



Fact sheet

UNFAIR TERMS

Consumer protection is a fundamental requirement of EU law, enshrined in both the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union ('the Charter').

Article 169 TFEU provides that, in order to promote the interests of consumers and to ensure a high level of consumer protection, the European Union is to contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. Article 38 of the Charter provides that Union policies are to ensure a high level of consumer protection.

It was in order to achieve that objective of protecting consumer interests that, through Directive 93/13/EEC,¹ the European Union established a system to defend consumers against unfair terms. That directive provides for minimum harmonisation of the law governing unfair terms, by laying down definitions and assessment criteria to be used in order to determine whether contractual terms are unfair, regulating the effects of those terms and establishing adequate and effective means of protection, in the form of remedies either before a judicial authority or before an administrative body, to prevent the continued use of unfair terms.

The system of protection thus introduced is based on the idea that consumers are in a position of weakness vis-à-vis sellers or suppliers, as regards both their bargaining power and their level of knowledge. This leads to consumers agreeing to terms drawn up in advance by sellers or suppliers without being able to influence the content of those terms.

This fact sheet provides an overview of the main case-law of the Court of Justice in this area.

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

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I. Scope of application of directive 93/13

1. Scope *ratione loci*: the application of Directive 93/13 in the absence of any cross-border element

*Judgment of 31 May 2018, Sziber (C-483/16, [EU:C:2018:367](#))*²

Loan agreements denominated in foreign currency – National legislation providing for specific procedural requirements when the fairness of terms is challenged

The main proceedings involved a dispute between an individual and a Hungarian bank concerning an application for a declaration of unfairness of certain terms inserted into a loan agreement, for the purchase of a dwelling, paid out and repaid in Hungarian forints (HUF), but registered in Swiss francs (CHF) on the basis of the exchange rate in force on the day of payment.

As regards the scope of Directive 93/13, the Court stated that it also applies to situations without a cross-border element. According to the Court, the rules contained in EU legislation that harmonises across the Member States a specific field of law apply irrespective of the purely internal nature of the situation at issue in the main proceedings (paragraph 58).

2. Scope *ratione materiae*: notions of ‘seller or supplier’ and ‘consumer’

Judgment of 22 November 2001, Cape and Others (Joined Cases C-541/99 and C-542/99, [EU:C:2001:625](#))

Meaning of ‘consumer’ – Undertaking concluding a standard contract with another undertaking to acquire merchandise or services solely for the benefit of its employees

In both of these cases, the dispute arose from a contract for the supply of automatic drink dispensers installed by Idealservice on the premises of the companies OMAI and Cape and intended to be used solely by their staff. OMAI and Cape maintained that the clause conferring jurisdiction on the Giudice di Pace, Viadana (Magistrates’ Court, Viadana, Mantua, Italy) contained in the contracts was unfair within the meaning of the Italian Civil Code and was consequently unenforceable against the parties to the contracts.

Before the Giudice di Pace, Viadana ((Magistrates’ Court, Viadana), Idealservice argued that Cape and OMAI could not be regarded as ‘consumers’ for the purpose of applying Directive 93/13 because they are companies and not natural persons, and had signed the contracts in the course of their business activity.

² That judgment is also presented in Section VI.3. ‘Specific procedural rules’.

The Italian court therefore asked the Court whether the term ‘consumer’, as defined in Article 2(b) of that directive, referred solely to natural persons.

The Court points out that it is clear from the wording of Article 2 of Directive 93/13 that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision (paragraph 16).

Accordingly, the Court considers that the term ‘consumer’, as defined in Article 2(b) of Directive 93/13, must be interpreted as referring solely to natural persons (paragraph 17 and operative part).

Judgment of 17 May 2018, Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen (C-147/16, [EU:C:2018:320](#))³

Notion of ‘seller or supplier’ – Higher educational establishment financed mainly by public funds – Contract for an interest-free repayment plan for registration fees and share of costs of a study trip

The dispute in the main proceedings was between an educational establishment and one of its students, who owed the establishment an amount of money in respect of registration fees and costs connected with a study trip. The parties had concluded a repayment agreement providing for interest of 10% per annum in the event of non-payment and an indemnity to cover debt collection costs.

The Court was asked whether an educational establishment which, by contract, has granted one of its students repayment facilities for sums due by the latter, must be regarded, in the context of that contract, as a ‘seller or supplier’ within the meaning of Article 2(c) of Directive 93/13, with the result that the contract falls within the scope of that directive.

The Court notes in that regard that the EU legislature intended a broad definition to be given to that notion (paragraph 48).

It is a functional concept, requiring determination of whether the contractual relationship is amongst the activities undertaken as part of a person’s trade, business or profession. The Court considered that by providing, in that contract, a service which is complementary and ancillary to its educational activity, an educational establishment acts as a ‘seller or supplier’ within the meaning of Directive 93/13 (paragraph 55).

³ That judgment is also presented in Section IV.2. 2.1. ‘Obligation to examine *ex officio* the unfairness of a contractual term – Scope of the obligation’.

Judgment of 21 March 2019, Pouvin and Dijoux (C-590/17, [EU:C:2019:232](#))***Concepts of ‘consumer’ and of ‘seller or supplier’ – Finance for the purchase of a home – Mortgage loan granted by an employer to its employee and to his spouse, the jointly and severally liable co-borrower***

Under one of the terms of a loan contract, that contract was to be automatically terminated where, for whatever reason, the borrower ceased to be a member of staff at the company for which he was working. Following the resignation of the employee, the latter and his spouse stopped paying the loan instalments. In accordance with that term, the company issued a summons against the borrowers for payment of the outstanding sums owed in respect of capital, interest and a penalty clause.

Ruling on that case, the court at first instance found that the term providing for the automatic termination of the loan contract was unfair. That judgment was then overturned by the appellate court, which held that the automatic termination of the contract at issue occurred on the date of the employee's resignation. Since the employee and his spouse considered that they had acted as consumers and claimed that a term such as that at issue in the main proceedings, which provides for the termination of the loan on the occurrence of an event that is external to the contract is unfair, they brought an appeal in cassation.

As regards, in the first place, the concept of ‘consumer’, within the meaning of Article 2(b) of Directive 93/13, the Court holds that that concept covers the employee of an undertaking and his or her spouse who conclude a loan contract with that undertaking, reserved, principally, for members of staff of that undertaking, with a view to financing the purchase of real estate for private purposes. It states that the fact that a natural person concludes a contract, other than an employment contract, with his or her employer does not, in itself, prevent that person from being classified as a ‘consumer’ within the meaning of Directive 93/13. As regards the exclusion of employment contracts from the scope of that directive, the Court rules that a real estate loan contract offered by an employer to its employee and the latter's spouse cannot be classified as an ‘employment contract’ in so far as it does not regulate an employment relationship or employment conditions (paragraphs 29, 32, 43 and operative part).

As regards, in the second place, the concept of ‘seller or supplier’, for the purposes of Article 2(c) of Directive 93/13, the Court takes the view that it covers an undertaking which concludes, in the context of its professional activity, a loan contract reserved, principally, for members of its staff with one of its employees and his or her spouse, even if granting loans does not constitute its main activity. In that regard, the Court notes that even if the main activity of such an employer consists not in offering financial instruments, but in supplying energy, that employer has technical information and expertise, and human and material resources that a natural person, namely the other party to the contract, is not deemed to have. It adds that offering a loan contract to its employees, thus offering them the possibility of being able to buy property, serves to attract and maintain a qualified and skilled workforce facilitating the exercise of the employer's professional activity. In that context, the Court points out that the existence or otherwise of a potential direct income for that employer, provided for by that contract, has no bearing on the recognition of that employer as a ‘seller or supplier’ within the meaning of Directive 93/13. The Court considers that a broad interpretation of the concept of ‘seller or supplier’ serves to achieve the objective of that directive consisting in protecting the consumer

as the weaker party to the contract concluded with a seller or supplier and to restore the balance between the parties (paragraphs 40, 42, 43 and the operative part).

Judgment of 2 April 2020, Condominio di Milano, via Meda (C-329/19, [EU:C:2020:263](#))

Definition of ‘consumer’ – Commonhold of a building

A commonhold association, the condominio di Milano, via Meda (‘Condominio Meda’), represented by its administrator, had concluded a contract for the supply of thermal energy with the company Eurothermo. Under a term of that contract, Condominio Meda was, in the event of late payment, required to pay default interest at the rate of 9.25% from the expiry of the period for payment of the balance. Condominio Meda challenged the order for payment of late-payment interest under that contract term before the referring court claiming that that term was unfair and that it was a consumer within the meaning of the Directive on unfair terms. In that case, the Italian court considered that that term was unfair but was uncertain whether it was permissible to regard a commonhold association, such as the *condominio* under Italian law, as a consumer within the meaning of the Directive. According to the information provided to the Court, in Italian law, a commonhold association is a subject of the law which is not a natural or legal person.

In the first place, as regards the definition of ‘consumer’, the Court notes that two cumulative conditions must be satisfied in order for a person to fall within its scope, namely that that person is a natural person and that he or she carries out his or her activity for non-professional purposes. As regards the first of those conditions, the Court holds that, as EU law currently stands, the concept of ‘ownership’ has not been harmonised at EU level and differences may exist between the Member States. Consequently, the Court states that the Member States remain free to regard, or not to regard, a commonhold association as a ‘legal person’ in their respective national systems. The Court therefore holds that a commonhold association, such as the *condominio* in Italian law, does not satisfy the first condition, as a result of which it does not fall within the definition of ‘consumer’, so that the contract between that commonhold association and a supplier or seller is excluded from the scope of Directive 93/13 (paragraph 24, 27, 28 and 29).

In the second place, the Court examines whether national case-law which applies the rules of consumer protection to contracts concluded by a *condominio* with a seller or supplier is consistent with the spirit of the framework of consumer protection in the European Union. In that regard, the Court notes that Directive 93/13 provides for partial minimum harmonisation of national laws on unfair terms, leaving Member States the option to afford consumers a higher level of protection through national provisions that are more stringent than those of that directive, provided that they are compatible with the TFEU.⁴ In that regard, the Court points out that a line of case-law according to which, in order to afford greater protection to consumers, the scope of that protection is extended to subjects of the law, such as the *condominio* under Italian law, which is not a natural person under national law, furthers the objective of consumer protection sought by that directive. It follows that, although such a subject of the law does not

⁴ Article 169(4) TFEU; recital 12 and Article 8 of Directive 93/13.

fall within the definition of ‘consumer’ within the meaning of that directive, the Member States may apply its provisions to areas not covered by its scope, provided that such an interpretation ensures a maximum degree of protection for the consumer and is not precluded by the Treaties (paragraphs 31 and 33 to 35).

3. Exclusions from the scope of Directive 93/13

3.1. Contractual terms which reflect mandatory statutory or regulatory provisions

*Judgment of 21 March 2013, RWE Vertrieb (C-92/11, [EU:C:2013:180](#))*⁵

Unilateral alteration by the supplier of the price of the service – Reference to mandatory legislation designed for another category of consumers – Applicability of Directive 93/13

The Verbraucherzentrale Nordrhein-Westfalen (consumer association for North Rhine-Westphalia) challenged before the German courts a standard contractual term by which RWE, a German undertaking supplying natural gas, reserved the right unilaterally to amend the price charged to its customers if they were on a special tariff (*Sonderkunden*). Since it regarded that term as unfair, the association, acting on behalf of 25 consumers, sought reimbursement of the additional amounts the consumers paid RWE following four price increases from 2003 to 2005, a total of EUR 16 128.63.

RWE considered inter alia that the disputed term, which formed part of the general terms and conditions applicable to the customers in question, could not be reviewed for unfairness. That term merely referred to the German legislation applicable to standard tariff contracts. That legislation allowed the supplier to vary gas prices unilaterally without stating the grounds, conditions or extent of such a variation, while ensuring, however, that customers would be notified of the variation and would be free, where appropriate, to terminate the contract.

Having lost before the lower courts, RWE turned to the Bundesgerichtshof (Federal Court of Justice, Germany), which put questions to the Court of Justice on the interpretation of Article 1(2) and Articles 3 and 5 of Directive 93/13, intended to protect consumers against unfair and/or non-transparent standard contractual terms. The German court was uncertain in particular about the scope of the exclusion from review for unfairness of standard terms which merely reproduce mandatory statutory or regulatory provisions, within the meaning of Article 1(2) of Directive 93/13.

The Court states that exclusion from review for unfairness of contractual terms that reflect the provisions of national legislation governing a certain category of contracts is justified by the fact that it can legitimately be assumed that the national legislature struck a balance between all the rights and obligations of the parties to those contracts. That reasoning does not apply, however, to terms in a different contract. To exclude a term in such a contract from review for unfairness

⁵ That judgment is also presented in Section III.2. ‘Requirements of good faith, balance and transparency’.

merely because it reproduces legislation that applies only to another category of contracts would call into question the protection of consumers aimed at by EU law (paragraphs 28, 30 and 31).

Judgment of 20 September 2018, OTP Bank and OTP Faktoring (C-51/17, [EU:C:2018:750](#)) ⁶

Scope – Article 1(2) – Mandatory statutory or regulatory provisions

In February 2008 two borrowers concluded with a Hungarian bank a credit contract for the provision of a loan denominated in Swiss francs (CHF). According to the contract, although the monthly repayment instalments were to be paid in Hungarian forints (HUF), the amount of those instalments was to be calculated on the basis of the current exchange rate between the Hungarian forint and the Swiss franc. In addition, the contract refers to the foreign exchange risk in the event of possible fluctuations in the exchange rate between these two currencies.

The exchange rate subsequently changed considerably to the detriment of the borrowers, resulting in a significant increase in the amount of their monthly instalments. In May 2013, the two borrowers brought legal proceedings before the Hungarian courts against OTP Bank and OTP Faktoring, two companies to which the creditor claims arising from the loan contract had been transferred. In the course of these proceedings, the question arose as to whether the term relating to the foreign exchange risk had not been drafted by the bank in plain intelligible language and could therefore be considered unfair within the meaning of the Directive on unfair terms.

In the meantime, Hungary adopted, in 2014, laws by which it removed from foreign currency loan contracts certain unfair terms, converted virtually all outstanding debts under these contracts into HUF and applied the exchange rate set by the National Bank of Hungary. Those laws also sought to implement a decision of the Kúria (Supreme Court, Hungary) on the non-compliance with Directive 93/13 of certain terms incorporated into foreign currency loan contracts ⁷ (this decision was issued in the light of the judgment of the Court of Justice in *Kásler and Káslerné Rábai* ⁸). However, the new laws did not alter the fact that the foreign exchange risk is placed on the borrower in the event of a depreciation of the Hungarian forint in relation to the Swiss franc.

The Court was asked by the Fővárosi Ítéltábla (Regional Court of Appeal, Budapest, Hungary), hearing the case, whether the latter jurisdiction could assess the unfairness of a term, where it is not drafted in plain intelligible language, even though the Hungarian legislature, by not intervening in that respect, has accepted that the foreign exchange risk continues to be placed on the consumer in the event of a depreciation of the Hungarian forint in relation to the foreign currency concerned.

⁶ That judgment is also presented in Section II.2. ‘Concept of “contractual term which has not been individually negotiated” and Section III.2 ‘Requirements of good faith, balance and transparency’.

⁷ Decision N° 2/2014 PJE (Magyar Közlöny 2014/91, p. 10975).

⁸ Judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, ECLI:EU:C:2014:282) presented in Section I.3. 3.2. ‘Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration’.

In its judgment, the Court recalls that the rule excluding terms which reflect mandatory statutory or regulatory provisions from the scope of Directive 93/13 is justified by the fact that it can legitimately be assumed that the national legislature struck a balance between all the rights and obligations of the parties to the contract. However, this does not mean that another contractual term which is not covered by statutory provisions, such as that relating to the foreign exchange risk in the present case, is, in its entirety, also excluded from the scope of the Directive. The unfairness of that term may therefore be assessed by the national court in so far as it forms the view, following a case-by-case examination, that it is not drafted in plain intelligible language⁹ (paragraphs 53, 65 and 68).

Judgment of 3 March 2020 (Grand Chamber), Gómez del Moral Guasch (C-125/18, EU:C:2020:138)¹⁰

Mortgage loan agreement – Variable interest rate – Reference index based on mortgage loans granted by savings banks – Index arising from a regulatory or administrative provision

An individual brought an action before a Spanish court of first instance concerning the alleged unfairness of a contractual term governing the variable ordinary and remunerative interest rate in the mortgage-loan agreement he had concluded with the banking institution Bankia SA. Under that term, the interest rate to be paid by the consumer varies according to the reference index. That reference index was provided for by national legislation and was able to be applied to mortgage loans by credit institutions. However, the Spanish court stated that the indexing of the variable interest rates calculated on the basis of the reference index was less favourable than that calculated on the basis of the average Euro Interbank Offered Rate (Euribor), which is used in 90% of mortgage loans taken out in Spain and involves an additional cost of around EUR 18 000 to EUR 21 000 per loan.

The Court recalls that terms reflecting mandatory statutory or regulatory provisions are excluded from the scope of Directive 93/13.¹¹ Nevertheless, the Court observes that, subject to verification by the Spanish court, the national legislation applicable in that case did not require, for variable-interest-rate loans, the use of an official reference index, but merely established the conditions to be satisfied by ‘the reference indices or rates’ in order for them to be able to be used by credit institutions. The Court therefore concludes that a contractual term in a mortgage-loan agreement, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation that may be applied by credit institutions to mortgage loans, falls within the scope of that directive, where that national legislation does not provide either for the mandatory application of that index independently of the choice of the parties to the contract or for the supplementary application thereof in the absence of other arrangements established by those parties (paragraphs 34 and 37 and operative part, paragraph 1).

