

Case C-600/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

6 August 2019

Referring court:

Audiencia Provincial de Zaragoza (Spain)

Date of the decision to refer:

12 July 2019

Appellant:

MA

Respondent:

Ibercaja Banco, S.A.

Subject matter of the main proceedings

Appeal against an order, made in enforcement proceedings, approving the payment of interest because no objection was raised at the appropriate time, which makes it impossible to assess whether certain contractual terms are unfair since *res judicata* applies.

Subject matter and legal basis of the request for a preliminary ruling

The referring court has referred four questions for a preliminary ruling. The first question seeks to determine the compatibility with Article 6(1) of Council Directive 93/13/EEC of national legislation from which it may be inferred that if, at the time the enforcement order is made, the court seised has not assessed of its own motion whether a term is unfair, that court cannot re-examine that term of its own motion even if, during its initial review, the court did not express any considerations on the validity of the terms examined.

The second question asks whether, where the party against whom enforcement is sought does not argue that terms are unfair in the preliminary application

stipulated for that purpose by the Law, once that application objecting to the enforcement proceedings has been resolved that party can make a further application even though no new factual or legal material exists.

The third question asks whether, if the second question is answered in the negative on the ground that a time-barring effect is created which prevents the debtor from being able to raise again the unfairness of the terms, the court may carry out such a review of its own motion.

The last question asks whether, once the sale at auction has been approved and the property awarded, the enforcement proceedings are to be considered concluded, and whether it is possible, therefore, either for the court of its own motion or for a party to raise the invalidity of an unfair term that could affect the enforcement proceedings.

Questions referred for a preliminary ruling

- (1) Is national legislation compatible with the principle of effectiveness provided for in Article 6(1) of Council Directive 93/13/EEC, as that directive has been interpreted by the Court of Justice, where it may be inferred from that national legislation that, if a particular unfair term withstood an initial review conducted by a court of its own motion when making an enforcement order [negative review of the validity of the terms' content], that review prevents the same court from subsequently assessing that term of its own motion where the factual and legal elements existed from the outset, even if that initial review did not express, in the operative part or in the grounds, any considerations on the validity of the terms?
- (2) Where factual and legal elements exist which determine the unfairness of a term in a consumer contract and the party against whom enforcement is sought fails to rely on that unfairness in the application objecting to enforcement laid down for that purpose by the Law, can that party, following the resolution of that application, make a further preliminary application aimed at determining whether one or more other terms is/are unfair when that party could have relied on those terms at the outset in the ordinary procedural step provided for in the Law? In short, is a time-barring effect created which prevents the consumer from raising again the issue of unfairness of another term in the same enforcement proceedings, and even in subsequent declaratory proceedings?
- (3) If the conclusion that the party is not entitled to make a second or subsequent application objecting to the enforcement proceedings, in order to allege the unfairness of a term which that party could have raised earlier because the necessary factual and legal elements had already been determined, is held to be compatible with Directive 93/13, can this serve as a basis for use as a means whereby the court, having been alerted to the

unfairness of that term, is able to exercise its power of review of its own motion?

- (4) Once the sale at auction has been approved and the property awarded, possibly to the same creditor, and the ownership of the property provided as security, already realised, has even been transferred, is it compatible with EU law to apply an interpretation according to which (i) after the proceedings have concluded and the objective of such proceedings has been fulfilled, that is to say, the security has been realised, a debtor may make further applications for a declaration that an unfair term is invalid, entailing an effect on the enforcement proceedings or (ii) after the transfer has been completed, possibly in favour of the same creditor, and entered in the Land Registry, a court may of its own motion carry out a review which results in the entire enforcement proceedings being annulled or ultimately affects the amounts covered by the mortgage, potentially affecting the terms under which the bids were made?

Provisions of EU law relied on

Case-law of the Court of Justice

Judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60), paragraphs 51 and 52.

Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164) paragraphs 27 and 28 and 37 to 39.

Judgment of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731), paragraphs 37, 38 and 39.

Judgment of 7 December 2017, *Banco Santander* (C-598/15, EU:C:2017:945), paragraphs 59 and 60.

