Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

26 March 2019*

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Articles 6 and 7 — Unfair terms in consumer contracts — Accelerated repayment clause of a mortgage loan contract — Declaration that the clause is unfair in part — Powers of the national court when dealing with a term regarded as 'unfair' — Replacement of the unfair term with a provision of national law)

In Joined Cases C-70/17 and C-179/17,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 8 February 2017, received at the Court on 9 February 2017, and from the Juzgado de Primera Instancia nº 1 de Barcelona (Court of First Instance No 1, Barcelona, Spain), made by decision of 30 March 2017, received at the Court on 7 April 2017, respectively, in the proceedings

Abanca Corporación Bancaria SA

v

Alberto García Salamanca Santos (C-70/17),

and

Bankia SA

v

Alfonso Antonio Lau Mendoza,

Verónica Yuliana Rodríguez Ramírez (C-179/17),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, E. Juhász, M. Ilešič, E. Levits, L. Bay Larsen, D. Šváby and S. Rodin (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2018,

* Language of the case: Spanish.

after considering the observations submitted on behalf of:

– Abanca Corporación Bancaria SA, initially by J. Massaguer Fuentes and C. Vendrell Cervantes, abogados, and subsequently by D. Sarmiento Ramírez-Escudero, abogado,

– Bankia SA, by J.M. Rodríguez Cárcamo and A.M. Rodríguez Conde, abogados,

– the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,

– the Hungarian Government, by M.Z. Fehér, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by J. Baquero Cruz, N. Ruiz García and A. Cleenewerck de Crayencour, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), in particular Articles 6 and 7 thereof.

2 The request for a preliminary ruling in Case C-70/17 has been made in proceedings between Abanca Corporación Bancaria SA and Mr Alberto García Salamanca Santos concerning the conclusions to be drawn from the finding that the accelerated repayment clause set out in Clause 6a of the loan agreement secured by a mortgage concluded between those two parties is unfair.

3 The request for a preliminary ruling in Case C-179/17 has been made in proceedings between Bankia SA and Mr Alfonso Antonio Lau Mendoza and Ms Verónica Yuliana Rodríguez Ramírez concerning the application for mortgage enforcement pending before the referring court concerning property mortgaged to guarantee payment of a loan.

Legal context

European Union law

4 The 24th recital of Directive 93/13 states that ‘the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts’.

5 Article 1(1) of that directive provides:

‘The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.’

6 Article 3 thereof is worded as follows:

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

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

…’

7 Article 6(1) of the directive provides:

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

8 Under Article 7(1) of Directive 93/13:

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

Spanish law

9 Article 1124 of the Código Civil (Civil Code) is worded as follows:

‘The power to terminate obligations shall be deemed to be implied in the case of reciprocal obligations, if one of the contracting parties should fail to do what is required of him.

The injured party may choose to demand either the performance or the termination of the obligation, with compensation for damage and payment of interest in both cases. He may also request termination, even after opting for specific performance, if the latter should prove impossible.

The Court shall order the termination requested, unless there are justified grounds allowing it to fix a period for performance of the obligation.’

10 Under Article 1303 of the Civil Code:

‘When an obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price together with interest, subject to the provisions of the following articles.’

11 The first paragraph of Article 1857 of that code states that an essential feature of mortgage contracts is that they are created ‘in order to guarantee performance of a primary obligation’.

12 Article 1858 of the code provides:

‘[another] essential feature of those contracts consists in the fact that, where the primary obligation is outstanding, the goods constituting the security or the mortgage may be sold in order to satisfy the creditor.’

13 Under Article 1876 thereof:

'... the mortgage makes the goods it covers, regardless of their owner, directly and immediately subject to performance of the obligation with a view to which it was created by way of security.'

