Reports of Cases

AZIZ JUDGMENT OF THE COURT (First Chamber)

14 March 2013*

(Directive 93/13/EEC — Consumer contracts — Mortgage loan agreement — Mortgage enforcement proceedings — Powers of the court hearing the declaratory proceedings — Unfair terms — Assessment criteria)

In Case C-415/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 3 de Barcelona (Spain), made by decision of 19 July 2011, received at the Court on 8 August 2011, in the proceedings

Mohamed Aziz

v

Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa),

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, M. Ilešič, J.-J. Kasel and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 September 2012,

after considering the observations submitted on behalf of:

— Mr Aziz, by D. Moreno Trigo, abogado,

— the Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), by I. Fernández de Senespleda, abogado,

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 8 November 2012,

* Language of the case: Spanish.

gives the following

Judgment

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

2 The request has been made in proceedings between Mr Aziz and the Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ('Catalunyacaixa'), concerning the validity of certain terms of a mortgage loan agreement entered into by those parties.

Legal context

European Union law

3 The sixteenth recital in the preamble to the directive states:

'Whereas … 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'.

4 Article 3 of the directive provides:

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

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

…

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

5 Pursuant to Article 4(1) of the directive:

'Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.'

6 Article 6(1) of the directive states as follows:

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

7 Article 7(1) of the directive states:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

8 The annex to the directive lists, in paragraph 1, the terms referred to in Article 3(3) of the directive. It includes the following terms:

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

…

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

…

(q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.’

Spanish law

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

10 General Law 26/1984 was subsequently amended by Law 7/1998 on general contractual conditions (Ley 7/1998 sobre condiciones generales de la contratación) of 13 April 1998 (BOE No 89 of 14 April 1998, p. 12304), which transposed the directive into Spanish domestic law.

11 Lastly, Royal Legislative Decree 1/2007 approving the re-cast text of the General Law for the defence of consumers and users and related laws (Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias) of 16 November 2007 (BOE No 287 of 30 November 2007, p. 49181) adopted the consolidated version of Law 26/1984, as amended.

12 According to Article 82 of Royal Legislative Decree 1/2007:

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

…

3. The unfairness of a contractual term shall be assessed taking into account the nature of the contractual goods or services for which the contract was concluded and by referring to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

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

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

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

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

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

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

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

13 As regards the order for payment procedure, the Code of Civil Procedure (Ley de Enjuiciamiento Civil), as applicable at the date on which the proceedings which gave rise to the main proceedings were initiated, lays down, in its chapter V of Title IV of Book II, entitled 'Detailed provisions for enforcement in respect of mortgaged or pledged property', in particular in Articles 681 to 698 thereof, the mortgage enforcement proceedings at the centre of the case in the main proceedings.

14 Article 695 of the Code of Civil Procedure provides:

'(1) In the proceedings referred to in this chapter, an objection to enforcement by the defendant may be accepted only where it is based on the following grounds:

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

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

…

3. … the existence of another guarantee or mortgage … registered before the security which is the subject of the proceedings, together with the corresponding registration certificate.

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

15 Article 698 of the Code of Civil Procedure provides:

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

…

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

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

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

16 Article 131 of the Law on mortgages in force at the time of the facts in the main proceedings (Ley Hipotecaria), the consolidated text of which was approved by decree of 8 February 1946 (BOE No 58 of 27 February 1946, p. 1518), provides:

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

17 Under Article 153a of the Law on mortgages:

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

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

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

18 On 19 July 2007, Mr Aziz, a Moroccan national who had been working in Spain since December 1993, concluded with Catalunyacaixa, before a notary, a loan agreement secured by a mortgage. The immovable property subject to the mortgage was Mr Aziz’s family home, which he had owned since 2003.

19 The principal sum lent by Catalunyacaixa was EUR 138 000. It was to be reimbursed in 33 annual payments, in the form of 396 monthly instalments, beginning on 1 August 2007.

20 According to the case-file submitted to the Court, that loan agreement entered into with Catalunyacaixa provided, in clause 6, for annual default interest of 18.75%, automatically applicable to sums not paid when due, without the need for any notice.

