Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 July 2021 [1]

Case C-600/19

MA
v
Ibercaja Banco, S.A.,
joined parties:
PO

(Request for a preliminary ruling from the Audiencia Provincial de Zaragoza (Provincial Court, Zaragoza, Spain))

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Articles 6(1) and 7(1) – Principle of effectiveness – Mortgage enforcement proceedings – Power of the national court to examine the unfairness of contractual terms following an initial review which is not reasoned – Determination of the final point in time after which the unfairness of contractual terms can no longer be raised – Principle of *res judicata* – Time-barring)

I. Introduction

1. This request for a preliminary ruling submitted by the Audiencia Provincial de Zaragoza (Provincial Court, Zaragoza, Spain) concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [2] It is situated in the context of mortgage enforcement proceedings in which no objection was lodged by the consumer and the mortgaged property has already been transferred to a third party.

2. The main issue raised by the present case is essentially whether Articles 6(1) and 7(1) of Directive 93/13 preclude national legislation which, by virtue of the effect of *res judicata* and time-barring, does not allow the court at a subsequent stage of the proceedings to examine the unfairness of the contractual terms where those terms were the subject of an initial review carried out by the court of its own motion (*ex officio*), which is not explicitly reflected in the decision authorising the mortgage enforcement. The referring court also wishes to know what effect a subsequent review of unfairness of the contractual terms might have on the adjudication of the mortgaged property.

[1] Original language: English.

[2] OJ 1993 L 95, p. 29.

3. The present case is being heard by the Court in parallel with four other cases (C-693/19, C-725/19, C-831/19 and C-869/19) in which my Opinions are being delivered today. Those cases are based on Spanish, Italian and Romanian requests for preliminary rulings and also touch on similar and potentially sensitive issues relating to the extent of the national court's obligation to examine *ex officio* the unfairness of contractual terms in accordance with the Court's case-law interpreting Directive 93/13 and the relationship with certain principles of national procedural law, including the principle of *res judicata*.

4. Consequently, the present case provides the Court with the opportunity to develop its case-law on Directive 93/13, and in particular to clarify issues regarding *res judicata* and time-barring in connection with the judicial review of unfair terms under that directive.

II. Legal framework

A. Union law

5. Article 6(1) of Directive 93/13 provides:

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

6. Article 7(1) of Directive 93/13 reads as follows:

'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.'

B. Spanish law

7. Article 136 of the Ley de Enjuiciamiento Civil ('the Code of Civil Procedure') states:

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

8. Article 222 of the Code of Civil Procedure states:

'1. The authority of *res judicata* attaching to final judgments, either upholding or dismissing a claim, shall exclude, in accordance with the law, any further proceedings having the same subject matter as that in which the first judgment was given.

2. The authority of *res judicata* shall attach to claims made in the main application and to counterclaims and to the matters referred to in Article 408(1) and (2) of this law.

Facts subsequent to the expiry of the period for the lodging of pleadings in the proceedings in which such claims were made shall be regarded as new and different with respect to the basis on which such claims were made.

3. The authority of *res judicata* shall be binding on the parties to the proceedings in which it arises, their heirs and those deriving title from them, and on the persons who, not being parties to the proceedings, hold the rights which give them standing to bring proceedings in accordance with the provisions of Article 11 of this law.

…

4. A decision that has acquired the force of *res judicata* in a final judgment concluding proceedings shall be binding on a court before which subsequent proceedings are brought where the decision having the force of *res judicata* appears, in the subsequent proceedings, to be a logical antecedent to the subject matter of the subsequent proceedings and where the parties to the two sets of proceedings are the same or where the authority of *res judicata* applies to them pursuant to provisions of the law.'

9. Article 552 of the Code of Civil Procedure states:

'1. If the court considers that the terms and conditions required by law are not met for the purpose of ordering enforcement, it shall issue an order refusing enforcement.

The court shall examine of its own motion the question of whether a term in one of the enforcement orders referred to in Article 557.1 may be regarded as unfair. Where it considers that a term may be regarded as unfair, it shall hear the parties within fifteen days. After hearing the parties, it shall give its decision within five working days, in accordance with Article 561.1(3).'

10. Article 557 of the Code of Civil Procedure states:

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

…

(7) The document contains unfair terms.'

11. Article 695 of the Code of Civil Procedure states:

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

…

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

III. Facts, procedure and questions referred

12. According to the order for reference, on 6 May 2005, the financial institution Ibercaja Banco, S.A. ('Ibercaja Banco') concluded with PO and MA, acting as consumers, a loan contract in the amount of EUR 198 400, repayable before 31 May 2040, and which was secured by a mortgage on a single family home valued at EUR 299 290.

13. The interest for the loan was set at an annual nominal interest rate of 2.75% until 30 November 2005. From that date, clause 3bis of the contract provided that the interest was calculated at a variable interest rate and the minimum differential to be applied to the rate could not be less than 0.5% ('the floor clause'). Pursuant to clause 6 of the contract, default interest was set at an annual nominal rate of 19%. In addition, clause 6bis of the contract stipulated that Ibercaja Banco could claim the full amount of the loan in case of default in payment of any amount due ('the accelerated payment clause').