14 Ley 1/2000 de Enjuiciamiento Civil (Law No 1/2000 on Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575) ('the LEC') was amended by Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law No 1/2013 on measures to strengthen the protection of mortgage debtors, debt restructuring and social rents) of 14 May 2013 (BOE No 116 of 15 May 2013, p. 36373), by Real Decreto-Ley 7/2013 de medidas urgentes de naturaleza tributaria, presupuestaria y de fomento de la investigación, el desarrollo y la innovación (Royal Decree-Law No 7/2013 on urgent fiscal and budgetary measures and promoting research, development and innovation) of 28 June 2013 (BOE No 155 of 29 June 2013, p. 48767), then by Real Decreto-Ley 11/2014 de medidas urgentes en materia concursal (Royal Decree-Law No 11/2014 on urgent measures in bankruptcy matters) of 5 September 2014 (BOE No 217 of 6 September 2014, p. 69767).

15 Article 693(2) of the LEC, in the version in force on the date when the contracts at issue in the main proceedings were signed, indicated:

'The entirety of the principal and interest owed may be claimed if it has been agreed that the debt shall mature in its entirety in the event of failure to pay one of the agreed repayment instalments, and that agreement is recorded in the register.'

16 Under Article 693(2) of the LEC, concerning the accelerated repayment of debts repayable in instalments, in the version subsequent to the signing of the contracts at issue in the main proceedings:

'The total amount owed by way of principal and interest may be claimed if it has been agreed that repayment of the loan in its entirety is due in the event of failure to pay at least three monthly repayment instalments without the debtor fulfilling his obligation to pay or his failure to pay a number of repayment instalments from which it can be inferred that the debtor has failed to fulfil his obligation for a period at least equivalent to three months, and that agreement is set out in the instrument creating the mortgage and the corresponding entry in the register.'

17 Article 695 of the LEC, concerning the procedure for objecting to mortgage enforcement proceedings, in the version subsequent to the signing of the contracts at issue in the main proceedings, is worded as follows:

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

…

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

2. If an objection is lodged under the preceding paragraph, the court registry shall stay enforcement and summon the parties to a hearing before the court which ordered the enforcement. There shall be at least 15 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.

3. …

If ground 4 of paragraph 1 of the present article is upheld, enforcement shall be discontinued where it is based on the contractual term. In other cases, enforcement shall be continued without the application of the unfair term.

4. An appeal may lie against the order discontinuing enforcement or disapplying an unfair term or rejecting the opposition on the ground laid down in paragraph 1(4) of the present article.

Save in those circumstances, no appeal shall lie against orders adjudicating upon the objection to enforcement referred to in the present article and the effects of those orders shall be confined exclusively to the enforcement proceedings in which they are made.'

18 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 (Royal Legislative Decree No 1/2007 approving the consolidated text of the General Law for the protection of consumers and users and other supplementary laws) of 16 November 2007 (BOE No 287 of 30 November 2007, p. 49181), as amended by Ley 3/2014 (Law No 3/2014) of 27 March 2014 (BOE No 76 of 28 March 2014, p. 26967), provides, in Article 83 thereof:

'Unfair terms shall automatically be void and deemed not to have formed part of the contract. To that end, the court, after consulting the parties, shall declare the invalidity of unfair terms included in the contract, which shall nevertheless continue to bind the parties on the same terms if it is capable of continuing in existence without the unfair terms.'

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

Case C-70/17

19 By contract signed on 30 May 2008, Mr García Salamanca Santos and Ms Varela Pena obtained a loan secured by a mortgage from the banking establishment Abanca Corporación Bancaria in respect of an amount of EUR 100 000, granted for a term of 30 years.

20 Clause 6a of that contract, concerning its early termination, is worded as follows:

'6a. Early termination by the credit establishment.

[The bank] may, without first making a demand, call in the loan and require, by legal proceedings, repayment of the debt in its entirety, both sums that have fallen due and those yet to fall due, with interest, default interest, expenses and costs, in the following cases:

(a) Failure to pay any instalment of interest or any repayment instalment, including all the components thereof, the parties expressly requesting that this stipulation be noted in the records of the Land Registry, in accordance with Article 693 of Law No 1/2000.