Provisions of national law relied on

Provisions of national law

Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Law No 1 of 7 January 2000 on Civil Procedure) in particular, Articles 136, 222, 447(2), 517, 552(1), 557, 571 and 695.

Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law No 1 of 14 May 2013 on measures to strengthen the protection of mortgagors, restructuring of debt and social rent).

Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario (Law No 5 of 15 March 2019 on mortgage loan agreements), in particular the third transitional provision.

Código Civil (Civil Code), in particular Article 1129.

National case-law

S[entencia del]T[ribunal]S[upremo] (Judgment of the Supreme Court) 462/2014 (ECLI: ES:TS:2014:4617)

STS 463/2014 (ECLI:ES:TS:2014:4972)

STS 526/2017 (ECLI: ES:TS:2017:3373)

STS 576/2018 (ECLI:ES:TS:2018:3553)

STS 628/2018 (ECLI:ES:TS:2018:3734)

STS 484/2010 (ECLI:ES:TS:2010:4294)

STC 31/2019 (ECLI:ES:TC:2019:31)

Succinct presentation of the facts and the procedure in the main proceedings

- 1 A loan agreement in the amount of EUR 198 400 secured by mortgage was concluded between Ibercaja Banco S.A. and PO and MA, and following the failure to pay five instalments, Ibercaja Banco applied for enforcement in relation to a house (valued at EUR 299 290) claiming the capital and interest due and unpaid, without prejudice to a subsequent calculation of default interest.
- 2 The interest for the loan was set at an annual nominal rate of 2.750% until the end of 2005 to be followed by a variable interest rate as set out in Clause 3*bis*, and the minimum differential to be applied to the rate could not be less than 0.5%. Default interest was set at an annual nominal rate of 19%.
- 3 On 26 January 2015, an enforcement order was handed down against the borrowers (PO and MA), requiring payment and granting them a period of 10 days to object to enforcement. That same day, the *secretario judicial* (judicial officer) issued an order requiring the Land Registry to submit evidence of ownership and of other rights *in rem* over the property and of the existence of the mortgage in favour of the party seeking enforcement.
- 4 PO, a party against whom enforcement was sought, died, and therefore SP and JK became parties to the case as possible legal heirs.
- 5 Following an auction, which was unsuccessful, Ibercaja requested to be awarded the property for the amount of EUR 179 574 and stated that it was transferring the

sale at auction to the company Residencial Murillo, S.A., which accepted the transfer and provided a receipt of payment for that amount.

- 6 On 25 October 2016, costs were assessed in the amount of EUR 2 886.19 and the interest was calculated at EUR 32 538.28, an interest rate of 12% having been applied as provided in Law 1/2013, and the parties against whom enforcement had been sought were notified thereof. By order of 13 December, the assessment of costs for the abovementioned amount was approved.
- 7 By document of 9 November 2016, MA objected to the interest calculation on the ground that both the sixth clause of the loan agreement with default interest at 19% and the clause regarding the minimum interest to be paid ('floor clause') were unfair.
- 8 A decision was served on the parties which stated that potentially unfair terms in the enforceable instrument were to be assessed since it had been found that the accelerated repayment clause, among other clauses, might be unfair. Ibercaja objected to the stay of proceedings on the ground that it was not the appropriate time to declare that the terms of the contract were unfair given that the sale at auction had been transferred and the assessment of costs approved.
- 9 The proceedings were stayed by order of the court pending a ruling regarding a request for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain) in relation to accelerated repayment and default interest. Ibercaja appealed against that order and the stay of proceedings was lifted by the Audiencia Provincial (Provincial Court), allowing the proceedings to continue.
- 10 By order of the court of 20 November 2017, the accelerated repayment clause was found to be unfair and enforcement was stayed. Ibercaja lodged an appeal, which was opposed by MA. The Provincial Court, by order of 28 March 2018, set aside the order appealed against, allowing the proceedings to continue on the ground that it was not appropriate to assess whether certain terms (such as that relating to accelerated repayment) were unfair since the mortgage loan agreement had already produced its effects and the security had already been realised without the consumer having exercised his rights. That order stated that, since the right of ownership had been transferred, that right had to be upheld in accordance with the principle of legal certainty in pre-existing proprietary relationships
- 11 By order of 31 July 2018, the court dismissed the objection to the interest calculation, which was set at EUR 32 389.89 because the proceedings had been initiated after Law 1/2013 and no objection had been lodged; it was, therefore, no longer possible, on account of the effect of *res judicata*, to assess whether the terms were unfair.
- 12 MA lodged an appeal against the order of 31 July 2018, which was opposed by Ibercaja, S.A. Consequently, the Provincial Court seised of the case has made the present request for a preliminary ruling.

