Reports of Cases

ORDER OF THE COURT (First Chamber)

14 November 2013*

(Directive 93/13/EEC — Article 99 of the Rules of Procedure of the Court of Justice — Consumer contracts — Mortgage loan agreement — Mortgage enforcement proceedings — Powers of the national court responsible for enforcement — Unfair terms — Criteria for assessment)

In Joined Cases C-537/12 and C-116/13,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia e Instrucción No. 1 de Catarroja (Spain) and the Juzgado de Primera Instancia No. 17 de Palma de Mallorca (Spain), made by decisions of 15 November 2012 and 26 February 2013, received at the Court on 26 November 2012 and 11 March 2013, respectively, in the proceedings

Banco Popular Español SA

v

Maria Teodolinda Rivas Quichimbo,

Wilmar Edgar Cun Pérez (C-537/12),

and

Banco de Valencia SA

v

Joaquín Valldeperas Tortosa,

María Ángeles Miret Jaume (C-116/13),

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give its decision by reasoned order in accordance with Article 99 of the Rules of Procedure of the Court,

* Language of the case: Spanish.

makes the following

Order

1 These requests for a preliminary ruling concern the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29; 'the Directive').

2 The requests have been made in two sets of proceedings, first, between Banco Popular Español SA ('Banco Popular') and Ms Rivas Quichimbo and Mr Cun Pérez and, second, between Banco de Valencia SA ('Banco de Valencia') and Mr Valldeperas Tortosa and Ms Miret Jaume, concerning the recovery of unpaid debts arising from mortgage loan agreements between those parties.

Legal context

European Union law

3 The sixteenth recital in the preamble to Directive 93/13 states that:

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

4 Article 3 of that directive 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 the term, particularly in the context of a pre-formulated standard contract.

…

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

5 Under Article 4(1) of the Directive:

'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.'

6 Article 6(1) of Directive 93/13 is worded as follows:

'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 7(1) of Directive 93/13 states:

‘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.’

8 The annex to Directive 93/13 lists the terms referred to in Article 3(3) of the Directive:

‘1. Terms which have the object or effect of:

…

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

…

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

2. Scope of subparagraphs (g), (j) and (l)

(a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

…’

Spanish law

9 Under Spanish law, consumers were initially protected against unfair terms by General Law 26/1984 for the protection of consumers and users (Ley General 26/1984 para la Defensa de los Consumidores y Usuarios) of 19 July 1984 (BOE No 176 of 24 July 1984, p. 21686).

10 That law was subsequently amended by Law 7/1998 on general contractual conditions (Ley 7/1998 sobre Condiciones Generales de la Contratación) of 13 April 1998 (BOE No 89 of 14 April 1998, p. 12304), which transposed Directive 93/13 into Spanish domestic law.

11 Lastly, General Law 26/1984, as amended by Law 7/1998, was codified by Royal Legislative Decree 1/2007 approving the re-cast text of the General Law for the Defence of Consumers and Users and related laws (Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usarios y otras leyes complementarias) of 16 November 2007 (BOE No 287 of 30 November 2007, p. 49181).

12 Article 82 of that royal legislative decree provides:

‘1. All stipulations not negotiated individually and all practices not expressly allowed which, contravening the requirements of good faith, give rise, in a manner detrimental to the consumer and user, to a significant imbalance of the rights and obligations of the parties under the contract, shall be regarded as unfair terms.

…

3. 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 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.

4. Notwithstanding the foregoing paragraphs, terms shall be regarded as unfair if, in accordance with the provisions of Articles 85 to 90, both inclusive, they:

(a) make the contract dependent on the wishes of the supplier or seller,

(b) limit the rights of the consumer and user,

(c) determine that there shall be no contractual reciprocity,

(d) require the consumer or user to provide disproportionate guarantees or improperly impose upon him the burden of proof,

(e) are disproportionate in relation to the formation and performance of the contract, or

(f) contravene the rules on jurisdiction and applicable law.'

13 The Code of Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil), in the version in force on the date on which the actions in the main proceedings were commenced ('the Code of Civil Procedure') governs, in Book III, Title IV, Chapter V, entitled 'Procedure for enforcing payment of debts guaranteed by a pledge or mortgage', in particular in Articles 681 to 698, mortgage enforcement proceedings.

