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OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 13 July 2016 (1)

Joined Cases C-154/15, C-307/15 and C-308/15

Francisco Gutiérrez Naranjo

v

Cajasur Banco S.A.U. (C-154/15),

and

Ana María Palacios Martínez

v

Banco Bilbao Vizcaya Argentaria SA (BBVA) (C-307/15),

and

Banco Popular Español SA

v

Emilio Irles López

Teresa Torres Andreu (C-308/15)

(Requests for a preliminary ruling from the Juzgado de lo Mercantil No 1 de Granada (Commercial Court No 1, Granada, Spain) (Case C-154/15) and from the Audiencia Provincial de Alicante (Provincial Court, Alicante, Spain) (Cases C-307/15 and C-308/15))

(Reference for a preliminary ruling — Consumer contracts — Unfair terms — Powers of the national court — Declaration of invalidity — Effects — Obligation to refund amounts received on the basis of a clause regarded as unfair — Non-retroactivity — Compliance with Article 6(1) of Directive 93/13/EEC)

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1. The Spanish courts have contributed significantly to the development of the case-law relating to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, (2) by referring, on numerous occasions, questions to the Court for a preliminary ruling to clarify the interpretation of that directive. At present, it is disputes concerning the 'floor' clauses included in loan agreements concluded with consumers which are of concern to the Spanish courts and, incidentally, to the Court. (3) Those

clauses allow a banking institution which grants a variable rate mortgage loan to impose a lower limit on the variable interest rate, so that even if the applicable interest rate is below a certain threshold (or 'floor'), the consumer will continue to pay minimum interest equivalent to that threshold.

2. The present cases raise a question of principle which relates not so much to 'floor' clauses in themselves as to the effects that must follow a declaration that such terms are unfair. The context in which that question arises is unique in that it involves a series of judgments of the Tribunal Supremo (Supreme Court) ruling that consumers may obtain a refund of the amounts which they have paid to financial institutions on the basis of 'floor' clauses only from the date of that court's first judgment declaring those clauses invalid on the ground that they are unfair, that is to say from 9 May 2013.

I – **Legal framework**

A – *Directive 93/13*

3. According to the fourth recital of Directive 93/13 'it is the responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms'.

4. The 12th recital of Directive 93/13 states that 'as they now stand, national laws allow only partial harmonisation to be envisaged; … Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive'.

5. In the 16th recital of Directive 93/13, the EU legislature stated that 'the assessment, according to the general criteria chosen, of the unfair character of terms … must be supplemented by a means of making an overall evaluation of the different interests involved; … this constitutes the requirement of good faith; …, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties …; … the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

6. The 18th recital of Directive 93/13 asserts that 'the nature of goods or services should have an influence on assessing the unfairness of contractual terms'.

7. The 20th recital of Directive 93/13 requires that 'contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail'.

8. The 21st recital of Directive 93/13 states that 'Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and … if, nevertheless, such terms are so used, they will not bind the consumer, and the

contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions'.

9. The 24th recital of Directive 93/13 states that 'the courts … of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts'.

10. According to Article 3(1) and (2) of Directive 93/13:

'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.'

11. Article 4 of Directive 93/13 is worded as follows:

'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 supplies [sic] in exchange, on the other, in so far as these terms are in plain intelligible language.'

12. Article 5 of Directive 93/13 states that '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'.

13. Article 6(1) of Directive 93/13 provides that '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'.

14. Article 7(1) of Directive 93/13 states that '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'.

15. Article 8 of Directive 93/13 provides that 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'.

B – *Spanish law*

1. Legislative provisions

16. According to Article 1303 of the Civil Code, which defines the consequences arising from a declaration of invalidity, 'when an obligation is declared invalid, the contracting parties shall restore to each other the things [forming the subject matter of the contract] and the price, together with interest'.

17. According to Article 83 of the Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (the General Law for the protection of consumers and users and other supplementary laws, 'the LGDCU'), (4) 'unfair contract terms shall be automatically invalid and deemed not to have formed part of the contract. For those purposes, having heard the parties, the court shall rule that the unfair terms included in the contract are invalid, though the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'.

2. The case-law of the Tribunal Supremo (Supreme Court)

a) The judgment of 9 May 2013

18. In its judgment of 9 May 2013, (5) the Tribunal Supremo (Supreme Court) examined, in the context of a collective action brought by a consumer association against three banking institutions, whether or not 'floor' clauses were unfair.

19. The Tribunal Supremo (Supreme Court) found that, since they were inseparable from the price or consideration, 'floor' clauses formed part of the main subject matter of the contract, so it was, in principle, not possible to review whether their content was unfair. Nevertheless, in so far as the Court had allowed judicial review of terms defining the main subject matter of the contract, in order to afford consumers a higher level of protection, the Tribunal Supremo (Supreme Court) held that it could carry out an analysis of whether or not 'floor' clauses were unfair by arguing that the judgment of 3 June 2010 in *Caja de Ahorros y Monte de Piedad de Madrid* (6) allowed it to carry out a review which was not limited simply to checking whether terms were clearly drafted. The Tribunal Supremo (Supreme Court) acknowledged that the wording of Article 4(2) of Directive 93/13 referred only to a review of the formal transparency of the terms defining the main subject matter of the contract. However, the Tribunal Supremo (Supreme Court), in accordance with the way in which it interpreted the judgment of the Court of 3 June 2010 in *Caja de Ahorros y Monte de Piedad de Madrid*, (7) held that, in addition to that first transparency filter, the Spanish courts could make those clauses subject to a second review, more demanding than that provided for by Directive 93/13, based on Article 80(1) of the LGDCU. (8) According to the Tribunal Supremo (Supreme Court),

that provision establishes a second transparency filter consisting in an examination of whether the consumer knew or could easily have known of the economic and legal burden which the contract would place upon him. Although the Tribunal Supremo (Supreme Court) held that 'floor' clauses were lawful, in that they meet the legal requirements of transparency, and consistent with the first review of transparency, it decided otherwise in connection with the second review. (9) Consequently, it classified 'floor' clauses as 'unfair', and declared that they are invalid, while holding that the contracts in which they are included remained valid, and called on the three banking institutions party to the proceedings before it to remove those clauses from existing contracts and to stop using them.

20. Because it took the view that it had applied *ex novo* an enhanced review of the transparency of the terms at issue, the Tribunal Supremo (Supreme Court), at the request of the Ministerio Fiscal (State Counsel's Office), limited the temporal effects of its judgment. It thus held that retroactivity could be limited under the principles of legal certainty, fairness and prohibition of unjust enrichment and determined that the two criteria which the Court requires when it is asked to limit the temporal effects of its own judgments were present, namely that those concerned have acted in good faith and that there is a risk of serious economic difficulties. (10) As a result of that analysis, (11) it decided that the declaration of invalidity will not affect situations in respect of which final decisions have been made in judgments with the force of *res judicata* or payments made before the date of publication of the judgment on 9 May 2013.

b) The judgments of 25 March 2015 and 29 April 2015

21. On 25 March and 29 April 2015, (12) when it ruled in the context of two individual actions brought against one of the credit institutions which was a defendant in the collective proceedings which gave rise to the judgment of 9 May 2013, the Tribunal Supremo (Supreme Court) considered that the factual circumstances were identical to those underlying its decision of 9 May 2013. It therefore confirmed that 'floor' clauses were invalid. It also considered that there existed the same considerations of legal certainty, good faith and risk of serious economic difficulties. In those circumstances, it restricted the temporal effects of its judgments of 25 March and 29 April 2015, by limiting the obligation to repay the amounts paid under 'floor' clauses to those amounts paid after the publication of the judgment of 9 May 2013, the date from which the good faith of those concerned ceased to exist.

