



## Reports of Cases

### JUDGMENT OF THE COURT (Eighth Chamber)

26 June 2019\*

(Reference for a preliminary ruling — Unfair terms in consumer contracts — Directive 93/13/EEC — Proceedings for enforcement of a mortgage claim — Directly enforceable notarial instrument — Judicial review of unfair terms — Suspension of enforcement — Lack of competence of the court before which the application for enforcement has been brought — Consumer protection — Principle of effectiveness — Interpretation in conformity with EU law)

In Case C-407/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the *Višje sodišče v Mariboru* (Court of Appeal, Maribor, Slovenia), made by decision of 6 June 2018, received at the Court on 21 June 2018, in the proceedings

**Aleš Kuhar,**

**Jožef Kuhar**

v

**Addiko Bank d.d.,**

THE COURT (Eighth Chamber),

composed of F. Biltgen, President of the Chamber, C.G. Fernlund and L.S. Rossi (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Slovenian Government, by B. Jovin Hrastnik, acting as Agent,
- the European Commission, by M. Kocjan and N. Ruiz García, acting as Agents,

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

gives the following

\* Language of the case: Slovenian.

## 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).
- 2 The request has been made in proceedings between Mr Aleš Kuhar and Mr Jožef Kuhar and Addiko Bank d.d., a Slovenian banking establishment, concerning the enforcement of a claim under a mortgage contract concluded in the form of a directly enforceable notarial instrument.

### Legal context

#### *EU law*

- 3 Article 3 of Directive 93/13 provides:

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

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

...’

- 4 Article 4 of that directive states:

‘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.’

- 5 Article 5 of that directive is worded as follows:

‘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. ...’

- 6 Article 6(1) of that directive 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.’

7 Under 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.’

***Slovenian law***

*Law on consumer protection*

8 Article 23 of the Zakon o varstvu potrošnikov (Law on consumer protection, Uradni list RS, No 98/04) provides:

‘A business may not make provision for contractual terms which are unfair to the consumer.

The contractual terms referred to in the preceding paragraph shall be invalid.’

9 The first paragraph of Article 24 of that law states:

‘Contractual terms shall be regarded as unfair if they cause, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties, if they render the performance of the contract unduly prejudicial to the consumer, or if they render the performance of the contract significantly different to what the consumer could legitimately expect, or if they breach the principle of good faith and fairness.’

*Law on enforcement and protective measures*

10 Article 9 of the Zakon o izvršbi in zavarovanju (Law on enforcement and protective measures, Uradni list RS, No 3/07) states:

‘A decision at first instance shall be subject to appeal unless the law provides otherwise.

An action by a debtor against an enforcement order granting an application for enforcement shall constitute a complaint.

...

A decision concerning the complaint shall be subject to appeal.

...’

11 Article 15 of that law provides:

‘The provisions of the Zakon o pravdnem postopku [(Code of Civil Procedure, Uradni list RS, No 73/07)] shall apply by analogy to enforcement proceedings and protective measures, except as otherwise provided for in this law or another law.’

12 The first and second paragraphs of Article 17 of that law provide:

‘The court shall order enforcement on the basis of an enforceable instrument.

The following shall constitute enforceable instruments:

1. an enforceable judicial decision and an enforceable court settlement;

2. an enforceable notarial instrument;

...'

13 Under the first paragraph of Article 55 of that law:

'A complaint may be brought against an enforcement order on grounds which impede enforcement, including:

...

(2) if the instrument on the basis of which enforcement was granted is not an enforceable instrument or an authentic instrument;

...'

14 Article 71 of that law is worded as follows:

'The court may wholly or partially suspend enforcement on application by the debtor where he presents a credible argument that immediate enforcement would cause him to suffer damage which would be irreparable or difficult to remedy and worse than the damage which the creditor may suffer if enforcement is deferred, in the following cases:

...

(5) where an action is brought for a declaration of invalidity in respect of the transaction concluded in the directly enforceable notarial instrument on the basis of which enforcement was granted;

...

