



Reports of Cases

ORDER OF THE COURT (Fifth Chamber)

26 October 2016*

(Reference for a preliminary ruling — Directive 93/13/EEC — Article 99 of the Rules of Procedure of the Court of Justice — Contracts concluded between sellers or suppliers and consumers — Mortgage contracts — ‘Floor’ clause — Collective proceedings — Individual action with the same subject matter — Interim relief)

In Joined Cases C-568/14 to C-570/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain), made by decisions of 1 December, 27 November and 1 December 2014, respectively, received at the Court on 9 December 2014, in the proceedings

Ismael Fernández Oliva

v

Caixabank SA (C-568/14),

Jordi Carné Hidalgo,

Anna Aracil Gracia

v

Catalunya Banc SA (C-569/14),

and

Nuria Robirosa Carrera,

César Romera Navales

v

Banco Popular Español SA (C-570/14),

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, M. Berger, A. Borg Barthet and F. Biltgen, Judges,

* Language of the case: Spanish.

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- Mr Fernández Oliva, by F. Bertrán Santamaría, procurador, and J. Andreu Blake, abogado,
- Caixabank SA, by R. Feixo Bergada, procurador, and Ó. Quiroga Sardi, abogado,
- Catalunya Banc SA, by I. Fernández de Senespleda, abogado,
- Banco Popular Español SA, by C. Fernández Vicién, N. Iglesias, I. Moreno-Tapia Rivas, J. Torrecilla, J. Capell and J. Piñeiro, abogados,
- the Spanish Government, by A. Gavela Llopis, acting as Agent,
- the European Commission, by J. Baquero Cruz and D. Roussanov, acting as Agents,

having regard to the decision taken, after hearing the Advocate General, to give a decision on the action by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

- 1 These requests for a preliminary ruling concern the interpretation of Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The requests have been made in proceedings between, in Case C-568/14, Mr Ismael Fernández Oliva and Caixabank SA, in Case C-569/14, Mr Jordi Carné Hidalgo and Ms Anna Aracil Gracia and Catalunya Banc SA, and, in Case C-570/14, Ms Nuria Robirosa Carrera and Mr César Romera Navales and Banco Popular Español SA, concerning the validity of the rate of ordinary interest in the mortgage loan agreements respectively entered into by those parties.

Legal context

European Union law

- 3 Article 6(1) of Directive 93/13 is worded as follows:

‘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.’

- 4 Article 7(1) of that directive provides:

‘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.’

Spanish law

- 5 Article 721 of the Ley 1/2000 de enjuiciamiento civil (Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575) provides:

‘1. On his own responsibility, any party to the main proceedings or to the counterclaim may apply to the court for the protective measures, under the provisions of the present Title, that it deems necessary in order to ensure the effectiveness of the judicial protection that may be granted in any decision allowing his claim.

2. The protective measures provided for in the present Title may not under any circumstances be granted by the court of its own motion, subject always to the rules relating to special procedures. The court may not impose more onerous protective measures than the measures applied for.’

