Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 22 March 2018 [1]

Joined Cases C-96/16 and C-94/17

Banco Santander SA
v
Mahamadou Demba,
Mercedes Godoy Bonet
(Request for a preliminary ruling
from the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain))
and
Rafael Ramón Escobedo Cortés
v
Banco de Sabadell SA

(Request for a preliminary ruling
from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling — Directive 93/13/EEC — Consumer contracts — Unfair terms — Assignment of debts — Absence of right of withdrawal — Criteria for assessing the unfairness of a contractual term setting default interest — Consequences of that unfairness)

Introduction

1. These requests for a preliminary ruling from Spanish courts have both been made in the course of proceedings between certain banking institutions and consumers regarding the enforcement of loan agreements concluded between them.

2. Those cases concern the compatibility with EU law, in particular with Directive 93/13/EEC, [2] of the guidance in national case-law according to which, first, non-negotiated terms in consumer loan agreements setting a rate of default interest that exceeds by more than two percentage points the rate of ordinary (remunerative) interest are unfair, and, secondly, certain consequences should follow from that finding, both for unsecured loans and mortgage loans. That rule was established by the Tribunal Supremo (Supreme Court, Spain) in various judgments, [3] which were, in turn, delivered after the judgments of the Court of Justice in *Aziz* [4] and *Unicaja Banco SA*. [5]

1 Original language: French.

2 Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), as amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 (OJ 2011 L 304, p. 64) ('Directive 93/13').

3 Those judgments, which concern unsecured loans, are dated 22 April, and 7 and 8 September 2015, respectively. The Tribunal Supremo (Supreme Court) ruled on mortgage loans by judgments of 23 December 2015 as well as 18 February and 3 June 2016.

4 Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164).

5 Judgment of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21).

Legal framework

EU law

3. Article 1(2) of Directive 93/13 provides that the 'contractual terms which reflect mandatory statutory or regulatory provisions … shall not be subject to the provisions of [that] Directive.'

4. Article 3(1) and (3) of Directive 93/13 is worded as follows:

'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.

…

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

5. Under Article 4(1) of that directive:

'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.'

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. Article 7(1) of Directive 93/13 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.'

8. Under Article 8 of the Directive:

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

9. Article 8a of Directive 93/13 provides:

'1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:

…

– contain lists of contractual terms which shall be considered as unfair.

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.

…'

Spanish law

The provisions concerning unfair terms

10. Article 82(1) of the texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (consolidated text of the General Law for the protection of consumers and users and other supplementary laws), approved by Real Decreto Legislativo 1/2007 (Royal Legislative Decree 1/2007) of 16 November 2007,[6] in the version applicable in the main proceedings, provides:

'All terms not individually negotiated and all practices not expressly agreed to which, 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 and user, shall be regarded as unfair terms.'

11. Under Article 83 of Royal Legislative Decree 1/2007:

'1. Unfair terms shall automatically be void and deemed not to have formed part of the contract.

2. That part of the contract deemed void shall be completed in accordance with the provisions of Article 1258 of the Código Civil (Civil Code) and with the principle of objective good faith.

To that end, the court which rules that such terms are void shall remedy the contract and enjoy moderating powers with regard to the rights and obligations of the parties, where the contract continues in existence, and to the consequences of its being ruled ineffective in the event of significant loss or damage to the consumer or user. Only where the remaining contract terms result in an imbalance in the respective positions of the parties which cannot be remedied may the court rule that the contract is ineffective.'

Provisions relating to assignment of debts

12. Article 1535 of the Código Civil (Civil Code), which governs the right of the debtor to repay his loan in the event of the assignment of the debt provides:

'When a disputed debt is assigned, the debtor shall have the right to extinguish it by reimbursing to the assignee the price paid by the latter, plus any costs incurred by the assignee and interest on the price from the date on which it was paid.

A debt shall be deemed to be disputed as soon as a claim for its payment, in legal proceedings, is contested.

The debtor may exercise his right within nine days of the claim for payment made by the assignee.'

6 BOE No 287 of 30 November 2007, p. 49181.

13. The replacement of the assignor with the assignee in court proceedings is governed by Articles 17 and 540 of Ley 1/2000 de Enjuiciamiento Civil (Law 1/2000 establishing the Code of Civil Procedure) of 7 January 2000 ('the Code of Civil Procedure'), Article 17 being applicable to proceedings on the substance and Article 540 to enforcement proceedings.

Provisions relating to the setting of default interest

14. Article 1108 of the Civil Code provides:

'If the liability consists in the payment of a sum of money and the debtor falls into arrears, unless otherwise agreed, compensation for the damage suffered shall consist in the payment of the agreed interest and, in the absence of agreement, payment at the statutory interest rate.'

15. Under Article 114(3) of the Ley Hipotecaria (Mortgage Law), as amended by Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013 on measures to strengthen the protection of mortgage debtors, debt restructuring and social rent), of 14 May 2013:[7]

'Default interest on loans or credits for the purchase of a habitual dwelling, secured by mortgages charged on the dwelling in question, may not be more than three times the statutory rate of interest and may accrue only on the outstanding principal. ...'

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

Case C-96/16

16. According to the order for reference in Case C-96/16, Ms Mercedes Godoy Bonet and Mr Mahamadou Demba concluded with the banking institution Banco Santander SA two loan agreements, on 2 November 2009 and 22 September 2011 respectively, the first for a loan of EUR 30 750 with a repayment date of 2 November 2014, and the second for EUR 32 153.63 with a repayment date of 22 September 2019.

