Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 10 September 2019[1]

Case C-125/18

Marc Gómez del Moral Guasch
v
Bankia SA

(Request for a preliminary ruling
from the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain))

(Reference for a preliminary ruling — Consumer protection — Unfair terms in consumer contracts — Mortgage loan agreement — Variable interest rate — Mortgage loan reference index (IRPH) — Index resulting from a regulatory or administrative provision — Unilateral introduction by the seller or supplier — Review of transparency by the national court — Level of information to be supplied by the bank)

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I. Introduction

1. Nowadays real property is rarely acquired without a loan. Paying the monthly instalments on a mortgage loan has been normal practice since the dawn of time.[2] In order to take out a loan, the average consumer generally has various sources of information, such as the brochures or practical guides issued by the banks, and also by consumer protection associations, which are intended to inform potential purchasers about various matters such as maximum indebtedness, the fixed or variable interest rates and the reference indices.

2. Frequently, owing to the technical nature of the information relating to mortgage loans, the average consumer is not in a position to understand certain concepts, such as 'interest rate' (fixed or variable), 'reference index' or 'annual percentage rate of charge' (APRC), and, in particular, the differences between those concepts. That also applies to the functioning or the actual calculation not only of the

2 The first cuneiform writings of ancient Mesopotamia attest to the existence of loan arrangements. In any event, there is proof that interest-bearing loans existed during the Sumerian period (3000 BC to 1900 BC) and different political rules imposed maximum limits with regard to that interest (the most common, in various periods, was 33.3% in cereals and 20% in money). The Code of Hammurabi, around 1800 BC, expressly included limits on interest rates, and also detailed regulation of interest rates and the consequences of non-payment. See Santamaría Aquilué, R., *El tipo de interés en las operaciones de préstamo: a vueltas con la usura*, UPNA, Pampelune, 2014, pp. 6 and 7.

variable interest rates but also of the official reference indices of mortgage loans and of the APRC on the basis of which those interest rates are calculated. In that context, the level of information required of the seller or supplier is of crucial importance if the average consumer is to understand the real cost of his borrowing.

3. The present reference for a preliminary ruling, which was made to the Court by the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain), concerns the interpretation of Directive 93/13/EEC,[3] in particular Article 1(2), Article 4(2) and Articles 5 and 8 of that directive. The request for a preliminary ruling was made in the context of a dispute between Mr Marc Gómez del Moral Guasch and Bankia SA, a banking institution, concerning what is alleged to be the unfair nature of a term in a mortgage loan agreement entered into by those two parties, under which the variable interest rate of the loan is subject to one of the official mortgage loan reference indices (IRPH) ('the term at issue'), namely the IRPH Cajas.

4. The questions for a preliminary ruling raised in that request provide the Court with the opportunity to clarify its case-law relating, inter alia, to, first, the scope of the exception set out in Article 1(2) of Directive 93/13 and, second, the extent and the content of the review of the transparency of the term at issue, in accordance with Article 4(2) and Article 5 of that directive.

II. Legal framework

A. European Union law

5. The 13th, 19th and 20th recitals of Directive 93/13 state:

'whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions … [to the provisions of this Directive]; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) [of this Directive] also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

…

whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; …

whereas contracts should be drafted in plain, intelligible language, … and, if in doubt, the interpretation most favourable to the consumer should prevail'.

6. According to Article 1(2) of Directive 93/13:

'The contractual terms which reflect mandatory statutory or regulatory provisions … shall not be subject to the provisions of this Directive.'

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

7. Article 3(3) of that directive provides:

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

8. Article 4(2) of that directive provides:

'Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.'

9. The Annex to Directive 93/13, entitled 'Terms referred to in Article 3(3)', states in point 1(l) and point 2(c) and (d):

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

…

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

…

2. Scope of paragraphs … (l)

…

(c) Subparagraphs … (l) do not apply to:

– transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

…

(d) Subparagraph (1) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.'

B. Spanish law

10. Article 1303 of the Código Civil (Civil Code) is drafted as follows:

'Where an obligation is declared null and void, the contracting parties must return to each other reciprocally the things which constituted the subject matter of the contract, the profits produced by those things and the price with interest, without prejudice to the following articles.'

11. Article 80(1)(a) of the texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Consolidated Text of the General Law for the Protection of Consumers and other supplementary laws), approved by Real Decreto Legislativo 1/2007 (Royal Legislative Order 1/2007), of 16 November 2007,[4] in the version applicable to the dispute in the main proceedings (the LGDCU'), provides:

'1. In contracts with consumers and users which contain terms that have not been individually negotiated, … those terms must satisfy the following requirements:

(a) Precise, clear and simple wording, enabling immediate understanding without reference to texts or documents not supplied before, or at the time of, the conclusion of the contract and that must, at all events, be expressly referred to in the contract document.'

12. Article 82(1) and (2) of the LGDCU provides:

'1. All contractual terms not individually negotiated and all practices for which express consent has not been given that, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer or user, shall be regarded as unfair terms.

2. … A supplier or seller asserting that a particular term has been individually negotiated shall bear the burden of proof.'

13. Article 83 of the LGDCU is worded as follows:

'Unfair contract terms shall be automatically void and deemed not to have formed part of the contract. For those purposes, the court, after hearing the parties, shall rule that the unfair terms included in the contract are void, but the contract shall continue to bind the parties upon those terms, provided that it is capable of continuing in existence without the unfair terms.'

14. The Orden del Ministerio de la Presidencia, sobre transparencia de las condiciones financieras de los préstamos hipotecarios (Order of the Ministry of the Presidency concerning the transparency of the financial terms of mortgage loans), of 5 May 1994,[5] as amended by the Ministerial Order of 27 October 1995[6]('the Order of 5 May 1994'), applied only to loans that were secured on a dwelling house taken out by natural persons provided that the amount of the loan sought was equal to or below EUR 150 000. That order, which has now been repealed, was in force between 11 August 1994 and 29 April 2012, the date on which the new Orden EHA/2899/2011 de transparencia y protección del cliente de servicios bancarios (Ministerial Order 2899/2011 on transparency and the protection of banking services customers), of 28 October 2011 ('Order 2899/2011'),[7] entered into force.[8]

15. The second additional provision of the Order of 5 May 1994 provided:

'The Bank of Spain, on receiving a report from the Dirección General del Tesoro y Política Financiera [Directorate-General for the Treasury and Financial Policy], shall define by means of a notice a set of indices or of official reference rates that may be applied by the credit institutions to variable-interest-rate mortgage loans and shall publish their value at regular intervals.'

4 BOE No 287, 30 November 2007, p. 49181.

5 BOE No 112, 11 May 1994, p. 14444.

6 BOE No 261, 1 November 1995, p. 31794.

7 BOE No 261, 29 October 2011, p. 113242.

8 See point 21 of this Opinion.

16. Article 6(2)(a) and (b) and Article 6(3)(1) and (2) of the Order of 5 May 1994 provided:

'2. For variable-interest-rate loans subject to this Order, the credit institutions may use as indices or reference rates only those that satisfy the following conditions:

(a) that they do not depend exclusively on the credit institution itself and cannot be influenced by the credit institution under agreements or practices consciously parallel to those of other institutions;

(b) that the data on which the index is based are collected according to an objective mathematical method.

3. For variable interest loans subject to this Order, it is not compulsory to communicate the variations in the applicable interest rate individually to the borrower when the following two conditions are satisfied:

1. it has been agreed to use an official index or reference rate from among those referred to in the second additional provision to this Order;

2. the interest rate applicable to the loan is defined in the manner set out in Clause 3 *bis*(1)(a) or (b) of Annex II to this Order.'

17. The IRPH, in its three variations, namely the banks' IRPH ('the IRPH Bancos'), the savings banks' IRPH ('the IRPH Cajas') and the IRPH of all credit institutions ('the IRPH Entidades'), is an official index introduced by provision 6 bis of Circular 8/1990 del Banco de España, a entidades de crédito, sobre transparencia de las operaciones y protección de la clientela (Notice 8/1990 of the Bank of Spain to credit institutions, on the transparency of transactions and customer protection), of 7 September 1990,[9] as amended by Circular 5/1994 del Banco de España, a entidades de crédito, sobre modificación de la notice 8/1990, sobre transparencia de las operaciones y protección de la clientela (Notice 5/1994 of the Bank of Spain to credit institutions, *amending* Notice 8/1990, on the transparency of transactions and customer protection), of 22 July 1994[10] ('Notice 8/1990'). The fourth paragraph of the statement of reasons of Notice 5/1994 stated:

'The reference rates selected are, in the final analysis, [APRCs]. The average rates of mortgage loans for the acquisition of a residential property on the private housing market are entirely [APRCs], since they also include the effect of the charges. Also, to use them directly and simply as contractual rates assumes placing the [APRC] of the mortgage transaction above the market rate. In order to bring the [APRC] of that transaction in line with the market rate, it would be necessary to apply a negative margin, the value of which would vary depending on the transaction charges and the frequency of payments …'

9 BOE No 226, 20 September 1990, p. 27498

10 BOE No 184, 3 August 1994, p. 25106. This notice envisaged a total of six indices: the IRPH Bancos, the IRPH Cajas, the IRPH Entidades, the CECA indicator (the index of the Confederation of Spanish Savings Banks), the rate of internal profitability on the secondary market for public debt with a residual maturity of two to six years and the Madrid InterBank Offered Rate ('the MIBOR'). The MIBOR has disappeared since the introduction in Spain, in 1999, of the Euro Interbank Offered Rate ('the Euribor').

18. Provision 2 of Notice 8/1990, entitled 'Information on the interest rates applied', concerned the information that had to be communicated to the Bank of Spain in order for it to determine and publish certain mortgage market indices or reference rates. That provision was worded as follows:

'… Banks, savings banks, the Confederation of Spanish Savings Banks, branches of foreign credit institutions and mortgage loan companies shall communicate to the Bank of Spain, during the first 15 days of each month, information on the average rates of [Spanish] peseta [(ESP)] credit transactions and deposits completed in Spain, whether they were initiated or renewed during the preceding month.'

19. Provision 6 *bis* of Notice 8/1990, entitled 'Mortgage loans', referred in paragraph 3(b) to the IRPH Cajas as follows:

'3. For the purposes of the second additional provision of the order on mortgage loans, the following indices or reference rates, the definition and mode of calculation of which are set out in Annex VIII, shall be regarded as official:

(b) the average rate of mortgage loans of a duration of more than three years granted by savings banks for the acquisition of a residential property on the private housing market.

…

The Bank of Spain shall circulate these indices appropriately, which shall in any event be published monthly in the *Boletín Oficial del Estado*.'