14 Article 695 of the Code of Civil Procedure states:

'1. In the proceedings referred to in this chapter, opposition to enforcement by the defendant may be accepted only when based on the following grounds:

1. Extinguishment of the security or secured obligation on condition of production of a certificate from the register showing the annulment of the mortgage or, as appropriate, of the non-possessory pledge or a notarial instrument attesting receipt of payment or annulment of the security.

2. An error in determining the amount due, where the secured debt is the closing balance of an account between the creditor seeking enforcement and the party against whom enforcement is sought. The party against whom enforcement is sought shall produce his copy of the statement of account and the objection shall be accepted only when the balance shown in that statement differs from the balance submitted by the creditor seeking enforcement.

…

3. … the existence of another guarantee or mortgage … registered before the security which is the subject of the proceedings, which is to be established by means of an appropriate certificate from the register.

2. If an objection is lodged under the preceding paragraph, the registrar shall stay enforcement and summon the parties to a hearing before the court which ordered the enforcement. There shall be at least four days between the summons and the date of the hearing in question. At that hearing, the court shall hear the parties, admit the documents that are submitted and issue the decision that it considers reasonable within two days in the form of an order …'

15 Article 698 of the Civil Procedure Code states:

‘1. Any application made by a debtor, third-party holder or other interested party, which is not covered by the preceding articles, including applications concerning nullity of title, maturity, certainty, extinguishment or the amount of the debt, shall be settled by an appropriate judgment, without ever having the effect of staying or terminating the judicial enforcement proceedings provided for in the present chapter.

…

2. Upon submission of the application referred to in the preceding paragraph or in the course of the subsequent proceedings, and in order to secure the effectiveness of the decision to be taken in those proceedings, retention of all or part of the amount to be paid to the creditor in accordance with the procedure laid down in the present chapter may be requested.

The court shall order such retention on the basis of the documents submitted if it considers the grounds asserted to be sufficient. If the party seeking retention clearly lacks adequate funds, the court may first require him to provide a sufficient security in respect of default interest and any compensation for other damage the creditor may suffer.

3. If the creditor provides a reasonable security for the amount ordered to be retained as a result of the proceedings referred to in the first paragraph, the retention shall be revoked.’

16 Article 131 of the Law on mortgages (Ley Hipotecaria) in force at the material time, codified by Decree of 8 February 1946 (BOE No 58, of 27 February 1946, p. 1518), provides:

‘Preliminary registrations of an application for annulment of a mortgage or the other entries not based on one of the cases which may lead to staying of enforcement shall be cancelled pursuant to the order on annulment referred to in Article 133, provided that such entries postdate the marginal note regarding the issue of the security certificate. The act concerning receipt of payment of the mortgage may not be registered unless the abovementioned marginal note has already been cancelled by order of the court to that effect.’

17 Pursuant to Paragraph 153a of that law:

‘… The parties may agree that, in the case of enforcement, the amount due shall be that resulting from the quantification carried out by the lending financial institution in the manner agreed by the parties to the contract.

At the expiry of the period agreed by the contracting parties or following any extension, mortgage enforcement may be carried out in accordance with Articles 129 and 153 of the present law and analogous provisions of the Code of Civil Procedure.’

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

Case C-537/12

18 On 28 May 2005, Mr Cun Pérez and Ms Rivas Quichimbo concluded a loan agreement for EUR 107 300 secured by a mortgage on the family home.

19 From 31 October 2009 the debtors ceased paying the loan instalments.

20 Therefore, giving judgment on the application brought on 20 January 2012 by Banco Popular, the Juzgado de Primera Instancia e Instrucción No 1 de Catarroja (Court of First Instance and Preliminary Investigations No 1, Catarroja) authorised mortgage enforcement proceedings against the immoveable property subject to the mortgage, by decision of 8 February 2012, ordering the debtor to pay EUR 97 667.49 in respect of the principal outstanding and EUR 17 962.02 in respect of interest and expenses.

21 On 18 May 2012, Ms Rivas Quichimbo, represented by the lawyer appointed following her application for legal aid, opposed the enforcement proceedings, relying, inter alia, on the unfairness of the 'floor' clause in the loan agreement which guarantees the lending institution a minimum rate of interest in the event that the rate used as a reference falls below a specified amount, essentially transforming a variable rate loan into a fixed rate loan.

22 At the hearing on 10 July 2012, as Ms Rivas Quichimbo's lawyer repeated the argument concerning the unfairness of the contractual term concerned, Banco Popular claimed that it did not appear in the exhaustive list of grounds for opposition laid down in Article 695 of the Code of Civil Procedure and, accordingly, that the debtor must have recourse to declaratory proceedings.