…'

21 Mr García Salamanca Santos brought an action for annulment before the Spanish court of first instance having jurisdiction concerning several terms of the mortgage loan contract, including Clause 6a, on the ground that those terms were unfair.

22 That court upheld that action and annulled, inter alia, Clause 6a of that mortgage loan contract.

23 Abanca Corporación Bancaria brought an appeal against that judgment before the Audiencia Provincial de Pontevedra (Provincial Court, Pontevedra, Spain), which dismissed that appeal by judgment of 14 May 2014, thereby confirming the judgment delivered at first instance.

24 Abanca Corporación Bancaria brought an appeal on a point of law before the Tribunal Supremo (Supreme Court, Spain) against the judgment of the Audiencia Provincial de Pontevedra (Provincial Court, Pontevedra).

25 The referring court considers, first of all, that Clause 6a is unfair inasmuch as it provides for the early termination of the mortgage loan contract in the event that the debtor misses a single monthly loan repayment. It questions whether it is possible, in the light of Article 6(1) of Directive 93/13, to declare a contractual term unfair in part, retaining the part of that term which is not regarded as unfair. It considers in that regard, in essence, that excluding the unfair aspect of a contractual term and maintaining the rest of its content, which is not unfair, does not constitute revision or replacement of contractual content.

26 The referring court questions, next, whether it is consistent with the provisions of Directive 93/13 to apply a provision of national law as a supplementary provision in order to enable the continuation of mortgage enforcement proceedings launched on the basis of a term concerning the early termination of a loan contract which has been declared unfair by a national court, where those proceedings are considered more favourable to consumers than ordinary enforcement proceedings.

27 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 6(1) of Directive 93/13 be interpreted to the effect that a national court, in appraising the unfairness of an accelerated repayment clause in a mortgage loan contract concluded with a consumer that provides for acceleration upon failure to pay [a single] instalment, in addition to other cases of non-payment of further instalments, may assess the unfairness only of the contractual term or case of non-payment of an instalment and treat the accelerated repayment clause covering non-payment of instalments also laid down on a general basis in the clause as still valid, regardless of whether any specific finding of validity or unfairness has to be deferred to the time when the power [to declare the early maturity of the loan] is exercised?

(2) Does a national court have powers under Directive 93/13 — once an accelerated repayment clause in a loan or credit contract secured by a mortgage is declared unfair — whereby it may take the view that the supplementary application of a provision of national law, even though giving rise to the commencement or continuation of enforcement proceedings against the consumer, appears more favourable to the consumer than a stay of that special mortgage enforcement procedure and may allow the creditor to initiate proceedings to terminate the loan or credit contract, or to claim the sums owing, and ensure the subsequent enforcement of the adverse judgment, without the advantages which the special mortgage enforcement procedure makes available to consumers?’

Case C-179/17

28 On 22 June 2005 Ms Rodríguez Ramírez and Mr Lau Mendoza concluded a mortgage loan contract with the bank Bankia in respect of an amount of EUR 188 000, granted for a term of 37 years.

29 Clause 6a of that contract, entitled 'Early termination by the credit institution', provides as follows:

'Notwithstanding the stipulated term of this contract, the lending bank may declare the loan due, considering the contract terminated and the debt as being prematurely due in its entirety, for example in the event of failure to pay one, several or all of the repayment instalments set out in the second clause [concerning amortisation].'

30 Following 36 missed monthly payments by the defendants in the main proceedings, Bankia filed an application with the Juzgado de Primera Instancia no 1 de Barcelona (Court of First Instance No 1, Barcelona, Spain) for mortgage enforcement concerning the property mortgaged to guarantee payment of the loan granted.

