Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

9 July 2020 *

(Reference for a preliminary ruling — Consumer Protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Mortgage loan agreement — Term limiting the variability of the interest rate ('floor' term) — Novation agreement — Waiver of the right to bring an action contesting the terms of a contract — Non-binding)

In Case C-452/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain), made by decision of 26 June 2018, received at the Court on 11 July 2018, in the proceedings

XZ

v

Ibercaja Banco SA

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin (Rapporteur), D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: L. Carrasco-Marco, Administrator,

having regard to the written procedure and further to the hearing on 11 September 2019,

after considering the observations submitted on behalf of:

– XZ, initially by D.J. Fernández Yubero, and subsequently by J. de la Torre García, R. López Garbayo and M. Pradel Gonzalo, abogados,

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

– the Spanish Government, initially by M.J. García-Valdecasas Dorrego, and subsequently by L. Aguilera Ruiz, acting as Agents,

– the European Commission, by J. Baquero Cruz, N. Ruiz García Napoleón, and C. Valero, acting as Agents,

* Language of the case: Spanish.

after hearing the Opinion of the Advocate General at the sitting on 30 January 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3 to 6 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 XZ and Ibercaja Banco SA, concerning terms stipulated in a mortgage loan agreement between them.

Legal context

EU law

3 Article 3 of Directive 93/13 provides:

‘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 that term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.’

4 Article 4 of that directive 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 supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language.’

5 Article 5 of that directive is worded as follows:

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

6 Article 6(1) of that directive states:

'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.'

7 Article 8 of Directive 93/13 provides:

'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.'

8 Paragraph 1(q) of the Annex to that Directive, which contains an indicative and non-exhaustive list of terms which may be regarded as unfair, is worded as follows:

'Terms which have the object or effect of:

…

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy …'

Spanish law

Royal Legislative Decree 1/2007

9 Directive 93/13 was transposed into Spanish law, essentially, by Ley 7/1998 sobre condiciones generales de la contratación (Law 7/1998 on general contractual conditions) of 13 April 1998 (BOE No 89, of 14 April 1998, p. 12304), which was recast, together with other provisions transposing various EU consumer protection directives, 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 recast text of the General Law for the protection of consumers and users and other supplementary laws) of 16 November 2007 (BOE No 287, of 30 November 2007, p. 49181).

10 Article 10 of Royal Legislative Decree No 1/2007 provides:

'Waiver in advance of the rights granted to consumers and users by this Royal Legislative Decree shall be null and void, as shall any act carried out in breach of the law, in accordance with the provisions of Article 6 of the Civil Code.'

11 Article 83 of Royal Legislative Decree 1/2007 also provides that 'unfair contractual terms shall automatically be void and deemed not to have formed part of the contract'.

The Civil Code

12 Article 1208 of the Civil Code states:

'A novation shall be void if the original obligation was void, unless the ground for nullity may be relied on only by the debtor or acts that are originally void are made valid by ratification.'

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

13 By authenticated deed of 23 December 2011, XZ acquired a property from a developer for the sum of EUR 148 813.04 and, in so doing, took the place of that developer as debtor of the mortgage loan relating to that property granted by the credit institution Caja de Ahorros de la Inmaculada de Aragón, now Ibercaja Banco. XZ thus accepted all the agreements and conditions relating to that mortgage loan ('the mortgage loan agreement') as defined between the original debtor and the credit institution.

14 The mortgage loan agreement included a term relating to the maximum and minimum interest rates applicable to that loan, namely an annual interest rate 'cap' of 9.75% and an annual interest rate 'floor' of 3.25%.

15 That mortgage loan agreement was the subject of an amending document of 4 March 2014 ('the novation agreement'), relating, inter alia, to the interest rate stipulated in the 'floor' term, that rate being reduced to an annual nominal rate of 2.35%. The novation agreement also contained a term worded as follows: 'The parties confirm the validity and application of the loan, consider its conditions to be appropriate and, consequently, expressly and mutually waive the right to bring any action against the other party in relation to the agreement entered into, its terms or any settlements or payments made to date, which the parties acknowledge as being compatible with that agreement'. In addition, XZ stated, by way of a handwritten note, that she was aware and understood that 'the interest rate on the loan [would] never fall below an annual nominal rate of 2.35%'.

