Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 August 2018 * [i]

(Reference for a preliminary ruling — Directive 93/13/EEC — Unfair terms — Scope — Assignment of debts — Loan agreement concluded with a consumer — Criteria for assessing the unfairness of a contractual term setting the default interest rate — Consequences of that unfairness)

In Joined Cases C-96/16 and C-94/17,

REQUESTS for a preliminary ruling under Article 267 TFEU, from (i) the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain), made by decision of 2 February 2016, received at the Court on 17 February 2016; and (ii) the Tribunal Supremo (Supreme Court, Spain), made by decision of 22 February 2017, received at the Court on 23 February 2017, in the proceedings

Banco Santander SA

v

Mahamadou Demba,

Mercedes Godoy Bonet (C-96/16),

and

Rafael Ramón Escobedo Cortés

v

Banco de Sabadell SA (C-94/17),

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, E. Levits, A. Borg Barthet and F. Biltgen, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 10 January 2018,

* Language of the case: Spanish.

after considering the observations submitted on behalf of:

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

– Banco de Sabadell SA, by A.M. Rodríguez Conde and J.M. Rodríguez Cárcamo, abogados,

– the Spanish Government, by V. Ester Casas, acting as Agent,

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

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

after hearing the Opinion of the Advocate General at the sitting on 22 March 2018,

gives the following

Judgment

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

2 The requests have been made in the course of proceedings between, in the first case, Banco Santander SA and Ms Mercedes Godoy Bonet and Mr Mahamadou Demba (C-96/16); and, in the second case, Mr Rafael Ramón Escobedo Cortés and Banco de Sabadell SA (C-94/17), concerning the enforcement of loan agreements concluded between those parties.

Legal context

European Union law

3 The 13th recital of Directive 93/13 states that:

‘Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject [to this directive] the terms which reflect mandatory statutory or regulatory provisions …; whereas in that respect the wording “mandatory statutory or regulatory provisions” in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established.’

4 Article 1 of the directive provides:

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

2. The contractual terms which reflect mandatory statutory or regulatory provisions … shall not be subject to the provisions of this Directive.’

5 Article 3(1) and (3) of the directive provides:

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

…

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 the same directive is worded as follows:

'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 Under Article 6(1) of Directive 93/13:

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

8 Article 7(1) of that directive provides:

'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.'

9 Article 8 of that directive provides:

'Member States may adopt or retain the more stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

10 Point 1(e) of the Annex to Directive 93/13 includes in the list of contractual terms referred to in Article 3(3) thereof, those terms which have the object or effect of 'requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation'.

Spanish law

Provisions relating to assignment of debts

11 Article 1535 du Código Civil (Civil Code), which governs the right of the debtor to buy back his debt in the event of the assignment of the claim, provides:

'When a disputed debt is assigned, the debtor shall have the right to extinguish it by reimbursing to the assignee the price paid by the latter, any costs incurred by the assignee and interest on the price from the date on which it was paid.

A debt shall be deemed to be disputed as soon as a claim for its payment, in legal proceedings, is contested.

The debtor may exercise his right within nine days, running from the date on which the assignee claims payment from him.'

12 The substitution of the assignor by the assignee in court proceedings is governed by Articles 17 and 540 of Ley 1/2000 de Enjuiciamiento Civil (Law 1/2000 establishing the Civil Procedure Code) of 7 January 2000 (BOE No 7, of 8 January 2000, p. 575) ('the Civil Procedure Code'), Article 17 being applicable to proceedings on the substance and Article 540 to enforcement proceedings.

Provisions relating to unfair terms

13 Article 82 of the texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (consolidated text of the General law for the protection of consumers and users and other supplementary laws), approved by Real Decreto Legislativo 1/2007 (Royal Legislative Decree 1/2007) of 16 November 2007 (BOE No 287 of 30 November 2007, p. 49181) ('the LGDCU'), provides:

'All terms not individually negotiated and all practices not expressly agreed to which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer and user, shall be regarded as unfair terms.'

14 Under Article 85(6) of the LGDCU, 'terms that require a consumer and user who fails to fulfil his obligations to pay a disproportionately high sum in compensation' are considered unfair. That provision transposes the combined provisions of Article 3(1) and (3), together with point 1(e) of the Annex to Directive 93/13, whilst stating that, in Spanish law, the type of contractual term referred to in point 1(e) will always be considered unfair.