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

- 6 The request in Case C-568/14 has been made in proceedings between Mr Fernández Oliva and Caixabank concerning the validity of a ‘floor’ clause contained in a mortgage loan agreement entered into by those parties on 6 June 2006.
- 7 The request in Case C-569/14 has arisen from proceedings between Mr Carné Hidalgo and Ms Aracil Gracia and Catalunya Banc, which also concern the validity of a ‘floor’ clause contained in the mortgage loan subrogation agreement concluded between those parties on 21 June 2005.
- 8 Similarly, the request in Case C-570/14 has been made in proceedings between Ms Robirosa Carrera and Mr Romera Navales and Banco Popular Español concerning the validity of a ‘floor’ clause included in a mortgage loan agreement entered into by those parties on 21 June 2005.
- 9 The applicants in the main proceedings have brought those individual actions claiming that the ‘floor’ clauses at issue are unfair, within the meaning of Directive 93/13, inasmuch as they provide a guarantee to the financial institutions that, whatever the fluctuations in market rates, the minimum interest rates of the mortgage loan agreements entered into cannot under any circumstances fall below a predetermined value.
- 10 In the course of those individual actions, the financial institutions, the defendants in the main proceedings, indicated that a collective action with the same subject matter was pending before the Juzgado de lo Mercantil No 11 de Madrid (Commercial Court No 11, Madrid, Spain). Consequently, relying on Article 43 of the Code of Civil Procedure, they sought to have the actions in the main proceedings suspended pending a final judgment disposing of the collective action.
- 11 In the proceedings that have given rise to Cases C-569/14 and C-570/14, such an application was rejected by orders of the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain). Catalunya Banc and Banco Popular Español have challenged those orders before that same court, raising the objection of *lis alibi pendens* on the basis of Article 421 of the Code of Civil Procedure and seeking to have the actions in question closed, not suspended, on the ground that the applicants in the main proceedings were bound by the outcome of the ongoing collective action.
- 12 Against that background, the referring court, analysing the various claims made by the financial institutions concerned, raises the point that suspension or even the closure of the individual actions, in a situation where there is an ongoing parallel collective action, is liable to be detrimental to the interests of the consumers in question, since the applicants who have brought individual actions can no longer obtain specific answers to their claims, but become dependent on the outcome of that collective action even though they decided not to participate in that collective action.

- 13 In that regard, having noted that a request for a preliminary ruling specifically concerning the compatibility of Article 43 of the Code of Civil Procedure with Article 7 of Directive 93/13 has already been referred to the Court of Justice by the Juzgado de lo Mercantil No 9 de Barcelona (Commercial Court No 9, Barcelona, Spain), the referring court states, nevertheless, that, under Article 43 of the Code of Civil Procedure, it may not suspend of its own motion the actions in the main proceedings in such circumstances. Therefore, it expresses further doubts about the compatibility of Article 43 with the system of consumer protection established by Article 7 of Directive 93/13.
- 14 The doubts expressed by the referring court also relate to the compatibility of Article 721(2) of the Code of Civil Procedure with Directive 93/13, in so far as that provision of national law prohibits the referring court from adopting interim relief of its own motion aimed at mitigating the negative effects on the consumer applicants in the main proceedings of excessively long court proceedings, pending a final judgment in the ongoing parallel collective action, the outcome of which may be applied to the individual actions.
- 15 In those circumstances, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does Article 43 of the [Code of Civil Procedure], which precludes the court proposing to the parties a possible stay of civil proceedings when another court or tribunal has referred a question to the Court of Justice for a preliminary ruling, not constitute a clear limitation of Article 7 of Directive 93/13 with regard to the Member States’ duty to 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?
- (2) Does Article 721(2) of the [Code of Civil Procedure], which precludes the court adopting or proposing of its own motion the adoption of interim measures in individual actions in which it is claimed that a general condition is void because unfair, not constitute a clear limitation of Article 7 of Directive 93/13 with regard to the Member States’ duty to 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?
- (3) Ought not any interim measures that might be adopted, either of the court’s own motion or at the request of one or other of the parties, in proceedings in which an individual action is brought, to have effect until final judgment shall have been given either in the individual action or in a collective action that could interfere with the bringing of individual actions, in order to ensure the adequate and effective means provided for in Article 7 of Directive 93/13?

The court requests the Court of Justice to consider this reference for a preliminary ruling under the expedited procedure laid down in Article 105(1) of the Rules of Procedure.’

- 16 By order of the President of the Court of 21 January 2015, Cases C-568/14, C-569/14 and C-570/14 were joined for the purposes of the written and oral procedure and the judgment.
- 17 By order of the President of the Court of 12 February 2015, *Fernández Oliva and Others* (C-568/14 to C-570/14, EU:C:2015:100), the referring court’s requests that those cases be determined pursuant to the expedited procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and Article 105(1) of the Rules of Procedure of the Court of Justice were rejected.
- 18 Lastly, following the delivery of the judgment of 14 April 2016, *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252), the referring court informed the Court of Justice that it wished to withdraw the first question referred for a preliminary ruling. In that judgment, in ruling on the

relationship between individual actions and parallel collective actions seeking a declaration that analogous contractual terms were unfair, the Court held that Directive 93/13 precludes a provision of national law, such as the Spanish provision at issue in the main proceedings in those cases, which requires a court before which an individual action has been brought by a consumer automatically to suspend such an action pending a final judgment in an ongoing collective action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action before the court being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action.