17. In accordance with the general conditions of those agreements, the applicable ordinary and default interest rates were 8.50% and 18.50% respectively for the first agreement, and 11.20% and 23.70% for the second agreement.

18. Since Mr Demba and Ms Godoy Bonet ceased to pay to Banco Santander the monthly instalments stipulated in the loan agreements in question, the bank declared the acceleration of the maturity date of those agreements, in accordance with paragraph 8 of the general conditions of the agreements, and applied to the referring court for enforcement of the claim against Mr Demba and Ms Godoy Bonet for a total of EUR 53 664.14.

19. Although provision for such a possibility was not made in those general conditions, Banco Santander, on 16 June 2015, assigned that debt, by officially recorded instrument, to a third party for an estimated sum of EUR 3 215.72, on the basis of Articles 1112 and 1255 of the Civil Code.

20. That third party thus applied to take the place of Banco Santander in the enforcement proceedings brought by the latter before the referring court.

7 BOE No 116 of 15 May 2013, p. 36373.

21. That court is unsure whether Ms Godoy Bonet and Mr Demba have the right to repurchase their debt, and thus to extinguish it, by reimbursing to that third party the amount which it paid for the assignment at issue, plus the applicable interest, expenses and costs ('the right to extinguish the debt').

22. The referring court has particular doubts as to the compatibility with EU law and, in particular, with Directive 93/13, of a business practice of assigning or purchasing a debt for a low price, in the absence of a contractual term to that effect, without the debtor being given prior notice of that assignment, without consenting thereto and without him being given the opportunity to repurchase his debt, and thereby extinguish it, by reimbursing to the assignee the price that it paid in respect of that assignment, plus any applicable additional expenses.

23. Moreover, the referring court is unsure as to the factors which should be taken into account when assessing the possible unfairness of terms included in those general conditions which set the applicable default interest rate, and the consequences which should follow from such unfairness.

24. In that regard, that court states that, according to what is now the established case-law of the Tribunal Supremo (Supreme Court), in an unsecured loan agreement concluded with a consumer, a non-negotiated term which sets the rate of default interest must be regarded as unfair where that rate exceeds by more than two percentage points the ordinary interest rate agreed between the parties to that agreement. In accordance with that case-law, in such a case, ordinary interest is to continue to accrue until the debt is repaid in full.

25. However, that court has doubts as to the compatibility of such case-law with Directive 93/13. First, by establishing an objective and automatic criterion for assessing the unfairness of contractual terms which set the applicable rate of default interest, that case-law does not allow the national court to take into account all the circumstances of the case. Secondly, by establishing that, where the term setting the default interest has been found to be unfair, ordinary interest accrues until the debt is repaid in full, that case-law requires the national court to revise the content of the agreement.

26. In that context, the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Does the business practice of assigning or purchasing debts without offering the consumer the opportunity to extinguish the debt by paying the price, interest, expenses and costs of the proceedings to the assignee comply with EU law, and specifically with Article 38 of the [Charter of Fundamental Rights of the European Union] … and Articles 4(2), 12 and 169(1) TFEU?

(b) Is that business practice of purchasing a consumer's debt for a negligible price without his consent or knowledge, without including that practice as a general condition or unfair term imposed in the agreement, and without giving the consumer the opportunity to participate in that operation by purchasing and thus extinguishing the debt, compatible with the principles laid down in Directive [93/13] and, by extension, with the principle of effectiveness and with [Article] 3(1) and [Article] 7(1) of that directive?

(2) (a) For the purpose of safeguarding the protection of consumers and users and the Community case-law which develops it, is it in accordance with EU law, Directive 93/13, and in particular Article 6(1) and Article 7(1) thereof, to establish as an unequivocal criterion that, in unsecured loan agreements concluded with consumers, a non-negotiated term which sets a rate of default interest that exceeds by more than two percentage points the basic contract rate of interest ("ordinary interest") is unfair?

(b) For the purpose of safeguarding the protection of consumers and users and the Community case-law which develops it, is it in accordance with EU law, Directive 93/13, and in particular Article 6(1) and Article 7(1) thereof, to establish, as a consequence, that ordinary interest will continue to accrue until the debt has been paid in full?'

Case C-94/17

27. According to the order for reference in Case C-94/17, on 11 January 1999, Mr Rafael Ramón Escobedo Cortés concluded with Caja de Ahorros del Mediterráneo, now Banco de Sabadell, a mortgage loan agreement for an amount of EUR 17 633.70 for the purchase of his family home, payable in monthly instalments. Terms 3 and 3bis of that agreement stipulated an ordinary interest rate of 5.5% per annum, subject to change after the first year. At the time of the facts in the main proceedings, that rate was 4.75% per annum. Term 6 of that agreement stipulated that the default interest rate was 25% per annum.

28. Mr Escobedo Cortés, who had fallen into arrears, brought an action against Banco de Sabadell before the Juzgado de Primera Instancia (Court of First Instance, Spain) having jurisdiction, to have, inter alia, the latter term declared void on the ground that it was unfair.

29. That court found that term to be unfair. Consequently, it considered that the applicable rate of default interest was to be reduced to the threshold laid down in Article 114(3) of the Mortgage Law, which is a rate three times higher than the statutory interest rate. That decision was upheld on appeal by decision of 18 September 2014 of the Audiencia Provincial de Alicante (Provincial Court, Alicante, Spain).

