



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 14 January 2016¹

Joined Cases C-381/14 and C-385/14

Jorge Sales Sinués
v
Caixabank SA
and
Youssouf Drame Ba
v
Catalunya Caixa SA (Catalunya Banc SA)

(Request for a preliminary ruling from the Juzgado de lo Mercantil no 9 de Barcelona (Commercial Court No 9, Barcelona (Spain)))

(Directive 93/13/EEC — Consumer contracts — Mortgage loan agreement — Unfair terms — Actions for the annulment of a term of an agreement — Consumer protection association — Collective actions for an injunction — Stay of individual proceedings — Principles of equivalence and effectiveness)

I – Introduction

1. The present cases concern the doubts which the Juzgado de lo Mercantil no 9 de Barcelona (Commercial Court No 9, Barcelona) entertains regarding the consistency of Spanish legislation relating to precedence in civil proceedings with Article 7 of Directive 93/13/EEC² and, consequently, the consistency with that article of the staying of individual actions pending a final decision concluding collective proceedings brought by a consumers and users association.
2. The requests for a preliminary ruling were submitted in the context of disputes between two consumers and two banks involving individual actions for the annulment of ‘floor’ clauses in mortgage loan agreements.
3. These cases present the Court, inter alia, with an opportunity to clarify its case-law on the nature of individual actions and collective actions and the relationship between them.

1 — Original language: French.

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

II – Legal framework

A – EU law

4. Article 3(1) of Directive 93/13 provides:

‘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.’

5. Article 4(1) of that directive states:

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

6. Article 6(1) of the directive is drafted as follows:

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

7. Article 7(1) and (2) of Directive 93/13 provides:

‘1. 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.

2. The means referred to in paragraph 1 are to include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate effective means to prevent the continued use of such terms.

...’

B – Spanish law

8. Article 13 of the Code of Civil Procedure (*Ley de enjuiciamiento*) of 7 January 2000 (*BOE* No 7 of 8 January 2000, p. 575, ‘the Code of Civil Procedure’) provides:

‘1. While legal proceedings are pending, any person who is able to show a direct, legitimate interest in the outcome of the action may be admitted as a claimant or defendant in the action.

In particular, any consumer or user may intervene in proceedings commenced by legally recognised bodies whose object is to protect the interests of consumers and users.

2. An application to intervene shall not result in a stay of the proceedings. After hearing the parties to the proceedings, the court shall make an order deciding the application within a general period of 10 days.

3. The grant of leave to intervene shall not have any retroactive effect in the proceedings. However, the intervener shall be regarded as a party to the proceedings for all intents and purposes and shall be entitled to support the claims made by co-litigants or those which the intervener himself makes if he has a procedural right to do so, even if his co-litigants abandon their action, acquiesce to their opponent's claim, discontinue or withdraw from the proceedings for any other reason.

The intervener shall also be entitled to put forward such arguments as may be necessary to his case if he has not yet put forward those arguments because they belong to a stage in the proceedings prior to his being granted leave to intervene. The court registrar shall in any event communicate such arguments to the other parties within a period of five days.

Similarly, the intervener may pursue the prescribed legal remedies in respect of decisions which he regards as prejudicial to his own interests, even if his co-litigants consent to such decisions.'

9. Article 15 of the Code of Civil Procedure is drafted as follows:

'1. In proceedings brought by associations or other bodies established in order to protect the rights and interests of consumers and users, and in proceedings brought by groups of concerned persons, any person that has suffered harm as a result of consuming the product or using the service which gave rise to the proceedings shall be invited to join the proceedings in order to enforce his individual rights and interests. The invitation shall be issued by the court registrar, who shall publish a notice concerning the admission of claims in communication media published in the territory in which the said rights or interests were affected.

...

3. In the case of proceedings in which the harmful event affects a number of persons who are unidentified or difficult to identify, the invitation shall have the effect of staying the proceedings for a period not exceeding two months to be determined by the court registrar in each case in accordance with the circumstances or complexity of the harmful event and the difficulties involved in identifying and locating the injured parties. The proceedings shall resume with the participation of all consumers who have accepted the invitation, and consumers and users shall not be allowed subsequently to enter an individual appearance, without prejudice to their entitlement to assert their rights or interests in accordance with the provisions of Articles 221 and 519 of this law.

4. The provisions of the preceding paragraphs shall not apply to injunctive proceedings brought for the purpose of defending collective interests or the interests of consumers and users in general.'

10. Article 43 of the Code of Civil Procedure provides:

'Where, in order to give a ruling on the subject-matter of a dispute, it is necessary to decide an issue which itself constitutes the main subject-matter of other proceedings pending before the same or a different civil court, and where it is not possible for the two actions to be joined, the court may, on the application of both parties or on the application of one of them and after hearing the other party, order the proceedings to be stayed as they currently stand, until such time as the proceedings concerning the preliminary issue are concluded.'

11. As regards the effects of judgments given in proceedings brought by consumers or users associations, Article 221 of the Code of Civil Procedure states:

‘1. Without prejudice to the provisions of the preceding articles, judgments given on claims brought by consumers or users associations having the legal capacity referred to in Article 11 of this law shall be subject to the following rules:

1a. If the claim is for pecuniary damages, or an order laying down an obligation to do or to refrain from doing something or to give a specific or general thing, the judgment upholding the claim shall identify individually which consumers and users are to be regarded as entitled to benefit from the judgment, in accordance with the laws for their protection.

Where it is not possible to identify such consumers and users individually, the judgment shall set out the facts, characteristics and conditions required in order to be able to demand payment and, where appropriate, apply for execution or participate therein in the event that enforcement is sought by the claimant association.