II – **The facts, the main proceedings and the questions referred**

A – *Case C-154/15*

22. Mr Francisco Gutierrez Naranjo concluded with the bank Cajasur Banco S.A.U. a mortgage loan agreement which included a 'floor' clause. Mr Gutierrez Naranjo brought before the Juzgado de lo Mercantil No 1 de Granada (Commercial Court No 1, Granada), first, an action for an injunction in connection with that contractual term on the ground

that it was an unfair term and, secondly, an action for repayment of the amounts paid, from the signing of the loan agreement, under the allegedly unfair term.

23. The Juzgado de lo Mercantil No 1 de Granada (Commercial Court No 1, Granada) recalls the content of the judgment of the Tribunal Supremo (Supreme Court) of 9 May 2013 and notes that there have been disparities in the application of that judgment by the ordinary Spanish courts, in particular regarding whether or not it applies in the context of an individual action and not a collective action. Furthermore, should it be considered possible not to authorise repayment of the amounts received under an unfair term declared invalid from the date of concluding the contract containing that clause, the Juzgado de lo Mercantil No 1 de Granada (Commercial Court No 1, Granada) raises the question of the date from which the repayment in question should begin. It also asks whether such a limitation on the restitutory effects of the declaration of invalidity on grounds of unfairness is compatible with the case-law of the Court, (13) although it is inclined to consider that limiting the effects of invalidity is not comparable to any power of the national court to vary the content of terms held to be unfair.

24. Thus, faced with a difficulty relating to the interpretation of EU law, the Juzgado de lo Mercantil No 1 de Granada (Commercial Court No 1, Granada) decided to stay the proceedings and, by decision received at the Court Registry on 1 April 2015, to refer to the Court the following questions for a preliminary ruling:

'(1) In such cases, is an interpretation according to which an unfair term declared void nonetheless produces effects until that declaration is made compatible with the interpretation of "non-binding" in Article 6(1) of Directive 93/13 …? Therefore, even though the term has been declared void, will the effects produced by that term while it was in force be considered not to be invalidated or ineffective?

(2) Is an injunction that may be issued to desist from using a particular term (in accordance with Articles 6(1) and 7(1) [of Directive 93/13]) in an individual action brought by a consumer when such a declaration is made compatible with a limitation of the effects of a declaration of nullity? May (the courts) alter the reimbursement of any sums paid by the consumer — which the seller or supplier is obliged to reimburse — under the term subsequently declared void *ex tunc*, for want of information and/or of transparency?'

B – *Cases C-307/15 and C-308/15*

1. Case C-307/15

25. On 28 July 2006, Ms Ana María Palacios Martínez concluded with the bank Banco Bilbao Vizcaya Argentaria SA ('BBVA') a mortgage loan agreement which included a 'floor' clause. On 6 March 2014, Ms Palacios Martínez brought proceedings against BBVA for a declaration of invalidity of that clause on the ground that it was unfair. On 3 November 2014, the Juzgado de lo Mercantil No 1 de Alicante (Commercial Court No 1, Alicante) ruled that the action brought had become devoid of purpose, (14)

without prejudice to the reimbursement to Ms Palacios Martínez of the amounts which BBVA received under that clause from 9 May 2013, in accordance with the ruling of the Tribunal Supremo (Supreme Court) in its judgment of 9 May 2013.

26. Ms Palacios Martínez appealed against that judgment to the Audiencia Provincial de Alicante (Provincial Court, Alicante). In her view, the requirements found to exist at first instance for the refund comply neither with Article 1303 of the Civil Code or the principle, enshrined in Directive 93/13, that unfair terms are not to be binding on the consumer. Since the amounts received by BBVA from the date of concluding the contract with Ms Palacios Martínez until the date of the judgment of the Tribunal Supremo (Supreme Court) were received on the basis of a contractual term held to be unfair, and because the refund of those amounts is required only from the date of that judgment, the unfair term has therefore partially bound the consumer, whereas Directive 93/13 requires that an unfair term should be absolutely and unconditionally non-binding to ensure full consumer protection. Even assuming that the criteria of good faith and of risk of serious economic difficulties are relevant in order to limit, before the national court, the refund of the amounts paid under a term held to be unfair, Ms Palacios Martínez disputes the good faith of BBVA. Furthermore, no serious risk would be posed to BBVA if it were ordered to repay the amounts which Ms Palacios Martínez paid to it on the basis of the 'floor' clause held to be unfair. If any economic risk exists, it is that to the consumer's household finances.

2. Case C-308/15

27. On 1 June 2001, Mr Emilio Irles López and Ms Teresa Torres Andreu concluded with Banco Popular Español SA (15) a mortgage loan agreement containing a 'floor' clause. In May and June 2007, Banco Popular Español agreed to further advances and each further advance resulted in a revision of that 'floor' clause.

28. Mr Irles López and Ms Torres Andreu brought an action before the Juzgado de lo Mercantil No 3 de Alicante (Commercial Court No 3, Alicante) for a declaration of invalidity of the 'floor' clause contained in the agreement of 2001 and in the subsequent novation agreements. Due to its lack of transparency, that clause should, in their view, be regarded as unfair. Moreover, Mr Irles López and Ms Torres Andreu asked that their repayment dates be recalculated without applying the clause at issue and that the bank be ordered to repay the difference from the date of concluding the contract.

29. On 10 November 2014, the Juzgado de lo Mercantil No 3 de Alicante (Commercial Court No 3, Alicante) found that the 'floor' clause in the agreements at issue was automatically invalid. It also ordered Banco Popular Español to refund to Mr Irles López and Ms Torres Andreu the amounts held to be improperly received on the basis of that clause, together with interest, from the date of conclusion of the contract.

30. Banco Popular Español appealed against that judgment to the Audiencia Provincial de Alicante (Provincial Court, Alicante). Before that appellate court, Banco Popular Español disputes that the 'floor' clause included in the agreement of 2001 and twice

amended in 2007 is unfair and maintains that it provided sufficient information to the other parties to the contract. In any event, Banco Popular Español argues that the first instance court, by ordering the retroactive reimbursement by Banco Popular Español of the amounts allegedly received improperly, departed from the ruling of the Tribunal Supremo (Supreme Court) in its judgment 9 May 2013. Accordingly, the judgment of 10 November 2014 should be set aside.