Essential arguments of the parties to the main proceedings

- 13 The arguments of the parties were set out above in paragraphs 7 to 9 and 12.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 14 The present request for a preliminary ruling is closely linked to that in Case C-497/19. In essence, the questions raised in that case — which are the same as those raised in the present case, although in this case an additional question is referred for clarification — ask whether the principle of effectiveness of the consumer protection rules laid down in Council Directive 93/13/EEC of 5 of April 1999, in particular the rule that unfair terms are not binding, as set out in Article 6 thereof, is compatible with the effects of *res judicata*, time-barring, and the determination of a last or final point in enforcement proceedings after which the unfairness of any terms may no longer be raised, without prejudice to the consumer's assertion of his rights in subsequent declaratory proceedings.
- 15 The most significant difficulty to be resolved in the sphere of civil procedure in Spain in matters relating to consumer protection is the effect of the new procedural criteria derived from the case-law of the Court of Justice on the force of *res judicata* and time-barring.

The force of *res judicata* has been shaped by the obligation imposed on courts in relation to the conduct of proceedings to the effect that they must of their own motion identify and annul unfair contractual terms. In practice, when dealing with the limits and applicability thereof as far as consumer protection is concerned, national courts must address relevant uncertainties resulting from the lack of precision. In particular, it has not been clarified whether, in enforcement proceedings, the effect is created of closing the proceedings as regards the possibility of determining the validity of any of the terms of consumer contracts.

- 16 In Spanish procedural law, the Ley de Enjuiciamiento Civil (Law on Civil Procedure; 'LEC') includes two broad categories of civil proceedings: declaratory proceedings and enforcement proceedings.

Declaratory proceedings are substantive proceedings which must be used as an ordinary legal remedy whereby, in relationships between individuals, legal protection is claimed for a right which has been ignored or infringed by the defendant and a definitive adjudication sought, while it is not possible afterwards to seek to raise the same issue before the courts on subsequent occasions or the same protection based on the same cause of action (Article 222 LEC).

In addition to that category are enforcement proceedings, which are characterised by the fact that they do not require a prior delimitation of rights. In such proceedings, the substantive action necessary to give effect to a right has already been initiated. The requirement for direct access to enforcement proceedings is that the right whose enforcement is sought must be recognised in an instrument or

a document which is enforceable by law. The list of documents or enforceable instruments is included in Article 517 of the LEC, which governs in a unitary fashion so-called enforceable procedural instruments (including, principally, a judgment which brings to an end declaratory proceedings) and contractual instruments. The latter are created outside proceedings and are contracts which give rise to an obligation on the part of the debtor to pay the creditor a monetary amount which is due, payable and liquid (Article 571 LEC). The reason why the legislature allows direct access to enforcement proceedings in the situations governed by that article and the avoidance of declaratory proceedings in which the right is recognised is that the debt is acknowledged using a set of legal guarantees which make it possible to assume that the debt exists and is real.

- 17 It should be noted that *res judicata* applies not only to decisions in substantive proceedings but also to matters which could have been raised, as a cause of action in the proceedings brought by the applicant or as a plea by the defendant, but were not: this is the effect of time-barring.

Time-barring tends to be known as ‘virtual *res judicata*’ because it also creates the effect of closing or concluding the proceedings and the forms of order sought. Since *res judicata* is closely linked to the principle of legal certainty, time-barring is also closely related to it, in that the legislature is seeking to avoid an endless succession of proceedings to determine the same right.

Like *res judicata*, time-barring can be regarded as a formal aspect, as an effect in the proceedings themselves or as an effect on actions or defences in a substantive sense. As a formal effect, time-barring prevents reliance by a party, in the same proceedings, on a procedural right where that party had the appropriate opportunity in the proceedings to do so but did not make use of it (Article 136 LEC), while, as a substantive effect, it precludes the party from bringing in different proceedings an action based on a cause of action or a plea which he could have relied on in the first proceedings (Article 222 LEC).