⁹ Judgment of 20 September 2017, *Andriciuc and Others*, (C-186/16, EU:C:2017:703) presented in Section I.3. 3.2. ‘Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration’.

¹⁰ That judgment is also presented in Section V.2. ‘Substitution of the unfair term’.

¹¹ Article 1(2) of Directive 93/13.

Judgment of 9 July 2020, Banca Transilvania (C-81/19, [EU:C:2020:532](#))***Scope – Article 1(2) – Definition of ‘mandatory statutory or regulatory provisions’ – Supplementary provisions – Loan agreement denominated in a foreign currency – Term relating to the foreign exchange risk***

In 2006, two borrowers concluded a loan agreement with Banca Transilvania under which the bank loaned them the sum of 90 000 Romanian lei (RON) (approximately EUR 18 930). In 2008, they concluded a second loan agreement, denominated in Swiss francs (CHF), in order to refinance the first agreement.

As a result of the sharp fall in the value of the Romanian lei, the amount to be repaid almost doubled in the years that followed.

On 23 March 2017, those borrowers brought an action before the Tribunalul Specializat Cluj (Specialist Tribunal, Cluj, Romania) for a declaration that part of the refinancing agreement was unfair. That part provided that payments were to be made in the currency of the loan, but specified that the borrowers could ask the bank for the loan to be denominated in a different currency, without the bank being obliged to grant such a request. It was also provided that the bank was authorised by the borrower to discharge the payment obligations due by using its own exchange rate.

The borrowers also claimed that Banca Transilvania failed to comply with its obligation to provide information by not warning them, when the agreement was negotiated and signed, of the risk inherent in converting into a foreign currency the currency in which the first agreement was denominated. In addition, according to them, the term requiring repayment in a foreign currency created an imbalance to their detriment since they alone bore the exchange risk.

It is against that background that the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) asked the Court of Justice, first, whether Directive 93/13 applies to a contractual term relating to the foreign exchange risk which has not been individually negotiated but which reflects a provision of national law which is supplementary in nature, that is, which applies between contracting parties provided that no other arrangements have been established in that respect. Secondly, that court asked the Court of Justice what conclusions, if any, a national court is to draw from a finding that such a term is unfair.

The Court notes, first of all, that that directive does not apply if two conditions are met: first, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory. That exclusion is justified by the fact that, in principle, it may legitimately be presumed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts (paragraphs 24 and 26).

In order to establish whether the conditions for applying the exclusion are met, the Court states that it is for the national court to determine whether the contractual term in question reflects mandatory provisions of national law that apply between contracting parties independently of their choice or provisions that are supplementary in nature and therefore apply by default, that is to say, in the absence of other arrangements established by the parties in that respect (paragraph 28).

In that regard, the referring court has pointed out that a term relating to the foreign exchange risk reflects the ‘monetary nominalism’ principle, as laid down in Article 1578 of the Civil Code. Pursuant to that provision, ‘the debtor must repay the sum received by way of loan and shall be obliged to repay that sum only in currency that is legal tender at the time of payment’. Furthermore, the referring court has classified that article as a supplementary provision, that is to say, as a provision which applies to loan agreements provided that the parties have made no other arrangements (paragraph 30).

As regards the first condition, since, according to the referring court, the term contained in the general terms and conditions, which is alleged to be unfair by the applicants in the main proceedings, reflects a provision of national law which is supplementary in nature, it comes within the exclusion laid down by Directive 93/13 (paragraph 31).

As regards the second condition, the Court observes that the wording ‘mandatory statutory or regulatory provisions’, within the meaning of Article 1(2) of Directive 93/13, also covers rules which, under national law, apply between contracting parties provided that no other arrangements have been established. From that perspective, that provision makes no distinction between provisions which apply between contracting parties irrespective of their choice and supplementary provisions (paragraph 34).

In that regard, first, the fact that it is possible to derogate from a supplementary provision of national law is irrelevant to the determination of whether a contractual term which reflects such a provision is excluded. Secondly, the fact that a contractual term reflecting one of the provisions referred to in Directive 93/13 has not been individually negotiated has no bearing on whether it is excluded from the scope of that directive (paragraph 35).

The Court concludes that Directive 93/13 does not apply to a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect (paragraph 37 and operative part).

3.2. Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration

Judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, [EU:C:2014:282](#)) ¹²

Exclusion of terms relating to the main subject matter of the contract or the adequacy of the price and the remuneration provided they are drafted in plain intelligible language – Consumer credit contracts denominated in foreign currency – Terms relating to the exchange rate

On 29 May 2008, two borrowers concluded a contract for a mortgage denominated in a foreign currency with a Hungarian bank. The bank advanced the borrowers a loan of 14 400 000 Hungarian forints (HUF) (approximately EUR 46 867).

The contract stipulated that the fixing in Swiss francs of the amount of the loan was to be made on the basis of the buying rate of exchange of that currency applied by the bank on the day the funds were advanced. In accordance with that term, the amount of the loan was fixed at CHF 94 240.84. However, under the contract, the amount in Hungarian forints of each monthly instalment to be paid was to be determined, on the day before the due date, on the basis of the selling rate of exchange for the Swiss franc applied by the bank.

The borrowers challenged before the Hungarian courts the term which authorised the bank to calculate the monthly instalments due on the basis of the selling rate of exchange for the Swiss franc. They relied on the unfairness of that term, in so far as it provided, for the purpose of repayment of the loan, for the application of a rate different from that used when the loan was made available.

The Kúria (Hungarian Supreme Court), hearing the case on appeal, asked the Court of Justice whether the term concerning the exchange rates applicable to a loan contract denominated in foreign currency concerns the main subject matter of the contract or the quality/price ratio of the goods or services supplied. It also sought to ascertain whether the contested term may be regarded as having been drafted in plain intelligible language, and is therefore not subject to an assessment of its unfairness pursuant to the Directive. Finally, the Hungarian high court wished to know whether, if the contract cannot continue in existence if the unfair term is deleted, the national court is authorised to amend or supplement the contract.

The Court recalls, in the first place, that the prohibition on determining the unfairness of terms relating to the main subject matter of the contract must be interpreted strictly and may be applied only to terms laying down the essential obligations of the contract. It is thus for the referring court to determine whether the contested term constitutes an essential obligation of the contract concluded by the two borrowers.

¹² That judgment is also presented in Section III.2. 'Requirements of good faith, balance and transparency' and Section V.2. 'Substitution of the unfair term'.

Furthermore, the Court notes that the examination of the unfairness of the term at issue cannot be avoided on the ground that that term relates to adequacy of the price and the remuneration on one hand as against the services or goods supplied on the other. That term merely determines the conversion rate between Hungarian forints and Swiss francs for the purpose of calculating the repayments, without any foreign exchange service being supplied by the lender. In the absence of such a service, the financial costs resulting from the difference between the buying and selling rates of exchange, which must be borne by the borrower, cannot be regarded as remuneration due as consideration for a service (paragraphs 54 and 58).

Judgment of 20 September 2017, Andriuc and Others (C-186/16, [EU:C:2017:703](#)) ¹³

Loan agreement concluded in a foreign currency – Exchange rate risk born entirely by the consumer – Scope of the concept of terms drafted in ‘plain intelligible language’ – Level of information to be procured by the bank

In 2007 and 2008, a number of borrowers who, at that time, received their income in Romanian lei (RON) took out loans denominated in Swiss francs (CHF) with the Romanian bank Banca Românească with a view to acquiring immovable property, refinancing other credit arrangements or meeting personal needs.

According to the loan agreements concluded between the parties, the borrowers were required to make the monthly loan repayments in CHF and they accepted that the risk related to possible fluctuations in the exchange rate between the RON and the CHF would be borne by them.

Subsequently, the exchange rate concerned changed considerably to the detriment of the borrowers. They brought actions before the Romanian courts seeking declarations that the term according to which the loan must be repaid in CHF, regardless of the potential losses that those borrowers might sustain on account of the exchange rate risk, is an unfair term which is not binding on them in accordance with the provisions of Directive 93/13. The borrowers argued, in particular, that at the time of conclusion of the contracts, the bank presented its product in a biased manner, emphasising only the advantages to the borrowers, while failing to point out the potential risks and the likelihood of those risks materialising. According to the borrowers, in the light of the bank's practice, the disputed term must be regarded as being unfair.

Against that background, the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania) asked the Court of Justice about the extent of the obligation on banks to inform clients of exchange rate risks related to loans denominated in foreign currencies.

The Court declares that the disputed term is part of the main subject matter of the loan agreement, so that its unfairness may be examined in the light of Directive 93/13 only if it was not drafted in plain intelligible language. The obligation to repay a loan in a certain currency constitutes an essential element of the loan agreement, since it relates not to an ancillary repayment arrangement, but to the very nature of the debtor's obligation (paragraph 38).

¹³ That judgment is also presented in Section III.2. 'Requirements of good faith, balance and transparency'.

Judgment of 3 September 2020, Profi Credit Polska and Others (C-84/19, C-222/19 and C-252/19, [EU:C:2020:631](#))¹⁴

Article 4(2) – Obligation to draft contract terms in plain intelligible language – Contractual terms which do not specify the services for which remuneration is sought

Profi Credit Polska concluded a consumer credit agreement with a borrower through an intermediary. That agreement provided for an interest rate of 9.83% per annum, as well as an initial payment of 129 Polish zloty (PLN) (approximately EUR 30), a commission fee of PLN 7 771 (approximately EUR 1 804) and a sum of PLN 1 100 (approximately EUR 255) in respect of a financial product called ‘Your Package – Extra Package’.

Profi Credit Polska sought an order for payment based on a promissory note issued by the borrower before the referring court, the Sąd Rejonowy Szczecin – Prawobrzeże i Zachód w Szczecinie (District Court, Szczecin, Prawobrzeże and Zachód districts, Poland). That court handed down a default judgment, against which the borrower lodged an objection and in which context he argued that some provisions of the loan agreement were unfair.

The referring court found that that agreement did not define the concepts of ‘initial payment’ or ‘commission fee’ or specify the particular services to which they corresponded.

Thus, it asked the Court whether Article 4(2) of Directive 93/13 must be interpreted as meaning that terms of a consumer credit agreement, which impose on the consumer costs other than the payment of contractual interest, fall within the exception provided for in that provision, where those terms do not specify either the nature of those charges or the services which they are intended to reimburse. According to the referring court, an assessment of the unfairness of those terms is possible in the light of the wording of Article 4(2) of Directive 93/13. In particular, according to that court, the issue of the amount of the payments could fall within the exception of the ‘main subject matter of the contract’ or ‘the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other’, within the meaning of that provision.

In that regard, the referring court notes that there are significant differences between the wording of Article 4(2) of Directive 93/13 and that of Article 3851(1) of the Polish Civil Code, which transposed the former provision into national law. It follows from that article of the Civil Code that the assessment of unfairness by the national court is excluded only as regards the adequacy of the price and remuneration of the parties’ main service.

According to the Court, Article 4(2) of Directive 93/13 must be interpreted as meaning that those terms do not fall within the exception provided for in that provision where they do not specify either the nature of those costs or the services which they are intended to remunerate and where they are formulated in such a way as to give rise to confusion on the part of the consumer as to his or her obligations and the economic consequences of those terms (paragraph 86 and operative part, paragraph 3).

¹⁴ That judgment is also presented in Section I.4. ‘National legislation ensuring a higher level of consumer protection’.

Judgment of 12 January 2023, D.V. (Lawyers' fees – Principle of an hourly rate), (C-395/21, EU:C:2023:14) ¹⁵

Contract for the provision of legal services concluded between a lawyer and a consumer – Article 4(2) – Exclusion of terms relating to the main subject matter of the contract – Term providing for the payment of lawyers' fees on the basis of an hourly rate

M.A., as a consumer, concluded five contracts for the provision of legal services with D.V., a lawyer. Each of those contracts provided that the lawyer's fees were to be calculated on the basis of an hourly rate, fixed at EUR 100 for each hour of consultation or of provision of legal services to M.A.

When she did not receive all the fees claimed, D.V. brought an action before the court of first instance seeking an order that M.A. pay the fees due in respect of the legal services performed. The court of first instance upheld D.V.'s claim in part. However, it found the contractual term regarding the price of the services provided to be unfair and reduced the fees claimed by half. After that judgment was upheld by the appeal court, D.V. brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

On a request for a preliminary ruling from that court, the Court of Justice rules on the interpretation of Directive 93/13.

The Court finds that a term in a contract for the provision of legal services concluded between a lawyer and a consumer, which sets the cost of the services provided on the basis of an hourly rate, falls within the 'main subject matter of the contract' under Directive 93/13 (operative part, paragraph 1).

4. National provisions affording a higher level of consumer protection

Judgment of 3 June 2010, Caja de Ahorros y Monte de Piedad de Madrid (C-484/08, EU:C:2010:309)

Terms defining the main subject matter of the contract – Assessment by the courts as to their unfairness – Excluded – More stringent national provisions designed to afford a higher level of consumer protection

Caja de Ahorros y Monte de Piedad de Madrid ('Caja de Madrid') concluded with its clients variable-rate mortgage loan agreements for the purchase of residential property. Those agreements contained a clause pursuant to which the nominal interest rate laid down in those agreements, variable from time to time in accordance with the agreed reference index, was to

¹⁵ That judgment is also presented in Section II.1 'Concept of "unfair terms"', Section III.2 'Requirements of good faith, balance and transparency' and Section V.2 'Substitution of the unfair term'.

be rounded up, with effect from the first revision, to the next quarter of a percentage point ('the rounding-up term').

In the context of an action brought by the Asociación de Usuarios de Servicios Bancarios (the Spanish association of users of banking services), the Juzgado de Primera Instancia No 50 de Madrid (Court of First Instance No 50, Madrid, Spain) held that the rounding-up term was unfair, in accordance with the national legislation which had transposed Directive 93/13. After its appeal was dismissed, Caja de Madrid appealed in cassation against that judgment to the referring court, the Tribunal Supremo (Supreme Court, Spain).

The Court points out that the system of protection introduced by 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. That directive carried out only a partial and minimum harmonisation of national legislation concerning unfair terms, while recognising that Member States have the option of affording consumers a higher level of protection than that for which the Directive provides.

The Court thus pointed out that the Member States may retain or adopt, in the entire area covered by the Directive, rules more stringent than those laid down by the Directive itself, provided that they are designed to ensure a greater degree of consumer protection. Consequently, the Court concluded that Directive 93/13 does not preclude national legislation which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language (paragraphs 27, 28, 40, 44 and operative part, paragraph 1).

Judgment of 3 September 2020, Profi Credit Polska and Others (C-84/19, C-222/19 and C-252/19, [EU:C:2020:631](#))

National provision providing for the maximum amount of non-interest credit costs – Article 3(1) – Contractual term passing on to the consumer costs of the lender's business activity – Significant imbalance between the rights and obligations of the parties – Article 4(2)

In that judgment, the factual and legal context of which is set out above,¹⁶ the Court also states that, in so far as Article 3851(1) of the Civil Code, which transposed Article 4(2) of Directive 93/13 into Polish law, confers a stricter scope on the exception established by that provision of EU law, by ensuring a higher level of protection for the consumer, which is, however, for the referring court to determine, it allows for a more extensive review of the possible unfairness of contractual terms that fall within the scope of that directive (paragraph 83).

¹⁶ As regards the factual and legal context of the dispute, see Section I.3.3.2 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration', p. 12.

In that regard, Article 8 of Directive 93/13 provides that Member States may adopt or retain the most stringent provisions compatible with the FEU Treaty in the area covered by that directive, to ensure a maximum degree of protection for the consumer. That reflects the idea set out in the 12th recital of that directive, according to which that directive brings about only a partial and minimum harmonisation of national legislation concerning unfair terms (paragraph 84). In its case-law, the Court has already held that a provision of national law, which confers a stricter scope on the exception laid down in Article 4(2) of Directive 93/13, contributes to the objective of consumer protection pursued by that directive (paragraph 85).

II. Classification as an 'unfair term' within the meaning of Article 3 of Directive 93/13

1. Concept of 'unfair terms'

Judgment of 27 June 2000, Océano Grupo Editorial (C-240/98 to C-244/98, [EU:C:2000:346](#)) ¹⁷

Jurisdiction clause

Contracts for the sale of encyclopaedias to consumers contained a term conferring jurisdiction on the courts in Barcelona (Spain), a city in which none of the consumers was domiciled but where the plaintiffs in those proceedings had their principal place of business.

The purchasers of the encyclopaedias did not pay the sums due on the agreed dates, and, between 25 July and 19 December 1997, the sellers brought actions ('juicio de cognición' – a summary procedure available only for actions involving limited amounts of money) in the Juzgado de Primera Instancia No 35 de Barcelona (Court of First Instance No 35, Barcelona, Spain) to obtain an order that the defendants in the main proceedings should pay the sums due.

Notice of the claims was not served on the defendants since the national court had doubts as to whether it had jurisdiction over the actions in question. Indeed, on several occasions the Tribunal Supremo (Supreme Court, Spain) had held jurisdiction clauses of the kind at issue in these proceedings to be unfair.

The Juzgado de Primera Instancia No 35 de Barcelona (Court of First Instance No 35, Barcelona) took the view that an interpretation of the Directive was necessary to enable it to reach a decision in the proceedings before it. It decided to stay the proceedings and to ask the Court of Justice whether the scope of the consumer protection provided by Directive 93/13 is such that the national court may determine of its own motion whether a term of a contract is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the ordinary courts.