Consideration of the questions referred

- 19 Under Article 99 of the Rules of Procedure of the Court, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.
- 20 That article must be applied in the present case.
- 21 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 7 of Directive 93/13 must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which does not permit a court seised of an individual action brought by a consumer seeking a declaration that a term of a contract binding him to a seller or supplier is unfair to adopt interim relief of its own motion pending a final judgment in an ongoing collective action, the outcome of which may be applied to the individual action.
- 22 As a preliminary point, it should be recalled that, according to settled case-law, a national court seised of a dispute governed by EU law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law (see judgments of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 21; of 11 January 2001, *Siples*, C-226/99, EU:C:2001:14, paragraph 19; and of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 67).
- 23 As regards judicial protection of the rights conferred on consumers by Directive 93/13 against the use of unfair terms in contracts concluded with sellers or suppliers, according to settled case-law, Article 6(1) of that directive, under which unfair terms are not binding on the consumer, constitutes a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (see, to that effect, judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraphs 44 and 45, and of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraphs 22 and 23).
- 24 In that context, the Court has stated that the national court is required to assess of its own motion whether a contractual term falling within the scope of that directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (see judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 46, and of 30 April 2014, *Barclays Bank*, C-280/13, EU:C:2014:279, paragraph 34).
- 25 As regards the inferences to be drawn from a finding made by a court of its own motion that a contractual term is unfair, the Court has held that although Directive 93/13 does not seek to harmonise the penalties applicable in such circumstances, Article 7(1) of that directive nevertheless

requires the Member States to ensure that adequate and effective means exist to bring to an end the use of unfair terms in contracts concluded with consumers (judgments of 26 April 2012, *Invitel*, C-472/10, EU:C:2012:242, paragraph 35, and of 14 April 2016, *Sales Sinués and Drame Ba*, C-381/14 and C-385/14, EU:C:2016:252, paragraph 31).

- 26 As regards the requirement to provide interim protection for consumers in proceedings relating to such clauses, the Court has held, on the basis of the case-law deriving from the judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163), that that directive precludes national legislation, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of the terms on which the right to seek enforcement is based, does not permit the court adjudicating on the substance of the case, which has jurisdiction to assess the unfairness of those terms, to grant interim relief, including, in particular, staying the enforcement proceedings, where the grant of such relief is necessary to ensure the full effectiveness of its final decision (see judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 64).
- 27 Similarly, the Court has held that that directive precludes national legislation which does not allow the court responsible for enforcement, in mortgage enforcement proceedings, either to assess of its own motion or at the consumer's request, the unfairness of a term contained in the contract which gives rise to the debt claimed and which constitutes the basis of the right to enforcement, or to grant interim relief, including, in particular, staying the enforcement proceedings, where the grant of such relief is necessary to ensure the full effectiveness of the final decision of the court adjudicating on the substance of the case (order of 14 November 2013, *Banco Popular Español and Banco de Valencia*, C-537/12 and C-116/13, EU:C:2013:759, paragraph 60).
- 28 The answer to the second and third questions referred may be clearly inferred from that body of case-law, inasmuch as those questions relate, in essence, to the compatibility with the system of consumer protection established by Directive 93/13 of the fact that it is impossible for a national court, seised of an individual action brought by a consumer against the same procedural background as that in the judgment of 14 April 2016, *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252), to adopt interim relief of its own motion in order to ensure the full effectiveness of its final decision, pending a final judgment in an ongoing collective action, the outcome of which may be applied to that individual action.
- 29 In this connection, it must be stated that, in the absence of harmonisation of procedural means governing the adoption of such interim relief and the relationships between individual actions and collective actions referred to in Directive 93/13, it is for the internal legal order of each Member State, under the principle of procedural autonomy, to establish such rules, on condition, however, that they are not less favourable than those governing similar situations subject to domestic law (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness) (see judgment of 14 April 2016, *Sales Sinués and Drame Ba*, C-381/14 and C-385/14, EU:C:2016:252, paragraph 32 and the case-law cited).
- 30 First, as regards the principle of equivalence, there is no indication, regard being had to the information provided in the orders for reference, that Article 721(2) of the Code of Civil Procedure would be subject to a different application in disputes concerning rights arising under national law and in those concerning rights arising under EU law.
- 31 Second, as regards the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural 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 (judgment of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 43 and the case-law cited).

