Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 2 March 2023 [1]

Case C-35/22

Cajasur Banco S. A.
v
JO,
IM

(Request for a preliminary ruling from the Audiencia Provincial de Málaga (Provincial Court, Malaga, Spain))

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – General conditions of a mortgage loan contract declared null and void by national courts – National legislation requiring a consumer to deliver a pre-litigation demand in order to guarantee the award of the costs of subsequent legal proceedings – Effective judicial protection – Sound administration of justice)

I. Introduction

1. By Article 395 of Ley 1/2000 de Enjuiciamiento Civil (Law 1/2000 on the Code of Civil Procedure, 'the Code of Civil Procedure') of 7 January 2000, [2] entitled 'Order as to costs where a claim is admitted':

'(1) Where a claim is admitted prior to a statement of defence being lodged, neither party should be ordered to pay the costs of the proceedings unless the court finds, on a duly reasoned basis, that the defendant has acted in bad faith.

Bad faith shall in any event be deemed to exist if, prior to any legal action, the defendant has received a due and substantiated demand for payment, mediation proceedings have been initiated or a request for conciliation has been made to him or her.

(2) Where a claim is admitted after the statement of defence has been lodged, paragraph 1 of the preceding article shall apply.'

[1] Original language: English.

[2] BOE No 7 of 8 January 2000, p. 575.

2. Must a consumer, who seeks to rely upon national rules implementing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [3] with a view to persuading a court to set aside mortgage fee terms in a loan contract, demand repayment from the defendant credit institution prior to the institution of such proceedings so as to be able to demonstrate bad faith on the part of the defendant for the purposes of the aforecited Article 395 of the Code of Civil Procedure?

II. The dispute in the main proceedings, the request for a preliminary ruling and the procedure before the Court

3. At an unspecified date, JO and IM, two individuals, concluded a mortgage loan agreement with Cajasur Banco S. A. ('Cajasur').

4. In 2018, JO and IM initiated legal proceedings before the Juzgado de Primera Instancia nº 18 bis de Málaga (Court of First Instance No 18a, Malaga, Spain) seeking a declaration of invalidity, on grounds of unfairness, of the term requiring them to pay the mortgage fees in the loan agreement. JO and IM also sought reimbursement of sums they had paid under that term. JO and IM had not demanded of Cajasur the repayment of those sums prior to the commencement of their action.

5. Upon notification of the legal proceedings, Cajasur conceded the claim that the mortgage fees term was unfair. It offered to reimburse an amount lower than that demanded, calculated by reference to recent case-law of the Tribunal Supremo (Supreme Court, Spain).

6. On 2 March 2020, the Juzgado de Primera Instancia nº 18 bis de Málaga (Court of First Instance No 18a, Malaga) declared the term relating to the payment of the mortgage fees void on grounds of unfairness. It ordered Cajasur to reimburse the amount JO and IM had wrongly paid, namely, EUR 488.69. It also ordered Cajasur to bear the costs of the legal proceedings.

7. Cajasur brought an appeal before the Audiencia Provincial de Málaga (Provincial Court, Malaga, Spain), the referring court, against the part of the judgment which ordered it to bear the costs of the legal proceedings on the ground that it was made in breach of Article 395 of the Code of Civil Procedure.

8. According to the order for reference, the case-law of the Tribunal Supremo (Supreme Court) has enunciated the following principles in order to determine the existence of bad faith for the purposes of Article 395(1) of the Code of Civil Procedure. [4] First, where the applicant delivers a pre-litigation demand and the defendant does not reply, the defendant will bear the costs even if it concedes the legal proceedings prior to lodging a defence. Second, if the applicant does not

[3] OJ 1993 L 95, p. 29.

[4] Judgments No 2295/2021 of 8 June 2021 (ES:TS:2021:2295); No 3413/2021 of 22 September 2021 (ES:TS:2021:3413); and No 3421/2021 of 22 September 2021 (ES:TS:2021:3421). In judgment No 2295/2021 of 8 June 2021, the Tribunal Supremo (Supreme Court) ruled that the initiation of legal proceedings ten working days after the applicant had delivered a pre-litigation demand afforded the defendant insufficient time to respond to that claim. The defendant thus could not be deemed to have acted in bad faith, notwithstanding that it admitted that claim before it lodged its defence. In judgment No 3413/2021 of 22 September 2021, the applicant brought legal proceedings a few days after the defendant had responded to a pre-litigation demand by stating that it was willing to eliminate a term in a mortgage loan agreement that a previous judgment of the Tribunal Supremo (Supreme Court) had declared void on grounds of unfairness with effect from the date of that judgment. The Tribunal Supremo (Supreme Court) ruled that the defendant had not acted in bad faith and therefore did not have to bear the costs of the action.

deliver a pre-litigation demand, or if he or she does so but allows the defendant insufficient time to respond, the latter will not bear the costs, even where it has admitted the claim prior to lodging a defence.