30. Mr Escobedo Cortés lodged an appeal on a point of law before the referring court against the latter decision on the ground that it infringes Article 6(1) and Article 7(1) of Directive 93/13.

31. According to that court, that appeal raises doubts as to the interpretation of several provisions of that directive, which is invoked by Mr Escobedo Cortés, and which it is essential to apply in order to give a decision on the appeal.

32. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do [Article] 3, in conjunction with [point 1(e) of the annex], and [Article] 4(1) of Directive [93/13] preclude a judicial interpretation that declares that a term in a loan agreement setting a rate of default interest that exceeds by more than two percentage points the annual ordinary interest rate fixed in the agreement constitutes disproportionately high compensation imposed on the consumer who is late performing his obligation to pay and is, therefore, unfair?

(2) Do [Article] 3, in conjunction with [point 1(e) of the annex], [Article] 4(1), [Article] 6(1) and [Article] 7(1) of Directive [93/13] preclude a judicial interpretation that, when a term in a loan agreement that sets the rate of default interest is declared unfair, identifies, as the object of the review of unfairness, the fact that that rate exceeds the ordinary interest rate, on the grounds that it constitutes "disproportionately high compensation imposed on the consumer who has not performed his obligations", and establishes as the consequence of the declaration of unfairness that that additional charge must cease to apply, so that only ordinary interest continues to accrue until the loan has been repaid?

(3) If the second question were to be answered in the [affirmative], must a declaration that a term setting a rate of default interest is void, because unfair, have other effects in order to be compatible with Directive 93/13, such as, for example, the total elimination of both ordinary and default interest, or the charging of statutory interest, when the borrower fails to perform his obligation to make the loan repayments within the time limits stipulated in the agreement?'

Procedure before the Court

33. By order of the President of the Court of 13 July 2016, the request from the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona), that Case C-96/16 be determined under the expedited procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and in Article 105(1) of the Rules of Procedure of the Court, was rejected.

34. By order of the President of the Court of 5 April 2017, the request of the Tribunal Supremo (Supreme Court) that Case C-94/17 be determined under the expedited procedure provided for in Article 23a of the Statute of the Court of Justice and Article 105(1) of the Rules of Procedure, was rejected.

35. Written observations were submitted by Banco Santander, the Spanish Government and the European Commission in Case C-96/16 and by Banco de Sabadell, the Spanish and Polish Governments and the Commission in Case C-94/17.

36. By decision of 21 November 2017, Cases C-96/16 and C-94/17 were joined for the purposes of the oral procedure and of the judgment.

37. A hearing was held on 10 January 2018, in which Banco Santander, Banco de Sabadell, the Spanish Government and the Commission took part.

Analysis

38. Broadly speaking, there are three aspects to the referring courts' questions, which I will tackle successively. First, those courts are uncertain as to the compatibility of the business practice of assigning a claim held against a consumer. Secondly, the referring courts raise the question whether EU law on consumer protection precludes the recent case-law of the Tribunal Supremo (Supreme Court) in so far as it provides that a term setting default interest is unfair if it exceeds by more than two percentage points the rate of ordinary interest stipulated in the loan agreement. Thirdly, and finally, the Court will have to consider whether, in the event that the term setting the rate of default interest is found to be unfair pursuant to that case-law, ordinary interest can continue to accrue until the debt is repaid in full.

The first question, parts (a) and (b), in Case C-96/16: compatibility with EU law of the practice of assigning the debt at issue

39. By its first two questions, the referring court in Case C-96/16 asks whether the business practice of assigning or purchasing a consumer's debt, without any provision for such an assignment having been made in the loan agreement concluded with the consumer, without the consumer being given prior notice of that assignment, without him consenting to the assignment and without him being given the opportunity to purchase and thereby extinguish his debt by reimbursing to the assignee the price it paid in respect of that assignment, plus any applicable additional expenses, must be considered to be compatible with a number of provisions of EU law.

40. By those questions, which it is appropriate to examine together, it is apparent, as has been noted by Banco Santander and the Spanish Government, that the referring court is specifically requesting the Court to determine whether Directive 93/13[8] precludes Spanish national provisions governing, in this case, the assignment of debt, namely Article 1535 of the Civil Code and Articles 17 and 540 of the Code of Civil Procedure.

41. The referring court considers that the validity of those provisions can be called into question from the point of view of consumer protection. In that regard, it points out that, although Article 1535 of the Civil Code provides for a right to extinguish the debt, it nevertheless restricts that right to so-called 'disputed' debts, that is to say, debts which are the subject of a substantive challenge in the context of declaratory proceedings. Thus, there is no provision in that article for a debtor to rely on such a right in the context of enforcement proceedings, such as those in the main action, or an extrajudicial assignment of debts, which, according to the referring court, does not adequately protect the interests of consumers. According to that court, Articles 17 and 540 of the Code of Civil Procedure, which govern the substitution of the assignor by the assignee in court proceedings, do not ensure such protection either, given that, in particular, those provisions make no reference to the right to extinguish the debt provided for in Article 1535 of the Civil Code.

42. I take the view that those questions, as reformulated in point 40 above, must be answered in the negative.

43. It is clear from the wording of Article 1(1), Article 2(a) and Article 3(1) of Directive 93/13, and from the general scheme thereof, that that directive applies only to 'contractual terms' and excludes mere practices such as the practice at issue in the main proceedings.[9] In this case, and as noted by the referring court itself, the assignment of the debt at issue relates to a business *practice* and not to a *contractual term* contained in a contract concluded with a consumer. Such a practice is excluded from the scope of Directive 93/13.