The case-law of the Tribunal Supremo (Supreme Court, Spain)

15 It is apparent from the order for reference in Case C-94/17 that, in its judgments No 265/2015 of 22 April 2015, No 470/2015 of 7 September 2015 and No 469/2015 of 8 September 2015 ('judgments of 22 April and 7 and 8 September 2015'), the Tribunal Supremo (Supreme Court) found that, in the absence of statutory requirements giving rise to clear rules for assessing the unfairness of non-negotiated terms defining the default interest rate in personal loan agreements concluded with consumers, the Spanish courts of first instance and of appeal were applying different criteria. This resulted in a great deal of legal uncertainty and an arbitrary difference in treatment between consumers depending on the court hearing the case. There was also a great degree of divergence in the determination of the consequences of the possible unfairness of those contractual terms.

16 Consequently, in order to bring an end to that situation of legal uncertainty and those disparities, the Tribunal Supremo (Supreme Court) deemed it necessary to define the criteria for assessing the unfairness of such contractual terms and determine those consequences.

17 To that end, the Tribunal Supremo (Supreme Court) noted, first, that in accordance with Article 85(6) of the LGDCU, terms which require a consumer who fails to fulfil his obligations to pay a disproportionately high sum in compensation are considered unfair. Secondly, it examined the national provisions applicable in the event of late payment on the part of the debtor in the absence of agreement between the parties in various areas, as well as the default interest rates generally provided for by loan agreements which have been individually negotiated with consumers.

18 It concluded from that examination that, in the case of personal loan agreements concluded with consumers, non-negotiated contractual terms relating to default interest that satisfies the criterion whereby the rate of that interest exceeds by more than two percentage points the rate of the ordinary interest agreed between the parties to the contract, have to be declared unfair.

19 The Tribunal Supremo (Supreme Court) stated that the fixing of such a default interest rate leads to an unjustified difference by comparison with the percentages laid down by the national provisions mentioned in paragraph 17 of the present judgment, which apply in the event of late payment on the part of the debtor, and that a seller or supplier could not reasonably believe that, if the consumer were dealt with fairly, he would agree, in an individual negotiation, to a contractual term stipulating such an interest rate.

20 As regards the consequences of the unfairness of the contractual terms in question, the Tribunal Supremo (Supreme Court) found that, in the cases brought before it, the default interest rate fixed by those terms consisted in an increase in the ordinary interest rate by a certain number of percentage points. It inferred from that that, in the event of those terms being declared unfair, it would be appropriate to eliminate entirely the increase that the default interest represents as compared with the ordinary interest, so that only the latter continues to run. By contrast, it considered that it was not appropriate also to eliminate the ordinary interest, which retains its function of remuneration for making the money loaned available.

21 The solution adopted in the judgments of 22 April and 7 and 8 September 2015 was extended to mortgage loan agreements by judgments No 705/2015 of 23 December 2015, No 79/2016 of 18 February 2016 and No 364/2016 of 3 June 2016.

The disputes in the main proceedings and the questions referred for preliminary rulings

Case C-96/16

22 On 2 November 2009 and 22 September 2011, Mr Demba and Ms Godoy Bonet concluded with the banking institution Banco Santander two loan agreements, the first for the amount of EUR 30 750 with a repayment date of 2 November 2014, the second for the amount of EUR 32 153.63 with a repayment date of 22 September 2019. In accordance with the general conditions of those agreements, the applicable ordinary and default interest rates were 8.50% and 18.50% respectively for the first agreement, and 11.20% and 23.70% for the second agreement.

23 Since Mr Demba and Ms Godoy Bonet had ceased to pay the monthly instalments set out in those agreements, Banco Santander declared the acceleration of the maturity date thereof and applied to the referring court, namely the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain) for enforcement of the claims against Mr Demba and Ms Godoy Bonet for a total sum of EUR 53 664.14.

24 Although the agreements at issue did not provide for the possibility, Banco Santander, on 16 June 2015, assigned that debt, by officially recorded instrument, to a third party for the estimated sum of EUR 3 215.72 on the basis of the relevant provisions of the Civil Code. That third party also applied to take the place of Banco Santander in the enforcement proceedings brought by the latter before the referring court.

25 That court is unsure whether Mr Demba and Ms Godoy Bonet have the right to buy back their debt, and thus extinguish it, by reimbursing to that third party the amount which it paid for the assignment at issue, plus the applicable interest, expenses and costs.

