



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 July 2020*

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Articles 6 and 7 – Consumer contracts – Mortgage loans – Unfair terms – Term charging all of the costs of creating and cancelling a mortgage to the borrower – Effects of a declaration that those terms are void – Powers of the national court when dealing with a term considered to be ‘unfair’ – Award of costs – Application of national supplementary provisions – Article 3(1) – Assessment of the unfairness of contractual terms – Article 4(2) – Exclusion of terms relating to the main subject matter of the contract or the adequacy of the price and the remuneration – Condition – Article 5 – Obligation to draft contractual terms in plain, intelligible language – Costs – Limitation – Principle of effectiveness)

In Joined Cases C-224/19 and C-259/19,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia n.17 de Palma de Mallorca (Court of First Instance No 17, Palma de Mallorca, Spain) (C-224/19) and the Juzgado de Primera Instancia e Instrucción de Ceuta (Court of First Instance and Preliminary Investigations, Ceuta, Spain) (C-259/19), made by decisions of 12 March 2019 and 13 March 2019, received at the Court on 14 March 2019 and 27 March 2019 respectively, in the proceedings

CY

v

Caixabank SA (C-224/19),

and

LG,

PK

v

Banco Bilbao Vizcaya Argentaria SA (C-259/19),

THE COURT (Fourth Chamber),

* Language of the case: Spanish.

composed of M. Vilaras, President of the Chamber, S. Rodin (Rapporteur), D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- CY, by N. Martínez Blanco, abogado,
- Caixabank SA, by J. Gutiérrez de Cabiedes Hidalgo de Caviedes, abogado,
- LG, by R. Salamanca Sánchez, abogado, and M.C. Ruiz Reina, procuradora,
- Banco Bilbao Vizcaya Argentaria SA, by C. Fernández Vicién, J. Capell Navarro and A. Picón Franco, abogados,
- the Spanish Government, by L. Aguilera Ruiz and M.J. García-Valdecasas Dorrego, acting as Agents,
- the European Commission, by J. Baquero Cruz and N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 The requests for a preliminary ruling concern the interpretation of Articles 3 to 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 These requests have been made in the course of two disputes, between CY and Caixabank SA, on the one hand, and LG and PK and Banco Bilbao Vizcaya Argentaria SA, on the other, concerning unfair terms in loan agreements secured by mortgages.

Legal framework

EU law

- 3 The sixteenth, nineteenth, twentieth and twenty-fourth recitals of Directive 93/13 state:

‘Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of

good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;

...

Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms ...

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;

...

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts’.

4 Article 1 of Directive 93/13 states:

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

2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.’

5 Under Article 3(1) and (2) of that directive:

‘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.

...’

6 Article 4(2) of that directive provides:

‘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 supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language.’

7 Article 5 of that directive provides:

‘In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. ...’

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

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

9 Article 7(1) of Directive 93/13 is worded as follows:

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

10 Under Article 8 of that directive:

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

Spanish law

Royal Decree 1426/1989

11 The sixth rule of Annex II to Real Decreto 1426/1989, por el que se aprueba el arancel de los notarios (Royal Decree No 1426/1989 approving notaries’ fees) of 17 November 1989 (BOE No 285 of 28 November 1989, p. 37169), in the version in force on the date of the facts in the main proceedings, provides:

‘[The obligation to pay fees shall fall upon] the persons who required the intervention or services of the notary and, where appropriate, upon the persons concerned under the provisions of substantive and fiscal law ...’

Royal Decree 1427/1989

12 The eighth rule of Annex II to Real Decreto 1427/1989, por el que se aprueba el arancel de los registradores de la propiedad (Royal Decree 1427/1989 approving property registrars’ fees) of 17 November 1989 (BOE No 285 of 28 November 1989, p. 37171), in the version thereof in force on the date of the facts in the main proceedings, imposes the obligation [to pay property registrars’ fees] on ‘the person or persons in favour of whom the title is immediately registered or recorded, such fees also being payable also by ... the person who presented the document, the person who requested the service in question or the person in favour of whom the title is registered or certification is sought’.

The LCGC

- 13 Article 7 of Ley 7/1998, sobre condiciones generales de la contratación (Law 7/1998 on general conditions of contract) of 13 April 1998 (BOE No 89 of 14 April 1998, p. 12304), in the version thereof applicable on the date on which the agreements at issue in the main proceedings were signed ('the LCGC'), provides:

'The following general conditions shall be deemed not to be included in the contract:

- (a) those of which the consumer did not have a genuine opportunity to take full cognisance at the time when the contract was concluded or which were not signed, where this is necessary, in accordance with Article 5;
- (b) those that are illegible, ambiguous, obscure or incomprehensible, except, in the case of the latter, if the contracting party has expressly accepted them in writing and they comply with the specific rules concerning transparency of contractual terms in the field concerned.'

- 14 Article 8 of the LCGC states:

'1. General conditions that infringe the provisions of this Law or of any other prescriptive or prohibitive rule, to the detriment of a party to the contract, shall automatically be void, save in so far as those provisions attach other consequences to cases of infringement.

2. In particular, where a contract has been concluded with a consumer, general conditions that are unfair shall be void ...'

Royal Decree-Law 6/2000

- 15 Article 40 of Real Decreto-Ley 6/2000, de Medidas Urgentes de Intensificación de la Competencia en Mercados de Bienes y Servicios (Royal Decree-Law 6/2000 on urgent measures to increase competition in the markets for goods and services) of 23 June 2000 (BOE No 151 of 24 June 2000, p. 22440), in the version thereof in force on the date on which the agreements at issue in the main proceedings were signed, provides:

'Credit and other financial institutions shall expressly indicate ... the borrower's right to designate, by mutual agreement with the lender, the person or entity that will value the immovable property forming the subject of the mortgage ...'