By that judgment, the Court holds that, where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of that directive, in so far as such a term causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (paragraph 24).

¹⁷ That judgment is also presented in Section IV.2. 2.1. 'Obligation to examine *ex officio* the unfairness of a contractual term – Scope of the obligation'.

The Court states that a term of this kind obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive. By contrast, the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so (paragraphs 22 and 23).

Judgment of 7 August 2018, Banco Santander (C-96/16 and C-94/17, [EU:C:2018:643](#))¹⁸

Assignment of debts – Loan agreement concluded with a consumer – Criteria for assessing the unfairness of a contractual term setting the default interest rate

A borrower concluded with Caja de Ahorros del Mediterráneo, now Banco de Sabadell, a mortgage loan agreement payable in monthly instalments. The contract stipulated that the default interest rate was 25% per annum.

The borrower, who had fallen into arrears, brought an action against Banco de Sabadell before the Juzgado de Primera Instancia (Court of First Instance, Spain) requesting, inter alia, that it declare the latter term void on the ground that it was unfair. According to him, since the term of the loan agreement at issue in the main proceedings fixing the default interest rate had been found to be unfair, that agreement should no longer bear either default or ordinary interest.

The settled case-law of the Tribunal Supremo (Supreme Court, Spain) provides that terms which require a consumer who fails to fulfil his obligations to pay a disproportionately high sum in compensation are considered unfair. In the case of personal loan or mortgage loan agreements concluded with consumers, non-negotiated contractual terms relating to default interest that satisfies the criterion whereby the rate of that interest exceeds by more than two percentage points the rate of the ordinary interest agreed between the parties to the contract have to be declared unfair.

The Tribunal Supremo (Supreme Court), hearing an appeal in the case, asked the Court whether such case-law was contrary to Directive 93/13.

In that judgment, the Court holds that Directive 93/13 does not preclude national case-law, such as that of the Tribunal Supremo (Supreme Court), whereby, in a loan agreement concluded with a consumer, a non-negotiated term fixing the default interest rate applicable is unfair, on the ground that the consumer who is late performing his payment obligation is required to pay a disproportionately high sum in compensation, where that rate exceeds by more than two

¹⁸ That judgment is also presented in Section V.3. 'Other effects'.

percentage points the ordinary interest rate provided for in that agreement (operative part, paragraph 2).

In that regard, it cannot be excluded that, in their role of ensuring consistency in the interpretation of the law, and in the interests of legal certainty, the supreme courts of a Member State, such as the Tribunal Supremo (Supreme Court), may, in compliance with Directive 93/13, elaborate certain criteria in the light of which the lower courts must examine the unfairness of contractual terms. The case-law of the Tribunal Supremo (Supreme Court) admittedly does not appear to come within the ambit of the stricter measures which may be adopted by the Member States in order to ensure a higher level of protection for consumers pursuant to Article 8 of that directive, given, in particular, that that case-law does not appear to have the force of law or constitute a source of law in the Spanish legal order. However, the fact remains that the development of a criterion derived from case-law, such as that identified in the present case by the Tribunal Supremo (Supreme Court), is wholly consistent with the objective of consumer protection pursued by that directive (paragraph 68).

It follows from Article 3(1) of Directive 93/13 and from the general scheme of the Directive that the latter does not so much aim to guarantee an overall contractual balance between the rights and obligations of the parties to the agreement as to prevent an imbalance between those rights and obligations from arising to the detriment of consumers (paragraph 69).

Judgment of 9 July 2020, Ibercaja Banco (C-452/18, [EU:C:2020:536](#)) ¹⁹

***Mortgage loan agreement – Term limiting the variability of the interest rate ('floor' term) –
Novation agreement – Waiver of the right to bring an action contesting the terms of a contract –
Non-binding***

A borrower acquired a property from a developer and, in so doing, took the place of that developer as debtor of the mortgage loan relating to that property granted by the credit institution Caja de Ahorros de la Inmaculada de Aragón, now Ibercaja Banco. The borrower thus accepted all the agreements and conditions relating to that mortgage loan as defined between the original debtor and the credit institution.

On 9 May 2013, the Tribunal Supremo (Supreme Court, Spain) declared that 'floor' terms in mortgage loan agreements are void unless they meet the requirements of clarity and transparency. In accordance with that case-law, Ibercaja Banco began a process of renegotiating those terms in the mortgage loan agreements that it had entered into.

Thus, the mortgage loan agreement between the borrower and Ibercaja Banco was the subject of a novation agreement relating, inter alia, to the interest rate stipulated in the 'floor' term, that rate having been reduced. The novation agreement also contained a term whereby the borrower waived the effects that would result from the 'floor' term being found to be unfair.

¹⁹ That judgment is also presented in Section II.2. 'Concept of "contractual term which has not been individually negotiated"', Section III.2 'Requirements of good faith, balance and transparency' and Section V.3. 'Other effects'.

The borrower brought an action before the referring court, the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain), asking that court to declare that the 'floor' term in the mortgage loan agreement was unfair, and to order the credit institution to remove that term and to reimburse her the sums unduly paid on the basis of that term since the loan agreement was concluded.

As Ibercaja Banco relied on the terms of the novation agreement to contest the borrower's claims, it asked the referring court to specify to what extent legal documents amending a contract, in particular one of its terms which is claimed to be unfair, are also 'contaminated' by that term and, consequently, lose binding force.

Nevertheless, the referring court expressed doubts as to whether the renegotiation of an unfair term is compatible with the principle laid down in Article 6(1) of Directive 93/13, according to which unfair terms are not binding on consumers.

In that judgment, the Court holds that a distinction must be drawn between the waiver of rights of action where so stipulated in an agreement, such as a settlement, the very purpose of which is the resolution of a dispute between a seller or supplier and a consumer, and the prior waiver of any rights of action included in a contract concluded between a consumer and a seller or supplier (paragraph 67).

First, it considers that a term included in a contract concluded between a seller or supplier and a consumer with a view to resolving an existing dispute, whereby the consumer waives the right to submit to a national court claims that he or she could have submitted in the absence of that term, may be regarded as 'unfair', in particular where the consumer was not provided with the relevant information enabling him or her to understand the legal consequences for him or her (operative part, paragraph 4, first indent). The fact that a seller or supplier and a consumer mutually waive the right to bring legal proceedings relating to a contractual term does not prevent the national court from examining the unfairness of such a term, in so far as that term is capable of producing binding effects with regard to the consumer (paragraph 64).

Secondly, the Court considers that a term whereby the same consumer waives, in respect of future disputes, the right to take legal action based on his or her rights under Directive 93/13 is not binding on the consumer (operative part, paragraph 4, second indent). Indeed, a consumer may not legitimately waive, for the future, the legal protection and the rights that he or she derives from Directive 93/13. The Court states that, by definition, he or she cannot appreciate the consequences of agreeing to such a term as regards disputes which may arise in the future (paragraph 75).

Judgment of 12 January 2023, D.V. (Lawyers' fees – Principle of an hourly rate), (C-395/21, [EU:C:2023:14](#))

Contract for the provision of legal services concluded between a lawyer and a consumer – Article 4(2) – Assessment of the unfairness of contractual terms – Term providing for the payment of lawyers' fees on the basis of an hourly rate

In that judgment, the factual and legal context of which is set out above,²⁰ the Court also recalls that the assessment of the unfair character of a term in a contract concluded with a consumer is based, in principle, on an overall assessment which does not take account solely of the possible lack of transparency of that term. However, it is open to the Member States to ensure a maximum degree of protection for the consumer (paragraph 49).

Consequently, the Court holds that a term in a contract for the provision of legal services concluded between a lawyer and a consumer, which sets the price of those services on the basis of an hourly rate and therefore falls within the main subject matter of that contract, is not to be considered unfair simply on the ground that it does not satisfy the requirement of transparency, unless the Member State whose national law applies to the contract in question has expressly provided for classification as an 'unfair term' simply on that ground (operative part, paragraph 3).

2. Concept of 'contractual term which has not been individually negotiated'

Judgment of 20 September 2018, OTP Bank and OTP Faktoring (C-51/17, [EU:C:2018:750](#))

Article 3(1) – Concept of 'contractual term which has not been individually negotiated' – Term incorporated in the contract after its conclusion following the intervention of the national legislature

In that judgment, the factual and legal context of which is set out above,²¹ the Court also points out that the concept of 'term which has not been individually negotiated' in Article 3(1) of Directive 93/13 covers inter alia a contractual term amended by a mandatory national statutory provision adopted after the conclusion of a contract with a consumer, for the purpose of removing a term which is null and void from that contract (operative part, paragraph 1).

²⁰ As regards the factual and legal context of the dispute, see Section I.3. 3.2 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration', p. 13. That judgment is also presented in Section III.2 'Requirements of good faith, balance and transparency' and Section V.2 'Substitution of the unfair term'.

²¹ As regards the factual and legal context of the dispute, see Section I.3. 3.1 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms which reflect mandatory statutory or regulatory provisions', p. 7. That judgment is also presented in Section III.2 'Requirements of good faith, balance and transparency'.

Judgment of 9 July 2020, Ibercaja Banco (C-452/18, [EU:C:2020:536](#))***Mortgage loan agreement – Term limiting the variability of the interest rate ('floor' term) –
Novation agreement***

In that judgment, the factual and legal context of which is set out above,²² the Court also states that a term in a contract concluded between a seller or supplier and a consumer for the purpose of amending a potentially unfair term in a previous contract concluded between them, or for the purpose of dealing with the consequences of that other term being unfair, may itself be regarded as not having been individually negotiated and, where appropriate, be found to be unfair (operative part, paragraph 2).

The Court points out that the fact that the new term is intended to amend an earlier term which was not individually negotiated does not in itself relieve the national court of the obligation to verify whether the consumer was actually able to influence, within the meaning of Article 3(2) of Directive 93/13, the substance of that new term. Therefore, it is for the referring court to take account of all the circumstances in which such a term was presented to the consumer for the purposes of determining whether the consumer was able to influence its substance (paragraphs 34 and 35).

3. Concept of 'significant imbalance' to the detriment of the consumer***Judgment of 14 March 2013, Aziz (C-415/11, [EU:C:2013:164](#))***²³***Mortgage loan agreement – Mortgage enforcement proceedings – Powers of the court hearing the
declaratory proceedings – Unfair terms – Assessment criteria***

The case originated in a reference for a preliminary ruling from a Spanish court in an action by a consumer for a declaration that a number of terms contained in a loan agreement secured by a mortgage were unfair, and for annulment of the enforcement proceedings against the consumer.

Those terms related to the setting of default interest automatically applicable to sums not paid when due, without the need for any notice, to acceleration in long-term contracts, and to the unilateral determination by the lender of methods of quantifying the whole debt by submitting an appropriate certificate indicating the amount due. Entertaining doubts as to the compatibility of those terms with the provisions of Directive 93/13, the referring court referred the matter to the Court for a preliminary ruling (paragraph 30).

In that context, the Court holds that the concept of 'significant imbalance' to the detriment of the consumer, within the meaning of Article 3(1) of Directive 93/13, must be assessed in the light of

²² As regards the factual and legal context of the dispute, see Section II.1 entitled 'Concept of "unfair terms"' p. 18. That judgment is also presented in Section III.2 'Requirements of good faith, balance and transparency' and Section V.3. 'Other effects'.

²³ That judgment is also presented in Section IV.3. 'The grant of interim relief'.

an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms should also be carried out (operative part, paragraph 2).

Judgment of 16 January 2014, Constructora Principado (C-226/12, [EU:C:2014:10](#))

Contract for the purchase of immovable property – Unfair terms – Criteria for assessment

On 26 June 2005, an individual entered into a contract with Constructora Principado for the purchase of a dwelling. A term of the contract required the consumer to pay the municipal tax on the increase in value of urban land, and to pay the price of connecting the dwelling to the water and drainage system, which were by law payable by the seller or supplier.

That individual brought an action against Constructora Principado before the Juzgado de Primera Instancia No 2 de Oviedo (Court of First Instance No 2, Oviedo, Spain) for repayment of those sums. The claim was based on the ground that the term at issue, under which the purchaser had to pay those sums, should be considered unfair in that it was not negotiated, and it caused a significant imbalance in the rights and obligations of the parties to the contract.

Constructora Principado contended that there was no significant imbalance between the parties because the assessment of such an imbalance could not be limited to taking into account a specific term but should involve consideration of the contract as a whole and the weighing up of all its terms.

Hearing the case on appeal, the Audiencia Provincial de Oviedo (Provincial Court, Oviedo, Spain) asked the Court whether the imbalance referred to in Article 3(1) of Directive 93/13 is to be interpreted as arising merely from the act of passing on to the consumer an obligation to pay which by law falls on the seller or supplier, or does the fact that the Directive requires the imbalance to be significant mean that the financial burden on the consumer must be significant in relation to the total amount of the transaction.

In its judgment, the Court rules that the existence of a ‘significant imbalance’ does not necessarily require that the costs charged to the consumer by a contractual term have, as regards that consumer, a significant economic impact having regard to the value of the transaction in question, but can result solely from a sufficiently serious impairment of the legal situation in which that consumer, as a party to the contract, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under that contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules (operative part).

The Court states that in assessing whether there is a significant imbalance, it is for the referring court to take into account the nature of the goods or services for which the contract was

concluded by referring to all the circumstances attending the conclusion of that contract, as well as all the other terms of contract (operative part).

III. Assessment of the unfairness of a contractual term

1. Criteria for assessment

Judgment of 9 November 2010 (Grand Chamber), VB Pénzügyi Lízing (C-137/08, EU:C:2010:659) ²⁴

Criteria for assessment – Examination by the national court of its own motion of the unfairness of a term conferring jurisdiction

The parties to the main proceedings concluded a loan contract to finance the purchase of a car.

When the other party to the contract ceased to fulfil his contractual obligations, VB Pénzügyi Lízing, the applicant, terminated that loan contract and brought an action before the referring court for the repayment of a debt of 317 404 Hungarian forints (HUF) with interest on the outstanding amount and costs.

The applicant undertaking did not bring its application for a payment order before the court corresponding to the place where the other party to the contract, the defendant, lived but relied on the term conferring jurisdiction included in that loan contract which conferred jurisdiction in any dispute between the parties on the Budapesti II. és III. kerületi bíróság (Court of Districts II and III, Budapest, Hungary), the referring court in the present case.

The referring court found that the defendant did not live within its territorial jurisdiction, although the rules of civil procedure provide that the court which has jurisdiction to hear a dispute such as that before it is the court within whose jurisdiction the defendant lives.

The referring court nevertheless wished to ask the Court what criteria the national courts may take into account in the context of the examination of the unfairness of a term, in particular in the case that the contractual term does not grant jurisdiction to the judicial body corresponding to the registered office of the service provider, but to a different judicial body which is located close to that registered office.

In its judgment, the Court was required to expand upon the judgment in *Pannon GSM* (C-243/08). ²⁵ In so doing, it held that Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court extends to the interpretation of the concept of ‘unfair term’ used in Article 3(1) of Directive 93/13, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that Directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case (operative part, paragraph 2).

²⁴ That judgment is also presented in Section IV.2. 2.1, ‘Obligation to examine *ex officio* the unfairness of a contractual term – Scope of the obligation’.

²⁵ Judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350) presented in Section IV.2. 2.1, ‘Obligation to examine *ex officio* the unfairness of a contractual term – Scope of the obligation’.

The unfairness of a contractual term is to 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 it, including the fact that a term which is contained in a contract concluded between a consumer and a seller or supplier and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business has been included without being individually negotiated (paragraphs 42 and 43)

Judgment of 26 April 2012, Invitel (C-472/10, [EU:C:2012:242](#)) ²⁶

Unilateral amendment of the terms of a contract by a seller or supplier – Action for an injunction brought in the public interest and on behalf of consumers by a body appointed by national legislation – Declaration of the unfair nature of a term

The Nemzeti Fogyasztóvédelmi Hatóság (Hungarian national consumer protection authority; ‘the NFH’) is empowered to apply to the Hungarian courts for a declaration of invalidity of an unfair term included in a consumer contract if the use of such a term by a seller or supplier affects a wide range of consumers or causes substantial disadvantage. According to the Hungarian legislation, a declaration of invalidity made by a court following public-interest proceedings (class action) applies to any consumer who has concluded a contract with a seller or supplier which includes that term.

The NFH had received a large number of complaints from consumers concerning a fixed-line telephone operator which had unilaterally inserted into the general conditions of subscriber contracts a term under which it was entitled to invoice customers retroactively for the fees charged in the event of payment of invoices by money order. Furthermore, the method of calculation of those money order fees had not been specified in those contracts.

Taking the view that the term in question constituted an unfair contractual term, and since the operator refused to amend that term, the NFH brought an action before the Pest Megyei Bíróság (Pest County Court, Hungary) with a view to obtaining a declaration that the contested term was void on account of being unfair, and the automatic and retroactive reimbursement to subscribers of the amounts wrongly invoiced and received as ‘money order fees’. However, that court took the view that the outcome of the dispute depended on the interpretation of relevant provisions of Directive 93/13.

As regards the assessment of whether the term which it was requested to appraise was unfair, the Court states that that assessment falls within the jurisdiction of the national court ruling on an action brought in the public interest, and on behalf of consumers, by a body appointed by national law. It is for that court to assess, with regard to Article 3(1) and (3) of Directive 93/13, the unfair nature of a term such as that at issue in the present case. As part of this assessment, that court must determine, inter alia, whether, in light of all the terms appearing in the general business conditions of consumer contracts and in the light of the applicable national legislation, the reasons for, or the method of, the amendment of the fees connected with the service to be

²⁶ That judgment is also presented in Section VI.1. ‘Collective actions or actions in the public interest’.

provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract (operative part, paragraph 1).