26 The referring court notes in that regard that, whilst providing for such a right to buy back the debt, Article 1535 of the Civil Code nonetheless restricts that right to so-called 'disputed' debts, that is to say, those which are the subject of a substantive challenge in the context of declaratory proceedings. Thus, that article does not afford the debtor the possibility of relying on that right in the context of proceedings for the enforcement of the debt, such as in the proceedings before the referring court, or of an extra-judicial assignment, which, according to that court, does not guarantee sufficient protection of the interests of consumers. Nor, according to that court, is such protection provided by Articles 17 and 540 of the Civil Procedure Code — which lay down the framework for the replacement of the assignor by the assignee in ongoing proceedings — particularly since those provisions do not refer to the right of the debtor to buy back his debt, as provided for in Article 1535 of the Civil Code.

27 In that context, the referring court expresses doubts as to the compatibility with EU law and, in particular, with Directive 93/13, of a business practice consisting, in the absence of a specific contractual term to that effect, in assigning or purchasing a debt at a low price, without the debtor being informed of that assignment beforehand or giving his consent thereto and without giving him the opportunity to buy back his debt, and thus extinguish it, by reimbursing to the assignee the amount which it paid for the assignment at issue, plus the applicable interest, expenses and costs.

28 That court is also unsure of the factors to take into account in examining the possible unfairness of the contractual terms at issue in the main proceedings that set the applicable default interest rate, and the consequences that must follow from such unfairness. In that context, it entertains doubts as to the compatibility with Directive 93/13 of the case-law arising from the judgments of the Tribunal Supremo (Supreme Court) of 22 April and 7 and 8 September 2015.

29 In those circumstances, the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Does the business practice of assigning or purchasing debts without offering the consumer the opportunity to extinguish the debt by paying the price, interest, expenses and costs of the proceedings to the assignee comply with European Union law, and specifically with Article 38 of the [Charter of Fundamental Rights of the European Union] … and Articles 4(2), 12 and 169(1) [TFEU]?

(b) Is that business practice of purchasing a consumer's debt for a negligible price without his consent or knowledge, without including that practice as a general condition or unfair term imposed in the agreement, and without giving the consumer the opportunity to participate in that operation by purchasing and thus extinguishing the debt, compatible with the principles laid down in Directive [93/13] and, by extension, with the principle of effectiveness and with [Article] 3(1) and [Article] 7(1) of that directive?

(2) (a) For the purpose of safeguarding the protection of consumers and users and the Community case-law which develops it, is it in accordance with European law, Directive 93/13 and in particular Article 6(1) and Article 7(1) thereof, to establish as an unequivocal criterion that, in unsecured loan agreements concluded with consumers, a non-negotiated term which sets a rate of default interest that exceeds by more than two percentage points the basic contract rate of interest ("ordinary interest") is unfair?

(b) For the purpose of safeguarding the protection of consumers and users and the Community case-law which develops it, is it in accordance with European law, Directive 93/13 and in particular Article 6(1) and Article 7(1) thereof, to establish, as a consequence, that ordinary interest will accrue until the debt has been paid in full?'

Case C-94/17

30 On 11 January 1999, Mr Escobedo Cortés concluded with Caja de Ahorros del Mediterráneo, now Banco de Sabadell, a mortgage loan agreement for an amount of EUR 17 633.70, payable in monthly instalments. Terms 3 and 3bis of that agreement stipulated an ordinary interest rate of 5.5% per annum, subject to change after the first year. At the time of the facts in the main proceedings, that rate was 4.75% per annum. Term 6 of that agreement stipulated that the default interest rate was 25% per annum.

31 Mr Escobedo Cortés, who had fallen into arrears, brought an action against Banco de Sabadell before the Juzgado de Primera Instancia (Court of First Instance, Spain) requesting, inter alia, that it declare the latter term void on the ground that it was unfair.

32 That court found that term to be unfair and, consequently, considered that the applicable rate of default interest was to be reduced to the threshold laid down in Article 114(3) of the Ley Hipotecaria (Mortgage Law), as amended by Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013 on measures to strengthen the protection of mortgage debtors, debt restructuring and social rent) of 14 May 2013 (BOE No 116, 15 May 2013, p. 36373), which is a rate three times higher than the statutory interest rate. That decision was upheld on appeal by judgment of 18 September 2014 of the Audiencia Provincial de Alicante (Provincial Court, Alicante, Spain).

33 Mr Escobedo Cortés brought an appeal on a point of law before the referring court, namely the Tribunal Supremo (Supreme Court), against that judgment, on the ground that it infringes Article 6(1) and Article 7(1) of Directive 93/13. He submits that since the term of the loan agreement at issue in the main proceedings fixing the default interest rate has been found to be unfair, that agreement should no longer bear either default or ordinary interest.