3. The questions referred for a preliminary ruling in Cases C-307/15 and C-308/15

31. The Audiencia Provincial de Alicante (Provincial Court, Alicante) has doubts as to the scope of the penalties relating to unfair terms. Article 6(1) of Directive 93/13 merely requires that such terms are not to be binding on the consumer, as provided by national law. The question of whether the amounts paid on the basis of terms declared unfair should be refunded has not been harmonised, a priori, by that directive. Nevertheless, the referring court in both these cases raises the question of whether it would be contrary to the effectiveness, the deterrent effect and the full consumer protection promoted by Directive 93/13 for Article 6(1) of Directive 93/13 to be interpreted as not also requiring Member States to organise the requirements for compensating consumers affected by such clauses. That court also asks whether limiting refunds, as the Tribunal Supremo (Supreme Court) decided to do, is contrary to the prohibition imposed on national courts, by the Court, on revising or altering the content of terms held to be unfair. Since the case-law of the Court imposes, in particular, the obligation on national courts to draw all the consequences which, under their national law, result from a finding that a term is unfair, (16) the question is whether the non-binding nature of unfair terms provided for by the directive must be understood in absolute or unconditional terms, or whether it may, on the contrary, be modified. Finally, even assuming that the criteria established by the Court when deciding to limit the retroactive effects of its own judgments are relevant in a situation such as that faced by the Tribunal Supremo (Supreme Court), the Audiencia Provincial de Alicante (Provincial Court, Alicante) doubts that the banks, which were clearly in a position of superiority in relation to consumers, can be found to have acted in good faith. As regards the risk of serious economic difficulties, the referring court doubts that the case before the Tribunal Supremo (Supreme Court) actually involved such a risk, since the Tribunal Supremo (Supreme Court) based its decision on 'common knowledge' of that risk, without establishing specific qualitative or quantitative facts.

32. Thus, faced with a difficulty relating to the interpretation of EU law, the Audiencia Provincial de Alicante (Provincial Court, Alicante) decided to stay the proceedings and, by decisions received at the Court Registry on 25 June 2015, to refer the following questions to the Court for a preliminary ruling:

'(1) Is it compatible with the principle that unfair terms are not binding, laid down in Article 6(1) of … Directive 93/13 …, for the restitutory effects derived from a declaration on grounds of unfairness of the nullity of a "floor clause" included in a loan agreement not to be applied retroactively from the date of conclusion of the agreement but rather from a later date?

(2) Is the criterion that those concerned must act in good faith, which operates as a basis for limiting the retroactive effect derived from an unfair term, an autonomous concept of EU law that must be interpreted uniformly throughout the Member States?

(3) If so, what circumstances must be taken into account in order for it to be determined whether those concerned acted in good faith?

(4) At all events, is it compatible with the criterion of good faith for the actions of a seller or supplier, in creating the agreement, to have been the cause of a lack of transparency making the term unfair?

(5) Is the risk of serious difficulties, which operates as a basis for limitation of the retroactive effect derived from an unfair term, an autonomous concept of EU law that must be interpreted uniformly throughout the Member States?

(6) If so, what criteria ought to be taken into account?

(7) Must the risk of serious difficulties be assessed by taking account solely of the risk which may arise for the seller or supplier or must account also be taken of the loss caused to a consumer by the failure to reimburse in full the sums paid under that "floor clause"?

[and, solely with respect to Case C-308/15]

(8) Is it compatible with the principle that consumers are not bound by unfair terms, laid down in Article 6(1) of Directive 93/13, and with the right to effective judicial protection affirmed in Article 47 of the Charter of Fundamental Rights of the European Union, for the same limitation of the restitutory effects deriving from the nullity of a "floor clause", declared in proceedings brought by a consumers' association against [three] financial bodies, to be automatically extended to individual actions for a declaration that a "floor clause" is void because unfair brought by consumer customers who have concluded a mortgage loan with other financial bodies?'

III – **Procedure before the Court**

A – *The application for Cases C-307/15 and C-308/15 to be decided under the accelerated procedure*

33. In Cases C-307/15 and C-308/15, the referring court asked the Court to deal with those cases under an accelerated procedure, in accordance with Article 23a of the Statute of the Court of Justice of the European Union and Article 105(1) of the Rules of Procedure of the Court. That application was dismissed by order of the President of the Court of 14 August 2015.

B – *The course of the written procedure and of the oral procedure*

34. By order of the President of the Court of 10 July 2015, Cases C-307/15 and C-308/15 were joined for the purposes of the written and oral procedure and of the judgment. In those cases, written observations were submitted by Mr Irles López, BBVA, Banco Popular Español, the Spanish, Polish and United Kingdom Governments and the European Commission.

35. In Case C-154/15, written observations were submitted by Mr Gutiérrez Naranjo, Cajasur Banco, the Czech, Spanish and United Kingdom Governments and the Commission.

36. By order of the President of the Court of 21 October 2015, Cases C-154/15, C-307/15 and C-308/15 were joined for the purposes of the oral procedure and of the judgment.

37. At the joint hearing in the three cases which were now joined, held on 26 April 2016, oral arguments were presented by Mr Gutiérrez Naranjo, Ms Palacios Martínez, Mr Irles López, Cajasur Banco, Banco Popular Español, BBVA, the Spanish and the United Kingdom Governments and the Commission.

IV – **Legal assessment**

38. The questions raised by the referring courts involve, essentially, three sets of issues. First, it is necessary to determine whether it is consistent with Article 6(1) of Directive 93/13 to limit the restitutory effects of invalidity resulting from the classification of 'floor' clauses as unfair. Next, the Audiencia Provincial de Alicante (Provincial Court, Alicante) asks the Court, on the one hand, whether the Tribunal Supremo (Supreme Court) has correctly applied the criteria of good faith and of risks of serious difficulties within the meaning of the judgment of 21 March 2013 in *RWE Vertrieb* (17) and, on the other hand, whether the relationship, as established in the case-law of the Tribunal Supremo (Supreme Court), between the solutions adopted in collective actions and those adopted in individual actions is consistent with EU law.

39. The analysis of Article 6(1) of Directive 93/13 which I shall shortly carry out should, however, be sufficient for the Court to provide a useful answer to the referring courts. This Opinion will therefore be devoted in the main to the questions raised in Case C-154/15 and the first question common to Cases C-307/15 and C-308/15.

A – *The questions referred in Case C-154/15 considered as a whole, and the first question common to Cases C-307/15 and C-308/15*

40. The question of principle which I set out at the outset is, in essence, that of whether it is consistent with Article 6(1) of Directive 93/13 for a supreme court of a Member State, after it has classified as 'unfair' a contractual term contained in a contract between a consumer and a seller or supplier and after it has declared that term invalid, to be afforded the power to limit the effects of that declaration, by allowing the right to repayment of the amounts improperly paid by the consumer on the basis of the unfair

term to arise only from the date of the decision of that court confirming that the term in question was unfair.

41. To answer that question, a number of preliminary analyses must be carried out. One of the first steps in the analysis is to determine the basis on which the Tribunal Supremo (Supreme Court) delivered its judgment of 9 May 2013. It argues that it afforded a level of protection to consumers beyond that offered by Directive 93/13, which, by only minimally harmonising this field, actually allows Member States to adopt more stringent provisions. (18) However, if that were the case, the limitation of the effects of invalidity cannot be examined in the light of Article 6(1) of Directive 93/13, since measures offering more protection, by their nature, do not belong to a domain which has been harmonised by the directive.