Without prejudice to the preceding paragraph, the court may, on application by the debtor, suspend enforcement in other cases too, on specific legitimate grounds, but for a maximum of 3 months and on one occasion only.

Acting on a proposal by the creditor, the court shall make the suspension of enforcement subject to the debtor's provision of a guarantee, except if that is detrimental to his own maintenance or to that of the members of his family. If the debtor fails to provide the guarantee within the time limit set by the court, which may not exceed 15 days, the application for suspension shall be treated as having been withdrawn.'

#### *Code of Civil Procedure*

15 Point 1 of the third paragraph of Article 3 of the Code of Civil Procedure provides:

'A court shall not recognise a provision agreed by the parties:

1. which is contrary to public policy.'

*Law on notaries*

16 Article 4 of the Zakon o notariatu (Law on notaries, Uradni list RS, No 2/07) states:

‘A notarial instrument providing for an obligation to give, to do, not to do or to tolerate something, which may be the subject of an amicable agreement, shall constitute an enforceable instrument if the debtor expressly accepts that it is directly enforceable in the instrument itself or in a separate notarial instrument and if the debt is due.’

17 Article 42 of that law provides:

‘Before drawing up a notarial instrument, the notary must describe to the parties in an intelligible manner the content and the legal consequences of the planned legal instrument or expression of intent, and he must draw the attention of the parties to the known and usual risks linked to such a legal instrument or such an expression of intent. The notary must also draw the attention of the parties to other possible circumstances concerning the planned legal instrument, if he is aware of them ... He must also dissuade the parties from using unclear, unintelligible or ambiguous expressions and expressly draw their attention to the possible legal consequences of the use of such expressions. If the parties retain those expressions, he must include them in the notarial instrument, but also mention the warning concerning them given to the parties.’

*Law on legal aid*

18 The fourth indent of Article 8 of the Zakon o brezplačni pravni pomoči (Law on legal aid) provides:

‘Free legal aid under this law shall not be granted:

...

- to a debtor who is the subject of enforcement proceedings carried out on the basis of an enforceable instrument within the meaning of the Law on enforcement and protective measures, unless that debtor presents a credible argument that there are grounds for a complaint against the enforcement which impede that enforcement in accordance with the provisions of the Law on enforcement and protective measures.’

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

19 Addiko Bank and Mr Aleš Kuhar and Mr Jožef Kuhar concluded a mortgage contract, in the form of a directly enforceable notarial instrument, to fund the purchase of a residential property (‘the notarial instrument at issue’). The loan was denominated in Swiss francs (CHF), but the Kuhars were required to make the monthly repayments in euros, at the reference rate of the European Central Bank (ECB) on the day of payment. The interest rate was linked to the six-month CHF LIBOR rate.

20 As the Kuhars continued to be in default, Addiko Bank applied, on the basis of the notarial instrument at issue, to the Okrajno sodišče v Gornji Radgoni (District Court, Gornja Radgona, Slovenia) for an enforcement order in respect of that instrument.

