Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 29 June 2017 [1]

Case C-598/15

Banco Santander SA
v
Cristobalina Sánchez López

(Request for a preliminary ruling from the Juzgado de Primera Instancia de Jerez de la Frontera (Court of First Instance of Jerez de la Frontera, Spain))

(Reference for a preliminary ruling — Directive 93/13/EEC — Unfair terms in consumer credit agreements — Power of the national court to examine of its own motion the unfairness of a contractual term of a mortgage agreement in the course of a simplified procedure for the recognition of rights appearing on the land register)

1. This request for a preliminary ruling, which relates essentially to the interpretation of Articles 3, 6 and 7 of Directive 93/13/EEC, [2] invites the Court to clarify certain matters concerning the powers which the national court is to be recognised as having on the basis of effectiveness of the consumer protection guaranteed by that directive.

2. This matter, which is one in a line of cases relating to Spanish mortgage enforcement procedure, [3] relates more specifically to a so-called 'simplified' enforcement procedure which follows the commencement, before a notary, of an extrajudicial procedure for the exercise of security rights under a mortgage. It is apparent from the Spanish law applicable to the facts of the main proceedings that this simplified procedure is intended for the protection and enforcement of rights in rem appearing, inter alia, on the land register. The question therefore arises of whether effectiveness of consumer protection under Directive 93/13 requires that the national court be in a position to review the terms of the mortgage agreement for unfairness at a stage well after the transfer of title to the mortgaged property.

1 Original language: French.

2 Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

3 See, in particular, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164); of 30 April 2014, *Barclays Bank* (C-280/13, EU:C:2014:279); of 17 July 2014, *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099); and of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21); order of 16 July 2015, *Sánchez Morcillo and Abril García* (C-539/14, EU:C:2015:508); 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).

Legal context

EU law

3. Article 3(1) of Directive 93/13 provides:

'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.'

4. Article 6(1) of Directive 93/13 states:

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

5. Under Article 7(1) of Directive 93/13, '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'.

Spanish law

6. Ley 1/2000, de Enjuiciamiento Civil (Law 1/2000 on civil procedure) of 7 January 2000[4] provides, in Article 250(1), as follows:

'The court shall rule under the simplified procedure, regardless of the amount, on the following claims:

...7° claims brought by the holders of rights in rem appearing on the land register, seeking to enforce such rights against persons opposing them or interfering with their exercise, where those persons have no registered right which would provide a legitimate basis for such opposition or interference.'

7. Under Article 444(2) of the LEC, where the applicant so requests, the defendant must pay a deposit fixed by the court before he can oppose a claim brought under the Article 250(1)(7) procedure. Furthermore, the grounds of opposition which he is entitled to raise are limited to those set out in Article 444(2) of the LEC. Those grounds do not include the existence of unfair terms in the mortgage loan agreement giving rise to the extrajudicial sale.

8. Under Article 440(2) of the LEC, if the defendant does not appear in court, or if he appears without paying the deposit, the court is required, after hearing the defendant, to make a possession order in respect of the property and require the occupant to vacate it.

4 BOE No 7 of 8 January 2000, pp. 575 to 728 ('the LEC').

9. Extrajudicial enforcement of mortgage rights is regulated inter alia by Article 41 of the Ley Hipotecaria (Law on mortgages, 'LH').[5] This provision, in the version applicable to the facts of the main proceedings, provided as follows:

'Actions in rem based on registered rights may be brought by means of the simplified procedure governed by the [LEC] against persons opposing such rights or interfering with their exercise, without themselves holding any registered right. Such actions, which are based on the presumed legitimacy of registered entries under Article 38, nevertheless require unequivocal evidence of the validity of the relevant entry to be produced, in the form of a statement from the registrar.'

