Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 30 January 2020 [1]

Case C-452/18

XZ
v
Ibercaja Banco SA

(Request for a preliminary ruling
from the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain))

(Reference for a preliminary ruling – Unfair terms in consumer contracts – Directive 93/13/EEC – Mortgage loan agreement – Term limiting the variability of the interest rate ('floor' term) – Lack of transparency – Unfairness – Conclusion by the parties of an agreement amending the 'floor' term, confirming the validity of the mortgage loan agreement and providing for a mutual waiver of the right to challenge its validity before the courts – Compatibility with Directive 93/13 – Conditions)

I. Introduction

1. The present request for a preliminary ruling has been made by the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain) in proceedings between XZ and Ibercaja Banco SA ('Ibercaja'). In essence, the parties to the main proceedings were bound by a variable interest rate mortgage loan agreement. That agreement contained a 'floor' term limiting the variability of that interest rate. A judgment of the Tribunal Supremo (Supreme Court, Spain) has called into question the compatibility of such a term with the Spanish legislation transposing Directive 93/13/EEC on unfair terms in consumer contracts. [2] In that context, XZ and Ibercaja concluded an agreement, the legal characterisation of which they dispute, amending the term in question, confirming the validity of that loan agreement and providing for a mutual waiver of the right to challenge it before the courts.

2. By its questions, the referring court asks the Court whether such an agreement is compatible with Directive 93/13. Those questions provide the Court with the opportunity to rule, for the first time, on whether, and if so in what circumstances, a consumer may contractually waive the right to rely on the potential unfairness, within the meaning of that directive, of a particular contractual term. On this question hinges, inter alia, the extent of the freedom of a consumer and a seller or supplier to confirm or amend a potentially unfair contractual term – or to conclude amicable agreements, in particular settlements, in order to resolve their disputes out of court.

1 Original language: French.

2 Council Directive of 5 April 1993 (OJ 1993 L 95, p. 29).

3. In this Opinion, I shall explain that Directive 93/13 does not, as a matter of principle, prohibit a consumer and a seller or supplier from concluding an agreement in which the consumer waives the right to rely on the unfairness of a pre-existing term. Nevertheless, such an agreement must comply with the requirements laid down by that directive and, in particular, with the requirement of transparency provided for therein. I shall therefore propose that the Court adopt an approach which makes it possible, inter alia, to safeguard the validity of 'true' amicable settlements entered into with full knowledge of the facts by consumers, while declaring unlawful those imposed by a seller or supplier and merely having the appearance of being true amicable settlements.

II. Legal framework

A. Directive 93/13

4. Article 3 of Directive 93/13 provides:

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

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

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

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

5. Article 4 of that directive provides:

'1. 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.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.'

6. Under Article 6(1) of that directive:

'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.'

7. The annex to that directive, entitled 'Terms referred to in Article 3(3)', refers in its point 1(q) to terms which have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract'.

B. Spanish law

8. Directive 93/13 was transposed into Spanish law, essentially, by Ley 7/1998 sobre condiciones generales de la contratación (Law 7/1998 on general contractual conditions) of 13 April 1998, which was recast, together with other provisions transposing various EU consumer-protection directives, by Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Royal Legislative Decree 1/2007 approving the recast text of the General Law for the protection of consumers and users and other supplementary laws, 'Royal Legislative Decree 1/2007') of 16 November 2001.

9. Article 10 of Royal Legislative Decree 1/2007 provides:

'Any prior waiver of the rights accorded to consumers and users by the present legislation shall be void, and any acts carried out in fraudulent circumvention of the law shall also be void pursuant to Article 6 of the [Spanish] Civil Code'.

10. Article 83(1) of Royal Legislative Decree 1/2007 provides that 'unfair contractual terms shall be automatically void and deemed not to have formed part of the contract'.

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

11. By an authentic instrument of 23 December 2011, XZ acquired immovable property from a developer. That property was encumbered with a mortgage, established in favour of the Caja de Ahorros de la Inmaculada de Aragón, to secure repayment of a loan granted by that undertaking to that developer, in accordance with an agreement dated 23 July 2010.[3] By acquiring that property, XZ was subrogated to the rights of the developer in that agreement.

12. The mortgage loan agreement provided that a variable interest rate was applicable to that loan. However, a term in that agreement limited that variability, laying down an annual interest rate 'cap' of 9.75 % and an annual interest rate 'floor' of 3.25 %.

3 'The mortgage loan agreement'.

13. On 4 March 2014, Ibercaja, the successor company to the Caja de Ahorros de la Inmaculada de Aragón with respect to the loan in question,[4] concluded with XZ an agreement designated as a 'novation agreement amending the loan'. That agreement provided, in particular, for a reduction of the 'floor' rate applicable to that loan, lowering it to 2.35 % as of the next monthly instalment and until repayment of the loan in full. That agreement also contained a term which read as follows:

'The parties confirm the validity and application of the loan, consider its terms and conditions to be appropriate and, consequently, expressly and mutually waive the right to bring any action against the other party in relation to the agreement entered into and its terms, as well as any settlements and payments made to date, which the parties acknowledge as being compatible with that agreement.'

14. Moreover, that agreement contained a statement which was handwritten and signed by XZ, based on a model provided by Ibercaja, in which XZ declared:

'I am aware and understand that the interest rate on my loan will never fall below an annual nominal rate of 2.35 %.'

15. On 14 January 2016, XZ paid the last monthly instalment of the loan.

16. On 1 February 2017, XZ brought an action before the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel), seeking a declaration of invalidity on grounds of unfairness of the 'floor' term in the mortgage loan agreement and an order requiring Ibercaja to repay the amounts paid under that term.

17. Before that court, Ibercaja disputed that that term was unfair and opposed the refund requested, relying, inter alia, on the 'novation agreement amending the loan' concluded between it and XZ. In that context, XZ argued that the rule that unfair terms 'shall … not be binding on the consumer', laid down in Article 6(1) of Directive 93/13, must extend to such an agreement, with the result that that agreement, like that term, should be regarded as void.

18. In those circumstances, the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the principle that void contractual terms are not binding (Article 6 of [Directive 93/13] also extend to subsequent contracts and legal arrangements concerning such terms, such as the ["novation agreement amending the loan"]?

Given that absolute nullity means that the said term is deemed never to have existed in the legal/financial life of the contract, may it be concluded that subsequent legal documents and their effect on the term in question – that is, the ["novation agreement amending the loan"] – are also devoid of legal reality and must be deemed non-existent and without effect?

(2) Can documents which amend, or effect a settlement in respect of, non-negotiated terms and may not satisfy the fairness and transparency tests be considered to be in the nature of general contractual terms for the purposes of Article 3 of Directive 93/13 and, therefore, be subject to the same grounds for invalidity that apply to the original documents that are the subject of the novation or settlement?

4 It is apparent from the order for reference and from Ibercaja's observations that, on an undisclosed date, Caja de Ahorros de la Inmaculada de Aragón was integrated into Banco Grupo Cajatrés S.A. Subsequently, on 23 May 2013, Banco Grupo Cajatrés S.A. was itself integrated into Ibercaja, before being finally absorbed by the latter on 1 October 2014.

(3) Must the waiver of rights of action contained in a ["novation agreement amending the loan"] also be void, in so far as the contracts signed by customers did not inform them either of the fact that a contractual term was void or of the money or financial sum that they were entitled to receive in repayment of interest paid as a result of the initial imposition of the "floor terms"?

It is noted that customers thus sign a waiver agreeing not to take legal action, without having been told by the bank what rights they are waiving or how much money they are giving up.

(4) When the ["novation agreement amending the loan"] is examined in the light of the case-law of the Court … and Articles 3(1) and 4(2) of Directive 93/13, is the new "floor term" included vitiated once again by a lack of transparency, as the bank has again failed to comply with the transparency criteria laid down in the judgment of the Tribunal Supremo [(Supreme Court)] of 9 May 2013 and failed to inform the customer of the true financial cost of the said term in his or her mortgage, which would make him or her aware of the interest rate (and the resulting monthly payment) that he or she would have to pay if the new "floor term" were to be applied, and the interest rate (and the resulting monthly payment) that he or she would have to pay if no floor term were applied and the interest rate agreed in the mortgage were applied with no lower limit?

In other words, when the financial institution imposed the document referred to as a "novation" in respect of "floor terms", should it have satisfied the transparency tests described in Articles 3(1) and 4(2) of Directive 93/13 and informed the consumer of the amount of money lost as a result of applying the "floor terms", and of the interest rate that would be applicable in the absence of those terms, and, given that the bank did not do so, are those documents also vitiated by a ground of nullity?