16 XZ brought an action before the referring court, the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain), asking that court to declare that the 'floor' term in the mortgage loan agreement was unfair and to order the credit institution to remove that term and to reimburse her the sums unduly paid on the basis of that term since the loan agreement was concluded.

17 As Ibercaja Banco relied on the terms of the novation agreement to contest XZ's claims, the applicant in the main proceedings also asked the referring court to specify to what extent legal documents amending a contract, in particular one of its terms which is claimed to be unfair, are also 'contaminated' by that term and, consequently, lose binding force, in accordance with Article 83 of Royal Legislative Decree 1/2007.

18 The referring court observes that after the delivery of Judgment 241/2013 of the Tribunal Supremo (Supreme Court, Spain) of 9 May 2013, which held that 'floor' terms in mortgage loan agreements are void unless they meet the requirements of clarity and transparency, Ibercaja Banco began a process of renegotiating those terms in the mortgage loan agreements that it had entered into. Nevertheless, that court harbours doubts as to whether the renegotiation of an unfair term is compatible with the principle laid down in Article 6(1) of Directive 93/13, according to which unfair terms are not binding on consumers.

19 Moreover, the referring court points out that the novation agreement itself might not satisfy the conditions of the 'transparency test' established by the Tribunal Supremo (Supreme Court). With regard to the main proceedings, that court notes, in particular, the significant imbalance between the

rights and obligations stipulated to the detriment of the borrower, the lack of information regarding the losses the latter was likely to incur as a result of the application of the new 'floor' term, and the fact that it was impossible for the borrower to recover the losses thus incurred following the waiver of all rights of action against the lending credit institution.

20 In those circumstances, the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the principle that void contractual terms are not binding (Article 6 of [Directive 93/13]) also extend to subsequent contracts and legal documents concerning such terms, such as a novation agreement?

Given that absolute nullity means that the said term is deemed never to have existed in the legal/financial life of the contract, may it be concluded that subsequent legal documents — that is, the novation agreement — and their effect on the term in question are also devoid of legal reality and must be deemed non-existent and without effect?

(2) Can documents which amend, or effect a settlement in respect of, non-negotiated terms which may not satisfy the fairness and transparency tests be considered to be in the nature of general contractual terms for the purposes of Article 3 of Directive 93/13 and, therefore, be subject to the same grounds for invalidity that apply to the original documents that are the subject of the novation or settlement?

(3) Must the waiver of rights of action contained in a novation agreement also be void, in so far as the contracts signed by customers did not inform them either of the fact that a contractual term was void or of the money or financial sum they were entitled to receive in repayment of interest paid as a result of the initial imposition of the "floor terms"?

It is noted that customers sign a waiver agreeing not to take legal action, without having been told by the bank what rights they are waiving or how much money they are giving up.

(4) When the novation agreement amending the loan is examined in the light of the case-law of the Court of Justice of the European Union and Articles 3(1) and 4(2) of Directive 93/13, is the new "floor term" in the novation agreement vitiated once again by a lack of transparency, as the bank has again failed to comply with the transparency criteria laid down in the judgment of the Tribunal Supremo [(Supreme Court)] of 9 May 2013 and failed to inform the customer of the true financial cost of the said term in his or her mortgage, which would make him or her aware of the interest rate (and the resulting monthly payment) that he or she would have to pay if the new "floor term" were to be applied, and the interest rate (and the resulting monthly payment) that he or she would have to pay if no "floor term" were applied and the interest rate agreed in the mortgage were applied with no lower limit?

In other words, when the financial institution imposed the document referred to as a "novation" in respect of "floor terms", should it have satisfied the transparency tests described in Articles 3(1) and 4(2) of Directive 93/13 and informed the consumer of the amount of money lost as a result of applying the "floor terms", and of the interest rate that would be applicable in the absence of those terms, and, given that the bank did not do so, are those documents also vitiated by a ground of nullity?

