



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 8 November 2012¹

Case C-415/11

Mohamed Aziz

v

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

(Reference for a preliminary ruling from the Juzgado de lo Mercantil No 3 de Barcelona (Spain))

(Unfair terms in consumer contracts — Mortgage loans — Possibilities for legal protection in enforcement proceedings — Significant imbalance in the parties' rights and obligations arising under the contract — Default interest — Acceleration of the loan by the creditor)

I – Introduction

1. The present reference for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.²
2. Mr Aziz, the claimant in the main proceedings, had concluded a loan agreement with the defendant bank in order to finance his own home and created a mortgage to secure that loan. Because of payment difficulties experienced by Mr Aziz, the defendant initiated proceedings for enforcement against the property in the simplified mortgage enforcement proceedings provided for under Spanish law.
3. After the conclusion of the enforcement proceedings, Mr Aziz complained in separate proceedings that a term of the loan agreement was unlawful. According to the referring court, it is not possible to claim that terms of the loan agreement are unfair in mortgage enforcement proceedings. Consumers may make such a complaint only in separate declaratory proceedings. However, they cannot influence enforcement with those proceedings. Against this background, the referring court asks about the compatibility with Directive 93/13 of national procedural rules which preclude the ground of objection that terms are unlawful. It also asks whether individual terms of the loan agreement are unlawful.
4. These proceedings therefore give the Court an opportunity to develop further its case-law on the effective guarantee of consumer protection by national procedural law. It is also necessary to consider the circumstances which must be taken into consideration in determining whether a contractual term is unfair.

¹ — Original language: German.

² — OJ 1993 L 95, p. 29, now amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 (OJ 2011 L 304, p. 64), which did not, however, introduce any amendments to the directive which are relevant to the present case.

II – Legal context

A – *European Union law*

5. Article 3 of Directive 93/13 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.

...

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

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

‘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.’

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 Directive 93/13, entitled ‘Terms referred to in Article 3(3)’, states:

‘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.

...’

B – *National law*

9. Judicial mortgage enforcement proceedings are regulated in Article 693 and Articles 695 to 698 of the *Ley de Enjuiciamiento Civil*.³

³ — Code of Civil Procedure (‘LEC’).

10. Article 695 of the LEC 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, provided a certificate from the registry is produced which shows the cancellation of the mortgage or, as appropriate, of the non-possessory pledge (registered pledge), or a notarial instrument attesting receipt of payment or cancellation 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 ...

2. If an objection is lodged under the preceding paragraph, the registry official of the office shall stay enforcement and summon the parties to a hearing before the court which ordered the enforcement and 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 ...’

11. Article 698 of the LEC provides:

‘1. Any application made by a debtor, third-party debtor or other interested party which is not covered by the preceding articles, including claims concerning nullity of title, maturity, certainty, extinguishment or the amount of the debt, shall be settled by an appropriate judgment, without 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 during the course of the subsequent proceedings, it may be requested that a security is provided for the decision taken by retaining all or part of the amount to be paid to the creditor in accordance with the procedure laid down in the present chapter.

The court shall order such retention on the basis of the documents submitted if it considers the grounds asserted to be sufficient. If the applicant is manifestly unable to pay sufficiently, the court may first require a reasonable security in respect of default interest and any other claims for damages on the part of the creditor.

3. If the creditor provides a reasonable security for the payment of the amount to be retained in accordance with the judgment referred to in the first paragraph, the retention shall be revoked.’

III – Facts and reference for a preliminary ruling

12. In July 2007, Mr Aziz concluded with Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)⁴ a mortgage loan agreement recorded in a public instrument executed before a notary. The loan agreement, for a principal sum of EUR 138 000, was essentially intended to pay off the outstanding loan from another credit establishment, for the purchase of a family home, amounting to EUR 115 821. The mortgaged property continued to be the family home, which was valued in the notarial loan agreement at EUR 194 000. At that time, Mr Aziz had a fixed monthly income of EUR 1 341.

13. The main terms of the agreement are summarised in the order for reference as follows: as the repayment period 33 annual payments are envisaged in the form of 396 monthly instalments, calculated from 1 August 2007 to 31 July 2040. The amount of each monthly instalment, so long as the initial interest rate did not vary, was EUR 701.04. Ordinary interest is provided for as follows: until 30 January 2008, a fixed nominal annual interest rate of 4.87%. From the following day until total repayment of the loan, the nominal interest rate becomes variable (Euribor plus 1.10%).

