



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

10 September 2014*

(Request for a preliminary ruling — Directive 93/13/EEC — Unfair terms — Consumer credit agreement — Article 1(2) — Term reflecting a mandatory statutory provision — Scope of the directive — Articles 3(1), 4, 6(1) and 7(1) — Security for credit in the form of a charge on immovable property — Whether it is possible to enforce the charge by means of a sale by auction — Judicial review)

In Case C-34/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský súd v Prešove (Slovakia), made by decision of 20 December 2012, received at the Court on 23 January 2013, in the proceedings

Monika Kušionová

v

SMART Capital a.s.,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 5 June 2014,

after considering the observations submitted on behalf of:

- the Slovak Government, by B. Ricziová, acting as Agent,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the European Commission, by A. Tokár and M. van Beek, acting as Agents,

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

gives the following

* Language of the case: Slovakian.

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), and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22), in the light of Article 38 of the Charter of Fundamental Rights of the European Union ('the Charter') and the judgment in *Simmenthal* (106/77, EU:C:1978:49).
- 2 The request has been made in proceedings between Mrs Kušionová and SMART Capital a.s. ('SMART Capital') concerning the methods of enforcement of a charge provided by way of guarantee for a mortgage loan agreement and the lawfulness of terms included in that agreement.

Legal context

EU law

- 3 Article 7 of the Charter states that '[e]veryone has the right to respect for his or her private and family life, home and communications'.
- 4 Article 38 of the Charter provides that Union policies are to ensure a high level of consumer protection.
- 5 The first paragraph of Article 47 of the Charter states:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'
- 6 The 12th to 14th and the 24th recital in the preamble to Directive 93/13 are worded as follows:

'Whereas, however, as they now stand, national laws allow only partial harmonisation to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the [EC] Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive;

Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions ...; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

Whereas Member States must however ensure that unfair terms are not included ...

...

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.'

7 Article 1 of Directive 93/13 provides:

‘(1) The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

(2) The contractual terms which reflect mandatory statutory or regulatory provisions ... shall not be subject to the provisions of this Directive.’

8 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.’

9 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 ...’.

10 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.’

Slovak law

11 Paragraph 151j(1) of the Civil Code states:

‘Where a debt secured by a charge is not fully settled in due time, the secured creditor may commence enforcement of the charge. In enforcing the charge, the secured creditor may obtain settlement of the debt by the means specified in the contract or by sale of the security at auction pursuant to a specific law, ... or he may seek settlement of the debt by the sale of the security pursuant to specific statutory provisions, ... unless otherwise provided for by this law or a specific law.’

12 The referring court states that there is a footnote to that paragraph, inserted after the words ‘pursuant to a specific law’, which refers to Law No 527/2002 on voluntary auctions supplementing Law No 323/1992 of the Slovak National Council on notaries and notarial activity (the Notarial Code), as amended (‘the Law on Voluntary Sale by Auction’), and a further footnote, after the words ‘specific statutory provisions’, which refers to the Code of Civil Procedure and to the Rules on Enforcement.

13 Paragraph 151m of the Civil Code provides:

‘(1) The secured creditor may sell the security by the means specified in the charge agreement or at auction at the earliest 30 days from the date of the notice to the guarantor and debtor of the commencement of enforcement of the charge, where the debtor and the guarantor are not one and the same person, unless otherwise provided for by a specific law. ...

(2) The guarantor and the secured creditor may, after notice of the commencement of enforcement of the charge, agree that the secured creditor is authorised to sell the security by the means agreed upon in the charge agreement or at auction even before the expiry of the period prescribed in subparagraph (1).