14. On 30 December 2014, Ibercaja Banco filed an application for mortgage enforcement proceedings against PO and MA following their failure to pay five monthly instalments on the loan from 31 May 2014 to 31 October 2014. It claimed the amount of EUR 164 676.53, corresponding to the capital and interest due and unpaid as of 5 November 2014, plus the amount of EUR 49 402, calculated provisionally, without prejudice to a subsequent adjustment of default interest, at the annual nominal rate of 12% from the closing of the account on 5 November 2014 until full payment.

15. On 26 January 2015, an enforcement order was issued against PO and MA, requiring payment and granting them a period of 10 days to object to enforcement. On the same day, the court officer issued a decision, requesting the Land Registry to submit a certificate of ownership and other rights *in rem* over the property and a certificate of the existence of the mortgage in favour of Ibercaja Banco. No objection to enforcement was lodged by PO and MA.

16. Following notification of PO's death by letter of 14 December 2015, SP and JK became parties to the proceedings as possible legal heirs by order of 9 June 2016.

17. Thereafter, following an auction at which there were no bids, Ibercaja Banco was awarded the mortgaged property for the amount of EUR 179 574, and transferred that property to the company Residencial Murillo, S.A., which provided a receipt of payment for that amount.

18. On 25 October 2016, Ibercaja Banco requested the liquidation of costs valued at EUR 2 888.19, along with the interest which was calculated at EUR 32 538.28 by applying a rate of 12% as provided in Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013, of 14 May 2013, on measures to strengthen the protection of mortgagors, restructuring of debt and social rent; 'Law 1/2013').[3] The parties against whom the enforcement was sought were notified thereof. By order of 13 December 2016, the assessment of costs for the amount specified was approved.

19. On 9 November 2016, MA lodged an objection to the interest calculation on the grounds that clauses 3bis and 6 of the contract, relating to the floor clause and default interest, were unfair.

[3] BOE No 116, 15 May 2013, p. 36373.

20. By order of 8 March 2017, the Juzgado de Primera Instancia No 2 de Zaragoza (Court of First Instance No 2, Zaragoza, Spain; 'the Court of First Instance') decided to examine the potential unfairness of the terms of the contract forming the basis of the enforcement order, after finding that the accelerated repayment clause in clause 6bis of the contract could be unfair. The parties were requested to submit their observations on the matter and possible suspension of the proceedings. Ibercaja Banco objected to suspension and argued, inter alia, that it was not the appropriate time to declare that the terms were unfair since the property had been transferred and the assessment of costs approved.

21. By order of 19 April 2017, the Court of First Instance stayed the proceedings pending a ruling on a request for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain; 'the Supreme Court') in relation to accelerated repayment and default interest. Ibercaja Banco appealed against that order, and the stay was lifted by the Audiencia Provincial de Zaragoza (Provincial Court, Zaragoza, Spain; 'the Provincial Court'), which ordered the proceedings to continue.

22. By order of 20 November 2017, the Court of First Instance found the accelerated repayment clause in clause 6bis of the contract to be unfair, and enforcement was stayed. Ibercaja Banco lodged an appeal against that order, which was opposed by MA.

23. By order of 28 March 2018, the Provincial Court set aside that order, allowing the proceedings to continue on the grounds that it was not possible to examine whether certain terms were unfair, since the contract had produced its effects, the guarantee had been executed without the consumer asserting his or her rights and the right of ownership had been transferred, which should be respected in accordance with the principle of legal certainty in pre-existing proprietary relationships.

24. By order of 31 July 2018, the Court of First Instance dismissed MA's objection to the interest calculation, which it approved in the amount of EUR 32 389.89 on the grounds that the proceedings had been initiated after Law 1/2013 and no objection had been lodged, so it was no longer possible, on account of the effect of *res judicata*, to examine whether the terms were unfair.

25. MA lodged an appeal against that order before the Provincial Court, which was opposed by Ibercaja Banco.

26. The referring court explains that there is a distinction in national law between declaratory proceedings, involving the delimitation of rights between parties, and enforcement proceedings, which are carried out on the basis of enforceable instruments, including contracts giving rise to an obligation on the part of the debtor to pay the creditor a monetary amount which is due, payable and liquid. In that context, *res judicata* applies not only to decisions in substantive proceedings, but also to matters which could have been raised, but were not, which is the effect of time-barring. Specifically, national law provides that, in ordinary enforcement proceedings, pursuant to Article 557.1(7) of the Code of Civil Procedure, along with special mortgage enforcement proceedings under Article 695.1(4) thereof, a consumer may lodge an objection in order to invoke the unfairness of the terms of the contract forming the basis of the enforcement order, and that, according to Article 552.1 of that code, a national court seised of the enforcement proceedings is required to carry out an initial *ex officio* review of the unfairness of such terms before that order is issued. That initial review involves a negative assessment, with the result that only the terms which the court finds to be unfair are taken into consideration in respect of which *inter partes* proceedings are initiated, resulting in a ruling on the unfairness of

those terms. As regards the other terms, where they pass the initial review, the court will not set out any reasoning, so there is no explicit decision that those terms are valid although the initial review implies that they are, which is what occurred in the present case.