31 The referring court notes that, according to the case-law of the Tribunal Supremo (Supreme Court), where a court examining a special mortgage enforcement procedure finds that that procedure is based on an unfair term which provides for, inter alia, the early termination of the loan contract in the event that the debtor misses a single monthly repayment, that court, rather than ordering discontinuation of enforcement under Article 695(1) and (3) of the LEC, must maintain that procedure. This would be achieved by replacing such a term with the rule laid down in Article 693(2) of the LEC, in the version subsequent to the signing of the mortgage loan contract referred to in paragraph 28 above, which permits the early maturity of the loan in the event of failure to pay at least three monthly repayment instalments.

32 According to the referring court, it is apparent from that case-law that discontinuation of enforcement means that the bank may, after such discontinuation is ordered, rely on Article 1124 of the Civil Code, which permits an action to be brought requesting the court seised to declare the termination of the contract. The judicial decision resulting from that action would be the subject of ordinary enforcement proceedings whereby all the debtor's goods, including his home, may be seized.

33 The referring court also states that, according to the Tribunal Supremo (Supreme Court), where the mortgaged property is the debtor's home, the special mortgage enforcement procedure, unlike the ordinary enforcement procedure, has several distinctive features designed to protect that debtor. Those features include, inter alia, the possibility for the debtor to release the property, the application of a minimum price below which the debtor's home may not be sold at auction, and the recognised power of the debtor to pay off his debt where the amount obtained from the sale at auction is insufficient to cover the entirety of the claim. In the light of those distinctive features, the Tribunal Supremo (Supreme Court) has held that the special mortgage enforcement procedure is more favourable to consumers' interests than the ordinary enforcement procedure that would apply following a declaratory action based on Article 1124 of the Civil Code.

34 However, the referring court has doubts as to whether the case-law of the Tribunal Supremo (Supreme Court) is compatible with Articles 6 and 7 of Directive 93/13.

35 First, it questions whether the mortgage enforcement procedure is more favourable in comparison with the termination of the mortgage loan contract by judicial decision on the basis of Article 1124 of the Civil Code followed by an ordinary enforcement procedure. It notes in that regard that, in an ordinary enforcement procedure, the consumer is, in practice, in a position to buy some time and will avoid, for the moment, being evicted from his home. In addition, an analysis of the case-law of the Tribunal Supremo (Supreme Court) and the wording of Article 1124 of the Civil Code shows that, in cases of loans secured by a mortgage granted for the purchase of accommodation, it is relatively likely that a declaratory action based on Article 1124 of the Civil Code will be dismissed, because that provision is not applicable to loan contracts. Even if it were to be accepted that Article 1124 of the Civil Code is applicable to loan contracts, the referring court states that it cannot be ruled out that an action for termination may be dismissed if the court considers that there are justified grounds allowing it to fix a period for [performance of the obligation by] the debtor, as is expressly provided for in that article.

36 Second, the supplementary application of Article 693(2) of the LEC, in the version in force subsequent to the signing of the mortgage loan contract, instead of the contractual term which has been found to be unfair would, according to the referring court, be problematic in two respects.

37 In the first place, according to the case-law of the Court, in particular its judgment of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21), the national court may replace an unfair term with a supplementary provision of national law only in 'cases in which the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to disadvantageous consequences'.

38 In the second place, assuming that the supplementary application of Article 693(2) of the LEC, in the version in force subsequent to the signing of the mortgage loan contract, is considered to be feasible in the abstract, the existence of an agreement between the parties is a fundamental condition for the applicability of that provision laid down by the provision itself. In the present case, such an agreement did indeed arise from the conclusion of the mortgage loan contract, but that agreement has in fact been regarded as unfair and declared void.

39 For all those reasons, which point to legal issues likely to be important in the context of responding to the request for a preliminary ruling submitted by the Tribunal Supremo (Supreme Court) in Case C-70/17, the referring court considered it appropriate and necessary to submit a new request to the Court for a preliminary ruling so that it may, where appropriate, be joined to the request previously submitted in Case C-70/17.