21 In addition, clause 6a of that agreement conferred on Catalunyacaixa the right to call in the totality of the loan on expiry of a stipulated time-limit where the debtor failed to fulfil his obligation to pay any part of the principal or of the interest on the loan.

22 Finally, clause 15 of that agreement, concerning the agreement on determination of the amount due, stipulated not only that Catalunyacaixa had the right to bring enforcement proceedings to reclaim any debt but also, for the purposes of those proceedings, that it could immediately quantify the amount due by submitting an appropriate certificate indicating that amount.

23 Mr Aziz paid his monthly instalments regularly from July 2007 until May 2008 but stopped payments with effect from June 2008. In those circumstances, Catalunyacaixa, on 28 October 2008, contacted a notary in order to obtain a document determining the debt. The notary certified that according to the documents submitted and the content of the loan agreement, the value of the debt was EUR 139 764.76, corresponding to the unpaid monthly instalments, including contractual and default interest.

24 Having called in vain upon Mr Aziz to pay, on 11 March 2009 Catalunyacaixa instituted enforcement proceedings against him before the Juzgado de Primera Instancia No 5 de Martorell, seeking recovery of the sums of EUR 139 674.02 in respect of principal, EUR 90.74 in respect of accrued interest and EUR 41 902.21 in respect of interest and costs.

25 Since Mr Aziz failed to appear, on 15 December 2009 that court ordered enforcement. Mr Aziz was then sent an order for payment but he neither complied with it nor objected to it.

26 Accordingly, on 20 July 2010 a judicial auction of the immovable property was arranged, but no bid was made. Therefore, in accordance with the provisions of the Code of Civil Procedure, the Juzgado de Primera Instancia No 5 of Martorell consented to the vesting of that property at 50% of its value. That court also fixed 20 January 2011 as the date on which possession of the property was to pass to the vestee. Mr Aziz was, as a consequence, evicted from his home.

27 Shortly before that occurrence, on 11 January 2011, Mr Aziz had however applied to the Juzgado de lo Mercantil No 3 de Barcelona for a declaration seeking the annulment of clause 15 of the mortgage loan agreement, on the ground that it was unfair and, accordingly, of the enforcement proceedings.

28 In that context, the Juzgado de lo Mercantil No 3 de Barcelona expressed doubts concerning the conformity of Spanish law with the legal framework established by the directive.

29 In particular, that court stated that, should the creditor choose, for the purposes of execution, mortgage enforcement proceedings, the possibilities of alleging that one of the clauses of the loan agreement was unfair would be very limited, those possibilities being deferred to later declaratory proceedings which lack suspensory effect. The referring court considered that, in those circumstances, it is extremely difficult for a Spanish court to ensure effective protection of the consumer in those mortgage enforcement proceedings and in the corresponding declaratory proceedings.

30 In addition, the Juzgado de lo Mercantil No 3 de Barcelona was of the opinion that resolution of the case in the main proceedings gave rise to other questions concerning in particular the interpretation of ‘terms which have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation’ within the meaning of paragraph 1(e) of the annex to the directive, and ‘terms which have the object or effect of excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy’, provided for in paragraph 1(q) of that annex. It

was not clear that the clauses relating to acceleration in long-term contracts, the setting of default interest or the unilateral determination by the lender of methods of quantifying the whole debt were compatible with those provisions of the annex to the directive.

31 In those circumstances, the Juzgado de lo Mercantil No 3 de Barcelona, entertaining doubts as to the correct interpretation of European Union law, decided to stay the proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

'(1) Whether the system of levying execution, in reliance on judicial documents, on mortgaged or pledged property provided for in Article 695 et seq. of the Spanish Code of Civil Procedure, with its limitations regarding the grounds of objection, may be nothing more than a clear limitation of consumer protection since it involves, both formally and substantively, a clear impediment to the consumer's exercise of rights of action or judicial remedies of such a kind as to guarantee the effective protection of his rights?