(5) In view of their substance, can the terms concerning legal action included in the general terms and conditions of the ["novation agreement amending the loan"] be considered unfair under Article 3(1) of Directive 93/13 in conjunction with the Annex thereto listing unfair terms, and specifically with paragraph [1](q) of that annex …, given that they restrict the right of consumers to exercise rights that may arise or become evident after the contract has been signed, as was the case with the possibility of claiming full repayment of the interest paid (in accordance with [the judgment in *Gutiérrez Naranjo and Others* [5]])?'

19. The order for reference, dated 26 June 2018, was received at the Registry of the Court on 11 July 2018. Written observations have been lodged by Ibercaja, the Spanish Government and the European Commission. The same parties and interested persons, as well as XZ, were represented at the hearing held on 11 September 2019.

IV. Analysis

20. The background to the present case is the issue of 'floor' terms used in loan agreements. [6] I would briefly recall that, immediately preceding and during the financial crisis which shook the global economy between 2007 and 2012, the practice, in particular, of Spanish banks was to offer variable-interest-rate mortgage loans containing such a term, intended to limit the variability of that interest rate. More specifically, such a term means that, in the event that the interest rate falls below

5 Judgment of 21 December 2016 (C-154/15, C-307/15 and C-308/15, EU:C:2016:980), ('the judgment in *Gutiérrez Naranjo*').

6 This issue has already been brought to the attention of the Court. See, in particular, the judgment of 14 April 2016, *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252); the judgment in *Gutiérrez Naranjo*; and the order of 14 November 2013, *Banco Popular Español and Banco de Valencia* (C-537/12 and C-116/13, EU:C:2013:759).

the absolute 'floor' provided for therein, the borrower must pay a rate of interest equal to that floor.[7] In practice, 'floor' terms thus had the effect of preventing Spanish consumers from benefiting from the fall in interest rates which occurred during that financial crisis, while protecting credit institutions from the negative effects which that fall should have had on their margins.[8]

21. Nonetheless, the use of 'floor' terms has not been without consequences for Spanish banks. In a judgment of 9 May 2013,[9] the Tribunal Supremo (Supreme Court) found that the 'floor' terms contained in the general terms and conditions of three Spanish banks were unfair on grounds of lack of transparency and, consequently, declared those general terms and conditions invalid. Nevertheless, that court limited the temporal effects of its judgment, which was, in particular, not to apply to sums paid by consumers under those terms before the date of its publication.[10] Although the parties to the main proceedings disagree as to the extent of the publicity received by that judgment when it was delivered, it seems to me that it can safely be said that that judgment has, at the very least, given rise to serious doubts as to whether the 'floor' terms used by other banks were vitiated by the same lack of transparency.

22. In that context, in July 2013 Ibercaja adopted an internal policy of concluding a so-called 'novation agreement amending the loan' with some or all of its customers having a mortgage loan containing a 'floor' term.[11] That agreement provided, in particular, for a reduction of the absolute 'floor' applicable to the loan of the customer concerned, effective as of the next monthly instalment and until the end of that loan, and, also, for an express mutual waiver of the right to challenge the terms of that loan before the courts. On 4 March 2014, Ibercaja concluded such an agreement with XZ.

23. On 21 December 2016, the Court, adjudicating on a question referred by several Spanish courts concerning the conclusions which they were to draw from a finding that a 'floor' term was unfair, delivered the judgment in *Gutiérrez Naranjo*. In that judgment, the Court held, in essence, that Article 6(1) of Directive 93/13 generally requires that, where a national court finds that such a term is unfair, it must disapply the term and order that the amounts paid thereunder be repaid to the consumer.[12] The Court also pointed out that that provision prevents the right to restitution from being limited in time, as it had been by the Tribunal Supremo (Supreme Court) in its judgment of 9 May 2013.[13]

7 See the judgment in *Gutiérrez Naranjo*, paragraph 18.

8 The scale of the phenomenon was considerable: by way of example, no less than one third of all mortgage loans marketed in Spain during 2010 included such a term (see Zunzunegui, F., 'Mortgage Credit – Mis-selling of Financial Products – Study requested by the ECON committee', *European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies*, June 2018, pp. 23 to 32 and references cited).

9 Judgment No 241/2013 ('the judgment of the Tribunal Supremo (Supreme Court) of 9 May 2013' or 'the judgment of 9 May 2013', ES:TS:2013:1916).

10 The Tribunal Supremo (Supreme Court) subsequently confirmed that solution (see in particular judgments of 25 March 2015, No 139/2015 (ES:TS:2015:1280), and of 29 April 2015, No 222/2015 (ES:TS:2015:2207)). See the judgment in *Gutiérrez Naranjo*, paragraphs 18 to 21 and 67.

11 According to Ibercaja, its employees were to propose the conclusion of a 'novation agreement amending the loan' only to those customers who, following the judgment of the Tribunal Supremo of 9 May 2013, had submitted a claim concerning the 'floor' term laid down in their contract. By contrast, according to XZ, the conclusion of such agreements formed part of a campaign aimed at all customers whose contracts contained such a 'floor' term, whether or not they had submitted a claim in that regard. I would point out that the question whether XZ had herself submitted such a claim is a matter of dispute between the parties to the proceedings before the referring court (see point 80 of this Opinion).

12 That is to say, specifically, the difference between the amounts paid in accordance with the absolute 'floor' and those which would have been paid if that floor had not existed and the variable interest rate had been applied.

13 See the judgment in *Gutiérrez Naranjo*, paragraphs 61 to 75, and point 21 of this Opinion.

24. On 1 February 2017, having probably become aware of that judgment of the Court, XZ brought an action before the referring court seeking a declaration of invalidity on the ground that the 'floor' term in her mortgage loan agreement was unfair and an order requiring Ibercaja to repay to her the amounts paid under that term. [14]

25. The central question raised before that court is that of the legal consequences which the 'novation agreement amending the loan', concluded by XZ and Ibercaja on 4 March 2014, may have on those claims.

26. The bank maintains that that agreement precludes XZ from relying in court on the unfairness of the 'floor' term initially laid down in the mortgage loan agreement. Its line of argument in this regard echoes a judgment of the Tribunal Supremo (Supreme Court) of 11 April 2018, [15] in which that court gave a ruling on identical agreements concluded between Ibercaja and two other customers. That court held essentially that such an agreement constitutes a *settlement*, [16] concluded by the parties in order definitively to resolve out of court the uncertainty generated by its judgment of 9 May 2013 concerning the validity of the 'floor' term contained in their loan agreements, in exchange for a reduction of that term, to which the parties have mutually agreed. Consequently, it is not possible for a court to examine the question of the unfairness of that term, since that settlement is, in that regard, binding between the parties. In that context, the Tribunal Supremo (Supreme Court) ruled that Directive 93/13 does not prevent a seller or supplier and a consumer from compromising in order to settle their disputes out of court. Moreover, that court took the view that the agreements in question were transparent for consumers. [17]

27. XZ, for her part, maintains that the 'novation agreement amending the loan' should be regarded as void and cannot therefore prevent the referring court from examining her claims. Her line of argument in that respect reflects, for its part, the dissenting opinion accompanying the judgment of the Tribunal Supremo of 11 April 2018, [18] referred to in the previous point. In that opinion, it is argued, in essence, that such an agreement constitutes not a settlement, but a *novation* [19] of the 'floor' term contained in the mortgage loan agreements of the customers concerned, such a novation not being valid under national law. [20] In any event, first, Article 6(1) of Directive 93/13 precludes the parties from amending or confirming an unfair term and the consumer from waiving the right to challenge such a term before the courts. Secondly, such an agreement lacks transparency, since it does not contain the information necessary to allow consumers to understand the economic and legal consequences for them which derive from its conclusion. The referring court tends to take the same view.

28. I must point out at the outset that, although it is clear from the two preceding points that the legal characterisation of the 'novation agreement amending the loan' is a matter of dispute between the parties to the main proceedings, that issue is, as the Commission argues, a matter for Spanish law alone, with the result that it is for the referring court, rather than for the Court of Justice, to resolve that issue.

14 The case of XZ is far from being an isolated one. More than a million claims for repayment of amounts paid under a 'floor' term have been brought before the Spanish courts (see Zunzunegui, F., op. cit., p. 6). See, concerning the question of the impact on the Spanish economy of the judgment of the Tribunal Supremo of 9 May 2013 and the judgment in *Gutiérrez Naranjo*, International Monetary Fund, *IMF Country Report No 17/345, Spain: Financial Sector Assessment Program – Technical Note on Supervision of Spanish Banks – Select[ed] issues*, 13 November 2017, pp. 8, 10, 23 and 53, in which the marketing of mortgage loans with a 'floor' term was regarded as constituting a systemic risk for that economy.

15 Judgment No 205/2018 ('the judgment of the Tribunal Supremo (Supreme Court) of 11 April 2018' or 'the judgment of 11 April 2018', ES:TS:2018:1238).