10. Article 129 of the LH provides that 'the remedies of a mortgagee may be exercised directly over the mortgaged property, such exercise being subject to the provisions [of the LEC] ... Furthermore, the parties may consent, in the mortgage instrument, to the extrajudicial sale of the mortgaged property ... in the event of default in the performance of the secured obligation. Extrajudicial sales shall be effected through a notary, observing the formalities required by the mortgage regulation'.

11. The Decreto por el que se aprueba el Reglamento Hipotecario (Decree approving the new official wording of the mortgage regulations) of 14 February 1947[6] makes detailed provision as to the extrajudicial sale procedure.

12. Under Article 234 of the RH:

'1. The extrajudicial enforcement of mortgages provided for by Article 129 of the [LH] is subject to the requirement that the mortgage instrument stipulates that the parties consent to the use of that procedure and contains the following information:

(1) the value of the immovable property, as estimated by the interested parties, for use as the auction value ...;

(2) the mortgagor's address for service of claims and notices ...;

(3) the person who, at the relevant time, is to execute the instrument of sale of the immovable property on behalf of the mortgagor. The creditor itself may be nominated for this purpose.

2. The term under which the parties to the loan and mortgage consent to the use of the extrajudicial procedure for enforcement of the mortgage must appear separately from the other provisions of the instrument.'

13. Article 236-l of the RH provides:

'1. Once the highest bid or award has been verified and, where applicable, the price recorded, the notary shall enter the instrument on the annual list of documents authenticated by him, and the highest bidder or party to whom the award is made, on the one hand, and the owner of the dwelling, on the other, shall record their agreement in the form of an authentic instrument …

...

3. The authentic instrument is a sufficient basis for registration (in the land registry) in favour of the highest bidder or party to whom the award is made ...'

5 BOE No 58 of 27 February 1946.

6 Reglamento hipotecario (mortgage regulations), BOE No 106 of 16 April 1947 ('the RH').

14. Article 236-m of RH provides:

‘The party to whom the award is made may seek a possession order in respect of the acquired property from the court of first instance of the place where that property is situated.’

15. Article 236-ñ of RH provides:

‘1. The notary shall suspend the procedure only where documents establish [that there are ongoing criminal proceedings in which it is alleged that the mortgage is a forgery or where the (land) register indicates that an application for annulment of the mortgage has already been lodged] ...

2. After verifying certain of the facts referred to in the preceding paragraph, the notary shall suspend the extrajudicial enforcement of the mortgage until the conclusion of the criminal proceedings or the registration procedure, as the case may be. The extrajudicial enforcement of the mortgage shall resume, on the request of the creditor concerned, if the mortgage is not found to be a forgery or if the annulment of the mortgage is not registered.’

16. Under Article 236-o of the RH:

‘As regards other the objections capable of being raised by the debtor, third parties in possession, or other interested parties, the provisions of the last five paragraphs of Article 132 of the [LH] must be complied with where that article applies.’

17. The fifth transitional provision of Ley 1/2013, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013, on measures for the better protection of mortgage debtors, debt restructuring and social housing), of 14 May 2013,[7] amended Article 129 of the LH in various respects. It states that the amendments apply to extrajudicial sales of mortgaged properties where the process was begun after the entry into force of that law, regardless of the date of execution of the mortgage instrument. In respect of extrajudicial sales begun before the entry into force of Law 1/2013, and in respect of sales where there has been no award of the mortgaged property, the notary is to suspend these where, within a strict time limit of one month running from the day after the entry into force of Law 1/2013, one of the parties shows that he has brought an action before a competent court, in accordance with Article 129 of the LH, alleging that one of the terms of the mortgage loan agreement on which the extrajudicial sale is based, or a term determining the amount payable, is unfair.

The factual background to the dispute, the questions referred and the procedure before the Court

18. On 21 December 2004, Ms Cristobalina Sánchez López entered into a loan agreement with Banco Español de Crédito SA (which became Banco Santander SA, ‘Banco Santander’) for the purchase of a dwelling, the loan being secured by a mortgage.