- 18 Spanish law provides that a debtor may make a preliminary application in which a limited scope for objection to the enforcement proceedings is lawfully established. Before Law No 1 of 14 May 2013 on measures to strengthen the protection of mortgagors, restructuring of debt and social rent, issues relating to the validity of a debt were restricted to potential declaratory proceedings which had to be initiated by the debtor. That Law introduced the possibility of arguing that contractual terms are unfair in ordinary enforcement proceedings (Article 557(1)(7) of the LEC) and in special mortgage enforcement proceedings (Article 695(1)(4) of the LEC). It became possible to lodge an objection in order to argue that clauses in a standard consumer contract are unfair and therefore null and void and, furthermore, an obligation was imposed on courts to review of their own motion, at the outset, whether those contracts are unfair (Article 552(1), second subparagraph, of the LEC).

An objection based on unfairness raised by the debtor and a court's initial review of its own motion, as laid down in the Law, relate to terms which may form the basis for an enforcement order or for the amount of the debt.

- 19 Controversy resulted from the provision in the LEC concerning the effect of *res judicata* created by a judicial decision on an objection in enforcement proceedings. The view of the Supreme Court on the force of *res judicata* in enforcement proceedings is generally to find that that effect has occurred as regards any grounds for objection which were actually raised and which were determined by the court; matters adjudicated on in an objection raised in enforcement proceedings also create the force of *res judicata* in respect of grounds of objection which could have been relied on but were not. This is the effect of time-barring: pleas which could have been put forward were not, with the result that the debtor cannot later bring declaratory proceedings in which such pleas are upheld. That is the line of case-law followed in relation to enforcement proceedings by judgments of the Supreme Court 4617/2014 and 4972/2014.

The Supreme Court applied that case-law to pleas relating to unfair terms in consumer contracts. In that connection, it is appropriate to cite judgments 3373/2017, 3553/2018 and 3734/2018 of that court.

- 20 The difficulty arises from the possibility of applying that case-law or making it compatible with the requirements of the debtor/consumer's right of defence derived from the case-law of the Court of Justice.

The judgment of the Court of Justice which could be considered most relevant is that of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60). That judgment addressed the difficulty relating to the effect of *res judicata* and consumer protection and found that such protection cannot be regarded as unlimited and that it yields to a universal principle of cohesion in the legal system: the principle of legal certainty.

That judgment also states that the effect of *res judicata* is determined by reference to national law. Accordingly, regard must be had to the stipulations laid down by the Spanish Supreme Court and that court's general statement of the law, which it appears to have extended to the sphere of consumer protection, must be applied. Accordingly, where a court conducts a prior review while adjudicating on enforcement proceedings but does not, in any sense, set out any formal reasoning or relies only on the potential unfairness of a specific ground of objection and, later, in a possible objection raised by the debtor, that ground is not put forward in relation to any unfair terms, that would create the effect of *res judicata* or the effect of terminating the proceedings; that party would be time-barred from exercising, or would lose the right to exercise, the procedural right to claim before a court, after the time limit for objection had elapsed, that a term in the contract is unfair, both in the enforcement proceedings following the application objecting to those proceedings, and in any future declaratory proceedings.

However, the judgment in *Banco Primus* does not confine itself to referring to national law for the purpose of defining the effect of *res judicata* and instead it sets out a number of constraints or limits, in particular, in paragraphs 51 and 52. Paragraph 51 states that ‘the conditions laid down in the national laws to which Article 6(1) of Directive 93/13 refers may not adversely affect the substance of the right that consumers acquire under that provision not to be bound by a term deemed to be unfair’, while paragraph 52 stipulates that ‘in the case where, in a previous examination of a contract in dispute which led to the adoption of a decision which has become *res judicata*, the national court limited itself to examining of its own motion, with regard to Directive 93/13, one or certain terms of that contract, that directive requires a national court, such as the one in the main proceedings, before which a consumer has properly lodged an objection to enforcement proceedings, to assess, at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose, the potential unfairness of other terms of that contract. In the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13’.