2. Requirements of good faith, balance and transparency

Judgment of 21 March 2013, RWE Vertrieb (C-92/11, [EU:C:2013:180](#))

Directive 2003/55/EC – Internal market in natural gas – Directive 93/13/EEC – Contracts between suppliers and consumers – Unilateral alteration by the supplier of the price of the service – Reference to mandatory legislation designed for another category of consumers – Applicability of Directive 93/13 – Obligation of use of plain and intelligible language and transparency

In that judgment, the factual and legal context of which is set out above,²⁷ as regards the possible unfairness of the disputed term, the Court finds that the EU legislature recognised that, in the context of contracts of indefinite duration such as contracts for the supply of gas, the supplying undertaking has a legitimate interest in altering the charges for its service. A standard term allowing such a unilateral alteration must however satisfy the requirements of good faith, balance and transparency. In this respect, the Court points out that ultimately it is not for the Court but for the national court to determine in each particular case whether that is so. When making that assessment, the national court must accord fundamental importance to certain criteria specified by the Court (paragraphs 45 to 48).

The contract must set out in transparent fashion the reason for and method of the variation of the charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges (paragraph 49).

The Court points out in that regard that the lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation (paragraph 51).

The right of termination conferred on the consumer must actually be capable of being exercised in the specific circumstances. That would not be the case if, for reasons connected with the details of the termination procedure or the conditions of the market concerned, the consumer has no real possibility of changing supplier, or if he has not been informed suitably and in good time of the change (paragraph 54).

²⁷ As regards the factual and legal context of the dispute, see Section I.3. 3.1 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms which reflect mandatory statutory or regulatory provisions', p. 6.

Judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, [EU:C:2014:282](#))

Exclusion of terms relating to the main subject-matter of the contract or the adequacy of the price and the remuneration provided they are drafted in plain intelligible language – Consumer credit contracts denominated in foreign currency – Terms relating to the exchange rate

In that judgment, the factual and legal context of which is set out above,²⁸ the Court states that a term defining the main subject matter of the contract is exempt from an assessment of its unfairness only if it is drafted in plain, intelligible language. In that connection, the Court states that such a requirement is not limited to clarity and intelligibility from a purely structural and grammatical point of view. To the contrary, the loan contract must set out in a transparent fashion the reason for and the particularities of the mechanism for converting the foreign currency. Thus, it is for the national court to determine whether the average consumer, who is reasonably well informed and reasonably observant and circumspect, on the basis of the promotional material and information provided by the lender in the negotiation of the loan contract, would not only be aware of the existence of the difference between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the consequences arising from the application of the selling rate of exchange for the calculation of the repayments and for the total cost of the sum borrowed (paragraphs 73 and 76).

Judgment of 20 September 2017, Andriuc and Others (C-186/16, [EU:C:2017:703](#))

Loan agreement concluded in a foreign currency – Exchange rate risk born entirely by the consumer – Significant imbalance in the parties' rights and obligations arising under the contract – Time at which the imbalance must be assessed – Scope of the concept of terms drafted in 'plain intelligible language' – Level of information to be procured by the bank

In that judgment, the factual and legal context of which is set out above,²⁹ the Court recalls that the requirement that a contractual term must be drafted in plain intelligible language also requires the contract to set out transparently the specific functioning of the mechanism to which the relevant term relates. Where appropriate, the contract must also explain the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it. That question must be examined by the national court in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement (paragraphs 45 and 46).

More specifically, it is for the national court to ascertain whether all the information likely to have a bearing on the extent of his commitment has been communicated to the consumer, enabling him to estimate the total cost of his loan (paragraph 47).

²⁸ As regards the factual and legal context of the dispute, see Section I.3. 3.2 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration', p. 10. That judgment is also presented in Section V.2. 'Substitution of the unfair term'.

²⁹ As regards the factual and legal context of the dispute, see Section I. 3.3.2 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration' p. 11.

In that context, the Court states that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions. Thus, that information should inform consumers not only as to the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, but also the impact on repayments of fluctuations of the interest rate and a rise in the interest rate in the currency of the loan (paragraph 49).

Therefore, first, the borrower must be clearly informed of the fact that, in entering into a loan agreement denominated in a foreign currency, he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income. Second, the financial institution must explain the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency (paragraph 50).

The Court also states that if the bank has not fulfilled those obligations to inform, warn and advise, and its duty to draft contractual terms in plain and intelligible language and, therefore, the unfairness of the disputed term may be examined, it is for the national court to assess, first, the possible failure by the bank to observe the requirement of good faith and second, the existence of a significant imbalance between the parties to the contract. That assessment must be made by reference to the time of conclusion of the contract concerned, taking account of the expertise and knowledge of the bank as far as concerns the possible variations in the rate of exchange and the inherent risks in contracting a loan in a foreign currency. In that connection, the Court states that a contractual term may give rise to an imbalance between the parties which only manifests itself during the performance of the contract (paragraphs 54 to 57).

Judgment of 20 September 2018, OTP Bank and OTP Faktoring (C-51/17, [EU:C:2018:750](#))

Term incorporated in the contract after its conclusion following the intervention of the national legislature – Article 4(2) – Plain and intelligible drafting of a term

In that judgment, the factual and legal context of which is set out above,³⁰ the Court clarifies the scope of the requirement for a contractual term to be drafted in plain intelligible language (paragraph 73).

In that regard, the Court takes the view that financial institutions are required to provide borrowers with adequate information to enable them to take well-informed and prudent decisions. This means that a term relating to the foreign exchange risk must be understood by the consumer both at the formal and grammatical level and also in terms of its actual effects. It follows that an average consumer, who is reasonably well informed and reasonably observant and circumspect, must not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations (paragraph 78).

³⁰ As regards the factual and legal context of the dispute, see Section I.3. 3.1 entitled ‘Exclusions from the scope of Directive 93/13 – Contractual terms which reflect mandatory statutory or regulatory provisions’ p. 7. That judgment is also presented in Section II.2. ‘Concept of “contractual term which has not been individually negotiated”’.

Furthermore, the Court states that the plainness and intelligibility of the contractual terms must be assessed 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, notwithstanding that some of those terms have been declared or presumed to be unfair and, accordingly, annulled at a later time by the national legislature (paragraph 83 and operative part, paragraph 4).

Judgment of 3 October 2019, Kiss and CIB Bank (C-621/17, [EU:C:2019:820](#))

Requirement that contractual terms be drafted in plain and intelligible language – Terms requiring the payment of costs for unspecified services

The applicant in the main proceedings had concluded a loan contract for EUR 16 451 with the company which was the legal predecessor of CIB, at an annual interest rate of 5.4% and management charges of 2.4% per annum, over a period of 20 years. The applicant was also required to pay, under the terms of the contract, the sum of 40 000 Hungarian forints (HUF) (approximately EUR 125) as a disbursement commission.

The applicant brought an action before the Győri Törvényszék (Regional Court, Győr, Hungary) for a declaration that the terms relating to the management charges and the disbursement commission were unfair on the ground that the services to be provided in return were not specified in the contract.

In its defence, CIB argued that it was not under any obligation to specify the services covered by the management charges and the disbursement commission. It stated, however, that the disbursement commission corresponded to the formalities carried out before the contract was concluded, while the management charges covered the formalities to be fulfilled after the contract had been concluded.

Hearing that dispute on appeal, the Kúria (Supreme Court, Hungary) asked the Court whether the terms at issue in the main proceedings were drafted in a clear and comprehensible manner and how it should assess whether they may be unfair.

The Court holds that the requirement that a contractual term be drafted in plain, intelligible language does not require that non-individually negotiated contractual terms in a loan contract concluded with a consumer, such as those at issue in the main proceedings, which specify the exact amount of management charges and of a disbursement commission to be borne by the consumer, their method of calculation and the time when they have to be paid, also have to indicate all of the services provided in return for the amounts concerned (operative part, paragraph 1).

However, the Court states that it is necessary that the nature of the services actually provided can reasonably be understood or inferred from a consideration of the contract as a whole. In addition, the consumer must be able to establish that there is no overlapping of the different charges or of the services which they cover. Thus, the referring court must examine whether that is the case in the light of all the relevant facts, including not only the terms contained in the

agreement concerned, but also the promotional material and information provided by the lender in the negotiation of the loan agreement (paragraphs 43 and 44).

Moreover, the Court rules that a contractual term in relation to charges for the management of a loan contract, when it cannot be unequivocally determined what specific services are provided in return for those charges, does not in principle cause, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer (operative part, paragraph 2). Indeed, the Court states that, unless the services provided in return do not reasonably come within the scope of the services provided in connection with the management or disbursement of the loan, or the amounts of those charges and that commission to be borne by the consumer are disproportionate in relation to the amount of the loan, it does not appear, subject to verification by the referring court, that the terms in relation to the charges for the management of the loan and the disbursement commission adversely affect the consumer's legal position as provided for under national law. It is for the referring court also to take into account the effect of the other contractual terms in order to determine whether those clauses cause a significant imbalance to the detriment of the borrower (paragraph 55).

Judgment of 9 July 2020, Ibercaja Banco (C-452/18, [EU:C:2020:536](#))

***Mortgage loan agreement – Term limiting the variability of the interest rate ('floor' term) –
Novation agreement***

In that judgment, the factual and legal context of which is set out above,³¹ the Court states, moreover, that the requirement of transparency incumbent on a seller or supplier under Directive 93/13³² means that, when concluding a mortgage loan agreement subject to a variable interest rate that contains a 'floor' term, the consumer must be placed in a position to understand the economic consequences that the mechanism initiated by such a term will cause for him or her, in particular by means of being provided with information on past changes in the index on the basis of which the interest rate is calculated (operative part, paragraph 3).

Judgment of 12 January 2023, D.V. (Lawyers' fees – Principle of an hourly rate), (C-395/21, [EU:C:2023:14](#))

***Contract for the provision of legal services concluded between a lawyer and a consumer –
Article 4(2) – Assessment of the unfairness of contractual terms – Term providing for the payment
of lawyers' fees on the basis of an hourly rate***

In that judgment, the factual and legal context of which is set out above,³³ the Court examines whether a term in a contract for the provision of legal services concluded between a lawyer and

³¹ As regards the factual and legal context of the dispute, see Section II.1 entitled 'Concept of "unfair terms"' p. 18. That judgment is also presented in Section II.2. 'Concept of "contractual term which has not been individually negotiated"' and Section V.3. 'Other effects'.

³² Article 3(1), Article 4(2), and Article 5, of Directive 93/13.

³³ As regards the factual and legal context of the dispute, see Section I.3. 3.2 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration', p. 13. That judgment is also presented in Section II.1 'Concept of "unfair terms"' and Section V.2 'Substitution of the unfair term'.

a consumer, which sets the price of the services provided on the basis of an hourly rate, without including any further information other than the hourly rate charged, meets the requirement of being drafted in plain intelligible language. In that regard, the Court points out that, given the nature of the services which are the subject matter of a contract for the provision of legal services, it is often difficult, if not impossible, for the supplier to predict, at the time the contract is concluded, the exact number of hours needed to provide such services and, consequently, the actual total cost of those hours (paragraph 41). However, although a seller or supplier cannot be required to inform the consumer of the final financial consequences of his or her commitment, which depend on future events which are unpredictable and beyond the control of that seller or supplier, the seller or supplier is required to provide to the consumer, before the conclusion of the contract, with information that enables him or her to take a prudent decision in full knowledge of the possibility that such events may occur and of the consequences which they are likely to have with regard to the duration of the provision of legal services (paragraph 43).

That information, which may vary according to, on the one hand, the subject matter and nature of the services provided for and, on the other, the applicable rules of professional conduct, must include particulars that enable the consumer to assess the approximate total cost of those services. An estimate of the expected number or minimum number of hours of work needed or a commitment to send, at reasonable intervals, bills or periodic reports indicating the number of hours worked could constitute such particulars. The Court states that it is for the national court to assess, taking into account those considerations and all the relevant factors surrounding the conclusion of the contract concerned, whether the seller or supplier has provided appropriate pre-contractual information to the consumer (paragraph 44).

Thus, the Court concludes that a term which sets the price on the basis of an hourly rate, without the consumer being provided, before the conclusion of the contract, with information that enables him or to take a prudent decision in full knowledge of the economic consequences of concluding that contract, does not satisfy the requirement of being drafted in plain intelligible language (operative part, paragraph 2).

IV. Powers and obligations of the national court

1. Jurisdiction of the national court

Judgment of 1 April 2004, Freiburger Kommunalbauten (C-237/02, [EU:C:2004:209](#))

Contract for the building and supply of a parking space – Reversal of the order of performance of contractual obligations provided for under national law – Clause obliging the consumer to pay the price before the seller or supplier has performed his obligations – Obligation on the seller or supplier to provide a guarantee

By notarial contract of 5 May 1998, Freiburger Kommunalbauten, a municipal construction company acting in the course of its business, sold to two purchasers, who were dealing as consumers, a parking space located in a multi-storey car park that Freiburger Kommunalbauten was to build.

Under the contract, the whole of the price was due upon delivery of a security by the contractor. In the event of late payment, the purchaser was liable to pay default interest.

After delivery of the security, the purchasers refused to make payment. They claimed that the provision requiring payment of the whole of the price was contrary to Paragraph 9 of the Bürgerliches Gesetzbuch (German Civil Code). They paid the price only after they had accepted the parking space, free of defects, on 21 December 1999.

Freiburger Kommunalbauten claimed default interest for late payment before the Landgericht Freiburg (Regional Court, Freiburg, Germany), which upheld the claim.

Hearing the appeal on a point of law, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and to ask the Court whether a term contained in a seller's standard business conditions, which provides that the purchaser of a building which is to be constructed is to pay the total price for that building, irrespective of whether there has been any progress in the construction, provided that the seller has previously provided him with a guarantee from a credit institution securing any monetary claims the purchaser may have in respect of defective performance or non-performance of the contract is to be regarded as unfair, within the meaning of Directive 93/13.

By that judgment, the Court rules that it is for the national court to decide whether a contractual term in a building contract requiring the whole of the price to be paid before the performance by the seller or supplier of its obligations and provision by the latter of a guarantee satisfies the requirements for it to be regarded as unfair under Article 3(1) of Directive 93/13 (operative part).

Although the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms such as it appears in Directive 93/13, it should not, however, rule on the application of those general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question (paragraph 22).

2. Obligation to examine *ex officio* the unfairness of a contractual term

2.1. Scope of the obligation

Judgment of 27 June 2000, Océano Grupo Editorial (C-240/98 to C-244/98, [EU:C:2000:346](#))

Jurisdiction clause – Power of the national court to examine of its own motion whether that clause is unfair

In that judgment, the factual and legal context of which is set out above,³⁴ the Court holds that the protection provided for consumers by Directive 93/13 entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts. The national court is obliged, when it applies national law provisions predating or postdating Directive 93/13, to interpret those provisions, so far as possible, in the light of the wording and purpose of that directive. The requirement for an interpretation in conformity with Directive 93/13 requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term (operative part, paragraph 2).

Judgment of 4 June 2009, Pannon GSM (C-243/08, [EU:C:2009:350](#))

Power of and obligation on the national court to examine of its own motion the unfairness of a term conferring jurisdiction – Criteria for assessment

A consumer entered into a subscription contract with Pannon for the provision of mobile telephone services. By signing the contract, the consumer also accepted the undertaking's general terms and conditions which stipulated, inter alia, that the Budaörsi Városi Bíróság (District Court, Budaörs, Hungary), the court for the place where Pannon had its principal place of business, had jurisdiction for any dispute arising from the subscription contract or in relation to it.

Taking the view that that consumer had not complied with her contractual obligations, Pannon brought proceedings before the Budaörsi Városi Bíróság (District Court, Budaörs) which observed that the consumer, who was in receipt of an invalidity allowance, had her place of permanent residence in Dombegyház, that is to say, 275 km from Budaörs, with limited means of transport between those two places.

That court also noted that under the applicable rules of the Hungarian Code of Civil Procedure, in the absence of a term conferring jurisdiction in the subscription contract, the court with territorial jurisdiction is that for the place where the consumer resides.

³⁴ As regards the factual and legal context of the dispute, see Section II.1 entitled 'Concept of "unfair terms"' p. 16.

The Budaörsi Városi Bíróság (District Court, Budaörs), entertaining doubts as to the possible unfairness of the term conferring jurisdiction in the subscription contract, referred questions on the interpretation of Directive 93/13 to the Court of Justice. It wished, *inter alia*, to know whether it must, of its own motion, ascertain whether that term is unfair, in the context of verifying its own territorial jurisdiction.

The Court recalls, first of all, that the protection which Directive 93/13 confers on consumers extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfairness of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve (paragraph 30).

The role of the national court in the area of consumer protection is thus not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction. Where the national court considers such a term to be unfair, it must not apply it, except if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status (paragraphs 32 and 33).

Likewise, a national law does not comply with Directive 93/13 where it provides that it is only in the event that the consumer has successfully contested the validity of a contract term before the national court that such a term is not binding on the consumer. Such a law excludes the possibility for the national court to assess of its own motion whether a contractual term is unfair (operative part, paragraph 1).

