

JUDGMENT OF THE COURT (Grand Chamber)

17 May 2022

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Mortgage enforcement proceedings – Unfairness of the term setting the nominal rate for default interest, and of the advanced repayment term in the loan agreement – Force of res judicata and time-barring – Loss of the possibility of relying on the unfairness of a contractual term before a court – Power of review by the national court of its own motion)

In Case C-600/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Provincial de Zaragoza (Provincial Court, Saragossa, Spain), made by decision of 12 July 2019, received at the Court on 6 August 2019, in the proceedings

MA

v

Ibercaja Banco SA,

intervening party:

PO,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin (Rapporteur) and I. Jarukaitis, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, N. Piçarra, L.S. Rossi and A. Kumin, Judges,

Advocate General: E. Tanchev,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2021,

after considering the observations submitted on behalf of:

- Ibercaja Banco SA, by J. Rodríguez Cárcamo and A.M. Rodríguez Conde, abogados,
- the Spanish Government, by S. Centeno Huerta and M.J. Ruiz Sánchez, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and G. Greco, avvocati dello Stato,

- the European Commission, by J. Baquero Cruz, N. Ruiz García and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2021,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The request has been made in proceedings between MA and Ibercaja Banco SA concerning a claim for payment of interest due to the bank on account of the failure by MA and PO to perform the mortgage loan agreement concluded between those parties.

Legal context

European Union law

- 3 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’.

- 4 Article 6(1) of that 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.’

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

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

Spanish law

- 6 Ley 1/2000 de Enjuiciamiento Civil (Law 1/2000 on the Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575), in the version applicable to the facts in the main proceedings (‘the LEC’), provides, in Article 136, entitled ‘Time-barring’:

‘Once the time limit for carrying out a procedural step has elapsed, the step in question shall become time-barred and the opportunity to carry it out shall be lost. The Judicial Officer shall leave a record of the elapse of the time limit in an official document and shall order the

measures to be adopted or shall serve notice to the court so that the corresponding decision can be ordered.'

7 Article 207 of the LEC provides:

- '1. Decisions terminating proceedings are those which terminate the proceedings at first instance and those which adjudicate upon the appeals brought against such decisions.
2. Final decisions are those which are not appealable, either because the law makes no provision for appeal or because, although it does so, none of the parties appealed before the statutory time limit expired.
3. A final decision acquires the force of *res judicata*, and the court that conducted the proceedings in which it was given shall in all circumstances be bound by its operative provisions.
4. If a decision remains unchallenged on expiry of the time limits for appealing against it, it shall become final and acquire the force of *res judicata*, with the court that conducted the proceedings in which it was given being bound in all circumstances by its operative provisions.'

8 Article 222 of the LEC provides:

- '1. The force of *res judicata* attaching to final judgments, either upholding or dismissing a claim, shall exclude, in accordance with the law, any further proceedings having the same subject matter as that of the proceedings in which *res judicata* was acquired.
2. The force of *res judicata* shall attach to claims made in the main application and in the counterclaim and to the matters referred to in Article 408(1) and (2) of this law.

Facts subsequent to the expiry of the period for the lodging of pleadings in the proceedings in which such claims were made shall be regarded as new and different with respect to the basis on which such claims were made.

3. The force of *res judicata* shall be binding on the parties to the proceedings in which it arises, their heirs and those deriving title from them, and on the persons who, not being parties to the proceedings, hold the rights which give them standing to bring proceedings in accordance with the provisions of Article 11 of this law.

...

4. A decision that has acquired the force of *res judicata* in a final judgment concluding proceedings shall be binding on a court before which subsequent proceedings are brought where the decision having the force of *res judicata* appears, in the subsequent proceedings, to be a logical antecedent to the subject matter of the subsequent proceedings and where the parties to the two sets of proceedings are the same or where the force of *res judicata* applies to them pursuant to provisions of the law.'

9 Article 517 of the LEC is worded as follows:

- '1. Enforcement must be based on an enforceable instrument.

2. Only the following instruments shall be enforceable:
 - 1°. a judgment given against a defendant, which is no longer open to appeal;
 - ...
 - 9°. other procedural decisions and documents enforceable under this or another law.'