Royal Legislative Decree 1/2007

- 16 Article 8 of the 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 consolidated text of the General Law for the protection of consumers and users and other supplementary laws) of 16 November 2007 (BOE No 287 of 30 November 2007, p. 49181), entitled 'Basic rights of consumers and users', provides:

'Consumers and users enjoy the following basic rights:

...

(b) To have their legitimate economic and social interests protected, in particular from unfair commercial practices and the inclusion of unfair terms in contracts.

...

(d) To receive accurate information on the various goods or services, as well as instruction and familiarisation to facilitate knowledge of the proper use, consumption or enjoyment of those goods or services. ...'

17 Article 60 of Royal Legislative Decree 1/2007, entitled 'Pre-contractual information', is worded as follows:

'1. Before the consumer or user is bound by a contract or similar offer, the seller or supplier shall provide to him in plain intelligible language, unless this is clear from the context, relevant, accurate and adequate information on the main features of the contract, in particular its legal and financial terms.

2. The following shall be relevant: the obligations to provide information on goods or services which are laid down in this and any other applicable laws, as well as:

(a) The main characteristics of the goods or services, to the extent appropriate to the medium used and to the goods or services.

...

(c) The total price inclusive of all taxes and charges. Where the nature of the goods or services is such that the price cannot reasonably be calculated in advance or is subject to the preparation of an estimate, the manner in which the price is to be calculated, as well as all additional transport, delivery or postal costs or, where those costs cannot reasonably be calculated in advance, the fact that such additional costs may be chargeable.

All information provided to the consumer or user concerning the price of goods or services, including advertising, shall state the total price, with a breakdown, where appropriate, of the amount of any increases or discounts that may be applicable, any costs charged to the consumer or user and any additional costs connected with ancillary services, financing, use of different payment methods or other similar payment terms. ...'

18 Article 80 of Royal Legislative Decree 1/2007, entitled 'Requirements applicable to terms not individually negotiated', provides:

'1. In contracts concluded with consumers and users which include terms not individually negotiated, ... such terms must comply with the following requirements. They must be:

(a) Worded precisely, clearly and simply so as to be immediately intelligible ...

(b) Accessible and legible, so that the consumer or user is apprised of their existence and content before the contract is concluded. ...

(c) Characterised by good faith and a fair balance between the rights and obligations of the parties, which requirement excludes, in all circumstances, the use of unfair terms. ...'

19 Article 82 of Royal Legislative Decree 1/2007, entitled ‘Concept of unfair terms’, provides:

‘1. All stipulations not negotiated individually and all practices not expressly agreed which, in contravention of the requirements of good faith, give rise, in a manner detrimental to the consumer or user, to a significant imbalance in the rights and obligations of the parties as arising from the contract, shall be regarded as unfair terms.

2. ... A seller or supplier who claims that a particular term has been individually negotiated shall bear the burden of proving this to be the case.

3. The unfairness of a contractual term shall be assessed in the light of the nature of the goods or services for which the contract was concluded and with reference to all the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent. ...’

20 Article 83 of Royal Legislative Decree 1/2007, entitled ‘Invalidity of unfair terms and continued existence of the contract’, provides:

‘Unfair contractual terms shall automatically be void and shall be deemed not to have been laid down. To that end, the court shall, after consulting the parties, declare void any unfair terms included in the contract, which shall nevertheless continue to bind the parties on the same terms if it is capable of continuing in existence without the unfair terms.’

21 Article 87(5) of Royal Legislative Decree 1/2007, entitled ‘Terms that are unfair by reason of lack of reciprocity’, provides:

‘Terms which give rise to a lack of reciprocity that is contrary to good faith and detrimental to the consumer and user are unfair, in particular:

...

5. ... any other provision that prescribes payment for goods or services which have not actually been used or consumed. ...’

22 Article 89 of Royal Legislative Decree 1/2007, entitled ‘Unfair terms affecting the conclusion and performance of the contract’, provides:

‘The following shall, in any event, be regarded as unfair terms:

...

4. The imposition of unsolicited supplementary or ancillary goods or services on the consumer or user.

5. Increases in the prices of ancillary services ... other than additional supplies that can be accepted or rejected ...’

Law 2/2009

- 23 Article 5(1) of Ley 2/2009, por la que se regula la contratación con los consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito (Law 2/2009 on the conclusion with consumers of mortgage loan or credit agreements and brokerage services for the conclusion of loan or credit agreements) of 31 March 2009 (BOE No 79 of 1 April 2009, p. 30843), entitled ‘Pricing transparency obligations’, provides:

‘Undertakings shall be free to fix their schedules of fees, terms and conditions and costs chargeable to consumers without any restrictions other than those pertaining to unfair terms that are laid down in this Law ... and in [Royal Legislative Decree 1/2007].

The schedules of fees or remuneration and chargeable costs, including for consultancy, shall specify the circumstances in which, and, where appropriate, the frequency with which, the foregoing will be payable. Fees or remuneration and charged costs must correspond to services actually provided or to costs incurred. Under no circumstances may fees or costs be charged for services not agreed or requested by the customer.’

The LEC

- 24 Article 394 of Ley 1/2000, de Enjuiciamiento Civil (Law 1/2000 on the Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575), in the version thereof in force on the date on which the agreements at issue in the main proceedings were signed (‘the LEC’), provides:

‘1. In proceedings for declaratory relief, costs at first instance shall be borne by the party which has been unsuccessful in all of its heads of claims, unless the court forms the view, for which it shall provide reasons, that the case raises serious doubts in fact or law.

...

2. Where the heads of claim are upheld or dismissed only in part, each party shall pay the costs it has itself incurred as well as half of the common costs, unless there are grounds for awarding costs against one party for vexatious litigation.

...’