9. The referring court considers that that case-law may be contrary to the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6(1) of Directive 93/13 in so far as it makes the right to obtain full compensation conditional upon the delivery of a demand prior to the commencement of proceedings.

10. The referring court observes that, even though the case-law of the Tribunal Supremo (Supreme Court) declared the litigious term void on grounds of unfairness,[5] banks do not usually reimburse consumers for sums paid under such a term but await the initiation of legal proceedings. Where consumers do not deliver a pre-litigation demand, the banks seek to avoid bearing the costs of the legal proceedings by admitting the claim prior to lodging a defence.

11. Notwithstanding the foregoing, the referring court adds that a defendant may be deemed to have acted in bad faith in certain other circumstances. Those include where the defendant is aware that a term is unfair and refrains from taking steps to eliminate its consequences for consumers, instead waiting for the latter to initiate legal proceedings in the knowledge that, absent the delivery of a pre-litigation demand, it will not be obliged to bear the costs of those proceedings should it admit the claim before it lodges a defence.

12. In the light of those considerations, the Audiencia Provincial de Málaga (Provincial Court, Malaga) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it contrary to the right to effective judicial protection and Article 47 of the [Charter] to require that, before instituting legal proceedings, the consumer must first have issued an out-of-court demand for payment in order for the declaration as to the invalidity of a particular general condition of contract on grounds of unfairness to give rise to all of the compensatory effects (including the costs of the legal proceedings) associated with such invalidity, pursuant to Article 6(1) of [Directive 93/13]?

(2) Is it compatible with the right to full compensation and the effectiveness of European Union law and Article 6(1) of [Directive 93/13] to make the imposition of costs (including legal fees) subject to a condition based on the existence of a prior out-of-court demand for payment issued by the consumer to the financial institution with a view to the removal of that term?'

13. The Spanish Government and the European Commission submitted written observations. At the hearing of 11 January 2023, Cajasur, the Spanish Government and the Commission presented oral argument and replied to the Court's questions.

[5] Judgment No 705/2015 of 23 December 2015 (ES:TS:2015:5618).

III. Assessment

A. Admissibility

14. The Spanish Government, supported at the hearing by Cajasur, puts forward four arguments by which it contends that the referring court incorrectly presented the factual and the legal framework such that the questions it referred are inadmissible.

15. First, the referring court does not identify the amount of costs the defendant was ordered to pay.

16. Second, the order for reference states that Cajasur admitted JO and IM's claim as regards the unfairness of the term but not in the sum that they had claimed. Since JO and IM subsequently accepted the amount Cajasur offered, the Spanish Government argues that the claim had been admitted in part only, such that Article 395 of the Code of Civil Procedure does not apply. The defendant was ordered to pay the costs because the substance of the action was well founded, in which circumstances Article 394 of the Code of Civil Procedure applies.

17. Third, the referring court incorrectly suggests that consumers are fully compensated for the negative consequences of unfair terms only where the defendant bears the costs of legal proceedings based on Directive 93/13. Consumers may, however, be fully compensated if they make a pre-litigation demand, in which case the defendant has the possibility of satisfying that claim, on pain of it paying the costs of any litigation the applicant may be obliged to commence thereafter.

18. Fourth, the Spanish Government submits that the questions are inadmissible because Article 395 of the Code of Civil Procedure, as interpreted by the case-law of the Tribunal Supremo (Supreme Court), is in conformity with Article 47 of the Charter and Directive 93/13. The Spanish Government contends that Article 395 of the Code of Civil Procedure merely provides for a presumption of bad faith where a pre-litigation demand has been delivered to the defendant and it admits that claim before lodging a defence. That is not the only circumstance where bad faith may be found to exist.

19. The Commission stated at the hearing that the questions referred are admissible.

20. In accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling.[6]

21. Questions submitted by national courts relating to EU law therefore enjoy a presumption of relevance.[7] The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears

[6] Judgment of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 76 and the case-law cited).