- (3) A secured creditor who has commenced enforcement of a charge with the aim of obtaining settlement of the debt by the means agreed upon in the charge agreement may change the means of enforcing the charge at any time during the enforcement and sell the security at auction or require that the debt be settled by the sale of the security pursuant to specific statutory provisions. The secured creditor is required to inform the guarantor of the change in the means of enforcement.’
- 14 Under Article 74(1) of the Code of Civil Procedure, the court may grant interim relief where it is necessary temporarily to adjudicate on the relations between the parties or where there is a risk of the enforcement of the judgment being undermined. Article 76(1) of that code provides that the court may impose interim measures on a party, in particular in order ‘for it to take action, for it to abstain from taking action or for it to allow action to be taken’.
- 15 In Paragraph 6 thereof, the Law on Voluntary Sale by Auction defines the auctioneer as ‘the person who organises the auction and meets the conditions laid down in this specific law authorising that person to conduct such business’. Paragraph 7(1) of that law defines the person requesting sale by the auction as the owner of the subject-matter of the sale, the secured creditor or any other person who is authorised to request that a sale by auction be held under a specific law.
- 16 As regards, more specifically, the secured creditor, Paragraph 7(2) of the Law on Voluntary Sale by Auction states that such a person is required to declare in writing, not only that the subject-matter of the sale may be sold at auction, but also the amount of the debt in respect of which an application for enforcement of the charge has been made under that law and that the debt is genuine and payable.
- 17 According to Paragraph 16(1) of that law, a sale by auction may be proceeded with only on the basis of a signed agreement between the person initiating the sale and the auctioneer.
- 18 Under Paragraph 17 of the Law on Voluntary Sale by Auction, the auctioneer is required to announce the sale by auction by publishing a notice. If the item put up for auction is an apartment, a house or other building, an undertaking or part of an undertaking, or if the lowest bid is greater than EUR 16 550, the auctioneer is to publish the notice of public auction at least 30 days before the auction begins and, without undue delay, forward the notice of public auction to the Ministry for publication in the *Official Trade Journal*. The notice of auction is also to be sent to the person initiating the sale by auction, the debtor of the secured creditor and the owner of the property to be auctioned, where the latter is not the debtor.
- 19 Where the property to be auctioned is an apartment, a house or other building, Paragraph 20(13) of that law provides that the terms of the sale are to be recorded in a notarial act, in which the notary is also required to indicate the obligation imposed on the previous owner in accordance with the first sentence of Paragraph 29(2) of that law.
- 20 Paragraph 21(2) of the Law on Voluntary Sale by Auction provides that in the event of infringement of the provisions thereof, any person who considers himself adversely affected may apply to the court for a declaration that the sale by auction is void. The right to apply to the court lapses, however, if it is not exercised within three months following the public auction, unless the grounds on which annulment is sought relate to the commission of a criminal offence and the sale concerns a house or an apartment in which the previous owner was officially permanently resident.
- 21 Paragraph 21(4) of the above law states that the parties to the proceedings for a declaration that the sale by auction is void under Paragraph 21(2) are the person initiating the sale, the auctioneer, the successful bidder, the previous owner and the person alleging infringement of his rights in accordance with Paragraph 21(2).

- 22 Where the successful bidder defaults or the court declares the sale by auction void, Paragraph 21(5) of that law provides that the auction is to be deemed void with effect from the day on which the sale was concluded.
- 23 In the event of a sale by auction of property under Paragraph 20(13) of the Law on Voluntary Sale by Auction, Paragraph 29(2) thereof provides, first of all, that the previous owner is required, in accordance with the conditions set out in the notice of public auction and without undue delay, to surrender the property to be auctioned upon production of a certified copy of the notarial act and proof of identity of the successful bidder. Next, the auctioneer is required to draw up on the spot a record of the surrender of the property sold. Finally, that record is to include inter alia a detailed description of the condition of the property and the circumstances in which the rights and obligations pertaining to the subject-matter of the sale and, where appropriate, to the ancillary rights thereto, were transferred.
- 24 Paragraph 32(1) of that law provides that, unless otherwise provided, the proceeds of the sale by auction, after reimbursement of the fees, settlement of the debt owing to the secured creditor and payment of the cost relating to the auction, are to be paid without undue delay by the auctioneer to the previous owner.

