Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

14 April 2016*

[Text rectified by order of 29 November 2016]

(Reference for a preliminary ruling — Directive 93/13/EEC — Contracts concluded between sellers or suppliers and consumers — Mortgage contracts — 'Floor' clause — Examination of the clause with a view to its invalidation — Collective proceedings — Action for an injunction — Stay of an individual action with the same subject matter)

In Joined Cases C-381/14 and C-385/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 9 de Barcelona (Commercial Court No 9, Barcelona, Spain), made by decisions of 27 June 2014, received at the Court on 11 and 12 August 2014, in the proceedings

Jorge Sales Sinués

v

Caixabank SA (C-381/14),

and

Youssouf Drame Ba

v

Catalunya Caixa SA (Catalunya Banc SA) (C-385/14),

THE COURT (First Chamber),

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

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 September 2015,

* Language of the case: Spanish.

after considering the observations submitted on behalf of:

— Mr Sales Sinués, by D. Cirera Mora and F. Pertínez Vílchez, abogados,

— Caixabank SA, by J. Fontquerni Bas, counsel, assisted by A. Ferreres Comella, abogado,

— Catalunya Caixa SA, by J.M. Rodríguez Cárcamo and I. Fernández de Senespleda, abogados,

— the Spanish Government, by A. Gavela Llopis, acting as Agent,

— the European Commission, by J. Baquero Cruz and M. van Beek, acting as Agents,

[Text rectified by order of 29 November 2016] after hearing the Opinion of the Advocate General at the sitting on 14 January 2016,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The requests have been made in proceedings between, in one case, Mr Sales Sinués and Caixabank SA and, in the other, Mr Drame Ba and Catalunya Caixa SA, both relating to the annulment of contractual terms in mortgage loan agreements.

Legal context

Directive 93/13

3 Article 3 of Directive 93/13 is worded as follows:

‘1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

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

…’

4 Article 4(1) of Directive 93/13 provides:

‘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.’

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 of Directive 93/13 states:

‘1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate effective means to prevent the continued use of such terms.

…’

Spanish law

7 Article 43 of the Code of Civil Procedure (Ley de enjuiciamiento civil) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575) provides:

‘Where, in order to give a ruling on the subject matter of a dispute, it is necessary to decide an issue which itself constitutes the main subject matter of other proceedings pending before the same or a different civil court, and where it is not possible for the two actions to be joined, the court may, on the application of both parties or on the application of one of them and after hearing the other party, order the proceedings to be stayed as they currently stand, until such time as the proceedings concerning the preliminary issue are concluded.’

8 Article 221 of the Code of Civil Procedure, which deals with the effects of judgments given in proceedings brought by associations of consumers and users, is worded as follows:

‘…

1a. If the claim is for pecuniary damages, or an order laying down an obligation to do or to refrain from doing something or to give a specific or general thing, the judgment upholding the claim shall identify individually which consumers and users are to be regarded as entitled to benefit from the judgment, in accordance with the laws for their protection.

Where it is not possible to identify such consumers and users individually, the judgment shall set out the facts, characteristics and conditions required in order to be able to demand payment and, where appropriate, apply for execution or participate therein in the event that enforcement is sought by the claimant association.

2a. Where, as a preliminary finding or as the court’s principal or sole ruling, a given activity or particular conduct is declared unlawful or inconsistent with the law, the court shall indicate in its judgment whether, in accordance with the laws on the protection of consumers and users, that declaration has procedural consequences that are not limited to the parties to the relevant proceedings.

3a. Where particular consumers or users have participated in the proceedings, the judgment shall include an express ruling on their claims.

…'

9 Under Article 222 of the Code of Civil Procedure:

'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.'

10 The referring court interprets those procedural provisions as imposing on it an obligation to stay the proceedings brought before it, in which an individual action for annulment of an unfair term has been brought by a consumer, pending final judgment in proceedings in which a duly authorised association has brought a collective action seeking cessation of the use of a similar clause.

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

11 On 20 October 2005, Mr Sales Sinués concluded an agreement for the novation of a mortgage loan with Caixabank SA. The 'floor' clause contained in that agreement consisted of a nominal annual interest rate of 2.85%, the upper 'ceiling' of that interest rate being fixed at 12%. On 7 February 2005 Mr Drame Ba concluded a mortgage loan agreement with Catalunya Caixa SA. The 'floor' clause in that agreement corresponded to a rate of 3.75%, the upper 'ceiling' being fixed at 12%.

12 Independently of market rate fluctuations, the interest rates of the agreements concluded by the applicants in the main proceedings could not fall below the percentage stipulated by the 'floor' clause.