23 In that context, by decision of 15 October 2012, the Juzgado de Primera Instancia e Instrucción No 1 de Catarroja informed the parties of its doubts as to the conformity of Spanish procedural law with the legal framework established by Directive 93/13 so that they could express their views.

24 In particular, that court stated that, if the creditor chooses mortgage enforcement proceedings for enforcement purposes, only declaratory proceedings without suspensory effect enable a plea of unfairness to be raised regarding one of the terms of the loan agreement from which the debt claimed arises. In those circumstances, taking account of the impossibility of assessing unfairness at the stage of enforcement, either of the court's own motion or at the request of one of the parties, it is extremely difficult for a Spanish court to compensate for the imbalance which exists between the consumer and the seller or supplier in mortgage enforcement proceedings.

25 In that court's view, the Spanish legislation governing that procedure thus undermines the effectiveness of consumer protection intended by Directive 93/13.

26 That finding also follows from Case C-618/10 *Banco Español de Credito* [2012] ECR, paragraph 53, in which the Court arrived at the same conclusion regarding the procedural arrangement with respect to orders for payment such as that in force in Spain, on the ground that it 'completely prevents the court before which an application for order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, even though it already has all the legal and factual elements necessary for that task available to it, whether terms contained in a contract concluded between a seller or supplier and a consumer are unfair'.

27 In those circumstances the Juzgado de Primera Instancia e Instrucción No 1 de Catarroja decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) [Must] Directive 93/13 … be interpreted as precluding national legislation which prevents a judicial authority hearing mortgage enforcement proceedings such as those governed by Articles 681 to 695 of the Spanish Ley de Enjuiciamiento Civil … from examining, either of its own motion or at the request of a party, the unfairness of a term contained in a contract concluded between a supplier or seller and a consumer, whether or not the latter has formulated opposition[?]

(2) Regardless of whether the answer to those questions is positive or negative … [must] Directive 93/13 must be interpreted as precluding national legislation which prevents a judicial authority hearing mortgage enforcement proceedings of the kind governed by Articles 681 to 695 of the Spanish Ley de Enjuiciamiento Civil … from suspending those proceedings in the event that declaratory proceedings are subsequently initiated in which a declaration is sought as to the unfairness of a term contained in the contract concluded between a supplier or seller and a consumer, the said contract having been relied upon to commence the abovementioned enforcement proceedings[?]'

Case C-116/13

28 By notarial instrument of 26 July 2007, Mr Valldeperas Tortosa and Ms Miret Jaume concluded a loan agreement with Banco de Valencia for EUR 300 000 to finance the purchase of their family home. In that instrument, the borrowers secured the property with a mortgage.

29 The agreement provided, in a specific clause entitled 'Accelerated repayment of the mortgage', that in the event of non-payment of any one of the contractual obligations, the lending institution could cancel the loan agreement unilaterally without prior notice and require the repayment of the outstanding capital, together with interest and costs. Under that clause, the bank could, in particular, cancel that agreement from the first unpaid monthly instalment, without having to take into consideration previous compliance by the debtors with their contractual obligations.

30 Since the debtors did not pay four instalments for the period from March to June 2012, Banco de Valencia declared the repayment term accelerated and, on 5 June 2012, initiated mortgage enforcement proceedings seeking the payment of EUR 279 540.58 in respect of capital and a sum of EUR 83 862.17 provisionally calculated in respect of interest accruing after the notarially attested calculation annexed to the application, plus costs.

31 As the court responsible for enforcement, the Juzgado de Primera Instancia e Instrucción No. 17 de Palma de Mallorca (Court of First Instance and Preliminary Investigations No. 17, Palma de Mallorca) expressed doubts, in the same way as the Juzgado de Primera Instancia e Instrucción No. 1 de Catarroja, as to the compatibility with Directive 93/13 of Spanish mortgage enforcement proceedings. Under the latter, the court having jurisdiction has no power to determine of its own motion whether a term contained in a mortgage loan agreement is unfair before ordering enforcement, its task being limited to the formal examination of the right to seek enforcement and the accompanying documentation and to stay the mortgage enforcement proceedings if declaratory proceedings are brought by the debtor seeking a declaration that that contractual term is unfair

32 Thus, by noting the view expressed in Advocate General Kokott's Opinion in *Aziz* (Case C-415/11 [2013] ECR), the Juzgado de Primera Instancia No 17 de Palma de Mallorca stated that it is possible that those procedural rules may contravene the system established by Directive 93/13, as interpreted by the settled case-law of the Court (see Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421; Case C-243/08 *Pannon GSM* [2009] ECR I-4713; and *Banco Español de Crédito*). It is clear from that Opinion, that the national court is always required to determine of its own motion whether a contractual term falling within the scope of that directive is unfair, since it has before it the elements of law and fact necessary for that purpose.