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

- 25 On 26 February 2009, Mrs Kušionová concluded a consumer credit agreement with SMART Capital for an amount of EUR 10 000. The loan was secured by a charge on the family home in which the applicant in the main proceedings lives.
- 26 The latter brought before the Okresný súd Humenné (District Court, Humenné) an action for annulment of the credit agreement and the charge agreement against SMART Capital, claiming that the contractual terms binding her to that undertaking were unfair. That court of first instance partially annulled the credit agreement, holding that some of the contractual terms were unfair. The charge agreement, for its part, was annulled in its entirety. Both parties brought an appeal against that judgment before the Krajský súd v Prešove (Regional Court, Prešov).
- 27 The referring court seeks to establish whether one of the terms of the charge agreement, namely the term relating to extrajudicial enforcement of the charge on immovable property provided as security by the consumer, is unfair and notes that that term enables the creditor to enforce the charge without any review being carried out by a court.
- 28 In its assessment, the referring court, however, identified an additional difficulty in so far as the term concerned derives from a statutory provision, namely Paragraph 151j of the Civil Code.
- 29 Since the contractual terms which the referring court is required to review may be classified as unfair for the purposes of Directive 93/13 and since one of those terms is of statutory origin, that court considers that the outcome of the dispute before it depends on the interpretation of EU law.
- 30 In those circumstances, the Krajský súd v Prešove decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Are [Directive 93/13] and [Directive 2005/29], in the light of Article 38 of [the Charter], to be interpreted as precluding legislation of a Member State, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enables a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer’s immovable property without any assessment of the contract terms by a court and despite there being a dispute as to whether the contract term at issue is unfair?’

- (2) Does the European Union legislation referred to [in question 1] preclude the application of a national rule, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enables a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and despite there being a dispute as to whether the contract term at issue is unfair?
- (3) Must the judgment of the Court of Justice [in *Simmenthal*, EU:C:1978:49] be interpreted as precluding, in the interests of meeting the objectives of the directives [referred to in question 1] and in the light of Article 38 of the [Charter], the national court from applying domestic provisions, such as Paragraph 151j(1) of the Civil Code, in conjunction with other provisions of the legislation applicable in the present case, which enable a creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and also, despite there being a dispute, to circumvent review by a court of its own motion of the contract terms?
- (4) Is Article 4 of [Directive 93/13] to be interpreted as meaning that a term in a contract concluded by a consumer without representation by a lawyer which enables a creditor to enforce a charge by extra-judicial means and without any review by a court, is a circumvention of the important principle of EU law that contract terms are to be reviewed by courts of their own motion and, for that reason, is unfair, even where the wording of such a contract term is based on a national provision?'

Developments since the request for a preliminary ruling was made

- 31 At the hearing of 5 June 2014, the Slovak Government informed the Court that, as a result of the adoption of Law No 106/2014 Z.z. of 1 April 2014, applicable to all agreements in the process of being enforced as of 1 June 2014, the procedural rules concerning the enforcement of charges have been amended.
- 32 In particular, Paragraph 5(7) of that law supplemented Paragraph 21(2) of the Law on Voluntary Sale by Auction, so that that provision is now worded as follows:

'Where the validity of the charge agreement is challenged or the provisions of the present law are infringed, any person who claims that his rights have been adversely affected as a result of that infringement may request the court to declare the sale void ...'

Consideration of the questions referred

Admissibility of the questions referred

- 33 The German Government contends, as its primary argument, that the first two questions asked by the referring court are inadmissible.
- 34 First of all, the referring court has failed to provide either the factual or legal material necessary for the Court to give a useful answer to those questions. First, whether it is possible to enforce a charge without review by a court does not constitute a question relating to an unfair commercial practice. Secondly, the referring court makes no specific reference to the provisions of Directive 2005/29.
- 35 Next, those questions are hypothetical and the answer to them does not fall within the jurisdiction of the Court. Since the charge has not yet been enforced by SMART Capital, the situation described by the referring court does not exist.