10 Article 552 of the LEC provides:

'1. If the court considers that the rules and requirements laid down by law for issuing an enforcement order have not been observed, it shall make an order refusing enforcement.

The court shall examine of its own motion the question of whether a term in one of the enforcement instruments referred to in Article 557(1) may be regarded as unfair. Where it considers that a term may be regarded as unfair, it shall hear the parties within 15 days. After hearing the parties, it shall give its decision within five working days, in accordance with Article 561(1)(3).

2. An appeal may lie directly against an order refusing enforcement; only the creditor shall take part in this procedure. The creditor may also, if he or she chooses, apply for review by the same court before bringing the appeal.

3. Where the order refusing enforcement has become final, the creditor may assert his or her rights only in the relevant ordinary procedure, if this is not precluded by the principle of *res judicata* of the judgment or the final decision on which the request for enforcement was based.'

11 Article 556 of the LEC, entitled 'Objection to the enforcement of procedural decisions, arbitral awards or mediation agreements', provides in paragraphs 1 and 2:

'1. If the enforceable instrument is a procedural decision or arbitral decision making an award, or a mediation agreement, the party against whom enforcement is sought may, within 10 days of service of the enforcement order, object to it in writing by claiming payment or compliance with the operative part of the judgment, arbitral award or agreement, in which case it must adduce documentary evidence.

It is also possible to object to enforcement by claiming that it is time-barred or by relying on any agreements or settlements which have been concluded in order to avoid enforcement, provided that such agreements and settlements are set out in a notarised act.

2. Any objection lodged in the situations set out in the preceding paragraph shall not have suspensory effect on enforcement.'

12 Article 557 of the LEC provides:

'1. Where enforcement is ordered in respect of the instruments referred to in Article 517(2)(4), (5), (6) and (7), and of other enforceable documents referred to in Article 517(2)(9), the party against whom enforcement is sought may lodge an objection, within the period and in the form provided for in the preceding article, only if it relies on one of the following grounds:

...

7° The instrument contains unfair terms.

2. If an objection referred to in the previous paragraph is made, the Judicial Officer shall suspend the enforcement by a measure of organisation of the procedure.'

13 Article 695 of the LEC provides:

'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 Judicial Officer 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. An order upholding the objection to enforcement based on the first and third grounds set out in paragraph 1 of this article shall issue a stay of enforcement; the order upholding the objection based on the second ground shall set the amount for which enforcement should be maintained.

If ground 4 of paragraph 1 of the present article is upheld, enforcement shall be stayed 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 staying enforcement or disapplying an unfair term or rejecting the objection 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.'

14 Ley 1/2013, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013 on measures to strengthen the protection of mortgage debtors, debt restructuring and social rent) of 14 May 2013 (BOE No 116 of 15 May 2013, p. 36373; 'Law 1/2013'), which is one of the laws which amended the LEC, introduced, among the grounds for objection, the possibility of relying on the unfairness of contractual terms, both in the general enforcement procedure and in the mortgage enforcement procedure. The fourth transitional provision of Law 1/2013 states:

1. The amendments to [the LEC] introduced by the present Law shall apply to enforcement proceedings already in progress at the date of entry into force of the present Law, only in respect of those enforcement measures still to be taken.

2. In any event, in enforcement proceedings in progress on the date of the entry into force of the present Law, in which the 10-day period for lodging an objection to enforcement laid down by Article 556(1) of [the LEC] has expired, the parties against whom enforcement is sought shall have a period of one month within which to submit an extraordinary application objecting to enforcement based on the existence of new grounds for objection, set out in Article 557(1)(7) and Article 695(1)(4) of [the LEC].

In accordance with the provisions of Article 558 et seq. and Article 695 [of the LEC], the time limit of one month shall start to run from the day following the entry into force of the present Law, and the effect of the lodging by the parties of the application objecting to enforcement shall be to suspend proceedings until the application has been adjudicated upon.

The present transitional provision shall be applicable to all enforcement proceedings that have not led to the buyer's taking possession of the property in accordance with the provisions of Article 675 of [the LEC].