14. Clause 6 of the agreement provides that the borrower automatically incurs default, without the need for any notice or reminder whatsoever, if he fails to pay when due, even when the term is accelerated, any sum owing in respect of interest or repayment of principal. Default interest is to be calculated on a daily basis, at the rate of 18.75%.

15. It further states that the bank may accelerate the totality of the loan on grounds which include expiry of a stipulated time-limit without the debtor having fulfilled his obligation to pay any part of the principal or interest on the loan. The parties agreed to record this ground of acceleration in the Registry of Property, so that, if necessary, payment of the totality of the debt (principal plus interest) can be pursued by judicial means in accordance with Article 693 of the LEC.

16. Clause 11 concerns the creation of the mortgage. The mortgage covers the borrowed principal sum of EUR 138 000, agreed interest on annual payments and default interest up to the maximum sum of EUR 51 750, plus an additional EUR 13 800 for envisaged costs and disbursements. All the foregoing is without prejudice to the borrower's personal liability.

17. Clause 15 relates to judicial enforcement of the mortgage: in this clause, the valuation of the property given in the notarial loan agreement is specified (EUR 194 000). It is stipulated that the debt may be reclaimed in court proceedings, whether they be declaratory proceedings or ordinary or mortgage enforcement proceedings. The bank is expressly granted the right, in particular with a view to initiating enforcement, to make a unilateral quantification of the amount owed, by submitting, with the instrument creating the loan, a calculation of the sums outstanding, in the agreed notarial form, together with appropriate certificates.

18. From October 2007, Mr Aziz defaulted on the payment of certain monthly instalments (October 2007, December 2007, January, February, March, April and May 2008). Owing to those payments being in arrears, the bank charged the agreed default interest. From 31 July 2007 – the first due date under the loan – until 31 May 2008, Mr Aziz paid EUR 1 325.98 of the principal sum borrowed and EUR 6 656.44 in respect of contractual and default interest.

19. From the end of May 2008, Mr Aziz failed with some regularity to pay the monthly instalments on his loan. The bank exercised its right to accelerate the loan. As a result of the acceleration of the loan, it sought repayment of its total amount (principal plus interest).

⁴ — Hereinafter 'the bank'.

20. In October 2008, a representative of the bank appeared before a notary in order to execute an instrument determining the outstanding balance payable by Mr Aziz. In the notarial instrument, the debt was quantified – in accordance with generally accepted mathematical and financial criteria, having regard to the conditions stipulated by the parties, and in accordance with the certificates issued by the financial institution – as a total of EUR 139 764.76. This figure can be broken down as follows: EUR 136 674.02 principal amount, EUR 3 017.97 contractual interest, and EUR 72.77 default interest.

21. In January 2009, the bank sent a telegram to Mr Aziz notifying him of the commencement of legal proceedings to obtain the sum owing up to 16 October 2008, plus stipulated interest from that date until full payment, together with the associated costs. The telegram requiring him to pay the debt was delivered on 2 February 2009 to a family member of Mr Aziz at his home.

22. In March 2009, the bank brought an action for mortgage enforcement based on non-judicial documents under the LEC, demanding that Mr Aziz pay the sum of EUR 136 674.02 in respect of principal, EUR 90.74 in respect of accrued interest and EUR 41 902.21 in respect of interest and costs. When the application for mortgage enforcement was filed, the accrued instalments outstanding amounted to EUR 3 153.46. Execution was levied against the mortgaged property, which is the dwelling of Mr Aziz and his family.

23. The judicial mortgage enforcement proceedings were commenced before the Juzgado de Primera Instancia No 5 de Martorell (Court of First Instance No 5 of Martorell) (Spain). That court served an injunction on Mr Aziz requiring him to pay the debt, but he failed to do so.

24. The referring court points out that under Spanish law of civil procedure the grounds of objection in mortgage enforcement proceedings are limited. The only possible grounds of objection are extinguishment of the security or the secured obligation, an error in determining the amount due (where the debt is the closing balance of an account between the creditor and the party against whom enforcement is sought) and the existence of another, undischarged mortgage registered previously. None of those grounds is relevant here.