The Civil Code

- 25 Article 1303 of the Código Civil (Spanish Civil Code) is worded as follows:

‘Where an obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price plus interest, subject to the provisions of the following articles.’

- 26 Under Article 1964(2) of the Civil Code:

‘Personal actions not subject to a particular limitation period shall become time-barred after five years from the date on which performance of the obligation becomes enforceable. In the case of ongoing

obligations to take or refrain from action, the limitation period shall begin to run from the occurrence of each failure to fulfil those obligations.’

27 Article 1969 of the Civil Code states:

‘In the absence of specific provision to the contrary, the limitation period for all types of legal action shall begin to run from the date on which the action may properly be brought.’

Order on interest rates and fees, performance standards, information for customers and advertising of credit institutions

28 Chapter 1 of the Orden sobre tipos de interés y comisiones, normas de actuación, información a clientes y publicidad de las Entidades de crédito (Order on interest rates and fees, performance standards, information for customers and advertising of credit institutions) of 12 December 1989 (BOE No 303 of 19 December 1989, p. 39289), in the version thereof in force on the date on which the agreements at issue in the main proceedings were signed, is worded as follows:

‘Fifthly. Credit institutions shall be free to determine the fees payable for the operations or services which they provide.

...

Under no circumstances may fees or costs be charged for services not expressly agreed or requested by the customer. Fees or charged costs must correspond to services actually provided or costs incurred.’

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

Case C-224/19

29 On 16 May 2000, CY concluded with the financial institution Caixabank a mortgage loan agreement, executed before a notary, for an initial amount of EUR 81 136.63 which also provided for the payment of variable interest.

30 The fourth clause of that agreement requires the borrower to pay an ‘arrangement fee’. That clause provides:

‘The following fees shall be payable to [Caixabank] by the borrower:

(A) – An arrangement fee on the total ceiling of the loan, to be paid only once at the time of [execution] of the present instrument: one per cent, that is to say an amount of one hundred and thirty-five thousand Spanish pesetas (135 000), equivalent to EUR 811.37.’

31 The fifth clause of that agreement requires the borrower to pay all the costs of creating and cancelling the mortgage. That clause is worded as follows:

‘The borrower shall be liable for payment of the costs connected with the valuation of the mortgaged property[;] of all other costs and taxes arising from this notarially attested instrument, from the transactions and contracts executed therein and from its entry in the Registro de la Propiedad (Property Registry)[;] and of the costs and taxes incurred in connection with such acts of execution as are necessary in order for this document and the document of cancellation to be admitted to the Property Register, including the costs and taxes associated with receipts for payment, in whole or in part, of the sums lent, as well as lawyers’ and agents’ fees in the event of judicial recovery, even if the intervention of such persons is not mandatory.’

32 On 22 March 2018, CY brought an action before the Juzgado de Primera Instancia n.17 de Palma de Mallorca (Court of First Instance No 17, Palma de Mallorca, Spain) seeking, on the basis of the consumer protection legislation, a declaration as to the invalidity, by reason of unfairness, of the fourth and fifth clauses of the agreement at issue (‘the contested clauses’) and a refund of all the amounts paid pursuant to those clauses. For its part, Caixabank contended that the contested clauses were fully valid. In the course of those proceedings, CY considered it necessary for a reference to be made to the Court of Justice for a preliminary ruling on questions concerning those contested clauses.

33 As regards the clause concerning mortgage costs, the national court points out that, for the most part, the Spanish courts consider such clauses to be unfair and, consequently, void. That court nonetheless notes that, so far as concerns the effects of such invalidity, the Spanish courts have arrived at different and contradictory decisions which put consumers and financial institutions in a position of legal uncertainty. In that regard, the national court identifies several judicial decision-making practices which it regards as ‘moderating’ the restitutory effects of a declaration of invalidity and asks whether these are compatible with Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) thereof.

34 As for the clause imposing an arrangement fee, the Juzgado de Primera Instancia n.17 de Palma de Mallorca (Court of First Instance No 17, Palma de Mallorca) points to a consensus among the provincial courts that such a fee is unfair and void because it does not correspond to any real or actual service or cost. However, the Tribunal Supremo (Supreme Court, Spain) had recently contradicted that line of case-law by taking the view that, inasmuch as it forms part of the main subject matter of a loan agreement, the arrangement fee should be excluded from a review of its unfairness under Article 4(2) of Directive 93/13. The referring court questions the soundness of the reasoning thus adopted by the Tribunal Supremo (Supreme Court) and also asks whether the answer to that question is influenced by the fact that the Kingdom of Spain has not transposed Article 4 of Directive 93/13 into Spanish law in order to ensure a higher level of consumer protection in accordance with Article 8 of that directive.

35 In those circumstances, the Juzgado de Primera Instancia No 17 de Palma de Mallorca (Court of First Instance No 17, Palma de Mallorca) decided to stay the proceedings and to refer the following 13 questions to the Court of Justice for a preliminary ruling:

- (1) The Court of Justice is asked whether, in the light of Article 6(1) of Directive 93/13, a clause declared invalid on grounds of unfairness which attributes to the borrower all the formalisation, novation or cancellation costs of a loan agreement secured by a mortgage may be varied as regards its restitutory effects after it has been declared invalid on grounds of unfairness.
- (2) The Court of Justice is asked whether, in the light of Article 6(1) of Directive 93/13, national case-law establishing that, after the declaration of invalidity of a clause attributing to the borrower all the formalisation, novation or cancellation costs of a loan agreement secured by a mortgage, notarial and management expenses must be borne equally by the lender and borrower may be regarded as variation by the courts of the declaration of invalidity of an unfair term and therefore contrary to the principle set out in Article 6(1) of Directive 93/13 that unfair terms are not binding.
- (3) The Court of Justice is asked whether, in the light of Article 6(1) of Directive 93/13, national case-law establishing that, after the declaration of invalidity of the clause attributing to the borrower all the formalisation, novation or cancellation costs of a loan agreement secured by a mortgage, the borrower must also be required to pay the costs involved in valuing the property and the tax on the establishment of the mortgage deriving from formalisation of the loan infringes the principle that consumers are not bound by terms found to be unfair, and whether it is contrary to Article 3(2) of Directive 93/13 to place on the borrower the burden of proving that he was not permitted to provide his own valuation of the property.
- (4) The Court of Justice is asked whether, in the light of Article 6(1) of Directive 93/13, it is contrary [to that directive] for national case-law, after the declaration of invalidity of a clause attributing to the borrower all the creation, novation or cancellation costs of a loan agreement secured by a mortgage, to establish that that clause can continue to have effects for the borrower where it makes modifying novations or cancels the mortgage, in that the borrower must continue to pay the costs resulting from such modification or cancellation of the mortgage, and whether the attribution of those costs to the borrower entails an infringement of the principle that consumers are not bound by terms found to be unfair.
- (5) The Court of Justice is asked whether, in the light of Article 6(1) in conjunction with Article 7(1) of Directive 93/13, national case-law which partially excludes the restitutory effect of the declaration of invalidity on grounds of unfairness of a clause attributing to the borrower all the formalisation, novation or cancellation costs of a loan agreement secured by a mortgage is incompatible with the deterrent effect on the seller or supplier provided for in Article 7(1) of Directive 93/13.
- (6) The Court of Justice is asked whether, in the light of the principle established in the case-law of the Court of Justice that clauses declared invalid cannot be varied, and in the light of the principle that unfair terms are not binding set out in Article 6 of the directive, national case-law which varies the restitutory effects after the declaration of invalidity of a clause attributing to the borrower all the formalisation, novation or cancellation costs may be regarded as an infringement, based on the interests of the borrower.

- (7) The Court of Justice is asked whether, in the light of the Article 3(1) and (2) of Directive 93/13, national case-law establishing that an “arrangement fee” clause automatically satisfies the transparency test may infringe the principle of the reversal of the burden of proof established in Article 3(2) of the directive, since the seller or supplier is not required to prove that it provided information in advance or that the clause was individually negotiated.
- (8) The Court of Justice is asked whether it is contrary to Article 3 of Directive 93/13 and the case-law of the Court of Justice for a consumer to be regarded under national case-law as being automatically aware that it is normal practice for financial institutions to charge an arrangement fee, and, accordingly, for a lender not to be required to provide any evidence to establish that the clause was individually negotiated, or whether, on the contrary, and in any event, a lender must establish that that clause was individually negotiated.
- (9) The Court of Justice is asked whether, in the light of Articles 3 and 4 of Directive 93/13 and the case-law of the Court of Justice, it is contrary to that directive for national case-law to establish that it is not possible to assess the unfair nature of the “arrangement fee” clause under Article 4(2) since it relates to the definition of the main subject matter of the contract, or, on the contrary, whether such an arrangement fee must be regarded as forming not part of the contract price but an ancillary charge, and therefore the national court must be allowed to review its transparency and/or content in order to determine whether it is unfair in accordance with national law.
- (10) The Court of Justice is asked whether, in the light of Article 4(2) of Directive 93/13, which was not transposed by [Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación] into the Spanish legal system, it is contrary to Article 8 of Directive 93/13 for a Spanish court to rely upon and apply Article 4(2) of that directive when that provision has not been transposed into Spanish law in accordance with the wishes of the legislature – which sought a comprehensive level of protection in relation to all the terms that a seller or supplier may insert into a consumer contract, including those which relate to the main subject matter of the contract, even if those terms were drafted in plain, intelligible language – if the view is taken that an “arrangement fee” clause constitutes the main subject matter of the loan agreement.
- (11) The Court of Justice is asked whether, in the light of Article 3(1) of Directive 93/13, the “arrangement fee” clause, when it has not been individually negotiated and the financial entity has not established that it corresponds to services actually provided and to costs incurred, gives rise to a significant imbalance between the rights and obligations of the parties to the contract and must be declared invalid by the national court.
- (12) The Court of Justice is asked whether, in the light of Article 6(1) in conjunction with Article 7(1) of Directive 93/13, a costs order against the seller or supplier – resulting from proceedings in which a consumer has brought actions for a declaration of invalidity on grounds of unfairness of terms in a contract concluded with him and in which the Courts have declared the term invalid on the ground that it is unfair – is a necessary consequence of the principle that unfair terms are not binding and the principle of deterring the seller or supplier, where those actions for a declaration of invalidity are upheld by the national court, regardless of whether the repayments ordered by the judgment have actually been made, it being understood, moreover, that the main claim is for a declaration of invalidity of the term and that the repayment of amounts paid is merely an ancillary claim inherent in the former.

- (13) The Court of Justice is asked whether, in the light of the principle that unfair terms are not binding and the principle of the deterrent effect of Directive 93/13 (Articles 6(1) and 7(1)), the restitutory effects deriving from a declaration of invalidity on grounds of unfairness of a term in a contract concluded between a consumer and a seller or supplier may be limited in time, by the upholding of an objection that the action for repayment of the amount paid is time-barred, even though an action for a declaration that a term is invalid *ab initio* on the ground that it is unfair is not subject to any limitation period under national legislation.’