19. Article 11 of that agreement, headed ‘extrajudicial procedure’ provides, amongst other things, that the parties consent to the use of an extrajudicial procedure for the purpose of enforcing the mortgage. That article also empowers the bank to represent the mortgage debtor on the day of signature of the public deed of sale.

7 BOE No 116 of 15 May 2013, p. 36373, ‘Law 1/2013’.

20. On 24 March 2011, Banco Santander commenced a procedure for extrajudicial enforcement of the mortgage before a notary. This procedure was concluded, on 15 December 2011, by the award of the mortgaged dwelling to the creditor without a basic value having previously been established, the property being sold for an amount corresponding to 59.7% of the value which had been attributed to it for the purposes of enforcement of the mortgage. As a result, the debtor remained liable for an amount of EUR 13482.97.

21. On 23 February 2012, the notary drew up a public deed of sale of the dwelling in favour of the creditor, without the participation of the debtor, who was represented for this purpose by the creditor, in accordance with Article 11 of the mortgage loan agreement. The deed was entered in the land register on 12 April 2012.

22. Subsequently, on 23 September 2014, Banco Santander made a claim under the simplified procedure provided for by Article 250(1)(7) of the LEC, seeking an order requiring Ms Sánchez López to vacate the dwelling and granting possession to the bank.

23. Furthermore, Banco Santander set the amount of the deposit which the debtor would have to pay in order to oppose its claim at EUR 10 000.

24. In those proceedings, Ms Sánchez López did not appear before the referring court, the Juzgado de Primera Instancia de Jerez de la Frontera (Court of First Instance of Jerez de la Frontera, Spain).

25. It was in those circumstances that that court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is it contrary to the abovementioned provisions and the objectives of [Directive 93/13] for legislation such as the Spanish legislation to establish a procedure like that of Article 250(1)(7) of the [LEC], requiring the national court to give a ruling ordering the dwelling subject to enforcement to be handed over to the person who acquired it in extrajudicial enforcement proceedings, in which, under the current regime contained in Article 129 of the Law on Mortgages in the version contained in Law 1/2000 of 7 January [2000] and Articles 234 to 236-o of the [RH] ... there could be no review *ex officio* of unfair terms and the debtor could not raise an effective objection on those grounds, either in the extrajudicial enforcement procedure or in separate legal proceedings?

(2) Is it contrary to the abovementioned provisions and the objectives of [Directive 93/13] for legislation, such as the fifth transitional provision of Law 1/2013, to allow the notary to suspend extrajudicial enforcement proceedings already commenced when Law 1/2013 came into force only if the consumer establishes that he has lodged a claim concerning the unfairness of a clause in the mortgage loan agreement on which the extrajudicial sale is based, or which determines the amount payable on enforcement, provided that the separate claim has been lodged by the consumer within a period of one month from publication of Law 1/2013, without the consumer having been notified in person of that period, and in any case before the notary has made the award?

(3) Are the abovementioned provisions of [Directive 93/13], the objective it pursues and the obligation it imposes on national courts to examine of their own motion the existence of unfair terms in consumer contracts without the consumer having to request it to be interpreted as allowing the national court, in proceedings such as that established in Article 250(1)(7) of the [LEC] or in the “extrajudicial sale” procedure governed by Article 129 of the [LH], to disapply national law when the latter does not permit that judicial review of the court’s own motion, in view of the clarity of the provisions of the directive and of the affirmations of the [Court] concerning the obligation of national courts to review of their own motion the existence of unfair terms in cases relating to consumer contracts?

(4) Is it contrary to the abovementioned provisions and the objectives of [Directive 93/13] for national legislation, such as Article 129 of the [LH], in the wording of Law 1/2013, merely to confer on a notary, as sole effective remedy for protecting the consumer rights enshrined in the directive, and in respect of extrajudicial enforcement procedures with consumers, the power to warn of the existence of unfair terms; or to give the consumer against whom extrajudicial enforcement is sought an opportunity of lodging a claim in separate legal proceedings before the notary has awarded the property subject to enforcement?