Judgment of 9 November 2010 (Grand Chamber), VB Pénzügyi Lízing (C-137/08, [EU:C:2010:659](#))

Criteria for assessment – Examination by the national court of its own motion of the unfairness of a term conferring jurisdiction

In that judgment, the factual and legal context of which is set out above,³⁵ the Court also states that the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair. In order to safeguard the effectiveness of the consumer protection intended by the European Union legislature in a situation characterised by the imbalance between the consumer and the seller or supplier, which may be corrected only by positive action unconnected with the actual parties to the contract, the national court must, in all cases and whatever the rules of its domestic law, determine whether or not the contested term was individually negotiated between a seller or supplier and a consumer (paragraph 48 and operative part, paragraph 3).

³⁵ As regards the factual and legal context of the dispute, see Section III.1 entitled 'Criteria for assessment' p. 23.

Judgment of 17 May 2018, Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen (C-147/16, [EU:C:2018:320](#))

Examination by the national court of its own motion of the question of whether the contract is within the scope of Directive 93/13

In that judgment, the factual and legal context of which is set out above,³⁶ the Court states that a national court giving judgment in default and which has the power, under national procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national public policy laws is required to examine of its own motion whether the contract containing that term falls within the scope of Directive 93/13 and, if so, whether that term is unfair within the meaning of that directive (operative part, paragraph 1).

Judgment of 11 March 2020, Lintner (C-511/17, [EU:C:2020:188](#))

Foreign currency based loan contract – Consideration of all the other terms of the contract for the purpose of assessing the unfairness of the contested term – Article 6(1) – Examination by the national court of its own motion as to whether the clauses in the contract are unfair – Scope

The applicant had brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary) concerning the allegedly unfair nature of certain terms in a foreign currency mortgage loan contract which she had concluded with a bank. Under those terms, that bank had the right to unilaterally amend that loan contract. Having dismissed that action, that court had the case referred back to it by the competent court of appeal, following an appeal brought by the applicant, and was required to examine of its own motion the contractual terms that the applicant had not challenged in its initial action, relating, in particular, to the notarial certificate, the grounds for termination and certain fees payable by the applicant.

Having been requested to give a preliminary ruling, the Court rules, as regards, in the first place, the scope of the *ex officio* examination of whether a contractual term is unfair, which the national court must undertake under Directive 93/13, that that court is not obliged to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered to be unfair, but must examine only those terms connected to the subject matter of the dispute, as delimited by the parties. Thus, the Court states that that examination must respect the limitations of the subject matter of the dispute, understood as being the result that a party pursues by its claims, in the light of the heads of claim and pleas in law put forward to that end by the parties. Accordingly, it is within those limits that the national court is called upon to examine of its own motion a contractual term in order to prevent the consumer's claims from being rejected by a potentially final decision when they could have been upheld had the consumer not, for lack of knowledge, omitted to invoke the unfair nature of that term. The Court also points out that, in order for the effectiveness of the protection afforded to consumers under that directive not to be compromised, the national court must not interpret the claims put before it in a formalistic

³⁶ As regards the factual and legal context of the dispute, see Section I.2 entitled 'Scope *ratione materiae*: notions of "seller or supplier" and "consumer"' p. 3.

manner, but must, instead, comprehend their content in the light of the pleas in law relied on in support of them (paragraphs 28, 30, 32 and 33 and operative part, paragraph 1).

As regards, in the second place, the implementation of the *ex officio* examination of whether a term is unfair, the Court rules that if the elements of law and fact in the file before the national court give rise to serious doubts as to the unfair nature of certain clauses which were not invoked by the consumer but which are related to the subject matter of the dispute, that court must take *ex officio* investigative measures in order to complete that case file, by asking the parties, in observance of the principle of *audi alteram partem*, to provide it with the clarifications or documents necessary for that purpose (paragraph 37).

2.2. Limits on the obligation

Judgment of 21 November 2002, Cofidis (C-473/00, [EU:C:2002:705](#))

Action brought by a seller or supplier – National provision prohibiting the national court from finding a term unfair, of its own motion or following a plea raised by the consumer, after the expiry of a limitation period

By a contract of 26 January 1998, Cofidis granted a borrower the opening of a credit. When instalments remained unpaid, Cofidis brought an action against him on 24 August 2000 before the Tribunal d'instance de Vienne (District Court, Vienne, France) for payment of the sums due.

Although it found that certain terms of the credit contract were unfair, the Tribunal d'instance de Vienne (District Court, Vienne) considered that the limitation period of two years under Article L. 311-37 of the Code de la consommation (Consumer Code) applied and prevented it from annulling the terms it had found to be unfair

It decided to stay the proceedings and to ask the Court whether the requirement of an interpretation in conformity with the system of consumer protection under the Directive requires a national court, when hearing an action for payment brought by a seller or supplier against a consumer with whom he has contracted, to set aside a procedural rule on pleas in defence, such as that in Article L. 311-37 of the Code de la consommation (Consumer Code). In practice, that rule prohibited the national court, either on the application of the consumer or of its own motion, from annulling any unfair term which vitiates the contract where the latter was made more than two years before the commencement of proceedings, and in so far as it thereby permits the seller or supplier to rely on those terms before a court and base its action on them.

In its judgment, the Court holds that the protection which Directive 93/13 confers on consumers extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term. It is therefore apparent that, in proceedings aimed at the enforcement of unfair terms brought by sellers or suppliers against consumers, the fixing of a time limit on the court's power to set aside such terms, of its

own motion or following a plea raised by the consumer, is liable to affect the effectiveness of the protection intended by Articles 6 and 7 of the Directive (paragraph 35).

Accordingly, a procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a seller or supplier is unfair is therefore liable, in proceedings in which consumers are defendants, to render application of the protection intended to be conferred on them by the Directive excessively difficult (paragraph 36).

Judgment of 18 February 2016, Finanmadrid EFC (C-49/14, [EU:C:2016:98](#))

Order for payment procedure – Enforcement proceedings – Powers of the national court responsible for enforcement to raise of its own motion the fact that the unfair term is invalid – Principle of res judicata – Principle of effectiveness – Judicial protection

This case concerned Spanish legislation which (i) did not provide for intervention by the national courts in the order for payment procedure, subject to certain exceptions, and (ii) did not permit them to review any possible unfair terms of their own motion in enforcement proceedings concerning that order for payment.

In that connection, the Court holds that the consumer might be faced with an enforcement order without having the benefit, at any time during the proceedings, of a guarantee that an assessment will be made of whether the terms at issue are unfair, where the course and particular features of the order for payment proceedings are such that, in the absence of specific facts requiring the intervention of the court, those proceedings are closed without it being possible for there to be a check as to whether there are unfair terms in a contract concluded between a supplier or seller and a consumer, and the court hearing the enforcement of the order for payment does not have the power to assess of its own motion whether such terms are present. Such a procedural arrangement is liable to undermine the effectiveness of the protection of the rights under Directive 93/13. Effective protection of those rights can be guaranteed only provided that the procedural system allows the court, during order for payment proceedings or enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract concerned are unfair (paragraphs 45 and 46).

According to the Court, that consideration cannot be called into question where the national procedural law confers on the decision issued by the authority hearing the application for an order for payment the force of *res judicata* and endows it with effects analogous to those of a decision of the court. Such legislation appears to run counter to the principle of effectiveness, in so far as it makes it impossible or excessively difficult, in proceedings brought by suppliers or sellers and in which consumers are the defendants, to ensure the protection conferred on consumers by Directive 93/13 (paragraphs 47 and 48).

Judgment of 26 January 2017, Banco Primus (C-421/14, [EU:C:2017:60](#))***Mortgage loan agreements – Mortgage enforcement proceedings – Limitation period – Function of the national courts – Res judicata***

In 2008, Banco Primus had granted a loan to a borrower which was secured by a mortgage on his home. Following the borrower's failure to pay seven successive monthly instalments in repayment of the loan, the bank triggered the accelerated repayment procedure in accordance with a term of the loan agreement. Banco Primus sought payment of the outstanding total principal plus ordinary and default interest and costs. It also proceeded to auction the mortgaged property. Since there were no bidders for the property at the auction, the Juzgado de Primera Instancia nº2 de Santander (Court of First Instance Nº2, Santander, Spain, 'the court of first instance') awarded the property to Banco Primus, which sought to obtain possession of the property. This was deferred as a result of three successive incidents, including the one which led to the adoption of an order which deemed the term of the loan agreement, relating to default interest, to be unfair. The adoption of a decision, following the third objection, terminated the suspension of the eviction proceedings in progress.

The borrower had lodged, before the court of first instance, an extraordinary application objecting to the mortgage enforcement proceedings on the ground that the term of the loan agreement, relating to default interest, was unfair. Following that opposition, that court, after having suspended the eviction proceedings, expressed doubts relating to the unfairness, within the meaning of Directive 93/13, of certain terms of the loan agreement other than the term concerning default interest.

However, that court found, *inter alia*, that the Spanish legislation which governs the principle of *res judicata*, precludes it from re-examining the unfair nature of the terms of the loan agreement at issue in the main proceedings, since the lawfulness of that agreement, with regard to Directive 93/13, had already been ascertained in the context of a decision which has become final.

The Court rules that Directive 93/13 does not preclude a rule of national law which prohibits national courts from examining of their own motion the unfairness of contractual terms where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, with regard to that directive in a decision which has become *res judicata* (operative part, paragraph 2, first subparagraph). The Court observes that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (paragraph 43).

In that connection, the Court draws attention to the importance, both for the EU legal order and for the national legal systems, of the principle of *res judicata*. Indeed, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question (paragraph 46).

Moreover, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13, unless national law does not grant such a court that power in the event of infringement of national rules relating to public policy. Furthermore, according to EU law, the principle of effective judicial protection of consumers does not afford a right of access to a second level of jurisdiction but only to a court or tribunal (paragraphs 47 and 48).

However, the conditions laid down in the national laws, that unfair terms used in a contract concluded with a consumer by a seller or supplier are not to be binding on the consumer, to which Article 6(1) of Directive 93/13 refers, may not adversely affect the substance of the right that consumers acquire under that directive not to be bound by a term deemed to be unfair (paragraph 51).

Consequently, the Court rules that, where there are one or more contractual terms the potential unfair nature of which has not been examined during an earlier judicial review of the contract in dispute that has been closed by a decision which has become *res judicata*, the national court, before which a consumer has properly lodged an objection, is required to assess the potential unfairness of those terms, whether 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 (operative part, paragraph 2, second subparagraph). Indeed, 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 (paragraph 52).

Judgment of 17 May 2022 (Grand Chamber), Ibercaja Banco (C-600/19, [EU:C:2022:394](#))

Mortgage enforcement proceedings – Unfairness of the term setting the nominal rate for default interest, and of the advanced repayment term in the loan agreement – Force of res judicata and time-barring – Loss of the possibility of relying on the unfairness of a contractual term before a court – Power of review by the national court of its own motion

The dispute in the main proceedings was between MA and Ibercaja Banco SA concerning a claim for payment of interest due to the bank on account of the failure by MA and PO to perform the mortgage loan agreement concluded between those parties. The court having jurisdiction ordered enforcement of the mortgage instrument held by Ibercaja Banco and authorised enforcement against the consumers. It was not until during the enforcement proceedings, specifically after the auction of the mortgaged property, that MA pleaded the unfairness of the default interest clause and the floor clause, that is to say when the effect of *res judicata* and time-barring neither allow the court to examine of its own motion whether the contractual terms are unfair nor the consumer to raise the unfairness of those terms. The contract had been examined by the court of its own motion, when the mortgage enforcement proceedings were initiated, without, however, any express reference, or grounds attesting, to the examination of the terms at issue.

In its judgment, the Court examines the interaction between the principle of *res judicata*, time-barring and the power of a national court to examine of its own motion whether a contractual term is unfair in the course of mortgage enforcement proceedings.

First, the Court finds that Article 6(1) and Article 7(1) of Directive 93/13 preclude national legislation which, by virtue of the effect of *res judicata* and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings, nor a consumer, after the expiry of the period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings. That interpretation of the Directive is applicable where those terms have already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but the decision authorising the mortgage enforcement does not contain any express reference or grounds concerning that examination, nor state that such an examination could no longer be called into question if an objection were not lodged. Since the consumer was not informed of the existence of an examination by the court of its own motion of the unfairness of the contractual terms, in the decision authorising enforcement of the mortgage, he was unable to assess, with full knowledge of the facts, whether it was necessary to bring proceedings against that decision. An effective review of the possible unfairness of contractual terms could not be guaranteed if the force of *res judicata* extended also to judicial decisions which do not indicate such a review (paragraphs 49, 50 and operative part, paragraph 1).

Secondly, the Court holds, on the other hand, that national legislation which does not allow a national court, acting of its own motion or at the request of the consumer, to examine the possible unfairness of contractual terms once the mortgage security has been realised, the mortgaged property sold and the ownership rights in that property transferred to a third party, is compatible with Article 6(1) and Article 7(1) of Directive 93/13. That conclusion is, however, subject to the condition that the consumer whose mortgaged property has been sold can assert his or her rights by means of subsequent proceedings with a view to obtaining compensation for the financial damage caused by the application of the unfair terms (operative part, paragraph 2).

Judgment of 17 May 2022 (Grand Chamber), SPV Project 1503 and Others (C-693/19 and C-831/19, [EU:C:2022:395](#))

Payment order and attachment proceedings against third parties – Force of res judicata implicitly covering the validity of the terms of an enforceable instrument – Power of the court hearing the enforcement proceedings to examine of its own motion the potential unfairness of a term

The disputes in the main proceedings were between (i) SPV Project 1503 Srl and Dobank SpA as agent for Unicredit SpA, and YB and (ii) Banco di Desio e della Brianza SpA and other credit institutions and YX and ZW, concerning enforcement proceedings based on enforceable instruments which have acquired the force of *res judicata*. The Italian courts hearing the enforcement proceedings are uncertain whether the penalty clause and the clause providing for default interest in the financing contracts are unfair, and also whether certain terms in the guarantee contracts are unfair. It is on the basis of those contracts that the creditors obtained orders for payment which became final. However, those courts note that, in accordance with the principles of national procedural law, where there is no objection by the consumer, the force of

res judicata of an order for payment encompasses the fairness of the terms of the guarantee contract even where there is no express examination, by the court which issued that order, of the unfairness of those terms.

In its judgment, the Court clarifies the relationship between the principle of *res judicata* and the power of the court hearing the enforcement proceedings to examine of its own motion, in the course of order for payment proceedings, whether a contractual term forming the basis of that order is unfair.

In that regard, the Court finds that Article 6(1) and Article 7(1) of Directive 93/13 preclude national legislation under which, where an order for payment has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not review the potential unfairness of the contractual terms on which that order is based, on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms. More specifically, legislation under which an examination of the court's own motion of the unfairness of contractual terms is deemed to have taken place and to have the force of *res judicata*, even where there is no statement of reasons to that effect in the decision issuing the order for payment, is liable to render meaningless the national court's obligation to examine of its own motion the potential unfairness of those terms. In such a case, the requirement of effective judicial protection necessitates that the court hearing the enforcement proceedings is able to assess, including for the first time, whether the contractual terms which served as the basis for the order for payment are unfair. The fact that, at the time when the order became final, the debtor was unaware that he or she could be classified as a 'consumer', within the meaning of that directive, is irrelevant in that regard (paragraphs 65 to 68 and operative part).

Judgment of 17 May 2022 (Grand Chamber), Impuls Leasing România (C-725/19, [EU:C:2022:396](#))

Enforcement proceedings in respect of a leasing contract constituting an enforceable instrument – Objection to enforcement – National legislation not allowing the court hearing that objection to determine whether the terms of an enforceable instrument are unfair – Power of the court hearing the enforcement proceedings to examine of its own motion whether a term is unfair – Existence of an action under ordinary law allowing the review of whether those terms were unfair – Requirement of a security in order to suspend the enforcement proceedings

The dispute in the main proceedings was between IO and Impuls Leasing România IFN SA concerning an objection to enforcement lodged against enforcement measures relating to a leasing contract. The Romanian court states that the leasing contract, on the basis of which the enforcement proceedings were commenced, contains certain terms which could be regarded as unfair. Nonetheless, the Romanian legislation does not allow the court hearing the enforcement proceedings in respect of a debt, before which an objection to enforcement has been lodged, to assess, of its own motion or at the request of the consumer, whether the terms of a contract concluded between a consumer and a seller or supplier, which constitutes an enforceable instrument, are unfair, on the ground that there is an action under the ordinary law in which the unfairness of the terms of such a contract may be reviewed by the court hearing that action. Admittedly, seised of an action which is separate from that relating to the enforcement proceedings, the court having jurisdiction to rule on the substance of the case has a discretion

to suspend those proceedings. However, the consumer seeking suspension of the enforcement proceedings is required to pay a security calculated on the basis of the value of the subject matter of the action.

In its judgment, the Court considers the power of the national court to examine of its own motion whether the terms of an enforceable instrument are unfair when hearing an objection to enforcement of that instrument.

In that regard, the Court finds that Article 6(1) and Article 7(1) of Directive 93/13 and the principle of effectiveness preclude national legislation which does not allow the court hearing the enforcement proceedings in respect of a debt, before which an objection to enforcement has been lodged, to assess, of its own motion, or at the request of the consumer, whether the terms of a contract which constitutes an enforceable instrument are unfair, where the court having jurisdiction to rule on the substance of the case, which may be seised of a separate action under the ordinary law with a view to an assessment as to whether the terms of that contract are unfair, may only suspend the enforcement proceedings until a decision has been given on the substance if a security is paid, calculated for example on the basis of the value of the subject matter of the action, at a level that is likely to dissuade the consumer from bringing and maintaining such an action. As regards that security, the Court states that the costs which legal proceedings would entail in relation to the amount of the disputed debt must not be such as to discourage the consumer from bringing an action before the court. However, it is likely that a debtor in default does not have the financial resources necessary to provide the guarantee required. That is all the more so if the value of the actions brought greatly exceeds the total value of the contract, as would appear to be the case in the action in the main proceedings (paragraphs 58, 59 and the operative part).