25. Under Article 698(1) of the LEC, any objection which the debtor may raise on the basis of other grounds (such as those concerning the invalidity of the loan agreement clauses giving rise to the debt) is to be dealt with in separate ordinary civil proceedings, without the enforcement proceedings being stayed. Under Article 698(2) of the LEC, the court with responsibility for the ordinary proceedings may ensure compliance with the judgment delivered therein only by retaining all or part of the auction proceeds to be paid to the creditor.

26. Mr Aziz neither entered an appearance in the enforcement proceedings nor raised any objection to enforcement. He likewise did not avail himself of the opportunity to ‘discharge the property’ and avoid an auction, in accordance with Article 693(3) of the LEC, by paying the unpaid contractual instalments at the time of enforcement, plus interest, costs and disbursements relating to those instalments.

27. Consequently, on 15 December 2009, an order was made for enforcement against the mortgaged property.

28. On 20 July 2010, there was a judicial auction of the mortgaged property, not attended by any bidders. Therefore the bank requested that the property be vested in it as representing 50% of the sum at which it was valued (EUR 97 200.00), as is possible under Spanish enforcement law, and this was actually done. Mr Aziz has thus lost ownership of his home and, furthermore, continues to owe the bank more than EUR 40 000 of the principal sum as well as the outstanding interest and costs. On 20 January 2011, the judicial commission instructed by the Juzgado de Primera Instancia No 5 de Martorell attended at the property subject to auction and transfer in order to grant the bank possession. Mr Aziz has been evicted from the dwelling.

29. In the main proceedings before the referring court, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona) (Spain), Mr Aziz, as claimant, is applying for a declaration that clause 15 is unfair and thus void, and accordingly, as the referring court explains, for the annulment of the enforcement proceedings. The referring court has stayed its proceedings pending a ruling on the questions referred for a preliminary ruling.

30. The Juzgado de lo Mercantil No 3 de Barcelona refers the following questions to the Court 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 [LEC], with its limitations regarding the grounds of objection available under Spanish procedural law, 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) This reference to the Court of Justice of the European Union is made so that the concept of disproportion can be expanded upon 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.'

31. In the proceedings before the Court, written observations were submitted and oral argument was presented by Mr Aziz, CatalunyaCaixa, the Spanish Government and the European Commission.

IV – Legal assessment

A – First question

1. Admissibility

32. By its first question the referring court would like to know whether a system of mortgage enforcement laid down in national procedural law which does not provide for a possible ground of objection to enforcement that terms of the mortgage loan agreement are unfair constitutes a limitation of consumer protection and thus infringes Directive 93/13.

33. The defendant bank in the main proceedings challenges the admissibility of this question. It claims that it is purely hypothetical and bears no relation to the main proceedings before the referring court. The dispute concerns only the question whether clause 15 is effective. The Spanish Government also rejects its admissibility. The question of the limitation of grounds of objection in enforcement proceedings may be relevant at best for the court hearing the enforcement proceedings. However, the enforcement proceedings in the main action have already been concluded. The first question is therefore irrelevant to the proceedings before the referring court, which is required to assess the effectiveness of a contractual term abstractly and in isolation from the enforcement proceedings which have taken place.

34. The Commission also considers the question regarding the possibilities for review available to the court responsible for enforcement to be hypothetical and thus inadmissible. It proposes that the question be reformulated. It is necessary to consider the question of the powers which must be conferred on the court hearing the *declaratory proceedings* against the background of the limitation of the grounds of objection in enforcement proceedings.

35. The parties are correct in their view that the question in its specific wording is hypothetical in so far as it is not actually the court hearing the enforcement proceedings that refers it. However, only the court hearing the enforcement proceedings is faced directly with the question of the possible grounds of objection in its proceedings and of the influence of Directive 93/13 on the possibilities for legal protection in enforcement proceedings.

36. Consequently, the question asked by the referring court should, as the Commission rightly suggests, be construed more broadly as referring to the possibilities which a consumer must have, at least in the declaratory proceedings before the referring court, for obtaining legal protection against enforcement. This question could also be hypothetical at first sight, since enforcement has already been completed. Nevertheless it is relevant to the decision.

37. In its order for reference, the referring court makes clear that the main proceedings also concern potential compensation following the completed enforcement of the mortgage. The question of legal protection against enforcement is therefore relevant to the decision taken by the referring court, which may be required, in accordance with the principle of effectiveness, subsequently to compensate for any deficiencies in the previous proceedings through its decision.