27. The referring court harbours doubts as to whether the national legislation regarding *res judicata* and time-barring in connection with the scope of the negative review of unfair terms in enforcement proceedings is consistent with the requirements of Directive 93/13, and in particular the rule that unfair terms are not binding on the consumer set out in Article 6(1) thereof, as interpreted in the Court's case-law.[4] In that regard, the referring court notes that, according to the case-law of the Supreme Court,[5] if the time limit for lodging an objection to enforcement has expired, the effect of *res judicata* and time-barring applies with regard to pleas relating to unfair terms in consumer contracts. Given that time-barring is permitted by the Court's case-law, where the consumer, as the debtor, does not raise an objection during the enforcement proceedings, the referring court wonders whether the principle of effectiveness has the effect of bringing the proceedings to an end, which precludes both the court of its own motion and the debtor from being entitled to reconsider matters which were previously the subject of a review or object to matters which could have been the subject of an objection, but were not.

28. The referring court then indicates that there is some uncertainty regarding the determination of the last point at which it is possible for the court of its own motion or for a party to raise the unfairness of contractual terms with regard to Directive 93/13. Under national law, special mortgage enforcement proceedings are intended to realise the security *in rem*, the mortgage, in order to satisfy the claim of the creditor, whose effects are produced when, by means of an auction, the mortgaged property is transferred to a third party. The referring court observes that, having regard to the Court's case-law,[6] once the property can no longer be claimed, a court may not assess whether the mortgage loan contract contains unfair terms, while according to the case-law of the Tribunal Constitucional (Constitutional Court, Spain; 'the Constitutional Court'),[7] time-barring only occurs if the unfairness of a term was expressly raised by the debtor or dealt with by the court in a review of its own motion. The referring court therefore asks whether it is possible even after the transfer of the property has taken place, but before the debtor is evicted from the property, to raise that unfairness which may render the entire enforcement proceedings invalid.

29. It was in those circumstances that the Audiencia Provincial de Zaragoza (Provincial Court, Zaragoza) decided to stay the main proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is national legislation compatible with the principle of effectiveness provided for in Article 6(1) of Council Directive 93/13/EEC, as that directive has been interpreted by the Court of Justice, where it may be inferred from that national legislation that, if a particular unfair term withstood an initial review conducted by a court of its own motion when making an enforcement order [negative review of the validity of the terms' content], that review

4 The referring court mentions the judgments of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731), and of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60).

5 The referring court mentions, inter alia, the judgments of 27 September 2017 (No 526/2017), and of 13 November 2018 (No 628/2018).

6 The referring court mentions the judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164), and of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945).

7 The referring court mentions the judgment of 28 February 2019 (No 31/2019).

prevents the same court from subsequently assessing that term of its own motion where the factual and legal elements existed from the outset, even if that initial review did not express, in the operative part or in the grounds, any considerations on the validity of the terms?

(2) Where factual and legal elements exist which determine the unfairness of a term in a consumer contract and the party against whom enforcement is sought fails to rely on that unfairness in the application objecting to enforcement laid down for that purpose by the Law, can that party, following the resolution of that application, make a further preliminary application aimed at determining whether one or more other terms is/are unfair when that party could have relied on those terms at the outset in the ordinary procedural step provided for in the Law? In short, is a time-barring effect created which prevents the consumer from raising again the issue of unfairness of another term in the same enforcement proceedings, and even in subsequent declaratory proceedings?

(3) If the conclusion that the party is not entitled to make a second or subsequent application objecting to the enforcement proceedings, in order to allege the unfairness of a term which that party could have raised earlier because the necessary factual and legal elements had already been determined, is held to be compatible with Directive 93/13, can this serve as a basis for use as a means whereby the court, having been alerted to the unfairness of that term, is able to exercise its power of review of its own motion?

(4) Once the sale at auction has been approved and the property awarded, possibly to the same creditor, and the ownership of the property provided as security, already realised, has even been transferred, is it compatible with EU law to apply an interpretation according to which (i) after the proceedings have concluded and the objective of such proceedings has been fulfilled, that is to say, the security has been realised, a debtor may make further applications for a declaration that an unfair term is invalid, entailing an effect on the enforcement proceedings or (ii) after the transfer has been completed, possibly in favour of the same creditor, and entered in the Land Registry, a court may of its own motion carry out a review which results in the entire enforcement proceedings being annulled or ultimately affects the amounts covered by the mortgage, potentially affecting the terms under which the bids were made?'

30. Written observations were submitted to the Court by the Spanish and Italian Governments and the Commission.

31. A joint hearing with Case C-869/19 was held on 26 April 2021 at which Ibercaja Banco, the Spanish and Italian Governments and the Commission presented oral argument.

IV. Summary of the observations of the parties

32. Ibercaja Banco submits that, on the basis of the judgment of 7 December 2017, *Banco Santander*,[8] the fourth question should be answered to the effect that Article 6(1) of Directive 93/13 does not apply to national proceedings where the mortgage has already been executed, the property sold and the rights *in rem* in respect of that property transferred to a third party. It asserts that it is unnecessary to answer the first three questions and, in any event, as regards the

[8] C-598/15, EU:C:2017:945 ('the *Banco Santander* judgment').

second question, Article 6(1) of Directive 93/13 does not preclude national rules which establish time limits for consumers to raise the unfairness of contractual terms when those rules comply with the principles of equivalence and effectiveness, as is the case here.