16 In accordance with Article 1809 of the Spanish Civil Code, a settlement is a contract whereby the parties, by each giving, promising or retaining something, prevent a dispute from arising or put an end to an existing dispute.

17 For more details, see point 82 of this Opinion.

18 'The dissenting opinion of Judge Orduña Moreno'.

19 Novation is a contract, provided for in particular by Article 1203 of the Spanish Civil Code, by which two parties, bound by a pre-existing obligation, modify that obligation or replace it with another.

20 See footnote 31 to this Opinion.

29. It is for the Court, by contrast, to analyse, in the light of Directive 93/13, the situation in which (1) a consumer and a seller or supplier are bound by a contract, (2) serious doubts have arisen as to the potential unfairness, for the purposes of Article 3(1) of that directive, of a term of that contract,[21] and (3) the parties have, by a subsequent agreement, novated the term in question,[22] confirmed the validity of the original contract and mutually waived the right to challenge its terms before the courts. More specifically, it is necessary to determine, first, as requested by the referring court in its first question, whether, *as a matter of principle*, Article 6(1) of that directive precludes such an agreement from having binding effect on the consumer. I shall set out in the first part of this Opinion the reasons why, in my view, this is not the case (Section A)).

A. The consumer's option to novate a potentially unfair term, confirm its validity and/or waive the right to challenge it before the courts (first question referred)

30. Article 6(1) of Directive 93/13 provides, it will be recalled, 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'. Under that provision, where a national court finds that a particular contractual term is unfair, it must draw all the consequences of that finding, in accordance with national law, in order to ensure that the consumer is not bound by that term. That court is required to exclude the application of that term in order to ensure that it does not produce binding effects with regard to the consumer.[23]

31. In the judgment in *Gutiérrez Naranjo*, the Court further clarified that an unfair term 'must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer'. Therefore, the determination by a court that a contractual term is unfair 'must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed'. Where the term in question imposes on the consumer the payment of amounts of money, the obligation for the court to exclude its application 'entails, in principle, a corresponding restitutory effect in respect of those same amounts'.[24]

32. Consequently, if the referring court were to find, in the main proceedings, that the 'floor' term in the mortgage loan agreement is unfair within the meaning of Article 3(1) of Directive 93/13, it would in principle be required, in accordance with Article 6(1) of that directive, to disregard that term and to order Ibercaja to repay to XZ the amounts paid thereunder.

21 Ibercaja and the Spanish Government have pointed out that, in the judgment of 9 May 2013, the Tribunal Supremo (Supreme Court) did not annul all of the unfair 'floor' terms, but annulled only those which were used by the three banks targeted by the injunction proceedings brought before it. Moreover, according to that judgment, 'floor' terms are unfair only to the extent to which they lack transparency, this being a matter which must be established by a court on a case-by-case basis. However, when the parties to the main proceedings entered into the 'novation agreement amending the loan', the 'floor' term laid down in the mortgage loan agreement had not been challenged before the courts. XZ and the Commission nevertheless maintain that the transparency requirements laid down in that judgment are very strict, with the result that there is, at the very least, a high probability that the disputed 'floor' term is unfair. According to XZ and the Commission, consumers are successful in almost 97 % of cases in which the legal proceedings relate to unfair terms, including floor terms. I would recall that, in the judgment in *Gutiérrez Naranjo*, the Court did not rule on the unfairness of 'floor' terms. It proceeded on the basis of the premiss that they were unfair. In the present case, too, it is not for the Court itself to resolve that issue.

22 Strictly speaking, it is not the term that is novated but the resultant obligation. For the sake of convenience, however, I will refer in this Opinion to 'novation of a term'.

23 See, inter alia, judgments of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 58); of 15 March 2012, *Pereničová and Perenič* (C-453/10, EU:C:2012:144, paragraph 30); of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 65); and of 30 May 2013, *Jőrös* (C-397/11, EU:C:2013:340, paragraph 41).

24 The judgment in *Gutiérrez Naranjo*, paragraphs 61 and 62.

33. However, according to the interpretation of Spanish law given by the Tribunal Supremo (Supreme Court) in its judgment of 11 April 2018, the 'novation agreement amending the loan' *precludes the referring court from examining the very question of the unfairness of that 'floor' term.*[25] More precisely, the Spanish Government states that, although XZ is no longer able to ask the courts to review the validity of the 'floor' term originally contained in the mortgage loan agreement, she may, by contrast, challenge before the courts the validity of the new 'floor' term provided for in that agreement.

34. In those circumstances, the question arises as to whether, as XZ submits,[26] Article 6(1) of Directive 93/13 prevents, as a matter of principle, a consumer and a seller or supplier from concluding an agreement novating a potentially unfair term, confirming[27] its validity and/or waiving the right to challenge it before the courts – or, more specifically, whether that provision prevents such an agreement from having a binding effect on the consumer.

35. As stated earlier, I do not take that view. To my mind, that question calls for a nuanced response.

36. As I understand it, XZ's approach relies on the case-law of the Court according to which the system of protection introduced by Directive 93/13 is based on the premiss 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. Article 6(1) of that directive constitutes, in that context, a *mandatory provision* which aims to replace the formal balance which the contract establishes between the rights and obligations of the contracting parties with an effective balance which re-establishes equality between them. In addition, that provision must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of *public policy*.[28]

37. I accept that the logic which emerges from that case-law, read in conjunction with that cited in points 30 and 31 above, to some extent echoes the logic underlying the rules on *absolute nullity* existing in the law of various Member States, including the Kingdom of Spain.[29] Moreover, this is indeed the sanction provided for in Spanish law in the event of a finding that a contractual term is unfair.[30] However, the rules on absolute nullity leave no room for the intentions of the parties to the contract. Those parties are unable to confirm or novate an obligation which is absolutely null and void. Nor can they reach a settlement in relation to such an obligation: the court will of its own motion find that such an obligation is null and void and that those arrangements have no effect.[31]

25 See point 26 of this Opinion.

26 See point 27 of this Opinion.

27 I am using this term to refer to the act by which a party to a contract waives the right to rely on a ground for invalidity (see, in that regard, in particular, Articles 1309 to 1313 of the Spanish Civil Code).

28 See, inter alia, judgments of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraphs 25, 36 and 37); of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraphs 30, 51 and 52); and of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraphs 26, 27, 34 and 35).

29 I would point out that the law of several States, including the Kingdom of Belgium, the French Republic and the Kingdom of Spain, draws a distinction between 'absolute' nullity and 'relative' nullity of contracts. Absolute nullity occurs by operation of law and must be declared by a court of its own motion. Conversely, relative nullity can be relied on before the courts only by the party which the law is intended to protect and, where appropriate, is determined by the court. It is generally acknowledged that the criterion for distinguishing between those two sanctions is the basis of the rule infringed, that is to say, whether it is intended to safeguard the general interest or to protect private interests. Nullity is absolute in the first case, and relative in the second. See, inter alia, Opinion of Advocate General Trstenjak in *Martín Martín* (C-227/08, EU:C:2009:295, point 51 and references cited).

30 See Article 83(1) of Royal Legislative Decree 1/2007.

31 See, in particular, the judgment of the Tribunal Supremo (Supreme Court) of 16 October 2017, No 558/2017. In that judgment, the Tribunal Supremo (Supreme Court) held that a 'novation agreement' concluded between a bank and a consumer, in which they had novated the 'floor' term contained in their loan agreement, was void since that term was unfair and, consequently, was absolutely null and void. See also judgment of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraphs 37 to 42). In the case which gave rise to that judgment, two consumers had challenged before the courts various terms in their credit agreement. The national court had referred to the Court several questions concerning the interpretation of Directive 93/13. Those consumers and the defendant bank had subsequently entered into a settlement agreement intended to resolve the dispute out of court. The bank had relied on that settlement before the Court to establish the inadmissibility of the questions referred for a preliminary ruling. However, the national court had informed the Court that it had not taken note of that settlement on the ground that the issue of the alleged unfairness of the contractual terms concerned is a *question of public policy on which the parties cannot compromise*. I would point out that the Court did not rule on that point in its judgment. It merely found that a dispute was still pending before the referring court and, accordingly, dismissed the objection of inadmissibility raised before it.

38. However, the Court's case-law does not, in fact, go so far. Indeed, the Court has consistently held – and, in my view, this point is crucial – that *a consumer may waive the right to rely before the courts on the unfairness of a contractual term*.[32] According to the Court, 'Directive 93/13 does not go as far as making the system of protection against the use of unfair terms by suppliers or sellers, a system which it introduced for the benefit of consumers, mandatory'[33] and 'the right to effective consumer protection also includes the option not to assert one's rights'.[34]

39. In the judgment in *Banif Plus Bank*,[35] the Court thus held that it is for 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'.