40 In those circumstances, the Juzgado de Primera Instancia no 1 de Barcelona (Court of First Instance No 1, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is case-law incompatible with Articles 6 and 7 of [Directive 93/13] when it (a judgment of the Tribunal Supremo (Supreme Court) of 18 February 2016) holds that, despite the unfairness of the early repayment term and even though the application for enforcement is based on that term, mortgage enforcement proceedings are not to be closed because their continuation is more favourable to the consumer, given that, in the event of any enforcement of a judgment given [following] proceedings brought under Article 1124 of the Civil Code, a consumer would not enjoy the procedural privileges applicable in mortgage enforcement proceedings, and when that case-law does not take into account the settled case-law of the Tribunal Supremo (Supreme Court) to the effect that Article 1124 of the Civil Code (laid down for contracts creating reciprocal obligations) is not applicable to loan agreements, because such an agreement is a real, unilateral contract which does not become valid until the money is handed over and which, therefore, creates obligations for the borrower alone and not for the lender (creditor), so that, if that case-law of the Tribunal Supremo (Supreme Court) were to be applied in declaratory proceedings, a consumer could obtain a ruling dismissing the claim for termination and compensation and it could no longer be argued that continuation of the mortgage enforcement proceedings was more favourable to him?

(2) If the application of Article 1124 of the Civil Code to loan agreements or in the case of all credit agreements should be accepted, is case-law like that referred to incompatible with Articles 6 and 7 of [Directive 93/13] when that case-law does not take into account, for the purpose of assessing whether it is more favourable to the consumer for the mortgage enforcement proceedings to continue or more detrimental to hold declaratory proceedings under Article 1124 of the Civil Code, the fact that, in declaratory proceedings, the claim for termination of the agreement and the claim for compensation may be dismissed if the court applies the stipulation in Article 1124 of the Civil Code that "the court shall order the termination requested, unless there are justified grounds allowing it to fix a period [for performance of the obligation]", bearing in mind that,

precisely in the context of long-term (20 or 30 years) loans and mortgages for the purchase of dwellings, it is relatively likely that the courts will apply that ground for dismissal, particularly where the non-performance of the payment obligation has not been very serious?

(3) If it were to be accepted that it is more favourable to the consumer to continue enforcement of the mortgage with the effects of early repayment, is case-law like that referred to incompatible with Articles 6 and 7 of [Directive 93/13] when that case-law applies on a supplementary basis a statutory provision (Article 693(2) [of the LEC]), even though the contract is capable of continuing to exist without the early repayment term, and when that case-law gives effects to Article 693(2) of the LEC, even though the essential condition stipulated therein has not been met: that there should be in the contract a valid and effective agreement regarding early repayment, and the early repayment term has in fact been declared unfair, void and ineffective?'

Joinder of Cases C-70/17 and C-179/17

41 In view of the connection between Cases C-70/17 and C-179/17, it is appropriate, in accordance with Article 54 of the Rules of Procedure of the Court, to join them for the purpose of this judgment.

Consideration of the questions referred

Admissibility of the request for a preliminary ruling in Case C-179/17

42 The Spanish Government contests the admissibility of the request for a preliminary ruling in Case C-179/17 on the ground that the objective pursued by that request is that of supplementing the legal context set out by the Tribunal Supremo (Supreme Court) in Case C-70/17 in order to make available to the Court all the relevant evidence for the purposes of answering the questions referred for a preliminary ruling in that case. However, the purpose of a reference for a preliminary ruling is to obtain an interpretation of EU law and not to correct the content of questions referred for a preliminary ruling in other cases pending before the Court. In addition, the Spanish Government contends that the questions raised by the referring court are solely concerned with the interpretation of rules of national law.

43 As the Advocate General observed in point 43 of his Opinion, it should be borne in mind that, according to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgments of 29 November 1978, *Redmond*, 83/78, EU:C:1978:214, paragraph 25, and of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 76 and the case-law cited).