20. The definition and the mathematical formula for calculating those indices are set out in Annex VIII to Notice 8/1990. Paragraph 2 of Annex VIII to that notice defines the IRPH Cajas as 'the simple average of the weighted average interest rates of loan transactions secured by a mortgage of a duration equal to or greater than three years for the purpose of acquiring a residential property on the private housing market, which all savings banks have initiated or renewed during the reference month of the index. These weighted average interest rates are the equivalent annual rates declared to the Bank of Spain for those periods by all savings banks in accordance with provision 2.

The formula for calculating that rate shall be the following:

$$Ica = \frac{\sum ica}{\text{nca}}$$

Ica = sum of ica/nca

Where:

Ica = average of the weighted average interest rates of all savings banks;

ica = weighted average rate of the loans of each savings bank;

nca = number of declaring savings banks.'

21. The IRPH Cajas, the IRPH Bancos, and the CECA index, ceased to be official reference rates with the entry into force of Order 2899/2011 and of Circular 5/2012, del Banco de España, a entidades de crédito y proveedores de servicios de pago, sobre transparencia de los servicios bancarios y responsabilidad en la concesión de préstamos (Notice 5/2012 of the Bank of Spain, for the attention of credit institutions and payment service providers, concerning the transparency of banking services

and responsibility when granting loans), of 27 June 2012 ('Notice 5/2012'). [11]

22. The IRPH Cajas was replaced by the IRPH of all Spanish credit institutions ('the IRPH Conjunto de Entidades'), which at present, according to Order 2899/2011, is one of the six official references that exist in Spain.

23. Article 27 of Order 2899/2011, entitled 'Official interest rates', refers in paragraph 1(a) to the IRPH Conjunto de Entidades. That IRPH is determined by taking into consideration the values of transactions actually entered into by the credit institutions with their customers during each period. Article 27 provides:

'With a view to their application by the credit agencies, according to the conditions laid down in this Ministerial Order, the following official interest rates shall be published on a monthly basis: (a) Average rate of mortgage loans of a duration greater than three years granted by credit institutions in Spain for the purpose of acquiring a residential property on the open market.'

24. The IRPH Conjunto de Entidades was conceived by the Spanish financial authorities, namely the Bank of Spain and the Dirección General del Tesoro (Treasury Directorate-General), and became official when it was included in the abovementioned notices of the Bank of Spain and published in the *Boletín Oficial del Estado*.

25. Ley 14/2013 de apoyo a los emprendedores y su internacionalización (Law 14/2013 to support entrepreneurs and their internationalisation), [12] of 27 September 2013 ('Law 14/2013'), in its 15th additional provision, entitled 'Transitional arrangements for the discontinuation of reference indices or interest rates', sets out the date from which the IRPH Cajas and IRPH Bancos and the CECA index will no longer be published by the Bank of Spain. That provision is worded as follows:

'1. As from 1 November 2013, the following official indices applicable to mortgage loans or credits in accordance with the legislation in force shall cease to be published on the website of the Banco de España and shall completely disappear:

…

(b) the average rate of mortgage loans of a duration greater than three years granted by the savings banks [IRPH Cajas] for the acquisition of a residential property on the open market;

(c) the active reference rates of the savings banks [CECA].

2. References to the rates referred to in the preceding paragraph shall be replaced, with effect from the next review of the applicable rates, by the replacement rate or the reference index specified in the contract.

3. Where no rate or reference index is specified in the contract, or where that rate or index is among the indices or rates which cease to exist, it shall be replaced by the official interest rate called the "average rate of mortgage loans of a duration greater than three years granted by credit institutions in Spain for the purpose of acquiring a residential property on the open market", together with a margin equivalent to the arithmetical average of the differences between the rate that has been abolished and the abovementioned rate, calculated on the basis of the data available between the date on which the contract was concluded and the date on which the replacement of the rate takes effect.

11 BOE No 161, 6 July 2012, p. 48855.

12 BOE No 233, 28 September 2013, p. 78787.

The replacement of the rates in accordance with this paragraph shall automatically entail the novation of the contract without amendment or loss of the priority of the registered mortgage.

4. No remedy shall be available to the parties to require amendment, unilateral alteration or cancellation of the loan or credit by way of compensation for the application of this provision.'

III. The facts giving rise to the dispute in the main proceedings and the questions for a preliminary ruling

26. On 19 July 2001, Mr Gómez del Moral Guasch entered into a mortgage loan agreement with the Caja de Ahorros y Monte de Piedad de Madrid, now Bankia, for the amount of EUR 132 222.66 in order to finance the purchase of a residential property.

27. The first part of Clause 3 *bis* of that loan agreement, concerning the procedure for calculating the variable interest rate applicable to that loan (IRPH Cajas), is worded as follows:

'Clause 3 *bis*. Variable interest rate.

First. The agreed interest rate shall be calculated for periods of six months, running from the date of signature of the agreement, the interest rate for the first six-month period being that appearing in the paragraph of financial Clause 3. For subsequent six-month periods, the rate to be applied shall be the average savings bank rate for mortgage loans for a term of more than three years for the purchase of a residential property on the private housing market, in force at the time of the review, which the Bank of Spain publishes officially and periodically in the *Boletín Oficial del Estado* for variable-rate mortgage loans for the purchase of residential property, rounded up to the next higher quarter-percentage point and increased by 0.25 of a percentage point [sic]'.

28. The rate applied additionally, according to the same criteria as the preceding reference rate, is the CECA index.

29. On 18 April 2017, Mr Gómez del Moral Guasch brought an action before the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona) for a declaration that the term at issue was null and void owing to its unfair nature, on the ground that most mortgage loans are normally indexed on the Euribor,[13] which is generally more advantageous.

30. In that regard, the referring court explains that indexing on the IRPH, used in variable-rate mortgage agreements and representing around 10% of loans granted in Spain, is in fact less favourable for the consumer than indexing on the Euribor, which is used in 90% of mortgage loans. It states that use of the IRPH involves an additional cost for the consumer of around EUR 18 000 to 21 000 per mortgage loan by comparison with the Euribor and wonders about the level of information which the plaintiff in the main proceedings was given when entering into the agreement at issue.

31. The referring court justifies the present request for a preliminary ruling by the doubts which it has concerning whether the term at issue setting a rate of interest on the basis of a statutory index like the IRPH is excluded from the scope of Directive 93/13 and whether that directive must be interpreted as meaning that it precludes the national court from reviewing the unfairness of that term.

13 When the agreement was entered into, the Euribor was not one of the official reference indices referred to in Notice 8/1990. However, it is apparent from the observations of the Spanish Government that an official reference index linked with the performance of the Euribor was introduced by Circular 7/1999 del Banco de España, a Entidades de crédito, sobre modificación de la Circular 8/1990 (Notice 7/1999 of the Bank of Spain for the attention of the credit institutions, amending Notice 8/1990), of 29 June 1999 (BOE No 163 of 9 July 1999, p. 26016).

32. The referring court's uncertainties relate, inter alia, to whether the fact that the IRPH is governed by an administrative provision reproduced in the mortgage loan agreement in the form of a contractual term, so that that provision is neither mandatory nor additional, has the consequence that the exception in Article 1(2) of Directive 93/13 is not applicable to the term at issue. It considers, in that regard, relying in particular on the judgments in *Andriciuc and Others*[14] and *Kušionová*,[15] that such a provision is not binding, since it is an administrative provision that governs a variable and remunerative interest optionally included in the contract by the seller or supplier. It claims that, since subjection to the IRPH occurs solely because of the term at issue, the seller or supplier could have used other indices for the purposes of indexing the mortgage loan. The referring court also states that, in the absence of an agreement between the parties, that provision is not additional in nature.

33. The referring court states that the Tribunal Supremo (Supreme Court, Spain), however, in its judgment No 669/2017,[16] recently made a determination to the contrary, holding that the IRPH Entidades strictly speaking does not come under Directive 93/13 since it was fixed by a statutory provision. The referring court also makes clear that that judgment, which was delivered by the full court, constitutes a binding precedent that is directly applicable by all Spanish courts.

34. The referring court has doubts about the information that should be communicated by the seller or supplier when it enters into mortgage loan agreements with consumers with a variable rate indexed on a legal index such as the IRPH, where the formula for calculating that rate is complex and lacking in transparency for an average consumer, and also about the consequences of a finding that the term at issue is unfair. It observes, in that regard, that the Spanish legislature did not transpose the exception laid down in Article 4(2) of Directive 93/13, in order to ensure a higher level of consumer protection than that provided for in Directive 93/13 and it seeks to ascertain whether the application of that provision is consistent with the provisions of the directive.

35. It was in those circumstances that the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona), by judgment of 16 February 2018, received at the Court Registry on the same day, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the IRPH Cajas be the object of judicial protection, in the sense that it must be ascertained whether it is intelligible to the consumer, without this being precluded by the fact that it is governed by regulatory or administrative provisions, this not being a case provided for in Article 1(2) of Directive 93/13 because it is not a mandatory provision, but instead such variable ordinary and remunerative interest is included in the contract by the seller or supplier when he so chooses?

(2) (a) Under Article 4(2) of Directive 93/13, which has not been transposed into Spanish law, is it contrary to Directive 93/13, and to Article 8 thereof, for a Spanish court to rely upon and apply Article 4(2) of that act when that provision has not been transposed into Spanish law at the wish of the legislature, which sought a full level of protection in relation to all the terms that a seller or supplier may insert into a consumer contract, including those which relate to the main subject matter of the contract, even if those terms were drafted in plain, intelligible language?

(b) At all events, must information or promotional material be provided about all or some of the following facts or data, for the purpose of the understanding of an essential term, specifically the IRPH?

14 Judgment of 20 September 2017 (C-186/16, EU:C:2017:703, paragraphs 28, 29 and 31).

15 Judgment of 10 September 2014 (C-34/13, EU:C:2014:2189, paragraphs 77 to 79).

16 Judgment of 14 December 2017 (ES:TS:2017:4308) ('the judgment of 14 December 2017').

(i) an explanation of how the reference rate [is] configured, that is to say, stating that that index includes charges and other costs on top of the nominal interest rate, that it is a simple, unweighted average, that the seller or supplier [must] know and notify the fact that he must apply a negative margin and that the data provided are not public, compared with the other usual index, the Euribor;

(ii) an explanation of past and possible future fluctuations in the IRPH, notifying and publishing graphs that explain clearly and intelligibly to the consumer the fluctuations in that specific rate in relation to the Euribor, the usual rate on loans secured by a mortgage.

(c) If the Court concludes that it is for the referring court to examine whether contractual terms are unfair and to draw the necessary inferences in accordance with its national law, the Court is asked whether failure to provide information about all those consequences does not make the term unintelligible, inasmuch as it is not clear to an average consumer (Article 4(2) of Directive 93/13), or whether that failure to provide information amounts to unfair conduct by the seller or supplier and, therefore, the consumer would not have agreed to the use of the IRPH as the reference rate for his loan if he had been properly informed?