21 That court granted the application for enforcement for a total amount of EUR 128 765.66.

- 22 In their complaint brought before that court against the order granting enforcement, the Kuhars, without assistance from a lawyer, maintained that Addiko Bank had failed duly to draw their attention to the exchange rate risk, which had induced them to conclude a contract in which certain of the terms were unfair and under which they would now be required to repay a significantly higher amount than that of the loan obtained.
- 23 The Okrajno sodišče v Gornji Radgoni (District Court, Gornja Radgona) rejected the complaint on the grounds, in particular, in essence, that it was for the Kuhars to fulfil the obligation as it followed from the notarial instrument at issue and that it did not matter whether or not Addiko Bank had duly drawn their attention to the exchange rate risk.
- 24 The Kuhars, still without assistance from a lawyer, then brought an action before the referring court, the Višje sodišče v Mariboru (Court of Appeal, Maribor, Slovenia), seeking the annulment of the order granting enforcement.
- 25 It is apparent from the request for a preliminary ruling that the referring court has already held, on an interlocutory basis, that the term in the notarial instrument at issue stipulating that the loan is denominated in foreign currency but that it must be repaid in euros is unfair in that it does not provide for an appropriate limitation of the exchange rate risk. Although it relates to the main subject matter of the contract, that term was neither clear nor intelligible for the Kuhars. More generally, the referring court considers that, even though the fact that the exchange rate risk is not limited may affect both the consumer and the bank, there is nevertheless a significant imbalance in the rights and obligations of the parties to the contract, if only because of the significantly greater resources available to a bank to control such a risk, as a financial establishment of considerable size, which can rely to that end on specialist knowledge, significant data and experience in the field. In addition, that court is of the opinion that, in signing up to a loan to fund the acquisition of a residential property, a reasonable consumer would not expose himself to an unlimited exchange rate risk, which may have damaging and lasting economic consequences for him. On the contrary, if he were able to negotiate with the bank on an equal footing and if he were duly informed by it, such a consumer would commit himself only if the loan contract included a reasonable limitation of such a risk.
- 26 The referring court questions whether it is for the court before which an application has been brought for an order to enforce a mortgage contract, where it finds that that contract contains an unfair term, to prohibit, where necessary of its own motion, the implementation of such a term at that procedural stage or whether such a decision is to be taken by the court ruling on the substance, before which the consumer has potentially brought separate proceedings.
- 27 In that regard, the referring court points out first of all that, in accordance with the principle of effectiveness of EU law as interpreted by the case-law of the Court, national procedural rules relating to the finality of a judicial decision may not make it excessively difficult for the court before which an application for enforcement has been brought to refuse to apply unfair terms. However, under Slovenian law, in enforcement proceedings brought on the basis of a directly enforceable notarial instrument, the competent court is nevertheless faced with procedural provisions of that nature. More specifically, they are provisions of national law relating to the implementation of the principle of formal legality and the legal conditions for the suspension of enforcement, as laid down by the Law on enforcement and protective measures.
- 28 With regard to the principle of formal legality, the referring court states that, according to the traditional interpretation accepted in Slovenian law, the court may not refuse enforcement, since, under that principle, its review is limited to verifying that the authentic instrument constituting the loan contract of which enforcement is sought was drawn up in accordance with the formal requirements laid down by the applicable legislation. The position of the court before which an application has been brought for enforcement based on a notarial instrument, such as the notarial

instrument at issue, is consequently, from the point of view of breach of the principle of effectiveness, the same in essence as that in the case which gave rise to the order of 14 November 2013, *Banco Popular Español and Banco de Valencia* (C-537/12 and C-116/13, EU:C:2013:759).