Under national law, as pointed out, the court is required to examine all the terms, even if it only sets out its assessment with regard to terms which may be regarded as unfair. In accordance with Article 552(1) of the LEC, the enforceable instrument must be examined in its entirety; even if *inter partes* proceedings are commenced only in respect of terms which are identified as potentially being unfair; the exercise of that review implies that the remaining terms are considered to be valid.

- 21 The Court of Justice has drawn attention to the relevance of *res judicata* in legal proceedings, in view of the fact that the inability to change what has been decided is necessary in order to comply with the principle of legal certainty. This is closely related to time-barring, which means that, once the period for lodging a procedural act has expired, a party loses the right to do so.

The admissibility under EU law of time-barring construed in that way has been accepted in the case-law of the Court of Justice, in particular the judgment of 29 October 2015, *BBVA*, C-8/14, EU:C:2015:731; this concerned the transitional rules laid down in national Law 1/2013 on measures to strengthen the protection of mortgagors, restructuring of debt and social rent, in which, in order to comply with the case-law of the Court of Justice, a right was inserted for a debtor/consumer to argue in mortgage enforcement proceedings that a number of terms in the mortgage loan contract are unfair and, as regards instances where the ordinary time limit for objection has elapsed a special time limit of one month was granted, under the transitional provisions of that law, to lodge *de novo* an objection alleging unfairness. The Court of Justice held that that procedural tool, the time limit being classified as extraordinary, was incompatible with EU law. The Court’s reasoning is as follows:

‘However, that notification, prior to the date of entry into force of Law 1/2013, did not contain any information concerning their right to bring an application objecting to enforcement by raising the unfairness of a contractual term constituting the basis of the enforceable order, since that possibility was incorporated into Article 557(1)(7) of the Civil Procedure Code only by Law 1/2013.

In those circumstances, in particular having regard to the principles of the rights of the defence, legal certainty and the principle of the protection of legitimate expectations, consumers could not reasonably take advantage of a further opportunity to make an application objecting to enforcement if they were not notified about it through the same procedural means used to convey the initial information.

Therefore, it should be found that the contested transitional provision, in so far as it provides that the time limit begins to run in the present case without the consumers concerned being personally informed of the possibility to raise a new ground of objection in enforcement proceedings which were already in progress before the entry into force of that law, is not such as to guarantee full enjoyment of that period and, therefore, the effective exercise of the new right recognised by the legislative amendment concerned.’

That case-law can be understood only in the light of the fact that the Court of Justice allows limitation periods. In turn, it must be pointed out that paragraphs 27 and 28 of the same judgment invoke the principles which lie at the basis of the national legal system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings. In short, it follows from the case-law of the Court of Justice that, although the Court found that the transitional provisions of Law 1/2013 did not guarantee the rights of the defence, that was because it is assumed that limitation periods existed which were compatible with EU law, as an expression of a minimum procedural order and in accordance with the principle of legal certainty.

- 22 In those circumstances, uncertainties arise regarding the coordination of such principles between the different judgments of the Court of Justice and the case-law of the Supreme Court and national legislation.

In order to comply with the case-law of the Court of Justice, the national procedural law introduced a review of unfairness in ordinary enforcement proceedings and in mortgage enforcement proceedings. The initial review is of the court’s own motion and must be carried out by that court before the enforcement procedure commences and before the enforcement order is made. The specific feature of that review is that it involves a merely conditional and negative assessment. No ruling is given on the validity of the terms but only on their invalidity. It is not a positive but a negative assessment of their validity; as a result of the review of an enforceable contractual instrument, only terms which the court finds to be unfair are taken into consideration, in respect of which *inter partes*

proceedings will be commenced, resulting in a ruling on the validity of those terms.

As regards the other terms, where they pass the validity test performed by the court seised of the enforcement proceedings, that court will not set out any reasoning. There is no express declaration that the terms are valid although the initial review implies an assumption that they are. That is what occurred in the mortgage enforcement proceedings which gave rise to this reference for a preliminary ruling.