44. Furthermore, and assuming, as it appears from the order for reference, that the referring courts' doubts in fact concern whether the Spanish substantive and procedural provisions governing the assignment of debts and, more specifically, the debtor's right to extinguish his debt (namely Article 1535 of the Civil Code and Articles 17 and 540 of the Code of Civil Procedure) are compatible with that directive in so far as those provisions do not permit the debtor to rely on such a right in the context of enforcement proceedings such as those at issue in the main action,[10] it seems to me that they cannot be censured under Directive 93/13 either.

45. In that regard, it is sufficient to recall that, in accordance with Article 1(2) of that directive, the latter does not apply to mandatory statutory provisions such as Article 1535 of the Civil Code[11] and Articles 17 and 540 of the Code of Civil Procedure.

8 In so far as the objective of consumer protection enshrined in the provisions of the TFEU cited in the order for reference is pursued through provisions of secondary law, it is to that directive, applicable *rationae materiae*, that reference should be made.

9 See, as regards the necessary distinction between that type of dispute and the pending disputes which are directly concerned with the contractual terms and/or the limitation of the powers of the national courts to assess the unfairness of those terms, judgment of 30 April 2014, *Barclays Bank* (C-280/13, EU:C:2014:279, paragraphs 38 to 42). To the same effect, the Court has held, inter alia, that a finding that a commercial practice is unfair has no direct effect on whether a contract is valid from the point of view of Article 6(1) of Directive 93/13 (see judgment of 15 March 2012, *Pereničová and Perenič* (C-453/10, EU:C:2012:144, paragraph 46)).

10 Banco Santander and the Spanish Government state that the referring court also referred a question to the Tribunal Constitucional (Constitutional Court, Spain) concerning the constitutionality of those provisions, but according to the information provided to the Court, it was rejected.

11 See, in that regard, order of 5 July 2016, *Banco Popular Español and PL Salvador* (C-7/16, not published, EU:C:2016:523, paragraphs 19 to 27), which concerned precisely that provision.

46. In this context, I also consider it important to note that the assignment of the debt at issue in the present case does not change the content and scope of the obligations of the debtor/consumer. Such an assignment, which is effected by means of a contract between the professional assignor and a third-party assignee — to which the consumer is not a party —, cannot, as required under Article 3 of Directive 93/13, cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

47. In addition, it is quite clear that such a practice of assigning debts, which is a well-known possibility embodied in the civil law of the Member States, cannot be treated in the same way as the contractual terms mentioned in paragraph (f) of the Annex to Directive 93/13 entitled 'Terms referred to in Article 3(3)', namely, terms which have the object or effect of 'authorising the seller or supplier to dissolve the contract on a discretionary basis'. The assignment of the debt at issue in the main proceedings is, moreover, clearly distinct from the terms referred to in paragraph (p) of that annex, since it is not capable of 'serv[ing] to reduce the guarantees for the consumer, without the latter's agreement'.[12] This assignment is neutral from the point of view of the debtor. The fact, mentioned by the referring court, that the assignment is made to 'vulture funds', acting for speculative purposes, for a much lower or even negligible price by comparison to the original debt, is extraneous to the nature of the consumer's contractual obligation per se.[13]

48. In the light of all the foregoing considerations, I propose that the answer to the first question, parts (a) and (b), in Case C-96/16 should be that Directive 93/13 does not preclude a business practice of assigning or purchasing debt, as described in this case, without offering the consumer the opportunity to extinguish the debt by paying the price of the assignment, as well as interest, expenses and costs, to the assignee.

The second question, part (a), in Case C-96/16 and the first question in Case C-94/17: compatibility of the case-law of the Tribunal Supremo (Supreme Court) with Directive 93/13

49. By the second question, part (a), in Case C-96/16 and the first question in Case C-94/17, the referring courts ask, in essence, whether Directive 93/13 precludes national case-law, in this case that of the Tribunal Supremo (Supreme Court), according to which any non-negotiated term in a loan agreement — an unsecured loan agreement in Case C-96/16 and a mortgage loan in Case C-94/17 — which sets a rate of default interest that exceeds by more than two percentage points the rate of ordinary interest stipulated in that agreement is unfair.

Admissibility

50. It is appropriate to make some preliminary remarks on the admissibility of the questions relating to the compatibility of the case-law of the Tribunal Supremo (Supreme Court) with Directive 93/13, in so far as that admissibility has been specifically called into question by Banco Santander and the Spanish Government in Case C-96/16 and by Banco de Sabadell in Case C-94/17 on the ground that that question raises a hypothetical issue.

12 In this context, I feel it is also interesting to refer to the requirements of Article 17 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66 and corrigenda OJ 2009 L 207, p. 14, OJ 2010 L 199, p. 40, and OJ 2011 L 234, p. 46), even though it is not necessarily applicable *rationae temporis* to the case in the main proceedings. Although that provision requires that the debtor/consumer be informed of the assignment of the debt and that he retain his rights and guarantees in respect of the third party assignee, it does not impose any obligation to obtain his consent and certainly does not provide for him to have the right to extinguish his debt and/or a right of first refusal to repurchase that debt.

13 According to the referring court, the purpose of the right of first refusal, provided for in Article 1535 of the Civil Code in respect of 'disputed' debts, lies in the need to combat situations where debts are assigned for speculative purposes.