40. Unlike the Commission, I do not think that those considerations are relevant solely in the situation where a court has found of its own motion that a contractual term is unfair and has informed the consumer to that effect. In my view, a more general logic emerges, according to which a consumer may waive the right to rely on the unfairness of a particular term, provided that that waiver is, as the Court held in the judgment in *Banif Plus Bank*, based *on the consumer's free and informed consent*.

41. In my view, this logic reflects the idea, present in the case-law of the Court, that Directive 93/13 is intended, in particular, to prevent a consumer from entering into obligations of a scope unknown to or poorly grasped by him.[36] Conversely, where a consumer is aware of the legal consequences for him of a waiver of the protection afforded him by Directive 93/13, such a waiver is compatible with that directive.

42. Although a consumer is deemed to be aware of the consequences of his actions when he waives before a court the right to rely on the unfairness of a term, having been informed by a court of that unfairness, this does not mean that there is no other situation in which a waiver is possible. In particular, I can see no obstacle, as a matter of principle, to a consumer exercising his right of waiver by contract, provided, once again, that that waiver is the result of free and informed consent. On that last point, however, I consider that it is necessary to draw a distinction between two sets of circumstances.

43. In my view, on the one hand, a consumer can never waive from the outset the protection which he derives from Directive 93/13 when buying goods or receiving a service from a seller or supplier. A term in a contract of sale or a contract for the provision of services confirming the validity of the contract or waiving the right to challenge it before the courts cannot have any binding effect on the consumer. Moreover, various EU instruments expressly prohibit such a form of waiver.[37]

32 See judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraphs 33 and 35).

33 Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 54).

34 Judgment of 14 April 2016, *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 25). See, for the origin of that wording, Opinion of Advocate General Kokott in *Duarte Hueros* (C-32/12, EU:C:2013:128, point 53).

35 Judgment of 21 February 2013 (C-472/11, EU:C:2013:88, paragraph 35).

36 See, in particular, the case-law of the Court concerning the requirement of transparency of contractual terms, deriving from Article 4(2) and Article 5 of Directive 93/13 (see Section C of this Opinion). I refer here to the idea of 'informed' consent on the part of the consumer. In general, the question whether the consent given by a consumer to a contract is 'free' is one covered by national rules on defective consent (see footnote 54 to this Opinion).

37 See, in particular, Article 41(a) of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34) and Article 25 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). See also, in Spanish law, Article 10 of Royal Legislative Decree 1/2007.

44. Such a waiver cannot under any circumstances be regarded as 'informed'. It is really possible for a person to understand the importance of the protection afforded by consumer law only once a problem has arisen and that person has a specific need for that protection. It is in this sense that, in my view, the idea of *prior waiver* must be understood: a waiver is 'prior' when it occurs in advance, at the time when the contractual relationship between the seller or supplier and the consumer is established, and the consumer does not imagine – or does not attach sufficient importance to the possibility – that it might give rise to a dispute.

45. By contrast, where a problem has arisen in that contractual relationship and, as in the case in the main proceedings, serious doubts have arisen as to the potential unfairness, within the meaning of Article 3(1) of Directive 93/13, of a particular contractual term, and there exists, as the case may be, a dispute between the parties in that regard, the fact that the consumer waives the right to rely on the non-binding nature of that term must not be viewed with the same severity. In such a situation, the consumer is likely to grasp the importance of the protection afforded to him by that directive and, consequently, to understand the scope of that waiver.[38] In other words, I am of the view that a consumer has the option, in certain circumstances, of *subsequently waiving*, by contract, the rights which he derives from that directive.

46. It follows that, in my view, in this second situation, the consumer has the option of novating or confirming, by means of an agreement with the seller or supplier, the term concerned, or of waiving the right to bring before the courts the question of its unfairness, provided that he does so in a free and informed manner.[39]

47. The consumer may also exercise his right of waiver by reaching with the seller or supplier, whether through the courts or out of court, an *amicable settlement* in relation to that term. Moreover, such a settlement may offer a consumer certain advantages, including that of obtaining an immediate benefit – which is precisely the objective of the reciprocal concessions which must be contained in a settlement – without having to challenge that term before the courts, incur the costs of the proceedings and await their outcome, all the more so since, when concluding that settlement, he cannot be certain that that outcome will be favourable to him.[40]

48. In so far as, I repeat, the consumer has concluded that agreement with full knowledge of the facts, I see no obstacle to that agreement being binding, including on the consumer. In particular, a settlement must be capable of offering legal certainty to the parties, which means that it cannot remain without binding effect on one party. Furthermore, a waiver of the right to bring an action before the courts in exchange for reciprocal concessions is, as I shall explain below, 'the main subject matter' of a settlement, for the purposes of Article 4(2) of Directive 93/13, that is to say, it lies at the heart of the contractual freedom which, in principle, that directive seeks not to call into question.[41]

38 See, by analogy, the solution provided for in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) in relation to jurisdiction terms in cross-border disputes concerning consumer contracts. I would point out that Section 4 of Chapter II of that regulation lays down rules of jurisdiction which protect the consumer. In that context, Article 19 of that regulation provides that those rules may be departed from only by an agreement conferring jurisdiction which, in particular, *is entered into after the dispute has arisen* between the parties. In the legal literature, the accepted explanation for that rule is that the consumer is capable of fully grasping the consequences of such an agreement and, therefore, of giving informed consent to that agreement only once he knows what constitutes the subject matter of the dispute. See Nielsen, P.A., 'Article 19', in Magnus, U., and Mankowski, P., *Brussels Ibis Regulation – Commentary*, *European Commentaries on Private International Law*, Schmidt, Otto, Dr., KG, Verlag, 2016, p. 519.

39 The Court's assertion that an unfair term must be regarded 'as never having existed' is therefore a legal fiction which must be put into perspective – indeed, the Court itself has pointed out that this is only 'in principle' the case (see the judgment in *Gutiérrez Naranjo*, paragraph 61). A consumer has the option of retaining the term in question. To continue the analogy with the rules on nullity existing in the law of certain Member States (see point 37 of this Opinion), I am of the view that the rules on unfair terms are, to that extent, similar to the rules on *relative nullity*, which may give rise to novation or confirmation.

40 See, to that effect, Opinion of Advocate General Wahl in *Gavrilescu* (C-627/15, EU:C:2017:690, points 46 to 52).

41 See Opinion of Advocate General Trstenjak in *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2009:682, point 40 and references cited). See point 73 of the present Opinion.

49. This last point is supported, in my view, by the provisions of Directive 2013/11/EU on alternative dispute resolution for consumer disputes.[42] In accordance with that directive, a consumer and seller or supplier may, where there is a dispute between them concerning a consumer contract, have recourse to an alternative dispute resolution (ADR) procedure. Where, in that context, they choose to use a procedure aimed at resolving the dispute by proposing a solution – such as, for example, mediation – and where that procedure leads to a mutually acceptable compromise, that compromise is, as a general rule, given specific expression in a settlement.[43] The EU legislature did not confer on consumers the right, in such a situation, to ask the courts to examine that dispute notwithstanding the conclusion of that amicable agreement. On the contrary, the EU legislature recognised that such an agreement has legal effects for the consumer.[44] Nevertheless, that directive provides for safeguards to ensure that the conclusion of such a settlement is the result of free and informed consent on the part of the consumer.[45] Although that directive does not apply to amicable agreements concluded between a seller or supplier and a consumer outside the scope of an ADR procedure,[46] the logic deriving from it may, in my view, be applied generally.

50. Unlike the Commission, I do not consider that Article 47 of the Charter of Fundamental Rights of the European Union calls for a different response. In my view, first, that article guarantees that a consumer has a genuine possibility of exercising in court the rights which he derives from Directive 93/13, by ensuring that he has for that purpose legal remedies which are not subject to procedural conditions of such a kind as to make the exercise of those rights excessively difficult or even impossible.[47] However, that provision is not intended to require the consumer to avail himself of that possibility where he knowingly decides to waive it. Secondly, while I readily accept that, in view of the fundamental importance of the right to an effective remedy, an individual cannot, in general, give up his right to bring legal proceedings, that situation must nevertheless be distinguished from that of a specific waiver, relating to a particular term or dispute.

51. That said, it is essential not to lose sight of the fact 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.[48] The risk that a consumer's waiver of the right to rely on the unfairness of a term may be the result of an abuse of power[49] by the seller or supplier cannot be ignored. In concluding with a seller or supplier an agreement containing such a waiver, a consumer cannot therefore waive the right to all judicial protection and it must be possible for the weak position of the consumer to be corrected by 'positive action' on the part of the court.[50]

42 Directive of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ 2013 L 165, p. 63).

43 It is true that Directive 2013/11 leaves open the question of the nature or legal effects of the instrument to be used to formalise the parties' agreement to the proposed solution, with the result that that question is a matter for the law of each Member State. However, a settlement is the instrument most widely used to implement an amicable agreement resulting from mediation (see Caponi, R., '"Just Settlement" or "Just About Settlement"? Mediated Agreements: A Comparative Overview of the Basics', RabelsZ, No 79, 2015, pp. 117 to 141).

