth Transitional Provision of Law 1/2013, which makes consumers, against whom mortgage repossession proceedings have been instituted but which have not been concluded at the time of entry into force of that law, subject to a one-month time limit, calculated from the day following the publication of that law, to bring an objection to those enforcement proceedings on the basis of the alleged unfairness of contractual terms. The referring court also asks, where appropriate, whether that directive requires it to examine of its own motion the unfairness of terms of a contract which has already been the subject of such an examination with regard to Directive 93/13 in the context of a court decision which has become final, notwithstanding the fact that the domestic rules of procedure apply the principle of *res judicata*.

36 In so far as concerns the issue whether Articles 6 and 7 of Directive 93/13 preclude a provision of national law such as the Fourth Transitional Provision of Law 1/2013, it should be pointed out that that question has already been examined by the Court of Justice, which answered in the affirmative in its judgment of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731).

37 In particular, it is apparent from that judgment that the Fourth Transitional Provision of Law 1/2013, in so far as it provides that consumers, against whom mortgage repossession proceedings have been instituted before the date of entry into force of that

law and which have not been concluded at that date, are subject to a one-month time limit, calculated from the day following the publication of that law, to bring an objection to those enforcement proceedings on the basis of the alleged unfairness of the contractual terms, is not such as to guarantee consumers full enjoyment of that period and, therefore, the effective exercise of their rights (see, to that effect, judgment of 29 October 2015, *BBVA*, C-8/14, EU:C:2015:731, paragraph 39).

38 Moreover, in the case in the main proceedings, it is apparent from the file before the Court of Justice that, by the decision of 12 June 2013, which has become *res judicata*, the referring court has already examined the loan agreement at issue in the main proceedings with regard to Directive 93/13 and found that Clause 6 thereof, relating to default interest, was unfair.

39 In that context, the referring court raises the question whether Directive 93/13 precludes a rule of national law, such as that resulting from Article 207 of the LEC, which prohibits it from examining of its own motion certain contractual terms which have already been the subject of an examination before the courts and which was closed by a decision which has become *res judicata*.

40 In that regard, it should be observed that, according to settled case-law of the Court, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (see, inter alia, judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 22 and the case-law cited).

41 As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on consumers. It is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (see, inter alia, judgments of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 23, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 53 and 55).

42 According to settled case-law, Article 6(1) must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (see judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraphs 51 and 52, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 54).

43 In that context, the Court has stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 46 and the case-law cited, and of 21 December 2016,

Gutiérrez Naranjo and Others, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 58).

44 However, as stated in paragraph 38 above, in the present case, the national court has already examined the loan agreement at issue in the main proceedings with regard to Directive 93/13, following which it found, by a decision which has become *res judicata*, that one of the terms of the contract was unfair.

45 Accordingly, it needs to be determined whether, in such circumstances, the need to replace the formal balance which the agreement establishes between the rights and obligations of the seller or supplier and the consumer with an effective balance which re-establishes equality between them requires the referring court to carry out a new appraisal of that agreement of its own motion, notwithstanding the fact that the domestic rules of procedure apply the principle of *res judicata*.

46 In that connection, attention should be drawn, at the outset, to the importance, both for the EU legal order and for the national legal systems, of the principle of *res judicata*. Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question (see, inter alia, judgment of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraphs 35 and 36).

47 Moreover, the Court has already recognised that consumer protection is not absolute. In particular, it has considered that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13 (see, to that effect, judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 37, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68), unless national law does not grant such a court that power in the event of infringement of national rules relating to public policy (see, to that effect, judgment of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 53).

48 Furthermore, the Court has already pointed out that, according to EU law, the principle of effective judicial protection of consumers does not afford a right of access to a second level of jurisdiction but only to a court or tribunal (see, to that effect, judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 36 and the case-law cited).

49 It results from the foregoing that Directive 93/13 must be interpreted as not precluding a rule of national law, such as that resulting from Article 207 of the LEC, which prohibits the national courts from examining of their own motion the unfairness of contractual terms which have been entered into with a seller or supplier, where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole,

with regard to Directive 93/13 in a decision which has become *res judicata*, which is a matter to be ascertained by the referring court.

50 That said, it is apparent from the order for reference that, in the present case, the procedural rule relating to *res judicata*, laid down in Article 207 of the LEC, prohibits national courts not only from re-examining the lawfulness, with regard to Directive 93/13, of contractual terms in respect of which a definitive decision has already been delivered, but also from assessing the potential unfairness of other terms of the same contract.