2a. Where, as a preliminary finding or as the court’s principal or sole ruling, a given activity or particular conduct is declared unlawful or inconsistent with the law, the court shall indicate in its judgment whether, in accordance with the laws on the protection of consumers and users, that declaration has procedural consequences that are not limited to the parties to the relevant proceedings.

3a. Where particular consumers or users have participated in the proceedings, the judgment shall include an express ruling on their claims.

2. In any judgment granting an application for an injunction to protect collective interests or the interests of consumers and users in general, the court may, if it considers it appropriate, order that the judgment be published in full or in part, at the defendant’s expense and, where the effects of the infringement may persist over time, may make a rectifying declaration.’

12. Under Article 222 of the Code of Civil Procedure:

‘1. The authority 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 in which the first judgment was given.

2. The authority of *res judicata* shall attach to claims made in the main application and to counter-claims and to the matters referred to in Article 408(1) and (2) of this law.

Facts subsequent to the expiry of the time-limit 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 authority 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 authority of *res judicata* applies to them pursuant to provisions of the law.’

13. Under Article 519 of the Code of Civil Procedure:

‘Where, in a judgment as referred to in the first rule under Article 221, it has not been possible to identify individually which consumers and users are to be regarded as entitled to benefit from that judgment, the court having jurisdiction for enforcement shall, on the application of one or more interested parties and after hearing the party against which judgment was given, make an order determining whether, in accordance with the facts, characteristics and conditions specified in the judgment, the applicants are entitled to benefit from the judgment. With a copy of that order, the persons whose entitlement is recognised may apply for enforcement. The Public Prosecutor may apply for the enforcement of the judgment for the benefit of the consumers and users affected.’

III – The facts of the dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

14. On 20 October 2005, Mr Sales Sinués concluded an agreement with Caixabank SA (‘Caixabank’) for the novation of a mortgage loan. On 7 February 2005, Mr Drame Ba concluded a mortgage loan agreement with Catalunya Caixa SA (Catalunya Bank SA) (‘Catalunya Caixa’). Both agreements were concluded at nominal interest rates, the first for a capital sum of EUR 78 132 and the second for a capital sum of EUR 209 000. They both contained a ‘floor’ clause, stipulating a lower limit on the variation of the nominal interest applicable on successive annual renewals, the first fixed at 2.85% and the second at 3.75%, and an upper limit, or ceiling, on the interest rate, fixed at 12%.

15. The agreements also contained a clause under which the fixed nominal interest rate applied from the date of the agreement until 1 October 2006 and 31 August 2005, respectively. From the day following those dates until full repayment of the loans, variable nominal interest was applicable, based on an index, namely EURIBOR, plus 0.6% and 0.5% respectively.

16. On 10 October and 25 October 2013 respectively, Mr Sales Sinués and Mr Drame Ba each brought an individual action for the annulment of the floor clauses in their mortgage loan agreements. In their actions, the applicants in the main proceedings argue that the floor clauses had been imposed on them unilaterally by the banks as general conditions of the agreements and without any negotiation. Consequently, they request the referring court, first, to declare the clauses null and void as a result of a lack of transparency and the resulting imbalance which was to their detriment and, secondly, to order the reimbursement of sums unduly received by the banks under those clauses.

17. Prior to the commencement of the applicants’ actions, on 11 November 2010, the consumers and users association ADICAE (Asociación de Usuarios de Bancos Cajas y Seguros)³ brought before the Juzgado de lo Mercantil No 11 de Madrid (Commercial Court No 11, Madrid) a collective action against 72 banks including Caixabank and Catalunya Caixa,⁴ seeking an injunction prohibiting the continued use of floor clauses on the ground of their unfairness.

18. Relying on Article 11(4), Article 43 and Article 222 of the Code of Civil Procedure, the defendants in the main proceedings raised a preliminary objection and requested that the individual actions against them be stayed pending a final decision concluding the collective proceedings.

3 — A consumer association specialising in the field of banking and insurance services.

4 — At the request of that court, an invitation was issued to the public via social media and the association ADICAE.

19. The applicants in the main proceedings opposed that objection, arguing that they were entitled to dissociate themselves from the collective action brought by the consumers and users association and to bring an individual action.

20. In the context of the cases which have thus been brought before it, the referring court states, first of all, that Article 43 of the Code of Civil Procedure provides for the stay of the individual actions until such time as the collective action has resulted in a final decision. It adds that, where it is difficult or impossible to determine the number of persons affected, Article 15(3) of the Code of Civil Procedure permits those affected to enter an individual appearance only within the period of two months following a general invitation to participate in the proceedings made via social media. Lastly, it states that individual participation in proceedings for the protection of collective interests brought pursuant to Article 11(4) of the Code of Civil Procedure requires the consumer concerned to appear before the court seised of the case and to waive his right to bring proceedings in the courts of his own jurisdictional area (the commercial court for the place where he is resident).

21. In light of the foregoing, the referring court expresses doubt as to the compatibility of Article 43 of the Code of Civil Procedure with Article 7 of Directive 93/13 in circumstances such as those of the main proceedings. It points out, in particular, that the proceedings in the collective action, the outcome of which will be decisive if the individual actions in the main proceedings are stayed, had, by the date of its request for a preliminary ruling, been ongoing for four years, that no date has yet been fixed for the hearing and that several of the banks have yet to lodge their defences.