3. Likewise, in enforcement proceedings in progress in which, on the entry into force of the present Law, the 10-day period for objecting to enforcement laid down by Article 556(1) of [of the LEC] has already started to run, the parties against whom enforcement is sought shall enjoy the same period of one month provided for in the previous paragraph in order to submit an application on the basis of the existence of any of the grounds for objecting to enforcement provided for under Articles 557 and 695 of [the LEC].

4. Publication of the present provision shall be considered full and valid notification for the purposes of notifying and calculating the periods provided for in paragraphs 2 and 3 of the present article, without its being necessary in any circumstances expressly to make an order in that respect. ...'

- 15 Ley 5/2019 reguladora de los contratos de crédito inmobiliario (Law 5/2019 on real estate credit agreements) of 15 March 2019 (BOE No 65 of 16 March 2019, p. 26329) contains a third transitional provision on the special rules for enforcement proceedings in progress upon the entry into force of Law 1/2013. Under that provision, defendants in enforcement proceedings pending on the date of entry into force of Law 5/2019 in which the 10-day period for objecting to enforcement laid down in Article 556(1) of the LEC had expired on the date of entry into force of Law 1/2013, have a further 10-day period in which to lodge an extraordinary application objecting to enforcement based on the existence of unfair terms. The right thus conferred by that transitional provision applies to all enforcement proceedings which have not resulted in the purchaser of the property taking possession, provided, in particular, that the court has not already verified of its own motion whether the terms of the contract are unfair.

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

- 16 By agreement concluded by an authentic instrument of 6 May 2005, Ibercaja Banco granted PO and MA a mortgage loan in the amount of EUR 198 400, repayable before 31 May 2040. That loan was secured by way of a mortgage over a single-family dwelling, valued at EUR 299 290.

- 17 The loan was taken out at a fixed rate of 2.75% per annum until 30 November 2005, then at a variable rate from that date until the end of the agreement. In accordance with clause 3*bis* of that agreement, the variable rate resulted from the addition of the constant margin, or constant differential, to the reference rate, that constant margin or differential being fixed for the entire duration of the agreement at 0.95 points, or less if the objective connecting conditions stipulated were met. It was in any event agreed that the minimum differential applied to the reference rate would be 0.50% ('the floor clause'). The annual nominal rate of default interest, provided for in clause 6 of that agreement, was set at 19% ('the default interest clause'). In addition, clause 6*bis* of the agreement stipulated that the bank could claim the full amount of the loan in case of default in payment of any amount due ('the accelerated payment clause').
- 18 Since MA and PO failed to pay the monthly instalments for the period from 31 May to 31 October 2014, Ibercaja Banco filed an application, on 30 December 2014, for mortgage enforcement proceedings. It claimed the amount of EUR 164 676.53 from MA and PO, corresponding to the capital and interest due and unpaid as at 5 November 2014, plus the amount of EUR 49 402, calculated provisionally, without prejudice to a subsequent adjustment of default interest, at the annual nominal rate of 12% from the closing of the account on 5 November 2014 until full payment.
- 19 By order of 26 January 2015, the court having jurisdiction ordered enforcement of the mortgage instrument held by Ibercaja Banco, authorised enforcement against MA and PO for the amount claimed, ordered them to pay and granted them a period of 10 days to object to enforcement in accordance with Article 695 of the LEC. On the same date, the registry of that court requested the Registro de la propiedad (Land Registry, Spain) to provide a certificate of ownership and other rights *in rem* and a certificate of the existence of a mortgage in favour of Ibercaja Banco.
- 20 That order and that request were served on MA and PO on 9 February 2015 and 18 February 2015 respectively.
- 21 Following the death of PO, his heirs at law, SP and JK, were recognised as parties to the proceedings by order of 9 June 2016.
- 22 By order of 28 June 2016, issued at the request of Ibercaja Banco, the enforcing court organised an auction of the mortgaged property, at which nobody bid. Ibercaja Banco requested that the property be awarded to it for the sum of EUR 179 574, while at the same time indicating that it intended to transfer the rights to acquire the property to Residencial Murillo SA, with the latter's consent. Ibercaja Banco provided proof that the abovementioned sum had been lodged, which corresponded to the amount for which the property was to be awarded.
- 23 On 25 October 2016, Ibercaja Banco claimed payment of the costs, assessed at EUR 2 886.19, and interest in the amount of EUR 32 538.28, that amount being obtained by applying a rate of 12% in accordance with the provisions of Law 1/2013. That claim was notified to the defendant against whom enforcement was sought.
- 24 On 9 November 2016, MA lodged a written objection to the claim for interest, contending that the default interest clause and the floor clause were unfair.
- 25 By order of 8 March 2017, the Juzgado de Primera Instancia No 2 de Zaragoza (Court of First Instance No 2, Saragossa, Spain), after finding that the accelerated repayment clause could be