33. Ibercaja Banco contends that, as regards the first and third questions, Article 6(1) of Directive 93/13, read in the light of the principles of equivalence and effectiveness, does not preclude a national regime which obliges the court to carry out a negative *ex officio* review of the unfairness of contractual terms and which then prevents it from conducting a subsequent review of the same terms if there are no new factual or legal elements. In its view, obliging the court to state reasons in a decision when the terms are not unfair goes beyond what is required by the principle of effectiveness. It adds that it runs counter to *res judicata* and time-barring to permit a consumer who did not invoke the unfairness of contractual terms in the enforcement proceedings to bring subsequent declaratory proceedings on the same basis.

34. The Spanish Government reformulates the four questions for a preliminary ruling into three questions. First, Articles 6 and 7 of Directive 93/13 do not preclude national legislation which, having provided for an *ex officio* review by the court and an objection by the consumer in the mortgage enforcement proceedings, does not allow the review of unfair terms to extend beyond the adoption of the decision at which point ownership is transferred to a third party. It relies on the *Banco Santander* judgment [9] and the fact that such an extension of an *ex officio* review would have negative consequences for third parties and undermine legal certainty. Second, Articles 6 and 7 of Directive 93/13 do not preclude national legislation which does not allow for the review of unfairness to be carried out once a decision having the force of *res judicata* is given, once all the time limits provided for review of the court's own motion or at the consumer's request have expired, and once the factual and legal elements have existed at the time when the consumer could have requested such a review and the court should have performed it. This case differs from the judgment of 26 January 2017, *Banco Primus*, [10] and *res judicata* and time-barring prevent an ad infinitum review of unfairness which is not justified by Directive 93/13.

35. The Spanish Government argues, third, that Article 7 of Directive 93/13 does not preclude a national practice whereby the court carrying out an *ex officio* review makes explicit reference to it only when it considers that a term may be regarded as unfair, provided that full review by the court is guaranteed. As it emphasised at the hearing, Directive 93/13 does not require the court to give explicit reasons and, since there is a full review, the unfairness of a term cannot be raised by the consumer in subsequent declaratory proceedings.

36. The Italian Government does not take a position on the first question. In its view, as regards the second and third questions, which should be considered together, it follows from the *Banco Primus* judgment, [11] that, in so far as the decision has acquired the force of *res judicata*, neither the court nor the consumer can invoke the unfairness of terms which could have been raised previously. As regards the fourth question, based on the *Banco Santander* judgment, [12] the contract cannot be relied on to prevent the recognition of the owner's proprietary rights over the mortgaged property. As it emphasised at the hearing, Article 6(1) of Directive 93/13 applies within the limits established by the national legal systems, which presupposes compliance with national rules concerning, inter alia, *res judicata*.

[9] Judgment of 7 December 2017 (C-598/15, EU:C:2017:945).

[10] C-421/14, EU:C:2017:60 ('the *Banco Primus* judgment').

[11] Judgment of 26 January 2017 (C-421/14, EU:C:2017:60).

[12] Judgment of 7 December 2017 (C-598/15, EU:C:2017:945).

37. The Commission submits that the first three questions should be answered together to the effect that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude national legislation which, by virtue of time-barring, defines a point in the proceedings from which the consumer may no longer raise the unfairness of contractual terms, where the review carried out *ex officio* by the court at an earlier stage has not been documented or reasoned. As it argued at the hearing, a purely implicit review is insufficient to ensure the effectiveness of Directive 93/13, given that there is no guarantee that it has been carried out, and the consumer will not be able to understand the reasons for that decision or oppose enforcement effectively; nor will it be possible for a court on appeal to give a ruling.

38. The Commission contends that, as regards the fourth question, Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, do not preclude national rules providing that mortgage enforcement proceedings become *res judicata* when the debtor is evicted, while those provisions preclude national rules which do not permit consumers whose property has been the subject of mortgage enforcement proceedings to bring subsequent declaratory proceedings in order to claim compensation for damages, which seems to be in line with the case-law of the Constitutional Court.[13] As it emphasised at the hearing, once the transfer of property has been made, consumers must be able to have access to such proceedings to assert their rights based on Directive 93/13.

V. Analysis

39. By its first three questions, which should be addressed together, the referring court essentially asks whether Articles 6(1) and 7(1) of Directive 93/13 preclude national legislation which, by virtue of the effect of *res judicata* and time-barring, does not allow the court to assess the unfairness of contractual terms of its own motion in mortgage enforcement proceedings and, after the expiry of the time period for lodging an objection, the consumer to raise the unfairness of contractual terms in those proceedings or in subsequent declaratory proceedings, where those terms were the subject of an initial review by the court of its own motion which was not explicitly reflected in the decision authorising the mortgage enforcement.

40. By its fourth question, the referring court, in substance, seeks to ascertain at what point in time the mortgage enforcement proceedings are deemed to be completed with regard to the review of the unfairness of contractual terms by the court of its own motion or at the request of the party against whom enforcement is sought in accordance with Articles 6(1) and 7(1) of Directive 93/13, namely, whether that point in time corresponds to the stage when the mortgage guarantee has been executed, the mortgaged property sold and the ownership rights in that property transferred, or rather whether such a review is possible even after the property has been transferred up to the point at which the debtor is evicted from the property, which may result in the annulment of the mortgage enforcement proceedings or affect the conditions in which the auction of the property took place.