42. Thus, to answer the question of principle relating, once again, to what a court must or can do in the case of unfair terms, it is nevertheless necessary first to return to more substantive considerations concerning the classification by the Tribunal Supremo (Supreme Court) of 'floor' clauses as 'unfair' terms. This matter is all the more delicate since the court raising the questions, in these three joined cases, first, is not the court which has established that classification and, secondly, is not calling into question the unfairness of 'floor' clauses. (19) In that regard, I would therefore point out, in so far as it is relevant, that resolving that preliminary issue should be seen not as an attempt to widen the discussion in this request for a preliminary ruling but, rather, as a necessary and inevitable precondition for providing a useful answer to the referring courts.

43. After establishing that the Tribunal Supremo (Supreme Court) has not afforded a level of protection to the consumer beyond that offered by Directive 93/13 and, thus, ascertaining that the requested interpretation is relevant, I shall determine the scope of the obligation imposed on Member States under Article 6(1) of that directive.

1. The level of protection afforded to consumers by the case-law of the Tribunal Supremo (Supreme Court) compared to that offered by Directive 93/13

44. Underlying these three cases is a series of judgments of the Tribunal Supremo (Supreme Court). In summary, and in so far as my understanding of those judgments is correct, the Tribunal Supremo (Supreme Court) held that the 'floor' clauses contained in the loan agreements were terms relating to the main subject matter of the contract which were in principle excluded from the review of unfairness on the basis of Directive 93/13, provided that those terms were drafted in plain, intelligible language. The Tribunal Supremo (Supreme Court) held that 'floor' clauses were grammatically intelligible and therefore withstood the review of formal transparency. However, it considered that the sellers and suppliers who had introduced those clauses into the agreements at issue had not provided sufficient information to clarify their real meaning and that the requirement of substantive transparency was not satisfied. It concluded that those clauses were unfair. Next, although, in the Spanish legal system, unfair terms are void *ab initio* in principle, the Tribunal Supremo (Supreme Court), because of the particular circumstances which it considered to be involved, decided to give effect to the declaration that 'floor' clauses are

unfair only from the date of publication of the first judgment to that effect, that is to say with effect from 9 May 2013.

45. If I properly understand the judgment of the Tribunal Supremo (Supreme Court), it seems the Tribunal Supremo (Supreme Court) considered that, by enhancing the review of the transparency of the terms with a requirement for substantive transparency, it was going beyond the level of protection afforded by Directive 93/13. In particular, it used the innovative nature of its judgment to justify limiting the restitutory effects of the declaration of invalidity of 'floor' clauses. I must confess that I am not totally convinced that this is the case, as a careful review of the case-law of the Court demonstrates.

46. Thus, in the judgment of 30 April 2014 in *Kásler and Káslerné Rábai*, (20) the Court was asked whether Article 4(2) of Directive 93/13 should be interpreted as meaning that the requirement that a contractual term must be drafted in plain intelligible language must be understood as requiring not only that the relevant term should be grammatically clear and intelligible to the consumer, but also that the economic reasons for using that term should be clear and intelligible to him. The Court found that that requirement that contractual terms are to be drafted in plain intelligible language also appears in Article 5 of Directive 93/13 and the 20th recital thereof, according to which the consumer should actually be given an opportunity of examining all the terms of the contract. (21) That requirement, according to the Court, 'applies in all cases, including that in which a term falls within Article 4(2) of Directive 93/13 and therefore avoids the assessment of its unfairness referred to in Article 3(1) thereof'. (22) The Court also held that the requirement of transparency contained Article 4(2) of Directive 93/13 'has the same scope as that referred to in Article 5'. (23) However, concerning Article 5 of Directive 93/13, the Court recalls the scope of its judgment of 21 March 2013 in *RWE Vertrieb*, (24) in which it held 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, since it is on that basis in particular that the consumer decides whether to be bound contractually to the seller or supplier. (25) Accordingly, 'the requirement of transparency … cannot therefore be reduced merely to their being formally and grammatically intelligible' (26) and must be understood in a broad sense, having regard to the system of protection introduced by Directive 93/13 being 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 level of knowledge. (27)

47. The Court concluded that Article 4(2) of Directive 93/13 must be interpreted as meaning that 'the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism … so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it'. (28) Therefore, the Court held that, in the specific case then before the Court, 'it is for the referring court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer … would

not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application [of the term at issue] for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed'. (29)

48. In the judgment of 9 July 2015 in *Bucura*, (30) delivered subsequently, the Court was asked to clarify the extent to which the way certain terms of a credit agreement had been drafted and the failure to provide certain information, both at the time of concluding the contract and while it was being performed, could lead the referring court to conclude that certain terms of the agreement were unfair. After recalling the content of the 21st recital and Article 5 of Directive 93/13, the Court stated that 'that drafting requirement [that terms should be plain and intelligible] is particularly important since a national court is required to assess whether a term drafted in infringement of it is unfair, even if that term could be regarded as falling within the exclusion provided for in Article 4(2) of Directive 93/13. It should be recalled that the terms referred to in that provision, while they come within the area covered by that directive, escape the assessment as to whether they are unfair only in so far as the national court forms the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language'. (31) However, it is apparent from the settled case-law of the Court (32) that fundamental importance is given to the information provided to the consumer prior to the conclusion of the contract. Consequently, 'it is for the referring court to determine whether the average consumer … is able to assess from the method for calculating annual interest communicated to him, the economic consequences resulting from their application for the calculation of the repayments for which that consumer would ultimately be liable and, therefore, the total cost of the sum borrowed'. (33) According to the Court, 'failure to mention information relating to the loan repayment terms in question and modification of those terms during the period of the loan are decisive elements in the analysis by a national court of whether a term in a loan agreement which relates to its cost and which does not contain such information is drafted in plain intelligible language within the meaning of Article 4 of Directive [93/13]'. (34) If the national court considers that this is not the case, it is required to assess whether the term is unfair. (35)

49. It is true that the judgments of 30 April 2014 in *Kásler and Káslerné Rábai* (36) and 9 July 2015 in *Bucura* (37) were delivered after the judgment of the Tribunal Supremo (Supreme Court) of 9 May 2013. However, they are nothing other than the logical continuation of a series of earlier judgments, including the judgment of 21 March 2013 in *RWE Vertrieb*, (38) to which the Tribunal Supremo (Supreme Court) made extensive reference in its judgment of 9 May 2013 and which highlighted the relationship between the requirement of transparency referred to in Article 5 of Directive 93/13 and the fundamental importance of information prior to concluding a contract for ensuring the consumer's informed consent. (39)

50. Moreover, again in the judgment of 21 March 2013 in *RWE Vertrieb* (40), it is recalled that, 'according to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied'. (41) The judgment of 21 March 2013 in *RWE Vertrieb* (42) itself already contained within it the seeds of the judgments of 30 April 2014 in *Kásler and Káslerné Rábai* (43) and 9 July 2015 in *Bucura*. (44) Accordingly, by classifying 'floor' clauses as unfair terms, in particular because of the lack of sufficient prior information, the Tribunal Supremo (Supreme Court) has not gone further than the law of the European Union by offering a higher level of consumer protection than that offered by Directive 93/13 but has, on the contrary, applied the requirements contained in that directive. (45)

51. This having been established, I must now carry out an analysis of Article 6(1) of Directive 93/13.

2. The scope of the obligation imposed on the Member States by Article 6(1) of Directive 93/13

52. Having established that the wording of Article 6(1) of Directive 93/13 is not without some ambiguity, I shall turn to the case-law of the Court to identify the main principles which guide its interpretation of Directive 93/13 in general and Article 6(1) of that directive in particular. Finally, I shall apply my interim conclusions to the present case.

a) An insufficiently clear literal interpretation

53. Where unfair terms are used, Directive 93/13 requires Member States, first, to provide that such terms 'shall, as provided for under their national law, not be binding on the consumer' (Article 6(1) of Directive 93/13) and, secondly, to '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' (Article 7(1) of Directive 93/13).