13 Mr Sales Sinués and Mr Drame Ba, taking the view that the 'floor' clauses had been imposed on them by the banking institutions and that they created an imbalance to their detriment, brought individual actions seeking annulment of those clauses before the referring court.

14 Prior to those actions, a consumer association, the ADICAE (Asociación de Usuarios de Bancos Cajas y Seguros) brought a collective action against 72 banking institutions seeking, inter alia, an injunction prohibiting the continued use of 'floor' clauses in loan agreements.

15 Basing themselves on Article 43 of the Code of Civil Procedure, the defendants in the main proceedings seek to have the proceedings at issue suspended pending final judgment concluding the collective action. Mr Sales Sinués and Mr Drame Ba oppose that request.

16 The referring court finds that, in the circumstances of the cases in the main proceedings, Article 43 of the Code of Civil Procedure requires it to suspend the individual actions brought before it until such time as a final judgment on the collective action has been delivered, such a suspensory effect leading to a necessary subordination of the individual action to the collective action, as regards both the course of the proceedings and the outcome.

17 It also notes that participation in the collective action involves various constraints, as the individual concerned may be required to waive the jurisdiction of the court for the place where he is domiciled and the possibility of submitting observations individually in support of the collective action may be subject to time limitations.

18 In those circumstances, the Juzgado de lo Mercantil No 9, Barcelona (Commercial Court No 9, Barcelona, Spain) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Can it be considered [that the Spanish legal system provides for] an effective means or mechanism pursuant to Article 7(1) of Directive 93/13?

2. To what extent does the suspensory effect of a stay of proceedings preclude a consumer from complaining that unfair terms included in a contract concluded with him are void, and, therefore, infringe Article 7(1) of Directive 93/13?

3. Does the fact that a consumer is unable to dissociate himself from collective proceedings constitute an infringement of Article 7(3) of Directive 93/13?

4. Or, on the other hand, is the suspensory effect of a stay of proceedings provided for in Article 43 of the Code of Civil Procedure compatible with Article 7 of Directive 93/13 in that the rights of consumers are fully safeguarded by collective actions, the Spanish legal system providing for other equally effective procedural mechanisms for the protection of consumers' rights, and by the principle of legal certainty?'

19 By order of the President of the Court of 9 September 2014, Cases C-381/14 and C-385/14 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

20 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 7 of Directive 93/13 must be interpreted as precluding a provision of national law which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13, seeking, in particular, to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action.

21 In order to answer those questions, it should be recalled, first, that, under Article 7(1) of Directive 93/13, Member States are required to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded between sellers or suppliers and consumers. In parallel to the subjective right of a consumer to bring an action before a court for examination as to whether a term of a contract to which he is a party is unfair, the mechanism provided for in Article 7(2) of Directive 93/13 allows Member States to introduce a check on unfair terms contained in standard contracts by means of actions for an injunction brought in the public interest by consumer-protection associations.

22 As regards, first, the individual action brought by a consumer, the system of protection established by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both his bargaining power and his level of knowledge (see judgment in *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 27 and the case-law cited).

23 In order to guarantee that protection, the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (judgment in *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 31).

24 In that context, the national court is required to assess of its own motion the unfairness of a contractual term by taking account, as required by Article 4(1) of Directive 93/13, of the nature of the goods or services that form the subject matter of the contract and by reference, on the date on which the contract was concluded, to all the circumstances attending its conclusion, as well as all the other clauses of that contract or of a contract on which it is dependent (see, to that effect, judgment in *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 32).

25 However, if the national court were to find that a clause is unfair, the right to effective consumer protection also includes the option not to assert one's rights, with the effect that the national court must take into account, where appropriate, the intention expressed by the consumer when, conscious of the non-binding nature of an unfair term, that consumer states nevertheless that he is opposed to that term being disregarded, thus giving his free and informed consent to the term in question (see judgment in *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 35).

26 As regards, on the other hand, actions brought by persons or organisations having a legitimate interest in protecting consumers as referred to in Article 7(2) of Directive 93/13, it must be noted that such persons or organisations are not in an inferior position vis-à-vis the seller or supplier (judgment in *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 49).

27 Without denying the importance of the essential role that they must be able to play in order to achieve a high level of consumer protection within the European Union, it must nevertheless be noted that an action for an injunction pitting such an association against a seller or supplier is not characterised by the same imbalance that is present in an individual action brought by a consumer against a seller or supplier (see judgment in *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 50).

28 Such a differentiated approach is, moreover, supported by Article 4(1) of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ 1998 L 166, p. 51) and by Article 4(1) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30) which succeeded it, under which it is the courts of the Member State in which the defendant is established or has its address that have jurisdiction to hear actions for an injunction brought by consumer-protection associations from other Member States in

the event of an intra-EU infringement of European Union consumer-protection legislation (judgment in *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 51).