(5) In view of their substance, can the terms concerning legal action included in the general terms and conditions of the novation agreement amending the loan be considered unfair under Article 3(1) of Directive 93/13 in conjunction with the Annex thereto listing unfair terms, and specifically with paragraph (q) of that annex … given that they restrict the right of consumers to exercise rights

that may arise or become evident after the contract has been signed, as was the case with the possibility of claiming full repayment of the interest paid (in accordance with the judgment of the Court … of 21 December 2016)?'

Consideration of the questions referred

The first question

21 By its first question referred for a preliminary ruling, the national court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as precluding a term in an agreement concluded between a seller or supplier and a consumer, which might be found by a court to be unfair, from legitimately being the subject of a novation agreement between that seller or supplier and that consumer, whereby the consumer waives the effects that would result from that term being found to be unfair.

22 It should be noted that, under Article 6(1) of Directive 93/13, Member States are to lay down that unfair terms in a contract concluded with a consumer by a seller or supplier are not binding on consumers, as provided for under their national law (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 53).

23 Thus, a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 61).

24 Consequently, under Article 6(1) of Directive 93/13, it is for the national courts to exclude the application of unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 52 and the case-law cited).

25 However, it is clear from the Court's case-law that the right to effective consumer protection includes the option to waive the exercise of one's rights, with the consequence that, where appropriate, account must be taken of the intention expressed by the consumer where, although aware of the non-binding nature of an unfair term, that consumer states nevertheless that he or she is opposed to that term being disregarded, thus giving his or her free and informed consent to the term in question (see, to that effect, judgment of 14 April 2016, *Sales Sinués and Drame Ba*, C-381/14 and C-385/14, EU:C:2016:252, paragraph 25).

26 Directive 93/13 does not go as far as making the system of protection against the use of unfair terms by suppliers or sellers, a system which it introduced for the benefit of consumers, mandatory. Accordingly, where the consumer prefers not to rely on it, that system of protection is not applied (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 54).

27 It is thus for the national court to take into account, where appropriate, the intention expressed by the consumer where, although aware of the non-binding nature of an unfair term, that consumer states nevertheless that he or she is opposed to that term being disregarded, thus giving his or her free and informed consent to that term (see, to that effect, judgment of 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 35).

28 Consequently, and by way of analogy, it must be accepted, as the Advocate General essentially noted in points 39 to 42 of his Opinion, that a consumer may waive the right to rely on the unfairness of a contractual term in the context of a novation agreement, whereby the consumer waives the effects that would result from that term being declared to be unfair, provided that that waiver is the result of free and informed consent.

29 However, as is clear from the case-law cited in paragraph 25 of the present judgment, the consumer's waiver of the right to rely on the nullity of an unfair term may be taken into account only where, at the time of that waiver, the consumer was aware of the non-binding nature of that term and of the consequences resulting from it. Only in that scenario can it be considered that his or her agreement to the novation of such a term is the result of free and informed consent, in compliance with the requirements laid down in Article 3 of Directive 93/13, which it is for the national court to verify.

30 It follows from the foregoing that the answer to the first question referred is that Article 6(1) of Directive 93/13 must be interpreted as not precluding a term in a contract concluded between a seller or supplier and a consumer, which might be found by a court to be unfair, from being the subject of a novation agreement between that seller or supplier and that consumer, whereby the consumer waives the effects that would result from that term being found to be unfair, provided that that waiver is the result of free and informed consent, which it is for the national court to verify.

The second question

31 By its second question, the referring court asks, in essence, whether Article 3(1) and (2) of Directive 93/13 must be interpreted as meaning that a term in a contract concluded between a seller or supplier and a consumer for the purpose of amending a potentially unfair term in a previous contract concluded between them or for the purpose of dealing with the consequences of that other term being unfair may itself be regarded as not having been individually negotiated and, where appropriate, declared to be unfair.

32 It should be noted that, under Article 3(1) of Directive 93/13, a review of the unfairness of a term in a contract concluded between a seller or supplier and a consumer concerns the terms that have not been individually negotiated.