- 36 Finally, the main proceedings relate to the alleged nullity of the loan agreement and of the charge agreement. However, the referring court seeks to obtain, by means of its first two questions, an assessment of whether national procedural provisions comply with Directive 93/13. Since the latter seeks to approximate the laws of the Member States on unfair terms, it covers only terms stipulated in contracts and not the conditions laid down by national law for the enforcement of such a charge.
- 37 While acknowledging that the request for a preliminary ruling contains certain lacunae, the Slovak Government nevertheless considers that the first two questions asked by the referring court are admissible. As regards the European Commission, it claimed, at the hearing, that the conditions for establishing inadmissibility as defined by the Court in the Order in *SKP*, C-433/11, EU:C:2012:702, are not satisfied in the present case and it therefore considers that those two questions are admissible.
- 38 It should be noted in that respect that, according to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears 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 in *Pohotovost'*, C-470/12, EU:C:2014:101, paragraph 27 and case-law cited).
- 39 In the first place, it should be noted that the first question referred relates, in addition to Directive 93/13, to Directive 2005/29. However, as was correctly pointed out by the German Government, the referring court merely refers to the latter directive without stating the reason why an interpretation of that directive is necessary for the resolution of the main proceedings. Moreover, it does not explain to what extent the procedure for enforcing the charge that is contested by the applicant in the main proceedings may constitute an unfair commercial practice.
- 40 As regards the purpose of the present request for a preliminary ruling, it concerns the scope of Articles 1(2), 3(1), 4, 6(1) and 7(1) of Directive 93/13, provisions under which the EU legislature, respectively, provided for a derogation from the scope of that directive, defined what constitutes an unfair term, established the rule that an unfair term does not bind consumers and stated that the Member States are to ensure that adequate and effective means exist to prevent the continued use of unfair terms.
- 41 Therefore, the questions asked by the referring court will be answered solely in the light of the provisions of Directive 93/13.
- 42 In the second place, the fact that the enforcement of the charge has not yet been completed does not mean that those questions are hypothetical. First, the referring court points out that SMART Capital has actually taken steps against the consumer with a view to the sale of the property subject to the charge. Secondly, even though the enforcement of the charge has not been concluded, the questions referred do not so much seek to ascertain whether the sale has been completed as to determine whether the creditor may *de jure* proceed with such a sale and whether judicial remedies are available to the debtor to contest the enforcement.
- 43 To that extent, the questions referred for a preliminary ruling are not hypothetical and the interpretation requested of the provisions of Directive 93/13 is necessary for the resolution of the main proceedings.
- 44 In the light of the foregoing, the Court therefore finds that the request for a preliminary ruling is admissible.

Substance

Questions 1 to 3

- 45 It should be pointed out that, although the first question refers only to Article 38 of the Charter, the present request for a preliminary ruling relates to, in essence, and cites, in particular, among the relevant elements of EU law, Article 47 of the Charter. In view of the fact that the first three questions asked by the referring court seek to determine the level of protection afforded consumers and the judicial remedies available to the latter, that article should be included amongst the European Union legal instruments which the referring court seeks to have interpreted by the Court.
- 46 By its first three questions, which it is appropriate to examine together, the referring court asks, in essence, whether, in the light of Articles 38 and 47 of the Charter, Directive 93/13 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contract terms by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer. If that is the case, that court seeks to ascertain whether, in accordance with the case-law deriving from the judgment in *Simmenthal* (EU:1978:49), those domestic provisions must be set aside.
- 47 It should be noted, first, that Article 38 of the Charter provides that European Union policies must ensure a high level of consumer protection. Article 47 of the Charter concerns the right to an effective judicial remedy. Those mandatory requirements are applicable to the implementation of Directive 93/13 (see, to that effect, the judgment in *Pohotovost'*, EU:C:2014:101, paragraph 52).
- 48 Secondly, in its case-law, the Court has already held that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (judgments in *Pohotovost'*, EU:C:2014:101, paragraph 39 and case-law cited; *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282 paragraph 39 and the case-law cited; and *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 22).
- 49 With regard to the enforcement of guarantees attached to loan agreements concluded by consumers, it is clear that Directive 93/13 is silent as to enforcement of charges.
- 50 However, it is settled case-law that, in the absence of harmonisation of national mechanisms for enforcement under EU law, it is for the national legal order of each Member State to establish such rules, in accordance with the principles of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments in *Aziz*, C-415/11, EU:C:2013:164, paragraph 50 and case-law cited, and *Pohotovost'*, EU:C:2014:101, paragraph 46).
- 51 As regards the principle of equivalence, the Court does not have before it any evidence which might raise doubts as to the compliance of the legislation at issue in the main proceedings with that principle.
- 52 As regards the principle of effectiveness, it should be noted that the Court has already 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 in *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 34 and case-law cited).