44 See Article 9(2)(c) of Directive 2013/11.

45 See Article 9(2) of Directive 2013/11, reproduced in footnote 75 to this Opinion.

46 Directive 2013/11 is, according to Article 2(2)(e) thereof, not to apply to 'direct negotiation between the consumer and the trader'. Moreover, I would point out that, by means of that provision, the EU legislature has confined itself to excluding from the scope of that directive settlements directly negotiated between a seller or supplier and a consumer: however, it has not prohibited them, although it could very well have done so, had this been its intention.

47 See, to that effect, judgments of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 59), and of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 56).

48 See the case-law referred to in point 36 of this Opinion.

49 For this notion, see the ninth recital of Directive 93/13.

50 See, inter alia, judgments of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 27); of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 31); and of 14 April 2016, *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 23).

52. In that regard, I note that such an agreement between a seller or supplier and a consumer constitutes, by definition, a contract which, on the one hand, is subject to the general and special rules of contract law applicable to it and, on the other hand, is, like any contract between a seller or supplier and a consumer, capable of coming within the scope of Directive 93/13.[51] It is only where that agreement complies with those various rules that it will be binding.

53. Consequently, the terms of that agreement may be subject to review by the courts.[52] I also note that, although the parties to the main proceedings disagree, in this case, as to whether, given the conclusion of the 'novation agreement amending the loan', XZ may ask the courts to find that the 'floor' term originally contained in the mortgage loan agreement is unfair, neither of those parties calls into question the fact that XZ may challenge the validity of the latter agreement before the courts.[53]

54. In my view, it is in the context of that judicial scrutiny that a court may take the 'positive action' necessary to protect the consumer against abuses of power by a seller or supplier. Where such an agreement has been brought before it, a court must ascertain, including of its own motion, whether the consumer's waiver of the right to rely on the unfairness of a particular term is based on his free and informed consent or, on the contrary, on such an abuse of power. This means it is necessary to verify, inter alia,[54] whether the terms of that agreement were individually negotiated or, on the contrary, imposed by the seller or supplier and, secondly, whether the requirements of transparency, balance and good faith arising from Directive 93/13 have been fulfilled.

55. In the light of all the foregoing considerations, I propose that the Court answer the first question to the effect that Article 6(1) of Directive 93/13 does not preclude a finding that an agreement is binding on a consumer in a situation where a consumer and a seller or supplier are bound by a contract, serious doubts have arisen as to the potential unfairness of a term of that contract, for the purposes of Article 3(1) of that directive, and the parties have, by a subsequent agreement, amended the term in question, confirmed the validity of the original contract and mutually waived the right to challenge its terms before the courts, provided, however, that that agreement is based on the consumer's free and informed consent.

56. In view of that proposed answer, I shall set out, in the second part of this Opinion, the conditions which an agreement such as the one referred to in the previous point must fulfil in order to be compatible with Directive 93/13. In that regard, in accordance with what I have stated in point 54 of this Opinion, I shall first of all return to the concept of a 'contractual term which has not been individually negotiated', within the meaning of Article 3(1) of that directive, which is the subject of the second question referred (Section B). I shall then examine the requirements of transparency, balance and good faith arising from that directive, referred to in the third, fourth and fifth questions referred (Section C).

51 As stated in the tenth recital thereof, Directive 93/13 applies to 'all contracts' concluded between sellers or suppliers and consumers.

52 See Opinion of Advocate General Wahl in *Gavrilescu* (C-627/15, EU:C:2017:690, point 55).

53 See point 33 of this Opinion.

54 The question whether the consumer's consent is 'free' must be assessed in the light of the national rules on defective consent. In addition, with regard to the 'informed' nature of the consumer's consent, the law of the Member State is likely to provide guarantees relating to operations such as novation, confirmation or transaction, in order precisely to ensure that the parties carry out such a transaction in full knowledge of the issues involved. See, by way of example, Article 1182 of the French Civil Code, which provides that the act constituting confirmation of an obligation must mention, in particular, the defect affecting the contract.

B. The concept of a 'contractual term which has not been individually negotiated' (second question referred)

57. As I understand it, the referring court seeks, by its second question, to obtain guidance as to the concept of a 'contractual term which has not been individually negotiated' in Article 3(1) of Directive 93/13, so as to enable it to review the terms of the 'novation agreement amending the loan' in the light of the requirements of transparency, balance and good faith laid down in that directive. I would point out that, in accordance with Article 3(1) thereof, that directive applies only to contractual terms which have not been individually negotiated. That provision thus establishes a prerequisite for that review. However, it appears to me that some guidance in that regard would be welcome.[55]

58. Directive 93/13 does not define the concept of a 'contractual term which has not been individually negotiated'. Nevertheless, the first subparagraph of Article 3(2) of that directive states that a term is always to be regarded as not individually negotiated where it has been 'drafted in advance' and the consumer 'has therefore not been able to influence the substance of the term', particularly in the context of a 'pre-formulated standard contract'.

59. I think that that provision is instructive in a number of respects. First of all, a term is 'individually negotiated', in accordance with the usual meaning of that phrase, when it has been specifically discussed between the parties. Next, this is not the case, in particular, when the term in question is drafted by the seller or supplier 'in advance' of any discussion on the subject to which it relates. Finally, as the Commission argues, the decisive criterion is *whether or not the consumer had the possibility of influencing the substance of that term*.[56]

60. It also follows that the terms the substance of which cannot be influenced by a consumer include, in particular, those in 'pre-formulated standard' contracts, that is to say, contracts which the consumer is able only to accept or refuse as a whole, with the result that his freedom of action is limited to entering or not entering into a contract with the seller or supplier. The concept of 'pre-formulated standard contract' is, moreover, closely linked to that of 'general conditions', that is to say, the pre-drafted standard terms which a seller or supplier systematically uses in his business relations in order to rationalise his transaction costs.

61. Although general conditions and pre-formulated standard contracts thus constitute the 'prime target' of Directive 93/13, I would nevertheless point out that that directive applies to all non-negotiated terms. Quite simply, where a case concerns a pre-drafted standard term, Article 3(2) of that directive establishes a simple presumption of an absence of negotiation, which may be rebutted by contrary evidence that the seller or supplier has the burden of providing.[57] Otherwise, that presumption does not apply and it is therefore for the consumer to establish the absence of negotiation.

55 To date, the Court has essentially confined itself to reminding the national courts of the content of Article 3 of Directive 93/13. See orders of 16 November 2010, *Pohotovosť* (C-76/10, EU:C:2010:685, paragraph 57), and of 3 April 2014, *Sebestyén* (C-342/13, EU:C:2014:1857, paragraph 24).

56 See, for a similar definition, Article II.-1:110(1) of *Draft Common Frame of Reference (DCFR)* [Von Bar, C. et al. (ed.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) – Interim Outline Edition; prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)*, Sellier, European Law Publishers, Munich, 2008, p. 160]. See also, to that effect, Opinion of Advocate General Tanchev in *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:303, point 53).

57 Although the first subparagraph of Article 3(2) of Directive 93/13 tends to indicate that a pre-drafted term must 'always' (that is to say, *necessarily*) be regarded as not individually negotiated, the third subparagraph of Article 3(2) of Directive 93/13 nevertheless leaves it open to the seller or supplier to show that a standard term (pre-drafted by definition) has in fact been individually negotiated.

62. In the case in the main proceedings, it will be for the referring court to determine whether or not the terms of the 'novation agreement amending the loan' were individually negotiated, within the meaning of Article 3(1) of Directive 93/13.[58] The starting point for its analysis must be to verify whether those terms are pre-drafted standard terms – which appears to be the case.[59] If that is indeed so, the absence of such negotiation will be presumed, in accordance with Article 3(2) of that directive, and it will be for Ibercaja to adduce evidence to the contrary.