54. It is clear that the EU legislature did not go further when defining the penalties relating to unfair terms and, in particular, did not define the conditions concerning their lack of binding effect, required under Article 6(1) of Directive 93/13, to be put in place by Member States. The use, in the French version, of the present indicative ('ne lient pas') gives no indication as to any intention of the EU legislature to make the absence of binding effect retroactive. (46) The EU legislature clearly chose not to use a more precise legal term, such as a specific reference to invalidity, annulment or avoidance. The

expression used is entirely neutral, (47) as already stated by Advocate General Trstenjak in her Opinion in *Invitel*. (48)

55. That neutrality is naturally explained by the express reference which is made to national law. (49) Is it sufficient to leave the Member States entirely free to determine, as they wish, the non-binding nature of unfair terms? In order to clarify the scope of that article and since its wording alone is insufficient for that purpose, it is necessary to review the case-law of the Court on Directive 93/13 in general and Article 6(1) of that directive in particular.

b) Review of the case-law

56. The Court has, on several occasions, highlighted the role which Directive 93/13 plays in the EU legal order.

57. I shall merely recall 'that the system of protection established 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, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. (50) In view of that weak position, Article 6(1) of Directive 93/13 is a mandatory provision which aims to replace the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them. (51) Accordingly, the Court has repeatedly held that the national court is required to assess of its own motion whether a contractual term falling within the scope of that directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier. (52) Accordingly, in order to guarantee the protection intended by Directive 93/13, the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract. (53)

58. Moreover, the Court has repeatedly pointed out that Directive 93/13 constitutes, as a whole, a measure which is essential to the accomplishment of the tasks entrusted to the European Union and, in particular, to raising the standard of living and the quality of life throughout the European Union. (54) It is on account of the nature and significance of the public interest which constitutes the basis of the protection guaranteed to consumers that Directive 93/13 requires 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'. (55)

59. In order more specifically to determine the consequences to be drawn from the finding that a contractual term is unfair, the Court held that it is necessary to refer both to the wording of Article 6(1) of Directive 93/13 and to the objectives and overall scheme of that provision. (56) With regard to the wording of Article 6(1), the Court held, 'firstly, that the first part of the sentence in that provision, while granting the Member States a certain degree of autonomy so far as concerns the definition of the legal arrangements applicable to unfair terms, nevertheless expressly requires them to provide that those

terms "shall … not be binding"'. (57) The national courts must therefore 'draw all the consequences that follow under national law, in order that the consumer will not be bound'. (58) According to the Court's own words, 'it … follows from the wording of Article 6(1) [of Directive 93/13] that the national courts are required only *to exclude the application* of an unfair contractual term in order that it *does not produce* binding effects with regard to the consumer'. (59)

60. Unfair terms 'shall … not be binding', within the meaning of Article 6(1) of Directive 93/13, when a national court excludes their application (60) on account of the dissuasive nature of 'straightforward non-application'. (61) The Court considers, for that purpose, that an unfair term cannot be revised by the national court but must, on the contrary, not be applied. (62) The effectiveness of the penalties relating to unfair terms is therefore assessed in relation to the objective of preventing their continued use. (63) However, the pursuit of that objective may be abandoned where a consumer has expressed his intention to remain bound by a contractual term despite its unfairness. (64)

61. The Court did not go into further detail concerning how non-binding must be understood in the national legal systems. It is probably not for the Court to do so, precisely because the detailed rules of governing that matter must be decided by the Member States themselves. It is therefore logical that, in its case-law, the Court seems to have considered the invalidity of unfair terms not as the only way to satisfy the requirement under Article 6(1) of Directive 93/13 but as one possibility among others. This is particularly apparent from its judgment of 26 April 2012 in *Invitel*, (65) in which it held that national legislation which provides that the declaration, by a court, of the invalidity of an unfair term is to apply to any consumer who has concluded a contract with a seller or supplier which includes that term satisfies the requirements of Article 6(1), read in conjunction with Article 7(1) and (2) of Directive 93/13 (66) and that 'the application of a penalty of invalidity of an unfair term … ensures that those consumers will not be bound by that term, but does not exclude the application of other types of adequate and effective penalties provided for by national legislation'. (67) The Court again held, some time later, that national legislation 'providing that terms declared unfair are invalid, satisfies the requirements of Article 6(1) of Directive 93/13'. (68)

c) Application to the present case

62. What conclusions may be drawn from that substantial body of case-law?

63. According to my reading of it, that case-law does not seem to me to have established a systematic or automatic relationship between Article 6(1) of that directive and the invalidity of unfair terms. In other words, invalidity does not seem to represent, for the Court, the only legal response to the requirement that unfair terms are non-binding. This follows from a different form of wording to be found, for example, in its judgment of 21 January 2015 in *Unicaja Banco and Caixabank*, in which it states that 'the national court [must be able to] draw … all the inferences of possible unfairness — in the light of Directive 93/13 — of the term …, *if necessary* by annulling it'. (69)

64. The Court has not, therefore, peremptorily remedied the imprecision of Article 6(1) of Directive 93/13. It has not gone beyond that surface neutrality — and perhaps it could not do so. Indeed, if the Court were to decide in this case that that article must be interpreted as meaning that, in the case of an unfair term, the national court must declare those terms invalid and create a corresponding right to restitution *in integrum*, that is to say from the moment of concluding the contract, it would deprive of all practical effectiveness the express reference in that provision to national law and then with difficulty escape the criticism that harmonisation had been achieved through judicial decision. (70)

65. Next, I note that the national law as it stands is entirely consistent with the requirements of Directive 93/13. It is clear from the case file that, in the Spanish legal system, the general penalty for unfair terms is invalidity, which creates a right to full restitution. (71) This is the maximum level of civil penalty and eliminates all the effects of the unfair term. However, what is problematic in all three present cases is that the supreme court has used a procedural arrangement which allows it to limit the temporal effects of its judgments. That use has, with regard to the penalties relating to 'floor' clauses, resulted in the following situation.

66. From 9 May 2013, 'floor' clauses must cease to exist in the Spanish legal order. They must be eliminated from existing contracts and sellers or suppliers can no longer include them in new contracts since any seller or supplier who introduces such clauses from that date will be ordered both to eliminate those clauses and to repay any amounts paid on the basis thereof. In other words, the full effects of invalidity — the general penalty — are guaranteed from 9 May 2013.