33 Article 3(2) of that directive specifies that a term must always be regarded as not individually negotiated where it has been drafted in advance by the seller or supplier and the consumer has therefore not been able to influence the substance of the term, as is the case, in particular, in the context of a pre-formulated standard contract. In that regard, the Court has previously held that a term drafted for general use constituted a term that has not been individually negotiated (judgment of 15 January 2015, *Šiba*, C-537/13, EU:C:2015:14, paragraph 31).

34 Those conditions are also likely to be fulfilled by a term intended to amend a potentially unfair term in a previous contract concluded between the same parties, or to deal with the consequences of the other term being unfair. The fact that the new term is intended to amend an earlier term which was not individually negotiated does not in itself relieve the national court of the obligation to verify whether the consumer was actually able to influence, within the meaning of Article 3(2) of Directive 93/13, the substance of that new term.

35 In the case at issue in the main proceedings, it is for the referring court to take account of all the circumstances in which such a term was presented to the consumer for the purposes of determining whether the consumer was able to influence its substance.

36 In the present case, the fact that the conclusion of the novation agreement at issue in the main proceedings forms part of a general policy of renegotiating mortgage loan agreements subject to a variable interest rate and including a 'floor' term, initiated by Ibercaja Banco following judgment 241/2013 of the Tribunal Supremo (Supreme Court) of 9 May 2013, could be an indication that XZ was unable to influence the substance of the new 'floor' term.

37 The same can be said of the fact that, according to the referring court, the bank did not provide XZ with a copy of the contract and did not allow her to take it with her in order to become acquainted with its terms.

38 In any event, the fact that XZ preceded her signature of the novation agreement by a handwritten statement indicating that she had understood the mechanism of the 'floor' term does not in itself permit the conclusion that that term was individually negotiated and that the consumer was in fact able to influence the substance of that term.

39 It follows from the foregoing that the answer to the second question referred is that Article 3(2) of Directive 93/13 must be interpreted as meaning that a term in a contract concluded between a seller or supplier and a consumer for the purpose of amending a potentially unfair term in a previous contract concluded between them or for the purpose of dealing with the consequences of that other term being unfair may itself be regarded as not having been individually negotiated and, where appropriate, be found to be unfair.

The fourth question

40 By its fourth question, the referring court asks, in essence, whether Articles 3(1), 4(2) and 5 of Directive 93/13 must be interpreted as meaning that the requirement of transparency incumbent on a seller or supplier under those provisions means that, where the latter concludes with a consumer a mortgage loan agreement subject to a variable interest rate, which contains a 'floor' term, the seller or supplier must provide the consumer with the information necessary to understand the economic consequences resulting for the consumer, at the time of conclusion of that agreement, from the mechanism initiated by that 'floor' term.

41 Under Article 3(1) of Directive 93/13, a term in a contract concluded between a seller or supplier and a consumer which has not been individually negotiated is to be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under that contract, to the detriment of the consumer.

42 Nevertheless, in accordance with Article 4(2) of that directive, the assessment of whether terms are unfair is to 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 those terms are 'in plain intelligible language'.

43 Article 5 of that directive further provides that, where all or certain terms of the contract offered to the consumer are in writing, those terms must always be drafted 'in plain, intelligible language'.

44 It is apparent from the case-law of the Court that the requirement of transparency laid down in Article 4(2) and Article 5 of Directive 93/13 may not be reduced to the requirement of being formally and grammatically intelligible. As the system of protection introduced by that directive is based on the idea that consumers are in a position of weakness vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, that requirement, laid down by the directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent, must be understood in a broad sense (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 50).

45 Therefore, the requirement that a contractual term must be drafted in plain, intelligible language must be understood to mean also that the contract should indicate transparently how the mechanism to which the relevant term refers is specifically to function and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms, so that the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him or her of entering into the contract (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 45).

46 In the case of a mortgage loan agreement, it is for the national court to carry out the necessary checks in that regard, in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the agreement. More specifically, it is for the national court, when it considers all the circumstances surrounding the conclusion of the contract, to determine whether all the information likely to have a bearing on the extent of his or her commitment has been communicated to the consumer, enabling him or her to estimate, in particular, the total cost of his or her loan. First, whether the terms are drafted in plain, intelligible language enabling an average consumer to estimate that cost and, second, the fact of failing to mention in the loan agreement information regarded as being essential, in the light of the nature of the goods or services which are the subject matter of that agreement play a decisive role in that determination (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 52).