44 Consequently, when the question put by the national court concerns the interpretation of EU law, the Court is, in principle, bound to give a ruling. 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 EU 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 (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 17).

45 In the present case, the request for a preliminary ruling concerns the interpretation of Articles 6 and 7 of Directive 93/13. In addition, the order for reference sets out the factual and legal context in sufficient detail to enable the scope of the questions referred to be determined. Furthermore, it does not seem that the interpretation sought bears no relation to the actual facts or the purpose of the dispute in the main proceedings; nor does the problem appear to be hypothetical.

46 Lastly, having regard to the case-law cited in paragraph 44 above, the question whether the referring court wishes to supplement the legal context of the request for a preliminary ruling submitted by the Tribunal Supremo (Supreme Court) in Case C-70/17 is irrelevant for the purpose of assessing the admissibility of the request for a preliminary ruling in Case C-179/17.

47 It follows that the request for a preliminary ruling in Case C-179/17 is admissible.

Substance

48 By their questions in Case C-70/17 and Case C-179/17, which must be examined together, the referring courts ask, in essence, whether Articles 6 and 7 of Directive 93/13 are to be interpreted as meaning that, where an early repayment clause of a mortgage loan contract is found to be unfair, it may nonetheless be maintained in part, with the elements which make it unfair removed, and, if not, whether mortgage enforcement proceedings initiated on the basis of that clause may nonetheless continue by means of the supplementary application of a rule of national law because the impossibility of availing of those proceedings could be contrary to consumers' interests.

49 According to settled case-law, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (see, in particular, judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 27 and the case-law cited).

50 As regards such a position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair. In that context, it is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraphs 42 to 48, and of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 40).

51 In the present case, it is apparent from the findings of the referring courts that the terms at issue in the main proceedings, although they were based on Article 693(2) of the LEC, in the version in force on the date when the mortgage loan contracts at issue in the main proceedings containing those terms were signed, must be regarded as unfair, inasmuch as they provide that the financial establishment may declare the early termination of the contract and require repayment of the loan where the debtor has missed a single monthly repayment.

52 In that context, it should first of all be borne in mind that, under Article 6(1) of Directive 93/13, it is for the referring courts to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (see, to that effect, judgments of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 35, and of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 65).

53 Next, according to the case-law of the Court, where a national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, Article 6(1) of Directive 93/13 must be interpreted as precluding a rule of national law which allows the national court to modify that contract by revising the content of that term (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 73, and of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 77).

54 Thus, if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 69, and of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 79).

55 In the present case, the mere removal of the ground for termination making the terms at issue in the main proceedings unfair would ultimately be tantamount to revising the content of those terms by altering their substance. Therefore, those terms cannot be maintained in part without directly adversely affecting the dissuasive effect referred to in the preceding paragraph.

56 However, the Court has previously held that it does not follow from the case-law cited in paragraphs 53 and 54 above that, in a situation where a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, Article 6(1) of Directive 93/13 precludes the national court from removing, in accordance with the principles of contract law, an unfair term and replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences, so that the consumer would thus be penalised (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 80, 83 and 84).

57 In that regard, the Court has held that such a substitution is fully justified in the light of the purpose of Directive 93/13. It is consistent with the objective of Article 6(1) of Directive 93/13, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, not to annul all contracts containing unfair terms (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 81 and 82 and the case-law cited).

58 If, in a situation such as that described in paragraph 56 above, it was not permissible to replace an unfair term with a supplementary provision of national law, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised. In general, the consequence of such an annulment with regard to a loan contract would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 83 and 84).

59 For similar reasons, it must be held that, in a situation where a mortgage loan contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term whose wording is based on a provision of legislation which is applicable where the parties to the contract so agree, Article 6(1) of Directive 93/13 cannot be interpreted as

precluding a national court from replacing that term, with a view to preventing that contract from becoming invalid, with the new wording of that reference provision, introduced after the conclusion of the contract, in so far as the annulment of the contract would expose the consumer to particularly unfavourable consequences.