67. With regard to the prior period, although 'floor' clauses are deemed unfair and therefore void, sellers or suppliers are not required to repay the amounts paid on the basis of those clauses, on account of the exceptional circumstances which the supreme court regards as existing, essentially relating to the endemic nature of the problem.

68. Since EU law harmonises neither the penalties applicable in the event of a term being found to be unfair (72) nor the circumstances in which a supreme court decides to limit the effects of its judgments, the present situation falls within the internal legal order of the Member States by virtue of the principle of procedural autonomy. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). (73)

69. As regards, first, the principle of equivalence, it requires that the national rule at issue be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar. (74) Subject to any further verification by the national courts, it is apparent from the case file, and in particular from the written observations of the Spanish Government, that the Tribunal Supremo (Supreme Court) does not reserve the option of limiting the temporal effects of

its judgments only to disputes involving EU law and that it has already made use of such an option in purely internal disputes. (75) Considered from an objective point of view, the option of the Tribunal Supremo (Supreme Court) to limit the temporal effects of its judgments does not appear to me to be such as to raise doubts as to whether it is consistent with the principle of equivalence.

70. As regards, secondly, the principle of effectiveness, the Court has repeatedly held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision (76) in the procedure, its progress and its special features, viewed as a whole, before the various national bodies, and that for those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as, in particular, the principle of legal certainty. (77) Accordingly, the impact of the temporal limitation of the effects of the judgment of the Tribunal Supremo (Supreme Court) on the effectiveness of Directive 93/13 must, first, be assessed in the light of the objective pursued, while taking into account, secondly, the principles of the national legal system underlying the decision to limit those effects.

71. Having regard to *the objective pursued by Directive 93/13*, as was pointed out in the course of the analysis of the case-law of the Court, the penalties relating to unfair terms under Articles 6 and 7 of Directive 93/13 must have a deterrent effect on the seller or supplier and aim to restore a real balance between the seller or supplier and the consumer. As I pointed out above, from 9 May 2013 sellers or suppliers are required to stop using 'floor' clauses (78) and those terms must be removed from existing contracts. The deterrent effect is fully assured since any seller or supplier who, after 9 May 2013, introduces such clauses in its contracts will be ordered to eliminate those clauses and to repay any amounts paid on the basis thereof. The behaviour of sellers or suppliers will therefore necessarily have changed as of 9 May 2013 and the effectiveness of the directive is fully assured *pro futuro*.

72. The situation prior to 9 May 2013 remains to be examined. 'Floor' clauses are still regarded as unfair and declared invalid but that invalidity has its full effects only from the date of the judgment of the supreme court in which that finding was made. To justify such a postponement, the Tribunal Supremo (Supreme Court) based its decision on a series of arguments, (79) including the safeguarding of legal certainty on account of the innovative nature of its decision — an assessment with which I nevertheless disagree (80) — and the exceptional circumstances involved. On that point, the Tribunal Supremo (Supreme Court) emphasised, in particular, the endemic nature of the use of 'floor' clauses and then struck a balance between, on the one hand, the protection to be afforded to consumers inter alia under Directive 93/13 and, on the other hand, the macroeconomic challenges to the already weakened banking system of a Member State.

73. Provided that it remains quite exceptional, such an approach also appears permissible in the light of the principle of effectiveness. The Court has already recognised that consumer protection is not absolute. (81) Above all, it does not appear obvious that, in order to re-establish the balance between the consumer and the seller or

supplier, it was necessary, or even possible, (82) in each case, to return all the amounts paid on the basis of a 'floor' clause. Achieving the balance so eagerly sought by the directive is not the same as favouring the consumer. Depending on the date of the conclusion of the loan agreements, the lack of full retroactive effect has not necessarily resulted in a failure to restore the balance. That finding is, in my view, supported by two essential considerations in the assessment carried out by the Tribunal Supremo (Supreme Court), namely that, first, a consumer who had concluded a loan agreement containing a 'floor' clause could easily repay one loan with another from a different banking institution and, secondly, application of the 'floor' clause would not have led to a substantial change in the monthly amounts payable by consumers.

74. In the light of the need to *take account of the principles of the national legal system* underlying the decision to limit the temporal effects of the judgment of the Tribunal Supremo (Supreme Court), the legal security advanced by that court — less on account of the innovative nature of its decision, I would recall, than on account of the many legal situations which are potentially affected and which could undermine the stability of an economic sector — is a concern shared by the EU legal order.

75. Accordingly, in those circumstances, neither the effectiveness of the rights recognised by Directive 93/13 nor the objectives pursued by the latter are, in my view, adversely affected by the decision of the Tribunal Supremo (Supreme Court) to limit the temporal effects of the declaration of invalidity of unfair terms.

76. It follows from the foregoing that Article 6(1) of Directive 93/13, read in the light of the principles of equivalence and effectiveness, must be interpreted as meaning that, in the circumstances specific to the disputes in the main proceedings, it does not preclude a supreme court decision which finds that 'floor' clauses are unfair, orders the cessation of their use and their removal from existing contracts and declares them invalid, while restricting, on the basis of exceptional circumstances, the effects — in particular the restitutory effects — of that invalidity to the date of its first judgment to that effect.

B – *The other questions referred*

77. I consider that the answer which I propose that the Court give to the questions raised in Case C-154/15 and the first question common to Cases C-307/15 and C-308/15 is sufficient to allow the referring courts to resolve the disputes in the main proceedings. Accordingly, I am of the view that it is not necessary to answer the other questions raised.

78. I nevertheless wish to make a number of concluding remarks to avoid any ambiguity, in view of the systemic challenges involved in these cases.

79. I reiterate that the proposed solution is limited to the circumstances specific to these cases and that such a limitation, established by a supreme court, must remain exceptional.

80. Moreover, the solution which I propose must in no way be seen as a validation of the view that national courts may or must apply the criteria used by the Court itself when it is asked to limit the effects of its own judgments. The arrangements governing the circumstances in which a supreme court of a Member State may limit the effects of its own judgments fall, at first sight, within the scope of the procedural autonomy of the Member States subject to the principles of equivalence and effectiveness of EU law. That is why a more in-depth analysis of the requirements of good faith and risk of serious difficulties, within the meaning of the judgment of 21 March 2013 in *RWE Vertrieb*, (83) to which the Tribunal Supremo (Supreme Court) referred on several occasions, appears to me, in any event, ineffective. However, it is important to note that the Court retains, on the basis of the primacy and uniform application of EU law, fundamental jurisdiction to assess the compliance with EU law of nationally defined conditions relating to limitation of the temporal effects of judgments of supreme courts delivered in their capacity as ordinary courts applying EU law.