22. It was in those circumstances that the Juzgado de lo Mercantil No 9 de Barcelona (Commercial Court No 9, Barcelona) decided, by two decisions dated 27 June 2014, received at the Court registry on 11 August 2014 (Case C-381/14) and 13 August 2014 (Case C-385/14), to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- (1) Can it be considered [that the Spanish legal system provides for] an effective means or mechanism within the meaning of Article 7(1) of Directive 93/13?
- (2) To what extent does the suspensory effect of a stay of proceedings preclude a consumer from complaining that unfair terms included in a contract concluded with him are void, and, therefore, infringe Article 7(1) of the directive?
- (3) Does the fact that a consumer is unable to dissociate himself from collective proceedings constitute an infringement of Article 7(3) of Directive 93/13?
- (4) Or, on the other hand, is the suspensory effect of a stay of proceedings provided for in Article 43 [of the Code of Civil Procedure] compatible with Article 7 of Directive 93/13 in that the rights of consumers are fully safeguarded by collective actions, the Spanish legal system providing for other equally effective procedural mechanisms for the protection of consumers' rights, and by the principle of legal certainty?

23. By Order of the President of the Court of 9 September 2014, Cases C-381/14 and C-385/14 were joined for the purposes of the written procedure, the oral procedure and the judgment. Written observations were lodged by Mr Sales Sinués, Catalunya Caixa, the Spanish Government and the European Commission. Mr Sales Sinués, Caixabank, Catalunya Caixa, the Spanish Government and the Commission presented oral argument at the hearing on 30 September 2015.

IV – Analysis of the questions referred for a preliminary ruling

24. The questions referred for a preliminary ruling in the present cases, as formulated by the referring court, concern the interpretation of Directive 93/13 with reference to two mortgage loan agreements each of which contains a ‘floor’ clause. This is a type of clause which stipulates a minimum rate of variable interest below which consumers are unable to benefit from reductions in official rates.

25. The context in which these cases arose is not only legally complex, it is also one in which a number of interpretative criteria diverge from one national court to another. I therefore think it necessary to begin by noting, on the basis of the information given in the documents before the court, the essential elements of the procedural rules at issue before proceeding to examine the questions referred for a preliminary ruling.

A – Preliminary observations

26. The national court, Mr Sales Sinués, the Spanish Government and the Commission have all referred to the scope of the legislation at issue, and in particular Article 43 of the Code of Civil Procedure, which lies at the heart of the problem which the national court and the Court of Justice must address.

1. The objection concerning precedence in civil proceedings

27. The national court states that Spanish procedural law precludes the bringing, either simultaneously or successively, of two sets of legal proceedings between the same parties and having the same cause of action because of the risk of their leading to conflicting judgments. Three different mechanisms for avoiding that risk are therefore provided for in Spanish law, namely the force of substantive *res judicata*,⁵ *lis alibi pendens*,⁶ and precedence in civil proceedings.

28. It is this last procedural mechanism, provided for in Article 43 of the Code of Civil Procedure, which poses the central problem to which the national court refers. Article 43 addresses the situation in which, in order to give a ruling on the subject-matter of a dispute that is pending brought before a civil court, ‘it is necessary to decide an issue which itself constitutes the main subject-matter of other proceedings pending before the same or a different civil court’. According to that same article, if the joinder of the two actions is possible, the court must join them. If, however, joinder is not possible, Article 43 enables the court seized to stay the proceedings.

5 — According to the national court, the authority of substantive *res judicata*, provided for in Article 222 of the Code of Civil Procedure, exists where a final judgment, either upholding or dismissing the action, has already been given in legal proceedings, with the result that no new proceedings between the same parties and having the same cause of action may be commenced.

6 — The national court explains that *lis alibi pendens* exists where the cause of action of subsequent proceedings is the same as that which gave rise to earlier proceedings that are still pending. Accordingly, in view of the risk of conflicting judgments being given on the same subject-matter, the later proceedings must be removed from the register.

29. In order for the proceedings to be stayed, three cumulative conditions must be fulfilled: the preliminary issue must have a direct and decisive influence upon the resolution of the main proceedings, an application must be made by one party or by both parties,⁷ and proceedings must be pending which involve the preliminary issue. Nevertheless, Article 43 of the Code of Civil Procedure states that ‘the court *may* ... order the proceedings to be stayed’. Consequently, as is apparent from the order for reference, staying the proceedings is optional, in that Article 43 allows the courts a discretion in deciding whether a stay of the proceedings is appropriate.⁸

2. Divergent interpretation and application by the national courts of Article 43 of the Code of Civil Procedure

30. As is clear from the documents before the Court, it is the divergent interpretation and application by the national courts of Article 43 of the Code of Civil Procedure in the context of the collective injunctive proceedings brought by ADICAE which render the analysis of the questions referred for a preliminary ruling even more complex, the matter not having been decided by the highest national courts.

31. On the one hand, certain courts appear to take the view that there is an issue of civil procedural precedence, in accordance with Article 43 of the Code of Civil Procedure, and have stayed individual proceedings pending the delivery of a final judgment in the collective proceedings, on the basis of the connection between the subject-matter of the individual actions and that of the collective actions.⁹

32. On the other hand, certain other courts appear to believe there to be a situation of *lis alibi pendens* as regards the individual actions vis-à-vis the collective actions, on the view that the cause of action and the parties are the same,¹⁰ and are removing from the register individual actions on the basis of Article 222(3) of the Code of Civil Procedure. It is apparent from the documents before the court that such courts are in the minority.