38. It will therefore have to be examined below what requirements Directive 93/13 imposes, in connection with enforcement, as regards the possibilities for the consumer to object that terms are unlawful.

2. Assessment

39. For the purpose of replying to the first question, it is appropriate to note, first, that 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.⁵

⁵ — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25; Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 29; and Case C-618/10 *Banco Español de Crédito* [2012] ECR, paragraph 39.

40. As regards that weaker position, Article 6(1) of Directive 93/13 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.⁶

41. In order to guarantee the protection intended by Directive 93/13, the Court has already stated on several occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract.⁷

42. It is in the light of those principles that the Court has therefore held that the national court is even 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.⁸

43. The present case concerns the question of the possibilities which must be available to a consumer for relying on the unlawfulness of a term of the loan agreement against the enforcement of the mortgage securing it.

44. In the absence of harmonisation of the national enforcement measures at European Union level, the definition of the detailed procedural rules is a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. The latitude enjoyed by the Member States is limited, however, by the principle of equivalence and the principle of effectiveness.⁹ A rule may not be less favourable than those governing similar domestic actions and may not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law.¹⁰

45. According to the principle of equivalence, the detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must be no less favourable than those governing similar domestic actions.¹¹ There are no problems in the present case in this regard. Article 698 of the LEC precludes in enforcement proceedings not only the ground of objection that terms are unlawful but, in general, all grounds of objection which might concern nullity of title.

46. It is necessary to examine more closely below observance of the principle of effectiveness. Under that principle, the organisation of national procedural law may not impair the assertion of the rights conferred on consumers in Directive 93/13. 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.¹²

6 — *Mostaza Claro*, cited in footnote 5, paragraph 36; *Asturcom Telecomunicaciones*, cited in footnote 5, paragraph 30; Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 47; and Case C-453/10 *Pereničová and Perenič* [2012] ECR, paragraph 28.

7 — *Banco Español de Crédito*, cited in footnote 5, paragraph 41 and the case-law cited.

8 — *Banco Español de Crédito*, cited in footnote 5, paragraph 42.

9 — *Banco Español de Crédito*, cited in footnote 5, paragraph 46.

10 — *Banco Español de Crédito*, cited in footnote 5, paragraph 46 and the case-law cited.

11 — Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 48.

12 — *Asturcom Telecomunicaciones*, cited in footnote 5, paragraph 39, and *Banco Español de Crédito*, cited in footnote 5, paragraph 49.

47. According to the description given by the referring court, the Spanish simplified mortgage enforcement proceedings appear to have only very limited possibilities for debtor protection with a view to an effective and quick realisation of a mortgage. With a few exceptions, which were not relevant here in the view of the referring court, a debtor must therefore accept the realisation of the mortgage regardless of any unfair terms. Only in separate declaratory proceedings, which concern the validity of title, can he lodge objections to the claim on which enforcement is based and thus complain that the terms used are unlawful.

48. However, this only gives the debtor the possibility of influencing the distribution of the proceeds of enforcement or of making claims for damages on the basis of enforcement. In addition, in these separate declaratory proceedings the court also has the possibility of ordering the retention of the auction proceeds, thereby ensuring that a claim for payment by the debtor against the creditor can also be realised.

49. Nevertheless, according to the order for reference, the court hearing the case does not have the possibility, either in the simplified enforcement proceedings themselves or in the separate declaratory proceedings, of ordering the provisional suspension of enforcement, that is the judicial auction of the property.

50. Consequently, even if the unlawful nature of a term in the loan agreement on which the mortgage was based were relied on vis-à-vis enforcement against the property, the consumer would not be able, under Spanish law, to prevent the judicial auction and the associated loss of ownership. The consumer is limited to subsequent legal protection in the form of damages and, as in the main proceedings, must accept the loss of his home.

51. Such a form of procedure impairs the effectiveness of the protection intended by Directive 93/13.

52. In particular where the mortgaged property is the debtor's own home, a mere claim for damages is not conducive to guaranteeing effectively the rights conferred on the consumer by Directive 93/13. It does not constitute effective protection against unfair terms if, in connection with such terms, a consumer is defenceless in accepting the realisation of a mortgage and thus the judicial auction of his home, the associated loss of ownership and eviction, and can only make claims for damages by way of subsequent legal protection.

53. Instead, Directive 93/13 requires that the consumer be provided with an effective legal remedy for examining whether the terms of his loan agreement are unlawful and that, if necessary, enforcement can thereby be prevented.