(2) How is the concept of disproportion to be understood with regard to:

(a) the use of acceleration clauses in contracts planned to last for a considerable time – in this case 33 years – for events of default occurring within a very limited specific period;

(b) the setting of default interest rates – in this case exceeding 18% – which are not consistent with the criteria for determining default interest in other consumer contracts (consumer credit), which, in other types of consumer contracts, might be regarded as unfair, and which, nevertheless, in contracts relating to immovable property, are not subject to any clear legal limit, even where they are applied not only to the instalments that have already fallen due but also to the totality of those that have become due as a result of acceleration;

(c) the unilateral establishment by the lender of mechanisms for the calculation and determination of variable interest – both ordinary and default interest – which are linked to the possibility of mortgage enforcement and do not allow a debtor who is subject to enforcement to object to the quantification of the debt in the enforcement proceedings themselves but require him to resort to declaratory proceedings in which a final decision will not be given before enforcement has been completed or, at least, the debtor will have lost the property mortgaged or charged by way of guarantee – a matter of great importance when the loan is sought for the purchase of a dwelling and enforcement gives rise to eviction from the property?'

Consideration of the questions referred for a preliminary ruling

Admissibility

32 Catalunyacaixa and the Kingdom of Spain entertain doubts as to the admissibility of the first question, on the ground that it is not relevant to the resolution by the referring court of the dispute before it. In that regard, they argue that it is the declaratory proceedings – proceedings independent of and distinct from the enforcement proceedings – which form the locus of the present dispute, which concerns only the alleged invalidity, in the light of consumer protection legislation, of clause 15 of the loan agreement at issue in the main proceedings. Consequently, an answer relating to the compatibility of the mortgage enforcement proceedings with the directive is neither necessary for nor relevant to the resolution of that dispute.

33 In the same context, the Kingdom of Spain and Catalunyacaixa also dispute the admissibility of the second question, in so far as it seeks to ascertain the interpretation of the concept of disproportion, within the meaning of the relevant provisions of the directive, with regard to the terms concerning acceleration in long-term contracts and the determination of default interest. They argue that those terms have no bearing on the subject-matter of the dispute and also cannot be relevant to the determination of the unfairness of clause 15 of the loan agreement at issue in the main proceedings.

34 In that regard, it should be stated at the outset that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (Case C-618/10 *Banco Español de Crédito* [2012] ECR, paragraph 76 and case-law cited).

35 Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Banco Español de Crédito*, paragraph 77 and case-law cited).

36 However, that is not the case here.

37 Under the Spanish rules of procedure, Mr Aziz was not able, in the framework of the mortgage enforcement proceedings brought by Catalunyacaixa against him, to contest the unfairness of a term of the contract linking him with that lender, the party which initiated the enforcement proceedings, before the Juzgado de Primera Instancia No 5 of Martorell, the court responsible for enforcement, but only before the Juzgado de lo Mercantil No 3 de Barcelona, the court hearing the declaratory proceedings.

38 In that regard, as pointed out correctly by the European Commission, the first question asked by the Juzgado de lo Mercantil No 3 de Barcelona must be understood in a broad sense as seeking to ascertain, in essence, in the light of the restricted grounds for objection permitted in the course of mortgage enforcement proceedings, the compatibility with the directive of the powers of the court hearing the declaratory proceedings, which enjoys jurisdiction to determine the unfairness of the terms in the contract at issue in the main proceedings under which the debt claimed under those enforcement proceedings arises.

39 In those circumstances, and taking into account the fact that 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 (see Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18, and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 19), it must be concluded that it is not obvious that the interpretation of European Union law sought in the first question bears no relation to the actual facts of the main action or its purpose.

40 Equally, it cannot be excluded that the interpretation of the concept of disproportion, within the meaning of the relevant provisions of the directive, referred to in the second question, may be of use in determining the dispute before the Juzgado de lo Mercantil No 3 de Barcelona.