33. Lastly, some courts take the view that there is neither an issue of civil procedural precedence nor a situation of *lis alibi pendens* and consider, in particular, that the causes of action and the parties are not in fact the same, that the outcome of the collective action will not be decisive for the individual actions and that, whilst a declaration in the collective action that the floor clauses are null and void might have a positive influence on the individual actions, the dismissal of the collective action would not necessarily entail the dismissal of the individual actions. They thus conclude that consumers retain *locus standi* legally to defend their own interests and that it is unnecessary to stay the individual proceedings.¹¹

34. It is this last interpretation that the Spanish Government and the Commission appear to endorse, in particular arguing in their written observations that the application of Article 43 of the Code of Civil Procedure does not necessarily entail the staying of individual actions.

7 — See, to that effect, Judgment No 527/2013 of the Tribunal Supremo (Civil Chamber) of 3 September 2013.

8 — The national court states that it ‘is required at this stage of the proceedings to *decide* whether ... it must stay the proceedings ... or whether the proceedings must continue their normal course up to judgment’ (my emphasis). On Article 43 of the Code of Civil Procedure, see, inter alia, De la Oliva Santos, A., *Objeto del proceso y cosa juzgada en el proceso civil*, Thomson-Civitas, 2006, pp. 85 to 88, Montero Aroca, J., et al., *Derecho Jurisdiccional II. Proceso civil*, 21st ed., Tirant lo Blanch, 2013, pp. 126 and 127, and Gimeno Sendra, V., *Derecho Procesal Civil I. El proceso de declaración. Parte General*, 5th ed., Colex, 2014, p. 215.

9 — The national court refers in this connection to Order No 84/2013 of the Audiencia Provincial de Barcelona (Provincial Court, Barcelona) of 11 June 2013, which, taking into account the possibility that the judgment that is to be handed down in the collective proceedings will declare the floor clauses to be null and void, expressly provides, in accordance with Article 221(1) of the Code of Civil Procedure, that it applies *ultra partes*.

10 — The Commission states that this minority view seems to have been taken by the Audiencia Provincial de Barcelona in Order No 112/2014 of 9 October 2014.

11 — See, in particular, Order No 76/2013 of the Audiencia Provincial de Huelva (Provincial Court, Huelva) of 24 February 2014 and Judgments Nos 278/2013 and 494/2013 of the Audiencia Provincial de Ourense (Provincial Court, Ourense) of 22 May and 22 September 2014.

35. The Spanish Government added, in its submissions at the hearing, that a distinction must be drawn between the collective action for an injunction prohibiting the continued use of standard contract terms that are unfair and individual actions for the annulment of mortgage loan agreements on the ground that they contain a term that is unfair. The two types of action are different in nature and so their subject-matter is only partly the same. While, in *the collective action for an injunction*, the parties may submit observations without it being possible for the court to assess all the circumstances of each individual case (the court's review being abstract and general), in particular, the circumstances pertaining to each consumer who has concluded an agreement, in *the individual actions*, the court must take into account all the circumstances pertaining at the time when the loan agreement was concluded, how those circumstances have developed, all the circumstances attending the conclusion of the agreement and all the other terms of the agreement or of another agreement on which it is dependent.¹²

36. Consequently, the Spanish Government maintains that a logical, systematic interpretation of the Spanish procedural rules excludes civil procedural precedence and that Article 43 of the Code of Civil Procedure deals with precedence that is not merely hypothetical or potential but is real, and that for this reason no stay of the proceedings should be ordered.

3. The effects of judgments upholding collective actions for consumers who were not parties to the proceedings

37. The Spanish Government and Catalunya Caixa maintain that Article 221 of the Code of Civil Procedure does not provide that the effects of a judgment upholding a collective action must be extended to all consumers whose contracts contain a general condition of the same nature as that which was called into question. Indeed, in the event that *a collective action is dismissed*, Article 221 allows individual actions to be pursued, so as to enable consumers to put forward the particular circumstances of their individual case. According to the Spanish Government, that is consistent with Article 11(1) of the Code of Civil Procedure, in accordance with which consumer associations have *locus standi* to bring legal actions '[w]ithout prejudice to the individual right of injured parties to bring proceedings'.¹³ On the other hand, the Spanish Government adds that Article 221 of the Code of Civil Procedure merely establishes that the effects of a judgment *upholding a collective action* may be extended to persons who were not parties to the proceedings, and that that decision is a matter for the national court.¹⁴

38. However, Mr Sales Sinués argued at the hearing that the bringing of an individual action implies, in principle, dissociation from collective proceedings, that is to say that the consumer waives the extension of effect which Article 221(1) of the Code of Civil Procedure attaches to any judgment upholding a collective action. Consequently, there is, he alleges, no risk that two conflicting judgments will be delivered on the same claim. Nevertheless, he maintains that an interpretation of Article 43 of the Code of Civil Procedure according to which there is civil procedural precedence and the individual action would therefore be stayed pending a final judgment in the collective action would mean that the consumer could not dissociate himself from the collective action.

12 — Judgment No 241/13 of the Tribunal Supremo of 9 May 2013, paragraphs 235 to 238.

13 — Article 11(1) provides that '[w]ithout prejudice to the individual right of injured parties to bring proceedings, legally established consumers and users associations shall have *locus standi* to defend in a court of law the rights and interests of their members and of the association, as well as the general interests of consumers and users'.

14 — My emphasis.

4. Intervening in actions to protect the rights and the collective and diffuse interests of consumers

39. The national court, Mr Sales Sinués, the Spanish Government and the Commission refer to the judgment of the Tribunal Supremo of 9 May 2013,¹⁵ handed down in a collective action for an injunction different from the one with which the referring court is concerned, but also concerning a floor clause. The Tribunal Supremo (Supreme Court) had declared this type of clause null and void, not because of its content but because of a lack of transparency, that is to say, a failure to provide consumers with clear, transparent information regarding such clauses.¹⁶

40. In so far as concerns the nature of the action in which that judgment was delivered, the Commission pointed out in its written observations that it was simply a collective action for an injunction and thus merely concerned the legality of floor clauses. It was therefore without consequences in so far as concerns the award of damages.