34 According to that court, that appeal raises doubts as to the interpretation of various provisions of the directive, the application of which is essential to giving a decision in the appeal, with regard to the finding as to the unfairness of that term and the consequences of that unfairness. In particular, uncertainties remain as to the compatibility of its case-law arising from the judgments of 22 April and 7 and 8 September 2015, as well as those of 23 December 2015, 18 February 2016 and 3 June 2016, referred to in paragraph 21 of the present judgment, with that directive.

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

‘(1) Do Article 3, in conjunction with point 1(e) of the annex, [and Article] 4(1) of Directive [93/13] preclude a judicial interpretation that declares that a term in a loan agreement setting a rate of default interest that exceeds by more than two percentage points the annual ordinary interest fixed in the agreement constitutes disproportionately high compensation imposed on the consumer who is late performing his obligation to pay and is, therefore unfair?

(2) Do Article 3, in conjunction with point 1(e) of the annex, [and Article] 4(1), [Article] 6(1) and [Article] 7(1) of Directive [93/13] preclude a judicial interpretation that, when a term in a loan agreement that sets the rate of default interest is declared unfair, identifies, as the object of the review of unfairness, the fact that that rate exceeds the ordinary interest rate, on the ground that it constitutes “disproportionately high compensation imposed on the consumer who has not performed his obligations”, and establishes as the consequence of the declaration of unfairness that that additional charge must cease to apply, so that only ordinary interest continues to accrue until the loan has been repaid?

(3) If the second question were to be answered in the [affirmative], must a declaration that a term setting a default rate of interest is void, because unfair, have other effects in order to be compatible with Directive 93/13, such as, for example, the total elimination of both ordinary and default interest, or the charging of statutory interest, when the borrower fails to perform his obligation to make the loan repayments within the time limits stipulated in the agreement?'

Procedure before the Court

36 By orders of the President of the Court of 13 July 2016 and 5 April 2017, the respective requests from the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona) and the Tribunal Supremo (Supreme Court) that Cases C-96/16 and C-94/17 be determined under the expedited procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and in Article 105(1) of the Rules of Procedure of the Court, were dismissed.

37 By decision of the Court of 21 November 2017, the two cases were joined for the purposes of the oral part of the procedure and the judgment.

Consideration of the questions referred

The first question, parts (a) and (b), in Case C-96/16

38 By its first question, parts (a) and (b), in Case C-96/16, which it is appropriate to examine together, the referring court is asking, in essence, whether Directive 93/13 must be interpreted as precluding a business practice consisting in assigning or purchasing a consumer's debt, without any provision for such an assignment having been made in the loan agreement concluded with the consumer, without giving the consumer prior notice of that assignment, without his consent and without giving him the opportunity to purchase and thereby extinguish his debt by reimbursing to the assignee the price it paid in respect of that assignment, plus the applicable interest, expenses and costs.

39 In that regard, as the Advocate General notes in point 43 of his Opinion, it is apparent from the wording of Article 1(1) and Article 3(1) of Directive 93/13 and from the general scheme thereof, that that directive applies only to contractual terms and excludes mere practices.

40 In the present case, the order for reference indicates that no term contained in the contracts at issue in the main proceedings provides for or regulates either (i) the possibility for Banco Santander to assign to a third party the debt owed by the debtors in the main proceedings; or (ii) the latter's possible right to purchase their debt from that third party. According to the order for reference, that assignment was thus made on the basis of the relevant provisions of the Civil Code.

41 It follows that that directive does not apply to the practices referred to in the first question, parts (a) and (b), in Case C-96/16, in the absence of any contractual term in that regard.

42 In so far as, by those questions, the referring court seeks to ascertain whether Directive 93/13 precludes the national provisions contained in Article 1535 of the Civil Code and Articles 17 and 540 of the Civil Procedure Code, which regulate the assignment of debts and the replacement of the assignor by the assignee in ongoing proceedings, on the ground that those provisions –– for the reasons stated in paragraph 26 of the present judgment –– do not guarantee sufficient protection for consumer interests, it must be noted that, in accordance with Article 1(2) of Directive 93/13, contractual terms which reflect mandatory statutory or regulatory provisions are not subject to the provisions of that directive.

43 According to settled case-law of the Court, as is apparent from the 13th recital of Directive 93/13, the exclusion in Article 1(2) of that directive extends to provisions of national law that apply between the parties to the contract independently of their choice and to provisions that apply by default, that is to say, in the absence of other arrangements established by the parties in that regard. That exclusion is justified by the fact that it is legitimate to presume that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts, a balance which the EU legislature has expressly intended to preserve (see, to that effect, order of 7 December 2017, *Woonhaven Antwerpen*, C-446/17, not published, EU:C:2017:954, paragraphs 25 and 26 and the case-law cited).