(5) Is it contrary to the abovementioned provisions and the objectives of [Directive 93/13] for national legislation, such as Article 129 of the [LH], in the wording provided by Law 1/2013, and Articles 234 to 236 of the [RH] ... to establish an extrajudicial procedure for the enforcement of mortgage loan agreements concluded with consumers by sellers or suppliers in which there is no opportunity whatsoever for review *ex officio* of unfair terms?'

26. Written observations were lodged by Banco Santander, the Spanish Government and the European Commission.

27. A hearing took place on 25 April 2017, attended by Banco Santander, the Spanish Government and the Commission.

Analysis

Manifest inadmissibility of the second, fourth and fifth questions

28. As has been pointed out, essentially, by those lodging written observations, the questions referred fall into two categories.

29. The first and third questions relate to the compatibility of the simplified procedure under Article 250(1) of the LEC which was in force at the time of the facts of the case in the main proceedings, and to the consequences of any potential incompatibility between that procedure and Directive 93/13, particularly in terms of the role of the national court.

30. The second, fourth and fifth questions, on the other hand, relate to the compatibility of Article 129 of the LH, as amended by Law No 1/2013 and its implementing provisions, with Directive 93/13.

31. However, that regime does not apply to the facts of the case in main proceedings.

32. Law No 1/2013 provides, in its fifth transitional provision, that the amendments it makes apply to extrajudicial sales of mortgaged properties where the process was begun after it entered into force (on 15 May 2013), regardless of the date of execution of the mortgage instrument. Since the extrajudicial enforcement procedure at issue in the main proceedings was concluded well before that date, on 23 February 2012, that law is not applicable *ratione temporis* to the main proceedings, as indeed the referring court appears to state.

33. It follows that the second, fourth and fifth referred questions must be held to be manifestly inadmissible in that they do not relate to an interpretation of EU law which meets an objective need of the decision that the referring court must take. [8]

8 See, to that effect, judgment of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 41 and the case-law cited).

Substantive consideration of the first and third questions

34. The first and third of the questions referred, which are intimately linked, relate to the scope of the powers which the national court has in the interests of effectiveness of Directive 93/13, in the context of a procedure for the enforcement of immovable property rights which have been entered in the land register.

35. I must say at the outset that I am perplexed by the wording of the referred questions — and consequently as to whether they are formally admissible — and by the conclusions which the referring court seems to draw from the case-law on effectiveness of the protection given by Directive 93/13.

36. What is novel in the present case is that the term alleged to be unfair, namely that permitting the use of the extrajudicial procedure, with the consequences which flow from that, is the very term which, as I understand matters, ultimately enabled the main proceedings to be brought before the referring court, which was done several years after the conclusion of that procedure, under the simplified procedure provided for in Article 41 of the LH and referred to in Article 250(1)(7) of the LEC.

37. Furthermore, in relation to the link between the main proceedings and the application of Directive 93/13, it is observed that the issue before the national court does not, strictly speaking, relate, in that simplified procedure, to the validity of a mortgage loan agreement, the effects of that agreement having been exhausted, but only to that of a property right entered in the land register. It is apparent from statements in the written observations that it was only after a request had been made that the agreement in question was added to the file.

38. By its first and third questions, the referring court thus puts in issue, in a manner which is unprecedented to say the least, national legislation applicable to the procedure for exercising a legally registered property right.

39. By its first question, the referring court asks whether or not the Spanish legislation in force at the relevant time — and in particular Article 250(1)(7) of the LEC and Article 129 of the LH — which require the national court to make a possession order in respect of a dwelling acquired by the financial institution pursuant to the extrajudicial enforcement procedure provided for by Article 129 of the LH — is compatible with Article 3(1) and (2), Article 6(1) and Article 7(1) of Directive 93/13. It observes that neither during the extrajudicial procedure for enforcement of the mortgage, nor during the subsequent legal proceedings by which the enforcing party sought peaceful possession of the immovable property, was there any possibility of the court reviewing unfair terms, and that no mechanism was provided for the consumer to oppose the process in an effective and timely manner.