51. In Case C-96/16, Banco Santander and the Spanish Government are of the opinion that it is clear that the referring court has already taken the view that the terms setting the default interest at issue in the main proceedings must be regarded as unfair (which would make the question referred redundant). In Case C-94/17, Banco de Sabadell raises a very similar objection. It states that the appeal before the referring court does not relate to the question of the *criterion* in the light of which the unfairness of the term at issue was established, but concerns only the *consequences* of that unfairness. In that regard, it adds that the appellate court established the unfairness of the term in question without referring to the case-law of the Tribunal Supremo (Supreme Court), which is the subject of the first question referred for a preliminary ruling, since the appellate court's ruling pre-dates that case-law. Therefore, even if the Court of Justice were to declare that EU law precludes such case-law, the referring court could not set aside, in that respect, the judgment delivered on appeal.

52. In that regard, I take the view that, although it is apparent from the orders for reference that the referring courts seem clearly to be leaning towards a finding of unfairness in respect of the terms presented to them, they have not yet made a definitive decision regarding the unfairness of those terms, in the light of, in particular, the criterion established by the Tribunal Supremo (Supreme Court) in its most recent case-law.

53. The questions referred by the national courts as regards the compatibility of the criterion identified by the Tribunal Supremo (Supreme Court) thus appear still to be valid for them. Indeed, they seek to ascertain whether such a criterion laid down by case-law is consistent with the system of consumer protection established by Directive 93/13, in particular by Article 4(1) thereof, in so far as that criterion applies automatically, without allowing the court to take account of all the circumstances of the case.

54. With regard, in particular, to the relevance of the doubts of the referring court in Case C-94/17, that court has stated, in essence, that, although the appeal before it specifically concerns the consequences of the unfairness of the term at issue in the main proceedings, it also raises doubts as to the interpretation of the provisions of Directive 93/13 concerning the finding of unfairness. Moreover, it cannot be ruled out that, under Spanish procedural law, that court may, or must, re-examine, of its own motion, that unfairness in the context of the appeal pending before it and, in particular, the criteria in the light of which that unfairness must be established, bearing in mind that, according to settled case-law of the Court of Justice, the question whether a contractual term must be found to be unfair must be regarded as a matter of public policy. [14]

55. Consequently, it is not obvious from the orders for reference that the questions on the criterion identified by the Tribunal Supremo (Supreme Court) for the purpose of determining the unfairness of a term setting the rate of default interest, which, in accordance with the settled case-law of the Court, must enjoy a presumption of relevance, [15] are inadmissible.

14 See, to that effect, judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraphs 40, 41 and 44). See, also, judgment of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 40).

15 For a recent overview of the presumption of relevance attaching to questions referred for a preliminary ruling in similar contexts, relating to the interpretation of the directive, reference is made in particular to the judgments of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 38 and the case-law cited), and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 20).

Substance

56. On the substance, the question arises as to whether an unequivocal criterion, such as that identified by the Tribunal Supremo (Supreme Court), according to which, in a loan agreement concluded with a consumer, a non-negotiated term setting the applicable rate of default interest is unfair where that rate exceeds by more than two percentage points the rate of ordinary interest stipulated in that agreement, is compatible with the system of consumer protection established by Directive 93/13, in particular by Article 4(1) thereof, in so far as that criterion seems to apply automatically, without allowing the court to take account of all the circumstances of the case.

57. Before turning to the question of whether that case-law is problematic from the point of view of the effectiveness of the protection conferred by Directive 93/13, I should like to make a few preliminary observations on the context of that national case-law and on the practical scope for national courts called upon to rule, either upon request or of their own motion, on the unfairness of terms contained in consumer contracts.

– Preliminary remarks on the context and scope of the rule of case-law established by the Tribunal Supremo (Supreme Court)

58. The Court's case-law relating to Directive 93/13 has highlighted the importance, in accordance with the protection conferred by that directive, of the active role devolved to national courts in the detection and sanctioning of unfair terms in consumer contracts, such as those that set default interest. [16]

59. Nevertheless, as appears to be well established, it is not for the Court to define precisely — and go beyond recalling the general criteria expressly laid down in Directive 93/13 — the type of contractual terms which must be considered unfair for the purposes of that directive. The national court is thus the court which is best placed to determine — if not the only court to be able to determine —, in the light of all the relevant circumstances, whether a contractual term such as that setting the default interest, must be found to be unfair in so far as it may cause a significant imbalance in the rights and obligations of the parties to the contract to the detriment of the consumer. [17]

60. Moreover, it is not inconceivable that the higher courts of a Member State are empowered, in the performance of their role of ensuring consistency in the interpretation of national law, to provide guidance in order to assist the lower courts in their assessment of the unfairness of contractual terms which are binding on the consumer, in so far as that guidance is consistent with that established by the Court.

61. That appears to be precisely the subject of the case-law of the Tribunal Supremo (Supreme Court), arising, in particular, from the three judgments delivered on 22 April (sitting as a full court), and 7 and 8 September 2015, which is referred to in the cases at issue in the main proceedings.

16 See, in particular, judgments of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349); of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164); and of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21).

17 See, to that effect, judgment of 1 April 2004, *Freiburger Kommunalbauten* (C-237/02, EU:C:2004:209, paragraphs 22 and 25), and order of 16 November 2010, *Pohotovosť* (C-76/10, EU:C:2010:685, paragraph 60). See also my Opinion in Joined Cases *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2014:2299, point 42).