47 In particular, providing information, before concluding such a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he or she wishes to be bound by the terms drawn up in advance by the seller or supplier (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 50 and the case-law cited).

48 Furthermore, the unfairness of a contractual term is to be assessed by reference to the time of conclusion of the contract at issue, taking account of all the circumstances which could have been known to the seller or supplier at that time, and which were of such a nature that they could affect the future performance of the contract, since a contractual term may give rise to an imbalance between the parties which manifests itself only during the performance of the contract (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 54).

49 Accordingly, compliance by a seller or supplier with the requirement of transparency laid down in Article 4(2) and Article 5 of Directive 93/13 must be assessed by reference to the information available to that seller or supplier on the date of conclusion of the contract with the consumer.

50 In particular, in the case of a ‘floor’ term in a loan agreement subject to a variable interest rate, it must be noted that the financial impact of a mechanism limiting downward movements in the interest rate necessarily depends on changes in the reference index on the basis of which such a rate is calculated.

51 In those circumstances, the consumer concerned must be placed in a position to understand the economic consequences such a term will cause for him or her (see, to that effect, judgment of 5 June 2019, *GT*, C-38/17, EU:C:2019:461, paragraph 33 and the case-law cited).

52 However, as regards a term limiting downward movements of a variable rate calculated on the basis of an index, the exact value of that rate cannot, indeed, be determined in a loan agreement for the entire duration of the loan. A seller or supplier cannot therefore be required to provide precise information regarding the financial consequences of variations in the interest rate during the course of the contract, since those variations depend on unforeseeable future events that are outwith the seller or supplier’s control. In particular, the application of a variable interest rate entails, by its very nature, a fluctuation in the amounts of future payments, so that the seller or supplier cannot be in a position to specify the exact impact of the application of a ‘floor’ term on those payments.

53 The fact remains that the Court has held that, with regard to variable rate mortgage loans, the provision of data relating to past changes in the index on the basis of which that rate is calculated is a particularly relevant factor (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 56).

54 On the basis of such information, consumers can be put in a position to understand, in the light of past fluctuations, the possibility that they may not be able to take advantage of rates below the 'floor' rate proposed to them.

55 As regards the amounts the consumer might waive by agreeing to a new 'floor' term and which correspond to the difference between the amounts paid by the consumer under the original 'floor' term and those which would have been payable in the absence of a 'floor' term, it should be noted that, in principle, those amounts can easily be determined by an average consumer who is reasonably well informed and circumspect, provided that he or she has access to all the necessary information from the seller or supplier, in this case the banking institution, which has the necessary expertise and knowledge in that respect.

56 It follows from the foregoing that the answer to the fourth question referred is that Article 3(1), Article 4(2) and Article 5 of Directive 93/13 must be interpreted as meaning that the requirement of transparency incumbent on a seller or supplier under those provisions means that, when concluding a mortgage loan agreement subject to a variable interest rate that contains a 'floor' term, the consumer must be placed in a position to understand the economic consequences that the mechanism initiated by such a term will cause for him or her, in particular by means of being provided with information on past changes in the index on the basis of which the interest rate is calculated.

The third and fifth questions

57 By its third and fifth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3(1) of Directive 93/13, read in conjunction with paragraph 1(q) of the Annex thereto and Article 6(1) of that directive, must be interpreted as meaning that a term of a novation agreement which amends a term of a previous contract and by which a seller or supplier and a consumer mutually waive their right to take legal action in order to assert claims relating, inter alia, both to the original term amended by that novation agreement and to the new term must be classified as 'unfair'.

58 It is apparent from the order for reference that, by the novation agreement, Ibercaja Banco and XZ agreed to a reduction in the rate of the 'floor' term which was applicable under the mortgage loan agreement and to a mutual waiver of rights of action in relation to the old and new 'floor' terms.

59 Where such a waiver term is included in a contract concluded between a seller or supplier and a consumer, the national court may find that that term is unfair pursuant to the examination provided for in Article 3 of Directive 93/13, provided that the term has not been individually negotiated and subject to the limits laid down in Article 4(2) of that directive.