(3) If the IRPH Cajas term is declared null and void, failing agreement or if that would be more detrimental to the consumer, which of the two following consequences would be compatible with Articles 6(1) and 7(1) of Directive 93/13?

(a) the contract is adjusted by applying the usual replacement index, the Euribor, it being a contract essentially linked to a profitable rate of interest for the benefit of the bank [which is classified as] a seller or supplier;

(b) the interest rate ceases to be applied, and the sole obligation for the borrower or debtor is to repay the loan capital in the instalments stipulated.'

IV. The procedure before the Court

36. By order of the President of the Court of 10 April 2018, the request of the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona) that the present case be dealt with under the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court was refused.

37. Written observations were lodged by the parties to the main proceedings, by the Spanish and the United Kingdom Governments and by the European Commission. Those parties submitted oral argument at the hearing on 25 February 2019.

V. Analysis

38. The questions for a preliminary ruling submitted by the referring court relate to three issues, namely, first, the scope of the exception provided for in Article 1(2) of Directive 93/13; second, the extent and the content of the review of the transparency of the term at issue, in accordance with Article 4(2) of that directive, and, third and last, the consequences of a finding that that term is unfair.

39. Before examining those issues, it is appropriate to emphasise that the referring court, the parties to the main proceedings, the Spanish Government and the Commission have all referred to the particular features of the IRPH Cajas included in the term at issue and to the judgment of the Tribunal Supremo (Supreme Court) of 14 December 2017.

40. I therefore consider it appropriate to make some observations about those two points.

A. Preliminary observations

1. The IRPH Cajas: fluctuations and functioning

41. The referring court states that at the time of signature of the mortgage loan agreement between the plaintiff in the main proceedings and Bankia, the term at issue provided, for the purposes of determining the loan interest rate, for the application of the IRPH Cajas, so called because, for the calculation of that rate, only the mortgage loan transactions carried out by the savings banks were taken into account.[17]

42. It is apparent from the legal framework, as presented by the referring court, that the IRPH Cajas was at that time one of the 'reference indices based on mortgage loans' introduced by provision 6 bis(3)(b) of Notice 8/1990 and was therefore official and statutory in nature.[18] However, the referring court states that, since the entry into force of Order 2899/2011, the IRPH Cajas (like the IRPH Bancos and the CECA index) has ceased to be an official reference index and that a transitional arrangement was put in place for mortgage loans that used those indices.[19]

43. As regards that transitional arrangement, the Spanish Government has indicated that paragraphs 2 and 3 of the 15th additional provision of Law 14/2013 establish that the discontinued rates are to be replaced by 'the reference replacement rate or index specified in the agreement' and that, in the absence of a contractual replacement rate or index, or where that rate or index is one of the indices or rates to be cancelled — which is the case here —[20] the rate or index in question is to be replaced by the 'official interest rate called the "average rate of mortgage loans for a period greater than three years, granted by credit institutions in Spain for the acquisition of a residential property on the private housing market" [the IRPH Conjunto de Entidades], to which a margin equivalent to the arithmetical average of the differences between the discontinued rates and the rate mentioned above, calculated according to the information available between the date on which the agreement was entered into and the date on which the rate was actually replaced', is applied.[21]

17 It is apparent from Bankia's observations that the mortgage loan agreement at issue in the main proceedings provided for a variable interest rate of 5.25% for the first six months and, for the remainder of the life of the loan, for a variable interest rate indexed on the IRPH Cajas plus a margin of 0.25 of a percentage point. Bankia also states that a repayment period of 300 months (25 years) was fixed and that since the date on which the mortgage loan was taken out the borrower has paid the agreed amounts.

18 According to the referring court, the IRPH Cajas is a regulated, normative and therefore statutory reference index of mortgage loans. See points 17 to 19 of this Opinion.

19 It is apparent from the written observations of the Spanish Government that the single transitional provision of Order 2899/2011 provided that the IRPH Cajas, the IRPH Bancos and the CECA index would continue to be published and would be considered to be appropriate for all purposes until such time as a transitional arrangement for the loans concerned was established. According to that Government, however, those reference indices could not be applied by credit institutions in new mortgage loan agreements.

20 In this instance, the replacement reference index in the loan agreement was the CECA index, which ceased to be one of the official reference indices when Order 2899/2011 and Notice 5/2012 entered into force. See points 21 and 28 of this Opinion.

21 See points 22 to 25 of this Opinion.

44. The Spanish Government also emphasised that, in accordance with paragraph 3 of the 15th additional provision of Law 14/2013, that replacement entailed the automatic novation of the agreement without entailing the amendment or loss of priority of the registered mortgage. It added that paragraph 4 of the 15th additional provision of that law provided that the parties were not able to bring proceedings to challenge the amendment, unilateral alteration or cancellation of the loan or the credit. Thus, at present the index in Clause 3 *bis* of the agreement is the IRPH Conjunto de Entidades.

45. As regards the functioning of the IRPH Cajas, the referring court states, in the first place, that that index was calculated on the basis of the data communicated each month by the savings banks to the Bank of Spain and corresponded to a simple average, all savings banks being equally weighted, independently of the volume of loans granted. Thus, according to the referring court, the representativity of a savings bank within the IRPH Cajas did not change if it lost market share after having increased interest rates or charges in a particular month. Consequently, the more the number of savings banks was reduced, the more the influence of the remaining savings banks on the IRPH Cajas increased, so that any savings bank could influence the result of that index by increasing the interests or charges which it applied during the month in question.

46. In the second place, the referring court states that the information supplied by the savings banks in order to obtain the arithmetical average of the IRPH included the APRC, fees and charges, the latter representing around more than a quarter of a percentage point over the nominal interest, as well as 'floor' terms or terms providing for rounding up

47. In the third place, the referring court states that, in accordance with the national legislation, rates which had been reduced because of subsidies or agreements in favour of workers — and which would have caused the result to be lower — were not taken into account in the calculation of the IRPH.

48. In the fourth place, the referring court states that, since the weighted average rates were APRCs, in order for the IRPH to reflect average market interests, it was necessary, as the Bank of Spain explained, [22] in order to offset the inflationary effect of the charges applied, to apply a negative margin, the value of which depends on the charges applied. In the present case, and generally, a positive margin was applied, namely the IRPH Cajas + 0.25 of a percentage point.

49. In the fifth place, the referring court adds that, in Bankia's agencies, the IRPH was promoted among customers as a less volatile, safer and more stable index than the Euribor, [23] so that the question also arises whether the different graphs, based on the Bank of Spain's data and thus known by Bankia, should have been supplied, in order for the consumer to be aware of the fluctuations in each of the rates (the IRPH and the Euribor).

50. The referring court states, finally, that all of those data, in addition to their mathematical formula, which is also part of their comprehensibility and which is set out in Annex VIII, paragraph 1, to Notice 8/1990, tend to indicate that the IRPH is a complex index as a whole, which might require further information and publicity since it is an essential element of the agreement.

22 See the fourth subparagraph of the statement of reasons for Notice 5/1994. See also point 17 of this Opinion.

23 The referring court refers to the following internet addresses: http://www.sindic.cat/site/unitFiles/3937/Informe%20IRPH_castella_ok.pdf and https://www.bde.es/f/webbde/Secciones/Publicaciones/Folletos/Fic/Guia_hipotecaria_2013.pdf

2. The judgment of 14 December 2017

51. It is apparent from the order for reference and from the written observations of the Spanish Government and of the Commission that in its judgment of 14 December 2017 the Tribunal Supremo (Supreme Court) ruled on a contractual term similar to that at issue in the main proceedings and which provided for the application of the IRPH Entidades. [24]

52. Subject to any subsequent verifications by the referring court, it is apparent from the written observations of the Spanish Government that the Tribunal Supremo (Supreme Court) took account of the matters set out below.

53. First of all, the Tribunal Supremo (Supreme Court) found that the IRPH Entidades is an index defined and regulated by law, which was incorporated in the variable interest rate mortgage loan agreement by the lending banking institution through a general contractual condition. However, 'the party which inserts the pre-formulated term does not contractually define the reference index, but refers to one of the official indices regulated by legal provisions for agreements of that type. Consequently, it is for the public administration to ensure that those indices comply with the rules on banking transparency and therefore the review of those indices falls outside the jurisdiction of the civil courts. … Accordingly, the index *as such* cannot form the subject matter of a review of transparency in the light of Directive 93/13'. [25]

54. Next, the Tribunal Supremo (Supreme Court), after analysing the term, concluded that it satisfied the review of transparency, from both a substantive and a procedural point of view. It found, first, that from a procedural point of view, the term in its view satisfied what it calls the 'inclusion criterion', because it was grammatically clear and comprehensible and it enabled the borrower to understand and accept that the variable interest of his mortgage loan agreement would be calculated by reference to a rate fixed and controlled by the Bank of Spain. Second, from a substantive point of view, the term was in its view transparent and made it possible to understand the economic burden of the loan. It considered that the consumer was able to know that he would have to pay the sum of the index and the margin. To that end, the Tribunal Supremo (Supreme Court) considered, as is apparent from the Spanish Government's observations, that, as an official index was involved, it was easy for an average consumer who is reasonable well informed to know the different calculation systems and to compare the options used and that the institution could not be required either to offer different indices or to explain how the index was established.

55. In that regard, the Tribunal Supremo (Supreme Court) considered it irrelevant that the Euribor had performed more favourably for the consumer, since a 'retrospective bias could not serve as a guide for the review of transparency. [26] Furthermore, it considered that that reasoning did not take account of the fact that the interest rate corresponds not to the index but to the index plus the margin, and that it was not proved that the margins applied to loans indexed on the Euribor would have been more advantageous than those indexed on the IRPH. It also asserted that, statistically, the IRPH margins were even lower and that that reasoning also failed to take account of the fact that the margins are higher or lower depending on other contractual data (borrower's place of residence, connection with the banking institution, etc.). The Tribunal Supremo (Supreme Court) made clear

24 The Commission draws attention to the fact that 'although that judgment constitutes an interpretation of the provisions of Directive 93/13 by a court of last instance, it was delivered without the question for a preliminary ruling with which we are concerned here having been referred to the Court of Justice'.

25 Emphasis added.

26 The Tribunal Supremo (Supreme Court) relied for that purpose on the Court's reasoning in paragraphs 53 and 54 of the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703).

that what was important was not the difference between the IRPH and the Euribor, but future fluctuations in the IRPH, and that the bank could not be required to know those future fluctuations or to inform the borrower of them. In addition, past fluctuations in the value of the Euribor and that of the IRPH had been relatively similar.