44 The Court has held, in essence, that that exclusion covers mandatory statutory or regulatory provisions other than those relating to the control of unfair terms, particularly those concerning the scope of the national court's powers to assess the unfairness of a contractual term (see, to that effect, order of 7 December 2017, *Woonhaven Antwerpen*, C-446/17, not published, EU:C:2017:954, paragraph 27 and the case-law cited).

45 In the order of 5 July 2016, *Banco Popular Español and PL Salvador* (C-7/16, not published, EU:C:2016:523, paragraphs 24 to 27), the Court has already held, in the light of that case-law, that the exclusion provided for in Article 1(2) of Directive 93/13 covered a national provision such as Article 1535 of the Civil Code on the ground that that article was a mandatory provision and did not relate to the scope of the national court's powers to assess the unfairness of a contractual term. In the latter respect, it should be added, more generally, that Article 1535 does not appear to relate to the control of unfair terms.

46 In the light of the information contained in the order for reference, it appears that the same may be said with regard to Articles 17 and 540 of the Civil Procedure Code, a matter which is, however, for the referring court to determine.

47 In the light of the foregoing, the answer to the first question, parts (a) and (b), in Case C-96/16 is, first, that Directive 93/13 must be interpreted, first, as not applying to a business practice consisting in assigning or purchasing a consumer's debt, without any provision for such an assignment having been made in the loan agreement concluded with the consumer, without giving the consumer prior notice of that assignment, without his consent and without giving him the opportunity to buy back and thereby extinguish his debt by reimbursing to the assignee the price it paid in respect of that assignment, plus the applicable interest, expenses and costs. Secondly, that directive does not apply to national provisions, such as those contained in Article 1535 of the Civil Code and Articles 17 and 540 of the Civil Procedure Code, which regulate that opportunity to buy back a debt and govern the replacement of the assignor by the assignee in ongoing proceedings.

The second question, part (a), in Case C-96/16 and the first question in Case C-94/17

48 By the second question, part (a), in Case C-96/16 and the first question in Case C-94/17, the referring courts are asking, in essence, whether Directive 93/13 must be interpreted as precluding national case-law, such as that of the Tribunal Supremo (Supreme Court) at issue in the main proceedings, according to which, in a loan agreement concluded with a consumer, a non-negotiated term that fixes the default interest rate is unfair, on the ground that the consumer who is late performing his payment obligation is required to pay a disproportionately high sum in compensation, when that interest rate exceeds by more than two percentage points the ordinary interest rate provided for by that agreement.

Admissibility

49 Both Banco Santander and the Spanish Government, in Case C-96/16, and Banco de Sabadell, in Case C-94/17, submit that the questions referred to in the preceding paragraph of the present judgment are inadmissible on the ground that they raise a purely hypothetical problem.

50 In that regard, it should be recalled that, in the context of the procedure referred to in Article 267 TFEU, which is based on a clear separation of functions between national courts and the Court of Justice, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Where those questions concern the interpretation of EU law, the Court is bound, in principle, to give a ruling (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 19 and the case-law cited).

51 Such questions in fact enjoy a presumption of relevance. The Court may refuse to give a ruling thereon only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure, are not satisfied or where it is quite obvious that the interpretation of a provision of EU law, or the assessment of its validity, which is sought by the national court, bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 20 and the case-law cited).

52 In the present case, as regards, in the first place, the second question, part (a), in Case C-96/16, it is apparent from the order for reference in that case that the referring court has not yet given a final ruling on the unfairness of the terms of the agreements at issue in the main proceedings, which fix the default interest rate. Furthermore, as the Advocate General notes in point 53 of his Opinion, it follows from that same order for reference that, by that question, that court is asking in essence whether the criterion identified by the Tribunal Supremo (Supreme Court), as recalled in paragraph 18 of the present judgment, is compatible with the consumer protection scheme established by Directive 93/13 inasmuch as that criterion applies objectively and automatically, without allowing the national court hearing the matter to take into account all of the circumstances of the case. An answer to that question would be useful to the referring court in determining which factors should form the basis of its assessment of the unfairness of the contractual terms in the case in the main proceedings.