41 As stated by the Advocate General in points 62 and 63 of her Opinion, although the application for annulment sought by Mr Aziz in the main proceedings relates only to the validity of clause 15 of the loan agreement, suffice it to note that, first, in accordance with Article 4(1) of the directive, an overall analysis of the other contractual terms referred to in that question can affect the assessment of the term at issue in those proceedings and, second, the national court is bound, in accordance with the case-law of the Court, to examine of its own motion all the contractual terms falling with the scope of the directive to ascertain whether they are unfair, even in the absence of an express application to that effect, where it has available to it the legal and factual elements necessary for that task (see, to that effect, Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraphs 31 and 32, and *Banco Español de Crédito*, paragraph 43).

42 Consequently, the questions referred for a preliminary ruling are admissible in their entirety.

Substance

The first question

43 By its first question, the referring court wishes to know, essentially, whether Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a clause contained in a contract between a consumer and a seller or supplier, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a clause is unfair, to grant interim relief in order to guarantee the full effectiveness of its final decision.

44 In replying to that question, it should be noted first that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (*Banco Español de Crédito*, paragraph 39).

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

46 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (*Pannon GSM*, paragraphs 31 and 32, and *Banco Español de Crédito*, paragraphs 42 and 43).

47 Thus, in ruling on a request for a preliminary ruling submitted by a national court before which *inter partes* proceedings, initiated following an objection lodged by a consumer against an order for payment, had been brought, the Court held that that national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer falls within the scope of the directive and, if it does, assess of its own motion whether such a term is unfair (Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 56).

48 The Court has also held that the directive precludes legislation of a Member State which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, even though it already has the

legal and factual elements necessary in that regard, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, where that consumer has not lodged an objection (*Banco Español de Crédito*, paragraph 57).

49 However, the case at issue in the main proceedings can be distinguished from those which led to the abovementioned judgments *VB Pénzügyi Lízing* and *Banco Español de Crédito* because it concerns the definition of the duties of the court hearing declaratory proceedings linked to mortgage enforcement proceedings, with the objective of ensuring the effectiveness of any judgment in the declaratory proceedings declaring unfair the contractual term on which the right to seek enforcement and thus to initiate those enforcement proceedings is based.

50 In that regard, in the absence of harmonisation of the national mechanisms for enforcement, the rules implementing the grounds of objection allowed in mortgage enforcement proceedings and the powers conferred on the court hearing the declaratory proceedings, which enjoys jurisdiction to analyse the lawfulness of the contractual clauses on the basis of which the right to seek enforcement was established, are a matter for the national legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law (principle of effectiveness) (see, to that effect, Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 24, and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 38).

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

52 It is apparent from the case-file that the Spanish rules of procedure not only do not allow the court hearing declaratory proceedings linked to mortgage enforcement proceedings to adopt interim measures guaranteeing the full effectiveness of its final decision where it assesses whether a term contained in a contract concluded between a seller or supplier and a consumer is unfair in the light of Article 6 of the directive but also where it assesses whether such a term conflicts with national rules of public policy, which is, nevertheless, for the national court to ascertain (see, to that effect, *Banco Español de Crédito*, paragraph 48).

53 As regards the principle of effectiveness, it is the Court's settled case-law that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (see *Banco Español de Crédito*, paragraph 49).

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

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

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

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

58 In that regard, taking into account the progress and the special features of the mortgage enforcement proceedings at issue in the main proceedings, such an eventuality must however be regarded as remote because there is a significant risk that the consumer in question will not make that preliminary registration within the period prescribed for that purpose, either because of the rapidity of the enforcement proceedings in question or because he is unaware of or does not appreciate the extent of his rights (see, to that effect, *Banco Español de Crédito*, paragraph 54).

59 It must therefore be held that such procedural rules impair the protection sought by the directive, in so far as they render it impossible for the court hearing the declaratory proceedings – before which the consumer has brought proceedings claiming that the contractual term on which the right to seek enforcement is based is unfair – to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision (see, to that effect, Case C-432/05 *Unibet* 2007 ECR I-2271, paragraph 77).

60 As also observed by the Advocate General in point 50 of her Opinion, without that possibility, where, as in the main proceedings, enforcement in respect of the mortgaged immovable property took place before the judgment of the court in the declaratory proceedings declaring unfair the contractual term on which the mortgage is based and annulling the enforcement proceedings, that judgment would enable that consumer to obtain only subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13.