- 53 Moreover, the specific characteristics of court proceedings which take place under national law between sellers or suppliers and consumers cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under the provisions of Directive 93/13 (see, to that effect, judgments in *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 55 and case-law cited, and *Aziz*, EU:C:2013:164, paragraph 62).
- 54 It is necessary, therefore, to determine, in a situation such as that in the main proceedings, to what extent it is impossible in practice or excessively difficult to apply the protection conferred by that directive.
- 55 In this case, it is clear from the documents before the Court that Paragraph 151m(1) of the Civil Code, read in conjunction with Paragraph 17(3) of the Law on Voluntary Sale by Auction, provides, first, that a sale by auction may be contested within 30 days of the notice of enforcement of the charge and, secondly, that the person who contests the conditions under which that sale took place has, under Paragraph 21(2) of that law, a period of three months following the public auction to take steps.
- 56 Although Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the parties to the contract (the judgments in *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 39 and case-law cited, and *Pohotovost*, EU:C:2014:101, paragraph 40 and case-law cited), the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for the total inertia on the part of the consumer concerned (see, to that effect, the judgment in *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 47).
- 57 Subject to investigations to be carried out by the referring court, the combination of time-limits laid down by the national legislation at issue in the main proceedings, as referred to in paragraph 55 of the present judgment, is comparable neither with the 20-day time-limit at issue in the case giving rise to the judgment in *Banco Español de Crédito*, EU:C:2012:349, nor with facts of the case giving rise to the judgment in *Aziz*, EU:C:2013:164, paragraphs 57 to 59, in both of which cases the consumer's action against such measures was unsuccessful.
- 58 In addition, in order to protect the rights granted to consumers by Directive 93/13, the Member States are bound, in particular, under Article 7(1) of that directive, to adopt protective measures in order to prevent the continued application of terms which are deemed unfair. That is, moreover, confirmed by the 24th recital in the preamble to that directive, which states for that purpose that the courts or administrative authorities of the Member States must have at their disposal adequate and effective means.
- 59 In particular, according to the Court's settled case-law relating to the principle of sincere cooperation, now enshrined in Article 4(3) TEU, while the choice of penalties applicable to infringements of EU law remains within their discretion, Member States must ensure in particular that they are effective, proportionate and dissuasive (see, to that effect, the judgment in *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paragraph 44 and case-law cited).
- 60 With regard to the requirement that the penalty should be effective and dissuasive, first, the written observations submitted to the Court by the Slovak Government state that, during such a procedure for the extrajudicial enforcement of a charge, the national court with jurisdiction may, under Paragraphs 74(1) and 76(1) of the Code of Civil Procedure, adopt any interim measure to prevent such a sale from going ahead.
- 61 Secondly, as stated in paragraphs 31 and 32 of the present judgment, it appears that Law No 106/2014 Z.z. of 1 April 2014, which entered into force on 1 June 2014 and is applicable to all charge agreements in the process of being enforced as of that date, amended the procedural rules applicable to a term such as that at issue in the main proceedings. In particular, Paragraph 21(2) of the Law on Voluntary

Sale by Auction, in the version in force, allows the court, where the validity of the term providing for the charge is challenged, to declare the sale void, which, retrospectively, places the consumer in a situation almost identical to his original situation and does not therefore limit the compensation for the harm caused to him, where the sale is unlawful, to mere monetary compensation.

- 62 With regard to the proportionality of the penalty, it is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge at issue in the main proceedings is directed is the immovable property forming the consumer's family home.
- 63 The loss of a family home is not only such as to seriously undermine consumer rights (the judgment in *Aziz*, EU:C:2013:164, paragraph 61), but it also places the family of the consumer concerned in a particularly vulnerable position (see, to that effect, the Order of the President of the Court in *Sánchez Morcillo and Abril García*, EU:C:2014:1388, paragraph 11).
- 64 In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v United Kingdom*, application No 19009/04, paragraph 50, ECHR 2008, and *Rousk v Sweden*, application No 27183/04, paragraph 137).
- 65 Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13.
- 66 With regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13 (see, to that effect, the judgment in *Aziz*, EU:C:2013:164, paragraph 59).
- 67 In the present case, the fact that it is possible for the competent national court to adopt any interim measure, such as that described in paragraph 60 of the present judgment, would suggest that adequate and effective means exist to prevent the continued use of unfair terms, which is a matter for the referring court to determine.
- 68 It follows from the foregoing considerations that Directive 93/13 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer, in so far as that legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine.
- 69 In the light of the answer given to the first part of the first three questions, there is no need to answer the second part of those questions, relating to the effect of the case-law devolving from the judgment in *Simmenthal* (EU:C:1978:49) on national legislation allowing extrajudicial enforcement of a charge.