81. Finally, it is clear from the wording of the eighth question referred in Case C-308/15 that the referring court starts from the premiss that there is an obligation to extend the limitation of the restitutory effects resulting from the invalidity of a 'floor' clause, as determined in a collective action before the Tribunal Supremo (Supreme Court), to individual actions brought against sellers or suppliers who were not parties to that collective action before the Tribunal Supremo (Supreme Court). The Spanish Government, both in its written observations and at the hearing, stated that such a rule supporting automatic extension was unknown to the Spanish legal system. (84) Although it is true that the case-law of the Tribunal Supremo (Supreme Court) operates as a complement to the Spanish legal system, (85) this is without prejudice to the power of any court hearing an action seeking a declaration that a 'floor' clause is unfair to carry out its own analysis of the circumstances and to determine whether, in the specific case before it, those circumstances are identical and, if so, should lead it to apply the case-law of the Tribunal Supremo (Supreme Court). In those circumstances, the eighth question raised in Case C-308/15 does not require further analysis on the part of the Court. In any event, since the solution adopted by the Tribunal Supremo (Supreme Court) does not appear to me incompatible with EU law, its implementation by the ordinary courts is likely to safeguard the principle of equality and the principle of economy of procedure.

V – **Conclusion**

82. In view of the foregoing considerations, I suggest that the Court give the following answer to the questions referred by the Juzgado de lo Mercantil No 1 de Granada (Commercial Court No 1, Granada) and by the Audiencia Provincial de Alicante (Provincial Court, Alicante):

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the principles of equivalence and effectiveness, must be interpreted as meaning that, in the circumstances specific to the disputes in the main proceedings, it does not preclude a supreme court decision which finds that 'floor' clauses are unfair, orders the cessation of their use and their removal from existing

contracts and declares them invalid, while restricting, on the basis of exceptional circumstances, the effects — in particular the restitutory effects — of that invalidity to the date of its first judgment to that effect.

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1 – Original language: French.

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2 – OJ 1993 L 95, p. 29.

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3 – As evidenced by the stream of requests for a preliminary ruling on this issue made to the Court recently. See, to that effect, the judgment of 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252) and the pending Cases C-349/15, C-381/15, C-431/15, C-525/15, C-554/14, C-1/16 and C-34/16.

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4 – The consolidated text of which was approved by Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Royal Legislative Decree 1/2007 approving the consolidated version of General Law for the protection of consumers and users and other supplementary laws of 26 November 2007 (BOE No 287 of 30 November 2007).

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5 – Judgment No 241/12 (ES:TS:2013:1916).

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6 – C-484/08, EU:C:2010:309.

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7 – C-484/08, EU:C:2010:309.

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8 – Which specifies the qualities required by a term for it to be deemed transparent.

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9 – It is clear from the case file that that second review is presented as being a new requirement by the Tribunal Supremo (Supreme Court). That court considered that, for 'floor' clauses to satisfy that further review, it would have been necessary, at the time of concluding the contract, for the consumer to have been aware of simulations of various scenarios related to reasonably foreseeable changes in interest rates or information concerning the cost as compared with other loan arrangemtents offered by the same institution. I shall return later in my analysis to the allegedly innovative position of the Tribunal Supremo (Supreme Court).

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10 – Concerning those two criteria, the Tribunal Supremo (Supreme Court) referred to the judgment of 21 March 2013 in *RWE Vertrieb* (C-92/11, EU:C:2013:180).

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11 – The Tribunal Supremo (Supreme Court) considered that (i) 'floor' clauses were lawful; (ii) they were incorporated into contracts with variable interest rates for objective reasons; (iii) they were not unusual or extravagant clauses; (iv) their use had long been tolerated by the market; (v) they were declared unfair not because of the intrinsically unlawful nature of their effects, but because of their lack of transparency; (vi) the absence of transparency resulted from insufficient information; (vii) the national provisions were complied with; (viii) the purpose of determining the minimum interest rate meets the need to maintain a minimum return on mortgage loan assets and the clauses were calculated so that they would not lead to significant changes in the amounts to be paid; (ix) subrogation of the creditor is made possible by law, so that a dissatisfied consumer could easily change credit institution; and (x) it was common knowledge that *restitutio in integrum* from the date of concluding the contract would have caused serious economic disruption.

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12 – Respectively, judgment No 139/2015 (ES:TS:2015:1280) and judgment No 222/2015 (ES:TS:2015:2207).

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13 – See, in particular, judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349).

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14 – The Juzgado de lo Mercantil No 1 de Alicante (Commercial Court No 1, Alicante) held that since the Tribunal Supremo (Supreme Court) had declared an identical clause invalid in its judgment of 9 May 2013, the declaration of invalidity of the clause in

question in the case pending before it was unnecessary given that BBVA was one of three financial institutions party to proceedings before the Tribunal Supremo (Supreme Court).

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15 – Banco Popular Español was not among the three credit institutions party to the proceedings before the Tribunal Supremo (Supreme Court) which gave rise to the judgment of 9 May 2013.

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16 – The Audiencia Provincial de Alicante (Provincial Court, Alicante) bases its decision in that case, in particular, on the judgments of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242) and 30 May 2013 *Jőrös* (C-397/11, EU:C:2013:340).

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17 – C-92/11, EU:C:2013:180.

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18 – See Article 8 of Directive 93/13. However, I note that that article refers to the possibility for Member States to retain or adopt more stringent 'provisions' and question the extent to which the judgment of a national court, even a supreme court, can be regarded as a 'provision' within the meaning of Article 8 of Directive 93/13. I would also point out that Directive 2011/83/EU of the Parliament and of the Council of 25 October 2011 on consumer rights (OJ 2011 L 304, p. 64) introduced a new Article 8a into Directive 93/13, which requires Member States, where they adopt provisions in accordance with Article 8 of Directive 93/13, to inform the Commission thereof.

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19 – The Court has repeatedly pointed out that its jurisdiction 'extends to the interpretation of the concept of "unfair term" … and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of … Directive [93/13], 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' [judgments of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 22 and the case-law cited) and 21 March 2013 in *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 48). To the same effect, see judgments of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 45); 23 April 2015 in *Van Hove* (C-96/14, EU:C:2015:262, paragraph 28) and 9 July 2015 in *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 46)]. Since the Tribunal Supremo (Supreme Court) in particular based its reasoning on Article 4(2) of Directive 93/13, it would have been desirable, on the basis of the judicial cooperation characteristic of the European legal order, for the Tribunal Supremo (Supreme Court) to refer a

question to the Court not only on issues relating to the review of the transparency of the terms determining the main subject matter of the contract but also on whether it is consistent with EU law to limit the temporal effects of its seminal judgment in this area.

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20 – C-26/13, EU:C:2014:282.

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21 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 67).

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22 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 68).

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23 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 69).

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24 – C-92/11, EU:C:2013:180, paragraph 44.

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25 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 70).

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26 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 71).

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27 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 72).

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28 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 75).

29 – Judgment of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 74).

30 – C-348/14, not published, EU:C:2015:447.

31 – Judgment of 9 July 2015 in *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 50).

32 – Judgment of 9 July 2015 in *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 51).

33 – Judgment of 9 July 2015 in *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 56).

34 – Judgment of 9 July 2015 in *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 61).

35 – Judgment of 9 July 2015 in *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 62).

36 – C-26/13, EU:C:2014:282.

37 – C-348/14, not published, EU:C:2015:447.

38 – C-92/11, EU:C:2013:180.

39 – The judgment of 21 March 2013 in *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraphs 43 and 44). The Court has always paid particular attention to the provision of information to consumers. See, to that effect, inter alia, judgment of 27 June 2000 in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25). Moreover, it cannot be said that any ambiguity arose from the judgment of 3 June 2010 in *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309). In the latter judgment, it is true that the Court recognised that the Spanish legislation at issue in the main proceedings, which authorised a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, made it possible to afford consumers a higher level of protection than that established by Directive 93/13. However, that legislation allowed such a review including when those terms were drafted in plain, intelligible language (see judgment of 3 June 2010 in *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraphs 24 and 42)).