3. The grant of interim relief

Judgment of 14 March 2013, Aziz (C-415/11, [EU:C:2013:164](#))

Mortgage loan agreement – Mortgage enforcement proceedings – Powers of the court hearing the declaratory proceedings

In that judgment, the factual and legal context of which is set out above,³⁷ the Court also states that the national procedural rules impair the protection sought by Directive 93/13 since those rules render it impossible for the court hearing the declaratory proceedings – before which the consumer has brought proceedings claiming that the contractual term on which the right to seek enforcement is based is unfair – to grant interim relief capable of staying the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision (paragraph 59).

³⁷ As regards the factual and legal context of the dispute, see Section II. 3 entitled ‘Concept of “significant imbalance” to the detriment of the consumer’ p. 21.

Without that possibility, where enforcement in respect of the mortgaged immovable property took place before the judgment of the court in the declaratory proceedings declaring the contractual term on which the mortgage is based to be unfair and annulling the enforcement proceedings, that judgment would enable the consumer to obtain only protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or an effective means of preventing the continued use of that term, contrary to Article 7(1) of that directive (paragraph 60).

4. Assessment of the unfairness of an arbitration clause

Judgment of 26 October 2006, Mostaza Claro (C-168/05, [EU:C:2006:675](#))

Failure to raise the unfair nature of a term during arbitration proceedings – Possibility of raising that objection in the context of an action brought against the arbitration award

On 2 May 2002, a mobile telephone contract was concluded between Móvil and a consumer. The contract contained an arbitration clause under which any disputes arising from the contract were to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and in Equity, 'the AEADE').

The consumer contested the arbitration decision delivered by the AEADE before the referring court, submitting that the unfair nature of the arbitration clause meant that the arbitration agreement was null and void.

Hearing the case, the Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain) found that there was no doubt that the arbitration agreement included an unfair contractual term and was therefore null and void.

However, as the consumer did not plead that the agreement was invalid in the context of the arbitration proceedings, and in order to interpret the national law in accordance with Directive 93/13, that court decided to stay the proceedings and to refer a question to the Court for a preliminary ruling. More specifically, it raised the question whether, where an action has been brought before a national court for annulment of an arbitration award against the consumer made following arbitration proceedings which were required by a clause, contained in a mobile telephone contract, that has to be classified as unfair, the national court can uphold the action although the consumer did not plead that the clause was unfair before the arbitrator.

In its judgment, the Court holds that Directive 93/13 requires a national court to determine whether the arbitration agreement is void and annul the award where the agreement contains an unfair term, even though the consumer has pleaded that invalidity only in the course of the action for annulment. The result sought by Article 6 of that directive, which requires the Member States to ensure that consumers are not bound by unfair terms, could not be achieved if the court seised of an action for annulment of an arbitration award was unable to determine whether that award was void solely because the consumer did not plead the invalidity of the arbitration agreement in the course of the arbitration proceedings. Such an omission by the

consumer could not then, under any circumstances, be compensated for by action on the part of persons not party to the contract. The regime of special protection established by the Directive would be definitively undermined (paragraphs 30, 31 and operative part).

Judgment of 6 October 2009, Asturcom Telecomunicaciones (C-40/08, [EU:C:2009:615](#))

Unfair arbitration clause – Measure void – Arbitration award which has become final – Enforcement – Whether the national court responsible for enforcement can consider of its own motion whether the unfair arbitration clause is null and void

On 24 May 2004, a subscription contract for a mobile telephone was concluded between Asturcom and a consumer. The contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and Equity, 'AEADE'). The seat of that arbitration tribunal, which was not indicated in the contract, is located in Bilbao, Spain.

Since that consumer failed to pay a number of bills and terminated the contract before the agreed minimum subscription period had expired, Asturcom initiated arbitration proceedings against her before the AEADE.

The arbitration award, made on 14 April 2005, ordered the consumer to pay the sum of EUR 669.60. On 29 October 2007, Asturcom brought an action before the Juzgado de Primera Instancia nº4 de Bilbao (Court of First Instance Nº4, Bilbao, Spain) for enforcement of the arbitration award.

In its order for reference, that court states that the arbitration clause in the subscription contract was unfair. However, since it entertained doubts as to whether the national legislation, in particular its domestic procedural rules, is compatible with EU law, that court decided to refer to the Court a question for a preliminary ruling.

Hearing the case, the Court held that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause (operative part, paragraph 1).

In reaching this conclusion, the Court stated, first, that Article 6(1) of Directive 93/13 is a mandatory provision and, second, that, in view of the nature and importance of the public interest underlying the protection which that directive confers on consumers, Article 6 must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (paragraphs 51 and 52).

V. Effects of a finding that a term is unfair

1. The fate of a contract containing an unfair term

Judgment of 15 March 2012, Pereničová and Perenič (C-453/10, [EU:C:2012:144](#))

Incorrect statement of annual percentage rate of charge – Effect of unfair commercial practices and unfair terms on the validity of the contract as a whole

Two borrowers (a couple) obtained a loan of SKK 150 000 (EUR 4 979) from SOS, a non-bank institution which grants consumer loans on the basis of standard contracts. According to the credit agreement, the loan was to be repaid in 32 monthly instalments of SKK 6 000 (EUR 199) and a 33rd instalment in the same amount as the loan granted. The borrowers were thus obliged to repay an amount of SKK 342 000 (EUR 11 352).

The annual percentage rate of charge (APR) of the loan – that is to say, the consumer's total costs in connection with the loan – was fixed at 48.63% in the agreement.

The two borrowers brought an action before the Okresný súd Prešov (District Court, Prešov, Slovakia) seeking a declaration that their credit agreement contained several unfair terms, such as the incorrect statement of the APR, and asking that court to declare the agreement void as a whole.

That court asked the Court of Justice whether the provisions of Directive 93/13 allow it to declare void a consumer contract containing unfair terms if that is more advantageous to the consumer.

In its judgment the Court starts by recalling that the aim of Directive 93/13 is to eliminate unfair terms in consumer contracts while preserving, if possible, the validity of the contract as a whole, not to abolish all contracts containing unfair terms. As regards the criteria for assessing whether a contract can indeed continue to exist without the unfair terms, the Court observes that an objective approach must be applied, under which the situation of one of the parties to the contract, in this case the consumer, cannot be regarded as the decisive criterion determining the fate of the contract. Consequently, the Directive precludes that, when assessing whether a contract containing one or more unfair terms can continue to exist without those terms, only the advantageous effects for the consumer of the annulment of the contract as a whole are taken into consideration (paragraph 36 and operative part, paragraph 1).

However, the Court observes that Directive 93/13 carried out only a partial and minimum harmonisation of national legislation concerning unfair terms, while allowing Member States the option of giving consumers a higher level of protection than that for which the Directive provides. Consequently, that directive does not preclude a Member State from enacting, in compliance with European Union law, legislation under which a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will provide better protection of the consumer (operative part, paragraph 1).

Judgment of 14 June 2012, Banco Español de Crédito (C-618/10, [EU:C:2012:349](#))***Unfair term concerning interest on late payments – Order for payment procedure – Powers of the national court***

That case originated in Spain, where applications may be made to the courts for an order for payment of an outstanding and payable pecuniary debt which does not exceed EUR 30 000 provided that the amount of that debt is duly established. If such an application is made in accordance with those requirements, the debtor must pay his debt or may object to payment within a period of 20 days, in which event his case will be heard in an ordinary civil procedure.

Nonetheless, the Spanish legislation does not authorise the courts dealing with an application for an order for payment to hold, of their own motion, that unfair terms in a contract concluded between a seller or supplier and a consumer are void. Thus, assessment of the unfairness of the terms of such a contract is permitted only where the consumer objects to payment.

Furthermore, where a Spanish court is authorised to find that an unfair term in a consumer contract is void, the national legislation allows it to modify the contract by revising the content of that term in such a way as to remove its unfairness.

In the present case, a private individual had entered into a loan agreement for the sum of EUR 30 000 with a Spanish bank in order to purchase a motor vehicle. Although the term of the contract had been fixed at 2014, the creditor bank took the view that it had expired before that date since, in September 2008, reimbursement of seven monthly repayments had not yet been made. Thus, the bank submitted, before the Juzgado de Primera Instancia No 2 de Sabadell (Court of First Instance, No 2, Sabadell, Spain), an application for an order for payment corresponding to the unpaid monthly repayments plus contractual interest and costs. The court declared of its own motion that the term relating to interest for late payment was void on the ground that it was unfair, the rate having been fixed at 29%, and fixed the new rate of such interest at 19%, referring to the statutory rate of interest and to the rate of interest for late payment. It also ordered the credit institution to recalculate the amount of the interest.

In the proceedings on the appeal against that decision, the Spanish referring court sought to ascertain, *inter alia*, whether the Spanish legislation, which permitted the courts not only to strike out but also to revise the content of the unfair terms, was compatible with Directive 93/13.

The Court points out that, under Directive 93/13, an unfair term in a contract concluded between a seller or supplier and a consumer is not binding on the consumer, and that the contract containing such a term will continue to bind the parties upon those terms if it is capable of continuing in existence without that unfair term. Accordingly the Court holds that that directive precludes the Spanish legislation in that it allows a national court, where it finds that an unfair term is void, to revise the content of that term (operative part, paragraph 2).

The power to do so, if it were conferred on the national court, would be liable to eliminate the dissuasive effect on sellers and suppliers of the straightforward non-application with regard to the consumer of the unfair terms. The protection afforded to consumers if that power were used would thus be less efficient than that resulting from the non-application of those terms. Indeed, if it were open to the national court to revise the content of unfair terms, sellers and

suppliers would remain tempted to use those terms in the knowledge that, even if they should be declared invalid, the contract could nonetheless be modified by the court in such a way as to safeguard their interests (paragraph 69).

Consequently, where they find the existence of an unfair term, the national courts are required solely to exclude the application of such a term so that it will not produce binding effects on consumers, and are not authorised to revise the content of the unfair term. The contract containing the term 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 domestic law, such continuity of the contract is legally possible (paragraph 65).

2. Substitution of the unfair term

Judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, [EU:C:2014:282](#))

Consumer credit contracts denominated in foreign currency – Terms relating to the exchange rate – Difference between the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to its repayment – Powers of the national court when dealing with a term considered to be unfair – Substitution of the unfair term by a supplementary provision of national law – Whether lawful

In that judgment, the factual and legal context of which is set out above,³⁸ the Court also rules that, if the deletion of an unfair term renders the contract unenforceable, as in the present case, Directive 93/13 does not preclude the national court from substituting the contested term with a supplementary provision of national law. Such an approach enables attainment of the aim of the Directive, which consists in re-establishing a balance between the parties while preserving, as far as possible, the validity of the contract as a whole (operative part, paragraph 3).

If such a substitution were not allowed and if the court were obliged to annul the contract, the dissuasive nature of the penalty of nullity and the objective seeking to protect consumers might be jeopardised. In the present case, such an annulment would have the consequence that the whole of the outstanding sum would become due. That is likely to be in excess of the consumer's financial capacities and, as a result, to penalise him rather than the lender who, in the light of that consequence, might not be dissuaded from inserting such terms in its contracts (paragraphs 83 and 84).

³⁸ As regards the factual and legal context of the dispute, see Section I.3. 3.2 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration', p. 10. That judgment is also presented in Section III.2. 'Requirements of good faith, balance and transparency'.

Judgment of 3 October 2019, Dziubak (C-260/18, [EU:C:2019:819](#))

Mortgage loan indexed to a foreign currency – Term relating to arrangement of the exchange rate between the currencies – Effects of a declaration that a term is unfair – Whether it is possible for the court to remedy unfair terms by having recourse to general terms of civil law – Assessment of the consumer's interests – Continued existence of the contract without unfair terms

In 2008, two borrowers (a couple) concluded, with the Raiffeisen Bank, a contract for a mortgage loan specified in Polish złotys (PLN) but indexed to the Swiss franc (CHF). Thus, whereas the funds were made available in PLN, the outstanding sum due and the monthly repayments were expressed in CHF in such a way however that the repayments were required to be debited in PLN from the borrowers' bank account. At the time the loan was disbursed, the debt remaining due and expressed in CHF was determined on the basis of the PLN-CHF buying rate applied by Raiffeisen on the day of the disbursement, whereas the monthly repayments were calculated in accordance with the PLN-CHF selling rate applied by that bank at the time they fell due. Having concluded a loan contract indexed to CHF, the borrowers benefitted from an interest rate based on the rate of that currency, which was lower than the rate applicable to PLN, but they were exposed to an exchange risk resulting from the fluctuation in the PLN-CHF exchange rate.

The borrowers brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) seeking a declaration that the loan contract at issue was invalid on the ground that the terms in that contract providing for the application of a difference in the exchange rate between the buying rate for the disbursement of the funds and the selling rate for their repayments, were unlawful, unfair terms that were not binding on them in accordance with Directive 93/13.

According to the borrowers, once the terms at issue are removed, it would be impossible to determine the correct exchange rate, with the result that the contract could not continue in existence. In addition, they claimed that, even if it appeared that the loan contract could be executed without those terms as a loan contract expressed in PLN but no longer indexed to CHF, the loan would continue to be subject to the more advantageous interest linked to CHF.

Referring to the judgment in *Kásler*,³⁹ the referring court asked the Court whether, after their removal, the unfair terms could be replaced by general provisions of Polish law which provide that the effects expressed in a contract are to be completed by the effects arising from the principles of equity or established customs.

The national court also asked whether Directive 93/13 permits it to annul a contract where the maintenance of the contract without the unfair terms would result in altering the nature of its main subject matter since, even though the loan at issue would no longer be indexed to CHF, the interest would continue to be calculated on the basis of the rate applicable for that currency.

³⁹ Judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282) presented in Section I.3. 3.2. 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration'.

By its judgment, the Court finds, first of all, that the possibility of substitution established by the Kásler judgment is limited to supplementary provisions of national law or those which are applicable where the parties so agree and is based, in particular, on the ground that such provisions are presumed not to contain unfair terms (paragraph 59).

Those provisions are meant to reflect the balance that the national legislature intended to establish between all the rights and obligations of the parties to certain contracts in cases where the parties have not departed from a standard rule provided for by the national legislature in relation to the contracts concerned, or indeed have expressly opted for a rule introduced by the national legislature to that end to be applicable. However, those general provisions of Polish law referred to do not appear to have been subject to a specific assessment by the legislature with a view to establishing that balance, such that those provisions are not covered by the presumption that they are not unfair (paragraphs 60 and 61).

Consequently, the Court finds that those provisions cannot remedy the gaps in a contract caused by the removal of unfair terms contained in it (paragraph 62).

In that context, the Court considers that, since the possibility of substitution seeks to ensure the attainment of consumer protection by safeguarding consumers' real and actual interests against the possible detrimental consequences that could result from the contract at issue being annulled in its entirety, those consequences must be assessed in the light of the existing or foreseeable circumstances at the time of the dispute relating to the removal of the unfair terms concerned, and not those existing at the time when the contract was concluded (operative part, paragraph 2).

The Court recalls, next, that under Directive 93/13 a contract from which the unfair terms have been removed remains binding on the parties as regards the other terms that it contains, provided that it can continue in existence after the unfair terms are removed and that such continuity of the contract is legally possible under the rules of domestic law. In that regard, the Court notes that, according to the national court, after the removal of the terms on the difference in exchange rate, the nature of the main subject matter of the contract appears to be altered by the cumulative effect of abandoning the indexation to the CHF and the continued application of an interest rate based on the CHF rate. Since such an alteration appears to be legally impossible under Polish law, the Directive does not preclude the annulment of the contract at issue by the Polish court (paragraphs 39, 42 and 43).

On that point, the Court emphasises that the deletion of the terms at issue would lead not only to the removal of the indexing mechanism and the exchange difference but also, indirectly, to the disappearance of the exchange rate risk, which is directly linked to the indexing of the loan to a currency. The Court recalls that the terms relating to the exchange rate risk define the main subject matter of a contract for a loan indexed to a foreign currency, such that the objective possibility of continuing the loan agreement at issue appears, in any event, uncertain (paragraph 44).

Finally, the Court recalls that, where the consumer prefers not to rely on the system of protection established by the Directive against unfair terms, it does not apply. In that regard the Court clarifies that the consumer must also be entitled to object to being protected, under that

same system, against the unfavourable consequences caused by the contract being annulled in its entirety where he does not wish to rely on that protection (paragraph 55).

Judgment of 7 November 2019, Kanyeba and Others Joined Cases C-349/18 to C-351/18, EU:C:2019:936 ⁴⁰

General conditions of carriage of a railway undertaking – Mandatory statutory or regulatory provisions – Penalty clause – Powers of the national court

That judgment is part of three disputes between the Société nationale des chemins de fer belges (SNCB) (the Belgian national railway company) and three passengers, concerning additional surcharges claimed from the latter for having travelled by train without a transport ticket. Following those passengers' refusal to regularise their situation by paying either immediately the price of the journey, plus surcharges, or, subsequently, a fixed amount, the SNCB sued them and sought an order that they pay it the sums due as a result of those breaches of its conditions of carriage. In that context, the SNCB claimed that the relationship between it and those passengers was not contractual, but administrative, given that those passengers did not buy a ticket. Ruling on those disputes, the referring court questioned the Court, *inter alia*, on the scope of the protection offered by Directive 93/13 to passengers who use the services of a transport company without having obtained a ticket.