Case C-259/19

- 36 On 1 July 2011, LG and PK concluded with the financial institution Banco Bilbao Vizcaya Argentaria a mortgage loan agreement including a clause which, according to the referring court, provided that all the costs connected with the creation and cancellation of the mortgage were to be borne by the borrower.
- 37 The applicants in the main proceedings brought before the Juzgado de Primera Instancia e Instrucción de Ceuta (Court of First Instance and Preliminary Investigations, Ceuta, Spain) an action for a declaration as to the invalidity of that clause on the ground that it was unfair.
- 38 Since the grounds are, in essence, similar to those of the request for a preliminary ruling in Case C-224/19, the Juzgado de Primera Instancia e Instrucción de Ceuta (Court of First Instance and Preliminary Investigations, Ceuta) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Whether, under [Directive 93/13], in particular Articles 6(1) and 7(1) of the directive, the following ruling is compliant with EU law in order to ensure protection for consumers and users and compliance with the relevant case-law: the ruling by the Tribunal Supremo (Supreme Court) in judgments 44 to 49 of 23 January 2019, which establishes the unambiguous criterion that a term in a consumer mortgage loan agreement that has not been negotiated and that stipulates that all the costs of arranging the mortgage are to be borne by the borrower is unfair, and which apportions the various expenses that are involved in the unfair term found to be void between the bank that imposed the term and the borrower, in order to limit repayments of amounts wrongly paid under national legislation.
- (2) And whether, under [Directive 93/13], in particular Articles 6(1) and 7(1) of the directive, in order to ensure protection for consumers and users and compliance with the relevant case-law, it is compliant with EU law for the Tribunal Supremo (Supreme Court) to adopt an inclusive interpretation of a term that is void for unfairness if the term can be severed and its effects abolished without affecting the continued existence of the mortgage loan agreement.’

The questions referred for a preliminary ruling

Admissibility

The admissibility of the second to fourth questions in Case C-224/19

- 39 The Spanish Government submits that the Court does not have jurisdiction to hear and determine the second to fourth questions referred in Case C-224/19, on the ground that they have to do with who is liable for the payment of certain costs under the national legislation in force, which, as a matter relating to the interpretation and application of national law, falls outside the Court's power of assessment, in accordance with settled case-law (judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 22).
- 40 In that regard, it should be noted that, in accordance with that case-law, the Court must, when examining a reference for a preliminary ruling, take account of the factual and legislative context, as described in the order for reference, in which the questions put to it are set. Consequently, the Court does not have jurisdiction to determine whether the referring court's interpretation of the national rules is correct.
- 41 By contrast, where the questions submitted concern the interpretation of European Union law, the Court of Justice is bound, in principle, to give a ruling (judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 21 and the case-law cited).
- 42 It is clear from the second to fourth questions that the Court is asked to rule on the interpretation of Article 3(2) and Article 6(1) of Directive 93/13. More specifically, the referring court asks whether those provisions must be interpreted as precluding a particular body of national case-law. It follows that the Court is not at any point asked to interpret national law.
- 43 In the light of the foregoing, the second to fourth questions in Case C-224/19 are admissible.

The admissibility of the twelfth question in Case C-224/19

- 44 Caixabank contests the admissibility of the twelfth question referred in Case C-224/19 and the Court's jurisdiction to answer it, arguing, first, that the referring court has not provided the information necessary to answer that question, namely the national rules on the award of costs and the extent to which those rules may infringe the consumer rights guaranteed by Directive 93/13, and, secondly, that national rules on costs fall within the competence of the Member States.
- 45 Now, while it is true that the referring court has not indicated which provision of Spanish law governs the attribution of costs in the main proceedings, the Spanish Government stated in its written observations that the provision in question is Article 394 of the LEC, the wording of which it provided, with the result that the Court has the information it requires to rule on the twelfth question in Case C-224/19. Moreover, in so far as that question is concerned not with the interpretation or application of Article 394 of the LEC but, in essence, with whether Article 6(1) or Article 7(1) of Directive 93/13 must be interpreted as precluding the application of a provision such as Article 394 of the LEC in the circumstances of the dispute in the main proceedings in Case C-224/19, the Court has jurisdiction to answer it.

Substance

- 46 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 34).
- 47 Moreover, the fact that a national court has, formally speaking, worded its request for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court of Justice from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 43 and the case-law cited).
- 48 It is appropriate to reorganise the 15 questions referred for a preliminary ruling in the two joined cases into five groups, the first relating to the clause concerning the costs of creating and cancelling the mortgage, the second relating to the clause imposing an arrangement fee, the third relating to any significant imbalance in the rights and obligations of the parties as arising from such a term, the fourth relating to the limitation in time of the effects of a finding that an unfair term is void, and the fifth relating to the national system for awarding costs in actions for a declaration as to the invalidity of unfair terms.

The first to sixth questions in Case C-224/19 and the two questions in Case C-259/19, concerning the effects of the invalidity of the clause imposing fees for creating and cancelling the mortgage

- 49 By these questions, the referring courts asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that, in the case where an unfair contractual term requiring the consumer to pay the full costs of creating and cancelling the mortgage is void, they preclude the national court from refusing to refund to the consumer the amounts paid pursuant to that term.
- 50 In that regard, it should be noted that, according to settled case-law, once a term has been declared unfair and therefore void, it is for the national court, in accordance with Article 6(1) of Directive 93/13, to exclude the application of that term so that it does not produce binding effects on the consumer, unless the latter objects to this (see, in particular, judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 65, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 52 and the case-law cited).
- 51 It follows that the national court may not revise the content of unfair terms, lest it contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 60).

- 52 A contractual term held to be unfair must therefore 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 such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in if that unfair term had not existed (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 61).
- 53 Thus, the Court has already held that it is for the national court to establish all the consequences, arising under national law, of a finding that the term in question is unfair in order to ensure that the consumer is not bound by that term (judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 49). In particular, the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 62).
- 54 Further to the foregoing, it should also be noted that the fact that a contractual term which has been held to be unfair is deemed never to have existed is such as to justify the application of any provisions of national law that govern the allocation of costs connected with the creation and cancellation a mortgage in the absence of any agreement between the parties in this regard. If those provisions impose all or part of those costs on the borrower, neither Article 6(1) nor Article 7(1) of Directive 93/13 make it impossible for the consumer to be denied a refund of that part of those costs which he or she must himself or herself bear.
- 55 In the light of all the foregoing considerations, the answer to the first to sixth questions in Case C-224/19 and the two questions in Case C-259/19 is that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that, in the case where an unfair contractual term requiring the consumer to bear the full costs of creating and cancelling a mortgage is void, they preclude the national court from refusing to refund to the consumer the amounts paid pursuant to that term, unless any provisions of national law which apply in the absence of that term require the consumer to pay all or part of those costs.