41. As is apparent from the order for reference, those questions arise from the procedural arrangements concerning mortgage enforcement proceedings as set out in Spanish law, according to which at the first stage of the proceedings, the court is required to examine *ex officio* the unfairness of the terms contained in the mortgage loan contract forming the basis of the enforcement order, and which entails a negative review, meaning that the court does not set out any reasoning with regard to terms other than those which are regarded as unfair in the decision

[13] The Commission refers, inter alia, to the judgment of 18 December 1981 (No 41/1981), and the order of 19 July 2011 (No 113/2011).

authorising the mortgage enforcement. Consequently, the court is precluded from raising the unfairness of the terms at a subsequent stage of the proceedings, and the consumer, as the debtor, who does not lodge an objection to enforcement within the prescribed time limit, is barred from raising such unfairness in the same proceedings or in subsequent declaratory proceedings. In addition, the legal effects of the proceedings are realised when the mortgage has been executed, the mortgaged property sold and the ownership rights in that property transferred to a third party, which have occurred in the present case.

42. With a view to answering those questions, I will first consider the Court's case-law regarding the national court's *ex officio* review of unfair terms under Directive 93/13 (section A). I will then examine the application of the principles developed in that case-law to the first three questions (section B) and to the fourth question (section C). [14]

A. Pertinent case-law of the Court on the ex officio review of unfair terms by national courts

43. Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms used in consumer contracts are not binding on the consumer. [15] Article 7(1) of that directive, read in conjunction with the twenty-fourth recital thereof, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts. [16] While those provisions have given rise to an extensive body of case-law, I will outline the applicable principles drawn from that case-law relating to the existence and extent of the national court's duty to review *ex officio* the unfairness of contractual terms which are most pertinent to my analysis of the present case.

1. Existence of the national court's duty of ex officio *review*

44. According to settled case-law, the system of protection implemented 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 bargaining power and 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. [17] In order to guarantee the protection intended by Directive 93/13, the imbalance that exists between the consumer and the seller or supplier may be corrected only by positive action unconnected to the parties to the contract. [18] Therefore, in the light of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, the national court is required to assess of its own motion whether a contractual term is unfair and, in doing so, compensate for that imbalance between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task. [19]

[14] In that regard, it seems to me that, contrary to what Ibercaja Banco and the Kingdom of Spain suggest, there is no reason to reformulate or depart from the order of the questions submitted by the referring court.

[15] See judgment of 27 January 2021, *Dexia Nederland* (C-229/19 and C-289/19, EU:C:2021:68, paragraph 57). See also the twenty-first recital of Directive 93/13. As the Court has recognised, Article 6(1) of Directive 93/13 is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them. See judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 24).

[16] See judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 52).

[17] See judgments of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 49).

[18] See judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 48), and of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 25).

[19] See judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraphs 31 and 32), and of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraph 37).

2. Extent of the national court's duty of ex officio *review*

45. Under equally consistent case-law, Directive 93/13 requires the Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair.[20] The Court has also emphasised that the specific characteristics of court proceedings which take place under national law between consumers and sellers or suppliers cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under Directive 93/13.[21] In that regard, national enforcement proceedings, such as mortgage enforcement proceedings, are subject to the requirements arising out of the Court's case-law which seeks to ensure the effective protection of consumers.[22]

46. While the Court has defined, in a number of respects and taking account of the requirements of Articles 6(1) and 7(1) of Directive 93/13, the way in which national courts must ensure that the rights which consumers derive from that directive are protected, the fact remains that, in the absence of Union harmonisation, the rules governing the procedures applicable to examining whether a contractual term is unfair fall within the legal systems of the Member States, provided they are not less favourable than those governing similar domestic actions (principle of equivalence) and do not make it impossible or excessively difficult to exercise the rights conferred by Union law (principle of effectiveness).[23]

47. As regards the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural rule makes the application of Union law impossible or excessively difficult must be analysed by reference to the role of that rule in the procedure, its conduct and its special features viewed as a whole, along with, where relevant, the principles underlying the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[24] In that connection, the Court has recognised that the need to comply with that principle cannot be stretched so far as to make up fully for the total inertia on the part of the consumer.[25]

48. In particular, the Court has ruled that the effective protection of the rights conferred on consumers by Directive 93/13 can be guaranteed only if the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract are unfair.[26] Thus, in a case in which the national court's *ex officio* review of unfair terms is not provided for at the enforcement stage of the order for payment, a national law is regarded as undermining the effectiveness of the protection afforded by Directive 93/13 if it does not provide for such an examination when the order is granted or, in the case where such an examination is provided for only when an objection is lodged against the order granted, if there is a significant risk that consumers will not lodge the objection required.[27] Directive 93/13 therefore precludes national

[20] See judgment of 3 March 2020, *Gómez del Moral Guasch* (C-125/18, EU:C:2020:138, paragraph 44).

[21] See judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 50).

[22] See judgment of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731, paragraph 20).

[23] See judgment of 26 June 2019, *Kuhar* (C-407/18, EU:C:2019:537, paragraphs 45 and 46).

[24] See judgment of 22 April 2021, *PROFI CREDIT Slovakia* (C-485/19, EU:C:2021:313, paragraph 53).

[25] See judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 62).

[26] See judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraph 44).