The Court, at the outset, notes that, in accordance with Article 1(2) of Directive 93/13, contractual terms which reflect, in particular, mandatory statutory or regulatory provisions are not subject to the provisions of that directive and that it is for the national court to verify whether the term at issue is covered by that exclusion from the scope of application of that directive. Relying however on the assumption that that term is covered by that scope of application, the Court examines the powers of the national court under Article 6(1) of Directive 93/13 where the latter establishes that a contractual term is unfair, for the purposes of that directive (paragraph 61).

The Court rules that that provision also precludes that a national court replace such a term, in accordance with the principles of its contract law, with a supplementary provision of national law, except where the contract at issue cannot continue in existence in the event that the unfair term is deleted and where the cancellation of the contract in its entirety exposes consumers to particularly unfavourable consequences (operative part, paragraph 2).

⁴⁰ That judgment is also presented in Section V.3. 'Other effects'.

Judgment of 3 March 2020 (Grand Chamber), Gómez del Moral Guasch (C-125/18, [EU:C:2020:138](#))

Mortgage loan agreement – Variable interest rate – Reference index based on mortgage loans granted by savings banks – Index arising from a regulatory or administrative provision – Unilateral introduction of the term by the seller or supplier – Review of the transparency requirement by the national court – Consequences of a finding that the term is unfair

In that judgment, the factual and legal context of which is set out above,⁴¹ the Court recalls that Article 6(1) of Directive 93/13 does not preclude the national court from removing, in accordance with the principles of contract law, an unfair term from a contract concluded between a seller or supplier and a consumer, and replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences (paragraph 61).

In general, the consequence of such an annulment of the contract would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts. In the present case, the Spanish legislature, since the conclusion of the loan agreement at issue, has introduced a 'replacement' index which, subject to verification by the referring court, was supplementary. In those circumstances, the Court considers that Articles 6(1) and 7(1) of Directive 93/13 do not preclude the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index applicable in the absence of an agreement to the contrary between the parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is removed, and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences (paragraphs 63 to 67 and operative part, paragraph 4).

Judgment of 12 January 2023, D.V. (Lawyers' fees – Principle of an hourly rate), (C-395/21, [EU:C:2023:14](#))

Contract for the provision of legal services concluded between a lawyer and a consumer – Term providing for the payment of lawyers' fees on the basis of an hourly rate – Article 6(1) – Powers of the national court when dealing with a term considered to be 'unfair'

In that judgment, the factual and legal context of which is set out above,⁴² the Court rules on the effects of a finding that a term in a contract for the provision of legal services, concluded between a lawyer and a consumer, which sets the price of the services provided on the basis of

⁴¹ As regards the factual and legal context of the dispute, see Section I.3. 3.1 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms which reflect mandatory statutory or regulatory provisions', p. 8.

⁴² As regards the factual and legal context of the dispute, see Section I.3. 3.2 entitled 'Exclusions from the scope of Directive 93/13 – Contractual terms defining the main subject matter of the contract or concerning the price or the remuneration and the services or goods supplied as consideration', p. 13. That judgment is also presented in Section II.1 'Concept of "unfair terms"' and Section III.2 'Requirements of good faith, balance and transparency'.

an hourly rate, is unfair. In that regard, the Court notes that there is an obligation on the national court to disapply that term, unless the consumer objects (paragraph 55).

It states that, where, pursuant to the relevant provisions of national law, a contract for the provision of legal services is not capable of continuing in existence after the unfair term regarding cost has been removed and those services have already been provided, Directive 93/13 does not preclude the invalidation of that contract or the national court from restoring the situation in which the consumer would have been in the absence of that term, even if, as a result, the seller or supplier does not receive any remuneration for the services provided (paragraph 59).

As regards the consequences which annulment of the contracts at issue in the main proceedings could have for the consumer, the Court recalls its case-law according to which, in the case of a loan agreement, the annulment of such an agreement in its entirety would, in principle, make the outstanding balance of the loan become due forthwith, which would be likely to be in excess of the consumer's financial capacities and could expose the consumer to particularly unfavourable consequences. However, the particularly unfavourable nature of the annulment of a contract cannot be reduced solely to purely pecuniary consequences (paragraph 61).

It is possible that the annulment of a contract for the provision of legal services that have already been performed may place the consumer in a situation of legal uncertainty, in particular where national law allows the seller or supplier to claim remuneration for those services on a different basis from that of the annulled contract. Furthermore, the invalidity of the contract could possibly affect the validity and effectiveness of the transactions conducted under it.

In those circumstances, the Court finds that, in the event that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences, which it is for the referring court to ascertain, Directive 93/13 does not preclude the national court from remedying the invalidity of the unfair term by replacing it with a supplementary provision of national law or a provision of national law applied by mutual agreement of the parties to that contract. On the other hand, that directive precludes the national court from replacing the unfair term that has been annulled with a judicial assessment of the level of remuneration due for those services (operative part, paragraph 4).

3. Other effects

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](#))

Mortgage contracts – Default interest clauses – Unfair terms – Mortgage enforcement proceedings – Moderation of the amount of interest – Powers of the national court

The cases in the main proceedings concern mortgage enforcement proceedings initiated by Unicaja Banco and Caixabank for the enforcement of several mortgages. In addition, all the loan

contracts in the cases in the main proceedings contain a clause authorising the lender, if the borrower fails to meet his payment obligations, to bring forward the maturity date initially agreed and require payment of all the outstanding capital debt, together with the interest, default interest, commission, expenses and costs agreed. Unicaja Banco and Caixabank brought enforcement proceedings before the referring court for the amounts due after application of the default interest rates laid down by the mortgage contracts at issue.

As part of those actions, that court focused on the question of the ‘unfair’ nature, within the meaning of Article 3(1) of Directive 93/13, of the clauses relating to the default interest rates and the application of those rates to the capital whose early repayment is triggered by the delay in payment. In that regard, the referring court nevertheless expressed doubt about the inferences which it must draw regarding the unfairness of those clauses in the light of the national provision, under which the national court hearing mortgage enforcement proceedings is required to adjust the amounts due under a clause in a mortgage loan contract where the contract provides for default interest at a rate more than three times greater than the statutory rate, by applying a default interest rate which does not exceed that threshold.

In that regard, the Court notes at the outset that, according to the referring court, the clauses relating to default interest in the mortgage loan contracts for which enforcement proceedings have been brought before it are unfair within the meaning of Article 3 of Directive 93/13. In that context, the Court notes that, as regards the inferences to be drawn from the finding of unfairness of a contract provision between a consumer and a professional, it follows from the wording of Article 6(1) of Directive 93/13 that national courts are merely required to exclude the application of an unfair contractual term in order that it may not produce binding effects with regard to the consumer, without being empowered to revise the content of that term. 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 domestic law, such continuity of the contract is legally possible (paragraph 28).

It is clear from the orders for reference that the national provision in question requires a moderation of default interest for loans or credit for the purchase of a principal residence and guaranteed by mortgages on the dwelling at issue (paragraph 35). The scope of application of that provision extends to any mortgage loan contract and is thus distinguished from that of Directive 93/13 which concerns only unfair terms included in contracts concluded between a seller or supplier and a consumer. It follows that the obligation to respect the threshold corresponding to the default interest rate equal to three times the statutory interest rate, as it was intended by the legislature, is without prejudice to the assessment, by the court, of the unfairness of a term setting default interest (paragraph 36).

In those circumstances, the Court points out that, pursuant to Article 4(1) of Directive 93/13, the unfairness of a contractual term must be assessed by taking into account the nature of the goods or services for which the contract was concluded and by referring, on the date of conclusion of the contract, to all the circumstances attending its conclusion. It therefore follows that the consequences of the term under the law applicable to the contract must also be taken into account. This requires consideration to be given to national law (paragraph 37). In that connection, the Court recalls, furthermore, that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording

and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by that directive (paragraph 38).

Consequently, the Court holds that Article 6(1) of Directive 93/13 does not preclude a national provision such as that at issue in this case, provided that its application is without prejudice to the assessment by the national court of the unfairness of such a term, and does not prevent that court from removing that term if it were to find the term to be 'unfair'. Where the national court is faced with a contractual term relating to default interest at a rate less than that envisaged by national law, the fact that such a legislative ceiling has been set does not prevent that court from assessing whether that term may be unfair (paragraph 40 and operative part).

Conversely, when the default interest rate laid down in a term in a mortgage loan contract is higher than that provided by national law and must, in accordance with that law, be subject to a limitation, such a fact must not preclude the national court from, above and beyond that measure of moderation, drawing all the inferences of possible unfairness – in the light of Directive 93/13 – of the term which contains that rate, if necessary by annulling it (paragraphs 41 and 42).

Judgment of 7 August 2018, Banco Santander (C-96/16 and 94/17, [EU:C:2018:643](#))

Assignment of debts – Loan agreement concluded with a consumer – Criteria for assessing the unfairness of a contractual term setting the default interest rate – Consequences of that unfairness

In that judgment, the factual and legal context of which is set out above,⁴³ the Court states that Directive 93/13 does not preclude national case-law, such as that of the Tribunal Supremo (Supreme Court, Spain), whereby the consequence of the unfairness of a non-negotiated term fixing the default interest rate in a loan agreement concluded with a consumer consists in the complete elimination of that interest, while the ordinary interest provided for in that agreement continues to run (operative part, paragraph 3).

In particular, the Court points out that it does not follow from that directive that the setting aside or annulment of the term in a loan agreement fixing the default rate of interest, on the ground of the unfairness of that term, should also bring about that of the term in that agreement fixing the ordinary rate of interest, particularly as those different terms must be clearly distinguished. In the latter respect, the Court considers that default interest is intended to penalise the debtor's failure to fulfil his obligation to make the loan repayments on the dates agreed contractually, to deter the debtor from falling behind in the performance of his obligations and, where appropriate, to compensate the lender for the loss suffered as a result of a late payment. By contrast, the function of ordinary interest is one of remuneration for the lender making a sum of money available until that sum has been repaid. Those considerations apply regardless of the way in which the contractual term determining the default interest rate and that fixing the ordinary rate of interest are worded. In particular, they apply not only when the default interest rate is fixed independently of the ordinary interest rate, in a separate contractual term, but also

⁴³ As regards the factual and legal context of the dispute, see Section II.1 entitled 'Concept of "unfair terms"' p. 17.

when the default interest rate is fixed in the form of an increase in the ordinary interest rate by a certain number of percentage points. In the latter case, as the unfair term consists in that increase, Directive 93/13 requires solely that that increase be annulled (paragraphs 76 and 77).

Judgment of 26 March 2019 (Grand Chamber), Abanca Corporación Bancaria (C-70/17 and C-179/17, [EU:C:2019:250](#))

Accelerated repayment clause of a mortgage loan contract – Declaration that the clause is unfair in part – Powers of the national court when dealing with a term regarded as ‘unfair’ – Replacement of the unfair term with a provision of national law

The disputes in the main proceedings concerned mortgage loan contracts concluded in Spain which contained a clause making it possible to require the early termination of the contract, in particular in the event of failure to pay a single monthly instalment.

The referring courts sought a ruling from the Court as to whether, in essence, Articles 6 and 7 of Directive 93/13 are to be interpreted as meaning that, where an early repayment clause of a mortgage loan contract is found to be unfair, it may nonetheless be maintained in part, with the elements which make it unfair removed. They also sought to ascertain whether, if that was not the case, those provisions could be interpreted as meaning that mortgage enforcement proceedings initiated on the basis of that clause may nonetheless continue by means of the supplementary application of a rule of national law because the impossibility of availing of those proceedings could be contrary to consumers’ interests.

In that regard, the Court holds that Articles 6 and 7 of Directive 93/13 must be interpreted, first of all, as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance. Next, the Court holds that those same articles do not preclude the national court from compensating for the invalidity of such an unfair term by replacing that term with the new wording of the legislative provision on which it was based, which is applicable where the parties to the contract so agree, provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed, and that it is established that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences (operative part).

It is true that, where a national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, Article 6(1) of Directive 93/13 precludes a rule of national law which allows the national court to modify that contract by revising the content of that term. Thus, if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (paragraphs 53 and 54).

However, in a situation where a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, Article 6(1) of Directive 93/13 does not preclude the national court from removing, in accordance with the principles of contract law, an unfair term and replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences, so that the consumer would thus be penalised (paragraph 56).

Such a substitution is fully justified in the light of the purpose of Directive 93/13. It is consistent with the objective of Article 6(1) of that directive, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties a real balance re-establishing equality between them, not to annul all contracts containing unfair terms (paragraph 57).

If it was not permissible to replace an unfair term with a supplementary provision of national law, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised. In general, the consequence of such an annulment with regard to a loan contract would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts (paragraph 58).

For similar reasons, the Court holds that, in a situation where a mortgage loan contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term whose wording is based on a provision of legislation which is applicable where the parties to the contract so agree, Article 6(1) of Directive 93/13 also does not preclude a national court from replacing that term, with a view to preventing that contract from becoming invalid, with the new wording of that reference provision, introduced after the conclusion of the contract, in so far as the annulment of the contract would expose the consumer to particularly unfavourable consequences (paragraph 59).

It is for the referring courts to verify, in accordance with the rules of national law and adopting an objective approach, whether the removal of those terms would mean that the continued existence of the mortgage loan contracts is no longer possible.

In such a case, it will be for the referring courts to examine whether the annulment of the mortgage loan contracts at issue in the main proceedings would expose the consumers concerned to particularly unfavourable consequences. In that regard, the Court observes that it is apparent from the orders for reference that such an annulment could have effects, in particular, on the procedural requirements of national law pursuant to which the banks may obtain repayment from the consumers, in court, of the entirety of the outstanding amount of the loan (paragraph 61).

Judgment of 7 November 2019, Kanyeba and Others (Joined Cases C-349/18 to C-351/18, [EU:C:2019:936](#))

General conditions of carriage of a railway undertaking – Penalty clause – Powers of the national court

In that judgment, the factual and legal context of which is set out above,⁴⁴ the Court, ruling on a penalty clause in a contract concluded between a seller or supplier and a consumer, holds that Article 6(1) of Council Directive 93/13 precludes that a national court which establishes that such a penalty clause is unfair moderate the amount of the penalty imposed on the consumer by that clause (operative part, paragraph 2).

Judgment of 9 July 2020, Ibercaja Banco (C-452/18, [EU:C:2020:536](#))

Mortgage loan agreement – Term limiting the variability of the interest rate ('floor' term) – Novation agreement – Waiver of the right to bring an action contesting the terms of a contract – Non-binding

In that judgment, the factual and legal context of which is set out above,⁴⁵ the Court considers that Article 6(1) of Council Directive 93/13 does not preclude a term in a contract concluded between a seller or supplier and a consumer, which might be found by a court to be unfair, from being the subject of a novation agreement between that seller or supplier and that consumer, whereby the consumer waives the effects that would result from that term being found to be unfair, provided that that waiver is the result of the consumer's free and informed consent, which it is for the national court to verify (operative part, paragraph 1).

The Court states that the consumer's waiver of the right to rely on the nullity of an unfair term may be taken into account only where, at the time of that waiver, the consumer was aware of the non-binding nature of that term and of the consequences resulting from it. Only in that scenario can it be considered that his or her agreement to the novation of such a term is the result of free and informed consent, in compliance with the requirements laid down in Article 3 of Directive 93/13, which it is for the national court to verify (paragraph 29).

⁴⁴ As regards the factual and legal context of the dispute, see Section V.2 entitled 'Substitution of the unfair term' p. 49.

⁴⁵ As regards the factual and legal context of the dispute, see Section II.1 entitled 'Concept of "unfair terms"' p. 18. That judgment is also presented in Section II.2. 'Concept of "contractual term which has not been individually negotiated"' and Section III.2 'Requirements of good faith, balance and transparency'.

4. Limitation of the temporal effects of a declaration of invalidity

Judgment of 21 December 2016 (Grand Chamber), Gutiérrez Naranjo (C-154/15, C-307/15 and C-308/15, [EU:C:2016:980](#))

Mortgage loans – Unfair terms – Declaration of nullity – Limitation by the national court of the temporal effects of the declaration of nullity of an unfair term

The main actions concerned clauses inserted in mortgage loan agreements establishing a minimum rate below which the variable rate of interest could not fall. Although these ‘floor clauses’ had been held to be unfair by an earlier judgment of the Spanish Supreme Court in the light of the Court’s case-law on the interpretation of Directive 93/13, the fact remained that the Supreme Court had limited, in a general manner, the restitutory effects of the declaration of invalidity of those clauses to the sums overpaid after the date of delivery of its fundamental judgment. Against that background, the national courts – before which consumers affected by the application of those ‘floor clauses’ had brought proceedings – sought to ascertain whether such a temporal limitation of the effects of the declaration of invalidity was compatible with Directive 93/13.

In its judgment, the Court makes clear that a finding that a term is unfair within the meaning of Directive 93/13 must have the effect of restoring the consumer to the situation he would have been in if that term had not existed. Consequently, in this instance, the finding that ‘floor clauses’ are unfair had to allow the restitution of advantages wrongly obtained to the detriment of consumers (paragraphs 66 and 67).

In that connection, the Court states that, although a national court is entitled to hold that its judgment is not, in the interests of legal certainty, to affect situations in which judgments with the force of *res judicata* have been given, it is for the Court and the Court alone to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of an EU rule. Furthermore, in so far as the temporal limitation of the effects of the invalidity of ‘floor clauses’, as decided by the Spanish Supreme Court, deprives consumers of the right to obtain repayment in full of the amounts overpaid, it ensures only incomplete and insufficient protection for consumers. Accordingly, such a limitation is neither an adequate nor an effective means of preventing the use of terms of this kind, as required by the Directive. EU law therefore precludes this temporal limitation of the restitutory effects of the invalidity of an unfair term (paragraphs 70, 72, 73, 75 and operative part).