63. On this last point, I would note that determining whether negotiation has taken place involves, as the Commission maintains, having regard to the circumstances attending the conclusion of the contract. A consumer has had the possibility of influencing the substance of a particular term where the conclusion of the contract was preceded by discussions between the parties which offered him a real opportunity in that regard. It is therefore necessary for the genuine seller or supplier to adduce evidence not only of the existence of such discussions, but also that the consumer played an active role in determining the substance of the term in the course of those discussions.[60]

64. In the present case, I note that Ibercaja essentially confines itself to maintaining that, according to the information contained in the internal document defining the policy which it had adopted with regard to the renegotiation of 'floor' terms contained in its customers' loan agreements,[61] the lowest floor which its employees could offer customers in that context was 2.75 %. The fact that the 'novation agreement amending the loan' concluded with XZ includes an absolute 'floor' of 2.35 % therefore demonstrates, according to Ibercaja, that there was negotiation between the parties. It will be for the referring court to determine the probative value of that information – which, in my view, is unlikely to be sufficient to establish the elements referred to in the previous point.[62]

65. Having regard to the foregoing considerations, I propose that the Court answer the second question to the effect that a contractual term has not been individually negotiated, within the meaning of Article 3(1) of Directive 93/13, where the consumer has not had a genuine possibility of influencing the substance of that term. That question is to be assessed in the light of the circumstances attending the conclusion of the contract and, in particular, in the light of the extent of the discussions between the parties concerning the subject matter of that term. In the case of a pre-drafted standard term, it is for the seller or supplier to adduce evidence that it has been individually negotiated, in accordance with Article 3(2) of that directive.

58 See, by analogy, judgment of 16 January 2014, *Constructora Principado* (C-226/12, EU:C:2014:10, paragraph 19), and order of 24 October 2019, *Topaz* (C-211/17, not published, EU:C:2019:906, paragraph 46).

59 Ibercaja itself acknowledges that the conclusion of such agreements with its customers formed part of a general policy (see point 22 of this Opinion). Moreover, in the judgment of 11 April 2018, which concerns, I would point out, an agreement identical to that here at issue in the main proceedings, the Tribunal Supremo (Supreme Court) held that the terms of that agreement had not been individually negotiated, with the result that they could be reviewed in the light of the requirement of transparency laid down in Article 4(2) of Directive 93/13 (see points 26 and 82 of this Opinion).

60 In that regard, the mere fact that the seller or supplier explains the substance of a term to the consumer does not indicate negotiation. The same is true where the consumer does not object to or request explanations regarding the substance of a term. By contrast, the fact that a substantive change has been made to the term in the course of exchanges between the parties is an indication of individual negotiation. In the event that, after hearing the explanations of the seller or supplier, the consumer makes a counter-proposal and the parties enter into discussions leading to a compromise, the term must then be regarded as negotiated (see Von Bar, C. et al., op. cit., pp. 161 and 162).

61 See point 22 of this Opinion.

62 Likewise, the fact that the 'novation agreement amending the loan' contains a handwritten term in which the consumer confirms that she understands the mechanism of the 'floor' term (see point 14 of this Opinion) cannot demonstrate that there has been individual negotiation (see, to that effect, order of 24 October 2019, *Topaz* (C-211/17, not published, EU:C:2019:906, paragraphs 47 to 51) or, *a fortiori*, that there is a term mutually waiving recourse to the courts.

C. The review of the requirements of transparency, balance and good faith arising from Directive 93/13 (third, fourth and fifth questions referred)

66. On the assumption that the terms of the 'novation agreement amending the loan' were not individually negotiated, within the meaning of Article 3(1) of Directive 93/13, the referring court, by its third, fourth and fifth questions, asks the Court whether the two main terms of that agreement are compatible with the requirements of transparency, balance and good faith arising from that directive: those two terms being, first, the term establishing a mutual waiver of the right to bring an action before the courts and, secondly, the new 'floor' term, amending the floor in the mortgage loan agreement between XZ and the bank. I shall examine those two aspects in turn.

1. Review of the term establishing a mutual waiver of the right to bring an action before the courts

67. The third and fifth questions from the referring court ask, in essence, whether Article 3(1) of Directive 93/13, read in conjunction with point 1(q) of the annex thereto, must be interpreted as meaning that a term establishing a mutual waiver of the right to bring an action before the courts, which has not been individually negotiated, is unfair within the meaning of Article 3(1) of that directive, since, first, it prevents the consumer from exercising rights which came to light after that agreement had been concluded, including the possibility of claiming restitution of the amounts paid under the 'floor' term,[63] and, secondly, it informed the consumer neither of the potential unfairness of that 'floor' term nor of the amounts which he had paid under it and which he was potentially entitled to have repaid to him.

68. It should be recalled in this regard that, in accordance with Article 3(1) of Directive 93/13, a contractual term which has not been individually negotiated is to 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. Moreover, Article 5 of that directive provides that, where the terms offered to the consumer are in writing, they must always be drafted in plain, intelligible language, that latter requirement being generally described as laying down a requirement of *transparency*. Furthermore, point 1(q) of the annex to that directive identifies, as terms which may be unfair, those which have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy'.

69. In that context, the Commission maintains that a term establishing a mutual waiver of the right to bring an action before the courts which has not been individually negotiated within the meaning of Article 3(1) of Directive 93/13 – as is probably the case with the term contained in the 'novation agreement amending the loan' – is *unfair in itself*, without further examination being necessary in that regard.[64]

70. For my part, and in accordance with the explanations given in Section A of this Opinion, I consider that the answer must be more nuanced. Aside from the fact that the list in the annex to Directive 93/13 is, according to Article 3(3) thereof, merely indicative and that, consequently, a contractual term cannot be regarded as unfair solely on the ground that it is included in that annex,[65] it is necessary, in my view, to bear in mind the distinction between *prior waiver* and *subsequent waiver*.

63 See the judgment in *Gutiérrez Naranjo*, paragraph 62.

64 See, in relation to a jurisdiction term which has not been individually negotiated and which confers jurisdiction on the courts where the seller or supplier has its principal place of business, judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 24).

65 See judgment of 19 September 2019, *Lovasné Tóth* (C-34/18, EU:C:2019:764, paragraphs 45, 46 and 49 and the case-law cited).

71. First, a term establishing a waiver of the right to bring an action before the courts included in a contract of sale or a contract for the provision of services must indeed be regarded as unfair in itself. As I have stated in points 43 and 44 of this Opinion, a consumer can never waive in advance the judicial protection and rights which he derives from Directive 93/13. In that regard, it is irrelevant whether that waiver is mutual.

72. Secondly, by contrast, I am of the view that Directive 93/13 does not, in principle, preclude contractual terms providing for a mutual waiver of the right to bring an action before the courts where those terms are laid down in agreements, such as a settlement, having the very purpose of resolving a dispute between a seller or supplier and a consumer.

73. In such a context, as I have indicated in point 47 of this Opinion, the term waiving the right to bring an action before the courts is likely to be regarded as coming within the 'main subject matter' of such an agreement, for the purposes of Article 4(2) of Directive 93/13. I would recall that, according to the Court, the contractual terms covered by that concept are those that lay down the essential obligations of the contract in question and, as such, characterise it.[66] In that regard, it is of the very essence of a settlement to contain, inter alia, a term waiving all rights, actions and claims relating to the dispute which gave rise to it, and to preclude the initiation or continuation between the parties of legal proceedings having the same subject matter.[67]

74. However, pursuant to that Article 4(2) of Directive 93/13, terms forming part of the 'main subject matter of the contract' are not, in principle, the subject of an assessment as to their potential unfairness.[68] Provided that it comes within the particular context referred to in the two preceding points, a term establishing a waiver of the right to bring an action before the courts cannot therefore be regarded as unfair in itself.

75. Nor, in that particular context, is such a term unfair, to my mind, solely because it may prevent the consumer from exercising rights which came to light after the agreement containing it had been concluded. That is the case here, as the referring court points out in its fifth question, with regard to XZ's right to restitution under Article 6(1) of Directive 93/13. In that connection, I would recall that, in the judgment of 9 May 2013 relating to 'floor' terms, the Tribunal Supremo (Supreme Court) had limited the temporal effects of its judgment, which was not to apply to payments made before the date of its publication. The agreement in question was concluded on 4 March 2014, that is to say, after that judgment, but two years before the judgment in *Gutiérrez Naranjo* of 21 December 2016, in which the Court of Justice ruled that Article 6(1) precludes such a limitation.[69] However, the unfairness of a contractual term is to be assessed *by reference to the time of conclusion of the contract at issue*, taking account of all the circumstances which could have been known to the seller or supplier at that time, and which were of such a nature that they could affect the future performance of the contract.[70]

66 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 49 and 50), and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraphs 35 and 36).

67 See Article 1816 of the Spanish Civil Code and Caponi, R., 'Agreements Resulting from Mediation: Judicial Review, Avoidance, and Enforcement', in Stürner, M. et al, *The Role of Consumer ADR in the Administration of Justice*, 2013, Sellier, p. 149 et seq.

68 According to that provision 'assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'. See judgments of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraphs 31, 35 and 40), and of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 41).