60 In the present case, the contracts at issue in the main proceedings concern, first, the granting of loans by a bank and, second, the creation of mortgage guarantees relating to those loans. The terms at issue in the main proceedings, which draw on the wording of Article 693(2) of the LEC, in the version in force on the date when those contracts were signed, enable the banks concerned, in essence, to declare that the loan is due and to require payment of any amount still outstanding in the event that the debtor misses a single monthly repayment. It is for the referring courts to verify, in accordance with the rules of national law and adopting an objective approach (see, to that effect, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 32), whether the removal of those terms would mean that the continued existence of the mortgage loan contracts is no longer possible.

61 In such a case, it will be for the referring courts to examine whether the annulment of the mortgage loan contracts at issue in the main proceedings would expose the consumers concerned to particularly unfavourable consequences. In that regard, it is apparent from the orders for reference that such an annulment could have effects, in particular, on the procedural requirements of national law pursuant to which the banks may obtain repayment from the consumers, in court, of the entirety of the outstanding amount of the loan. Thus, in the event of annulment of the mortgage loan contracts at issue in the main proceedings, the banks will have to recover their claims by means of an ordinary enforcement procedure, whereas, if those contracts are maintained by replacing the unfair terms with the new version of Article 693(2) of the LEC, which makes it possible for those contracts to be terminated prematurely after the debtors have failed to pay at least three monthly repayment instalments, the special mortgage enforcement procedure will remain applicable. Those two procedures would be distinguished, inter alia, by the fact that the specific procedure for enforcing the mortgage against the debtor's habitual residence is characterised by the possibility for the debtor to release the mortgaged property until the date of auctioning by depositing the amounts outstanding, by the possibility of obtaining a partial reduction of the debt, and by the guarantee that the mortgaged property will not be sold at a price lower than 75% of its estimated value.

62 Such a deterioration of the procedural position of the consumers concerned, resulting from the use of an ordinary enforcement procedure rather than the special mortgage enforcement procedure, is relevant in the context of assessing the consequences of annulling the contracts in question and, in accordance with what has been stated in paragraph 59 above, could therefore justify, provided that it exposes those consumers to particularly unfavourable consequences, the referring courts replacing the unfair terms with the version of Article 693(2) of the LEC subsequent to the signing of the contracts at issue in the main proceedings. As the features of those enforcement procedures are, however, exclusively a matter of national law, it is solely for the referring courts to carry out the necessary checks and comparisons in that regard.

63 By contrast, if those courts were to come to the conclusion that the mortgage loan contracts concerned are capable of continuing in existence without the unfair terms at issue in the main proceedings, it would be for those courts, in accordance with the case-law cited in paragraph 56 above, to exclude the application of those terms, unless the consumer objects, for example if that consumer were to consider that enforcement of the mortgage carried out on the basis of such a term would be more favourable to him than the ordinary enforcement procedure. That contract must continue in existence, in principle, without any amendment other than that resulting from the removal of the unfair terms, in so far as, in accordance with the rules of national law, such continuity of the contract is legally possible (see, to that effect, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 71).

64 In the light of the foregoing considerations, the answer to the questions referred in Cases C-70/17 and C-179/17 is that Articles 6 and 7 of Directive 93/13 must be interpreted, first, as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance, and, second, as not precluding the national court from compensating for the invalidity of such an unfair term by replacing that term with the new wording of the legislative provision on which it was based, which is applicable where the parties to the contract so agree, provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed, and that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences.

Costs

65 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 (Grand Chamber) hereby rules:

Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted, first, as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance, and, second, as not precluding the national court from compensating for the invalidity of such an unfair term by replacing that term with the new wording of the legislative provision on which it was based, which is applicable where the parties to the contract so agree, provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed, and that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences.

[Signatures]