- 29 The referring court observes that Slovenian law does not provide for the suspension of enforcement proceedings in the event of the consumer's bringing an action for a declaration of invalidity based on there being an unfair term in the contract which he concluded with a seller or supplier. The suspension of enforcement provided for in the first and second paragraphs of Article 71 of the Law on enforcement and protective measures is possible only on an exceptional basis, upon reasoned application by the debtor, on very strict conditions relating to the existence of damage which would be irreparable or difficult to remedy which, according to the settled case-law of the Slovenian courts, may not consist in the damage resulting from carrying out the enforcement itself.
- 30 The referring court then points out that, as a general rule, a debtor who is the subject of enforcement proceedings is not entitled to receive free legal aid and does not have the means to obtain representation either, which leads in the majority of cases to his not being assisted by a lawyer in such proceedings. There is thus a not insignificant risk that, through lack of knowledge, the debtor fails even to submit an application for suspension of enforcement or that such an application is so flawed that it is bound to fail. The already very limited opportunities available to the debtor to assert his rights are all the more limited due to the creditor's right to require the debtor to provide a guarantee. The third paragraph of Article 71 of the Law on enforcement and protective measures provides that, if the debtor fails to provide such a guarantee, the application for suspension of enforcement is to be regarded as withdrawn.
- 31 Finally, the referring court takes the view that, in order to comply with the principle of effectiveness of EU law, it would be possible for the Slovenian courts to adopt a less strict interpretation of the principle of legal formality referred to in paragraph 28 above, by allowing a court before which an application for enforcement has been brought to determine of its own motion whether a term is unfair at that procedural stage. During that stage, the court is required to make a complete finding in respect of all the legally determining facts, including those on which the parties do not agree. In addition, the notarial instrument is better suited to determining the substance of the case than classic enforceable instruments issued by courts. In addition, Article 4 of the Law on notaries provides that the debtor must expressly accept that the instrument is directly enforceable, which precludes the possibility that public policy provisions such as consumer protection provisions relating to unfair terms could be circumvented by obtaining the debtor's agreement. On the basis of such an interpretation, a court before which an application for enforcement had been brought would therefore be able to refuse of its own motion enforcement of a notarial instrument, such as the notarial instrument at issue, which was accepted by the debtor in breach of public policy provisions.
- 32 Since, however, it is the strict and restrictive interpretation of the principle of legal formality which currently prevails in the majority of Slovenian courts, the referring court questions whether such an interpretation is compatible with the principle of effectiveness of EU law, applied to Directive 93/13.
- 33 In those circumstances, the *Višje sodišče v Mariboru* (Court of Appeal, Maribor) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In the light of the principle of effectiveness of EU law, should [Directive 93/13] be interpreted as meaning that, in enforcement proceedings, the court before which an application for enforcement has been brought is required of its own motion to refuse that application on the ground that a directly enforceable notarial instrument (enforceable instrument) contains an unfair term, in a case such as the present one in which the procedural rules of the Member State do not give the court before which an application for enforcement has been brought an effective possibility of suspending or

postponing enforcement (on application by the debtor or of its own motion) until a final substantive decision on whether the term is unfair is given in civil proceedings brought by the debtor as a consumer?’

### **Admissibility of the request for a preliminary ruling**

- 34 The Slovenian Government, by way of a preliminary point, questions the admissibility of the request for a preliminary ruling. It points out that the referring court is of the opinion that it must oppose of its own motion the implementation of unlawful terms contained in a notarial instrument, such as the notarial instrument at issue, since Slovenian procedural law does not allow the temporary suspension of enforcement. However, up until the date of the reference for a preliminary ruling, the Kuhars themselves had not met the procedural conditions to obtain such a suspension in accordance with national legislation, in the absence of their having brought a substantive action for a finding of invalidity of contractual terms, and for that reason the question of the suspension of enforcement does not even arise.
- 35 In that regard, it must be recalled that, according to the settled case-law of the Court, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving, inter alia, the interpretation of provisions of EU law which are necessary for the resolution of the case before them and they are free to exercise that discretion at whatever stage of the proceedings they consider appropriate (see, in particular, to that effect, judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and of 14 November 2018, *Memoria and Dall’Antonia*, C-342/17, EU:C:2018:906, paragraph 33 and the case-law cited).
- 36 Similarly, the Court has repeatedly stated that questions submitted by national courts relating to EU law enjoy a presumption of relevance. The Court may thus refuse to rule on such questions only where it is quite obvious that the interpretation of EU law that is sought bears 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 (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).
- 37 The Court has also held that it is not for the Court, in the context of the cooperation established by Article 267 TFEU, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and legal proceedings (see, in particular, to that effect, judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 30 and the case-law cited).
- 38 In the present case, it should be observed that the argument put forward by the Slovenian Government to establish the hypothetical nature of the request for a preliminary ruling submitted by the referring court, ruling on the enforcement of a mortgage claim, is based on considerations linked to compliance with procedural rules of national law, and more specifically on the fact that the debtors in the main proceedings had not brought, under Slovenian law and up until the date of the reference for a preliminary ruling, a substantive action seeking a finding of invalidity in respect of the contractual terms in the notarial instrument at issue, terms which they consider to be unfair.
- 39 However, as is apparent from paragraphs 35 and 37 above, a request for a preliminary ruling cannot be declared inadmissible on the grounds that it was adopted in breach of the rules of national law governing the organisation of the courts and legal proceedings or that it may have been made at an early stage of the national proceedings.
- 40 It follows that the request for a preliminary ruling is admissible.