69 See points 21 and 23 of this Opinion.

70 See, to that effect, judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 54).

76. It will be for the referring court to ascertain, in the main proceedings, whether the term mutually waiving the right to bring an action before the courts included in the 'novation agreement amending the loan' actually forms part of the 'main subject matter of the contract' within the meaning of Article 4(2) of Directive 93/13. This will depend, inter alia, on whether, as Ibercaja claims, this case actually involves a settlement. [71]

77. Nonetheless, in any event, the analysis should not stop there. I would point out that, in accordance with Article 4(2) of Directive 93/13, terms forming part of the 'main subject matter of the contract' are not the subject of an assessment of their unfairness *in so far as they are in plain intelligible language*. The requirement of transparency laid down in Article 5 of Directive 93/13 must therefore be complied with even in relation to those terms.

78. In that regard, according to settled case-law of the Court, that requirement of transparency of contractual terms cannot be reduced merely to their being formally and grammatically intelligible. [72] Article 4(2) and Article 5 of Directive 93/13 require a review of the *substantive transparency* of such terms. [73] A contractual term is transparent from a substantive point of view when the average consumer, who is reasonably well informed and reasonably observant and circumspect, is able to understand the legal and economic consequences for him which derive from it. It is necessary to verify in particular whether the contract in question sets out transparently the reasons for and the particularities of the mechanism covered by the term in question. Promotional material and information provided by the seller or supplier prior to the conclusion of the contract and concerning the contractual conditions and their consequences for the consumer are also relevant in that context. [74]

79. With regard to a contractual term establishing a mutual waiver of the right to challenge before the courts the validity of a pre-existing term and forming part of an agreement such as a settlement, I am of the view that the average consumer is able to understand the legal and economic consequences for him which derive from it if, at the time when that agreement is concluded, he is aware (i) of the defect potentially affecting that pre-existing term, (ii) of the rights which he could derive from Directive 93/13 in that connection, (iii) of the fact that he was free to sign that agreement or to reject it and bring

71 The Tribunal Supremo (Supreme Court), in its judgment of 11 April 2018, held that the requirements of a settlement, as laid down in Article 1809 of the Civil Code (see footnote 16 to this Opinion), were fulfilled in the case of an agreement such as that at issue in the main proceedings, since the parties had intended to settle definitively a situation of uncertainty relating to the validity of the 'floor' terms by waiving the right to bring an action before the courts in exchange for reciprocal concessions: on the one hand, the credit institution, which benefited from a given absolute 'floor', agreed to a lowering of that threshold, and, on the other hand, the consumer, who did not want a 'floor' term, agreed to tolerate a lower floor than that originally established (see point 26 of this Opinion). In his dissenting opinion, Judge Orduña Moreno maintained that that agreement constituted a novation since the bank's intention in that regard was clear and that agreement did not reflect the existence of a dispute between the parties. Similarly, the Audiencia Provincial de Badajoz (Provincial Court, Badajoz, Spain), in a judgment of 26 April 2018, No 168/2018, ruling on a similar contract, held that it was incorrect to speak of a settlement, since there was no dispute between the parties. I myself have doubts as to the analysis of the Tribunal Supremo (Supreme Court) in this regard (see point 80 of this Opinion).

72 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 71 and 72), and of 20 September 2018, *EOS KSI Slovensko* (C-448/17, EU:C:2018:745, paragraph 61).

73 See the judgment in *Gutiérrez Naranjo*, paragraphs 48 to 51.

74 See, inter alia, judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 73 and 74), and of 5 June 2019, *GT* (C-38/17, EU:C:2019:461, paragraph 35). The Court has repeatedly held that pre-contractual information is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier. See, inter alia, judgments of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 44), and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 48).

proceedings before the courts, and (iv) of the fact that he would no longer be able to do so after its conclusion.[75] It will be for the referring court to verify this in the main proceedings, in the light of the provisions of the 'novation agreement amending the loan' and the pre-contractual information provided by Ibercaja to XZ.

80. In this context, the referring court will first have to ascertain whether XZ, prior to the conclusion of the 'novation agreement amending the loan', was genuinely aware of the defect potentially affecting the 'floor' term in her loan agreement and of the rights which she could derive, as appropriate, from Directive 93/13. In that connection, I will merely point out in this regard, first, that it is not certain that XZ had even lodged a complaint with Ibercaja seeking to have that term removed and, secondly, that the agreement was presented by Ibercaja not as a settlement indicative of the existence of a dispute between the parties in that regard,[76] but as a 'novation agreement' intended to adapt the mortgage loan agreement to changes in the economic situation. The mutual waiver term provided for in that agreement is, in itself, ambiguous because it is particularly broad: it does not focus on the question of the validity of the 'floor' term, but covers all the terms of the mortgage loan agreement.

81. The referring court will also have to ascertain whether XZ had been informed by Ibercaja that she was free to conclude that agreement or to reject it and bring proceedings before the courts, and that she would necessarily no longer be able to do so after its conclusion.[77] Also relevant in this context is whether XZ was allowed a reasonable period of time to reflect before indicating her decision. In that regard, I would simply point out that it is common ground that the draft agreement had not been submitted to her in advance,[78] and that she had no opportunity to take it home with her either, since she was required to make a decision on the spot.

82. It is true that, in its judgment of 11 April 2018, the Tribunal Supremo (Supreme Court) held that an agreement such as that concluded by XZ fulfilled the requirement of transparency, in essence, on the ground that its judgment of 9 May 2013 concerning 'floor' terms was known to the general public and that that agreement included a handwritten term in which the consumer acknowledged that she had understood the significance of the new absolute 'floor'. However, I have doubts with respect to that reasoning. Possible common knowledge of a decision is not, to my mind, sufficient to release a seller or supplier from its obligation to draft transparent terms and to act in a similarly transparent manner at the pre-contractual stage. Moreover, I am not certain that a handwritten term, the model of which is imposed by the bank, stating that the consumer has understood that his interest rate will not fall below a certain threshold actually demonstrates the consumer's understanding of the scope of the waiver to which he has just agreed.

75 In my view, it is possible here to draw inspiration from the guarantees provided for by the EU legislature in Directive 2013/11, referred to in point 49 of this Opinion. In accordance with Article 9(2) of that directive, 'in ADR procedures which aim at resolving the dispute by proposing a solution, Member States shall ensure that: … (b) The parties, before agreeing or following a proposed solution, are informed that: (i) they have the choice as to whether or not to agree to or follow the proposed solution; (ii) participation in the procedure does not preclude the possibility of seeking redress through court proceedings; (iii) the proposed solution may be different from an outcome determined by a court applying legal rules. (c) The parties, before agreeing to or following a proposed solution, are informed of the legal effect of agreeing to or following such a proposed solution. (d) The parties, before expressing their consent to a proposed solution or amicable agreement, are allowed a reasonable period of time to reflect'.

76 By way of example, as regards agreements conferring jurisdiction in cross-border consumer disputes (see footnote 38 to this Opinion), a dispute is deemed to have arisen between the parties as soon as they disagree on a specific point and proceedings are imminent or contemplated (see Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction in civil and commercial matters (OJ 1979 C 59, p. 1), p. 33). A simple complaint by a consumer is not sufficient to support the conclusion that this is the case: the seller or supplier must also have refused to uphold the complaint (Nielsen, P.A., op. cit., p. 520).

77 This does not necessarily imply, as the referring court states, that the seller or supplier must indicate the exact amounts waived by the consumer. Such a requirement seems to me to be unrealistic in the context of negotiating a settlement. The Court is also careful, in the context of the requirement of transparency, not to go beyond what could reasonably be expected of the seller or supplier (see judgment of 19 September 2019, *Lovasné Tóth* (C-34/18, EU:C:2019:764, paragraph 69)). Moreover, in the present case, at the time when the 'novation agreement amending the loan' was concluded, the bank could not reasonably have known that XZ might potentially benefit from such a right to restitution (see point 75 of this Opinion).

78 The twentieth recital of Directive 93/13 states that the consumer must actually be given an opportunity to examine all the terms of the contract. In addition, the Court has already held that compliance with the need for transparency is helped if the consumer receives the contract in advance. See, to that effect, order of 24 October 2019, *Topaz* (C-211/17, not published, EU:C:2019:906, paragraph 50).