29 It should be added that the deterrent nature and dissuasive purpose of actions for an injunction, together with their independence of any particular dispute, mean that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts (judgment in *Invitel*, C-472/10, EU:C:2012:242, paragraph 37).

30 Consequently, individual and collective actions have, in the context of Directive 93/13, different purposes and legal effects, with the result that the procedural relationship between the respective conduct of each can correspond only to procedural requirements relating, in particular, to the sound administration of justice and to the need to avoid incompatible judicial decisions, without, however, the interaction of those different actions leading to a weakening of consumer protection, as provided for by Directive 93/13.

31 Although that directive does not seek to harmonise the penalties applicable in the event of a term being found to be unfair in the context of those actions, Article 7(1) of Directive 93/13 nevertheless requires the Member States to ensure that adequate and effective means exist to bring an end to the use of unfair terms in contracts concluded with consumers (judgment in *Invitel*, C-472/10, EU:C:2012:242, paragraph 35).

32 In that context, it should nevertheless be noted that, in the absence of harmonisation of procedural means governing the relationship between collective and individual actions as provided for under Directive 93/13, it is for the internal legal order of each Member State, under the principle of procedural autonomy, to establish such rules, on condition, however, that they are not less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law on consumer protection associations (principle of effectiveness) (see, by way of analogy, judgment in *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 30 and the case-law cited).

33 As regards, first, the principle of equivalence, there is no indication, regard being had to the information provided in the orders for reference, that Article 43 of the Code of Civil Procedure would be subject to a different application in disputes concerning rights arising under national law and in those concerning rights arising under EU law.

34 As regards, second, the principle of effectiveness, the Court has previously held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration the principles which form the basis of the national legal system, such as the principle of legal certainty and the authority of judicial decisions (see, to that effect, judgment in *BBVA*, C-8/14, EU:C:2015:731, paragraph 26 and the case-law cited).

35 In the present cases, it must be held that, as is clear from the interpretation provided by the referring court, in circumstances such as those in the main proceedings, that court is required, pursuant to Article 43 of the Code of Civil Procedure, to stay the individual action brought before it pending a final judgment concluding the collective action, the outcome of which is likely also to be applied in the individual action and, on that basis, the consumer can no longer individually assert the rights recognised by Directive 93/13 by dissociating himself from that collective action.

36 Such a situation, however, is liable to undermine the effectiveness of the protection intended by that directive, in view of the differences in the purpose and nature of the consumer-protection mechanisms given specific expression by those actions, as noted in paragraphs 21 to 29 of the present judgment.

37 First, the consumer will necessarily be linked to the outcome of the collective action, even if he has decided not to participate in it, and the obligation of the national court under Article 43 of the Code of Civil Procedure thus prevents that court from conducting its own analysis of the circumstances in the proceedings brought before it. In particular, the question of individual negotiation of the allegedly unfair term will not be decisive, nor even the nature of the goods or services for which the contract in question was concluded.

38 Second, the consumer is dependent, pursuant to Article 43 of the Code of Civil Practice, as interpreted by the referring court, on the period within which a judicial decision relating to the collective action is to be taken, without the national court being able to examine in that regard the relevance of the suspension of the individual action pending delivery of a final judgment in the collective action.

39 Such a national rule therefore appears incomplete and insufficient and does not constitute either an adequate or effective means of bringing to an end the continued use of unfair clauses, contrary to the requirements of Article 7(1) of Directive 93/13.

40 This applies *a fortiori* since, under domestic law, if the consumer wishes to take part in the collective action, he is subject, as is clear from the orders for reference, to constraints relating to the determination of the competent court and to the pleas that may be put forward. Furthermore, the consumer will necessarily forfeit the rights which he would be recognised as having in an individual action, namely to have all the circumstances of his situation taken into account, as well as the possibility of waiving the non-application of an unfair clause, *a fortiori* if he cannot disassociate himself from the collective action.

41 In this context, it is also important to note that the need to ensure consistency between judicial decisions cannot justify such a lack of effectiveness since, as was stressed by the Advocate General at point 72 of his Opinion, the difference in nature between judicial control exercised in the context of a collective action and that exercised in the context of an individual action should, in principle, prevent the risk of incompatible judicial decisions.

42 Furthermore, as regard the need to avoid overburdening the courts, the effective exercise of subjective rights conferred by Directive 93/13 on consumers cannot be called into question by considerations connected to the organisation of a Member State's judicial system.

43 In light of all the foregoing considerations, the answer to the questions referred is that Article 7 of Directive 93/13 must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action before the court being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action.

Costs

44 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:

Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action before the court being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action.

[Signatures]