



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

3 March 2020 \*

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Mortgage loan agreement — Variable interest rate — Reference index based on mortgage loans granted by savings banks — Index arising from a regulatory or administrative provision — Unilateral introduction of the term by the seller or supplier — Review of the transparency requirement by the national court — Consequences of a finding that the term is unfair)

In Case C-125/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain), made by decision of 16 February 2018, received at the Court on the same day, in the proceedings

**Marc Gómez del Moral Guasch**

v

**Bankia SA,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, M. Safjan and S. Rodin (Rapporteur), Presidents of Chambers, L. Bay Larsen, T. von Danwitz, D. Šváby, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 25 February 2019,

after considering the observations submitted on behalf of:

- M. Gómez del Moral Guasch, by J.M. Erasquin Vázquez, A. Benavente Antolín, M. Ortiz Pérez and S. Moreno de Lamo, abogados,
- Bankia SA, by R. Fernández-Aceytuno Sáenz de Santamaría, F. Manzanedo González, M. Muñoz García-Liñán, V. Rodríguez de Vera Casado, L. Briones Bori and A. Fernández García, abogados,
- the Spanish Government, by M.J. García-Valdecasas Dorrego and J. Rodríguez de la Rúa Puig, acting as Agents,

\* Language of the case: Spanish.

– the United Kingdom Government, by S. Brandon, acting as Agent, and A. Howard, Barrister,  
– the European Commission, by N. Ruiz García, J. Baquero Cruz and C. Valero, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 10 September 2019,  
gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), in particular Article 1(2), Article 4(2), Article 6(1), Article 7(1) and Article 8 thereof.
- 2 The request has been made in proceedings between Marc Gómez del Moral Guasch and Bankia SA concerning the contractual term governing the variable ordinary and remunerative interest rate in the mortgage loan agreement concluded between those two parties.

### **Legal context**

#### ***EU law***

- 3 The 24th recital of Directive 93/13 states that ‘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(2) of the directive states:

‘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 [European Union] are party, particularly in the transport area, shall not be subject to the provisions of this directive.’

- 5 Article 4 of the directive provides:

‘1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

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

- 6 Article 5 of the directive states:

‘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. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. ...’

7 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.’

8 As provided in Article 7(1) of that directive:

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

9 Article 8 of the directive states:

‘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.’

10 The Annex to Directive 93/13, which contains an indicative list of the terms which may be regarded unfair, is worded as follows:

‘1. Terms which have the object or effect of:

- ...
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

...

2. Scope of subparagraphs (g), (j) and (l)

...

(c) Subparagraphs (g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

...

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.’

### *Spanish law*

11 Article 1303 of the Código Civil (Civil Code) provides:

‘Once an obligation has been declared void, the contracting parties must restore to each other the things that formed the subject matter of the contract, together with the proceeds therefrom and the price plus interest, without prejudice to the following articles.’

- 12 The second additional provision of the Orden del Ministerio de la Presidencia, sobre transparencia de las condiciones financieras de los préstamos hipotecarios (Order of the Ministry for the Presidency concerning the transparency of the financial terms of mortgage loans) of 5 May 1994 (BOE No 112 of 11 May 1994, p. 14444), as amended by the Ministerial Order of 27 October 1995 (BOE No 261 of 1 November 1995, p. 31794) ('the Order of 5 May 1994'), provided:

'The Bank of Spain, on receiving a report from the [Dirección General del Tesoro y Política Financiera (Directorate-General of the Treasury and Financial Policy, Spain)], shall define by means of a notice a set of indices or official reference rates that may be applied by the entities referred to in Article 1.1 to variable-interest-rate mortgage loans and shall publish their value at regular intervals.'

- 13 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; 'Royal Legislative Decree 1/2007'), provides, in Article 8 thereof, entitled 'Basic rights of consumers and users':

'The following are basic rights of consumers and users:

...

- (b) The protection of their legitimate economic and social interests, in particular against unfair commercial practices and the inclusion of unfair terms in contracts.

...'