[7] Judgment of 26 June 2019, *Aleš Kuhar and Jožef Kuhar* v *Addiko Bank d.d.* (C-407/18, EU:C:2019:537, paragraph 36 and the case-law cited).

no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[8]

22. Those conditions are not satisfied in the present case. The questions in the order for reference are clearly relevant for the purpose of adjudicating on the dispute before the referring court since the latter seeks to ascertain whether Directive 93/13 and Article 47 of the Charter prevent the application of rules such as Article 395 of the Code of Civil Procedure to the allocation of costs in legal proceedings. The Court may reject the objections to the admissibility of the questions referred on that ground alone.

23. As for the four objections of inadmissibility put forward by the Spanish Government, I propose that the Court reject them for the following reasons.

24. First, the fact that the referring court did not identify the costs the defendant was ordered to pay has no bearing upon the answer to the questions asked.

25. Second, the Court does not have jurisdiction to determine whether the referring court's interpretation of the national rules is correct.[9] It is for the latter to determine whether Article 394 or Article 395 of the Code of Civil Procedure is the relevant provision for the purposes of ruling on the proceedings before it. In that context I observe that, contrary to the Spanish Government's suggestion, by judgment of 2 March 2020, the Juzgado de Primera Instancia nº 18 bis de Málaga (Court of First Instance No 18a, Malaga) had ordered the defendant to bear the costs in view of the fact that it had admitted the claim in its entirety.

26. The Spanish Government's third and fourth objections fail on the ground that they go to the substance of the questions referred. If anything, those objections lend credence to the view that it is appropriate for the Court to answer those questions.

B. Substance

27. By its two questions, which should be answered together, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13, read in conjunction with the principle of effectiveness and Article 47 of the Charter, are to be interpreted so as to preclude national legislation according to which, where a defendant admits a claim in legal proceedings before it lodges a defence, making an order to require it to bear the costs of those proceedings is conditional upon a finding that it acted in bad faith.

1. Arguments of the parties

28. Cajasur, the Spanish Government and the Commission consider that EU law does not preclude national legislation such as that at issue before the referring court.

[8] Judgment of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 77 and the case-law cited).

[9] Judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 40).

29. Cajasur contended at the hearing that Article 395 of the Code of Civil Procedure does not require consumers to deliver a pre-litigation demand to defendants in order to be awarded the costs of litigation arising therefrom. In view of the circumstances of the case before the referring court, however, Cajasur did not act in bad faith.

30. The Spanish Government submits that Article 395 of the Code of Civil Procedure, as interpreted by the case-law of the Tribunal Supremo (Supreme Court), is consonant with the requirements of Article 47 of the Charter and Article 6(1) of Directive 93/13. Article 395 of the Code of Civil Procedure merely establishes a non-rebuttable presumption of bad faith once the consumer delivers a pre-litigation demand. The case-law of the Tribunal Supremo (Supreme Court) does not exclude the possibility for a consumer to demonstrate bad faith on the part of a defendant even where the consumer did not deliver such a demand, as paragraph 14 of the order for reference suggests. At the hearing, the Spanish Government submitted that that may be the case where the case-law of the Tribunal Supremo (Supreme Court) has already declared a term such as that before the referring court unfair and where, in view of its nature, the unfairness of that term does not require a case-by-case assessment.

31. The Spanish Government moreover considers that consumer protection is not absolute and must be reconciled with the sound administration of justice. Article 395 of the Code of Civil Procedure promotes the latter principle by encouraging applicants to seek out-of-court solutions to disputes by notifying defendants of an intention to commence legal proceedings before their initiation. The fact that consumers must respect minimum procedural requirements in order to assert their rights does not mean they do not enjoy the effective judicial protection required by Article 47 of the Charter. It has furthermore been held that such requirements may include following an out-of-court settlement procedure prior to the issue of proceedings. [10] A mechanism to incentivise consumers to settle their disputes out of court, such as that contained in Article 395 of the Code of Civil Procedure is not, a fortiori, contrary to that principle. Such an incentive can be easily satisfied, such that it neither imposes a disproportionate burden upon the consumer nor goes beyond what is necessary to achieve the objective pursued.

32. The Spanish Government finally submits that Article 395 of the Code of Civil Procedure affords its courts sufficient room for manoeuvre so as to enable them to apply it in an manner that conforms to EU law.