It is important to stress that that initial procedural step entails only a negative assessment, which is consistent with enforcement proceedings, in which there is in principle no declaration of rights. In the case of the negative assessment, there is nothing to preclude the debtor's rights of defence and therefore, once enforcement has been ordered, the debtor may raise an objection on the ground that other terms, which were not explicitly examined in the initial review of the court's own motion, are unfair.

However, as regards the terms which the debtor initially claimed are unfair, that must lead to a declaratory judgment which may be negative, if the court finds the terms to be unfair, or positive, in the opposite case.

What is clear for the present purposes is that such judgments, given following the necessary exchange of argument between the parties, will have the force of *res judicata*, meaning that neither a debtor objecting to enforcement nor a court exercising its powers to carry out a review of its own motion can seek to re-examine a ruling previously made against the debtor.

The uncertainties relating to the specific case arise where, as a result of the court's review of its own motion, that court does not order that the parties be heard because it has not found that any terms are unfair or has found that only one particular term is unfair. In other words, an enforcement order is made and no positive or negative view on the validity of the terms is expressed, even if those terms have been reviewed by the court.

- 23 For its part — and this is the second uncertainty — the difficulty arises as to whether a debtor who made an initial application objecting to enforcement, claiming that certain terms are unfair, can subsequently, notwithstanding that that right is time-barred, make another application based on a term which he considers to be unfair but which he did not raise at the relevant point in the proceedings, taking account of the fact that the factual and legal elements determining that unfairness already existed at the time when the first, timely objection to enforcement was raised.

In short, given that time-barring is permitted by the case-law of the Court of Justice, where a debtor does not raise an objection during the enforcement proceedings, the question turns on whether or not the principle of effectiveness has the effect of bringing the proceedings to an end, which precludes both the

debtor and the court of its own motion from being entitled to reconsider matters which were previously the subject of a review or object to matters which could have been the subject of an objection but were not.

- 24 Separately from the effect of *res judicata* and time-barring, the case-law of the Court of Justice and national law give rise to some uncertainty regarding the determination of the last point until which it is possible for either the court, of its own motion, or for a party to raise the unfairness of terms. Special mortgage enforcement proceedings are intended to realise the security *in rem*, the mortgage, in order to satisfy the claim of the creditor/party seeking enforcement. That security is realised when, by means of an auction, the mortgaged property is transferred to a person other than the debtor.

Under Spanish Law, that legal effect is produced where there is a transfer document and a mode of transfer, whether that mode of transfer be the actual handing over of goods (*traditio*) or a legal transfer (for example, by an officially recorded instrument). *Nuda traditio* (simple delivery) does not transfer ownership since that requires a legal basis, a complex set of acts.

In the case of judicial enforcement proceedings, the approval of the sale at auction to the highest bidder represents the transfer document, while an order from a judicial officer represents the mode of transferring the property. With evidence of that order, the new owner of the property can register at the Land Registry and the property may be subject to legal transactions. For the legal transfer of the property to take effect, it is not necessary for the successful bidder to actually take possession of the property.

According to the Court of Justice, once the property may no longer be claimed, a court may not review the validity of the loan agreement or assess whether it contains unfair terms. Thus, in its judgment of 14 March 2013 the Court of Justice states that ‘the final vesting of mortgaged property in a third party is always irreversible, even if the unfairness of the term challenged by the consumer before the court hearing the declaratory proceedings results in the annulment of the mortgage enforcement proceedings, except where that consumer made a preliminary registration of the application for annulment of the mortgage before that marginal note’.

That ruling was restated in the judgment of the Court of Justice of 7 December 2017 (ECLI:EU:C:2017:945) in which, with regard to extrajudicial mortgage enforcement proceedings, it was held that it is not permissible to attempt to review the fairness of terms in a consumer contract that resulted in compulsory enforcement, on the basis that ‘it is within the course of the mortgage enforcement procedure that the court seised could, if necessary of its own motion, have carried out a review of the potential unfairness of terms stipulated in the mortgage loan agreement.

... Article 6(1) and Article 7(1) of ... Directive 93/13 do not apply to proceedings ... brought by the successful bidder in an auction of immovable property, following extrajudicial enforcement of a mortgage granted over that property by a consumer to a creditor acting in the course of trade, such proceedings having been brought for the purpose of protecting real rights lawfully acquired by the successful bidder, provided that, first, the proceedings are independent of the legal relationship between that creditor and the consumer and, second, the mortgage has been enforced, the immovable property sold, the real rights over that property transferred, and the consumer has not availed himself of the legal remedies provided in that context.’