83. If the referring court confirms the lack of transparency of the term establishing a mutual waiver of the right to bring an action before the courts contained in the 'novation agreement amending the loan', it follows that that court may review the unfairness of that term, even if it forms part of the 'main subject matter of the contract' within the meaning of Article 4(2) of Directive 93/13. That being so, such a lack of transparency would, in my view, suffice, in the particular context of an agreement such as that here at issue, to demonstrate the incompatibility of that term with that directive, without it even being necessary to examine the criteria of significant imbalance and good faith provided for in Article 3(1) thereof. By reason of that absence of transparency the waiver provided for in that term cannot be regarded as resulting from the 'informed consent' of the consumer.[79] Moreover, to my mind, that absence of transparency and the imbalance of information which it implies allow the presumption to be made that this imbalance is significant and tend to point to a failure on the part of Ibercaja to comply with the requirement of good faith.[80]

84. In the light of all the foregoing considerations, I propose that the Court answer the third and fifth questions to the effect that a term establishing a mutual waiver of the right to bring an action before the courts is unfair in itself, for the purposes of Article 3(1) of Directive 93/13, unless it is laid down in an agreement having the very purpose of settling a dispute between a consumer and a seller or supplier. Even in that case, such a term must nevertheless comply with the transparency requirement resulting from Article 4(2) and Article 5 of that directive. Where, under such an agreement, a term provides for a mutual waiver of the right to challenge before the courts the validity of a pre-existing contractual term, an average consumer is deemed to be able to understand the legal and economic consequences for him which derive from it if, at the time of the conclusion of that agreement, he is aware (i) of the defect potentially affecting that pre-existing term, (ii) of the rights which he could derive from that directive in that connection, (iii) of the fact that he was free to sign that agreement or to reject it and bring proceedings before the courts, and (iv) of the fact that he would no longer be able to do so after its conclusion.

2. Review of the new 'floor' term

85. By its fourth question, the referring court asks whether a term, such as the new 'floor' term laid down in the 'novation agreement amending the loan', is vitiated by a lack of transparency, for the purposes of Article 4(2) and Article 5 of Directive 93/13, on the ground that the bank failed to inform the consumer, in that agreement, of the true financial cost of that term, in such a way that the consumer would be able to ascertain the interest rate that would be applicable and the monthly instalments that he would have to pay in the absence of that term.

86. In the case in the main proceedings, it is likely that the new 'floor' term comes within the 'main subject matter' of the 'novation agreement amending the loan', for the purposes of Article 4(2) of Directive 93/13, whatever the legal classification given to that agreement under national law. Indeed, if the purpose of that agreement is, as XZ argues, the novation of the 'floor' term originally contained in the mortgage loan agreement, then that new term must be the main subject matter of the agreement. If the purpose of that agreement is, as Ibercaja and the Spanish Government maintain, to settle a dispute definitively in exchange for reciprocal concessions, then that term also comes within the main subject matter of the agreement in so far as it gives specific expression to those concessions.

79 See the reply which I propose for the first question referred.

80 The Court has held that, in order to determine whether the imbalance caused by a contractual term arises 'contrary to the requirement of good faith' within the meaning of Article 3(1) of Directive 93/13, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations. See, inter alia, judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 69).

87. Nevertheless, as I have already indicated, even a term coming within the 'main subject matter of the contract', within the meaning of Article 4(2) of Directive 93/13, must satisfy the requirement of transparency. As already stated in this Opinion, a contractual term is transparent when the average consumer is in a position to understand the economic consequences for him which derive from it. In the case of a 'floor' term, the contract containing it must set out transparently the reasons for and the particularities of the mechanism covered by the term.[81] In that regard, the Tribunal Supremo (Supreme Court), in its judgment of 9 May 2013, laid down conditions concerning the use of that type of term in loan agreements[82] which constitute, in my view, an application and concrete expression of the requirement of transparency laid down, in general terms, by the Court. Those conditions must be complied with in this case, irrespective of the fact that the 'novation agreement amending the loan' is, in itself, not a loan agreement but a form of modification of such an agreement. It will be for the referring court to ascertain whether there has indeed been compliance with those conditions.

88. Nevertheless, two specific points need to be addressed. On the one hand, I am not certain that the credit institution can be required to set out the future monthly instalments which the consumer would have to pay in the absence of the 'floor' term. Since the interest rate depends on economic changes which are rarely predictable, such a requirement does not seem reasonable to me.[83] At most, the seller or supplier must indicate, as the Tribunal Supremo (Supreme Court) has pointed out in its case-law, scenarios as regards reasonably foreseeable interest rate changes on the day on which the contract is concluded. On the other hand, as regards the handwritten term drafted by the consumer,[84] and to which the Tribunal Supremo (Supreme Court) in its judgment of 11 April 2018 attached decisive weight in establishing compliance with the requirement of transparency, I consider that, while such a term is undeniably relevant evidence, it cannot be decisive in itself. That handwritten term does, admittedly, prove that the consumer's attention was drawn to the effects of a 'floor' term. However, that term is not sufficient to demonstrate that there has been compliance with the strict conditions of transparency laid down by the Court of Justice and by the Tribunal Supremo (Supreme Court). The indication provided by that handwritten term must, to my mind, be supplemented by other corroborative elements.

89. In the light of the foregoing considerations, I propose that the Court's answer to the fourth question should be that a 'floor' term, which has not been the subject of individual negotiation, must be regarded as transparent, for the purposes of Article 4(2) and Article 5 of Directive 93/13, where the consumer is in a position to understand the economic consequences for him which derive from it. In particular, the contract containing it must set out transparently the reasons for and the particularities of the mechanism covered by that term. By contrast, the seller or supplier cannot be required to set out the future monthly instalments which the customer would have to pay in the absence of that term.

81 See point 78 of this Opinion.

82 The Tribunal Supremo (Supreme Court) held that a 'floor' term lacks transparency in so far as (a) there is a lack of sufficiently clear information regarding the fact that it is an element defining the main subject matter of the contract; (b) terms are inserted at the same time as 'caps' and presented as if they were the *quid pro quo*; (c) on the day on which the contract is concluded, there are no simulations of different scenarios as regards reasonably foreseeable interest rate changes; (d) there is neither prior, clear and comprehensible information on the cost as compared with other lending arrangements – if any – offered by the institution nor a warning to the customer that, in view of his customer profile, those arrangements are not being offered to him; and (e) the 'floor' term is concealed among a huge amount of information which diverts the attention of the consumer.

83 In particular, this would, it seems to me, go far beyond the requirements laid down by Directive 2014/17 which, although it is not applicable *ratione temporis* to the dispute in the main proceedings, nevertheless provides a useful point of reference. Article 14 of that directive provides that the creditor must fulfil his pre-contractual information obligation through the European Standardised Information Sheet (ESIS) contained in Annex II to that directive. However, that annex merely provides in point 6 of Section 3, entitled 'Main features of the loan', that 'this section shall explain whether the borrowing rate is fixed or variable and, where applicable, the periods during which it will remain fixed; the frequency of subsequent revisions and the existence of limits to the borrowing rate variability, such as caps or floors'.

84 See point 14 of this Opinion.

V. Conclusion

90. In the light of all the foregoing considerations, I propose that the Court should give the following answers to the questions referred by the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain):

(1) Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not preclude a finding that an agreement is binding on a consumer in a situation where a consumer and a seller or supplier are bound by a contract, serious doubts have arisen as to the potential unfairness of a term of that contract, for the purposes of Article 3(1) of that directive, and the parties have, by a subsequent agreement, amended the term in question, confirmed the validity of the original contract and mutually waived the right to challenge its terms before the courts, provided, however, that that agreement is based on the consumer's free and informed consent.

(2) A contractual term has not been individually negotiated, within the meaning of Article 3(1) of Directive 93/13, where the consumer has not had a genuine possibility of influencing the substance of the term. That question is to be assessed in the light of the circumstances attending the conclusion of the contract and, in particular, in the light of the extent of the discussions between the parties concerning the subject matter of that term. In the case of a pre-drafted standard term, it is for the seller or supplier to adduce evidence that it has been individually negotiated, in accordance with Article 3(2) of that directive.

(3) A term establishing a mutual waiver of the right to bring an action before the courts, which has not been individually negotiated, is unfair, for the purposes of Article 3(1) of Directive 93/13, unless it has been laid down in an agreement having the very purpose of settling a dispute between a consumer and a seller or supplier. Even in that situation, such a term must nevertheless be consistent with the transparency requirement resulting from Article 4(2) and Article 5 of that directive. Where, under such an agreement, a term provides for a mutual waiver of the right to challenge before the courts the validity of a pre-existing contractual term, an average consumer is deemed to understand the legal and economic consequences for him which derive from it if, at the time of the conclusion of that agreement, he is aware (i) of the defect potentially affecting that pre-existing term, (ii) of the rights which he could derive from that directive in that connection, (iii) of the fact that he was free to sign that agreement or to reject it and bring proceedings before the courts, and (iv) of the fact that he would no longer be able to do so after its conclusion.

(4) A 'floor' term, which has not been individually negotiated, must be regarded as transparent, for the purposes of Article 4(2) and Article 5 of Directive 93/13, where the consumer is in a position to understand the economic consequences for him which derive from it. In particular, the contract containing it must set out transparently the reasons for and the particularities of the mechanism covered by that term. By contrast, the seller or supplier cannot be required to explain the future monthly instalments which the customer would have to pay in the absence of that term.