56. Last, the Tribunal Supremo (Supreme Court) concluded that it was contradictory to assert that the bank was aware that the IRPH was more advantageous than the Euribor when the IRPH had been used only in fewer than 15% of loans. For the same reasons, the reference to the Euribor could have been annulled if its fluctuations had been less favourable.

57. Having presented the material submitted by the referring court and by the parties, I shall now turn my attention to the analysis of the legal problems raised by the questions for a preliminary ruling.

B. The questions for a preliminary ruling

1. First question: the scope of the exception referred to in Article 1(2) of Directive 93/13

58. By its first question, the referring court asks, in essence, whether the IRPH Cajas may be the subject matter of a review of transparency under Directive 93/13. However, as Bankia, the Spanish Government and the Commission have claimed, as the IRPH Cajas is governed by regulatory provisions, it is not itself amenable to such review.

59. In my view, that question differs from the issue whether a contractual term in a mortgage loan agreement entered into between a consumer and a seller or supplier that provides for the application of that index, for the purpose of calculating the variable interest rate of that loan, as is the case in the main proceedings, comes within the scope of Directive 93/13.

60. In that regard, it should be borne in mind that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation with the national courts, it is for the Court to provide the referring court with an answer which will be of use to it and enable it to determine the case before it and that, with that in mind, the Court may have to reformulate the questions submitted to it.[27]

61. In this instance, I am of the view that the first question must be understood as seeking to ascertain, in essence, whether Article 1(2) of Directive 93/13 must be interpreted as meaning that a term of a contract entered into between a consumer and a seller or supplier, such as that at issue in the main proceedings, which fixes an interest rate on the basis of one of the six official and statutory legal reference indices that may be applied by credit institutions to variable-interest-rate mortgage loans, is excluded from the scope of that directive.

62. As a preliminary point, it is appropriate to examine the Spanish Government's argument that, since the IRPH Cajas is an official and statutory index, governed by regulatory or administrative provisions and published monthly in the *Boletín Oficial del Estado*, the question of the review of the transparency of that index does not come within the scope of Directive 93/13, in accordance with Article 1(2) of that directive. Accordingly, since the index cannot be declared unfair, its inclusion in the term at issue has no impact on that interpretation.

27 See judgments of 17 July 1997, *Krüger* (C-334/95, EU:C:1997:378, paragraphs 22 and 23); of 8 December 2011, *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 18); and of 21 December 2016, *Ucar and Kilic* (C-508/15 and C-509/15, EU:C:2016:986, paragraph 51).

63. In that regard, the Spanish Government and Bankia argued that, following the cancellation of the IRPH Cajas, the index currently applied to the mortgage loan agreement at issue in the main proceedings, namely the IRPH Conjunto de Entidades, was imposed under a legal and binding provision, namely paragraph 2 of the 15th additional provision of Law 14/2013. Consequently, the IRPH Conjunto de Entidades has applied since its mandatory entry into force, so that the balance established by the legislature is respected. In addition, Bankia explained that Law 14/2013 provides that no remedy is to be available to the parties to require the amendment, unilateral alteration or cancellation of the loan or credit by way of compensation for the application of the fourth paragraph of the 15th additional provision of Law 14/2013. Consequently, the Spanish Government and Bankia maintain that the IRPH Cajas does not fall within the scope of Directive 93/13 pursuant to Article 1(2) of that directive.

64. I understand, however, on reading the legal and factual background presented by the referring court that, at the time of conclusion of the mortgage loan agreement at issue in the main proceedings, which is the time at which the national court must place itself in order to assess the unfair nature of a contractual term,[28] the IRPH that appeared in the term at issue for the purpose of calculating the variable interest rate was not the IRPH Conjunto de Entidades — which replaced the IRPH Cajas pursuant to paragraph 2 of the 15th additional provision of Law 14/2013, entailing the automatic novation of the agreement — but the IRPH Cajas, introduced by Notice 8/1990. The fact that the IRPH Conjunto de Entidades is now the official reference index that appears in Clause 3 *bis* of the mortgage loan agreement and that it was imposed by law pursuant to a mandatory provision, namely paragraph 2 of the 15th additional provision of Law 14/2013, has no impact on the analysis of the term at issue that provides for the application of the IRPH Cajas, as drafted at the time when the agreement was entered into.

65. It is therefore clear that it is in connection with the term at issue, providing for the application of the IRPH Cajas, that the question arises.[29] In order to answer that question, in the first place, I shall briefly present the relevant case-law of the Court on the interpretation of Article 1(2) of Directive 93/13 and, in the second place, I shall examine, in the light of that case-law, whether or not the term at issue comes under Directive 93/13.

(a) Brief reminder of the Court's case-law

66. As a preliminary point, it should be borne in mind that an own-motion review by the national court may be required only in the case of a contractual term which comes within the scope of Directive 93/13, as defined in Article 1 of that directive.[30] According to Article 1(2) of Directive 93/13, contractual terms that reflect mandatory statutory or regulatory provisions are to be excluded from the scope of that directive.

28 I note that, 'pursuant to Article 4(1) of [Directive 93/13], the unfairness of a contractual term is to 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 it' (judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 39); of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 42); of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 71); and of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraph 61). On that question, see also my Opinion in *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2018:724, point 70)).

29 The Spanish Government itself states, in paragraphs 8 and 17 of its written observations, that the term at issue in the main proceedings is the term providing for the IRPH Cajas and that the Order of 5 May 1994 was applicable at the time of conclusion of the mortgage loan forming the subject matter of the present reference for a preliminary ruling.

30 See, to that effect, judgment of 3 April 2019, *Aqua Med* (C-266/18, EU:C:2019:282, paragraph 28).

67. In the judgment in *RWE Vertrieb*,[31] the Court clarified for the first time the concept of 'mandatory statutory or regulatory provisions' within the meaning of Article 1(2) of Directive 93/13. In that regard, the Court observed that that provision establishes an exclusion from the scope of that directive, which refers to terms that reflect mandatory statutory or regulatory provisions.[32] That exclusion assumes that two conditions must be satisfied. First, the contractual term must reflect a statutory or regulatory provision and, second, that provision must be mandatory.[33]

68. In order to determine whether those conditions are satisfied, the Court held that it is for the national court to ascertain whether that term reflects the provisions of national law that apply between the contracting parties independently of their choice (and are therefore mandatory) or those which are supplementary in nature and therefore apply by default, that is to say, in the absence of other arrangements established by the parties.[34]

69. Thus, the national court must ascertain whether the term at issue in the main proceedings reflects mandatory provisions of national law, within the meaning of Article 1(2) of Directive 93/13,[35] and must take account of the fact that having regard to the purpose of that directive, namely the protection of consumers, the exception provided for in that provision is to be strictly construed.[36]

70. Having briefly presented the general context of the interpretation of that provision to be found in the case-law, I shall now apply it to the case before the Court.

(b) Does the term at issue come within the exception provided for in Article 1(2) of Directive 93/13?

71. It should be made clear at the outset that, as is apparent from the preceding points of this Opinion, if a contractual term reflects a mandatory or supplementary statutory or regulatory provision, the question whether that term comes within the scope of Directive 93/13 does not arise. Such a term is simply not subject to the provisions of that directive.

72. On the other hand, if the national court considers that the provision in question does not oblige the banking institution to choose an official reference index from among those provided for in that provision, but allows other reference indices to be used, the question whether the contractual term in which it is reproduced comes within the scope of Directive 93/13 would then undoubtedly be relevant. It is clear that such a term would fall within the scope of that directive. The same would apply in my view if that legislation required the banking institution to choose an official reference index from among those provided for in that legislation.[37]

31 Judgment of 21 March 2013 (C-92/11, EU:C:2013:180).

32 Judgment of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 25).

33 See judgments of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 78), and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 28). According to the Court, that exclusion of the application of the rules of Directive 93/13 is justified by the fact that it may in principle be legitimately supposed that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts. See, also, judgments of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 28), and of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 53).

34 See judgment of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 26). See also judgments of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 76), and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 27). See also the 13th recital of Directive 93/13.

35 See, to that effect, judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 30), and also the Opinion of Advocate General Wahl (C-186/16, EU:C:2017:313, point 59). See also judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraphs 69 and 70).

36 See judgments of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 31), and of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 77).

37 See point 83 of this Opinion.

73. In the present case, the referring court considers that the term at issue, drawn up in advance by the banking institution, reflects provisions of national law. However, it asserts that the conditions established in the Court's case-law in order for the exclusion introduced by Article 1(2) of Directive 93/13 to be applied are not satisfied. First, it considers that the national provision set out in the term at issue is not mandatory in so far as it is a statutory or administrative provision that governs a variable and remunerative interest that is *optionally* included in the agreement by the seller or supplier, that is to say that the IRPH Cajas would not be of mandatory application independently of the parties' choice. Second, that provision is not supplementary in the absence of an agreed arrangement. [38]

74. In this instance, in the case of the IRPH Cajas set out in the term at issue, it is apparent from the legal framework of the present case that the second additional provision of the Order of 5 May 1994 cited by the referring court empowered the Bank of Spain to define, in a notice (Notice 8/1990, as amended by Notice 5/1994, which has now been repealed but was in force at the time the agreement was entered into), 'a set of official indices or reference rates that *might* be applied by the credit institutions to variable-interest-rate mortgage loans'. [39]

75. It is apparent from Bankia's observations that the Order of 5 May 1994 provided, in Article 6(2), that for variable-interest-rate loans subject to that order, the credit institutions could use as reference indices or rates only '*those that satisfy the following two conditions*: (a) they do not depend exclusively on the establishment of the credit itself and they cannot be influenced by the credit under agreements or practices that are consciously parallel to those of other institutions; (b) the data on which the index is based are gathered according to an objective mathematical method'.

76. It is also apparent from Bankia's observations that Article 6(3)(1) and (2) of the Order of 5 May 1994 provided that, 'for variable-interest-rate loans subject [to that order], it is not compulsory to communicate individually to the borrower the variations in the applicable interest rate when the following two conditions are satisfied: (1) it *has been agreed* to use an official reference index or rate from among those referred to in the second additional provision [of that order] and (2) the interest rate applicable to the loan is defined in the manner provided for in Clause 3 *bis*(1)(a) or (b) of Annex II [to that order]'. [40]

77. In that regard, as the Spanish Government stated in its written observations, the Order of 5 May 1994 set out — in Annex II, entitled 'Financial terms in mortgage loan agreements covered by the present order' — the information that must appear in those terms. It is apparent from those observations that paragraph 3 *bis* of Annex II, entitled 'Variable higher interest rates', provided, in particular, in the definition of the variable interest rate, that that rate must be expressed in one of the forms laid down in that provision. Paragraph 3 *bis*(a), (b) and (c) of Annex II referred to the definitions of the variable interest rate that provided for the application of a reference index, *or*, under (d) of that provision, '*in any other way*, provided that it is clear, specific and comprehensible to the borrower and is consistent with the law. [41]

78. It is thus apparent, subject to verification by the referring court, that the Order of 5 May 1994 did not require, for variable-interest-rate loans, the use of one of the six official reference indices, including the IRPH Cajas, but — as is apparent from the national provisions cited by Bankia in its observations, referred to in point 75 of this Opinion — established the conditions to be satisfied by 'the reference indices or rates' in order for them to be capable of being used by the banking institutions. Accordingly, the contracting parties were not under *a mandatory obligation* to choose from among

38 Spanish commentators on the judgment of 14 December 2017 consider that the provision in question is neither mandatory nor supplementary. See Cámara Lapuente, S., 'IRPH y STS 14.12.2017: dos colosos con pies de barro. El art. 1.2 de la Directiva 93/13 no blinda en realidad cualquier cláusula que reproduzca "normas". Transparencia lejos del suelo', *Comentarios a las Sentencias de Unificación de Doctrina (Civil y Mercantil)*, Mariano Yzquierdo Tolsada (coord.), No 9, Dykinson, 2017, pp. 211 to 236, in particular pp. 219 and 222.