unfair, decided, as part of a measure of organisation of procedure, to examine whether the terms of the enforceable instrument were unfair. It granted the parties 15 days to enable them to submit their observations in that regard and on a possible stay of proceedings.

- 26 Ibercaja Banco objected to the stay of proceedings and argued that the unfairness of the terms of the contract could no longer be established, on the ground that the rights connected with the award of property had been transferred and that the assessment of costs had been approved. Ibercaja Banco noted that, in any event, it had not claimed payment of default interest at the rate of 19% and that several repayment instalments had not been paid when the account was closed.
- 27 By order of 20 November 2017, the Juzgado de Primera Instancia No 2 de Zaragoza (Court of First Instance No 2, Saragossa) held that the accelerated repayment clause was unfair and ordered enforcement to be stayed, without costs being awarded. Ibercaja Banco lodged an appeal against that order before the Audiencia Provincial de Zaragoza (Provincial Court, Saragossa, Spain).
- 28 By order of 28 March 2018, the appeal court varied the order of 20 November 2017 and ordered the continuation of the enforcement proceedings, on the ground that the unfairness of the terms of the loan agreement could no longer be examined, since that agreement had already taken effect, the mortgage guarantee had already been enforced and the right of ownership had been transferred. The appeal court thus based its decision on the principle of legal certainty in pre-existing property relationships.
- 29 By order of 31 July 2018, the Juzgado de Primera Instancia No 2 de Zaragoza (Court of First Instance No 2, Saragossa) dismissed the objection regarding the determination of the amount of interest and, therefore, approved the amount of EUR 32 389.89, on the ground that, since the proceedings had been brought after Law 1/2013 without any objection having been lodged, the potentially unfair nature of the terms could no longer be examined due to the force of *res judicata* attaching to the order of 26 January 2015.
- 30 MA brought an appeal against that order before the Audiencia Provincial de Zaragoza (Provincial Court, Saragossa).
- 31 That court states that, in accordance with the procedural rules governing mortgage enforcement proceedings, laid down in Spanish law, the court is required, at the first stage of the proceedings, to examine of its own motion, pursuant to Article 552 of the LEC, whether the terms in the mortgage loan agreement forming the basis of the order for enforcement are unfair. That examination entails a negative assessment, in the sense that the court does not provide, in the decision authorising enforcement of the mortgage, any express statement of reasons with regard to terms other than those regarded as unfair. Consequently, the national courts cannot raise the unfairness of the terms at a subsequent stage of the proceedings, and likewise the consumer who does not lodge an objection to enforcement, within the prescribed time limit, cannot raise such unfairness of the terms in the same proceedings or in subsequent declaratory proceedings. The question arises, therefore, whether those procedural rules comply with Article 6(1) of Directive 93/13 and with the principle of effectiveness.
- 32 In addition, the referring court asks from what point in time the mortgage enforcement proceedings must be regarded as completed with regard to the examination of the unfairness

of contractual terms either by the court acting of its own motion, or at the request of the party against whom enforcement is sought. More specifically, the question arises whether those proceedings are thus completed when the mortgage security was realised, the mortgaged property was sold and the ownership rights in that property were transferred or whether, on the contrary, those proceedings are not thus completed after the transfer of ownership and an examination of the unfairness of contractual terms remains possible until the time when the debtor is evicted from the property, which could lead to the annulment of the mortgage enforcement proceedings or affect the conditions under which the property was auctioned.