[27] See judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 46 and point 2 of the operative part).

legislation which allows an order for payment to be issued without allowing the consumer to benefit, at any time during the proceedings, from the guarantee of a check that there are no unfair terms undertaken by the court. [28]

49. Furthermore, the Court has recognised that consumer protection is not absolute and that Union law does not require a national court to disapply domestic procedural rules conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13. [29] Indeed, the Court has emphasised the importance, both for the Union legal order and for the national legal systems, of the principle of *res judicata*, and that, in order to ensure stability of the law and legal relations as well as the sound administration of justice, judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question. [30] Likewise, in the interests of legal certainty, it is compatible with Union law to lay down reasonable time limits for bringing actions on pain of foreclosure. [31] However, national legislation must not adversely affect the substance of the right of consumers under Article 6(1) of Directive 93/13 not to be bound by unfair terms. [32]

50. For example, in the judgment of 29 October 2015, *BBVA*, [33] the Court essentially held that Articles 6 and 7 of Directive 93/13, read in the light of the principle of effectiveness, precluded the transitional rules laid down in Law 1/2013, in which a special time limit of one month was granted to lodge an objection alleging the unfairness of contractual terms in the context of mortgage enforcement proceedings because there was a significant risk that that time limit would expire without the consumers in question being able to effectively exercise their rights with regard to Directive 93/13.

51. In addition, in the judgment of 6 October 2009, *Asturcom Telecomunicaciones*, [34] the Court held, in particular, that national rules imposing a two-month time limit, upon the expiry of which, in the absence of any action for annulment, an arbitration award had become final and thus had acquired *res judicata*, were consistent with the principle of effectiveness, noting that that principle could not be stretched so far as to make up fully for the total inertia on the part of a consumer who had not brought any proceedings to assert his or her rights.

52. By contrast, in the judgment of 18 February 2016, *Finanmadrid EFC*, [35] the Court ruled that national legislation providing for the principle of *res judicata* in the context of the order for payment procedure ran counter to the principle of effectiveness, given that the decision of the authority closing the order for payment proceedings became *res judicata*, which made it impossible to check the unfairness of the contractual terms at the enforcement stage simply because the consumer did not lodge an objection within the prescribed time limit, and there was a significant risk that the consumer would not do so.

28 See judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 49).

29 See judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68).

30 See judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraph 46).

31 See judgment of 22 April 2021, *PROFI CREDIT Slovakia* (C-485/19, EU:C:2021:313, paragraph 57).

32 See judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 71).

33 C-8/14, EU:C:2015:731, paragraphs 27 to 42.

34 C-40/08, EU:C:2009:615, paragraphs 34 to 48.

35 C-49/14, EU:C:2016:98, paragraphs 45 to 55.

53. It should also be made clear that, in the *Banco Primus* judgment,[36] which was situated in the context of an objection to mortgage enforcement proceedings brought by the consumer, the Court held that Directive 93/13 does not preclude national legislation which prevents the court from examining of its own motion the unfairness of terms where a definitive decision has already been given on the lawfulness of all the terms of the contract in the light of that directive by means of a decision having the force of *res judicata*. However, according to the Court, where there are one or more terms whose unfairness has not been examined during an earlier judicial review of the contract which has been closed by a decision having the force of *res judicata*, Directive 93/13 requires the court before which a consumer has properly lodged an objection to review the unfairness of those terms, whether of its own motion or at a party's request, where it has the necessary legal and factual elements for that purpose. In the absence of such a review, consumer protection under that directive would be incomplete and insufficient.

54. Consequently, it follows from the foregoing case-law that the Member States are not required by Directive 93/13 to adopt a particular procedural system for the judicial review of unfair terms, provided that they comply with their obligations under Union law, including the principles of equivalence and effectiveness, and therefore ensure that there is a check conducted by a national court with regard to the unfairness of any contractual term irrespective of the proceedings. There must be an *ex officio* review of unfair terms either by the first court in the proceedings, or by the second court, whether seised of the enforcement or on the merits, which can be triggered by the consumer, so long as there is not a significant risk that the particular procedural route will not be undertaken by the consumer, thus closing off the possibility for the judicial review of unfair terms in accordance with Directive 93/13.

55. Moreover, according to the Court's case-law, while consumer protection is not absolute, neither is the principle of *res judicata*. As illustrated by the foregoing judgments mentioned in points 50 to 53 of this Opinion, the Court takes a balanced approach with regard to the interaction between national rules concerning *res judicata* and time-barring and the requirements of Directive 93/13, whilst ensuring that such rules do not undermine the system of consumer protection established by that directive. In particular, while the *Banco Primus* judgment does not directly address the scope of the negative review of unfair terms arising in the present case, the Court's emphasis on the need for a definitive assessment of the unfairness of contractual terms in a decision having the force of *res judicata* lends support to the view that national legislation, such as that at issue, is contrary to Directive 93/13. I will return to that judgment later in my analysis (see point 62 of this Opinion).

56. It is in the light of those principles developed in the Court's case-law that it is necessary to examine the questions in the present case.

B. Questions 1 to 3

57. It should be recalled from point 39 of this Opinion that the first three questions deal in substance with the effect of *res judicata* and time-barring on the examination by the enforcement court, of its own motion or at the consumer's request, of the unfairness of contractual terms which have been the subject of an initial review carried out by the court of its own motion which is not explicitly reflected in the decision authorising the mortgage enforcement.