The seventh to tenth questions in Case C-224/19, concerning review of the unfairness and transparency of the term requiring the payment of an arrangement fee

- 56 By these questions, the referring court asks, in essence, whether Articles 3, 4(2) and 5 of Directive 93/13 must be interpreted as precluding national case-law which rules out any assessment of the unfairness of a contractual term requiring the consumer to pay an arrangement fee on the ground that that fee is an element of the price of the contract, in accordance with Article 4(2) of that directive, while at the same time taking the view that such a term is sufficient to satisfy the requirement of transparency laid down in the latter provision.
- 57 In the present case, it must be noted, as a preliminary point, that the referring court asked its seventh to tenth questions on the premiss that Article 4(2) of Directive 93/13 has not been transposed into the Spanish legal order.
- 58 However, in order to answer the questions referred, it is not necessary to determine whether or not Article 4(2) of Directive 93/13 has actually been transposed into the Spanish legal order (see, to that effect and by analogy, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 42).

- 59 First, it should be recalled that Article 4(2) of Directive 93/13, read in conjunction with Article 8 thereof nonetheless allows the Member States to provide, in the legislation transposing that directive, that an ‘assessment of the unfair nature’ is not to apply to the terms to which that provision relates, on condition that they are drafted in plain, intelligible language (see, to that effect, judgments of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 32; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 41; and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 45).
- 60 More specifically, Article 4(2) of Directive 93/13 simply states that ‘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 supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language’.
- 61 Thus, in the case in the main proceedings, it would only be if the term requiring the consumer to pay an arrangement fee related to one of the aforementioned two subjects that the review of its unfairness could be limited in accordance with Article 4(2).
- 62 In that regard, the Court has held that contractual terms falling within the concept of ‘main subject matter of the contract’ must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within that concept (judgments of 20 September 2017, *Andriuc and Others*, C-186/16, EU:C:2017:703, paragraphs 35 and 36 and the case-law cited, and of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 32).
- 63 It is for the referring court to determine, having regard to the nature, general scheme and the stipulations of the loan agreement in question, and its legal and factual context, whether the term at issue in the main proceedings is an essential element of the mortgage loan agreement at issue in the main proceedings (see, by analogy, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 33 and the case-law cited).
- 64 It is nonetheless worth pointing out, by way of guidance to inform the national court’s assessment, that the exact scope of ‘main subject matter’ and ‘price’ within the meaning of Article 4(2) of Directive 93/13 cannot be determined by the concept of ‘the total cost of the credit to the consumer’ within the meaning of Article 3(g) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66) (judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 47). An arrangement fee cannot be considered to be an essential obligation of a mortgage loan agreement solely because it is included in the total cost of that agreement.
- 65 Moreover, it is clear from the wording of Article 4(2) of Directive 93/13 that the second category of terms not open to assessment for unfairness is of limited scope, since it relates only to the adequacy of the price or remuneration provided for as against the services or goods supplied in exchange, the reason for that exclusion being that there is no legal scale or criterion capable of governing and informing a review of such adequacy. Terms relating to the consideration owed by the consumer to the lender or affecting the actual price payable to the latter by the consumer, therefore, are not, in principle, caught by that second category of terms, except from the point of

view of whether the amount of the consideration or the price as stipulated in the contract is adequate as against the service provided in exchange by the lender (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraphs 34 and 35 and the case-law cited).

- 66 Secondly, the Court has observed that the requirement for plain, intelligible drafting which appears in Article 5 of Directive 93/13 applies in any event, including where a contractual term falls within the scope of Article 4(2) of that directive and even if the Member State concerned has failed to transpose that provision. That requirement cannot be reduced merely to a contractual term being formally and grammatically intelligible (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 46).
- 67 On the contrary, since the system of protection introduced by Directive 93/13 is based on the idea that consumers are in a position of weakness vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, that requirement must be understood in a broad sense, namely as requiring not only that the term in question be grammatically intelligible to the consumer, but also that the contract set out transparently the specific functioning of the mechanism to which the term in question relates and, where appropriate, the relationship between that mechanism and the mechanism laid down by other terms, so that the consumer is capable of evaluating, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 70 to 73; of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 37; and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 43).
- 68 The clarity and intelligibility of the term at issue in the main proceedings must be examined by the referring court in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement and the level of attention to be expected of the average consumer, who is reasonably well informed and reasonably observant and circumspect (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 74; of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 75; of 20 September 2017, *Andriuc and Others*, C-186/16, EU:C:2017:703, paragraphs 46 and 47; and of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 46).
- 69 It follows that Article 4(2) and Article 5 of Directive 93/13 preclude case-law to the effect that a contractual term is deemed to be transparent in itself, there being no need for an examination such as that described in the preceding paragraph.
- 70 Accordingly, it is for the national court, taking into account all of the circumstances attending the conclusion of the agreement, to determine whether the financial institution provided the consumer with enough information to enable him or her to apprise himself or herself of the content and functioning of the term requiring him or her to pay an arrangement fee, and of the role of that term within the loan agreement. In this way, the consumer will be acquainted with the reasons justifying the remuneration corresponding to that charge (see, by analogy, judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 77), and will thus be able to assess the extent of his or her commitment and, in particular, the total cost of that contract.
- 71 In the light of all the foregoing considerations, the answer to the seventh to tenth questions is that Articles 3, 4(2) and 5 of Directive 93/13 must be interpreted as meaning that contractual terms falling within the concept of ‘main subject matter of the contract’ must be understood as being

those that lay down the essential obligations of that contract and which, as such, characterise it. By contrast, terms ancillary to those which define the very essence of the contractual relationship cannot fall within that concept. The fact that an arrangement fee is included in the total cost of a mortgage loan does not mean that it is an essential obligation of that loan. In any event, a court of a Member State is required to review the clarity and intelligibility of a contractual term relating to the main subject matter of the contract whether or not Article 4(2) of that directive has been transposed into the legal order of that Member State.