In essence, that judgment addresses two factors, time-barring and the fact that the mortgaged property has been transferred. However, uncertainty has been created as to whether the possibility for the court of its own motion or for a party to raise unfairness may lead to some clauses being declared invalid – which may render the entire enforcement proceedings invalid – where, after such a transfer has taken place and it has even been registered at the Land Registry, it is sought to extend the review even after such acts, provided the property has not yet been vacated and the new owner not yet taken possession.

- 25 In the context of national law, the uncertainty has been increased by the judgment of the Tribunal Constitucional (Constitutional Court, Spain) of 28 February 2019, which upheld an application lodged by a consumer claiming that the contract was unfair, even though he had not raised such unfairness at the time the mortgage was enforced. Essentially, the Constitutional Court takes the view, in its interpretation of the case-law of the Court of Justice, that there is no time bar and that time-barring only occurs if the unfairness of a term was expressly raised by the debtor or was dealt with by the court in a review of its own motion. And in any case, where there are doubts, as in the present case, it is necessary to make a request for a preliminary ruling to the Court of Justice.

That is the reason for the present request for a preliminary ruling, to clarify the scope of the negative review of unfairness under Spanish procedural law prior to enforcement. And more specifically, whether it is appropriate to review unfairness (whether by the court of its own motion or because the party against whom enforcement is sought seeks such a review) after the mortgage has been enforced and the property transferred, but, in any case, before the party against whom enforcement is sought has been dispossessed.

Consequently, regardless of whether or not the effect of *res judicata* applies and whether there is time barring, it is uncertain (i) whether the completion of the proceedings on account of the security’s being realised occurs once there is an auction, approval of the sale to the highest bidder and order assigning the property, already at that point preventing the court from reviewing of its own motion, or at the request of a party, the validity or unfairness of any of the terms in the agreement or (ii) whether, on the contrary, it is possible, even after the

property is assigned, to raise that unfairness up to the point at which the debtor is evicted from the property.

- 26 It is also important to note the amendment to national law introduced by Law No 5 of 15 March 2019 on mortgage loan agreements, which grants certain mortgage debtors a new 10-day period to lodge an objection on the basis of potentially unfair terms, in certain circumstances.

In particular, the third transitional provision of Law 5/2019 regarding the special rules to be applied in enforcement proceedings in progress on the date of the entry into force of Law 1/2013 grants the parties against whom enforcement is sought a new period to bring an extraordinary application objecting to enforcement, provided that the enforcement proceedings have not led to the purchaser taking possession of the property.

- 27 All the foregoing considerations have given rise to different points of view on the part of the various legal professionals, even though they all claim to be applying the case-law of the Court of Justice.

According to the Supreme Court, if the time limit for lodging an objection to enforcement has expired, provided that when that time limit started to run it would have been possible to object to the unfairness, the effects of time-barring and *res judicata* apply.

According to the Constitutional Court, neither time-barring nor *res judicata* apply until there is an express ruling regarding the validity of the terms, and the final point for raising unfairness in mortgage enforcement proceedings is when the successful bidder takes possession of the property.

And, according to the legislature, it appears that time-barring and *res judicata* apply: at least in cases where there was no material possibility to lodge an objection, an extraordinary application must be brought, which may be lodged until possession of the property is taken.

Such divergent positions make it necessary, in the view of this court, to make the present request for a preliminary ruling in order to clarify: (1) the scope of the negative review of the validity of terms in consumer contracts, which, under national law, must take place prior to enforcement; (2) the time-barring effect that may apply to the debtor where he does not lodge an objection to enforcement, on the basis that the agreement is unfair, within the time limit; and (3) whether the last point at which the court of its own motion or the debtor may raise the issue of the agreement's being in any way invalid on grounds of unfairness is when the property is assigned to a third party or, as the case may be, to the creditor, or whether, on the contrary, even where the property has been assigned, it is possible to object to that contractual unfairness, provided that possession has not yet been taken of the property.