53 As regards, in the second place, the first question in Case C-94/17, it is not obvious that that question bears no relation to the actual facts or purpose of the dispute in the main proceedings or that the problem raised is purely hypothetical. As the Advocate General notes in point 54 of his Opinion, the referring court has, in essence, stated that the appeal before it, although relating specifically to the consequences of the unfairness of the contractual term at issue in the main proceedings, also raises doubts as to the interpretation of the provisions of Directive 93/13 concerning the finding of unfairness. Moreover, it cannot be excluded that, under Spanish law, that court may or must, of its own motion, re-examine the unfairness of the contractual terms in the appeal pending before it and, more specifically, the criteria in the light of which that unfairness must be established –– a point on which it does not appear to have yet given a final ruling: that is particularly so since, in accordance with the Court's settled case-law, the question whether a contractual term must be declared unfair is to be treated as a question of public policy, the national court being required, as soon as it has the legal and factual elements necessary for that task, to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair (see, to that effect, judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 44, and of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraphs 40, 41 and 44).

54 Consequently, the second question, part (a), in Case C-96/16, and the first question in Case C-94/17, are admissible.

Substance

– Preliminary observations

55 Both Banco Santander and Banco de Sabadell argue that the criterion identified in the case-law of the Tribunal Supremo (Supreme Court) at issue in the main proceedings, which is referred to in paragraph 18 of the present judgment, is not binding. Thus, according to those banks, although the Spanish courts appear, on the facts, to have applied that criterion automatically the national court could nevertheless diverge from that criterion, if justified by the circumstances of the case.

56 Furthermore, at the hearing before the Court of Justice, the Spanish Government stated that the case-law of the Tribunal Supremo (Supreme Court) is supplementary to the national legal order inasmuch as it ensures a uniform interpretation of the law by the national courts. Nonetheless, according to that government, that case-law is not binding or mandatory, in that it is devoid of normative character *erga omnes*, does not have the force of law and is not a source of law in the Spanish legal order. Thus the lower courts may diverge from it and attempt to drive the Tribunal Supremo (Supreme Court) to amend it. The Spanish Government added that that case-law does, however, have illustrative value, inasmuch as the decisions of the lower national courts may be set aside by the Tribunal Supremo (Supreme Court) if they diverge from that case-law.

57 In that respect, it should be recalled that, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference. According to settled case-law, the Court does not have jurisdiction to interpret the internal law of a Member State (judgment of 16 February 2017, *Agro Foreign Trade & Agency*, C-507/15, EU:C:2017:129, paragraph 23 and the case-law cited).

58 As the Advocate General notes in points 65 to 67 of his Opinion, it follows from the orders for reference that, according to the referring courts, the Tribunal Supremo (Supreme Court) has, in the case-law at issue in the main proceedings, established an irrebuttable presumption that a contractual term which meets the criterion referred to in paragraph 18 of the present judgment is unfair.

59 Moreover, it also follows, in essence, from those orders and from the considerations stated in paragraph 56 of the present judgment, that the binding nature of that case-law with regard to the Spanish lower courts cannot be excluded, in that they are bound to declare such a contractual term unfair, failing which they will be criticised by the Tribunal Supremo (Supreme Court) ruling on appeal.

60 In those circumstances, the Court must answer the questions referred for a preliminary ruling on the basis of the premisses set out in the two preceding paragraphs of the present judgment.

61 Furthermore, it must be noted that, whilst it follows from the case-law of the Tribunal Supremo (Supreme Court) at issue in the main proceedings that any contractual term which satisfies the criterion referred to in paragraph 18 of the present judgment is presumed to be unfair, that case-law does not, however, appear to deprive the national court of the possibility of considering that a term contained in a loan agreement concluded with a consumer which does not satisfy that criterion –– that is to say, a term fixing a default interest rate not exceeding by more than two percentage points the ordinary interest rate provided for in the agreement –– is nevertheless unfair and, where appropriate, setting it aside, a matter which it is for the referring courts to determine.

– The answer to the second question, part (a), in Case C-96/16 and the first question in Case C-94/17

62 In order to answer the questions referred for a preliminary ruling, it must be noted from the outset, subject to the checks to be carried out by the referring courts, that the Tribunal Supremo (Supreme Court) appears to have taken as its basis, for the purpose of defining the criterion referred to in paragraph 18 of the present judgment, the guidelines identified by the Court of Justice as regards the assessment of the possible unfairness of a contractual term.

63 It is apparent from the considerations stated in paragraphs 17 to 19 of the present judgment and from the documents available to the Court that, to that end, the Tribunal Supremo (Supreme Court) examined the national rules applicable in various branches of law and sought to determine the default rate of interest which could reasonably be agreed to, at the end of an individual negotiation, by a consumer who has been treated fairly and equitably, whilst ensuring in particular that the function of that interest is maintained, which is specifically to deter delays in payment and compensate the creditor in a proportionate manner in the event of such delay. It therefore appears that the Tribunal Supremo (Supreme Court) complied with the requirements set out in particular in the judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraphs 68, 69, 71 and 74).