The eleventh question, concerning whether there is a significant imbalance in the rights and obligations of the parties as arising from a term requiring the payment of an arrangement fee

- 72 By the eleventh question, the referring court in Case C-224/19 asks, in essence, whether Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in a loan agreement concluded between a consumer and a financial institution which requires the consumer to pay an arrangement fee creates, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties under the agreement, contrary to the requirement of good faith, where the financial institution does not demonstrate that that fee corresponds to services actually provided and costs it has incurred.
- 73 In that regard, it should be recalled at the outset that, according to settled case-law, the jurisdiction of the Court extends to the interpretation of the concept of ‘unfair term’ used in Article 3(1) of Directive 93/13, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 47 and the case-law cited).
- 74 As to whether the requirement of good faith, within the meaning of Article 3(1) of Directive 93/13, is satisfied, it is important to note that, regard being had to the sixteenth recital thereof, 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 (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 50).
- 75 As regards the existence of any significant imbalance, the Court has held that this can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he or she enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him or her of an additional obligation not envisaged by the national rules (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 51).
- 76 Moreover, it is clear from Article 4(1) of Directive 93/13 that the unfairness of a contractual term is to 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 (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 52).

- 77 It is for the referring court to assess whether the term at issue in the main proceedings is unfair in the light of those criteria.
- 78 In that regard, it must be borne in mind that, as the national court has indicated, Law 2/2009 provides that fees or costs charged to the customer must correspond to services actually provided or to costs incurred. It follows that a term which had the effect of exempting the seller or supplier from the obligation to demonstrate that those conditions are fulfilled in relation to an arrangement fee could, subject to verification by the referring court in the light of all the terms of the agreement, impair the legal situation of the consumer and, consequently, create a significant imbalance to the detriment of that consumer, contrary to the requirement of good faith.
- 79 In the light of the foregoing considerations, the answer to the eleventh question in Case C-224/19 is that Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in a loan agreement concluded between a consumer and a financial institution which requires the consumer to pay an arrangement fee is capable of creating, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties as arising from that agreement, contrary to the requirement of good faith, where the financial institution does not demonstrate that that fee corresponds to services actually provided and to costs it has incurred, which is a matter for the referring court to verify.

The thirteenth question in Case C-224/19, concerning whether the effects of the invalidity of an unfair term may be made subject to a limitation period

- 80 By its thirteenth question in Case C-224/19, which must be examined before the twelfth question, the national court asks, in essence, whether Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that they do not preclude national case-law which provides that the bringing of an action to enforce the restitutory effects of a finding that an unfair contractual term is void is subject to a limitation period, even though, under national law, an action for a declaration that an unfair contractual term is void *ab initio* is not subject to a limitation period.
- 81 In that regard, it should be recalled that the protection conferred on consumers by Directive 93/13 precludes a national provision which prohibits the national court, on expiry of a time limit, from finding that a term of a contract concluded between a seller or supplier and a consumer is unfair (judgment of 21 November 2002, *Cofidis*, C-473/00, EU:C:2002:705, paragraph 38).
- 82 However, the Court has already recognised that consumer protection is not absolute (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68) and that, in the interests of legal certainty, it is compatible with EU law to lay down reasonable time limits for bringing proceedings (judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 41, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 69).
- 83 In that regard, it should be noted that, in the absence of specific EU legislation in this area, the rules implementing consumer protection, provided for in Articles 6(1) and 7(1) of Directive 93/13, are a matter for the domestic legal order of the Member States, in accordance with the principle of the procedural autonomy of the latter. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to

exercise the rights conferred by Community law (principle of effectiveness) (see, to that effect, inter alia, judgment of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 24 and the case-law cited).

- 84 It follows that EU law does not preclude national legislation which, while providing that an action for a declaration as to the invalidity of an unfair term in a contract concluded between a seller or supplier and a consumer is not subject to a limitation period, subjects to a limitation period an action to enforce the restitutory effects of that declaration, provided that that legislation complies with the principles of equivalence and effectiveness.
- 85 With regard, more particularly, to compliance with the principle of effectiveness, the Court has already held that each case in which the question arises as to whether a national provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraph 48 and the case-law cited).
- 86 In the case in the main proceedings, the referring court states that the issue is whether an action to enforce the restitutory effects of a finding that an unfair term in a mortgage contract is void is subject to the five-year limitation period laid down in Article 1964(2) of the Civil Code.
- 87 In so far as limitation periods of three years (judgment of 15 April 2010, *Barth*, C-542/08, EU:C:2010:193, paragraph 28) or two years (judgment of 15 December 2011, *Banca Antoniana Popolare Veneta*, C-427/10, EU:C:2011:844, paragraph 25) have been found, in the case-law of the Court, to be consistent with the principle of effectiveness, it must be held that a five-year limitation period applicable to an action to assert the restitutory effects of a finding that an unfair term is void does not, in principle, and subject to an assessment by the national court of the factors referred to in paragraph 85 of this judgment, appear to be such as to render the exercise of the rights conferred by Directive 93/13 practically impossible or excessively difficult.
- 88 The referring court also asks, in essence, whether national case-law to the effect that a five-year limitation period for bringing an action to enforce the restitutory effects of a finding that an unfair contractual term is void begins to run from the conclusion of the contract containing that term, is compatible with the principle of effectiveness, read in conjunction with the principle of legal certainty.
- 89 It would appear from the order for reference that that period, provided for in Article 1964(2) of the Civil Code, runs from the conclusion of a mortgage loan agreement containing an unfair term, although this is a matter for the national court to verify.
- 90 In that regard, it is important to bear in mind that consumers may be unaware that a term in a mortgage loan agreement is unfair or do not appreciate the extent of their rights under Directive 93/13 (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 69).