33 In those circumstances the Audiencia Provincial de Zaragoza (Provincial Court, Saragossa) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is national legislation compatible with the principle of effectiveness provided for in Article 6(1) of [Directive 93/13], as interpreted by the Court of Justice, where it may be inferred from that national legislation that, if a particular unfair term withstood an initial review conducted by a court of its own motion when making an enforcement order [– negative review of the validity of the terms’ content –], that review prevents the same court from subsequently assessing that term of its own motion where the factual and legal elements [enabling that court to establish that unfairness] existed from the outset, even if that initial review did not express, in the operative part or in the grounds, any considerations on the validity of the terms?
- (2) Where factual and legal elements exist which determine the unfairness of a term in a consumer contract and the party against whom enforcement is sought fails to rely on that unfairness in the application objecting to enforcement laid down for that purpose by the Law, can that party, following the resolution of that application, make a further preliminary application aimed at determining whether one or more other terms is/are unfair when that party could have relied on those terms at the outset in the ordinary procedural step provided for in the Law? In short, is a time-barring effect created which prevents the consumer from raising again the issue of unfairness of another term in the same enforcement proceedings, and even in subsequent declaratory proceedings?
- (3) If the conclusion that the party is not entitled to make a second or subsequent application objecting to the enforcement proceedings, in order to allege the unfairness of a term which that party could have raised earlier because the necessary factual and legal elements had already been determined, is held to be compatible with Directive 93/13, can this serve as a basis for use as a means whereby the court, having been alerted to the unfairness of that term, is able to exercise its power of review of its own motion?
- (4) Once the sale at auction has been approved and the property awarded, possibly to the same creditor, and the ownership of the property provided as security, already realised, has even been transferred, is it compatible with EU law to apply an interpretation according to which (i) after the proceedings have concluded and the objective of such proceedings has been fulfilled, that is to say, the security has been realised, a debtor may make further applications for a declaration that an unfair term is invalid, entailing an effect on the enforcement proceedings or (ii) after the transfer has been completed, possibly in favour of the same creditor, and entered in the Land Registry, a court may of its own motion carry out a review which results in the entire enforcement proceedings

being annulled or ultimately affects the amounts covered by the mortgage, potentially affecting the terms under which the bids were made?’

Consideration of the questions referred

The first to third questions

- 34 By its first to third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation which, by virtue of the effect of *res judicata* and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings, nor a consumer, after the expiry of the period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings, where the potential unfairness of those same terms has already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but the judicial decision authorising the mortgage enforcement does not contain any grounds, even of a summary nature, attesting to the existence of that examination, nor state that the assessment of that court at the end of that examination could no longer be called into question if an objection were not lodged within the aforementioned period.
- 35 According to settled case-law of the Court, 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 or her bargaining power and his or her level of knowledge (see, in particular, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 40 and the case-law cited).
- 36 As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on consumers. It 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, in particular, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 41 and the case-law cited).
- 37 In that context, the Court has held on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 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 (judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 46 and the case-law cited; of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 58; and of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 43).
- 38 In addition, Directive 93/13, as is apparent from Article 7(1) in conjunction with the 24th recital of that directive, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraph 44 and the case-law cited).

- 39 While the Court has already defined, on several occasions and taking account of the requirements of Article 6(1) and Article 7(1) of Directive 93/13, the way in which national courts must ensure that the rights which consumers derive from that directive are protected, the fact remains that, in principle, EU law does not harmonise the procedures applicable to examining whether a contractual term is unfair and that those procedures accordingly fall within the domestic legal system of the Member States, by virtue of the principle of procedural autonomy of those States; nevertheless, those procedures must be no less favourable than those governing similar domestic actions (principle of equivalence) and not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, in particular, judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraphs 45 and 46 and the case-law cited).
- 40 In those circumstances, it must be determined whether those provisions require the court responsible for enforcement to review the possible unfairness of contractual terms notwithstanding the national procedural rules applying the principle of *res judicata* with regard to a judicial decision which does not expressly reflect any examination on that point.
- 41 In that connection, attention should be drawn to the importance, both for the EU legal order and for the national legal systems, of the principle of *res judicata*. Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive, after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights, can no longer be called into question (see, in particular, judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraphs 35 and 36, and of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 46).
- 42 Moreover, the Court has recognised that consumer protection is not absolute. In particular, it has held that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13 (see, in particular, judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 37, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68), subject, however, in accordance with the case-law recalled in paragraph 39 above, to compliance with the principles of equivalence and effectiveness.
- 43 As regards the principle of equivalence, it should be noted that there is no evidence before the Court which calls into question whether the national legislation at issue in the main proceedings complies with that principle. It is not apparent from the documents before the Court that national law allows the enforcing court to re-examine a judicial decision having the force of *res judicata*, even where this concerns possible infringement of domestic rules of public policy.
- 44 As regards the principle of effectiveness, the Court has held that every case in which the question arises whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, and, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgment of 22 April 2021, *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paragraph 53). The Court has held that the