- 14 Article 60 of Royal Legislative Decree 1/2007, entitled 'Information prior to the conclusion of the contract', states:

'1. Before a consumer or user is bound by a contract or relevant offer, the supplier must, unless it is clear from the context, provide him in a clear and intelligible form with relevant, correct and sufficient information about the main features of the contract, in particular, its legal and financial terms.

...'

- 15 As provided in Article 80 of Royal Legislative Decree 1/2007, entitled 'Requirements for terms not individually negotiated':

'1. In contracts with consumers and users using terms that have not been individually negotiated, including contracts concluded by the public administration and their dependent entities and undertakings, those terms must satisfy the following requirements:

...

- (c) good faith and fair balance between the rights and obligations of the parties, which, in any case, excludes the use of unfair terms.

...'

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

‘1. All contractual terms not individually negotiated and all practices for which express consent has not been given that, contrary to the requirement of good faith, cause a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer or user shall be regarded as unfair terms.

...’

17 Article 27(1)(a) of the Orden EHA/2899/2011 de transparencia y protección del cliente de servicios bancarios (Ministerial Order EHA/2899/2011 on transparency and the protection of banking services customers) of 28 October 2011 (BOE No 261 of 29 October 2011, p. 113242), that article being entitled ‘Official interest rates’, states:

‘1. With a view to their application by the credit agencies, according to the conditions laid down in this ministerial order, the following official interest rates shall be published on a monthly basis:

(a) Average rate of mortgage loans of a duration greater than three years granted by credit institutions in Spain for the purpose of acquiring a residential property on the open market.’

18 The Ley 14/2013 de apoyo a los emprendedores y su internacionalización (Law 14/2013 to support entrepreneurs and their internationalisation) of 27 September 2013 (BOE No 233 of 28 September 2013, p. 78787) provides, in the 15th additional provision thereof, that the abolished rates mentioned in paragraph 1 of that provision, including the index based on the average rate of mortgage loans granted by the Spanish savings banks (‘the IRPH of the Spanish savings banks’), are to be replaced by the replacement rate or reference index specified in the contract, and that, where no replacement rate is specified in the contract, it is to be replaced by the ‘official interest rate called the “average rate of mortgage loans of a duration greater than three years granted by credit institutions in Spain for the purpose of acquiring a residential property on the open market”, together with a margin equivalent to the arithmetical average of the differences between the rate that has been abolished and the abovementioned rate, calculated on the basis of the data available between the date on which the contract was concluded and that on which the replacement of the rate takes effect.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

19 On 19 July 2001, Mr Gómez del Moral Guasch concluded a mortgage loan agreement with Bankia’s predecessor, a banking institution, for the amount of EUR 132 222.66 for the purpose of financing the acquisition of a residential property.

20 Clause 3 *bis* of that agreement, entitled ‘Variable interest rate’, contains a contractual term pursuant to which the interest rate to be paid by the consumer is to vary according to the IRPH of the Spanish savings banks (‘the term at issue’). The term at issue is worded as follows:

‘The agreed interest rate shall be calculated for periods of six months, running from the date of signature of the agreement, the interest rate for the first six-month period being that appearing in financial clause 3. For subsequent six-month periods, the rate to be applied shall be the average rate of mortgage loans of a duration greater than three years granted by savings bank for the purpose of acquiring a residential property on the open market, in force at the time of the review, which the Bank of Spain publishes officially and periodically in the *Boletín Oficial del Estado* for variable-rate mortgage loans for the purpose of acquiring a residential property, rounded up to the next higher quarter-percentage point and increased by 0.25 of a percentage point.’