41. By contrast, Mr Sales Sinués stated at the hearing that the collective action brought by ADICAE includes both a claim for a declaration, the purpose of which is to prevent the continued inclusion of floor clauses in loan agreements, and a collective claim for compensation of the losses sustained as a result of such clauses. He pointed out in this connection that Article 15 of the Code of Civil Procedure does not apply to actions for an injunction but only to collective actions in damages. Consequently, the individual intervention of consumers, which occurred in the two-month period following the general invitation to participate in the collective proceedings made via social media, as provided for in Article 15(3) of the Code of Civil Procedure, related not to the collective action for an injunction brought by ADICAE, but only to the collective action in damages.¹⁷ According to Mr Sales Sinués, the delay in the procedure in the present case is therefore due to the collective action in damages, because of the very large number of consumers who have entered an individual appearance before the court.¹⁸ He argues, accordingly, that a collective action in damages takes longer than an individual action.

42. I believe it is clear from the foregoing that that is the context in which the court must examine the questions referred for a preliminary ruling, subject to verification by the referring court.

15 — Judgment No 241/2013 of the Tribunal Supremo (Supreme Court) of 9 May 2013. In that judgment, the Tribunal Supremo restricted the retroactive effect of its declaration of invalidity so that it would only produce effects *ex nunc*, that is to say, not from the date of conclusion of the loan agreement (*ex tunc*), but only from 9 May 2013 onwards, that being the date of the judgment in question. Such a restriction was confirmed in another of that court's judgments, No 139/2015 of 25 March 2015. Moreover, this type of restriction of effects is the subject of a recent request for a preliminary ruling from a Spanish court in another case pending before the Court, *Gutierrez Naranjo* (C-154/15).

16 — It is apparent from the written observations lodged by Mr Sales Sinués that, since floor clauses are an element of the cost of the loan agreement, financial establishments are under an obligation to inform consumers about them, so that they are fully apprised of their existence and understand their effect on the actual cost of the credit when signing the loan agreement.

17 — The applicant cited Article 15(4) of the Code of Civil Procedure, which provides that '[t]he provisions of the preceding paragraphs shall not apply to injunctive proceedings brought for the purpose of defending collective interests or the interests of consumers and users in general'.

18 — Catalunya Caixa submitted at the hearing that the length of time taken by the collective proceedings is attributable, *inter alia*, to the large number of consumers (90 000) who have become parties to the proceedings.

B – *The questions referred for a preliminary ruling*

43. It should be noted first of all that, in the context of the procedure for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. In that light, the Court may have to reformulate the questions referred to it.¹⁹ To that end, the Court may draw upon all the information provided by the national court, in particular from the grounds of the decision to make the reference, the legislation and the principles of EU law that require interpretation, in view of the subject-matter of the dispute in the main proceedings.²⁰

44. In the present case, I am of the view that, by the questions which it has referred for a preliminary ruling, the Juzgado de lo Mercantil No 9 de Barcelona is actually asking the Court to interpret the principles of equivalence and effectiveness in the context of the implementation of Article 7 of Directive 93/13, so as to enable it to assess whether the procedural rules at issue comply with EU law.

45. In those circumstances, it is necessary to understand the questions referred for a preliminary ruling as asking, essentially, whether, in light of the principles of equivalence and effectiveness, Article 7 of Directive 93/13 is to be interpreted as precluding national procedural rules, such as those at issue in the case in the main proceedings, which permit the staying, on grounds of civil procedural precedence, of an individual action commenced in parallel with a collective action for an injunction until a final judgment concluding the collective action is delivered, without the individual consumer's being able to dissociate himself from the collective action.

1. The criteria for assessing the unfair nature of contractual terms in the context of Directive 93/13 and the case-law

a) Actions involving individual consumers and collective actions for an injunction

46. It seems to me important to observe, as a preliminary point, that the system of protection established by Directive 93/13 is based on the notion 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, which leads to the consumer's agreeing to terms drawn up in advance by the seller or supplier without his being able to influence the content of those terms.²¹

47. In order to guarantee the protection intended by Directive 93/13, criteria for assessing the unfair nature of contractual terms have been laid down in EU legislation. Amongst other things, these make it necessary for the specific circumstances of each individual case to be assessed.²² In accordance with Article 3 of Directive 93/13, it is necessary to establish whether the contractual term in question has been negotiated individually or whether it was drafted in advance, without the consumer's being able to influence its substance, particularly in the context of a pre-formulated standard contract. In

19 — See, inter alia, the judgments in *Krüger* (C-334/95, EU:C:1997:378, paragraphs 22 and 23), *Byankov* (C-249/11, EU:C:2012:608, paragraph 57) and *Biovet* (C-306/14, EU:C:2015:689, paragraph 17).

20 — See, to that effect, inter alia, the judgments in *Redmond* (83/78, EU:C:1978:214, paragraph 26), *Byankov* (C-249/11, EU:C:2012:608, paragraph 58) and *Konstantinides* (C-475/11, EU:C:2013:542, paragraph 42).

21 — See the judgments in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25), *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 25), *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 29), *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 22), *Invitel* (C-472/10, EU:C:2012:242, paragraph 33), *Aziz* (C-415/11, EU:C:2013:164, paragraph 44) and *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 32).