- 32 In the present case, it must be stated that Article 721(2) of the Code of Civil Procedure prohibits a national court from granting interim relief of its own motion even if the substantive conditions required under national law for granting such relief are in fact satisfied. It follows that, in the context of an individual action brought in order to challenge the unfairness of a contractual term the outcome of which is linked to the outcome of an ongoing collective action, in accordance with the principles set out in the judgment of 14 April 2016, *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252), the consumer cannot obtain temporary protection to mitigate the negative effects of excessively long court proceedings unless he has expressly made an application for the adoption of interim measures.
- 33 It must be observed, however, that, in view of the conduct and complexities of the national procedure in question in the main proceedings, in particular, as regards the relationships between the individual actions and the parallel collective actions, there is a not insignificant risk that the consumer concerned may not make such an application, even though the substantive conditions required under national law for the grant of interim relief may be satisfied, because he is unaware of or does not appreciate the extent of his rights.
- 34 Consequently, it should be stated that such a procedural rule, in so far as it renders it impossible for a court seised of an individual action seeking a declaration that a contractual term is unfair to grant interim relief of its own motion, including, in particular, suspending the application of that term, for as long as that court considers appropriate, pending a final judgment in an ongoing parallel action, even if it becomes apparent that the grant of such relief is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Directive 93/13, is liable to undermine the effectiveness of the protection sought by that directive (see, to that effect, judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraphs 67 and 77, and of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 59).
- 35 If it is not possible for the court seised to grant interim relief of its own motion, in cases in which, as in the cases the main proceedings, a consumer has not expressly applied for such relief, in the context of an individual action, in order to have the application of a ‘floor’ clause suspended pending a final judgment in an ongoing parallel collective action, that court cannot prevent that consumer from paying, during potentially lengthy court proceedings, higher monthly payments than those that would in fact be payable if the term concerned had to be disregarded. That is *a fortiori* the case when there is a genuine and immediate risk that that consumer’s ability to pay may be compromised in the meantime and that the financial institutions initiate mortgage enforcement proceedings for the purposes of obtaining, through the seizure of the dwelling of the consumer and his family, the payment of sums that may not be due.
- 36 In view of those characteristics, it must be observed that the procedural system in question in the main proceedings is not compatible with the principle of effectiveness, in that it is apparent that the protection afforded to the consumer in individual actions the outcome of which is linked to the approach upheld in an ongoing collective action is incomplete and insufficient, and it constitutes neither an adequate nor an effective means of preventing the continued use of a contractual term, such as the term contested in the cases in the main proceedings, contrary to what is required by Article 7(1) of Directive 93/13 (see, to that effect, judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 43).
- 37 In the light of all the foregoing considerations, the answer to the second and third questions referred is, therefore, that Article 7(1) of Directive 93/13 must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which does not permit a court seised of an individual action brought by a consumer seeking a declaration that a term of a contract binding him to a seller or supplier is unfair to adopt interim relief of its own motion, for as long as it considers appropriate, pending a final judgment in an ongoing collective action, the outcome of which may be

applied to the individual action, when such relief is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed by the consumer under Directive 93/13.

Costs

- ³⁸ 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 (Fifth Chamber) hereby rules:

Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which does not permit a court seised of an individual action brought by a consumer seeking a declaration that a term of a contract binding him to a seller or supplier is unfair to adopt interim relief of its own motion, for as long as it considers appropriate, pending a final judgment in an ongoing collective action, the outcome of which may be applied to the individual action, when such relief is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed by the consumer under Directive 93/13.

[Signatures]