39 See point 15 of this Opinion. Emphasis added.

40 Emphasis added.

41 See paragraph 18 of the observations of the Spanish Government.

the six official reference indices provided for in Notice 8/1990.[42] In that regard, while it is indeed true that the six official reference indices defined in Notice 8/1990 satisfied, in principle, the two stated conditions, the fact nonetheless remains, subject to any subsequent verification by the referring court, that Bankia, as is apparent from paragraph 3 *bis*(d) of Annex II to the Order of 5 May 1994,[43] had the option to define the variable interest rate 'in any other way, provided that it is clear, specific and comprehensible to the borrower and is consistent with the law'. It is in that context that the referring court refers to the possibility of using, at the time when the agreement was entered into, namely on 19 July 2001, the Euribor, which was introduced in Spain in 1999.[44] It should be borne in mind that it is apparent from the legal framework of the present case that, at the time when the agreement was signed, the Euribor was not among the six official indices provided for in Notice 8/1990. However, as the referring court has stated, the Euribor could have been chosen by the bank as a reference index at the time when the agreement was entered into.

79. That conclusion is supported by Bankia's written observations, in which it clearly asserts that 'the IRPH *[was] not binding on the contracting parties*'.[45]

80. Last, it should be emphasised that the Commission submits in its written observations that the Tribunal Supremo (Supreme Court), in so far as it examined *the transparency of the term* in question without questioning the applicability of Directive 93/13, itself implicitly acknowledged in its judgment of 14 December 2017 that the exception provided for in Article 1(2) of Directive 93/13 did not apply to the contractual term providing for the application of the IRPH Cajas.

81. Furthermore, the Commission also states that the judgment of 14 December 2017 contains a dissenting opinion drafted by two judges of that court, Mr Francisco Javier Orduña Moreno and Mr Francisco Javier Arroyo Fiestas, according to which 'the subject matter of that [judicial] review is not the index as such, that is to say, as a reflection of a statutory or administrative provision that makes it official, *but its employment or use in general conditions*'.[46] That opinion also states, with respect to the criterion of the mandatory nature of the national provision: 'nor is that the case here, since the seller or supplier uses *one of the seven reference indices* which were then authorised (including the MIBOR, the CECA index and the Euribor); consequently, the IRPH Entidades was not the only index that could serve as a reference value and its application was not mandatory for the seller or supplier'.[47]

82. In view of the fact that the exception provided for in Article 1(2) of Directive 93/13 must be interpreted strictly and subject to any subsequent verification by the referring court, it is apparent from the foregoing considerations that the term at issue comes within the scope of Directive 93/13 and that the potential unfairness of that contractual term may by the subject matter of judicial review.

42 It is apparent from the legal background to the present case that, among the six official reference indices provided for in Notice 8/1990, in addition to the reference indices already mentioned (the IRPH Bancos, the IRPH Cajas and the IRPH Entidades), the following three other indices were also present: the CECA index, the internal profitability rate on the secondary public debt market with a residual maturity of two to six years and the MIBOR. The MIBOR has ceased to exist since the introduction of the Euribor in Spain in 1999. As is apparent from the Spanish Government's written observations, an additional official reference index linked with the performance of the Euribor was introduced by Bank of Spain Notice 7/1999. See footnote 13 of this Opinion.

43 See point 77 of this Opinion.

44 See footnotes 13 and 42 of this Opinion.

45 Emphasis added. According to Bankia, the mandatory nature of the IRPH is the result of the fact that, once chosen, that index is incorporated in the mortgage loan agreement as a whole, without contractual amendment, an agreement which the parties cannot avoid. I do not agree with that argument. In my view, even though the banking institution cannot impose, in a pre-formulated clause, either the definition of an official reference index or the method of calculating it, it can still impose the margin which it applies to the index, as is the case in the main proceedings, where, in spite of the recommendations of the Bank of Spain relating to the application of a negative margin in order to bring the APRC of that transaction into line with that of the market, Bankia had chosen to apply a positive margin of 0.25 of a percentage point.

46 Emphasis added.

47 Emphasis added.

83. In any event, as I have already stated in point 72 of this Opinion, even if the referring court were to consider that the provisions that are applicable in the main proceedings were mandatory for the banking institutions, I consider that the term at issue comes within Directive 93/13. The mere fact that a national provision allows a banking institution to include an index, as an option, in the general conditions of a mortgage loan agreement after having chosen it from among a number of official reference indices set out in that provision is to my mind sufficient for such a provision to be considered *not to be mandatory* within the meaning of Article 1(2) of Directive 93/13 and, accordingly, for that directive to apply. In fact, it is clear to me that the exception provided for in that provision cannot apply to a contractual term that reflects a statutory or regulatory provision that restricts or limits the autonomy of the parties' will *without eliminating it*.

84. Nor do I see how a Member State could assert that a contractual term is not unfair in so far as it reflects a mandatory provision the content of which is contrary to the effectiveness of Directive 93/13.

85. Consequently, in the light of the foregoing elements, I am of the view that Directive 93/13 must be interpreted as meaning that a contractual term entered into between a consumer and a seller or a supplier, such as the term at issue in the main proceedings, which sets an interest rate on the basis of one of the six official and statutory reference indices that may be applied by credit institutions to variable-interest-rate mortgage loans, is not excluded from the scope of that directive.

2. Second question: the scope and content of the review of transparency of the term at issue, in accordance with Article 4(2) of Directive 93/13

86. By its second question, the referring court seeks to ascertain, in essence, whether Directive 93/13, and in particular Article 8 thereof, precludes a national court from applying Article 4(2) of that directive in order to decline to assess the potential unfairness of a contractual term, drawn up in plain, intelligible language and relating to the main subject matter of the agreement, when that provision has not been transposed into its legal order by the national legislature. The referring court also asks what, if any, information should be communicated by the seller or supplier, in accordance with Article 4(2) and Article 5 of Directive 93/13, in order to comply with the requirement of transparency of a contractual term setting an interest rate on the basis of a statutory reference index such as the IRPH Cajas, where the calculation formula is complex and lacking in transparency for the consumer. Last, it asks whether the lack of information must be considered unfair.

(a) Second question, part (a)

87. Before adopting a position on the first part of the second question, which concerns the interpretation not only of Article 4(2) of Directive 93/13, but also of Articles 5 and 8 of that directive, it is appropriate to set out the context in which that question is submitted. I shall therefore begin by recalling the Court's case-law.

(1) The judgment in Caja de Ahorros y Monte de Piedad de Madrid

88. As to whether Article 8 of Directive 93/13 precludes a national court from applying Article 4(2) of that directive in order to decline to assess the potential unfairness of a contractual term, drawn up in plain, intelligible language and relating to the main subject matter of the agreement, where that provision has not been transposed into its legal order by the national legislature, I would emphasise at the outset that the Court has already answered that question in the judgment in *Caja de Ahorros y Monte de Piedad de Madrid*.[48]

48 Judgment of 3 June 2010 (C-484/08, EU:C:2010:309, paragraph 44). The questions for a preliminary ruling in that case were referred by the Tribunal Supremo (Supreme Court).

89. In that judgment, the Court first of all observed, as the referring court in the present case has pointed out, that '[it] is apparent from the case file submitted to the Court [that] Law 7/1998[49] did not transpose Article 4(2) of [Directive 19/93] into national law'.[50] The Court then asserted that, in the Spanish legal system, a national court may therefore, in all circumstances, assess, in a dispute concerning a contract concluded between a seller or supplier and a consumer, the unfairness of a term which was not individually negotiated and which relates to, inter alia, the main subject matter of the contract, even in the case where that term was drawn up in advance by the seller or supplier in plain, intelligible language.[51] In those circumstances, the Court finally found that, by authorising a full judicial review of the unfairness of terms such as those referred to in Article 4(2) of Directive 93/13, provided for in a contract concluded between a seller or supplier and a consumer, 'the Spanish legislation … makes it possible for consumers to be afforded, in accordance with Article 8 of [that] directive, a higher level of protection than that established by that directive'.[52]

(2) The Spanish Government's position

90. In the present case, the Spanish Government, considers that,[53] although Article 4(2) of Directive 93/13 was indeed not formally transposed into Spanish law, that lack of formal transposition cannot be interpreted, as the referring court does, as an express intention on the part of the Spanish legislature to allow a review of the unfairness of matters that relate to the principle subject matter of the contract where they are drawn up in plain, intelligible language.[54] In that regard, the Spanish Government claims that following the judgment in *Caja de Ahorros y Monte de Piedad de Madrid*[55] the Tribunal Supremo (Supreme Court) considered, in its judgment of 18 June 2012,[56] that it had been the legislature's intention to transpose Article 4(2) of Directive 93/13 into Spanish law and that the reform brought about by Law 7/1998 showed that that article had been expressly transposed.[57]

49 La Ley 7/1998 sobre condiciones generales de la contratación (Law 7/1998 on standard conditions of contract), of 13 April 1998 (BOE No 89, of 14 April 1998).

50 Judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraph 41).

51 See judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraph 42).

52 Judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraph 43).

53 That position is shared by Bankia, which maintains that 'according to academic and judicial opinion, Article 4(2) of Directive 93/13 has indeed been transposed into the Spanish legal order'.