22 — According to the fifteenth recital of the preamble to Directive 93/13, '... it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms'.

addition, Article 4(1) of the directive provides that the unfairness of a contractual term must be assessed taking into account, at the time of conclusion of the contract, ‘all the circumstances attending the conclusion of the contract’ and ‘all the other terms of the contract or of another contract on which it is dependent’.

48. As regards, first of all, *actions involving an individual consumer*, such as those at issue in the main proceedings, the Court has held that, in view of the weaker position of the consumer, ‘Article 6(1) of the directive requires Member States to specify that unfair terms “shall, as provided for under their national law, not be 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’.²³

49. It seems pertinent to point out that Articles 3 and 6 of Directive 93/13 confer individual rights on consumers which national courts have a duty to protect, including of their own motion.

50. As regards, secondly, *collective actions for an injunction*, such as that brought by ADICAE, I would point out that it is clear from the case-law that Directive 93/13 does not seek to harmonise the penalties applicable in the event of a term being found to be unfair in the context of a collective action. Nevertheless, Article 7(1) of the directive requires the Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers.²⁴

51. The Court has already stated on several occasions that the system of protection established by Directive 93/13 is based on the notion 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.²⁵ That is why Article 7(2) of Directive 93/13 specifies that the aforementioned means are to include the possibility for authorised consumer associations to take action before the competent courts (or competent administrative bodies) in order to obtain a decision as to whether contractual terms drawn up for general use are unfair and, where appropriate, to have them prohibited.²⁶

52. That being said, it should also be observed that the relationship between individual actions and collective actions has not been expressly regulated by the EU legislature. Nevertheless, as the Commission has rightly pointed out, the nature and limits of the relationship between those two types of action may be inferred not only from Directive 93/13 but also from the case-law of the Court.

b) The nature of individual actions and collective actions for an injunction and the relationship between them

i) The different nature of individual actions and collective actions in the context of Directive 93/13

53. The Commission maintains in its written observations that Article 7(1) of Directive 93/13 refers in general fashion to individual actions brought by consumers who have been adversely affected by unfair terms, such actions being the normal legal remedy for protecting their interests, while the collective actions provided for in Article 7(2) are a complementary means of guaranteeing such protection.

23 — See the judgment in *Invitel* (C-472/10, EU:C:2012:242, paragraph 34).

24 — *Ibidem* (point 35).

25 — See the judgments in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 27), *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 26), *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 31) and *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 41).

26 — See, to that effect, the judgments in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 27), *Commission v Italy* (C-372/99, EU:C:2002:42, paragraph 15) and *Invitel* (C-472/10, EU:C:2012:242, paragraph 36). See also the twenty-third recital of the preamble to Directive 93/13.

54. I concur with that analysis.

55. The complementary nature of collective actions for an injunction may, in my view, be deduced from the fact that they are general actions which entail no specific examination of the type which Directive 93/13 requires in the case of actions involving individual consumers and instead merely require an abstract, general assessment of whether or not contractual terms are unfair.²⁷

56. It follows that Directive 93/13 requires the Member States to include within their legal systems, first and foremost, individual legal actions in which it is possible to argue the unfair nature of contractual terms and, secondly and subsidiarily²⁸ collective actions for injunctions, which nevertheless may not replace individual actions or preclude them.

ii) The complementary relationship between individual actions and collective actions in the case-law

57. In so far as concerns *individual actions*, it is clear from the case-law that the role assigned by Directive 93/13 to national courts, which is to ensure the effectiveness of the protection intended to be given by the provisions of the directive, ‘is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion’.²⁹ According to the Court, this obligation upon national courts to intervene, even of their own motion, in individual actions constitutes, in a general fashion, the positive action or the adequate means needed to redress the position of inferiority in which the consumer finds himself vis-à-vis the seller or supplier.³⁰ As regards *collective actions for an injunction*, on the other hand, the Court has held that consumer protection associations are not in the same position of inferiority vis-à-vis the seller or supplier.³¹ More specifically, it has held that a collective action for an injunction pitting such an association against a seller or supplier ‘is not characterised by the same imbalance that is present in an individual action brought by a consumer against a seller or supplier’.³² That difference between individual actions and collective actions for an injunction which flows from Directive 93/13 and has been recognised in the case-law, reinforces, in my view, the complementary nature of the latter with respect to the former.

58. Moreover, the court has stated that ‘the deterrent nature and dissuasive purpose of the measures to be adopted, [that is to say, collective actions for an injunction,] together with their independence of any particular dispute, mean that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts’.³³ Effectively attaining that objective requires, according to the Court, that terms within the general business conditions of consumer contracts which are declared to be unfair in an action for an injunction brought against the seller(s) or supplier(s) concerned, such as the term to which the national court refers, ‘are not binding on either the consumers who are parties to the actions for an injunction or on those who have concluded with that seller or supplier a contract to which the same [general business conditions] apply’.³⁴ Indeed, ‘[t]he

27 — The Commission states that the ‘persons’ referred to in Article 7(2) of the directive are not the consumers themselves, but persons entrusted with their protection, such as a ‘consumer ombudsman’.

28 — According to the Commission, consumer protection is one of the areas ‘where the *supplementary* private enforcement of rights granted under Union law in the form of collective redress is of value’. See recital 7 of the preamble to Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ 2013 L 201, p. 60). My emphasis.

29 — Judgment in *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 32).

30 — See the judgments in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 27), *Cofidis* (C-473/00, EU:C:2002:705, paragraph 32) and *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 32).

31 — See the judgment in *Asociación de Consumidores Independientes de Castilla y León* (C-413/12, EU:C:2013:800, paragraph 49).