40. By its third question, it enquires as to the consequences of any finding that the relevant national legislation is incompatible. In particular, it raises the question of whether the national court may, by virtue of its duty to review the terms of consumer contracts for unfairness, disapply the national legislation at issue.

41. I will begin with a summary of what can be learned from the Court's case-law on the scope of the powers of the national court and the guarantees to be provided to consumers in the interests of effectiveness of Directive 93/13, in the very particular context of extrajudicial mortgage enforcement procedures. I will then set out why it does not seem to me that there is any need, nor is it necessarily appropriate, for the courts to intervene in the way suggested by the national court.

What can be learned from the case-law on the scope of the powers of the national court and the guarantees to be provided to consumers in the context of extrajudicial mortgage enforcement procedures

42. According to settled case-law,[9] the system of protection introduced 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. This 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.

43. First, Article 6(1) of Directive 93/13 lays down the rule that consumers are not to be bound by unfair terms in contracts.

44. Having regard to the weak position of the consumer, Article 6(1) of Directive 93/13, a mandatory provision[10] which aims to re-establish equality between the contacting parties, has been interpreted as permitting the national court — indeed requiring it, where it has the necessary factual and legal elements available, to assess of its own motion whether a contractual term in a contract between a consumer and a seller or supplier is unfair.[11]

45. In relation to the compatibility of procedural legislation with Directive 93/13, in particular that of a procedure for the realisation of security interests or the enforcement by notaries of security relating to consumer loans,[12] it must be borne in mind that it is for the national legal order of each Member State to establish rules governing their national mechanisms of enforcement, and the role assigned to notaries within them, in accordance with the principles of procedural autonomy, subject to compliance with the principles of equivalence and effectiveness.[13]

46. As to the principle of effectiveness, the only one of the two principles that is really put in issue in the present case,[14] the Court, when ruling specifically on procedural provisions for the enforcement of mortgages, has observed that unless the terms of the contract which creates the enforceable right are effectively reviewed for unfairness, protection of the rights under Directive 93/13 cannot be guaranteed.[15]

47. As regards national legislation on the extrajudicial enforcement of mortgages, the Court has identified a number of things which may be necessary in order to guarantee the consumer protection provided for by that directive.

9 See, in particular, judgments of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 48 and the case-law cited), and of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 39).

10 See, in particular, judgments of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 36), and of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraph 42 and the case-law cited).

11 See, to that effect, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 46 and the case-law cited), and of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 58).

12 See, in particular, judgments of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 49), and of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 48).

13 See, in particular, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 50 and the case-law cited), and of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 49).

14 There is nothing in the available material to give rise to any doubt as to the compatibility of the legislation at issue with the principle of equivalence.

15 See, in particular, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 59) and of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraph 46).

48. Thus, in relation to Slovak procedural provisions, the Court recognised the power of the national court to suspend the sale of immovable property on an application brought while an extrajudicial procedure is ongoing. Nonetheless, the provisions of Directive 93/13 were interpreted as not precluding national legislation which allowed the recovery of a debt that was based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer, in so far as that legislation did not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive. [16]

49. Furthermore, the Court has held that, where the notary was authorised to play a preventive role with respect to unfair terms in a contract, and was explicitly called on to ensure by his advice equal treatment in all the proceedings falling within his competence, with a view to drawing the attention of consumers to the potential unfairness of a term, and where the consumer was able to challenge the validity of the contract sought to be enforced, the effectiveness of the protection provided for by that directive was, in principle, guaranteed. [17]

50. Nevertheless, it is important to emphasise that, in relation to an argument that it was possible for a notary to initiate the enforcement of a contract without examining the unfairness of the various clauses, the case-law relating to the identification of unfair terms *ex officio* fell within the specific framework of the exercise of the judicial function and, having regard to the fundamental differences between that and the notarial function, could not be transposed to the latter. [18]