60 As is apparent from Article 3(1) of that directive, a contractual term which has not been individually negotiated must be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

61 It is for the national court to determine whether the contractual terms brought before it must be classed as unfair, taking account, in principle, and in accordance with Article 4(1) of that directive, of all the circumstances of the case (judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 66).

62 It is for the national court to determine whether, having regard to the particular circumstances of the case, a term meets the requirements of good faith, balance and transparency. Nonetheless, the Court has jurisdiction to identify from the provisions of Directive 93/13 the criteria which the national court may or must apply when making such a determination (judgment of 28 July 2016, *Verein für Konsumenteninformation*, C-191/15, EU:C:2016:612, paragraph 65).

63 In addition, it is clear from Article 3(3) of Directive 93/13 that the Annex to that directive contains an indicative and non-exhaustive list of the terms which may be regarded as unfair. Paragraph 1(q) of that annex identifies, as terms which may be unfair, those which have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy'.

64 Moreover, the fact that a seller or supplier and a consumer mutually waive the right to bring legal proceedings relating to a contractual term does not prevent the national court from examining the unfairness of such a term, in so far as that term is capable of producing binding effects with regard to the consumer.

65 In the present case, it is apparent from the order for reference that, by the novation agreement, Ibercaja Banco and XR agreed, first, to a reduction in the rate of the 'floor' term which was applicable under the mortgage loan agreement and, second, to a mutual waiver of rights of action in relation to the old and new 'floor' terms.

66 As regards, first, the waiver by XZ of her right to invoke before a national court her claims relating to the original 'floor' term, it should be noted that, as is clear from paragraphs 25 to 28 of the present judgment, Directive 93/13 does not in itself preclude a consumer from contractually waiving the benefit which he or she could obtain from a declaration that a contract term is unfair, provided that that waiver is based on free and informed consent.

67 Furthermore, as the Advocate General pointed out in points 70 to 73 of his Opinion, a distinction must be drawn between the waiver of rights of action where so stipulated in an agreement, such as a settlement, the very purpose of which is the resolution of a dispute between a seller or supplier and a consumer, and the prior waiver of any rights of action included in a contract concluded between a consumer and a seller or supplier, as referred to in paragraphs 75 and 76 of the present judgment.

68 However, a term establishing a mutual waiver of rights of action in the context of an agreement aimed at resolving a dispute that has arisen between a seller or supplier and a consumer, concerning the validity of a term in a contract binding those two parties, is capable of falling within the main subject matter of that agreement, within the meaning of Article 4(2) of Directive 93/13 and, consequently, of being exempt from the assessment of possible unfairness, provided that it is drafted in plain, intelligible language, that being a matter for the national court.

69 In the present case, the referring court considers that XZ was not provided with sufficient information regarding the unfair nature of the original 'floor' term and the amount of the reimbursement she would have been entitled to because of the sums that she unduly paid on the basis of that term.

70 As is apparent from paragraph 48 of the present judgment, whether a term in a contract concluded between a seller or supplier and a consumer is unfair must be assessed by reference to the time of conclusion of that contract, taking account of all the circumstances which could have been known to that seller or supplier at that time, and which were such as to affect the future performance of that contract, since a contractual term may give rise to an imbalance between the parties which manifests itself only during the performance of the contract.

71 While it is for the referring court to examine what information Ibercaja Banco had at its disposal on the date the novation agreement was concluded, it must be pointed out that, according to the information available to the Court, that contract was concluded on 4 March 2014. By judgment

241/2013 of 9 May 2013, the Tribunal Supremo (Supreme Court) held, in proceedings initiated by consumer associations, that 'floor' terms included in mortgage loan contracts did not in principle meet the requirements of clarity and transparency and were therefore liable to be declared unfair. In so doing, the Tribunal Supremo (Supreme Court) limited the effects of the declaration of nullity of such terms for the future. Only in the judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980), did the Court hold that Article 6(1) of Directive 93/13 precludes such a limitation.