- 21 Mr Gómez del Moral Guasch brought an action before the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain) seeking, *inter alia*, a declaration that that term is void on account of the alleged unfairness thereof.
- 22 The referring court notes, first of all, that the indexing of the variable interest rates of a mortgage loan calculated on the basis of the IRPH of the Spanish savings banks is less favourable than that calculated on the basis of the average Euro Interbank Offered Rate ('the Euribor index'), which is used in 90% of mortgage loans taken out in Spain. It states that use of the IRPH of the Spanish savings banks involves an additional cost of around EUR 18 000 to EUR 21 000 per loan.
- 23 Next, the referring court asks whether the fact that the IRPH of the Spanish savings banks is a regulated index has the consequence that the exception in Article 1(2) of Directive 93/13 must apply, even where the parties to the loan agreement are subject to that index as a result of the application of a term of that agreement.
- 24 In addition, the referring court asks whether consumers must be informed of the method for calculating the reference index and of past fluctuations in order to be able to assess the financial cost of the loan taken out. In that regard, the referring court observes that, in order to ensure a higher level of consumer protection than that provided for by the directive, the exception laid down in Article 4(2) of Directive 93/13 was not transposed into the Spanish legal order.
- 25 Moreover, the referring court asks whether, in the event that the term at issue is not consistent with EU law, the replacement of the IRPH of the Spanish savings banks with the Euribor index and the repayment of the loan capital only without interest are consistent with Directive 93/13.
- 26 In those circumstances, the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
1. Must [the IRPH of the Spanish savings banks] be the object of judicial protection, in the sense that it must be ascertained whether it is intelligible to the consumer, without this being precluded by the fact that it is governed by regulatory or administrative provisions, this not being a case provided for in Article 1(2) of Directive 93/13 because it is not a mandatory provision, but instead such variable ordinary and remunerative interest is included in the contract by the seller or supplier when it so chooses?
  - 2(a). Under Article 4(2) of Directive 93/13, which has not been transposed into Spanish law, is it contrary to Directive 93/13, and to Article 8 thereof, for a Spanish court to rely upon and apply Article 4(2) of that act when the legislature has chosen not to transpose that provision into Spanish law, which sought a full 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?
  - 2(b). At all events, must information or promotional material be provided about all or some of the following facts or data, for the purpose of the understanding of an essential term, specifically the IRPH [of the Spanish savings banks]:
    - (i) An explanation of how the reference rate [i]s calculated, that is to say, stating that that index includes charges and other costs on top of the nominal interest rate, that it is a simple, unweighted average, that the seller or supplier ha[s] to know and notify the fact that it must apply a negative differential and that the data provided is not public, compared with the ... usual index, the Euribor [index]?



- (ii) An explanation of past and possible future fluctuations in the IRPH [of the Spanish savings banks], providing information and including graphs in the promotional material that explain clearly and intelligibly to the consumer the fluctuations in that specific rate in relation to the Euribor [index], the usual rate on loans secured by a mortgage?
- 2(c). And, if the Court of Justice concludes that it is for the referring court to examine whether contractual terms are unfair and to draw the necessary inferences in accordance with its national law, the Court is asked whether failure to provide information about all those consequences does not make the term unintelligible, inasmuch as it is not clear to an average consumer (Article 4(2) of Directive 93/13), or whether that failure to provide information amounts to unfair conduct by the seller or supplier [vis-à-vis the consumer] meaning that the consumer would not have agreed to the use of the IRPH [of the Spanish savings banks] as the reference rate for the loan if he or she had been properly informed?
3. If the IRPH [of the Spanish savings banks] ... is declared null and void, failing agreement or if any such agreement is more detrimental to the consumer, which of the two following consequences would be compatible with Articles 6(1) and 7(1) of Directive 93/13?
- (i) The contract is adjusted by applying the usual replacement index, the Euribor [index], since that contract is essentially linked to a profitable rate of interest for the benefit of the [credit institution], [which is classified as] a seller or supplier.
  - (ii) The interest rate ceases to be applied, and the sole obligation for the borrower or debtor is to repay the loan capital in the instalments stipulated.'

## Consideration of the questions referred

### *The first question*

- 27 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).
- 28 In that respect, it is true that the first question concerns the IRPH of the Spanish savings banks as such. However, in order to provide the referring court with an answer which will be of use to it, that question must be understood as meaning that the referring court is asking whether Article 1(2) of Directive 93/13 must be interpreted as excluding from the scope of the directive a contractual term in a mortgage loan agreement concluded between a consumer and a seller or supplier, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation that may be applied by credit institutions to mortgage loans.
- 29 Under that provision, the contractual terms which reflect mandatory statutory or regulatory provisions are not to be subject to the provisions of that directive.
- 30 Article 1(2) of Directive 93/13 thus introduces an exclusion of those terms from the scope of Directive 93/13, such exclusion to be interpreted strictly (see, to that effect, judgment of 20 September 2017, *Andrić and Others*, C-186/16, EU:C:2017:703, paragraphs 27 and 31, and the case-law cited).
- 31 That exclusion requires two conditions to be met: first, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory (judgments of 10 September 2014, *Kušíonová*, C-34/13, EU:C:2014:2189, paragraph 78, and of 20 September 2017, *Andrić and Others*, C-186/16, EU:C:2017:703, paragraph 28).