64 As regards the matter of whether Directive 93/13 precludes the application of a criterion derived from case-law, such as that referred to in paragraph 18 of the present judgment, inasmuch as it results in an irrebuttable presumption that any contractual term which meets it is unfair, it should be recalled that that directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (judgment of 21 December 2016, *Biuro podróży 'Partner'*, C-119/15, EU:C:2016:987, paragraph 28 and the case-law cited).

65 In view of that weak position, Directive 93/13 prohibits, in Article 3(1), standard contractual terms which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 42).

66 It is for the national court to check whether the contractual terms brought before it must be classed as unfair, by taking account, in principle, and in accordance with Article 4(1) of Directive 93/13, of all the circumstances of the case (see, to that effect, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 71).

67 The Court in essence inferred from those provisions as well as from Article 6(1) and Article 7(1) of Directive 93/13 that the latter precludes national legislation defining a criterion in the light of which the unfairness of a contractual term must be assessed, when such legislation prevents the national court dealing with a term that does not meet that criterion from examining whether that term is unfair and, if it is, declaring it unfair and setting it aside (see, to that effect, judgment of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraphs 28 to 42). As stated in paragraph 61 of the present judgment, this does not, however, appear to be the effect of the case-law of the Tribunal Supremo (Supreme Court) at issue in the main proceedings.

68 In that respect, as the Advocate General notes in essence in paragraph 60 of his Opinion, it cannot be excluded that, in their role of ensuring consistency in the interpretation of the law, and in the interests of legal certainty, the supreme courts of a Member State, such as the Tribunal Supremo (Supreme Court), may, in compliance with Directive 93/13, elaborate certain criteria in the light of which the lower courts must examine the unfairness of contractual terms.

69 The case-law of the Tribunal Supremo (Supreme Court) at issue in the main proceedings admittedly does not appear to come within the ambit of the stricter measures which may be adopted by the Member States in order to ensure a higher level of protection for consumers pursuant to Article 8 of

that directive, given, in particular, that –– as stated by the Spanish Government at the hearing before the Court –– that case-law does not appear to have the force of law or constitute a source of law in the Spanish legal order. However, the fact remains that the development of a criterion derived from case-law, such as that identified in the present case by the Tribunal Supremo (Supreme Court), is wholly consistent with the objective of consumer protection pursued by that directive. It follows from Article 3(1) of Directive 93/13 and from the general scheme of the directive that the latter does not so much aim to guarantee an overall contractual balance between the rights and obligations of the parties to the agreement as to prevent an imbalance between those rights and obligations from arising to the detriment of consumers.

70 It follows that Directive 93/13 does not preclude the establishment of such a criterion.

71 Consequently, the answer to the second question, part (a), in Case C-96/16, and the first question in Case C-94/17, is that Directive 93/13 must be interpreted as not precluding national case-law, such as that of the Tribunal Supremo (Supreme Court) at issue in the main proceedings, whereby, in a loan agreement concluded with a consumer, a non-negotiated term fixing the default interest rate applicable is unfair, on the ground that the consumer who is late performing his payment obligation is required to pay a disproportionately high sum in compensation, where that rate exceeds by more than two percentage points the ordinary interest rate provided for in that agreement.

The second question, part (b), in Case C-96/16, and the second question in Case C-94/17

72 By the second question, part (b), in Case C-96/16 and the second question in Case C-94/17, the referring courts are asking, in essence, whether Directive 93/13 must be interpreted as precluding national case-law, such as that of the Tribunal Supremo (Supreme Court) at issue in the main proceedings, whereby the consequence of the unfairness of a non-negotiated term fixing the default rate of interest in a loan agreement concluded with a consumer is the complete elimination of that interest, while the ordinary interest provided for in that agreement continues to run.

73 In order to answer those questions, it must be recalled that, in accordance with Article 6(1) of Directive 93/13, national courts are merely required to refrain from applying an unfair contractual term in order that it may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible (judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 71 and the case-law cited).

74 While the Court has accepted that a national court may substitute a supplementary provision of domestic law for an unfair contractual term, the Court has held that that possibility is limited to situations in which the invalidation of that contractual term would require the court to annul the agreement in its entirety, thereby exposing the consumer to such consequences that he would be penalised as a result. From that point of view, as the Court has in essence ruled, the annulment of a term in a loan agreement fixing the default rate of interest applicable cannot have adverse consequences for the consumer concerned inasmuch as the amounts which may be demanded from him by the lender will necessarily be lower if that default interest does not apply (see, to that effect, judgment of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraphs 33 and 34).