33 In addition, the Juzgado de Primera Instancia No. 17 de Palma de Mallorca took the view that the handing of the case in the main proceedings raises other questions concerning, in particular, the interpretation of the definition of 'unfair term' in the light of Article 3(1) and (3) of that directive, and

Point 1(e) and (g) and Point 2(a) in the annex thereto. The compatibility of those provisions with the term which is the subject-matter of the dispute in the main proceedings and which concerns the accelerated repayment of a mortgage is unclear.

34 In those circumstances, the Juzgado de Primera Instancia No. 17, Palma de Mallorca decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the Spanish mortgage enforcement process comply with Article 7 of Directive 93/13 …, in so far as it does not accept, as a precondition for deciding whether or not to order enforcement, judicial review of the court's own motion of a term for acceleration of the loan, at the request of the bank alone, which is considered unfair in itself and in the specific way it is applied to this case, that term being indispensable for making that privileged means of enforcement available to a professional lender?

(2) Again having regard to Article 7 of Directive 93/13…, what must be the scope of the court's intervention regarding that term when it has to direct that enforcement is to take place in the mortgage enforcement process?

(3) Can a contractual term which enables the lending financial institution unilaterally to cancel the loan agreement on purely objective grounds, some of which have no connection with the loan agreement itself and, in the circumstances at issue in these proceedings, because of the failure to pay four monthly mortgage instalments, be regarded as unfair, both in itself and in the manner in which it is specifically applied to this case, in the light of Article 3(1) and (3) of Directive 93/13… and points 1(e) and (g) and 2(a) of the annex thereto?'

35 By order of the President of the Court of 20 June 2013, Cases C-537/12 and C-116/13 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred

36 Under Article 99 of the Rules of Procedure, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

37 It is appropriate to apply that article to the present joined cases.

The two questions in Case C-537/12 and the first two questions in Case C-116/13

38 By those questions, which should be examined together, the referring courts ask essentially whether Directive 93/13 must be interpreted as meaning that it precludes legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court responsible for enforcement, in mortgage enforcement proceedings, either to assess of its own motion or at the request of the consumer the unfairness of a term contained in the contract from which the debt arises and which is the basis for the enforcement order, or to grant interim relief guaranteeing the full effectiveness of the final decision of the court hearing the corresponding declaratory proceedings which has jurisdiction to determine whether that term is unfair.

39 In that connection, it is settled case-law that the system of protection introduced by the directive 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 (*Aziz*, paragraph 44).

40 As regards that weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Aziz*, paragraph 45).

41 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (*Aziz*, paragraph 46 and the case-law cited).

42 Furthermore, the Court has held that Directive 93/13 must be interpreted as precluding legislation of a Member State which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, in *limine litis* or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection (*Banco Español de Crédito*, paragraph 57).

43 In addition, the Court held, in paragraph 64 of *Aziz*, that that directive must be interpreted as meaning that it precludes the legislation of a Member State which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.

44 In those circumstances, the answer to the questions referred may be clearly deduced from that case-law in so far as they concern, in substance, the definition, pursuant to that directive, of the powers of the court with jurisdiction to authorise mortgage enforcement, in the context of the same procedural system as those examined by the Court of Justice in *Aziz*.

45 In that regard, in the absence of harmonisation of the national mechanisms for enforcement, the rules implementing the grounds of objection allowed in mortgage enforcement proceedings and the powers conferred on the court hearing the declaratory proceedings, which enjoys jurisdiction to analyse the lawfulness of the contractual terms on the basis of which the right to seek enforcement was established, are a matter for the national legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law (principle of effectiveness) (see, by analogy, *Aziz*, paragraph 50).

46 As regards the principle of equivalence, it must be observed that the Court does not have before it any evidence which might raise doubts as to the compliance of the legislation at issue in the main proceedings with that principle.