- 32 In order to establish whether those conditions are met, the Court has held that it is for the national court to determine whether the contractual term concerned reflects mandatory provisions of national law that apply between the parties to the contract independently of their choice or provisions that are supplementary in nature and therefore apply by default, that is to say, in the absence of other arrangements established by the parties (judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 26; of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 79, and of 20 September 2017, *Andriiciu and Others*, C-186/16, EU:C:2017:703, paragraphs 29 et 30).
- 33 In the present case, it follows from the description, by the referring court, of the national legislation applicable to the main proceedings that that legislation contained no obligation to provide, in the remuneration clauses included in mortgage loan agreements, for the application of one of the six official indices provided for by the circular 8/1990 del Banco de España, a entidades de crédito, sobre transparencia de las operaciones y protección de la clientela (Notice 8/1990 of the Bank of Spain to credit institutions, on the transparency of transactions and customer protection) of 7 September 1990 (BOE No 226 of 20 September 1990, p. 27498), in the version applicable to the dispute in the main proceedings ('Notice 8/1990').
- 34 In that regard, as noted, in essence, by the Advocate General in points 78 to 83 of his Opinion, it is apparent that, subject to verification by the referring court, the Order of 5 May 1994 did not require, for variable-interest-rate loans, the use of an official reference index, including the IRPH of the Spanish savings banks, but merely established the conditions to be satisfied by 'the reference indices or rates' in order for them to be able to be used by credit institutions.
- 35 Accordingly, subject to possible verifications by the referring court, Bankia, as is apparent from Paragraph 3bis(1)(d) of Annex II to the Order of 5 May 1994, had the option of defining the variable interest rate 'in any other way, provided that it is clear, specific and comprehensible to the borrower and is consistent with the law'.
- 36 Therefore, the reference to the IRPH of the Spanish savings banks in the term at issue, with a view to calculating the interest owed under the agreement at issue in the main proceedings, does not arise from a mandatory statutory or regulatory provision within the meaning of the case-law set referred to in paragraphs 31 and 32 above. Subject to verification by the referring court, that term therefore falls within the scope of Directive 93/13.
- 37 It follows that the answer to the first question is that Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term in a mortgage loan agreement concluded between a consumer and a seller or supplier, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation that may be applied by credit institutions to mortgage loans, falls within the scope of that directive, where that national legislation does not provide either for the mandatory application of that index independently of the choice of the parties to the agreement or for the supplementary application thereof in the absence of other arrangements established by those parties.

### *The second question, part (a)*

- 38 By its second question, part (a), the referring court asks whether Directive 93/13, in particular Article 8 thereof, must be interpreted as precluding the courts of a Member State from applying Article 4(2) thereof in order to decline to carry out a review of the possible unfairness of a contractual term drafted in plain, intelligible language and relating to the main subject matter of the agreement, where the latter provision has not been transposed into the legal order of that Member State.