62. It is interesting to note that the rule of case-law established by the Tribunal Supremo (Supreme Court) in those judgments directly reflects the principles identified by the Court in the judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164). Indeed, the Tribunal Supremo (Supreme Court) referred to paragraph 74 of that judgment according to which:

'... regarding the term concerning the fixing of default interest, it should be recalled that, in the light of paragraph 1(e) of the annex to … Directive [93/13], read in conjunction with [Article] 3(1) and [Article] 4(1) of [that] directive, the national court must assess in particular … the rate of default interest laid down, compared with the statutory interest rate, in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them.'

63. In that regard, it is observed that the banking institutions referred to in the cases in the main proceedings have argued, both in their written pleadings and at the hearing, that it does not follow from the judgments of the Tribunal Supremo (Supreme Court) of 22 April and 7 and 8 September 2015 that the criterion according to which a term setting a rate of default interest that exceeds by two percentage points the rate of ordinary interest must be found to be unfair applies automatically and is binding. In the view of those institutions, the purpose of the criterion is solely to assist the national court, which remains free to depart from it if justified by the circumstances of the case.

64. This interpretation does not seem to me to correspond to the wording used by the Tribunal Supremo (Supreme Court), in particular in its judgment delivered on 22 April 2015 by the Pleno de la Sala de lo Civil (Civil Division sitting as a full court).

65. In that judgment, the Tribunal Supremo (Supreme Court) found, first of all, that, contrary to the situation prevailing in other Member States, there was no legal limit in Spain as regards the setting of default interest in loan agreements concluded with consumers, which made it necessary for the Spanish courts to carry out a weighting. In such a context, that court considered it necessary not to restrict itself to considering the general principles, but rather to lay down a more specific rule in order to avoid lower courts establishing different criteria for assessing the unfairness of terms setting the rate of default interest, as such a situation would give rise to arbitrariness and legal uncertainty. Based on the criteria set out by the Court of Justice as well as those defined in various areas of the Spanish legal order, the Tribunal Supremo (Supreme Court) held that the addition of two percentage points, provided for in Article 576 of the Code of Civil Procedure for the calculation of statutory interest, was the most appropriate legal criterion for the setting of the rate of default interest on personal loans granted to consumers. In its view, such a criterion makes it possible to avoid imposing on a consumer who fails to fulfil his obligation the requirement to pay a high penalty, while still 'compensating' the creditor in a proportionate manner for the damage suffered by reason of the late fulfilment of the obligation established by a court.

66. It is thus clear from the wording used by the Tribunal Supremo (Supreme Court) in its judgment of 22 April 2015 that it has established an irrebuttable presumption that a contractual term setting a rate of default interest which exceeds by more than two percentage points the rate of ordinary interest stipulated in the loan agreement is unfair.

67. In my view, that case-law is undoubtedly binding on lower courts in Spain, as the latter are now obliged to find any contractual term setting a rate of default interest which exceeds the rate of ordinary interest by more than two percentage points to be unfair. Although, as the Spanish Government stated at the hearing in response to a written question from the Court, that case-law does not have the force of law, judgments of lower courts which depart from the guidance repeatedly provided by the Tribunal Supremo (Supreme Court) — which therefore has 'illustrative' value — are open to censure in the context of appeals on a point of law.

68. However, and contrary to what a superficial examination might suggest, the development of such case-law cannot, to my mind, be equated to the measures which national authorities may adopt in accordance with Article 8 of Directive 93/13.

69. I would point out that, under that provision, 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by [Directive 93/13], to ensure a maximum degree of protection for the consumer'. Under that article, Member States may adopt lists of unfair terms, provided that they inform the Commission thereof, in accordance with Article 8a of that directive.

70. Apart from the fact that the possibility of adopting these lists has been considered to be open only to the national legislature or national regulatory or administrative authorities, to the exclusion of national courts,[18] it seems to me that what is actually at issue here is not the laying down of a national rule intended to reinforce the level of consumer protection conferred by Directive 93/13 through the establishment of a 'black term', but rather the case-law of a higher court seeking, in the absence of specific provisions on setting the rate of default interest, to provide specific guidance to national courts to determine in what circumstances a contractual term setting that interest rate must necessarily be found to be unfair.

71. As was confirmed at the hearing, although this case-law complements national law and is thus binding on the Spanish courts,[19] it cannot be equated with the measures which Member States may adopt under Article 8 of Directive 93/13.

72. However, as I shall explain in the reasoning below, although that case-law is binding, it is, nevertheless, not problematic from the point of view of consumer protection pursued by Directive 93/13.

– Examination of the question whether the case-law of the Tribunal Supremo (Supreme Court) is problematic from the point of view of the protection conferred by Directive 93/13

73. It follows from the Court's case-law that Directive 93/13 precludes the establishment of a criterion determining the unfairness of a term if it prevents a national court dealing with a term that does not fulfil this criterion from assessing the possible unfairness of that term and, where appropriate, removing it.[20]

74. However, I do not think it can be inferred from that case-law that Directive 93/13 also precludes the application by the national courts of such a criterion in so far as the result is that any term which meets that criterion should automatically be found to be unfair, without regard to the particular circumstances of the case. Ultimately, what seems decisive in terms of the effectiveness of Directive 93/13 is that the power of national courts to find contractual terms which they examine to be unfair must not be adversely affected.