51 It follows from the principles resulting from paragraphs 40 to 43 above that the conditions laid down in the national laws to which Article 6(1) of Directive 93/13 refers may not adversely affect the substance of the right that consumers acquire under that provision not to be bound by a term deemed to be unfair (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 71).

52 Thus, in the case where, in a previous examination of a contract in dispute which led to the adoption of a decision which has become *res judicata*, the national court limited itself to examining of its own motion, with regard to Directive 93/13, one or certain terms of that contract, that directive requires a national court, such as the one in the main proceedings, before which a consumer has properly lodged an objection to enforcement proceedings, to assess, at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose, the potential unfairness of other terms of that contract. In the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13 (see, to that effect, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 60).

53 In the case at hand, in the absence of precise information in that regard in the file before the Court, it is for the national court to assess whether, in the decision of 12 June 2013 which has become *res judicata*, the lawfulness, with regard to Directive 93/13, of all the terms of the loan agreement at issue in the main proceedings have been reviewed or just Clause 6 thereof.

54 In the light of all of the foregoing considerations, the answers to questions 1, 2 and 3 are as follows:

- Articles 6 and 7 of Directive 93/13 must be interpreted as precluding a provision of national law, such as the Fourth Transitional Provision of Law 1/2013, which, as regards mortgage enforcement proceedings which were instituted before the date of entry into force of the law of which that provision forms part and which were not concluded at that date, imposes a time limit of one month on consumers, calculated from the day following the publication of that law, within which to object to enforcement on the basis of the alleged unfairness of contractual terms;

– Directive 93/13 must be interpreted as not precluding a rule of national law, such as that resulting from Article 207 of the LEC, which prohibits national courts from examining of their own motion the unfairness of contractual terms where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, with regard to that directive in a decision which has become *res judicata*.

By contrast, where there are one or more contractual terms the potential unfair nature of which has not been examined during an earlier judicial review of the contract in dispute which has been closed by a decision which has become *res judicata*, Directive 93/13 must be interpreted as meaning that a national court, before which a consumer has properly lodged an objection, is required to assess the potential unfairness of those terms, whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose.

Questions 4 and 5

55 By its fourth and fifth questions, which it is appropriate to examine jointly, the referring court seeks, in essence, clarification of the criteria to be taken into account, in accordance with Article 3(1) and Article 4 of Directive 93/13, in order to evaluate the potential unfairness of terms such as those at issue in the main proceedings, relating to the calculation of ordinary interest and accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period.

56 It should be pointed out, at the outset, that those questions are, in the light of the case-law set out in paragraph 30 above, inadmissible in as much as they seek to determine whether the national court may, in the context of its examination of the potential unfairness of a contractual term and, more specifically Clause 6a of the contract at issue in the main proceedings, take account of circumstances which arose after the conclusion of the contract. The order for reference does not specify in a clear manner the nature of the circumstances which arose after the conclusion of the contract. In those circumstances, the Court is not in possession of the necessary facts to be able to carry out its analysis and is not, therefore, in a position to provide the referring court with a reply which may be of use to it in determining the outcome of the dispute in the main proceedings.

57 In so far as concerns the other aspects raised in the fourth and fifth questions, the Court points out, first of all, that, in accordance with settled case-law, the jurisdiction of the Court of Justice extends to the interpretation of the concept of ‘unfair term’ used in Article 3(1) of Directive 93/13 and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the directive, 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 in order to assess whether the term at issue is unfair (judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 66 and the case-law cited).

58 That being so, it should be noted that, in referring to concepts of ‘good faith’ and ‘significant imbalance’ in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of Directive 93/13 merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 67 and the case-law cited).

59 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 that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. Similarly, it is appropriate, to that end, to carry out an assessment of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms (judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 68).

60 With regard to the question of the circumstances in which such an imbalance arises ‘contrary to the requirement of good faith’, it should be stated that, having regard to the 16th recital of Directive 93/13, the national court must assess for those purposes 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 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 69).

61 In addition, pursuant to Article 4(1) of the directive, the unfairness of a contractual term must 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 of the circumstances attending its conclusion (judgments of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 39, and of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 42). It follows that, in that respect, the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system (judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 71 and the case-law cited).

62 Secondly, the Court points out that, in accordance with Article 4(2) of Directive 93/13, the terms relating to the main subject matter of the contract or the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, although following within the scope of that directive, are exempt from the assessment as to whether they are unfair only in so far as the competent national court considers, following an examination on a case-by-case basis, that they have been drafted by the seller or supplier in plain, intelligible language (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 41, and of 9 July 2015, *Bucura*, C-348/14, EU:C:2015:447, paragraph 50).