54 In support of that argument, the Spanish Government annexed to its written observations an academic article which emphasises that the non-transposition of Article 4(2) of Directive 93/13 by Law 7/1998 is in fact the result of 'a careless mistake during the parliamentary vote, which resulted in the literal wording of that provision being deleted from the legal text'. According to that author, that mistake was not corrected in subsequent legislative reforms, and he also explains that since then not only academic comment but also national case-law has been divided on the consequences of that mistake, at least until judgment No 241/2013 of the Tribunal Supremo (Supreme Court) of 9 May 2013 (ES:TS:2013:1916). In that regard, that author concludes, in particular, that the Tribunal Supremo (Supreme Court) has attempted to put an end to that situation of uncertainty in Spain, but that the Spanish legislature, in spite of having had several opportunities to clarify the question whether or not Article 4(2) of Directive 93/13 has been transposed, 'does not appear to be disposed to do so'. Thus, that author asserts that 'neither the legal reforms approved by the Spanish Parliament in May 2013 to adapt the Spanish system to the judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164), nor the proposal to transpose Directive 2011/83[/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64)]' have addressed the question of unfair terms relating to the essential elements of the agreement. See Cámara Lapuente, S., '¿De verdad puede controlarse el precio de los contratos mediante la normativa de cláusulas abusivas? De la STJUE de 3 de junio de 2010 (Caja de Madrid, C-484/08) y su impacto aparente y real en la jurisprudencia española a la STS (pleno) de 9 de mayo de 2013 sobre las cláusulas suelo', *Cuadernos de Derecho Transnacional*, vol. 5(2), 2013, pp. 209 to 233, and in particular pp. 226, 227 and 233.

55 Judgment of 3 June 2010 (C-484/08, EU:C:2010:309, paragraph 44).

56 ES:TS:2012:5966.

57 In its written observations, the Spanish Government quotes an extract from the second legal ground of the judgment of the Tribunal Supremo (Supreme Court) of 18 June 2012: 'Thus, when the former general law on consumer protection of 1984 was amended by the insertion of the new Article 10(1)(c), the broad expression 'fair balance between the contracting parties' was replaced by 'significant imbalance between the rights and obligations', in accordance with the provisions of the directive designed to limit review of the substance that could be carried out in relation to the possible unfairness of the term; it may therefore be asserted that there is no review of prices or of the equilibrium of the contributions properly so-called'. According to the Spanish Government, the Tribunal Supremo (Supreme Court) added in that judgment that, finally, 'although the literature is not unanimous in that respect, it must be concluded, following a teleological application of Article 4(2) of Directive 93/13, that, although they are excluded from a review of the substance, the essential elements of the agreement may be the subject matter of a review concerning the inclusion criterion and the transparency criterion (Article 5(5) and Article 7 of Law 7/1998 on standard conditions of contract and Article 10(1)(a) of the general law on consumer protection)'. The Spanish Government also makes clear that the Tribunal Supremo (Supreme Court) confirmed that decision in its judgment of 9 May 2013 (ES:TS:2013:1916).

91. I do not share the Spanish Government's opinion in that respect. To my mind, its reasoning runs counter to the Court's case-law on the transposition of directives and, in particular, to the principles of legal certainty, transparency and sincere cooperation.

(3) Consequence of the failure to transpose Article 4(2) of Directive 93/13

92. According to the third paragraph of Article 288 TFEU, a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but is to leave to the national authorities the choice of form and methods. It follows that the Kingdom of Spain, in the same way as any other Member State, may choose the form and methods of implementing directives.

93. It is also well known that the transposition of directives designates the process of transforming directives into provisions of national law by the competent national legislative organ or organs.[58] In that context, the *principle of legal certainty* requires that a Member State take the necessary legislative, regulatory and administrative provisions to ensure that the provisions of a directive are transposed in full into national law.[59] Even though all the provisions of a directive do not need to be directly or explicitly transposed, the *obligation of transparency* may effectively require certain conduct, in particular the communication of certain information to the Commission.[60] In fact, 'to the basis of the obligation derived from the directive itself and of its mandatory effect' under the third paragraph of Article 288 TFEU must also be added 'the subsidiary obligation' derived from Article 4(3) TEU, 'which implies *sincere cooperation* between the national authorities and the Union in implementing the rules of the Treaties'.[61]

94. More specifically, it must not be forgotten that, in the context of the interpretation of the third paragraph of Article 288 TFEU, which has been the subject of abundant case-law, while it is true that the transposition of a directive does not necessarily require legislative action in each Member State, it is nonetheless essential that the national law in question guarantees that the directive will in fact be fully applied, that the legal position resulting from that law is *sufficiently precise and clear* and that the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts.[62]

95. The Court has already held in that regard that even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of *legal certainty*, that being particularly true in the field of consumer protection.[63] That is a fortiori the position when settled national case-law interprets and applies a provision of a directive which the national legislature

58 See Prechal, S., *Directives in EC Law*, 2nd Edition, Oxford EC Law Library, 2009, p. 6.

59 On the principle of legal certainty and the transposition of directives, see Tridimas, T., *The General Principles of EU La*w, 2nd Edition, Oxford EC Law Library, 2006, pp. 246 and 247.

60 See, to that effect, Prechal, S., *op. cit*., p. 6.

61 Simon, D., *Le système juridique communautaire*, 3rd Edition, Presse universitaires de France, Paris, 2006, pp. 328 to 332. Emphasis added.

62 See judgments of 23 May 1985, *Commission* v *Germany* (29/84, EU:C:1985:229, paragraph 23); of 23 March 1995, *Commission* v *Greece* (C-365/93, EU:C:1995:76, paragraph 9); of 10 May 2001, *Commission* v *Netherlands* (C-144/99, EU:C:2001:257, paragraph 17); of 9 September 2004, *Commission* v *Spain* (C-70/03, EU:C:2004:505, paragraph 36); and of 23 April 2009, *Commission* v *Belgium* (C-292/07, not published, EU:C:2009:246, paragraph 120). According to Advocate General Tizzano, 'the Member States must define a specific *legal framework* in the sector concerned which ensures that the national legal system complies with the provisions of the directive in question. That framework must be designed in such a way as to remove *all doubt or ambiguity*, not only as regards the content of the relevant national legislation and its compliance with the directive, but also as regards the authority of that legislation and its suitability as a basis for regulation of the sector'. See Opinion of Advocate General Tizzano in *Commission* v *Netherlands* (C-144/99, EU:C:2001:50, point 15). Emphasis added.

63 See judgments of 10 May 2001, *Commission* v *Netherlands* (C-144/99, EU:C:2001:257, paragraph 21), and of 10 July 2014, *Commission* v *Belgium* (C-421/12, EU:C:2014:2064, paragraph 46). See also judgment of 9 December 2003, *Commission* v *Italy* (C-129/00, EU:C:2003:656, paragraph 33): 'where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with [EU] law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with [EU] law'.

has not transposed. Accordingly, such national case-law cannot present the clarity and precision necessary to serve as an appropriate legal basis for the purpose of regulating consumer protection or, as is the case here, for the purpose of transposing the exception provided for in Article 4(2) of Directive 93/13.

96. Therefore, although, on reading the case file submitted to the Court in the present case, I understand that, by its judgments of 18 June 2012[64] and 9 May 2013,[65] the Tribunal Supremo (Supreme Court) attempted to remedy earlier inconsistent case-law and to ensure, in particular, the consistency of the national legal order, it is for the Spanish legislature, where necessary, to intervene and to take the appropriate measures if it wished to transpose Article 4(2) of Directive 93/13, which, having regard to the case-law referred to in points 94 and 95 of this Opinion, is not apparent either from the order for reference or from a reading of the case file submitted to the Court.

97. Furthermore, it should be borne in mind, in the first place, that it is clear from the Court's settled case-law that Article 4(2) of Directive 93/13 *is not a mandatory and binding provision*, such that its transposition by Member States is obligatory. That provision provides for a limitation of the rights which individuals derive from EU law. In that regard, the Court has already held that, in order to safeguard in practice the objectives of consumer protection pursued by that directive, any transposition of that provision had to be complete, with the result that the prohibition of the assessment of the unfairness of the terms relates solely to those which are drafted in plain, intelligible language.[66]

98. In the second place, as observed in point 89 of this Opinion, the failure to transpose the relevant provision into national law means that, by authorising a full judicial review of the unfairness of the terms in a contract concluded between a seller or supplier and a consumer, such as those referred to in Article 4(2) of Directive 93/13, the Spanish legislation makes it possible to guarantee to the consumer, in accordance with Article 8 of that directive, a higher level of protection than that established in that directive, even if that term relates to the principle subject matter of the contract or to the quality-to-price ratio of the service.

99. In the third and last place, as regards the requirement that a contractual term must be drafted in plain, intelligible language, in accordance with Article 4(2) of Directive 93/13, it is settled case-law that that requirement is also set out in Article 5 of that directive[67] and, consequently, as the Commission emphasised in its written observations, the review of the transparency of the term forms part of the assessment of unfairness within the meaning of Article 3(1) of that directive. Accordingly, the Spanish courts are required, when assessing the unfairness of the contractual terms in accordance with Article 3(1) of Directive 93/13, to examine the transparency of those terms, under Article 5 of that directive.

100. In those circumstances, I am of the view that Article 8 of Directive 93/13 precludes a national court from applying Article 4(2) of that directive in order to decline to assess the potential unfairness of a term, such as that at issue in the main proceedings, drafted in plain, intelligible language and relating to the principal subject matter of the contract, when that provision has not been transposed into its legal order by the national legislature.

64 ES:TS:2012:5966.

65 ES:TS:2013:1916.

66 See judgments of 10 May 2001, *Commission* v *Netherlands* (C-144/99, EU:C:2001:257, paragraph 22), and of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraph 39).

67 See, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 69); of 9 July 2015, *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 49); and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 44). See also the 20th recital of Directive 93/13.

(b) Second question, parts (b) and (c)

101. The second and third parts of the second question relate to the information that should be communicated by the seller or supplier in order to comply, in accordance with Article 4(2) and Article 5 of Directive 93/13, with the requirement of transparency of a contractual term fixing an interest rate on the basis of a statutory index like the IRPH Cajas, where the mathematical formula for calculating that rate is complex and lacking in transparency for an average consumer. The referring court also asks whether the failure to provide information must be considered unfair.

102. In that regard, the Spanish Government and Bankia claim that, since the IRPH Cajas was an official index published monthly in the *Boletín Oficial del Estado* and subject to Notice 8/1990, the term at issue contains *the definition* of the IRPH Cajas established by the national legislation.[68] The Spanish Government also maintains that *that notice* established *the formula for calculating the IRPH Cajas* and the information that must be supplied to the consumer by the banking institution before the mortgage loan agreement is entered into.[69]

103. Although the Spanish Government agrees that the information supplied to the consumer by the banking institution must actually contain a sufficient explanation as regards not only the elements that make up the reference index chosen but also the past fluctuations in that index, it considers that the requirement to inform the consumer of the actual functioning of the reference index, that is to say of the precise calculation method, would not be helpful since the mathematical formula applicable would make the information less intelligible and therefore less transparent for the consumer. The Spanish Government also maintains that an opinion about the possible future fluctuations cannot be required because, on the one hand, the banking institution does not have that information and, on the other hand, it is at the time when the contract is entered into that the unfairness of a term must be assessed. At that time, future fluctuations would be irrelevant. Last, the Spanish Government emphasises that the banking institution cannot be required to include in the promotional material aimed at consumers the graphs explaining the past fluctuations in the IRPH by comparison with the Euribor.