33. The Commission's starting point is that Article 6(1) of Directive 93/13 is a mandatory provision of equal standing to rules of public policy. Since Directive 93/13 does not harmonise the procedural rules applicable to disputes relating to unfair terms in consumer contracts, in accordance with the principle of procedural autonomy of Member States, their internal legal orders govern those matters, subject to respect for the principles of equivalence and effectiveness. The Commission observes that procedural rules governing the allocation of the costs of legal proceedings may raise concerns from the perspective of the principle of effectiveness if they have the effect of dissuading consumers from asserting their rights before the courts. The issue that arises in the present reference for a preliminary ruling is whether Article 395 of the Code of Civil Procedure, as interpreted by the Tribunal Supremo (Supreme Court), is an unjustified obstacle to consumers seeking to exercise their rights with regard to the invalidity of unfair terms in consumer contracts and to obtain full compensation.

[10] Judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraphs 61 to 65); of 14 June 2017, *Menini and Rampanelli* (C-75/16, EU:C:2017:457, paragraphs 52 to 55); and of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraphs 70 and 71).

34. The Commission points out that Article 395 of the Code of Civil Procedure does not oblige consumers to deliver a pre-litigation demand to the defendant before initiating legal proceedings. Where consumers do not deliver such pre-litigation demands, they run the risk of having to bear the costs of the legal proceedings if the defendant admits the claim prior to lodging a defence. According to the Commission, there is no infringement of the principle of effectiveness if consumers can easily avoid that risk and if the rule at issue can be justified by reference to the sound administration of justice. Here consumers can easily satisfy the requirement in question, acting either by themselves or with the assistance of a lawyer. Requiring consumers to take a certain amount of initiative to defend their interests is not a disproportionate obstacle to the vindication of their rights. The rule at issue also promotes the sound administration of justice, a legitimate objective consonant with that of consumer protection.

35. Finally, the Commission submits that, while Article 395 of the Code of Civil Procedure establishes a presumption of bad faith on the part of the defendant where a pre-litigation demand has been delivered to it, it does not prevent consumers from demonstrating the existence of bad faith on other grounds. In this respect, the Commission stated at the hearing that, in making such an assessment, it may be relevant to take into account that case-law of the national courts has already declared a term unfair and that other consumers had brought similar proceedings against the defendant on that ground.

2. Analysis

36. Under Article 6(1) of Directive 93/13, Member States are to provide that unfair terms used in a contract concluded with a consumer by a seller or a supplier are, as provided for under their national law, not binding on the consumer. The contract shall nevertheless continue to bind the parties if it is capable of continuing in existence without the unfair terms. That mandatory provision is to be regarded as one of equal standing to national rules that have the character of rules of public policy within the domestic legal order. It is intended to replace the formal balance established by the contract between the rights and obligations of the parties with an effective balance that re-establishes equality between them. [11]

37. Given the significant public interest in consumer protection, Article 7(1) of Directive 93/13 obliges Member States, in the interests of consumers and of competitors, to provide adequate and effective means to prevent the continued use of unfair terms in contracts concluded between consumers and sellers or suppliers. [12] That system of protection is based on the idea that consumers are in a position of weakness vis-à-vis sellers or suppliers, in particular with regard to their level of knowledge. [13]

38. Article 6(1) of Directive 93/13 has been interpreted to mean that a contractual term that is held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. A court determination that such a term is unfair must, in principle, restore the consumer to the legal and factual situation that he or she would have been in if that term had not existed. [14]

[11] Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 54 and 55).

[12] Ibid., paragraph 56.

[13] Judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 22), and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 67).

[14] 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).

39. In accordance with the principle of division of powers stated in Article 5(1) and (2) TEU, however, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. [15]

40. According to well-established case-law, EU law does not harmonise the procedures for examining the unfairness of a contractual term and it is for the Member States' legal orders to regulate those procedures. [16] The award of the costs of judicial proceedings before national courts being quintessentially a matter of legal procedure, its regulation falls within the procedural autonomy of the Member States. [17] In accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, 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 EU law (principle of effectiveness). [18]

41. There is nothing in the documents before the Court to suggest that the procedural rules at issue before the referring court apply differently depending on whether the right in question is conferred under EU law or national law. The principle of equivalence is thus irrelevant to the answer the questions referred.