63 It is in the light of those considerations that the referring court is required to assess the unfairness of the terms concerned by the fourth and fifth questions referred.

64 As regards, first, Clause 3 of the loan agreement at issue in the main proceedings, relating to the calculation of ordinary interest, the referring court has pointed out that, although covered by Article 4(2) of Directive 93/13, that term was not in plain intelligible language within the meaning of that provision. In those circumstances, as stated by the Advocate General in point 61 of his Opinion, it is for the referring court to examine whether that term is unfair and, in particular, whether, in the light of the considerations set out in paragraphs 58 to 61 above, it causes a significant imbalance in the parties' rights and obligations under the agreement, to the detriment of the consumer.

65 The referring court will be required, *inter alia*, 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. In particular, it will be required to ascertain whether the fact that ordinary interest is calculated by using a 360-day year as a basis, instead of a 365-day calendar year, is such as to render Clause 3 unfair.

66 As regards, secondly, Clause 6a of the contract at issue in the main proceedings, relating to the accelerated repayment procedure resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period, it is for the referring court to examine, *inter alia*, whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the applicable common law rules, where specific contractual provisions are lacking, and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in (see, to that effect, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 73).

67 It follows from all of the foregoing considerations that the answer to the fourth and fifth questions referred is that Article 3(1) and Article 4 of Directive 93/13 must be interpreted as meaning that:

– the examination of the potential unfairness of a term of a contract concluded between a seller or supplier and a consumer requires it to be determined whether that term causes a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer. That examination must be carried out in the light of national rules which, in the absence of an agreement between the parties, are applicable, the means which the consumer has at his disposal under national law to bring an end to

the use of that type of term, the nature of the goods or services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract;

- where the national court considers that a contractual term relating to the calculation of ordinary interest, such as that at issue in the main proceedings, is not in plain intelligible language, within the meaning of Article 4(2) of that directive, it is required to examine whether that term is unfair within the meaning of Article 3(1) of the directive. In the context of that examination, it is the duty of the referring court, inter alia, 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; and
- as regards the assessment by a national court of the potential unfairness of the term relating to accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period, it is for the referring court to examine whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the applicable common law rules, where specific contractual provisions are lacking, and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.

The sixth and seventh questions

68 By its sixth and seventh questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 93/13 must be interpreted as precluding an interpretation in the case-law of a provision of national law governing accelerated repayment clauses in loan agreements, such as Article 693(2) of the LEC which prohibits the national court which has found such a contractual term to be unfair from declaring that term null and void and removing it where the seller or supplier did not in fact apply it, but complied with the requirements laid down in that provision of national law.

69 It should be noted, at the outset, that although, pursuant to Article 1(2) of that directive, ‘the contractual terms which reflect mandatory statutory or regulatory provisions ... shall not be subject to the provisions of this directive’, Clause 6a of the agreement at issue in the main proceedings, which lays down the conditions for accelerated repayment, to which the sixth and seventh questions refer, does not reflect Article 693(2) of the LEC. That clause provides that the lender may seek accelerated repayment and order immediate reimbursement of the principal, interest and other costs where the debtor defaults on payment, on the agreed date, of any sums by way of principal, interest or amounts advanced and not, as provided for in Article 693(2) of the

LEC, after a failure to fulfil his obligation for a period of three months. Moreover, that clause contains the terms ‘in addition to the cases laid down by law’ and ‘besides the cases laid down by law’. It can be inferred from that wording that, by that clause, the parties sought not to limit the causes of accelerated repayment to that provided for in Article 693(2) of the LEC.

70 Therefore, that clause falls within the scope of the directive (see, *a contrario*, judgment of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279, paragraph 41) and the national court is required to assess of its own motion whether that clause is potentially unfair (see, *inter alia*, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 46 and the case-law cited).

71 As regards the inferences to be drawn from the finding that such a term is unfair, it should be pointed out that it follows from the wording of Article 6(1) of Directive 93/13 that national courts are merely required to exclude the application of an unfair contractual term in order that it may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible (see, *inter alia*, judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 65; of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 57; and of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 28).

72 Moreover, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers, Directive 93/13, as is apparent from Article 7(1) thereof, read in conjunction with its 24th recital, requires the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (see, *inter alia*, judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 68, and of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 30).