## Consideration of the question referred

- 41 By its question, the referring court seeks, in essence, to ascertain whether Directive 93/13 must be interpreted, in the light of the principle of effectiveness, as precluding national legislation, such as that at issue in the main proceedings, under which the national court before which an application has been brought for enforcement of a mortgage contract, concluded between a seller or supplier and a consumer in the form of a directly enforceable notarial instrument, does not have the option, either on application by the consumer or of its own motion, to examine whether the terms in such an instrument are unfair within the meaning of that directive, and on that basis to suspend the enforcement sought.
- 42 As a preliminary point, it should be pointed out that the referring court is not asking the Court about the interpretation of Articles 3 to 5 of Directive 93/13, allowing it to examine whether the terms of the loan contract which is the subject of the notarial instrument at issue and of which enforcement is sought may be unfair. As stated in paragraph 25 above, the referring court has already ruled, on an interlocutory basis, on the unfairness of the terms of that contract, which it is not for the Court to call into question in the context of the procedure provided for in Article 267 TFEU.
- 43 Having set out that premiss, it should be emphasised that, under Article 6(1) of Directive 93/13, Member States shall lay down that, as provided for under their national law, unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.
- 44 It should also be recalled that, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers, Directive 93/13, as is apparent from Article 7(1) in conjunction with the 24th recital of the directive, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (see, to that effect, judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 40 and the case-law cited).
- 45 While the Court has already defined, in a number of respects and taking account of the requirements of Articles 6(1) and 7(1) of Directive 93/13, the way in which national courts must ensure that the rights which consumers derive from that directive are protected, the fact remains that, in principle, EU law does not harmonise the procedures applicable to examining whether a contractual term is unfair and that those procedures accordingly fall within the domestic legal system of the Member States (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 57).
- 46 That is why, in the absence of harmonisation of the national enforcement mechanisms, the details of their implementation are governed by the internal legal order of the Member States by virtue of the principle of procedural autonomy of those States. Nevertheless, the means of implementation must meet the dual condition that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness) (judgment of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 40 and the case-law cited).
- 47 With regard, first, to the principle of equivalence, which is not the subject of the request for a preliminary ruling, it should be pointed out, as the European Commission did in its written observations, that there is no evidence before the Court which is capable of giving rise to any doubt as to the compliance of the national legislation at issue in the main proceedings with that principle.
- 48 With regard, second, to the principle of effectiveness, it is settled case-law that the question 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 (see, to that effect, in particular, judgments of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 51, and of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraphs 43 and 44).

49 It is in the light of that case-law that it is necessary to determine whether a national procedural regime such as that at issue in the main proceedings undermines the effectiveness of the protection offered to consumers by Directive 93/13.

50 In that regard, in the present case, it follows from the referring court's description of it that in Slovenian law the enforcement regime displays the following features:

- the court responsible for enforcement of a mortgage contract, concluded in the form of a directly enforceable notarial instrument, may not refuse that enforcement because of the presence of an unfair term in the contract in question, as that court must abide unconditionally by the content of an enforceable instrument, and may not assess the lawfulness of its content;
- suspension of enforcement is, in principle, not possible, even on a provisional basis, except in the event that substantive proceedings are brought, by the debtor as a consumer, seeking a finding of invalidity in respect of an unfair contractual term;
- that suspension of enforcement until a final decision is given on the substance of the case is authorised only exceptionally and is subject to strict legal conditions relating to the demonstration of damage which would be irreparable or difficult to remedy, within the meaning of the first paragraph of Article 71 of the Law on enforcement and protective measures, which excludes damage linked to the enforcement itself, which in practice makes that suspension almost impossible;
- the creditor has the right to require the debtor to provide a guarantee where the debtor applies for the suspension of enforcement; and
- a debtor who is the subject of enforcement proceedings cannot obtain free legal aid, so that he must bear the significant costs of legal representation himself.