54. The judgment recently delivered in *Banco Español de Crédito* runs along similar lines. In that judgment, the Court ruled, in relation to a judicial order for payment procedure, that in order to safeguard the principle of effectiveness in connection with Directive 93/13 a national court is even required, before the adoption of the order for payment against which the consumer could then lodge an objection, to assess of its own motion whether terms contained in a contract are unfair, provided the court has all the legal and factual elements necessary for that task available to it.¹³ There is a significant risk that the consumer will not lodge the objection required.¹⁴

55. Does it also follow that the consumer must have the possibility to complain that terms are unfair *directly* in the enforcement proceedings and not only in separate proceedings? Doubts whether the *Banco Español de Crédito* case-law can be applied may arise because, in contrast to the order for payment procedure, in a case like the present one an enforcement order already exists in the form of

¹³ — *Banco Español de Crédito*, cited in footnote 5, paragraph 53.

¹⁴ — *Banco Español de Crédito*, cited in footnote 5, paragraphs 54 and 55.

the notarial instrument and it must be recognised that the creditor has an interest in seeking enforcement quickly. Through the procedural organisation of the enforcement proceedings themselves and a comprehensive exclusion of grounds of objection in those proceedings, the legislature pursues the aim of being able to execute enforceable claims quickly. Accordingly, it would not seem absolutely necessary to regard it a priori as an excessive impediment to the legal protection of the consumer if, by initiating proceedings, the consumer must first establish the conditions so that the court hearing the case can assess terms of the agreement.

56. However, it is not necessary to clarify this question definitively in the present case. As I have already explained when I examined admissibility, there is no need in the present case to answer the question whether the consumer must have the possibility explicitly *in the enforcement proceedings* to claim that a term of the loan agreement is unfair. Nor is it therefore necessary to clarify whether it can be inferred from *Banco Español de Crédito* that the court hearing the enforcement proceedings must also assess of its own motion the effectiveness of individual contractual terms which may have effects on enforcement.¹⁵ Lastly, the first question explicitly concerns the possible grounds of objection by the consumer and the referring court has not asked about the possibility of assessment of the court's own motion.

57. In the context of the present case, it is therefore important only that the principle of effectiveness requires in any event that the court hearing the declaratory proceedings has the possibility of staying the enforcement proceedings (provisionally) in order to stop enforcement until it has been assessed whether a term is unfair and thus of preventing the enforcement proceedings creating facts to the detriment of the consumer which would be difficult or even impossible to rectify.

3. Interim conclusion

58. The answer to the first question must therefore be that a system of levying execution, in reliance on notarial documents, on mortgaged or pledged property, in which the possible grounds of objection to enforcement are limited is incompatible with Directive 93/13 where the consumer cannot obtain effective legal protection, either in the enforcement proceedings themselves or in separate judicial proceedings for the assertion of the rights conferred in Directive 93/13, by the court being able to order the provisional suspension of enforcement.

B – *Second question*

59. The wording of the second question uses the term 'disproportion'; it thereby applies the terminology used in point 1(e) of the annex to Directive 93/13. The request for a preliminary ruling is however to be understood as meaning that by its second question the referring court is seeking an interpretation of the overall concept of 'imbalance' between the rights and obligations under the contract; in the annex to the directive, point 1(e) refers to 'disproportion' only in the special case of the payment of sums by way of compensation.

60. By its second question, the referring court is, in essence, seeking more precise clarification of the concept of imbalance within the meaning of Article 3(1) of Directive 93/13. Under that provision, a contractual term which has not been individually negotiated must 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.

¹⁵ — At least in cases where the court responsible for enforcement has all the legal and factual elements necessary for the task available to it; see *Banco Español de Crédito*, cited in footnote 5, paragraph 53.

61. The referring court mentions three specific terms which form part of the agreement at issue in the main proceedings. According to the referring court, those terms were imposed on a consumer unilaterally and therefore fall within the scope of the directive.

1. Admissibility

62. However, according to the bank and the Spanish Government, the main proceedings have thus far related to only one of the terms cited by the referring court. Nevertheless, an answer in respect of the other terms is not irrelevant to the decision in the main proceedings. It cannot be ruled out that an overall analysis of the individual contractual terms and their legal assessment will also have effects on the interpretation of the term at issue in the main proceedings.