[36] See judgment of 26 January 2017 (C-421/14, EU:C:2017:60, paragraphs 49 to 54).

58. It should be noted at the outset that, contrary to the arguments put forward by the Commission that the present case concerns time-barring and not the principle of *res judicata*, it is apparent from the order for reference that the referring court considers that the effect of *res judicata* and time-barring arising from the national legislation at issue is engaged in the present case. According to settled case-law, the national court alone has jurisdiction to interpret and apply national law. [37]

59. Furthermore, there are no indications in the present case which could give rise to doubts with regard to the principle of equivalence. Therefore, all that has to be examined is whether the national legislation at issue is consistent with the principle of effectiveness.

60. There are, in my view, strong indications, based on the Court's case-law, that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude the national legislation at issue.

61. In that regard, it seems to me that the review of the potential unfairness of contractual terms under Directive 93/13 must be the subject of an explicit and sufficiently reasoned assessment by the national court. As illustrated by the circumstances of the present case, the national legislation at issue has the result that an *ex officio* review is deemed to have taken place even though there is no trace of this review in the court's decision. To my mind, as indicated by the Commission, if the review of the unfairness of the contractual terms is not reasoned in the decision authorising the mortgage enforcement, the consumer will not be able to understand or analyse the reasons for this decision or, where appropriate, to oppose the enforcement effectively. Nor will it be possible for a national court that may be seised of an appeal to give a ruling. In this respect, the Court has made it clear that, without effective review of whether the terms of the contract are unfair, observance of the rights conferred by Directive 93/13 cannot be guaranteed. [38]

62. Further support for this approach may be deduced from the *Banco Primus* judgment. [39] As mentioned in point 53 of this Opinion, the Court found incompatible with Directive 93/13 national legislation which extended the effects of *res judicata* to terms on which the national court had not given a definitive ruling. The Court therefore presumes that if the national court has not examined the unfairness of the specific contractual terms in question, it is difficult to consider that the principle of *res judicata* was affected. [40]

63. This approach is also consonant with the objectives pursued by Directive 93/13 as interpreted by the Court's case-law. It should be recalled from point 44 of this Opinion that the national court's duty of *ex officio* review of unfair terms is justified by the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers. Thus, an *ex officio* review which is limited to a mere implicit judicial intervention would be liable, in my view, to empty this obligation incumbent on the national court under Directive 93/13 of its substance.

[37] See judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 46).

[38] See judgment of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraph 35).

[39] See judgment of 26 January 2017 (C-421/14, EU:C:2017:60, paragraphs 49 to 54).

[40] See, in that regard, García-Valdecasas Dorrego, M.J., *Dialogue between the Spanish courts and the European Court of Justice regarding the judicial protection of consumers under Directive 93/13/EEC*, Association of Property and Business Registrars of Spain, 2018, pp. 98-99.

64. It should be added that this approach appears to be in line with the Court's case-law concerning national legislation implementing *res judicata* outside the context of Directive 93/13. In certain judgments,[41] the Court has disapproved of excessive protection being granted to final decisions through *res judicata* in ways that significantly hinder the effective application of Union law.[42] In addition, it should be noted that, in the judgment of 17 October 2018, *Klohn*,[43] the Court indicated that the force of *res judicata* extends only to the legal claims on which the court has ruled and therefore does not preclude a court, in a later dispute, from ruling on points of law on which there is no ruling in that definitive decision. Likewise, in its case-law concerning the application of *res judicata* in Union law, the Court has consistently held that *res judicata* attaches only to matters of fact and law actually or necessarily settled by the judicial decision in question.[44]

65. Consequently, it should be considered that the national legislation at issue runs counter to the principle of effectiveness, since it makes it impossible or excessively difficult to ensure the protection conferred on consumers by Directive 93/13.

66. I therefore conclude that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude national legislation such as that at issue in the main proceedings.

C. Question 4

67. It should be recalled from point 40 of this Opinion that the fourth question essentially concerns whether it is consistent with Articles 6(1) and 7(1) of Directive 93/13 that, in the event that the mortgage guarantee has been executed, the mortgaged property sold and the ownership rights in that property transferred to a third party, a national court may, of its own motion or at the request of the party against whom enforcement is sought, review the unfairness of the terms of the mortgage loan contract up to the point at which that party is evicted from the property, and which may result in the annulment of the mortgage enforcement proceedings or affect the conditions in which the auction of the property took place.

68. I should state at the outset that I share the Commission's view that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, do not preclude national legislation which does not allow the review of unfair terms by a national court, of its own motion or at the request of a party, once the ownership rights in the mortgaged property have been transferred to a third party, provided that consumers whose property has been the subject of mortgage enforcement proceedings may assert their rights by way of subsequent legal proceedings to seek redress with regard to Directive 93/13.

41 See, inter alia, judgments of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraphs 29 to 32); of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraphs 94 to 96); and of 16 July 2020, *UR (VAT liability of lawyers)* (C-424/19, EU:C:2020:581, paragraphs 31 to 34).

42 See, in that regard, Turmo, A., 'National *Res Judicata* in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgement of Domestic Procedural Law', *Common Market Law Review*, vol. 58, 2021, pp. 361-390, at p. 375.