104. As I stated in points 95 to 101 of this Opinion, and as is apparent from the order for reference and from the case file submitted to the Court, the Spanish legislature did not transpose Article 4(2) of Directive 93/13 into domestic law. It follows, in my view, that the Spanish courts are required, when assessing the unfairness of contractual terms in accordance with Article 3(1) of Directive 93/13, to examine the transparency of those terms, under Article 5 of that directive.[70]

105. Should the Court reach the same conclusion, it will be necessary to clarify what information must be communicated to consumers by the banking institution in the context of the review of transparency. Before determining that information, I shall present the Court's case-law relating to the level of information required in the context of the interpretation of Article 4(2) and Article 5 of Directive 93/13.

68 See points 19 and 20 of this Opinion. It is necessary to distinguish between the definition of the IRPH Cajas and the mathematical formula for calculating it. In fact, it follows from the order for reference and from the observations submitted by the plaintiff in the main proceedings, by Bankia and by the Spanish Government that the term at issue contains the definition of the IRPH Cajas and the method of calculating the *variable interest rate* of the loan (IRPH Cajas + margin), while the actual mathematical equation for calculating the IRPH Cajas was set out in paragraph 2 of Annex VIII to Notice 8/1990 but does not appear in the contractual term. See footnote 78 of this Opinion.

69 See point 20 of this Opinion.

70 In that regard, it should be made clear that the requirement of transparency applies in particular in the case of limitations of the rights that the individual derives from EU law.

(1) Reminder of the Court's case-law on the scope of the level of information required in the context of the requirement of transparency of contractual terms under Article 4(2) and Article 5 of Directive 93/13

106. It should be borne in mind at the outset that the Court has on many occasions held, in connection with Article 5 of Directive 93/13, that information provided before the conclusion of a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be contractually bound to a seller of supplier by the terms previously draw up by the seller or supplier.[71] It should also be borne in mind that, according to a consistent line of decisions of the Court since the judgment in *Kásler and Káslerné Rábai*,[72] the requirement of transparency of contractual terms, as resulting from Article 4(2) and Article 5 of Directive 93/13, cannot be reduced merely to their being formally and grammatically intelligible. On the contrary, as the system of protection introduced by that directive is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, that requirement that the contractual terms be drafted in plain and intelligible language and, accordingly, that they be transparent, laid down by that directive, must be understood in a broad sense.[73]

107. Consequently, according to the Court, the requirement that a contractual term must be drafted in plain, intelligible language is to be understood as also requiring that the contract should set out transparently the specific functioning of the mechanism to which the relevant term refers and also, where appropriate, the relationship between that mechanism and the mechanism laid down by other contractual terms, so that the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him that derive from it.[74]

108. The Court has also held that that question must be examined by the referring court in the light of all the relevant information, including the promotional material and information provided by the lender in the negotiation of a loan agreement.[75] In particular, the Court has made clear that it is for the national court, when it considers all the circumstances surrounding the conclusion of the contract, to ascertain whether, in the case concerned, *all the information* likely to have a bearing on the extent of his commitment has been communicated to the consumer, enabling him to estimate in particular the total costs of his loan. The Court has also identified the factors that play a decisive role in that assessment, in particular, first, whether the terms are drafted in plain, intelligible language enabling an average consumer, that is to say a reasonably well informed and reasonably observant and circumspect consumer, to estimate such a cost; and, second, the fact related to the failure to mention in the loan agreement the information regarded as being *essential* with regard to the nature of the goods or services which are the subject matter of that contract.[76]

109. It is in the light of that case-law that the questions submitted by the referring court should be answered.

71 See, inter alia, judgments of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 44); of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 70); of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 50); and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 48).

72 Judgment of 30 April 2014 (C-26/13, EU:C:2014:282).

73 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 71 and 72); of 23 April 2015, *Van Hove* (C-96/14, EU:C:2015:262, paragraph 40); of 9 July 2015, *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 52); and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 44). See also judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 73), and order of 22 February 2018, *ERSTE Bank Hungary* (C-126/17, not published, EU:C:2018:107, paragraph 29).

74 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 75), and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 45).

75 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 74); of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 75); and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 46).

76 See judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 47 and the case-law cited).

(2) Application to the present case

110. In the light of the case-law referred to in the preceding points, it is for the referring court to carry out the verifications necessary to determine, having regard to all the relevant elements of fact surrounding the conclusion of the contract, including the promotional material and information supplied by the banking institution in the context of the negotiation of the loan agreement, whether the information communicated was sufficient to enable an average consumer to understand the method used to calculate the variable interest rate applicable to the loan and, in consequence, to evaluate the total cost of his loan [77] or whether, on the contrary, having regard in particular to the fact that it was a case of a mortgage loan, other factors considered essential ought to have been communicated.

111. More specifically, the information in respect of which the referring court asks whether the communication to consumers by the banking institution is necessary in order for them to understand the economic consequences of the term at issue relate to (i) the specific mathematical formula used to calculated the IRPH Cajas (in particular the fact that that reference index includes charges and other fees in addition to the nominal interest and that it uses a simple, non-weighted average);[78] (ii) the obligation for the banking institutions to apply a negative margin in accordance with the national legislation;[79] (iii) the fact that the information supplied is not published, unlike the Euribor; (iv) past fluctuations in the IRPH Cajas, and (v) projected future fluctuations in the reference index in comparison with other official reference indices, in particular with the Euribor.[80]

112. It is indeed true, as the referring court has stated, that the term at issue is grammatically plain and intelligible, in the sense that it allows the average consumer to understand and accept that the variable interest rate applicable to his mortgage loan is calculated by reference to an official reference index (the IRPH Cajas). That term also enables the consumer to understand, first, that that reference index is defined as 'the average rate of mortgage loans granted by the savings banks for a period greater than three years for the acquisition of a residential property on the private housing market and, second, that the index is 'rounded up to the next higher quarter of a percentage point and increased by 0.25 of a percentage point' (IRPH Cajas + margin or differential).

113. However, it still falls to be determined whether the term at issue satisfies the requirement of transparency imposed by Directive 93/13, in particular with respect to the obligation that follows from the Court's case-law set out in point 107 of this Opinion, according to which the contract 'should set out transparently the specific functioning of the mechanism to which the relevant term refers'. In that context, the following question might arise: in order to understand *the method used to calculate the interest rate* applicable to the mortgage loan, from which it follows that the consumer must pay the sum of the reference index and the margin (IRPH Cajas + margin or differential), should the average consumer not also be in a position to understand the specific functioning of the reference index contained in that calculation method?

77 It should be borne in mind that, in so far as a contractual term, drafted in advance, contained in the mortgage loan agreement between a consumer and a supplier, provides for the application of a reference index for the purpose of calculating the variable interest rate of that loan, the use of that index by the supplier, as a component of that term, is entirely a matter for the review of transparency, in accordance with Article 4(2) and Article 5 of Directive 93/13.

78 See, in that regard, points 45 and 46 of this Opinion. It is apparent from the observations of the plaintiff in the main proceedings that a distinction should be drawn between: (a) a *reference index*, as is the case, in particular, of the Euribor, (b) an *interest rate*, which is the sum of a reference index plus the margin (Euribor + margin) and (c) an APRC, which is the sum of the reference index plus the margin, plus charges, plus fees (Euribor + margin + charges + fees). It should further be observed that it is apparent from the fourth subparagraph of the statement of reasons for Notice 5/1994 that the reference indices provided for in that notice, including the IRPH Cajas, were APRCs.

79 See, in that regard, point 48 of this Opinion.

80 See point 50 of this Opinion.

114. The answer to that question, which is logically in the affirmative, is however devoid of relevance when it comes to determining whether the requirement that the contractual terms are drafted in plain, intelligible language and, therefore, the requirement of transparency, imposed by Directive 93/13 has been complied with by the banking institution. The requirement of transparency of contractual terms imposed by that directive, the aim of which is to allow the average consumer to evaluate the economic consequences of his loan, must not be confused with the obligation to provide advice, which is not provided for by that directive.

115. In addition, as I shall explain below, although I am of the view that the case-law referred to in point 107 of this Opinion is of particular significance for the present case, a number of factual differences distinguish the present case from those that gave rise, in particular, to the judgments in *Kásler and Káslerné Rábai*[81] and *Andriciuc and Others*.[82] Those differences lead me to qualify the consequences to be inferred from that case-law as regards the case at issue in the main proceedings.

116. In the first place, the cases that gave rise to the judgments in *Kásler and Káslerné Rábai*[83] and *Andriciuc and Others*[84] concerned loan agreements denominated in a foreign currency, namely the Swiss franc (CHF), under the terms of which the foreign exchange risk was placed entirely on the borrower.[85] In that context, the Court, ruling that the requirement of transparency 'is to be understood as requiring … that the contract should set out transparently the specific functioning of the mechanism … to which the relevant term refers', referred expressly to the 'mechanism for converting the foreign currency' and to the 'relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan',[86] so that the consumer would be in a position to evaluate, on the basis of clear, intelligible criteria, *the economic consequences* for him which derive from it.[87]

117. In the second place, according to the Court, that requirement of transparency of the contractual terms implies that an average consumer, reasonably well informed and reasonably observant and circumspect, could not only be aware of 'the possibility of a rise or fall in the value of the foreign currency' in which the loan was taken out, but would also be able to 'assess the potentially significant economic consequences of such a term with regard to his financial obligations'.[88] First, the borrower must be clearly informed that, in entering into a loan agreement denominated in a foreign currency, he exposes himself to a foreign exchange risk which it may be economically difficult for him to assume if the currency in which he receives his income is devalued. Second, the banking institution must be required to set out the possible variations in the exchange rates and the risks inherent in taking out a loan in a foreign currency, particularly in where the consumer borrower does not receive his income in that currency.[89]

81 Judgment of 30 April 2014 (C-26/13, EU:C:2014:282).

82 Judgment of 20 September 2017 (C-186/16, EU:C:2017:703).

83 Judgment of 30 April 2014 (C-26/13, EU:C:2014:282).

84 Judgment of 20 September 2017 (C-186/16, EU:C:2017:703).

85 More specifically, those terms provided that the selling rate of the foreign currency was to apply for the purpose of calculating repayments of the loan (judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 24) and that the loan must be repaid in the same currency as that in which it had been concluded (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 9).

86 In fact, there was a difference between buying rate applicable to the advance of the loan and the selling rate applicable to its repayment. See, in that regard, judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 53 and 74).