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40 – C-92/11, EU:C:2013:180.

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41 – Judgment of 21 March 2013 in *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 58 and the case-law cited).

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42 – C-92/11, EU:C:2013:180.

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43 – C-26/13, EU:C:2014:282.

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44 – C-348/14, EU:C:2015:447.

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45 – It is clear from the wording of Article 4(2) of Directive 93/13 that a term relating to the main subject matter of the contract, when it does not meet the requirements of clarity and comprehensibility, may be subject to an assessment of whether or not it is unfair as provided for in Article 3(1) of Directive 93/13.

46 – It appears that the 21st recital of Directive 93/13 even places that non-binding effect in the future (‘will not bind’).

47 – A quick comparison of the various language versions available is scarcely more illuminating. Accordingly, Article 6(1) of Directive 93/13 provides that unfair terms, in Spanish, ‘no vincularán’, in German, ‘unverbindlich sind’, in English, ‘shall … not be binding’, in Italian, ‘non vincolano’ and, in Portuguese, ‘não vinculem’.

48 – Opinion of Advocate General Trstenjak in *Invitel* (C-472/10, EU:C:2011:806, point 48).

49 – See, also, footnote 70 of this Opinion.

50 – See, among many, judgments of 21 March 2013 in *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 41 and the case-law cited) and 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 22), and order of 16 July 2015 in *Sánchez Morcillo and Abril García* (C-539/14, EU:C:2015:508, paragraph 24). See, also, Opinion of Advocate General Szpunar in Joined Cases *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:15, footnote 21).

51 – See, among many, judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 34) and order of 16 July 2015 in *Sánchez Morcillo and Abril García* (C-539/14, EU:C:2015:508, paragraph 25 and the case-law cited).

52 – See order of 16 July 2015 in *Sánchez Morcillo and Abril García* (C-539/14, EU:C:2015:508, paragraph 27).

53 – See, among many, judgments of 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 31 and the case-law cited) and 14 June 2012 *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 41 and the case-law cited).

54 – See, in particular, judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 67 and the case-law cited).

55 – See, in particular, judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 68, citing Article 7 of Directive 93/13).

56 – See, in particular, judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 61 and the case-law cited).

57 – Judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 62).

58 – See judgments of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 63); 30 May 2013 in *Jőrös* (C-397/11, EU:C:2013:340, paragraph 41) and 30 May 2013 in *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 49). See, also, orders of 3 April 2014 in *Sebestyén* (C-342/13, EU:C:2014:1857, paragraph 35) and 17 March 2016 in *Ibercaja Banco* (C-613/15, EU:C:2016:195, paragraph 35).

59 – Judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 65). Emphasis added.

60 – See judgments of 30 May 2013 in *Jőrös* (C-397/11, EU:C:2013:340, paragraph 41); 30 May 2013 in *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraphs 49 and 57); and 21 April 2016 in *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 98).

61 – See judgments of 30 May 2013 in *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 58) and 21 January 2015 in *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 31).

62 – Judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraphs 69 and 70).

63 – See judgments of 30 April 2014 in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 78) and 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraphs 21 and 39).

64 – See judgments of 3 December 2015 in *Banif Plus Bank* (C-312/14, EU:C:2015:794, paragraph 27) and 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 25).

65 – C-472/10, EU:C:2012:242.

66 – See judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 39).

67 – Judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 40).

68 – Judgment of 30 May 2013 in *Jőrös* (C-397/11, EU:C:2013:340, paragraph 43).

69 – C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 41. Emphasis added. See, also, order of 17 March 2016 in *Ibercaja Banco* (C-613/15, EU:C:2016:195, paragraph 37).

70 – It is also necessary to recall that the Report from the Commission on the implementation of Directive 93/13 [COM(2000) 248 final of 27 April 2000] had already noted that ‘because of the diversity of legal traditions, [Article 6(1) of Directive 93/13] has been transposed in different ways (the civil penalties include non-existence, nullity, revocability, voidability and unenforceability of such unfair terms). … Besides, any court

judgment that finds a term to be unfair must provide that the judgment take effect from the time of conclusion of the contract (*ex tunc*). … It is somewhat difficult to gauge to what extent the different national legal orders meet these requirements, but it seems they do not always do so' (pp. 19 and 20). The attention of the EU legislature was already drawn to that issue. However, I note that Directive 93/13 was last amended by Directive 2011/83 and that none of the amendments made related to Article 6(1) of Directive 93/13.

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71 – See Article 1303 of the Civil Code read in conjunction with Article 83 of the LGDCU.

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72 – See, most recently, judgment of 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 31).

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73 – See, by analogy, judgments of 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 38); 14 June 2012 *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 46); 3 December 2015 in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 26); *Aziz* (C-415/11, EU:C:2013:164, paragraph 50); 30 May 2013 in *Jőrös* (C-397/11, EU:C:2013:340, paragraph 29); 30 May 2013 in *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 42); 5 December 2013 in *Asociación de Consumidores Independientes de Castilla y León* (C-413/12, EU:C:2013:800, paragraph 30); 27 February 2014 in *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 46); 10 September 2014 in *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 50); 18 February 2016 in *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraph 40); 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 32); and 21 April 2016 in *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 48).

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74 – See, in particular, judgment of 27 February 2014 in in *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 47).

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75 – See paragraph 95 of the written observations of the Spanish Government in Joined Cases C-307/15 and C-308/15.

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76 – Here, rather than a provision, it is more a practice of the courts which is not actually codified. In response to a question posed by the Court at the hearing, the Spanish Government representative asserted that the Tribunal Supremo (Supreme Court) based the prerogative to limit the restitutory effects of invalidity on its interpretation of Article 1303 of the Civil Code.

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77 – See judgments of 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 39 and the case-law cited); 14 June 2012 *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 49); 3 December 2015 in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 33); *Aziz* (C-415/11, EU:C:2013:164, paragraph 53); 30 May 2013 in *Jőrös* (C-397/11, EU:C:2013:340, paragraph 32); 5 December 2013 in *Asociación de Consumidores Independientes de Castilla y León* (C-413/12, EU:C:2013:800, paragraph 34); 27 February 2014 in *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 51); 10 September 2014 in *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 52); 18 February 2016 in *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraphs 43 and 44); 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 34); and 21 April 2016 in *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 50).

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78 – Unless, of course, it is ensured that sufficient information is provided to the consumer.

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79 – See footnote 11 of this Opinion.

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80 – See point 44 et seq. of this Opinion.

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81 – See judgment of 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615).

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82 – Indeed, the principle of *restitutio in integrum* may, at the time of its application, conflict with rules on limitation periods for claims.

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83 – C-92/11, EU:C:2013:180.

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84 – The absence of a clearly identifiable rule thus renders impossible an analysis of the type which the Court carried out in the judgment of 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 32 et seq.).

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85 – According to Article 1(6) of the Civil Code.