Question 4

- 70 By Question 4, the referring court asks, in essence, whether Article 4 of Directive 93/13 must be interpreted as precluding a contractual term in an agreement concluded by a seller or supplier with a consumer, even though the wording of that term is based on a statutory provision.

- 71 First of all, it must be noted that the fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is, in this context, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, regard being had to the subject-matter of the dispute (the judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 22 and the case-law cited).
- 72 Next, since the referring court refers extensively to the exclusion from the scope of Directive 93/13 of contractual terms which reflect domestic statutory provisions, it should be noted that, although reference is not made to Article 1(2) of that directive in the request for a preliminary ruling, the fourth question referred for a preliminary ruling impliedly but necessarily relates to that provision. Consequently, the present request for a preliminary ruling must be regarded as relating to Article 1(2) of that directive.
- 73 Finally, it is settled case-law that the Court may, in the context of its jurisdiction under Article 267 TFEU to interpret EU law, interpret general criteria used by the EU legislature in order to define the concept of unfair terms (see, to that effect, the order in *Pohotovost'*, C-76/10, EU:C:2010:685, paragraph 60 and case-law cited). However, it is for the national court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. It follows that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (the judgments in *Aziz*, EU:C:2013:164, paragraph 66 and case-law cited; *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraph 45; and the order in *Sebestyén*, C-342/13, EU:C:2014:1857, paragraph 25).
- 74 While Article 1(1) of Directive 93/13 defines the scope of that directive, Article 1(2) thereof provides that terms which reflect mandatory statutory or regulatory provisions are excluded.
- 75 In that regard, the Slovak and German governments propose that the Court should answer that the contractual term at issue in the main proceedings, namely that providing for voluntary sale by auction, is covered by that exclusion. Conversely, the Commission considers that the effectiveness of the provisions of Directive 93/13 would be undermined if a situation such as that in the main proceedings were covered by such an exclusion.
- 76 The Court has already had occasion to point out that Article 1(2) of Directive 93/13 establishes an exclusion from the scope of that directive which covers terms which reflect mandatory statutory or regulatory provisions (see, to that effect, the judgment in *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 25).
- 77 As with all derogations, it should be noted, having regard to the purpose of that directive, namely the protection of consumers against unfair terms included in contracts concluded with consumers by sellers or suppliers, that it is to be strictly construed.
- 78 In this case, it is apparent from the judgment in *RWE Vertrieb*, EU:C:2013:180, that that exclusion requires two conditions to be met. First, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory.
- 79 In that regard, it should be noted that, in order to establish whether a contractual term is excluded from the scope of Directive 93/13, it is for the national court to determine whether that term reflects provisions of national law that apply between the parties to the contract independently of their choice or those that apply by default, that is to say in the absence of other arrangements established by the parties (see, to that effect, judgment in *RWE Vertrieb*, EU:C:2013:180, paragraph 26).

80 In the light of the foregoing considerations, the answer to Question 4 is that Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term included in a contract concluded by a seller or supplier with a consumer falls outside the scope of that directive only if that contractual term reflects the content of a mandatory statutory or regulatory provision, which is a matter for the national court to determine.

The temporal effect of this judgment

81 In the event that the Court reaches the conclusion that Directive 93/13 must be interpreted as meaning that the extrajudicial enforcement of a charge such as that at issue in the main proceedings must be preceded by review by a court, the Slovak Government requests the Court to limit the temporal effects of any such judgment.

82 In the light of the answer to the first three questions, it is not necessary to respond to that request by the Slovak Government.

Costs

83 Costs incurred in submitting observations to the Court, other than the costs of the parties to the main proceedings, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer, in so far as that legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine.**
2. **Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term included in a contract concluded by a seller or supplier with a consumer falls outside the scope of that directive only if that contractual term reflects the content of a mandatory statutory or regulatory provision, which is a matter for the national court to determine.**

[Signatures]