need to comply with the principle of effectiveness cannot, however, be stretched so far as to make up fully for the complete inaction on the part of the consumer concerned (judgment of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 62).

- 45 In addition, the Court has stated that the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, particularly the rights deriving from Directive 93/13, implies a requirement for effective judicial protection, reaffirmed in Article 7(1) of that directive and also guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, which applies, inter alia, to the definition of detailed procedural rules relating to actions based on such rights (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 29 and the case-law cited).
- 46 In this respect, the Court has ruled that, without effective review of whether the terms of the contract concerned are unfair, observance of the rights conferred by Directive 93/13 cannot be guaranteed (judgment of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, paragraph 35 and the case-law cited).
- 47 It follows that the conditions laid down in the national laws, to which Article 6(1) of Directive 93/13 refers, may not adversely affect the substance of the right that consumers acquire under that provision not to be bound by a term deemed to be unfair (judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 71, and of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 51).
- 48 In the case in the main proceedings, it is apparent from the order for reference that when the enforcement proceedings were initiated, as already noted in part in paragraph 31 above, the court having jurisdiction examined of its own motion whether one of the terms of the contract at issue could be characterised as unfair. Having found that that was not the case, it ordered enforcement without expressly referring in its decision to the review which it had carried out of its own motion. It is also apparent therefrom that, on the expiry of a period of 10 days, from the date of service of that decision, for lodging an objection to enforcement, the defendant is time barred from challenging the enforcement, including on grounds relating to the potentially unfair nature of terms of a contract concluded with a seller or supplier.
- 49 Since none of the grounds of the decision by which the court ordered the initiation of the mortgage enforcement proceedings attested to the existence of a review of the unfairness of the terms of the instrument giving rise to those proceedings, the consumer was not informed of the existence of that review or, at least summarily, of the grounds on which the court found that the terms at issue were not unfair. Consequently, the consumer was unable to assess, with full knowledge of the facts, whether it was necessary to bring proceedings against that decision.
- 50 As the Advocate General observed in point 63 of his Opinion, the obligation of the national court to examine of its own motion whether contractual terms are unfair is justified by the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers. However, an effective review of the possible unfairness of contractual terms, as required by Directive 93/13, could not be guaranteed if the force of *res judicata* extended also to judicial decisions which do not indicate such a review.

- 51 On the other hand, it must be found that that protection would be ensured if, in the situation referred to in paragraphs 49 and 50 above, the national court expressly stated, in its decision authorising the mortgage enforcement, that it had carried out an examination of its own motion as to whether the terms of the instrument giving rise to the mortgage enforcement proceedings were unfair, that that examination, with at least summary reasons, had not revealed the existence of any unfair terms and that, in the absence of an objection within the period laid down by national law, the consumer would be time barred from asserting the possible unfairness of those terms.
- 52 It follows from the foregoing that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation which, by virtue of the effect of *res judicata* and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings, nor a consumer, after the expiry of the period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings, where the potential unfairness of those terms has already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but the judicial decision authorising the mortgage enforcement does not contain any grounds, even of a summary nature, attesting to the existence of that examination, nor state that the assessment of that court at the end of that examination could no longer be called into question if an objection were not lodged within the aforementioned period.