- 91 Indeed, the application of a five-year limitation period that begins to run from the conclusion of the contract, in so far as it means that the consumer may seek the refund of payments made pursuant to a contractual term held to be unfair only during the first five years following the signing of the contract, irrespective of whether he or she was or could reasonably have been aware of the unfairness of that term, may make it excessively difficult for that consumer to exercise his or her rights under Directive 93/13, and, consequently, run counter to the principle of effectiveness read in conjunction with the principle of legal certainty.
- 92 In the light of all the foregoing considerations, the answer to the thirteenth question in Case C-224/19 is that Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that it is not contrary to those provisions for the bringing of an action to assert the restitutory effects of a finding that an unfair contractual term is void to be subject to a limitation period, provided that the starting point and duration of that period do not make it practically impossible or excessively difficult for the consumer to exercise his or her right to seek such a refund.

The twelfth question in Case C-224/19, concerning whether the statutory rules on the award of costs is compatible with Directive 93/13

- 93 By its twelfth question in Case C-224/19, the referring court asks, in essence, whether Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that they preclude a system whereby the consumer may be made to bear part of the costs of the proceedings depending on the level of the unduly paid sums which are refunded to him following a finding that a contractual term is void on the ground that it is unfair.
- 94 It is clear from the documents before the Court that, under Article 394 of the LEC, the seller or supplier might not be ordered to pay all the costs of the proceedings where an action brought by a consumer for a declaration as to the invalidity of an unfair contractual term is upheld in its entirety, but the action for a refund of sums paid pursuant to that term is only partially upheld.
- 95 In that regard, it is clear from the case-law referred to in paragraph 83 of this judgment that the award of the costs of judicial proceedings before the national courts falls within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness.
- 96 Thus, it should be noted that there is nothing in the documents before the Court to support a finding that those rules apply differently depending on whether the right in question is conferred by EU law or by national law. It is, however, necessary to determine whether it is compatible with the principle of effectiveness for the consumer to be made to bear the costs of proceedings depending on the sums refunded to him or her, notwithstanding that he or she has successfully obtained a declaration that the contested term is unfair.
- 97 As regards compliance with the principle of effectiveness, that question must be assessed in the light of the factors set out in paragraph 85 of this judgment.
- 98 In the present case, Directive 93/13 gives consumers the right to apply to a court to have a contractual term declared unfair and disapplied. Making the decision on the award of costs in such proceedings exclusively dependent on how much has been unduly paid and must be refunded, however, is likely to deter consumers from exercising that right, given the costs which legal action would entail (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 69).

99 In the light of all the foregoing considerations, the answer to the twelfth question in Case C-224/19 is that Articles 6(1) and 7(1) of Directive 93/13 and the principle of effectiveness must be interpreted as precluding a system whereby the consumer may be made to bear part of the costs of proceedings depending on the level of the unduly paid sums which are refunded to him following a finding that a contractual term is void for being unfair, given that such a system creates a substantial obstacle that is likely to discourage consumers from exercising the right to an effective judicial review of the potential unfairness of contractual terms such as that conferred by Directive 93/13.

Costs

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

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

- 1. Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, in the case where an unfair contractual term requiring the consumer to pay the full costs of creating and cancelling a mortgage is void, they preclude the national court from refusing to refund to the consumer the amounts paid pursuant to that term, unless any provisions of national law that may be applicable in the absence of that term require the consumer to pay all or part of those costs.**
- 2. Articles 3, 4(2) and 5 of Directive 93/13 must be interpreted as meaning that contractual terms falling within the concept of ‘main subject matter of the contract’ must be understood as being those that lay down the essential obligations of that contract and which, as such, characterise it. By contrast, terms ancillary to those which define the very essence of the contractual relationship cannot fall within that concept. The fact that an arrangement fee is included in the total cost of a mortgage loan does not mean that it is an essential obligation of that loan. In any event, a court of a Member State is required to review the clarity and intelligibility of a contractual term relating to the main subject matter of the contract whether or not Article 4(2) of that directive has been transposed into the legal order of that Member State.**
- 3. Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in a loan agreement concluded between a consumer and a financial institution which requires the consumer to pay an arrangement fee may create, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties as arising from that agreement, contrary to the requirement of good faith, where the financial institution does not demonstrate that that fee corresponds to services actually provided and to costs it has incurred, which is a matter for the referring court to verify.**

4. **Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that it is not contrary to those provisions for the bringing of an action to enforce the restitutory effects of a finding that an unfair contractual term is void to be subject to a limitation period, provided that the starting point and duration of that period do not make it practically impossible or excessively difficult for the consumer to exercise his or her right to seek such a refund.**
5. **Articles 6(1) and 7(1) of Directive 93/13 and the principle of effectiveness must be interpreted as meaning that they preclude a system whereby the consumer may be made to bear part of the costs of proceedings depending on the level of the unduly paid sums which are refunded to him following a finding that a contractual term is void for being unfair, given that such a system creates a substantial obstacle that is likely to discourage consumers from exercising the right to an effective judicial review of the potential unfairness of contractual terms such as that conferred by Directive 93/13.**

[Signatures]