47 It is apparent from the file that the Spanish procedural system prohibits the court responsible for enforcement, in mortgage enforcement proceedings, either from examining of its own motion or at the request of one of the parties, the contract on which the debt claimed is based for reasons different from the grounds of opposition expressly provided for or from granting interim relief guaranteeing the full effectiveness of the final decision of the court hearing the declaratory proceedings, not only where the latter assesses the unfairness, in the light of Article 6 of Directive 93/13, of a term used in a

contract concluded between a seller or supplier and a consumer but also where it examines any conflict between such a term and national rules relating to public policy, which it is bound, none the less, to examine.

48 As regards the principle of effectiveness, it is the Court's settled case-law that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (*Aziz*, paragraph 53).

49 In the present case, it is apparent from the file submitted to the Court that, pursuant to Article 695 of the Code of Civil Procedure, in mortgage enforcement proceedings, an objection by the defendant to enforcement may be accepted only where it is based on extinguishment of the security or secured obligation, an error in determining the amount due, where the secured debt is the closing balance of an account between the creditor seeking enforcement and the party against whom enforcement is sought, or the existence of another mortgage or guarantee registered before the security which is the subject of the proceedings.

50 Under Article 698 of the Code of Civil Procedure, any other application made by the debtor, including claims concerning nullity of title, maturity, certainty, extinguishment or the amount of the debt, is to be settled by an appropriate judgment, without having the effect of staying or terminating the judicial enforcement proceedings provided for in the chapter concerned.

51 In addition, according to Article 131 of the Law on mortgages, preliminary registrations of an application for annulment of a mortgage or the other entries in the register not based on one of the cases which may lead to staying of enforcement are to be cancelled pursuant to the order on annulment referred to in Article 133 of that law, provided that such entries postdate the marginal note regarding issue of the security certificate.

52 It follows from the above that, under Spanish rules of procedure, the final vesting of mortgaged property in a third party is always irreversible, even if the unfairness of the term challenged by the consumer before the court hearing the declaratory proceedings results in the annulment of the mortgage enforcement proceedings, except where that consumer made a preliminary registration of the application for annulment of the mortgage before that marginal note (*Aziz*, paragraph 57).

53 In that regard, taking into account the progress and the special features of the mortgage enforcement proceedings at issue in the main proceedings, such an eventuality must however be regarded as remote because there is a significant risk that the consumer in question will not make that preliminary registration within the period prescribed for that purpose, either because of the rapidity of the enforcement proceedings in question or because he is unaware of or does not appreciate the extent of his rights (*Aziz*, paragraph 58).

54 As the Court has already held in paragraph 59 of *Aziz*, such procedural rules impair the protection sought by Directive 93/13, in so far as they render it impossible for the court hearing the declaratory proceedings – before which the consumer has brought proceedings claiming that the contractual term on which the right to seek enforcement is based is unfair – to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision.

55 In the same way, it must be held that such procedural rules, in so far as they completely prevent the court responsible for enforcement either to assess of its own motion or at the consumer's request, the unfairness of a term contained in the contract which gives rise to the debt claimed and which constitutes, in the present case, the basis of the right to enforcement, or to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is

necessary to ensure the full effectiveness of the final decision of the court hearing the declaratory proceedings liable before which the consumer argues that that term is unfair, are liable to undermine the effectiveness of the protection which Directive 93/13 seeks to achieve.

56 As the Court has stated, without that possibility, where, as in the main proceedings, enforcement in respect of the mortgaged immovable property took place before the judgment of the court in the declaratory proceedings declaring unfair the contractual term on which the mortgage is based and annulling the enforcement proceedings, that judgment would enable that consumer to obtain only subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13 (*Aziz*, paragraph 60).

57 That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling (*Aziz*, paragraph 61).

58 It would thus be sufficient for sellers or suppliers, if the conditions are satisfied, to initiate such mortgage enforcement proceedings so as to deprive consumers, in essence, of the protection intended by the directive, that being also contrary to the Court's case-law, according to which the specific characteristics of court proceedings, which take place under national law between sellers or suppliers and consumers, cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under the provisions of that directive (*Aziz*, paragraph 62).

59 In those circumstances, it must be held that the Spanish legislation at issue in the main proceedings does not comply with the principle of effectiveness, in so far as, in mortgage enforcement proceedings initiated by sellers or suppliers against consumer defendants, it makes the application of the protection which the directive seeks to confer on those consumers impossible or excessively difficult (*Aziz*, paragraph 63).