- 39 It is apparent, however, from the explanations set out in the order for reference in respect of the second question that, by the first part thereof, the referring court has doubts specifically as to whether or not a national court can verify that a term such as that at issue meets the transparency requirement laid down in Directive 93/13 even where Article 4(2) thereof has not been transposed into domestic law.
- 40 In the present case, it must be noted, as a preliminary point, that the referring court asked its second question, part (a), on the premiss that Article 4(2) of Directive 93/13 has not been transposed into the Spanish legal order.
- 41 Bankia and the Spanish Government, on their part, contend that the Tribunal Supremo (Supreme Court, Spain), in its judgments 406/2012 of 18 June 2012 (ES:TS:2012:5966) and 241/2013 of 9 May 2013 (ES:TS:2013:1916), noted that the Spanish legislature had transposed Article 4(2) of Directive 93/13 into national law with the Ley 7/1998 sobre condiciones generales de la contratación (Law No 7/1998 on general contractual conditions) of 13 April 1998 (BOE No 89 of 14 April 1998, p. 12304). They argue that it follows from those judgments that (i) the expression ‘fair balance between the contracting parties’ used in the Spanish legislation prior to the adoption of Directive 93/13 was replaced by the expression ‘significant imbalance between the rights and obligations’, with a view to limiting the review of the possible unfairness of a contractual term; (ii) the price and equilibrium of the contractual obligations as such cannot be the subject matter of a review and (iii) the essential elements of the agreement, although excluded from a review of the substance, may still be the subject matter of a review of the inclusion criterion and the transparency criterion.
- 42 However, in the light of the clarification in paragraph 39 above as to the scope of the second question, part (a), 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.
- 43 Indeed, it is appropriate to recall that, according to settled case-law, 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, as regards both their bargaining power and their level of knowledge. This leads to consumers agreeing to terms drawn up in advance by sellers or suppliers without being able to influence the content of those terms (see, inter alia, judgments of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 27 and the case-law cited, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 49).
- 44 In the light of that position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term that has not been individually negotiated may be reviewed in order to assess whether or not it is unfair. In that context, it is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraphs 42 to 48; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 40, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 50).
- 45 Article 4(2) of Directive 93/13, read in conjunction with Article 8 thereof, however, 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, and of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 41).

- 46 The Court also observed that that requirement for plain, intelligible drafting appears in Article 5 of Directive 93/13, which states that contractual terms must ‘always’ satisfy that requirement (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 67 et 68, and of 20 September 2017, *Andriiciuc and Others*, C-186/16, EU:C:2017:703, paragraph 43). It follows that that requirement applies in any event, including when a contractual term falls within the scope of Article 4(2) of the 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 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 71).
- 47 Accordingly, the answer to the second question, part (a), is that Directive 93/13, in particular Article 4(2) and Article 8 thereof, must be interpreted as meaning that the court of a Member State is required to verify that a contractual term relating to the main subject matter of the agreement is plain and intelligible, irrespective of whether or not Article 4(2) of that directive was transposed into the legal order of that Member State.

*The second question, parts (b) and (c)*

- 48 By its second question, parts (b) and (c), the referring court asks, in essence, whether Directive 93/13, in particular Article 4(2) and Article 5 thereof, must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term, under a mortgage loan agreement, setting a variable interest rate, where the method for calculating that rate is regarded as complex for the average consumer, the seller or supplier must provide the consumer with information on the method used for calculating the index on the basis of which that interest rate is calculated as well as past fluctuations of that index and possible future fluctuations.
- 49 In that regard, as the Advocate General noted in points 106 to 109 of his Opinion, according to settled case-law of the Court on the requirement of transparency, information provided before the conclusion of a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he or she wishes to be contractually bound to a seller or supplier by the terms previously drawn up by the latter (judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 44; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 70; of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 50, and of 20 September 2017, *Andriiciuc and Others*, C-186/16, EU:C:2017:703, paragraph 48).
- 50 It follows that, as already noted in paragraph 46 above, the transparency requirement of contractual terms, as resulting from Article 4(2) and Article 5 of Directive 93/13, cannot be reduced merely to their being formally and grammatically intelligible. As the system of protection introduced by that directive 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, laid down by the directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent must be understood in a broad sense (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 71 and 72, and of 20 September 2017, *Andriiciuc and Others*, C-186/16, EU:C:2017:703, paragraph 44).
- 51 As to a contractual term providing, under a mortgage loan agreement, for that loan to be remunerated by interest calculated on the basis of a variable rate, that requirement must thus be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but also that an average consumer, who is reasonably well-informed and reasonably observant and circumspect, is in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially

significant economic consequences of such a term on his or her financial obligations (see, to that effect and by analogy, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 75, and of 20 September 2017, *Andriiciuc and Others*, C-186/16, EU:C:2017:703, paragraph 51).