32 — See the judgment in *Asociación de Consumidores Independientes de Castilla y León* (C-413/12, EU:C:2013:800, paragraph 50).

33 — See the judgments in *Commission v Italy* (C-372/99, EU:C:2002:42, paragraph 15), *Invitel* (C-472/10, EU:C:2012:242, paragraph 37) and *Pohotovost’* (C-470/12, EU:C:2014:101, paragraph 44).

34 — See the judgment in *Invitel* (C-472/10, EU:C:2012:242, paragraph 38).

application of a penalty of invalidity of an unfair term with regard to all consumers who have concluded a consumer contract to which the same [general business conditions] apply ensures that those consumers will not be bound by that term, *but does not exclude the application of other types of adequate and effective penalties* provided for by national legislation'.³⁵

59. It is therefore clear from that case-law that, under Directive 93/13, the relationship between collective actions for an injunction and the specific terms by which consumers are bound must be one that is favourable to the consumer, not one which poses an obstacle to individual actions or replaces individual actions by collective actions for an injunction.

2. Assessment of the procedural rules at issue in the light of Article 7 of the directive and the principles of equivalence and effectiveness

60. It should be noted that it appears from the way in which the questions for a preliminary ruling have been formulated that the national court proceeds on the assumption that the staying of the individual actions in question, which have been brought by the applicants in parallel pending a final decision in the collective proceedings, is a necessary consequence of Article 43 of the Code of Civil Procedure.³⁶ However, it is clear from the observations submitted by Mr Sales Sinués, the Spanish Government and the Commission that staying those actions is optional, inasmuch as the provision in question allows the Spanish courts a discretion in deciding whether or not a stay is appropriate.

61. I would also observe that, as is clear from points 30 to 33 of this Opinion, in the present case, the divergent interpretation of the procedural rules in question by national courts compounds the complexity of these rules.

62. In the present instance, as regards the national legislation at issue in the main proceedings, I would point out that it is not for the Court to rule on the interpretation of provisions of national law, that being a matter exclusively for the referring court or, as the case may be, the national courts having jurisdiction, which must determine whether the provisions of the applicable national legislation meet the requirements of EU law. However, when giving a preliminary ruling, the Court may, where appropriate, offer clarification intended to provide the national court with guidance in its assessment.³⁷

63. It is in that context that I shall now examine, in the light of the principles of equivalence and effectiveness, whether the national procedural rules at issue pose an obstacle to the exercise of the rights conferred by Directive 93/13.

64. I would recall in this connection that the Court has already held on a number of occasions that, there being no harmonisation of procedural rules, that question is a matter for the national legal order of the Member States, in accordance with the principle of the procedural autonomy of the latter. None the less, the Court has stressed that the detailed procedural rules governing actions for safeguarding the rights which individuals derive under EU law must fulfil the dual requirement that they should be no less favourable than those governing similar domestic actions (the principle of equivalence) and should not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (the principle of effectiveness).³⁸

35 — See the judgment in *Invitel* (C-472/10, EU:C:2012:242, paragraph 40).

36 — It nevertheless appears from the order for reference that the national court is not obliged to stay the actions in question. See, in this connection, footnote 8 to this Opinion.

37 — See, to that effect, the judgment in *Mascolo and Others* (C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 81 and 83).

38 — See, inter alia, the judgments in *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5), *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 12) and *Impact* (C-268/06, EU:C:2008:223, paragraph 44 to 46). See also the judgments in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 26), *Aziz* (C-415/11, EU:C:2013:164, paragraph 50) and *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 37).

a) Observance of the principle of equivalence

65. The principle of equivalence requires that the national rule in question be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar. In order to establish whether the principle of equivalence has been complied with, it is for the national court, which alone has direct knowledge of the procedural rules governing actions under national law, to ensure, in national law, that the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded respect that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions. To that end, the national court must assess the similarity of the actions concerned in terms of their purpose, cause of action and essential characteristics. In order to determine whether a national procedural provision is less favourable, the national court must take account of the role of that provision in the procedure, viewed as a whole, of the conduct of that procedure and of its special features.³⁹

66. In the present case, the possibility of civil procedural precedence and of the application of the rule of *lis alibi pendens* to individual disputes and collective actions arises from interpretative criteria relating to the legislation at issue which diverge from one national court to another. Nevertheless, there is, in my opinion, nothing to indicate that that legislation would be interpreted differently in the context of disputes concerning rights arising under national law.

b) Observance of the principle of effectiveness

67. In so far as concerns the principle of effectiveness, as I shall explain in the following points, there are several factors which, by contrast, lead me to consider that an *interpretation* of the procedural rules at issue which admits of civil procedural precedence and, therefore, permits the staying of individual actions pending the delivery of a final judgment in a collective action, renders the exercise of the rights conferred by Directive 93/13 impossible or excessively difficult.

68. First of all, if, as is suggested in points 46 to 59 of this Opinion, it is to be presumed that Directive 93/13 confers individual *in personam* rights on which it must be possible to rely in the context of individual legal actions and that collective actions for an injunction are complementary to, and different and distinct from individual actions, then there is no justification for the mandatory or automatic staying of individual actions until such time as a final judgment is delivered in collective proceedings.

69. As regards the individual nature of the rights of consumers, it should be observed that, in so far as concerns, in particular, the national court's duty to examine of its own motion whether a contractual term is unfair, that court is not, however, required under the directive to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status.⁴⁰ Indeed, the Court has held that, where a national court considers, after examining a contractual term of its own motion, that the term is unfair, 'it must not apply it, except if the consumer opposes that non-application'.⁴¹ This individual dimension, in accordance with which '[t]he right to effective legal protection also includes the option not to assert one's rights'⁴², takes form in the opportunity which the consumer must be afforded to

39 — See, to that effect, the judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 90).