42. As for the principle of effectiveness, whether a national procedural provision makes the application of EU law impossible or excessively difficult falls to be analysed by reference to the role of that national provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies with jurisdiction to adjudicate on such matters. In that context, it may be necessary to take into consideration the principles that lie at the heart of the national legal order, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings. [19] In so far as they aim at providing relief to what is often an overburdened judicial system, procedural rules adopted in pursuit of the general interest in the proper administration of justice, including those that require an additional effort from consumers who seek to assert their rights, may be justified provided they do not go beyond what is necessary to achieve that objective. [20]

43. The need to comply with the principle of effectiveness cannot be stretched so far as to fully compensate for total inertia on the part of the consumer. [21] Since consumer protection is not absolute, the fact that the consumer must respect certain procedural requirements to assert his or her rights does not deprive him or her of effective judicial protection. [22] Consumers must

15 Judgment of 12 September 2017, *Anagnostakis* v *Commission* (C-589/15 P, EU:C:2017:663, paragraph 97).

16 Judgments of 26 June 2019, *Aleš Kuhar and Jožef Kuhar* v *Addiko Bank d.d.* (C-407/18, EU:C:2019:537, paragraph 45 and the case-law cited), and of 22 September 2022, *Vicente (Action for the recovery of lawyers' fees)* (C-335/21, EU:C:2022:720, paragraph 53 and the case-law cited).

17 Judgments of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 95), and of 7 April 2022, *Caixabank* (C-385/20, EU:C:2022:278, paragraph 47). See also, to that effect, judgment of 22 September 2022, *Vicente (Action for the recovery of lawyers' fees)* (C-335/21, EU:C:2022:720, paragraph 53).

18 Judgments of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 83), and of 22 September 2022, *Vicente (Action for the recovery of lawyers' fees)* (C-335/21, EU:C:2022:720, paragraph 54).

19 Judgments of 26 June 2019, *Aleš Kuhar and Jožef Kuhar* v *Addiko Bank d.d.* (C-407/18, EU:C:2019:537, paragraph 48), and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 85).

20 Judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraph 51).

21 Judgment of 22 September 2022, *Vicente (Action for the recovery of lawyers' fees)* (C-335/21, EU:C:2022:720, paragraph 56).

22 Judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraph 50).

nevertheless be permitted to bring legal proceedings to challenge the content of contracts under reasonable procedural conditions, including the allocation of costs, which do not make it impossible or excessively difficult to exercise the rights guaranteed by Directive 93/13. [23]

44. The Court has ruled that Article 6(1) and Article 7(1) of Directive 93/13 and the principle of effectiveness preclude a system whereby, consequent upon a finding that a contractual term is void for unfairness, consumers may be required to bear part of the costs of proceedings by reference to the amount of the unduly paid sums refunded to them. Such a system creates a substantial obstacle that is likely to discourage consumers from exercising the right to an effective judicial review of such terms. [24] The Court has similarly held that a rule according to which consumers must pay three quarters of the court fees when they object to an order for payment may dissuade them from defending their rights, in particular where small amounts are in dispute. [25] National rules establishing a limit on the lawyers' fees recoverable by successful consumers from the seller are not, however, contrary to Directive 93/13 provided that limit allows consumers to obtain reimbursement of a reasonable and proportionate amount of the costs they were objectively required to incur in bringing an action. [26] In the context of court proceedings relating to unfair terms in consumer contracts, national legislation that requires consumers to bear their own costs in the event that their claim is satisfied out of court is not contrary to EU law, provided the court hearing the case takes account of any bad faith on the part of the seller and, where appropriate, orders the latter to pay the costs of those court proceedings. [27]

45. The obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, including those derived from Directive 93/13, implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter, which applies, inter alia, to the definition of the detailed procedural rules governing actions based on such rights. [28] Yet fundamental rights, such as the requirement of effective judicial protection, are not unfettered prerogatives. They may be restricted provided that such restrictions correspond to objectives of general interest pursued thereby and do not involve, as regards those objectives, a disproportionate and intolerable interference which infringes the very substance of the rights guaranteed. [29]

46. In the light of that case-law it is necessary to examine whether a national procedural rule such as that at issue in the main proceedings, namely Article 395 of the Code of Civil Procedure, undermines the effectiveness of the protection offered to consumers by Directive 93/13, read in combination with Article 47 of the Charter.

47. I observe that Article 395 of the Code of Civil Procedure governs the award of the costs of legal proceedings before the national courts, a matter that falls within the procedural autonomy of the Member States subject to respect, notably, for the principle of effectiveness. Rules governing the allocation of the costs of legal proceedings are capable of constituting obstacles to the effective exercise of rights derived from Directive 93/13 before national courts. As the

[23] Judgments of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraph 63), and of 26 June 2019, *Aleš Kuhar and Jožef Kuhar* v *Addiko Bank d.d.* (C-407/18, EU:C:2019:537, paragraph 57).