75 Moreover, Directive 93/13 does not require that, in addition to the term declared unfair, the national court set aside those terms which have not been classed as such. The objective pursued by that directive consists in protecting the consumer and restoring the balance between the parties by not

applying those contractual terms held to be unfair, whilst maintaining, in principle, the validity of the other terms of the agreement at issue (see, to that effect, judgments of 30 May 2013, *Jőrös*, C-397/11, EU:C:2013:340, paragraph 46, and of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 32).

76 In particular, it does not follow from that directive that the setting aside or annulment of the term in a loan agreement fixing the default rate of interest, on the ground of the unfairness of that term, should also bring about that of the term in that agreement fixing the ordinary rate of interest, particularly as those different terms must be clearly distinguished. In the latter respect, the point should be made that, as is apparent from the order for reference in Case C-94/17, default interest is intended to penalise the debtor's failure to fulfil his obligation to make the loan repayments on the dates agreed contractually, to deter the debtor from falling behind in the performance of his obligations and, where appropriate, to compensate the lender for the loss suffered as a result of a late payment. By contrast, the function of ordinary interest is one of remuneration for the lender making a sum of money available until that sum has been repaid.

77 As the Advocate General notes in point 90 of his Opinion, those considerations apply regardless of the way in which the contractual term determining the default interest rate and that fixing the ordinary rate of interest are worded. In particular, they apply not only when the default interest rate is fixed independently of the ordinary interest rate, in a separate contractual term, but also when the default interest rate is fixed in the form of an increase in the ordinary interest rate by a certain number of percentage points. In the latter case, as the unfair term consists in that increase, Directive 93/13 requires solely that that increase be annulled.

78 In the present case, subject to the checks to be carried out by the referring courts, it appears from the orders for reference that the approach adopted in the case-law of the Tribunal Supremo (Supreme Court) at issue in the main proceedings implies that the national court, having found the term in a loan agreement fixing the default interest rate to be unfair, simply refrains from applying that term or the increase that that interest represents by comparison with the ordinary interest, without being able to substitute supplementary national provisions for that contractual term or revise the term in question, whilst maintaining the validity of the other terms in the agreement, and in particular the term concerning ordinary interest.

79 In the light of the foregoing, the answer to the second question, part (b), in Case C-96/16 and the second question in Case C-94/17 must be that Directive 93/13 must be interpreted as not precluding national case-law, such as that of the Tribunal Supremo (Supreme Court) at issue in the main proceedings, whereby the consequence of the unfairness of a non-negotiated term fixing the default interest rate in a loan agreement concluded with a consumer consists in the complete elimination of that interest, while the ordinary interest provided for in that agreement continues to run.

The third question in Case C-94/17

80 Given that the second question in Case C-94/17 has been answered in the negative, it is not necessary to answer the third question in that case.

Costs

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

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

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted, first, as not applying to a business practice consisting in assigning or purchasing a consumer's debt, without any provision for such an assignment having been made in the loan agreement concluded with the consumer, without giving the consumer prior notice of that assignment, without his consent and without giving him the opportunity to buy back and thereby extinguish his debt by reimbursing to the assignee the price it paid in respect of that assignment, plus the applicable interest, expenses and costs. Secondly, that directive does not apply to national provisions, such as those contained in Article 1535 of the Código Civil (Civil Code) and Articles 17 and 540 of Ley 1/2000 de Enjuiciamiento Civil (Civil Procedure Code) of 7 January 2000, which regulate that opportunity to buy back a debt and govern the replacement of the assignor by the assignee in ongoing proceedings.**

2. **Directive 93/13 must be interpreted as not precluding national case-law, such as that of the Tribunal Supremo (Supreme Court, Spain) at issue in the main proceedings, whereby, in a loan agreement concluded with a consumer, a non-negotiated term fixing the default interest rate applicable is unfair, on the ground that the consumer who is late performing his payment obligation is required to pay a disproportionately high sum in compensation, where that rate exceeds by more than two percentage points the ordinary interest rate provided for in that agreement.**

3. **Directive 93/13 must be interpreted as not precluding national case-law, such as that of the Tribunal Supremo (Supreme Court) at issue in the main proceedings, whereby the consequence of the unfairness of a non-negotiated term fixing the default interest rate in a loan agreement concluded with a consumer consists in the complete elimination of that interest, while the ordinary interest provided for in that agreement continues to run.**

[Signatures]

i — The wording of paragraph 77 of this document has been modified after it was first put online.