- 52 Since the Court's jurisdiction extends only to the interpretation of provisions of EU law, in the present case Directive 93/13 (see, to that effect, judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 48 and the case-law cited), it is solely for the referring court to carry out the necessary checks in that regard, in the light of all the relevant information, including the promotional material and information provided by the lender in the negotiation of a loan agreement (judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 74; of 26 February 2015, *Matei*, C-143/16, EU:C:2015:127, paragraph 75, and of 20 September 2017, *Andriiciuc and Others*, C-186/16, EU:C:2017:703, paragraph 46). Specifically, it is for the national court, when it considers all the circumstances surrounding the conclusion of the contract, to ascertain whether, in the case concerned, all the information likely to have a bearing on the extent of his or her commitment have been communicated to the consumer, enabling the consumer to estimate in particular the total cost of the loan. First, whether the terms are drafted in plain, intelligible language enabling an average consumer, as described in paragraph 51 above, to estimate such a cost and, secondly, the fact of failing to mention in the loan agreement the information regarded as being essential with regard to the nature of the goods or services which are the subject matter of that agreement play a decisive role in that assessment (judgment of 20 September 2017, *Andriiciuc and Others*, C-186/16, EU:C:2017:703, paragraph 47).
- 53 As to a term such as the one referred to in paragraph 51 above, which makes reference to a variable rate, the exact value of which cannot be determined in a credit agreement for the entire duration thereof, it should be noted, as Advocate General observed in points 122 and 123 of his Opinion, that the fact that the essential information relating to the calculation of the IRPH of the Spanish savings banks was easily accessible to anyone intending to take out a mortgage loan is relevant for the purposes of that examination, since that information was set out in Notice 8/1990, published in the *Boletín Oficial del Estado*. That circumstance was capable of enabling a reasonably observant and circumspect consumer to understand that the index was calculated on the basis of the average rate of mortgage loans of a duration greater than three years for the purpose of acquiring a residential property, thus including the average margins and fees charged by those institutions, and that, in the mortgage loan agreement in question, the index was rounded up to the next higher quarter-percentage point, to which was added a further 0.25% margin.
- 54 Of relevance also to assess the transparency of the term at issue is the fact that, under the national legislation in force at the time the agreement at issue in the main proceedings was entered into, credit institutions were required to provide consumers with data relating to the fluctuations of the IRPH of the Spanish savings banks during the two calendar years preceding the conclusion of loan agreements as well as with the last available value. Such data is also capable of giving the consumer an objective indication as to the economic consequences arising from the application of such an index and constitutes a useful point of comparison between the calculation of the variable interest rate based on the IRPH of the Spanish savings banks and other formulas for calculating interest rates.
- 55 The referring court will therefore have to ascertain whether, in the context of the conclusion of the agreement at issue in the main proceedings, Bankia has actually complied with all the obligations to provide information laid down in the national legislation.
- 56 In the light of the above, the answer to the second question, parts (b) and (c), is that Directive 93/13, in particular Article 4(2) and Article 5 thereof, must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term setting a variable interest rate under a mortgage loan agreement, that term not only must be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and

circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations. Information that is particularly relevant for the purposes of the assessment to be carried out by the national court in that regard include (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and (ii) the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated.

### *The third question*

- 57 By its third question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index or from requiring the borrower to repay the loan capital in the instalments stipulated without interest, in the absence of an agreement to the contrary between the parties.
- 58 It should first of all be borne in mind that, under Article 6(1) of Directive 93/13, it is for the national court to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (see, to that effect, judgments of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 35; 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).
- 59 Next, according to the case-law of the Court, where a national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, Article 6(1) of Directive 93/13 must be interpreted as precluding a rule of national law which allows the national court to modify that contract by revising the content of that term (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 73; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 77, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 53).
- 60 Thus, if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 69; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 79, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 54).
- 61 However, the Court has previously held that in a situation where a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, Article 6(1) of Directive 93/13 does not preclude the national court from removing, in accordance with the principles of contract law, an unfair term and replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences, so that the consumer would thus be penalised (see, to that effect, judgments of



30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 80 to 84, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraphs 56 and 64, and of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 48).