The fourth question

- 53 By its fourth question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation which does not allow a national court, acting of its own motion or at the request of a consumer, to examine whether contractual terms are unfair where the mortgage security has been realised, the mortgaged property sold and the ownership rights in the asset forming the subject matter of the contract at issue transferred to a third party.
- 54 It must be recalled that, in paragraph 50 of the judgment of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945), the Court held that Article 6(1) and Article 7(1) of Directive 93/13 do not apply to proceedings brought by the successful bidder in an auction of immovable property, following extrajudicial enforcement of a mortgage granted over that property by a consumer to a creditor acting in the course of trade, such proceedings having been brought for the purpose of protecting real rights lawfully acquired by the successful bidder, provided that, first, the proceedings are independent of the legal relationship between that creditor and the consumer and, secondly, the mortgage has been enforced, the immovable property sold, the real rights over that property transferred, and the consumer has not availed himself or herself of the legal remedies provided in that context. In particular, the Court pointed out, in paragraph 44 of that judgment, that the procedure in question did not concern the compulsory enforcement of the mortgage guarantee and was not based on the mortgage loan agreement.
- 55 By contrast, as the Advocate General observed in point 71 of his Opinion, the present case arises in the context of mortgage enforcement proceedings relating to the legal relationship between a consumer and a professional creditor who have concluded a mortgage loan agreement.
- 56 As is apparent from the answer provided to the first to third questions, where a judicial decision authorising the enforcement of a mortgage has been taken – while a court has previously

carried out an examination of its own motion of the unfairness of the terms of the instrument giving rise to those proceedings – but that decision does not contain any grounds, even of a summary nature, attesting to the existence of that examination, nor state that the assessment of that court at the end of that examination could no longer be called into question if an objection were not lodged within the period provided for, neither the force of *res judicata* nor time-barring can be relied upon as against the consumer for the purposes of depriving him or her of the protection against unfair terms which he or she derives from Article 6(1) and Article 7(1) of Directive 93/13, during the subsequent stages of those proceedings, such as a claim for payment of the interest due to a bank on account of the consumer's failure to perform the mortgage loan agreement in question, or during subsequent declaratory proceedings.

- 57 However, in a situation such as that in the main proceedings, in which the mortgage enforcement proceedings have ended and the ownership rights in that property have been transferred to a third party, a court, acting of its own motion or at the request of the consumer, can no longer carry out an examination of the unfairness of contractual terms which would lead to the annulment of the acts transferring ownership and call into question the legal certainty of the transfer of ownership already made to a third party.
- 58 Nevertheless, in such a situation, the consumer must, in accordance with Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, be able to rely, in separate subsequent proceedings, on the unfairness of the terms of the mortgage loan agreement in order to be able to exercise effectively and in full his or her rights under that directive, with a view to obtaining compensation for the financial damage caused by the application of those terms.
- 59 Consequently, the answer to the fourth question is that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding national legislation which does not allow a national court, acting of its own motion or at the request of the consumer, to examine the possible unfairness of contractual terms where the mortgage security has been realised, the mortgaged property sold and the ownership rights in that property transferred to a third party, provided that the consumer whose property was the subject of mortgage enforcement proceedings may assert his or her rights during subsequent proceedings with a view to obtaining compensation, under that directive, for the financial consequences resulting from the application of unfair terms.

Costs

- 60 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:

- 1. Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national legislation which, by virtue of the effect of *res judicata* and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings, nor a consumer, after the expiry of the**

period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings, where the potential unfairness of those terms has already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but the judicial decision authorising the mortgage enforcement does not contain any grounds, even of a summary nature, attesting to the existence of that examination, nor state that the assessment of that court at the end of that examination could no longer be called into question if an objection were not lodged within the aforementioned period.

2. Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding national legislation which does not allow a national court, acting of its own motion or at the request of the consumer, to examine the possible unfairness of contractual terms where the mortgage security has been realised, the mortgaged property sold and the ownership rights in that property transferred to a third party, provided that the consumer whose property was the subject of mortgage enforcement proceedings may assert his or her rights during subsequent proceedings with a view to obtaining compensation, under that directive, for the financial consequences resulting from the application of unfair terms.