40 — Judgment in *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 33).

41 — *Ibidem* (paragraph 35).

42 — Opinion of Advocate General Kokott in *Duarte Hueros* (C-32/12, EU:C:2013:128), point 53).

set out his views and in the duty of the national court ‘to take into account, where appropriate, the intention expressed by the consumer when, conscious of the non-binding nature of an unfair term, that consumer states nevertheless that he is opposed to that term being disregarded, thus giving his free and informed consent to the term in question’.⁴³

70. Consequently, an interpretation of the legislation in question, and in particular Article 43 of the Code of Civil Procedure, in accordance with which there is an obligation to stay an individual action where parallel collective proceedings are afoot⁴⁴ or which accords automatic priority over individual actions, without the consumer’s being able to decide either to refrain from exercising his rights or to exercise them effectively in individual proceedings or indeed to dissociate himself from the collective action, is not consistent with the principle of effectiveness.

71. As the Commission pointed out in its written observations, guaranteeing the effectiveness of the individual rights conferred by Directive 93/13 implies that every consumer must be able to dissociate himself from collective action and bring an individual action, or simply continue with the collective proceedings and accept the non-binding nature of the contractual term at issue. In other words, the consumer ‘should be free to leave the [collective action] at any time before the final judgement is given or the case is otherwise validly settled ... without being deprived of the possibility to pursue [his] claims in another form, if this does not undermine the sound administration of justice’.⁴⁵ That conclusion applies to the case where the consumer has not intervened in the collective action.

72. Secondly, if, as is suggested in point 55 of this Opinion, it is to be accepted that the abstract, general assessment of whether or not a contractual term is unfair that is to be carried out in a collective action for an injunction pursues a different aim from that pursued in an individual action, which entails a specific examination of the contractual term in the light of the particular circumstances of the case, then it must also be accepted that, in principle, the judgments handed down in collective actions and in individual actions may differ, even if they are seldom contradictory.⁴⁶ Accordingly, a consumer who decides to act in his individual capacity should not be directly affected by a judgment delivered in collective proceedings, even though the court hearing his individual action will obviously take that judgment into account.⁴⁷

73. Thirdly and lastly, the option which is open to the consumer of participating in a collective action is not comparable to the bringing of an individual action. First of all, as is clear from the order for reference, individual participation in proceedings for the protection of collective interests brought pursuant Article 11(4) of the Code of Civil Procedure requires the consumer concerned to appear before the court seised of the case and to waive his right to bring proceedings in the courts of his own jurisdictional area (the commercial court for the place where he is resident). Next, the two-month period following the publication in the media contemplated by Article 15(1) and (3) of the Code of Civil Procedure may present certain practical difficulties for consumers who have been

43 — Judgment in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 35).

44 — I would, however, note that national courts must retain the right to stay individual proceedings on other legitimate grounds where such a stay constitutes an appropriate and proportionate means of ensuring the sound administration of justice.

45 — Paragraph 22 of the Commission Recommendation of 11 June 2013.

46 — For example, a contractual term may not be unfair in the abstract, but may be unfair under certain circumstances, or it may be potentially unfair and yet, having been negotiated individually in a given situation, it will be binding on the consumer in question.

47 — I note that this is the interpretation adopted by certain national courts which are refusing to stay proceedings, in particular, on the ground that the difference in nature between individual actions (specific review) and collective actions (abstract, general review) precludes the extension of the effects of the latter to the former. See, inter alia, Judgments Nos 128/2014 of the Audiencia Provincial de Granada (Provincial Court, Granada) of 23 May 2014, 308/2014 of the Audiencia Provincial de Oviedo (Provincial Court, Oviedo) of 17 December 2014, 141/2015 of the Audiencia Provincial de Oviedo of 20 May 2015 and 332/2014 of the Audiencia Provincial de Girona (Provincial Court, Girona) of 3 December 2014.

adversely affected and wish to participate in collective proceedings.⁴⁸ Finally, the consumer will find himself constrained by the approach which the consumer protection association has taken to the case and will be unable to alter its substance or include other claims. He will also be affected by any delay which, as in the present case, poses an obstacle to his protection as a consumer.

74. Consequently, in light of all the foregoing considerations, I am of the opinion that, having regard to the principle of effectiveness, Article 7 of Directive 93/13 is to be interpreted as not precluding national procedural rules, such as those at issue in the case in the main proceedings, which permit the staying, on grounds of civil procedural precedence, of individual actions brought in parallel to a collective action for an injunction pending the delivery of a final judgment concluding the collective proceedings, provided that such a stay is neither mandatory nor automatic and provided that the consumer concerned is able to dissociate himself from the collective action.

V – **Conclusion** In light of all the foregoing considerations, I propose that the Court should answer the Juzgado de lo Mercantil No 9 de Barcelona (Commercial Court No 9, Barcelona) as follows: Having regard to the principle of effectiveness, Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to be interpreted as not precluding national procedural rules, such as those at issue in the case in the main proceedings, which permit the staying, on grounds of civil procedural precedence, of individual actions brought in parallel to a collective action for an injunction pending the delivery of a final judgment concluding the collective proceedings,

- provided that such a stay is neither mandatory nor automatic, and
- provided that the consumer concerned is able to dissociate himself from the collective action.

⁴⁸ — In this connection, see point 41 of this Opinion.