60 In the light of those considerations, the answer to two questions in Case C-537/12 and the first two questions in Case C-116/13 is that Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court responsible for the enforcement, in mortgage enforcement proceedings, either to assess of its own motion or at the consumer's request, the unfairness of a term contained in the contract which gives rise to the debt claimed and which constitutes the basis of the right to enforcement, or to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of the final decision of the court hearing the declaratory proceedings before which the consumer argues that that term is unfair.

The third question in Case C-116/13

61 By that question, the national court essentially seeks clarification regarding the interpretation of Article 3(1) and (3) of Directive 93/13 and points 1(e) and (g) and 2(a) of the annex thereto, in order to determine whether the contractual term, which is the subject-matter of the dispute in the main proceedings and which concerns the 'accelerated repayment of the mortgage', is unfair.

62 In that connection, it should be stated that in *Aziz*, the Court was called on to answer a similar request, in order to enable the national court to determine, in particular, whether a term accelerating the repayment of a long-term mortgage contract was unfair. Accordingly, the answer to the present question may be clearly deduced from the findings set out in that judgment.

63 According to the Court's settled case-law, the relevant jurisdiction of the Court extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of Directive 93/13 and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (see Case C-472/10 *Invitel* [2012] ECR, paragraph 22 and the case-law cited).

64 That being so, it should be noted that, in referring to concepts of good faith and significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of that directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (*Aziz*, paragraph 67).

65 As the Court has already stated, in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms (*Aziz*, paragraph 68).

66 With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', the Court has held that the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations (*Aziz*, paragraph 69).

67 In that regard, it should be recalled that the annex, to which Article 3(3) of Directive 93/13 refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (*Aziz*, paragraph 70).

68 In particular, Point 1(e) and (g) of that annex sets out the terms which have the object or effect of, first, requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation and, second, enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so. Point 2(2) of the annex further states that Point 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

69 It is in the light of those criteria that the Juzgado de Primera Instancia No 17 de Palma de Mallorca must assess whether the term accelerating the repayment of the mortgage at issue in the main proceedings is unfair, pursuant to which the lending institution may unilaterally cancel fixed term loan agreements and thereby require the repayment of the outstanding principal and interest on account of events of default occurring within a limited period.

70 In that connection, it is for the referring court to ascertain in particular whether the right of the seller or supplier to cancel the contract unilaterally is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the

consumer, given the procedural means at his disposal, to take legal action and exercise the rights of the defence, and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the unilateral cancellation of the loan agreement (see, to that effect, *Aziz*, paragraphs 73 and 75).

71 Having regard to all of those considerations, the answer to the third question in Case C-116/13 is that Article 3(1) and (3) of Directive 93/13 and Points 1(e) and (g) and 2(a) of the annex thereto must be interpreted as meaning that, in order to assess the unfairness of a contractual term accelerating the repayment of a mortgage, such as that at issue in the main proceedings, the following are of decisive importance:

— whether the right of the seller or supplier to cancel the contract unilaterally is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question,

— whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the contractual term and amount of the loan,

— whether that right derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence, and

— whether national law provides for adequate and effective means enabling the consumer subject to such a contractual term to remedy the effects of the unilateral cancellation of the loan agreement.

It is for the referring court to carry out that assessment in relation to all the circumstances of the particular case before it.

Costs

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

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

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court responsible for the enforcement, in mortgage enforcement proceedings, either to assess of its own motion or at the consumer's request, the unfairness of a term contained in the contract which gives rise to the debt claimed and which constitutes the basis of the right to enforcement, or to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of the final decision of the court hearing the declaratory proceedings before which the consumer argues that that term is unfair.**

2. Article 3(1) and (3) of Directive 93/13 and Points 1(e) and (g) and 2(a) of the annex thereto must be interpreted as meaning that, in order to assess the unfairness of a contractual term accelerating the repayment of a mortgage, such as that at issue in the main proceedings, the following are of decisive importance:

— whether the right of the seller or supplier to cancel the contract unilaterally is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question,

— whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the contractual term and amount of the loan,

— whether that right derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence, and

— whether national law provides for adequate and effective means enabling the consumer subject to such a contractual term to remedy the effects of the unilateral cancellation of the loan agreement.

It is for the national court to make such an assessment on the basis of the specific circumstances of the case before it.

[Signatures]