63. Furthermore, it has already been pointed out in connection with the examination of the admissibility of the first question that, according to the referring court, the subject-matter of the main proceedings extends to the possible ineffectiveness of the enforcement proceedings. It is conceivable that the legal assessment of the terms described in the second question, which the referring court moreover has to examine also of its own motion, could also have consequences for the effectiveness of the enforcement proceedings. The second question is therefore admissible in its entirety.

2. Assessment

a) General remarks

64. The Court has pointed out on several occasions that, in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Article 3 of Directive 93/13 merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated.¹⁶

65. There must be specific assessment of a particular term, in the light of the circumstances of the case, to assess whether it is unfair.¹⁷ Under Article 4(1) of Directive 93/13, that assessment must take into account the nature of the goods or services for which the contract was concluded and refer, 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.

66. According to the Court's settled case-law, it is for the national court to determine whether a contractual term satisfies the criteria in order to be regarded as unfair within the meaning of Article 3(1) of Directive 93/13. Only the national court can comprehensively assess the consequences of the term in question under the law applicable to the contract. This requires that consideration be given to the national law.¹⁸

67. The final assessment of the unfair nature of the contested terms lies with the national court and not the Court of Justice.¹⁹ The Court's task is only to set out the general criteria permitting an assessment as to whether the contractual terms subject to the provisions of the directive are unfair.²⁰

16 — Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 37.

17 — *VB Pénzügyi Lízing*, cited in footnote 6, paragraph 44, and Case C-472/10 *Invitel* [2012] ECR, paragraph 22.

18 — *Invitel*, cited in footnote 17, paragraph 30.

19 — *Pannon GSM*, cited in footnote 16, paragraph 42; *Mostaza Claro*, cited in footnote 6, paragraph 22; and *VB Pénzügyi Lízing*, cited in footnote 6, paragraphs 43 and 44.

20 — Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, paragraph 33, and *VB Pénzügyi Lízing*, cited in footnote 6, paragraph 40.

b) Acceleration clause

68. The first kind of term referred to in the second question is acceleration clauses in contracts planned to last for a considerable time for events of default occurring within a very limited specific period.

69. In the case at issue, clause 6 of the loan agreement provides that, in the event of default by the debtor in respect of just one of the total of 396 monthly instalments to be paid during the 33-year term of the agreement, the lending bank may automatically call in the totality of the loan.

70. The Commission considers this contractual term to be manifestly effective, since the non-payment of even one instalment constitutes a breach of the borrower's main contractual obligation and the lender cannot reasonably be expected to adhere further to the agreement.

71. It is not possible to assess whether a term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, without a comparison with the legal situation under national law in the event that the parties themselves have not made any contractual provision. Only where the contractual term treats the consumer less favourably than the statutory provisions might the term actually cause an unfair shift in the rights and obligations arising under the contract, to the detriment of the consumer.

72. Even if a contractual term treats the consumer less favourably than the statutory provisions, this does not inevitably shift the contractual balance such that this must be regarded as unfair within the meaning of Article 3 of Directive 93/13.

73. In fact, Article 3 of Directive 93/13 expressly requires that a contractual term be regarded as unfair only 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. Consequently, the principle of contractual freedom is observed and it is recognised that in many cases parties have a legitimate interest in organising their contractual relations in a manner which derogates from the statutory provisions.

74. The question whether the shift resulting from the contractual term, in relation to the statutory provisions, in the rights and obligations arising under the contract to the detriment of the consumer causes a significant imbalance can only be answered by means of a comprehensive analysis of all the individual circumstances of the agreement, as set out in Article 4(1) of the directive. A significant imbalance should be considered to be unjustified in particular where the consumer's rights and obligations are curtailed to such an extent that the party stipulating the contractual conditions could not assume, in accordance with the requirement of good faith, that the consumer would have agreed to such a provision in individual contract negotiations.

75. In this connection, it is important *inter alia* whether such contractual terms are common, that is to say they are used regularly in legal relations in similar contracts, or are surprising, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection.

76. In the main proceedings, it is therefore relevant, first of all, how the statutory provisions on the termination of a loan are organised, in particular the conditions under which, in the event that the debtor defaults on individual instalments, the lender is entitled to terminate and call in the totality of the loan. The term in question will then have to be assessed with reference to this criterion.