51. Furthermore, the principle of effectiveness could not be stretched so far as to mean that a national court was required not only to compensate for a procedural omission on the part of a consumer who was unaware of his rights, but also to make up fully for the total inertia on the part of the consumer concerned, who had not engaged with the judicial enforcement procedure at any stage. [19]

52. Ultimately, the Court therefore held that, although it did not enable the notary to make a decision as to whether the contract contained unfair terms, the procedure for extrajudicial sale of immovable property did not undermine the effectiveness of Directive 93/13, since the consumer would have been able to bring the matter before the court, which would have been able to grant interim relief suspending any auction arranged by the notary. [20]

53. Secondly, as regards Article 7(1) of Directive 93/13, which requires Member States to ensure that effective means exist to prevent the continued use of unfair terms, that provision does not require wholesale amendment of national procedures. It is only necessary to ensure that the relevant national provisions, analysed in their context by taking account of all the existing remedies, guarantee that adequate and effective means exist to stop the use of unfair terms in consumer contracts and that such terms are not binding on consumers. [21]

54. I must point out that, in every case where the Court has censured a national provision on the basis of effectiveness of Directive 93/13, the court hearing the matter has had power to declare a term invalid, and thus either to disregard it, or to intervene in an ongoing procedure for repossession or transfer of property. Thus the context was either that of substantive proceedings for declaratory relief, heard by a court able to consider whether a term in a contract concluded between a consumer and a seller or supplier was unfair, or that of an enforcement procedure based on such a contract, potentially containing an unfair term.

16 See, in particular, judgment of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraphs 60 and 68).

17 See, in particular, judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraphs 57 and 60).

18 See judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 47).

19 See, to that effect, judgments of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 47), and of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 56).

20 See, to that effect, judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraphs 59 to 61).

21 See, in particular, judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 52).

55. In other words, considering the situations which have come before the Court to date, it has been in the course of an ongoing enforcement procedure, and in the light of the established or presumed existence of an unfair term in the mortgage loan agreement giving rise to the dispute, that the national court has sought clarification of the scope of the protection conferred under Directive 93/13.

56. Thus, in *Aziz*,[22] the transfer of title to the immovable property at issue had not yet taken place, since, despite the property having been auctioned, no buyer had been found, and since, shortly before he was ordered to vacate the property, Mr Aziz had brought an action for declaratory relief before the competent national court, seeking the annulment of a term of the mortgage loan agreement.

57. It is in the light of that learning, and of its legislative context, that the procedure for recognition of rights in rem which is at issue in the main proceedings should be examined.

The power to examine, ex officio, the unfairness of the terms of a contract cannot extend to a procedure for recognition of rights in rem which is independent from the procedure for the award of a property

58. The present case, it must be noted, is not concerned with a procedure for enforcing an order for payment, or with an ongoing enforcement procedure in which it might still be appropriate to give a ruling as to the unfairness of the terms of a mortgage loan agreement previously entered into.

59. The sole object of the proceedings before the referring court is to give effect to a property right which has been duly registered. As that court stated in a response to a question put to it by the Court, those proceedings are intended purely to protect rights in rem which have been registered.

60. To my mind, it is important to make a clear distinction between the procedure for extrajudicial sale and the simplified procedure governed by Article 41 of the LH.

61. The procedure for extrajudicial sale, which, in accordance with Article 234 of the RH, presupposes that the parties have given their consent in the mortgage instrument, is designed to lead to the drawing-up of a public deed transferring title to the immovable property to the highest bidder, inter alia through registration in the land register.

62. The simplified procedure for recognition of rights in rem, here that governed by Article 41 of the LH, which is independent of the procedure for extrajudicial sale before a notary, is designed by contrast to protect the rights of holders of rights in rem including (but not limited to) those entered in the land register. This procedure is not related to any consumer contract in respect of which the national court makes a ruling, but is intended solely to verify that a registered right exists, with a view to carrying it into effect.