18 See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *Biuro podróży Partner* (C-119/15, EU:C:2016:387, points 53 to 57), and Opinion of Advocate General Mengozzi in Joined Cases *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:552, footnote 18). It should also be noted that recital 63 of Directive 2011/83 refers to 'the adoption of specific national provisions'.

19 In accordance with Article 1(6) of the Civil Code, case-law is to complement the legal system with the principles repeatedly established by the Tribunal Supremo (Supreme Court) in its interpretation and application of legislation, custom and general principles of law. At the hearing, Banco de Sabadell stated, without being contradicted on this point, that the Spanish courts automatically apply the rule laid down by the Tribunal Supremo (Supreme Court).

20 See, to that effect, judgment of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 40).

75. In the context of the assessment of terms setting the rates of default and ordinary interest, what is important is that the establishment of such a criterion does not deprive the national court of the opportunity to find that a contractual term setting a rate of default interest which exceeds the agreed rate of ordinary interest by less than two percentage points is unfair if the specific circumstances of the case so require. Similarly, the national court must not be prevented from assessing the unfairness of a term setting the rate of ordinary interest in a contract concluded with a consumer where that term has not been negotiated between the parties. [21]

76. However, in this case, all the parties agree that terms setting the default interest at a rate not exceeding by more than two percentage points the rate of ordinary interest can still be found to be unfair by the Spanish courts in the light of the circumstances attending the conclusion of the contract. Moreover, I take the view that the case-law of the Tribunal Supremo (Supreme Court) does not prevent the courts from assessing the unfairness of the rate of ordinary interest set in a contract concluded with a consumer where no agreement has been reached in the context of the conclusion of the contract.

77. Indeed, I would point out that there is no golden rule for assessing, in the abstract, the unfairness of a term setting the rate of default interest. [22] In other words, there are no infallible criteria for deciding, without examining the circumstances of each individual case, that such a term is unfair.

78. However, it must be acknowledged that a presumption that terms setting the rate of default interest above a certain level are unfair, even where it is irrebuttable, is consistent with the objective of Directive 93/13, which, I would reiterate, is to avoid the creation of an imbalance between the rights and obligations of the parties to the contract (see Article 3(1) of that directive) *to the detriment of consumers* and, ultimately, to protect consumers. The fact that a national court is obliged to find a contractual term setting the rate of default interest above a certain threshold to be unfair is not problematic from the point of view of pursuing those objectives, even though it may be problematic from the point of view of the overall balance between the parties rights and obligations considered in the abstract.

79. In that context, it should be noted that, in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations under a contract to the detriment of the consumer, it may be relevant in particular to consider which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, if so, to what extent, the contract places the consumer in a legal situation less favourable *than that provided for by the national law in force.* [23]

80. In this case, the criterion according to which the default interest rate cannot exceed by more than two percentage points the annual ordinary interest rate is not gleaned directly from Spanish legislation, but takes that legislation into account indirectly. As the Tribunal Supremo (Supreme Court) has stated in the order for reference in Case C-94/17, the criterion which that court identified as regards the setting of the default interest rate is based on what can be considered reasonable, having regard to the national provisions applicable in other areas.

21 See, to that effect, judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 74).

22 See my Opinion in Joined Cases *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2014:2299, point 42).

23 See judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraph 59).

81. In the light of all those considerations, I propose that the Court's answer to the second question, part (a), in Case C-96/16 and the first question in Case C-94/17 should be that Directive 93/13 does not preclude national case-law according to which, in a loan agreement, a term which sets a rate of default interest that exceeds by more than two percentage points the annual ordinary interest rate fixed in the agreement is unfair, in so far as that case-law does not pre-empt the national court's power to assess, independently and taking into account all the circumstances of the case, the potential unfairness of terms not meeting that criterion on which it has to give a ruling.

The second question, part (b), in Case C-96/16 and the second and third questions in Case C-94/17

82. By the second question, part (b), in Case C-96/16 and the second and third questions in Case C-94/17, the referring courts ask whether Directive 93/13 precludes the approach taken in the judgments of the Tribunal Supremo (Supreme Court), whereby the consequence of the finding of unfairness of a term in a loan agreement setting the rate of default interest is that that interest must cease to apply, so that only ordinary interest continues to accrue. If so, the Tribunal Supremo (Supreme Court) is uncertain, in Case C-94/17, what the consequence should be, and in particular whether it should be the elimination not only of the default interest but also of the ordinary interest stipulated in that agreement, or the charging of statutory interest.

83. In accordance with Article 6(1) of Directive 93/13, unfair terms used in a contract concluded with a consumer by a seller or supplier are not, as provided for under their national law, to be binding on the consumer and the contract is to continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

84. As the Court has ruled, national courts are required to refrain from applying an unfair contractual term in order that it does not produce binding effects with regard to the consumer, but are not empowered to revise its content. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of national law, such continuity of the contract is legally possible. [24]

85. It is true that the Court has also recognised the possibility for the national court to replace an unfair term with a supplementary provision of national law. However, that possibility has been clearly limited to cases in which the invalidity of the unfair term would require the court to declare the contract void in its entirety, thereby exposing the consumer to such consequences that he would be penalised as a result. From that point of view, as the Court has in essence pointed out, the annulment, in a loan agreement, of a term relating to the default interest rate cannot, in principle, have such consequences, since the amount claimed by the lender will necessarily be lower if that interest is not applied. [25]

86. In the light of that case-law, it must be concluded that Directive 93/13 does not preclude the approach taken by the Tribunal Supremo (Supreme Court) in the abovementioned case-law, in so far as that approach requires the national court, if it has found a contractual term setting the rate of default interest to be unfair, on the one hand, simply to disapply that term, while preserving the validity of the other terms in that contract, in particular that relating to the ordinary interest rate, and, on the other hand, not to replace the term found to be unfair with supplementary legal provisions, such as, inter alia, provisions setting the statutory default interest rate applicable in the absence of an agreement between the parties to the contract.