73 Therefore, and in order to ensure the dissuasive effect inherent in Article 7 of Directive 93/13, the prerogatives of the national court ruling on whether a term is unfair, within the meaning of Article 3(1) of that directive, cannot be contingent on whether that term was actually applied or not. Accordingly, the Court has already held that Directive 93/13 must be interpreted as meaning that, where the national court has established the ‘unfairness’ within the meaning of Article 3(1) of Directive 93/13 of a term in a contract between a consumer and a seller or a supplier, the fact that that term has not been executed cannot, in itself, prevent the national court drawing the appropriate conclusions from the ‘unfair’ nature of that term (see, to that effect, order of 11 June 2015, *Banco Bilbao Vizcaya Argentaria*, C-602/13, not published, EU:C:2015, 397, paragraphs 50 and 54).

74 In those circumstances, as the Advocate General pointed out in point 85 of his Opinion, the fact that, in the present case, the bank in fact satisfied the requirements of Article 693(2) of the LEC and initiated the mortgage enforcement proceedings only after non-payment of seven successive monthly instalments and not, as provided for in Clause 6a of the loan agreement at issue in the main proceedings, as a result of failure to pay any amount owed, cannot exonerate the national court from its obligation to draw the appropriate conclusions from the potentially unfair nature of that term.

75 In the light of all of the foregoing considerations, the answer to the sixth and seventh questions is that Directive 93/13 must be interpreted as precluding an interpretation in the case-law of a provision of national law governing accelerated repayment clauses in loan agreements, such as Article 693(2) of the LEC, which prohibits the national court which has found such a contractual term to be unfair from declaring that term null and void and removing it where the seller or supplier did not in fact apply it, but complied with the requirements laid down in that provision of national law.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (First Chamber) hereby rules:

1. **Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding a provision of national law, such as the Fourth Transitional Provision of Ley 1/2013, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013 on the protection of mortgagors, restructuring of debt and social rent) of 14 May 2013, which, as regards mortgage enforcement proceedings which were instituted before the date of entry into force of the law of which that provision forms part and which were not concluded at that date, imposes a time limit of one month on consumers, calculated from the day following the publication of that law, within which to object to enforcement on the basis of the alleged unfairness of contractual terms.**

2. **Directive 93/13 must be interpreted as not precluding a rule of national law, such as that resulting from Article 207 of Ley 1/2000, de Enjuiciamiento Civil (Law 1/2000 on the Civil Procedure Code), of 7 January 2000, as amended by Ley 1/2013, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013 on the protection of mortgagors, restructuring of debt and social rent), of 14 May 2013, then by Real Decreto-Ley 7/2013, de medidas urgentes de naturaleza tributaria, presupuestaria y de fomento de la investigación, el desarrollo y la innovación (Decree-Law 7/2013 on urgent fiscal and budgetary measures and promoting research, development and innovation), of 28 June 2013, then by Real Decreto-Ley**

11/2014, de medidas urgentes en materia concursal (Decree-Law 11/2014 on urgent measures in the area of bankruptcy), of 5 September 2014, **which prohibits national courts from examining of their own motion the unfairness of contractual terms where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, with regard to that directive in a decision which has become *res judicata*.**

By contrast, where there are one or more contractual terms the potential unfair nature of which has not been examined during an earlier judicial review of the contract in dispute which has been closed by a decision which has become *res judicata*, Directive 93/13 must be interpreted as meaning that a national court, before which a consumer has properly lodged an objection, is required to assess the potential unfairness of those terms, whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose.

3. Article 3(1) and Article 4 of Directive 93/13 must be interpreted as meaning that:

- the examination of the potential unfairness of a term of a contract concluded between a seller or supplier and a consumer requires it to be determined whether that term causes a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer. That examination must be carried out in the light of national rules which, in the absence of an agreement between the parties, are applicable, the means which the consumer has at his disposal under national law to bring an end to the use of that type of term, the nature of the goods or services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract;**
- where the national court considers that a contractual term relating to the calculation of ordinary interest, such as that at issue in the main proceedings, is not in plain intelligible language, within the meaning of Article 4(2) of that directive, it is required to examine whether that term is unfair within the meaning of Article 3(1) of the directive. In the context of that examination, it is the duty of the referring court, *inter alia*, 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; and**
- as regards the assessment by a national court of the potential unfairness of the term relating to accelerated repayment resulting from a failure on the part of the debtor to comply with his obligations during a limited specific period, it is for the referring court to examine whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an**

obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the applicable common law rules, where specific contractual provisions are lacking, and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.

4. Directive 93/13 must be interpreted as precluding an interpretation in the case-law of a provision of national law governing accelerated repayment clauses in loan agreements, such as Article 693(2) of Law 1/2000, as amended by Decree-Law 7/2013, which prohibits the national court which has found such a contractual term to be unfair from declaring that term null and void and removing it where the seller or supplier did not in fact apply it, but complied with the requirements laid down in that provision of national law.

[Signatures]

* Language of the case: Spanish.