87 Judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 73 and 74). As regards, in particular, contractual terms that allow the lender to amend the interest rate unilaterally, see judgment of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 74).

88 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 51). Emphasis added.

89 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 50).

118. In my view, the words '*potentially significant economic consequences*' constitute one of the key elements of that case-law. Those consequences constitute the basis of the banking institutions' obligation to provide consumers with sufficient information to enable them to take their decisions prudently and in full knowledge of the facts.[90] That means that the requirement of transparency imposed by Directive 93/13 is intended not only to avoid the potentially significant economic consequences for the consumer but also to ensure that those consequences are neither random nor unforeseeable. The average consumer must be in a position to foresee the cost of his loan without being exposed to an unforeseeable risk of a variation in the resulting economic burden.

119. On the other hand, unlike a mortgage loan agreement concluded in a foreign currency, which, because of the foreign exchange risk assumed by the borrower, may have potentially significant economic risks which it will be difficult for him to bear,[91] in the present case the economic consequences resulting from the mortgage loan at issue in the main proceedings, the variable interest rate of which is calculated on the basis of an official reference index, cannot be described as 'potentially significant' within the meaning of the Court's case-law. The economic burden that derived from the loan was foreseeable and capable of being calculated by the consumer, who was in a position to evaluate it before entering into the contract. Consequently, apart from the fact that his loan is subject to a variable interest rate, the plaintiff in the main proceedings is not exposed to an unforeseeable risk of a variation in the economic burden that results from his loan.

120. Even if the plaintiff in the main proceedings was not in a position to understand the way in which one of the components of the method used to calculate the variable interest rate applicable to his loan — namely the IRPH Cajas, the functioning of which does not emerge from the wording of the term at issue — actually functioned, he was in a position to understand, on the basis of the loan agreement, that for each repayment he was required to pay a more or less stable fixed price, namely the sum of the IRPH Cajas plus the margin.

121. As I stated in points 113 and 114 of this Opinion, I am of the view that, in order to be able to consider that he genuinely understood the method used to calculate the variable interest rate applicable to his loan to which the term at issue refers, the average consumer must be in a position to ascertain a significant piece of information, in the light of the nature of the goods and services forming the subject matter of that agreement, namely the fact that the IRPH Cajas is an *annual percentage rate* of the contracts concluded by the savings banks for the reference month. However, the actual mathematical formula used to calculate that index, at the time when the agreement was entered into, was to be found not in the term at issue but in paragraph 2 of Annex VIII to Notice 8/1990.

122. Nonetheless, it cannot be considered that the plaintiff in the main proceedings was not 'in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive[d] from it',[92] since, subject to subsequent verification by the referring court, he was aware that the amount of the repayments to be made was the sum of the IRPH Cajas plus the margin and, moreover, the information relating to the specific functioning of the IRPH Cajas was available because it was published in the *Boletín Oficial del Estado*. Since that mathematical equation for calculating the IRPH Cajas was available to the public, the consumer was able to understand that the

90 It should be noted that in the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 49), the Court refers to Recommendation CERS/2011/1 of the European Systematic Risk Board of 21 September 2011 on lending in foreign currencies (OJ 2011 C 342, p. 1).

91 For an example of the Court's case-law concerning the requirement of transparency of contractual terms in the context of entering into a different type of contract, namely a contract of insurance in connection with the conclusion of two loan agreements, see judgment of 23 April 2015, *Van Hove* (C-96/14, EU:C:2015:262, paragraph 47). That case concerned the review of the transparency of a term in the insurance contract which was intended to ensure that loan repayments payable to the lender would be covered in the event of the borrower's total incapacity for work (where, following an accident at work, the borrower was in a state of permanent partial incapacity for work). In its judgment, the Court took account of the fact that, in the absence of a transparent explanation of the specific functioning of the insurance arrangements for covering the loan repayments in the contractual framework, the consumer might not have been in a position to evaluate, on the basis of precise, intelligible criteria, the economic consequences for him which derived from it.

92 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 45 and the case-law cited).

IRPH Cajas used to calculate the variable interest rate of his agreement was the sum of (i) the average of the indices used by the savings banks for the reference month; (ii) the average of the margins added to those indices by the savings banks; and (iii) the average of the charges and fees inherent in those transactions, and, furthermore, that the bank added the charges and fees linked to the loan to that sum constituted by the IRPH Cajas.

123. In addition, because the IRPH Cajas is an official reference index published in the *Boletín Oficial del Estado* it may be presumed that it is relatively easy for an average consumer to access the systems used to calculate the various official indices and to compare the different options proposed by the banking institutions. The bank cannot therefore be required to propose different reference indices to consumers. The obligation to provide information referred to in the Court's case-law is not an obligation to provide advice and, accordingly, it by no means entails an obligation for the banking institution to use or offer the consumer different official indices.

124. All of the foregoing considerations lead me to conclude that the banking institution complied with the requirement of transparency imposed by Directive 93/13. However, it is for the referring court to carry out the necessary verifications in that respect, ascertaining in particular whether Bankia communicated to the plaintiff in the main proceedings, before the loan agreement was concluded, sufficient information to allow him to take his decision prudently and in full knowledge of the facts. Accordingly, it is for that court, taking account of all the relevant facts surrounding the conclusion of the agreement, including the promotional material and the information supplied by Bankia in the context of the negotiation of the agreement, to verify whether that banking institution complied with the obligations to supply information set out in Notice 8/1990.

125. In those circumstances, in order to provide the referring court with guidance in those verifications, it is appropriate to consider that the information that should be communicated by the seller or supplier in order to comply, in accordance with Article 4(2) and Article 5 of Directive 93/13, with the requirement of transparency of a contractual term fixing an interest rate on the basis of a statutory reference index such as the IRPH Cajas, the calculation formula of which is complex and lacking in transparency for an average consumer, must, first, be sufficient to enable the consumer to take his decision prudently and in full knowledge of the facts as regards *the method of calculating the interest rate* applicable to the loan agreement and its component elements, making clear not only *the full definition of the reference index* used by that calculation method but also the relevant provisions of the national legislation determining that index and, second, past fluctuations in the reference index chosen. [93]

126. However, it is for the national court, when reviewing the transparency of the term at issue, taking account of all the circumstances surrounding the conclusion of the agreement, to verify, first, whether the agreement sets out that method of calculating the interest rate in a transparent fashion, so that the consumer was in a position to evaluate, on the basis of specific, intelligible criteria, the economic consequences that derive for him from it, and, second, whether that agreement complies with all the obligations to supply information laid down in the national legislation.

127. Last, it must be considered that if the referring court should conclude that the requirement of plain, intelligible drafting of the contractual items and, accordingly, of transparency, has been complied with in the light of the elements that the Court will provide in answer to the questions referred, the fact nonetheless remains that the term at issue must, in any event, be the subject matter of an assessment of its possible substantive unfairness, taking account of the possibility that a

93 In that regard, it is apparent from the Spanish Government's observations that Annex VII to Notice 8/1990 set out, as minimum information that must appear in information leaflets on mortgage loans, relating to the variable interest rate, the reference index and, inter alia, fluctuations 'during the two preceding calendar years and the last available value'. On the other hand, having regard to the fact that economic forecasts are always uncertain and that certain variables, such as the reference indices, are difficult to forecast, it does not seem to me to be fair to require the banking institution to provide the consumer with predictions concerning the reference index proposed.

significant imbalance is caused, to the detriment of the consumer, between the rights and obligations arising under the agreement.[94] In that context, it is for the national court to determine, taking account of the criteria set out in Article 3(1) and Article 5 of Directive 93/13, whether, in the light of the specific circumstances of the case,[95] a term such as that at issue in the main proceedings also meets the requirements of good faith and balance imposed by that directive.[96] However, that question goes beyond the subject matter of the present request for a preliminary ruling and I shall therefore not explore it further.

128. Having regard to the proposed answer to part (b) of the second question, I consider that there is no need to answer part (c) of that question, which relates to whether the lack of information must be considered unfair,[97] and the third question, relating to the consequences of a finding that that term is unfair.

VI. Conclusion

129. In the light of all of the foregoing considerations, I propose that the Court should answer the questions submitted by the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain) as follows:

(1) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a contractual term concluded between a consumer and a seller or supplier, such as that at issue in the main proceedings, which sets an interest rate on the basis of one of the six official statutory reference indices that may be applied by credit institutions to variable-interest-rate mortgage loans is not excluded from its scope.

(2) Article 8 of Directive 93/13 precludes a national court from applying Article 4(2) of that directive in order to decline to assess the potential unfairness of a term, such as that at issue in the main proceedings, drafted in plain, intelligible language and relating to the principal subject matter of the agreement, where that provision has not been transposed into its legal order by the national legislature.

The information that must be communicated to the consumer by the seller or supplier in order to meet, in accordance with Article 4(2) and Article 5 of Directive 93/13, the requirement of transparency of a contractual term setting an interest rate on the basis of a statutory reference

94 See, to those effects, judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 69), and the Opinion of Advocate General Kokott in that case (C-415/11, EU:C:2012:700, point 74).

95 In that regard, the referring court should verify, inter alia, whether or not, as is apparent from the order of reference, the banking institutions were really in a position to influence the IRPH Cajas. I refer, in particular, to the explanations of the functioning of the IRPH Cajas provided by the referring court. See points 45 to 47 of this Opinion.

96 See, to that effect, judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 50 and the case-law cited). On the fact that the system of protection implemented by Directive 93/13 is based on the idea that the consumer is in a weak bargaining position vis-à-vis the supplier, see, in particular, judgments of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraph 27), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 49). See also my Opinion in Joined Cases *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2018:724, points 65 to 82).

97 It should be pointed out that the referring court does not specify the provisions of EU law against which the lack of fairness on the part of the seller or supplier must be examined. In any event, it should be borne in mind that the 16th recital of Directive 93/13 states that 'the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

index such as the savings banks' mortgage loan reference index (IRPH Cajas), where the mathematical formula for calculating that interest rate is complex and lacking in transparency for an average consumer, must:

– first, be sufficient to enable the consumer to take his decision prudently and in full knowledge of the facts as regards the method of calculating the interest rate applicable to the mortgage agreement and its component elements, explaining not only the full definition of the reference index used by that calculation method but also the relevant provisions of the national legislation that governs that index; and

– second, indicate past fluctuations in the reference index chosen.

However, it is for the national court, when reviewing the transparency of the term at issue, taking account of all the circumstances surrounding the conclusion of the agreement, to verify whether the agreement, first, sets out that method of calculating the interest rate in a transparent fashion, so that the consumer was in a position to evaluate, on the basis of specific, intelligible criteria, the economic consequences for him that derive from it, and, second, complies with all the obligations to supply information laid down in the national legislation.