51 In its written observations, the Slovenian Government challenged the referring court's interpretation of national law. More specifically, the Slovenian Government argued that, in view of the recent case-law of the Ustavno sodišče (Constitutional Court, Slovenia), as also applied by several other national courts, it was now necessary both to interpret the criterion of damage which would be irreparable or difficult to remedy within the meaning of the first paragraph of Article 71 of the Law on enforcement and protective measures, and to weigh up the situation of the debtor and that of the creditor by also taking account of damage which would result from carrying out the enforcement.

52 In that regard, it is sufficient to recall that, in accordance with the Court's settled case-law, in the procedure laid down by Article 267 TFEU, the functions of the Court and those of the referring court are clearly separate. Although it is for the Court to interpret the provisions of EU law, it falls exclusively to the referring court to interpret national legislation. The Court must base itself on the interpretation of national law as described to it by that court (judgment of 27 February 2019, *Associação Peço a Palavra and Others*, C-563/17, EU:C:2019:144, paragraph 36 and the case-law cited).

- 53 With regard to the procedural regime for enforcement at issue in the main proceedings, in view of the features of that regime highlighted by the referring court and summarised in paragraph 50 above, it must be found that such a regime is liable to undermine the effectiveness of the protection which Directive 93/13 seeks to provide.
- 54 It has already been established that effective protection of the rights conferred on the consumer by that directive can be guaranteed only provided that the national system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether the terms of the contract concerned are unfair (see, in particular, judgments of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 46, and of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraph 44).
- 55 As the Slovenian Government argued, it is indeed possible, subject to verification to be carried out by the referring court, that, in view in particular of the Law on notaries, notaries are obliged to advise and inform consumers, in particular in connection with a mortgage contract concluded in the form of an authentic instrument, which ensures that a preventive check is carried out with respect to unfair terms in such a contract and therefore contributes to compliance with the requirements set out in Article 6(1) and Article 7(1) of Directive 93/13 (see, by analogy, judgment of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraphs 55, 57 and 58).
- 56 However, even if it exists, a preventive check of that nature is not sufficient to ensure the effectiveness of the protection guaranteed by Directive 93/13.
- 57 As the Court held in paragraph 59 of the judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637), even where national legislation provides for such a preventive check, adequate and effective means to stop the use of unfair terms in contracts concluded by a seller or supplier with consumers must include provisions enabling the latter to be guaranteed effective judicial protection which makes it possible for them to bring legal proceedings against such a contract, including in the enforcement phase, under reasonable procedural conditions, so that the exercise of their rights is not subject to conditions, in particular time limits or costs, which make it excessively difficult or impossible to exercise the rights guaranteed by Directive 93/13.
- 58 More specifically, in the case which gave rise to that judgment, the Court had specified, in paragraphs 60 and 61 of that judgment, that under the national law at issue in that case the consumer could bring an action challenging the validity of the contract at issue and also initiate proceedings to exclude or limit enforcement, which, in that context, included the right for the consumer to request the suspension of the enforcement of that contract. Moreover, the Court had deduced from the information in the documents submitted to it in that case that, in the context of those procedures, the national courts could and should raise of their own motion cases involving manifest grounds for invalidity, on the basis of the available evidence. Those procedural rules governing actions under domestic law thus appeared, subject to verification by the national court, to guarantee the consumer effective judicial protection.
- 59 In contrast, with regard to the case in the main proceedings, it is apparent from the documents submitted to the Court that Slovenian law does not offer the consumer any guarantees comparable to those referred to in paragraphs 54, 57 and 58 above.
- 60 Those documents show, first, that Slovenian procedural law does not clearly provide for a right for the consumer to seek the suspension, even on a provisional basis, of the enforcement of a mortgage contract on the grounds that that contract includes an unfair term. In any event, even assuming that the consumer does have such an option, the fact remains that national law makes an application for suspension of enforcement subject to satisfaction of very strict procedural conditions and to the provision of a deposit by way of guarantee at the request of the creditor. Such requirements, in practice, make it almost impossible to obtain such a suspension, since it is likely that a debtor in

default will not have the necessary financial resources to provide the guarantee required. Second, it appears that the court before which the mortgage creditor brings an application seeking the grant of enforcement of its claim may not check of its own motion whether the terms of that contract are unfair. Finally, third, it is apparent from the request for a preliminary ruling that there is a not insignificant risk that, in enforcement proceedings, the consumers concerned may be deterred from defending themselves and fully asserting their rights, in view of the costs of legal representation to which the proceedings would give rise compared to the amount of the debt concerned and of the fact that it is not possible to seek legal aid.