63. It is true that, in the main proceedings, use of the simplified procedure follows incidentally in Article 11 of the agreement concluded on 21 December 2004 between Ms Sánchez López and Banco Santander, by which consent was given to the use of the extrajudicial notarised procedure in the event of enforcement of the mortgage.

64. Nonetheless, the procedure governed by Article 41 of the LH, to which the first and third questions relate, is intended for the protection of rights in rem arising from an extrajudicial sale, through which the proprietor obtains actual possession of the immovable property.

65. That procedure is not based on the mortgage loan agreement at issue, but on the property right entered in the land register. Indeed, on the conclusion of the extrajudicial sale procedure, the mortgage agreement is extinguished, together with the mortgage itself.

22 Judgment of 14 March 2013 (C-415/11, EU:C:2013:164, paragraphs 26 and 27).

66. On the facts, it appears that the notarised sale procedure has had its full effect in that the immovable property has been auctioned and sold.

67. In other words, the simplified procedure put at issue in the present case is thus, as the Spanish Government observed, independent of the extrajudicial sale or any other mortgage enforcement procedure.

68. I think it is relatively clear that Directive 93/13 cannot be held to be applicable to the procedure at issue, which relates to the verification of rights in rem with a view to the exercise of those rights, and not to the performance of a contract concluded between a consumer and a seller or supplier.

69. Moreover, the Court has stated on several occasions that every case in which the question arises as to whether a national procedural provision makes the application of European 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.[23]

70. As the Spanish Government pointed out, it appears that the debtor had the opportunity, at the time of the extrajudicial procedure for transfer of the mortgaged property, to oppose or seek a suspension of it on the ground that the mortgage loan agreement contained an unfair term, while applying for interim measures so as to suspend the sale of the immovable property of which she was the proprietor.

71. In any event, it must be noted that this matter differs from those brought to the attention of the Court thus far, in that the order for reference does not include any factual material showing that the referring court considered that a term in the agreement at issue, other than the term referring to the extrajudicial enforcement procedure, might be unfair within the meaning of Article 3(1) of Directive 93/13.

72. Thus, in *Aziz*, the second question referred expressly related to contractual terms concerning acceleration of the date for payment and the amount of default interest.[24] In *Finanmadrid EFC*, the order for reference stated that there was doubt as to whether certain terms of the agreement at issue might be unfair.[25]

73. While the national court is required to examine, of its own motion, the possible unfairness of any contractual term falling within the scope of that directive, even where there has been no express request to that effect, where it has available to it the legal and factual elements necessary for that task,[26] it is still necessary to explain that there is doubt as to whether another term of the agreement at issue in the main proceedings may be unfair.

74. It must be borne in mind that Directive 93/13 is intended to ensure that contracts concluded with consumers do not contain unfair terms (fourth recital), to suppress unfair terms in such contracts and, finally, to ensure that such terms do not bind the consumer (21st recital).

75. Since the contract supposedly containing the term presumed to be unfair, which is not the subject of the proceedings pending before the national court, was exhausted by the definitive transfer of the immovable property at issue in the main proceedings, it no longer appears relevant to examine the need to prevent or suppress the incorporation of such a term.

23 Judgment of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 49 and the case-law cited).

24 Judgment of 14 March 2013 (C-415/11, EU:C:2013:164, paragraph 65 et seq.).

25 Judgment of 18 February 2016 (C-49/14, EU:C:2016:98, paragraph 22).

26 See, in particular, judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 32).

76. Having regard to all of those considerations, in my opinion the protection conferred by Directive 93/13 does not imply that the court is empowered to rule as to the unfairness of a term incorporated in a mortgage agreement, in the course of a procedure which is independent of the mortgage enforcement procedure and designed to ensure the effectiveness of the proprietary entitlement to the immovable property concerned.