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

62 As also observed by the referring court, it would thus be sufficient for sellers or suppliers, if the conditions are satisfied, to initiate such mortgage enforcement proceedings so as to deprive consumers, in essence, of the protection intended by the directive, that being also contrary to the Court's case-law, according to which the specific characteristics of court proceedings, which take place under national law between sellers or suppliers and consumers, cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under the provisions of that directive (see, to that effect, *Banco Español de Crédito*, paragraph 55).

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

64 In the light of those considerations, the answer to the first question is that the directive must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.

The second question

65 By its second question, the referring court seeks, essentially, to obtain clarification of the constituent elements of the concept of 'unfair term', in the light of Article 3(1) and (3) of the directive, and of the annex thereto, in order to assess whether the terms which are the subject of the main proceedings and relate to acceleration in long-term contracts, setting of default interest rates and the agreement on quantification are or are not unfair.

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

67 That being so, it should be noted that, in referring to concepts of good faith and significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of the directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (see Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19, and *Pannon GSM*, paragraph 37).

68 As stated by the Advocate General in point 71 of her Opinion, in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.

69 With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', having regard to the sixteenth recital in the preamble to the directive and as stated in essence by the Advocate General in point 74 of her Opinion, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.

70 In that regard, it should be recalled that the annex, to which Article 3(3) of the directive refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (see *Invitel*, paragraph 25 and case-law cited).

71 Furthermore, pursuant to Article 4(1) of the directive, 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 (*Pannon GSM*, paragraph 39, and *VB Pénzügyi Lízing*, paragraph 42). It follows that, in that respect, the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system (*Freiburger Kommunalbauten*, précité, paragraph 21, and the order in Case C-76/10 *Pohotovosť* [2010] ECR I-11557, paragraph 59).

72 It is in the light of those criteria that the Juzgado de lo Mercantil No 3 de Barcelona must assess whether the terms referred to in the second question are unfair.

73 In particular, with regard, first, to the term concerning acceleration, in long-term contracts, on account of events of default occurring within a limited specific period, it is for the referring court to assess in particular, as stated by the Advocate General in points 77 and 78 of her Opinion, whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.

74 Second, regarding the term concerning the fixing of default interest, it should be recalled that, in the light of paragraph 1(e) of the annex to the Directive, read in conjunction with Articles 3(1) and 4(1) of the directive, the national court must assess in particular, as stated by the Advocate General in points 85 to 87 of her Opinion, first, the rules of national law which would apply to the relationship between the parties, in the event of no agreement having been reached in the contract in question or in other consumer contracts of that type and, second, the rate of default interest laid down, compared with the statutory interest rate, in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them.

75 With regard, finally, to the term concerning the unilateral determination by the lender of the amount of the unpaid debt, linked to the possibility of initiating mortgage enforcement proceedings, it must be held that, taking into account paragraph 1(q) of the annex to the directive and the criteria contained in Articles 3(1) and 4(1) thereof, the referring court must in particular assess whether and, if appropriate, to what extent, the term in question derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence.

76 In the light of the foregoing, the answer to the second question is that:

— Article 3(1) of the directive must be interpreted as meaning that:

  — the concept of 'significant imbalance', to the detriment of the consumer, must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out;

— in order to assess whether the imbalance arises 'contrary to the requirement of good faith', it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.

— Article 3(3) of the directive must be interpreted as meaning that the annex to which that provision refers contains only an indicative and non-exhaustive list of terms which may be regarded as unfair.

Costs

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

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

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a term is unfair, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.**

2. **Article 3(1) of Directive 93/13 must be interpreted as meaning that:**

   — **the concept of 'significant imbalance' to the detriment of the consumer must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out;**

   — **in order to assess whether the imbalance arises 'contrary to the requirement of good faith', it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.**

   Article 3(3) of Directive 93/13 must be interpreted as meaning that the annex to which that provision refers contains only an indicative and non-exhaustive list of terms which may be regarded as unfair.

[Signatures]