- 61 It should be added that the fact that, under Slovenian procedural law, a check as to whether the terms contained in a mortgage contract concluded between a seller or supplier and a consumer are unfair may be carried out not by the court before which an application for enforcement of such a contract has been brought, but only, later and where applicable, by the court ruling on the substance before which the consumer has brought an action for a declaration of invalidity in respect of such unfair terms, is manifestly insufficient to ensure the full effectiveness of the consumer protection intended by Directive 93/13.
- 62 In the absence of a right for the court before which the application for enforcement has been brought to suspend that enforcement on the grounds that the mortgage contract is affected by an unfair term, it is likely that the mortgaged immovable property will have been repossessed before the court gives judgment in the substantive proceedings finding, as the case may be, that that term is invalid given that it is unfair and, therefore, annulling the enforcement proceedings. In those circumstances, even if such a decision were given on the substance in favour of the consumer concerned, he would receive as a result only protection a posteriori in the form of financial compensation, so that such protection would be incomplete and insufficient, and all the more so if the property in respect of which enforcement was carried out was the family home of that consumer, which would thus be definitively lost. Such protection a posteriori consequently does not constitute either an adequate or an effective means of preventing the continued use of an unfair term, contrary to the objective set out in Article 7(1) of Directive 93/13 (see, to that effect, order of 14 November 2013, *Banco Popular Español and Banco de Valencia*, C-537/12 and C-116/13, EU:C:2013:759, paragraphs 56 and 57 and the case-law cited).
- 63 Consequently, Directive 93/13, interpreted in the light of the principle of effectiveness, precludes national legislation, such as that at issue in the main proceedings, which displays the features described in paragraph 50 above.
- 64 Admittedly, in the present case, the referring court indicates that the Slovenian legislation could be interpreted in a manner which is compliant with EU law, and which, in particular, allows the court before which an application for enforcement has been brought to assess of its own motion whether a term of a mortgage contract, concluded in the form of a notarial instrument, is unfair, and on that basis to suspend such enforcement.
- 65 In that regard, 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 jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 59 and the case-law cited).
- 66 As the Court has also held, that requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot validly claim that it is impossible for it to interpret a

provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (see, in particular, judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraphs 33 and 34, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 60).

- 67 In view of the circumstance referred to in paragraph 64 above, it is for the referring court to examine whether the national legislation at issue in the main proceedings can indeed be interpreted in conformity with Directive 93/13 and, if so, to draw the legal conclusions from that.
- 68 In the light of the foregoing considerations, the answer to the question referred is that Directive 93/13 must be interpreted, in the light of the principle of effectiveness, as precluding national legislation, such as that at issue in the main proceedings, under which the national court before which an application has been brought for enforcement of a mortgage contract, concluded between a seller or supplier and a consumer in the form of a directly enforceable notarial instrument, does not have the option, either on application by the consumer or of its own motion, to examine whether the terms in such an instrument are unfair within the meaning of that directive, and on that basis to suspend the enforcement sought.

### Costs

- 69 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 (Eighth Chamber) hereby rules:

**Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted, in the light of the principle of effectiveness, as precluding national legislation, such as that at issue in the main proceedings, under which the national court before which an application has been brought for enforcement of a mortgage contract, concluded between a seller or supplier and a consumer in the form of a directly enforceable notarial instrument, does not have the option, either on application by the consumer or of its own motion, to examine whether the terms in such an instrument are unfair within the meaning of that directive, and on that basis to suspend the enforcement sought.**

[Signatures]