77. To decide otherwise would not, to my mind, be necessarily advantageous for the consumer concerned, or desirable from the point of view of upholding the principle of legal certainty and the security of acquired property rights.

78. First, it does not seem that a ruling that the procedure at issue is incompatible with Directive 93/13 would necessarily be justified in the interests of protection of the consumer concerned. I reiterate that such protection is the primary objective pursued by Directive 93/13.

79. While the order for reference has proven to be very much lacking in information concerning the situation of the defendant to the main proceedings, it is apparent from factual material brought to the Court's attention by Banco Santander and the Spanish Government that, while the award of the property concerned was given effect by notarial instrument on 23 February 2012, and while that instrument was entered in the land register on 12 April 2012, Ms Sánchez López asked Banco Santander to allow her to stay in the dwelling in question under the convention for the creation of a social housing fund established at national level on 17 January 2013. On 19 November 2015, Ms Sánchez López and Banco Santander concluded a contract subject to that convention, which amongst other things enables Ms Sánchez López to remain on the premises as a tenant, subject to paying rent in a sum of about EUR 90. In so doing, it does not appear that she expressed any wish to challenge the mortgage loan agreement which she had previously signed, even though, it would very much appear, she had the opportunity to do so. Similarly, there is nothing to show that the consumer in question intended to challenge the definitive character of the transfer of title to the property she occupies, a transfer which resulted from the award of 15 December 2011 and was entered in the land register on 12 April 2012.

80. In other words, it is not certain that there would be any 'benefit' to the consumer in challenging that procedure. Since a clause which is declared to be unfair does not bind the consumer, the extrajudicial enforcement of the mortgage might be invalidated and the consumer in arrears would once again be bound by the mortgage loan agreement. On the basis that no other terms of the contract can be identified as potentially unfair, the original contractual framework would come back into force, in this case without modification of the terms relating to repayment. Sight should not be lost of the fact that the right to effective consumer protection includes the option not to exercise consumer rights. [27]

81. Furthermore, it is conceivable that invalidating the mortgage agreement to which this case relates would put the consumer concerned in an even less favourable position, in that it would result in the annulment of the award of the immovable property and thus cast doubt over the social tenancy agreement subsequently concluded between Banco Santander and Ms Sánchez López.

82. Secondly, to authorise the court to examine, of its own motion, the fairness of the terms of a mortgage agreement which was concluded previously and has been exhausted of effect — the mortgaged property having been definitively transferred — would involve calling into question, on the basis of effectiveness of Directive 93/13, a right in rem which is not based on a contract concluded with a consumer but on the extrajudicial recognition of a right.

27 See, in particular, judgments of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 35), and of 14 April 2016, *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 25).

83. On the facts of the present case, it is notable that the right in rem at issue was entered in the land registry around four years before the order for reference. While, in the main proceedings, Banco Santander happens to be the holder of that right, it could have been that a completely different entity acquired the property after the registered entry was made.

84. Accordingly, it would appear to be contrary to the principle of legal certainty and security of property rights to call acquired rights of ownership into question, on the basis of effectiveness of Directive 93/13, when there is no longer any question of striking out an unfair term in a contract between a seller or supplier and a consumer which continues to produce effects.

Conclusion

85. Having regard to all of the foregoing considerations, I suggest that the questions referred by the Juzgado de Primera Instancia de Jerez de la Frontera (Court of First Instance of Jerez de la Frontera, Spain) be answered as follows:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not apply to a procedure such as that provided for in Article 41 of the Ley Hipotecaria (Law on mortgages) and Article 250(1) of Ley 1/2000, de Enjuiciamiento Civil (Law 1/2000 on civil procedure) of 7 January 2000, inasmuch as that procedure does not concern the assessment and/or the performance of a contract between a seller or supplier and a consumer, but is intended simply to ensure the effectiveness of a property right which has been legally acquired and entered in the land register.