43 C-167/17, EU:C:2018:833, paragraph 69.

44 See judgments of 29 June 2010, *Commission* v *Luxembourg* (C-526/08, EU:C:2010:379, paragraph 27), and of 31 January 2019, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (C-225/17 P, EU:C:2019:82, paragraph 47).

69. I observe that this question relates to circumstances in which the contractual relationship between the consumer and the creditor has already ended with the transfer of ownership of the mortgaged property to a third party. However, in my view and contrary to what Ibercaja Banco and the Spanish and Italian Governments contend, the circumstances of the present case differ from those giving rise to the *Banco Santander* judgment. [45]

70. In that judgment, [46] the Court held that Articles 6(1) and 7(1) of Directive 93/13 do not apply to proceedings brought by the successful bidder in an auction of immovable property, following extrajudicial enforcement of a mortgage granted over that property by a consumer to a creditor, where those proceedings were brought for the purpose of protecting real rights of ownership lawfully acquired by that bidder, provided that, first, the proceedings are independent of the legal relationship between the consumer and the creditor and, second, the mortgage has been enforced, the immovable property sold, the real rights over that property transferred and the consumer did not avail himself or herself of the legal remedies provided in that context. In particular, the Court pointed out that the proceedings in question did not concern the enforcement of the mortgage guarantee and were not based on the mortgage loan contract. Rather, they concerned the protection of real rights derived from the title lawfully acquired by the bidder. In addition, according to the Court, the consumer had the possibility to contest or seek suspension of the procedure on the ground that the contract contained unfair terms, and it was within the context of mortgage enforcement proceedings that the court seised could carry out an *ex officio* review of the potential unfairness of the contractual terms.

71. By contrast, the present case is situated in the context of mortgage enforcement proceedings involving the legal relationship between the consumer and the creditor, and which is based on the mortgage loan contract, more precisely, the liquidation of the interest for the loan secured by the mortgage (see point 18 of this Opinion). It is true that the consumer, as the debtor, failed to lodge an objection to enforcement within the prescribed time limit, and the court seised of the mortgage enforcement proceedings was required to carry out an *ex officio* review of the unfairness of the terms of the contract forming the basis of the enforcement order. However, on the basis of my arguments propounded in points 60 to 66 of this Opinion, the effect of *res judicata* and time-barring by virtue of the national legislation at issue should be considered to come into play only where there has been an explicit and sufficiently reasoned *ex officio* review of the potential unfairness of contractual terms in the decision given by the court at a previous stage of the proceedings, which is not the case in the circumstances of the main proceedings.

72. In that regard, it seems to me that, in a situation where there has been no explicit and sufficiently reasoned *ex officio* review at a previous stage of the mortgage enforcement proceedings, the enforcement court must be able to ensure the effectiveness of the protection afforded to consumers under Directive 93/13 by examining, of its own motion or at the request of the consumer, the unfairness of the contractual terms. Therefore, national legislation which prevents the unfairness of the contractual terms from being raised by the consumer and being reviewed by the court after the expiry of the period for opposing the enforcement must be disregarded. That said, once the mortgage guarantee has been executed, the mortgaged property sold and the ownership rights in that property transferred to a third party, it should be considered that it is no longer possible for the court of its own motion or for a party to raise the unfairness of the contractual terms which would result in the annulment of acts transferring ownership and thereby give rise to negative consequences for third parties and undermine legal certainty in pre-existing proprietary relationships.

[45] Judgment of 7 December 2017 (C-598/15, EU:C:2017:945).

[46] See judgment of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945, paragraphs 39 to 50).

73. Nonetheless, in my view, it must be possible in accordance with Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, for a consumer, in such a situation, to rely, in a separate subsequent procedure, on the unfairness of the terms of the mortgage loan contract in order to be able to effectively and usefully exercise his or her rights based on that directive and thus to seek redress from the creditor for the financial consequences borne by the consumer on account of such terms.

74. I therefore conclude that Articles 6(1) and 7(1) of Directive 93/13, read in the light of the principle of effectiveness, do not preclude national legislation which does not allow the review of unfair terms by a national court, of its own motion or at the request of a party, once the mortgage guarantee has been executed, the mortgaged property sold and the ownership rights in that property transferred to a third party, provided that consumers whose property has been the subject of mortgage enforcement proceedings may assert their rights by way of subsequent legal proceedings to seek redress with regard to that directive.

VI. Conclusion

75. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Audiencia Provincial de Zaragoza (Provincial Court, Zaragoza, Spain) as follows:

(1) Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted, in the light of the principle of effectiveness, as precluding national legislation which does not allow the court to examine the unfairness of the contractual terms of its own motion in mortgage enforcement proceedings or a consumer who failed to lodge an objection to the enforcement to raise the unfairness of the contractual terms in those proceedings or in subsequent declaratory proceedings, where those terms were the subject of an initial review for unfairness carried out by the court of its own motion which was not explicit and sufficiently reasoned with regard to that directive.

(2) Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted, in the light of the principle of effectiveness, as not precluding national legislation which does not allow the court, of its own motion or at the request of a party, to examine the unfairness of the terms of the mortgage loan contract once the mortgage guarantee has been executed, the mortgaged property sold and the ownership rights in that property transferred to a third party, provided that consumers whose property has been the subject of mortgage enforcement proceedings may assert their rights by way of subsequent legal proceedings to seek redress with regard to that directive.