24 Judgments of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 28 and the case-law cited), and of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraph 71).

25 See, to that effect, judgment of 21 January 2015, *Unicaja Banco and Caixabank* (C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraphs 28 to 34).

87. If a provision determining the rate of default interest is deemed to be unfair by the national court, that court will refrain from applying the term, but will not be able to choose instead to reduce the amount of the penalty imposed on the consumer. The other contractual terms, (including, where appropriate, those relating to ordinary interest rates), will be retained and will naturally continue to produce the effects they are normally expected to produce.

88. However, to render ineffective the term setting the ordinary interest rate even if that term has not been found to be unfair would go far beyond the consequences relating to the effectiveness of the protection conferred by Directive 93/13.

89. That is a fortiori the case since, with regard to a loan agreement, the terms defining the rate of ordinary interest must be clearly distinguished from the terms determining the rate of default interest. While ordinary interest serves the purpose of providing compensation to a lender for making available an amount of money, until the amount is repaid, the purpose of default interest is to penalise the failure by the debtor to fulfil his obligation to make the loan repayments on the contractually agreed payment dates. Terms relating to the ordinary interest rate consequently constitute the core of a loan agreement and, therefore, relate to the main subject matter of the agreement which, in principle, is not subject to review by the court under Directive 93/13.[26]

90. That conclusion applies, in my view, regardless of how the contractual terms setting the interest rates are drafted. Whether the term setting the default interest rate is distinct from that relating to the ordinary interest rate, or the two types of terms are indissociable, the finding that the term relating to the default interest rate is unfair cannot have an impact on the application of ordinary interest. If the default interest rate is represented by an increase in the rate of ordinary interest, only that increase is to be invalidated. That is in no way akin to an 'adaptation' of the contract, which is prohibited under the case-law, but rather consists in the removal of the only term found to be unfair.

91. In view of these considerations, I suggest that the answer to the second question, part (b), in Case C-96/16 and the second question in Case C-94/17 should be that Article 6(1) and Article 7(1) of Directive 93/13 do not preclude –– following a finding, in accordance with the case-law mentioned above, of unfairness of a term in a loan agreement setting a rate of default interest that exceeds by more than two percentage points the agreed rate of ordinary interest –– the term setting the rate of ordinary interest from continuing to apply until the debt is repaid in full.

92. In view of that reply, there is no need to answer the third question in Case C-94/17.

Conclusion

93. In view of the foregoing considerations, I propose that the Court give the following answers to the questions referred for a preliminary ruling:

I. In Case C-96/16, referred by the Juzgado de Primera Instancia No 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain):

(1) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not preclude a business practice of assigning or purchasing debts, as described in the present case, without offering the consumer the opportunity to extinguish the debt by paying the price of the assignment, as well as interest, expenses and costs, to the assignee.

26 See, to that effect, my Opinion in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:85, points 56 to 58). This applies notwithstanding the possibility for the court to review terms which are not drafted in plain, intelligible language.

(2) Article 6(1) and Article 7(1) of Directive 93/13 do not preclude national case-law which establishes as an unequivocal criterion the fact that, in loan agreements concluded with consumers, a non-negotiated term which sets a rate of default interest that exceeds by more than two percentage points the agreed rate of ordinary interest is unfair in so far as:

– it does not restrict the discretion of a national court with regard to a finding of unfairness in respect of terms of a loan agreement concluded between a consumer and a seller or supplier that do not meet that criterion, and

– it does not prevent that court from setting aside such a term should it find the term to be 'unfair', within the meaning of Article 3(1) of that directive.

(3) Article 6(1) and Article 7(1) of Directive 93/13 do not preclude –– following a finding, in accordance with the case-law mentioned above, of unfairness of a term in a loan agreement setting a rate of default interest that exceeds by more than two percentage points the agreed rate of ordinary interest –– the term setting the rate of ordinary interest from continuing to apply until the debt is repaid in full.

II. In Case C-94/17, referred by the Tribunal Supremo (Supreme Court, Spain):

(1) Article 6(1) and Article 7(1) of Directive 93/13 do not preclude national case-law which establishes as an unequivocal criterion the fact that, in loan agreements concluded with consumers, a non-negotiated term which sets a rate of default interest that exceeds by more than two percentage points the agreed rate of ordinary interest is unfair in so far as:

– it does not restrict the discretion of a national court with regard to a finding of unfairness in respect of terms of a loan agreement concluded between a consumer and a seller or supplier that do not meet that criterion, and

– it does not prevent that court from setting aside such a term should it find the term to be 'unfair', within the meaning of Article 3(1) of that directive.

(2) Article 6(1) and Article 7(1) of Directive 93/13 do not preclude –– following a finding, in accordance with the case-law mentioned above, of unfairness of a term in a loan agreement setting a rate of default interest that exceeds by more than two percentage points the agreed rate of ordinary interest –– the term setting the rate of ordinary interest from continuing to apply until the debt repaid in full.

(3) There is no need to answer the third question.