- 62 In that regard, the Court has held that such a substitution is fully justified in the light of the purpose of Directive 93/13. It is consistent with the objective of Article 6(1) of Directive 93/13, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties a real balance re-establishing equality between them, not to annul all contracts containing unfair terms (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 81 and 82, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 57).
- 63 If, in a situation such as that described in paragraph 61 above, it was not permissible to replace an unfair term with a supplementary provision of national law which would require the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, meaning that the dissuasive effect resulting from the annulment of the contract could well be jeopardised. In general, the consequence of such an annulment with regard to a loan agreement would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 83 and 84, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 58).
- 64 It must therefore be held that, in a situation where a mortgage loan agreement concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term referring to a statutory index for calculating the variable interest rate applicable to the loan, Article 6(1) of Directive 93/13 cannot be interpreted as precluding a national court from replacing that term, with a view to preventing that contract from becoming invalid, with a supplementary index provided for under national law, in so far as the annulment of the contract would expose the consumer to particularly unfavourable consequences (see, by analogy, judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 et C-179/17, EU:C:2019:250, paragraph 59).
- 65 In the present case, the term at issue provides that the variable interest rate is to be calculated on the basis of the IRPH of the Spanish savings banks. However, it is clear from the file before the Court that that statutory index, provided for by Notice 8/1990, was replaced, pursuant to the 15th additional provision of Law 14/2013 of 27 September 2013, with a replacement index described by the Spanish Government as 'supplementary'. Subject to verification by the referring court, that additional provision states that the replacement index is to apply in the absence of other arrangements established by the parties to the contract.
- 66 In that context, were the referring court to find that (i) the term at issue is unfair, (ii) the mortgage loan agreement at issue in the main proceedings is not capable of continuing in existence without that term and (iii) the annulment of that agreement would expose the applicant in the main proceedings to particularly unfavourable consequences, it could replace that term with the replacement index referred to in Law 14/2013 of 27 September 2013, in so far as it may be regarded as supplementary under national law.
- 67 Accordingly, the answer to the third question is that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index applicable in the absence of an agreement to the contrary between the



parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.

***Request for temporal limitation of the effects of the present judgment***

- 68 Since the wording of the third question referred relates to the possibility that ‘the IRPH [of the Spanish savings banks] is declared null and void’, the Spanish Government, in its written and oral submissions before the Court, requested the Court to limit the temporal effects of its judgment. It should be pointed out that the Spanish Government’s request is based on the assumption that, where a contractual term such as the term at issue is null and void, the loan agreement would continue in existence without interest.
- 69 As recalled in paragraph 52 above, the Court’s jurisdiction extends only to the interpretation of provisions of EU law, in the present case Directive 93/13.
- 70 It is apparent from the answer to the third question referred that, where a term such as that at issue is null and void, the national court has the power, under the conditions set out in paragraph 67 above, to replace the index used in the term with a statutory index applicable in the absence of an agreement to the contrary between the parties to the contract.
- 71 In those circumstances, the financial consequences of the possible invalidity of such a term, for banking institutions taken individually and for the banking system as a whole, cannot be determined on the sole basis of the interpretation of EU law given by the Court in the present case (see, by analogy, judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraphs 60 and 61).
- 72 It follows that it is not appropriate to limit the temporal effects of the present judgment.

**Costs**

- 73 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 (Grand Chamber) hereby rules:

1. **Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a contractual term in a mortgage loan agreement concluded between a consumer and a seller or supplier, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation that may be applied by credit institutions to mortgage loans, falls within the scope of that directive, where that national legislation does not provide either for the mandatory application of that index independently of the choice of the parties to the agreement or for the supplementary application thereof in the absence of other arrangements established by those parties.**
2. **Directive 93/13, in particular Article 4(2) and Article 8 thereof, must be interpreted as meaning that the court of a Member State is required to verify that a contractual term relating to the main subject matter of the agreement is plain and intelligible, irrespective of whether or not Article 4(2) of that directive was transposed into the legal order of that Member State.**

3. Directive 93/13, in particular Article 4(2) and Article 5 thereof, must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term setting a variable interest rate under a mortgage loan agreement, that term not only must be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations. Information that is particularly relevant for the purposes of the assessment to be carried out by the national court in that regard includes (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and (ii) the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated.
4. Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index applicable in the absence of an agreement to the contrary between the parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.

[Signatures]