[24] Judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 99).

[25] Judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraphs 67 to 69).

[26] Judgment of 7 April 2022, *Caixabank* (C-385/20, EU:C:2022:278, paragraphs 54 to 58).

[27] Judgment of 22 September 2022, *Servicios prescriptor y medios de pagos EFC SAU* (C-215/21, EU:C:2022:723, paragraph 44).

[28] Judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraph 49).

[29] Judgment of 14 June 2017, *Menini and Rampanelli* (C-75/16, EU:C:2017:457, paragraphs 53 and 54).

Spanish Government and the Commission have submitted, it appears that Article 395 of the Code of Civil Procedure pursues an objective of general interest, namely the sound administration of justice, in so far as it seeks to promote out-of-court settlements, thereby relieving the demands on the court system.

48. It requires a moderate effort by consumers to deliver a pre-litigation demand for repayment in order to be certain that they will obtain the costs of any legal proceedings in the event the defendant admits the claim before serving a defence. In view of the legitimate objective that rule pursues, requiring that effort is not a disproportionate obstacle to the exercise of the rights derived from Directive 93/13. Delivery of a pre-litigation demand is free of charge and does not require the assistance of a lawyer. As Cajasur and the Spanish Government stated at the hearing, a pre-litigation demand can be delivered to the defendant by letter, by email or through the complaints' service that Spanish law requires credit institutions under the supervision of the Banco de España (Bank of Spain) to have. For those consumers who have retained a lawyer to initiate legal proceedings, as appears to have been the case in the proceedings before the referring court, it is all the more difficult to see how that requirement could constitute a significant burden.

49. Cajasur, the Spanish Government and the Commission emphasise that, under Article 395 of the Code of Civil Procedure, the defendant will not bear the costs if it admits the claim in the context of legal proceedings before lodging a defence unless it acted in bad faith. On the face of it, however, and subject to its interpretation by the Spanish courts, that provision does not appear to prevent a court from establishing the existence of bad faith on the part of a defendant on other grounds. There is no indication in the documents before the Court that the Spanish courts have addressed that issue. In that context, it is important to recall that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their competence, taking the whole body of domestic law into consideration and applying recognised interpretative methods, to ensure that a directive is fully effective and to achieve an outcome consistent with the objective pursued. That requirement to interpret national law in conformity with EU law entails, in particular, an obligation on national courts to change, where necessary, established case-law based on an interpretation of national law that is incompatible with the objectives a directive pursues. [30]

50. It appears from the order for reference that the Tribunal Supremo (Supreme Court) has already declared the mortgage fees term, the subject matter of the proceedings before the referring court, void on grounds of unfairness. The order for reference suggests that credit institutions, instead of informing consumers of the consequences of that domestic case-law for their contracts, wait until they receive a pre-litigation demand, which they accept, or until consumers bring legal proceedings, in which case they admit the claim before lodging a defence in order to avoid bearing the costs of the proceedings. A combination of the knowledge that credit institutions can be expected to have of such matters and the consumers' position of weakness, [31] together with the aforementioned behaviour, may constitute bad faith on the part of the former, which is a matter for the referring court to determine. Such an approach would be consistent

[30] Judgment of 26 June 2019, *Aleš Kuhar and Jožef Kuhar* v *Addiko Bank d.d.* (C-407/18, EU:C:2019:537, paragraphs 65 and 66). See also, to that effect, judgment of 22 September 2022, *Vicente (Action for the recovery of lawyers' fees)* (C-335/21, EU:C:2022:720, paragraph 74).

[31] See, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 56).

with the dissuasive effect that the regime established by Directive 93/13 is designed to achieve [32] and the obligation on Member States to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts. [33]

IV. Conclusion

51. In view of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Audiencia Provincial de Málaga (Provincial Court, Malaga, Spain) as follows:

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with the principle of effectiveness and Article 47 of the Charter of Fundamental Rights of the European Union,

are to be interpreted as meaning that they do not preclude national legislation according to which, where a defendant admits a claim in legal proceedings before it lodges a defence, making an order to require it to bear the costs of those proceedings is conditional upon a finding that it acted in bad faith.

[32] Ibid., paragraph 63.

[33] Judgments of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraph 33) and of 26 June 2019, *Aleš Kuhar and Jožef Kuhar* v *Addiko Bank d.d.* (C-407/18, EU:C:2019:537, paragraph 44).