77. In this connection, it should be borne in mind, on the one hand, that the obligation to pay instalments is the borrower's main contractual obligation. In answering the question whether the lending bank can no longer be reasonably expected to adhere to the agreement following non-payment of even just one instalment, it should be taken into consideration, on the other hand, that with the mortgage the bank was provided with a security and that default in just one instalment may stem from a simple error and does not necessarily point to payment difficulties on the part of the borrower. Furthermore, the amount of the loan granted, its term and its importance to the existence of the borrower will have to be balanced against the interest of the lender in being able to extricate itself from the loan agreement following the non-payment of just one instalment.

78. Lastly, the referring court must also pay attention to the possibilities which national law, including national procedural law, gives the consumer for remedying the effects of the totality of the loan being called in. In this connection, the possibility accorded to the borrower under Article 693(3) of the LEC to eliminate the effects of termination/total repayment by settling due instalments is of particular relevance. This must be taken into account in the necessary overall assessment of whether the consumer is placed at a disproportionate disadvantage, contrary to the requirement of good faith, by the term in question.

79. The above observations show that, contrary to the view taken by the Commission, which considers the term in question to be effective in abstract terms and in isolation from specific legal systems and circumstances, the national court alone is able to conduct the necessary examination of unfairness on the basis of Article 3 of Directive 93/13.

80. It must therefore be stated as an interim conclusion that it is for the national court to assess, on the basis of Article 3(1) and (3) of Directive 93/13, whether a term in the general terms and conditions of consumer contracts is unfair. In connection with a term concerning the acceleration of a property loan by the creditor, the court must assess in particular the extent to which the term derogates from the otherwise relevant statutory provisions, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection.

c) Default interest clause

81. In addition, the second question concerns a default interest clause. In the case at issue, under clause 6 of the contested agreement in the main proceedings, if the borrower incurs default, without the need for any notice or reminder whatsoever, he must pay default interest of 18.75% per annum on the capital sum due, even when the term is accelerated. The ordinary interest rate for the loan, on the other hand, was initially fixed at a nominal rate of 4.87%.

82. As regards the general approach to the legal assessment of the question whether such a default interest clause constitutes a contractual term which is ineffective under Article 3(1) of Directive 93/13, reference can be made at this point to the general statements made above.²¹

83. The national court must first make a comparison with the statutory interest rate in order then to review, in a further step and having regard to all the circumstances of the individual case, whether a derogation to the detriment of the consumer, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract.²²

²¹ — See points 64 to 67 of this Opinion.

²² — In *Banco Español de Crédito*, cited in footnote 5, the Spanish court had, of its own motion, reduced an interest rate contractually agreed at 29% to 19% in the light of the statutory rate of interest and the rates of interest for late payment included in national budget laws from 1990 to 2008.

84. In the annex to Directive 93/13, to which Article 3(3) makes reference, terms requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation are expressly mentioned as an example of an unfair term under point 1(e). However, the list contained in the annex to the directive is, pursuant to Article 3(3), merely indicative of the terms which may be regarded as unfair and is non-exhaustive. Consequently, the unfairness of a term cannot automatically be inferred solely because it is mentioned in the annex. Nevertheless, its mention may form an important basis for the court's assessment of whether the term is unfair.²³

85. In the specific analysis, it may be important what default interest is normally agreed in mortgage loans. If, as the Commission points out, Spanish law limits default interest to 2.5 times the statutory interest rate in the case of other consumer loans, this may be an indication of a possible imbalance and of the fact that the banks' refinancing costs for mortgage loans are generally much lower, on account of the security provided, than for other consumer loans.

86. In the assessment to be carried out, it must also be taken into consideration what purposes may be lawfully pursued by default interest under national law and whether it constitutes, for example, merely a flat-rate amount to cover damage caused by default or is also intended to encourage the parties to observe the agreement. The purposes lawfully pursued by default interest may be different from one Member State to the next. It is not the spirit and purpose of Directive 93/13 to level out differences between national legal cultures.

87. If default interest is intended merely as flat-rate compensation for damage caused by default, a default interest rate will be substantially excessive if it is much higher than the accepted actual damage caused by default. It is clear, however, that a high default interest rate motivates the debtor not to default on his contractual obligations and to rectify quickly any default which has already occurred. If default interest under national law is intended to encourage observance of the agreement and thus the maintenance of payment behaviour, it should be regarded as unfair only if it is much higher than is necessary to achieve that aim.