72 Consequently, first, although the unfairness of the initial 'floor' term agreed between XZ and Ibercaja Banco was foreseeable at the time of conclusion of the novation agreement, it is apparent that that was not a certainty, as that unfairness had not been established between the parties to that contract in legal proceedings.

73 Second, it is not apparent that the law as it stood at the time of the conclusion of the novation agreement allowed Ibercaja Banco to know that the existence of an unfair 'floor' term gave rise to a right to full reimbursement of the sums unduly paid because of that term.

74 In those circumstances, it will be for the referring court to assess the level of certainty which existed at the time of conclusion of the novation agreement as regards the unfairness of the initial 'floor' term, in order to determine the extent of the information that Ibercaja Banco was required to provide to XZ in accordance with the requirement of transparency incumbent on it when presenting the term concerning waiver of rights of action, and whether XZ was placed in a position to understand the legal consequences such a term would have for her.

75 As regards, in the second place, the waiver by the parties to the main proceedings of their right to invoke before national courts their claims relating to the new 'floor' term, it must be emphasised that, as the Advocate General pointed out in points 43 and 44 of his Opinion, a consumer may not legitimately waive, for the future, the legal protection and the rights that he or she derives from Directive 93/13. By definition, he or she cannot appreciate the consequences of agreeing to such a term as regards disputes which may arise in the future.

76 In that regard, it should be noted that Article 6(1) of Directive 93/13, according to which Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier are not to be binding on consumers, as provided for under their national law, is mandatory (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 55). If it were to be permissible for a consumer to grant a prior waiver of the rights he or she derives from the system of protection put in place by the directive, that would run counter to the mandatory nature of that provision and would jeopardise the effectiveness of that system.

77 It follows from the foregoing that the answer to the third and fifth questions referred is that Article 3(1) of Directive 93/13, read in conjunction with paragraph 1(q) of the Annex thereto and Article 6(1) of that directive, must be interpreted as meaning that:

– a term included in a contract concluded between a seller or supplier and a consumer with a view to resolving an existing dispute, whereby the consumer waives the right to submit to a national court claims that he or she could have submitted in the absence of that term, may be regarded as 'unfair', particularly where the consumer was not provided with the relevant information enabling him or her to understand the legal consequences for him or her;

– a term whereby the same consumer waives, in respect of future disputes, the right to take legal action based on his or her rights under Directive 93/13 is not binding on the consumer.

Costs

78 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 (Fourth Chamber) hereby rules:

1. **Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding a term in a contract concluded between a seller or supplier and a consumer, which might be found by a court to be unfair, from being the subject of a novation agreement between that seller or supplier and that consumer, whereby the consumer waives the effects that would result from that term being found to be unfair, provided that that waiver is the result of the consumer's free and informed consent, which it is for the national court to verify.**

2. **Article 3(2) of Directive 93/13 must be interpreted as meaning that a term in a contract concluded between a seller or supplier and a consumer for the purpose of amending a potentially unfair term in a previous contract concluded between them or for the purpose of dealing with the consequences of that other term being unfair may itself be regarded as not having been individually negotiated and, where appropriate, be found to be unfair.**

3. **Articles 3(1), 4(2) and 5 of Directive 93/13 must be interpreted as meaning that the requirement of transparency incumbent on a seller or supplier under those provisions means that, when concluding a mortgage loan agreement subject to a variable interest rate that contains a 'floor' term, the consumer must be placed in a position to understand the economic consequences that the mechanism initiated by such a term will cause for him or her, in particular by means of being provided with information on past changes in the index on the basis of which the interest rate is calculated.**

4. **Article 3(1) of Directive 93/13, read in conjunction with paragraph 1(q) of the Annex thereto and Article 6(1) of that directive, must be interpreted as meaning that:**

   – **a term included in a contract concluded between a seller or supplier and a consumer with a view to resolving an existing dispute, whereby the consumer waives the right to submit to a national court claims that he or she could have submitted in the absence of that term, may be regarded as 'unfair', in particular where the consumer was not provided with the relevant information enabling him or her to understand the legal consequences for him or her;**

   – **a term whereby the same consumer waives, in respect of future disputes, the right to take legal action based on his or her rights under Directive 93/13 is not binding on the consumer.**

[Signatures]