88. It must therefore be stated as an interim conclusion that in connection with a default interest clause the court must examine in particular the extent to which the interest rate derogates from the otherwise applicable statutory interest rate and whether it is disproportionate to the purpose pursued by the default interest.

d) Clause concerning the unilateral determination of the amount owed

89. Lastly, the second question asks for the concept of disproportion to be expanded upon with regard to clause 15 of the contractual conditions at issue in the main proceedings. That clause provides that for the enforcement proceedings the lender may unilaterally determine the balance of the loan and can thus autonomously create an important condition for the conduct of the simplified mortgage enforcement proceedings. In order to explain the legislative context in which this term becomes important, the referring court states that it is not possible for the debtor to object to this quantification in enforcement proceedings and that he is required to resort to separate declaratory proceedings. However, the declaratory proceedings do not halt the progress of the enforcement proceedings and the debtor will therefore have already lost the property mortgaged when the declaratory proceedings are decided.

90. Here too it is for the national court to take into consideration all the specific circumstances of the individual case in its decision. Nevertheless, the following criteria are applicable.

²³ — *Invitel*, cited in footnote 17, paragraph 26.

91. The starting point must be the question of how the legal situation – here the enforcement proceedings – would appear if the agreement did not contain the term in question.

92. I understand the statements made by the referring court and by the parties to mean that without such a term the bank financing the loan would first have to bring legal proceedings against the borrower in order to quantify its outstanding claim, so as to be able to prove the necessary precisely quantified amount in the enforcement proceedings. The unilateral quantification by the creditor makes these prior declaratory proceedings unnecessary. This means that the borrower cannot challenge the amount of the enforceable claim before enforcement. The referring court makes clear, clearly in accordance with the statements made by the parties, that the unilaterally quantified amount has no binding effect between the parties and can therefore be challenged by the debtor in subsequent declaratory proceedings, and that the debtor does not suffer any disadvantages with regard to the burden of proof in this regard.

93. The reduction in legal protection prior to enforcement as a result of the term constitutes a shift in the rights and obligations arising under the contract, to the detriment of the consumer. However, this does not automatically mean that, contrary to the requirement of good faith, this causes a significant imbalance in the rights and obligations arising under the contract, to the detriment of the consumer. This must be ascertained definitively through an overall assessment of the advantages and disadvantages associated with the term for both parties to the contract.

94. For the bank financing the loan, the term in question means that the mortgage granted as a security can be realised more quickly and more easily. This increases the value of the security granted by the debtor, which is also in his economic interest. Conversely, the debtor/consumer is exposed to the risk of losing the security before it has been established to what extent the bank financing the loan may settle its claim from the security.

95. The national court must take its decision based on the overall assessment in the light of the other specific circumstances of the individual case. These include the question whether the debtor may not lodge objections in enforcement proceedings. This is suggested by the wording of Article 695(1) of the LEC. It is also relevant how the unilateral quantification procedure is organised, what powers of review are enjoyed by the notary engaged for that purpose and how the fact that, as the Spanish Government has argued, only banks subject to State banking supervision are entitled to use the term in question is to be evaluated.

96. It must be stated as an interim conclusion that in connection with a clause concerning the unilateral determination of the amount owed particular consideration should be given to the effects of such a term in national procedural law.

V – Conclusion

97. I therefore propose that the Court rule as follows:

- (1) A system of levying execution, in reliance on notarial documents, on mortgaged or pledged property, in which the possible grounds of objection to enforcement are limited is incompatible with Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts where the consumer cannot obtain effective legal protection, either in the enforcement proceedings themselves or in separate judicial proceedings for the assertion of the rights conferred in Directive 93/13, by the court being able to order the provisional suspension of enforcement.
- (2) It is for the national court to assess, on the basis of Article 3(1) and (3) of Directive 93/13, whether a term in the general terms and conditions of consumer contracts is unfair.

- (a) With regard to a term concerning the acceleration of a property loan by the creditor, the court must assess in particular the extent to which the term derogates from the otherwise relevant statutory provisions, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection.
- (b) With regard to a default interest clause, the court must examine in particular the extent to which the interest rate derogates from the otherwise applicable statutory interest rate and whether it is disproportionate to the purpose pursued by the default interest.
- (c) With regard to a clause concerning the unilateral determination of the amount owed particular consideration should be given to the effects of such a term in national procedural law.