Judgment of 17 May 2022 (Grand Chamber), Unicaja Banco (C-869/19, [EU:C:2022:397](#))

Mortgage agreement – Unfairness of the ‘floor clause’ in the agreement – National rules concerning the judicial appeal procedure – Limitation of the temporal effects of the declaration that an unfair term is void – Restitution – Power of review by the national appeal court of its own motion

The dispute in the main proceedings was between L and Banco de Caja España de Inversiones, Salamanca y Soria SAU, the successor in title to which is Unicaja Banco SA, concerning the failure of the national appeal court to raise of its own motion a ground relating to infringement of EU

law. The bank granted L a mortgage loan. That agreement provided for a ‘floor clause’ pursuant to which the variable rate could not be less than 3%. L brought an action against that bank, seeking a declaration that that clause was void and the repayment of the sums wrongly received, arguing that that clause had to be declared unfair on account of its lack of transparency. The first-instance court upheld the action, while temporally limiting the restitutory effects, pursuant to national case-law. The court hearing the appeal brought by the bank did not order the full repayment of the amounts received under the ‘floor clause’, since L had not brought an appeal against the first-instance judgment. According to Spanish law, where part of the operative part of a judgment is not challenged by any of the parties, the appeal court cannot deprive it of its effects or alter it. That rule of law displays certain similarities with *res judicata*. The Spanish Supreme Court therefore asked the Court of Justice whether the national law was compatible with EU law, in particular with regard to the circumstance that a national court, hearing an appeal against a judgment temporally limiting the repayment of sums wrongly paid by the consumer under a term declared to be unfair, cannot raise of its own motion a ground relating to the infringement of Directive 93/13 and order the repayment of those sums in full.

In its judgment, the Court examines the relationship between certain national procedural principles governing appeal proceedings, such as the principle of the delimitation of the subject matter of an action by the parties, the principle of the correlation between the claims put forward in the action and the rulings contained in the operative part, the principle of the prohibition of *reformatio in peius*, and the national court’s power to examine of its own motion whether a term is unfair.

In that regard, it considers that Article 6(1) of Directive 93/13 precludes the application of such national procedural principles, under which a national court, hearing an appeal against a judgment temporally limiting the repayment of sums wrongly paid by the consumer under a term declared to be unfair, cannot raise of its own motion a ground relating to the infringement of a provision of that directive and order the repayment of those sums in full, where the failure of the consumer concerned to challenge that temporal limitation cannot be attributed to his or her complete inaction. The Court states that, in the circumstances of the present case, the fact that the consumer did not bring proceedings within the appropriate period may be attributable to the fact that the period within which it was possible to bring an appeal had already expired when the Court delivered the judgment in *Gutiérrez Naranjo and Others*,⁴⁶ by which the Court held that national case-law temporally limiting the restitutory effects connected with the finding of unfairness of a contractual term by a court was incompatible with that directive. Consequently, in the case in the main proceedings, the consumer concerned had not displayed complete inaction in failing to bring an appeal. In those circumstances, the application of the national procedural principles depriving the consumer of the means enabling him or her to assert his or her rights under the Directive on unfair terms is contrary to the principle of effectiveness, since it is liable to make the protection of those rights impossible or excessively difficult (paragraphs 38, 39 and operative part).

⁴⁶ Judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, (C-154/15, C-307/15 and C-308/15, EU:C:2016:980), presented in Section V.4. ‘Limitation of the temporal effects of a declaration of invalidity’.

VI. Means to prevent the continued use of an unfair term

1. Collective actions or actions in the public interest

Judgment of 26 April 2012, Invitel (C-472/10, [EU:C:2012:242](#))

Unilateral amendment of the terms of a contract by a seller or supplier – Action for an injunction brought in the public interest and on behalf of consumers by a body appointed by national legislation – Declaration of the unfair nature of a term – Legal effects

In that judgment, the factual and legal context of which is set out above,⁴⁷ the Court observes, first of all, that Directive 93/13 obliges Member States to permit persons or organisations having a legitimate interest in protecting consumers to bring an action for an injunction in order to obtain a judicial decision as to whether contract terms drawn up for general use are unfair and, where appropriate, to have them prohibited. The Court nonetheless makes clear that that directive does not seek to harmonise the penalties applicable where a term has been found to be unfair in proceedings brought by those persons or organisations (paragraphs 35 and 36).

Next, the Court observes that the effective implementation of the deterrent objective of public-interest proceedings requires that terms declared unfair in such an action brought against the seller or supplier concerned are not binding on either consumers who are parties to the proceedings, or those who have concluded with that seller or supplier a contract to which the same general conditions apply. In that connection, the Court states that public-interest proceedings aimed at eliminating unfair terms may also be brought before those terms have been used in contracts (paragraph 38).

In those circumstances, the Court holds that the legislation at issue, under which the declaration of invalidity of an unfair term by a court, following an action brought in the public interest, is applicable to any consumer who has entered into a contract with a seller or supplier in which that term is used, is consistent with the aim of Directive 93/13 whereby the Member States are required to ensure that adequate and effective means exist to prevent the use of unfair terms. Consequently, that legislation is deemed compatible with that directive.

The Court then states that the national courts are required of their own motion, also with regard to the future, to draw the appropriate conclusions from the finding, in an action for an injunction, of invalidity, so that consumers who have concluded a contract containing such a term and to which the same general conditions apply are not bound by the unfair term (paragraph 43 and operative part, paragraph 2).

⁴⁷ As regards the factual and legal context of the dispute, see Section III.1 entitled 'Criteria for assessment' p. 24.

Judgment of 27 February 2014, Pohotovosť (C-470/12, [EU:C:2014:101](#))***Enforcement of an arbitration award – Application for leave to intervene in enforcement proceedings – Consumer protection association – National legislation which does not allow such an intervention – Procedural autonomy of the Member States***

The undertaking Pohotovosť granted a consumer credit to a borrower. The latter was ordered, by arbitration award, to repay sums relating to the performance of that contract. Following an application for enforcement of that arbitration award made by Pohotovosť, the competent bailiff applied to the Okresný súd Svidník (District Court, Svidník, Slovakia) ('the national court') for authorisation to enforce that arbitration award.

It was in the context of those enforcement proceedings that a consumer protection association sought leave to intervene. That association claimed that the bailiff was not impartial, on the ground that the bailiff in question had in the past been employed by Pohotovosť. After the national court issued an order declaring inadmissible the application to intervene, an appeal against that order was brought before it. In the present case, the consumer association claimed, in essence, that the court had not adequately protected the borrower against an unfair arbitration clause.

Under Slovak legislation, a consumer protection association may be granted leave to intervene in a dispute concerning the substance of a case involving a consumer. However, in accordance with the case-law of the Najvyšší súd Slovenskej republiky (Supreme Court, Slovak Republic), such an association is not permitted to intervene in enforcement proceedings concerning a consumer, whether they are proceedings for the enforcement of a judgment of a national court or for the enforcement of a final arbitration award.

In those circumstances, the national court decided to refer the case to the Court. In its judgment, the Court holds that Directive 93/13 and Articles 38 and 47 of the Charter relating, respectively, to consumer protection and to the right to an effective remedy, do not preclude national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award (operative part).

The Court states that the national court seised of an action for enforcement of a final arbitration award is required to assess of its own motion the unfair nature of the contractual terms which give rise to the debt determined in that arbitration award, provided that it has available to it the necessary legal and factual elements (paragraph 42).

Furthermore, as regards the role which consumer protection associations may play, the Court notes that Article 7(1) and (2) of Directive 93/13 provides the possibility for those associations to bring actions before the courts in order to determine whether contractual terms drawn up for general use are unfair and to have them prohibited. To that effect, the Court states that such prohibitory actions may be brought even if the terms which they seek to have prohibited have not been used in specific contracts. However, in the absence of European Union legislation concerning the possibility for consumer protection associations to intervene in individual disputes involving consumers, that situation is to be governed by each Member State, in

accordance with the principle of procedural autonomy and in compliance with the principle of effectiveness (paragraphs 43, 44 and 46).

The Court concludes that, in the present case, the principle of equivalence has not been infringed. The intervention of any third party in all enforcement proceedings of a decision of a national court or of a final arbitration award is precluded, whether the intervention in question is based on the infringement of European Union law or national law. The Court also finds that the principle of effectiveness has not been infringed. Accordingly, it states that the Directive on unfair clauses does not provide for a right for consumer protection associations to intervene in individual disputes involving consumers. Article 38 of the Charter, relating to the need to ensure a high level of consumer protection, does not impose an interpretation of that directive which would encompass such a right. Furthermore, it concludes that, in so far as that directive requires the national court to assess of its own motion the unfair nature of the contractual terms, the refusal to grant such an association leave to intervene in support of a consumer does not constitute an infringement of its right to an effective judicial remedy. However, according to the Court, that refusal does not affect the rights of such an association, including its right to bring a collective action or its right to directly represent a consumer in any proceedings (paragraphs 49, 50, 52 and 54 to 56).

Judgment of 14 April 2016, Sales Sinués (C-381/14 and C-385/14, [EU:C:2016:252](#))

Mortgage contracts – ‘Floor’ clause – Examination of the clause with a view to its invalidation – Collective proceedings – Action for an injunction – Stay of an individual action with the same subject matter

In 2005, some borrowers concluded an agreement for the novation of a mortgage loan with two Spanish banks. The agreements contained a so-called ‘floor’ clause which set a nominal annual interest rate and a ceiling for that interest rate. Under that clause, and independently of market rate fluctuations, the interest rates of those agreements could not fall below the percentage stipulated by the ‘floor’ clause.

The borrowers, taking the view that the ‘floor’ clauses had been imposed on them by the banking institutions and that they created an imbalance to their detriment, brought individual actions before the Juzgado de lo Mercantil no 9, Barcelona (Commercial Court No 9, Barcelona, Spain; ‘the national court’) seeking annulment of those clauses. Prior to those actions, a consumer association had brought a collective action against several banking institutions seeking, inter alia, an injunction prohibiting the continued use of ‘floor’ clauses in loan agreements.

In the present case, the banking institutions sought to have the proceedings at issue suspended pending final judgment concluding the collective action. The borrowers objected to that suspension. The national court considered that it was required, under a Spanish procedural rule, to suspend the individual actions brought before it until such time as a final judgment on the collective action has been delivered. Such a suspensory effect leads to a subordination of the individual action to the collective action, as regards both the course of the proceedings and the outcome.

In response to a question referred to it for a preliminary ruling, the Court ruled on the interpretation to be given to Article 7 of Directive 93/13. It holds that that provision precludes national legislation which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action. The Court states that that incompatibility continues to exist, in particular, if that suspension occurs without the relevance from the point of view of the protection of the consumer who brought the individual action before the court being able to be taken into consideration, and without that consumer being able to decide to dissociate himself from the collective action (operative part).

The Court recalls that, in parallel to the subjective right of a consumer to bring an action before a court for examination as to whether a term of a contract to which he is a party is unfair, Directive 93/13 allows Member States to introduce a check on unfair terms contained in standard contracts by means of actions for an injunction brought by consumer-protection associations under Article 7(2) of Directive 93/13. Accordingly, the Court notes that the deterrent nature and dissuasive purpose of those actions, together with their independence of any particular dispute, mean that such actions may be brought even though the terms which they seek to have prohibited have not been used in specific contracts. Consequently, the Court points out that individual and collective actions have different purposes and legal effects. Thus, their respective conduct can correspond only to procedural requirements relating, in particular, to the sound administration of justice and to the need to avoid incompatible judicial decisions, without leading to a weakening of consumer protection (paragraphs 21, 29 and 30).

In the absence of harmonisation of procedural rules applicable to the relationship between collective and individual actions, it is for each Member State to establish such rules, under the principle of procedural autonomy and in accordance with the principles of equivalence and effectiveness. In the present case, the Court notes that the Spanish procedural provision under which a national court is required automatically to suspend the individual action brought by a consumer, seeking a declaration that a contractual term is unfair, pending a final judgment concluding the ongoing collective action, does not raise any doubts as to compliance with the principle of equivalence. However, that is not the case as regards the principle of effectiveness, in so far as that procedural provision is liable to prevent the consumer from individually asserting the rights recognised by that directive. The Court finds that the consumer will necessarily be linked to the outcome of the collective action, even if he has decided not to participate in it, and is dependent on the period within which a judicial decision relating to the collective action is to be taken (paragraphs 32, 33, 36 and 39).

Moreover, if the consumer wishes to take part in the collective action, he is subject to constraints relating to the determination of the competent court and to the pleas that may be put forward. In addition, the consumer will also forfeit the rights which he would be recognised as having in an individual action, such as the right to have all the circumstances of his situation taken into account and the possibility of waiving the non-application of an unfair clause. Furthermore, the application of that procedural rule prevents the national court from being able to examine the relevance of the suspension of the individual action pending delivery of a final judgment in the collective action. In that context, the Court concludes that such a lack of effectiveness cannot be justified by the need to prevent the risk of incompatible judicial

decisions, since the difference in nature between judicial control exercised in the context of a collective action and that exercised in the context of an individual action should, in principle, prevent such a risk. Furthermore, such a lack of effectiveness cannot be justified by the need to avoid overburdening the courts, since the effective exercise of rights conferred by Directive 93/13 on consumers cannot be called into question by considerations connected to the organisation of a Member State's judicial system (paragraphs 37, 38 and 40 to 42).

2. Guarantee of the right to an effective remedy

Judgment of 17 July 2014, Sánchez Morcillo and Abril García (C-169/14, [EU:C:2014:2099](#))

Mortgage loan agreement – Unfair terms – Mortgage enforcement proceedings – Right to an appeal

In 2013 the applicants signed a notarial act with Banco Bilbao for a loan secured by a mortgage on their property. Owing to the debtors' failure to meet their obligation to make monthly repayments of the loan, Banco Bilbao demanded payment of the entire loan together with ordinary interest and default interest and the enforced sale of the property mortgaged in its favour.

Following the bringing of mortgage enforcement proceedings, the debtors lodged an objection thereto which was dismissed at first instance. They brought an appeal against that decision before the Audiencia Provincial de Castellón (Provincial Court, Castellón, Spain; 'the national court').

Spanish civil procedural law allows a creditor to bring an appeal against a decision which, upholding the objection raised by a debtor, terminates the mortgage enforcement proceedings. It does not, by contrast, allow the debtor whose objection has been dismissed to bring an appeal against the judgment ordering the enforcement procedure to be carried out. In addition, the court of first instance cannot stay mortgage enforcement proceedings, but may at most award compensation in respect of the damage suffered by the consumer.

In the present case, the national court entertained doubts as to whether the national legislation is compatible with the objective of consumer protection pursued by Directive 93/13 and with the right to an effective remedy guaranteed by Article 47 of the Charter. That court specified that the availability of an appeal to debtors could prove even more critical given that certain clauses in the loan agreement at issue could be considered to be 'unfair', within the meaning of Article 3(1) of Directive 93/13.

By its judgment, the Court rules that Article 7(1) of Directive 93/13, read in conjunction with Article 47 of the Charter, precludes a national system of enforcement which provides that mortgage enforcement proceedings may not be stayed by the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer. The Court states that the incompatibility lies in the fact that the consumer, the debtor against whom mortgage enforcement proceedings are brought, may not appeal against

a decision dismissing his objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disappplied (paragraph 51 and operative part).

The Court observes, first of all, that the Spanish procedural legislation limited the possibility of appealing against a decision ruling on the legality of a contractual clause, creating a difference of treatment between the consumer and the seller or supplier in their position as parties to the proceedings. The seller or supplier may appeal against a decision which is contrary to its interests whilst, if the objection is dismissed, the consumer does not have that right (paragraph 30).

The Court notes that, in the absence of harmonisation of national enforcement procedures, the detailed rules establishing the right of appeal against a decision ruling on the legality of a contractual clause, arising in the course of mortgage enforcement proceedings, are matters falling within the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, provided that they comply with the principles of equivalence and effectiveness (paragraph 31).

Next, the Court considers that, according to EU law, the principle of effective judicial protection affords a right of access only to a court or tribunal. Consequently, the fact that the only remedy available to the consumer, as a debtor against whom mortgage enforcement proceedings are brought, is to bring an action before a single jurisdictional level in order to protect the rights derived from Directive 93/13 is not, in itself, contrary to EU law (paragraph 36).

However, the Court notes that the Spanish system exposes consumers, and possibly their family, to the risk of losing their dwelling in an enforced sale, while the enforcing court may have, at most, delivered a rapid assessment of the validity of the contractual clauses upon which the seller or supplier bases his application. The protection that the consumer, as a mortgage debtor against whom enforcement proceedings are brought, might obtain by way of a separate judicial scrutiny undertaken in the context of substantive proceedings brought in parallel with the enforcement proceedings, cannot offset that risk because the consumer would not be granted a remedy reflecting the damage he had suffered by restoring him to the situation he was in before the enforcement proceedings against the mortgaged property, but, at best, an award of compensation. The purely compensatory nature of the remedy that might be awarded to the consumer would confer on him only incomplete and insufficient protection. It would not constitute either adequate or effective means, within the meaning of Article 7(1) of Directive 93/13, of preventing the continued use of the clause, found to be unfair (paragraph 43).

The Court states, moreover, that the procedure for objecting to enforcement, laid down in the Spanish legislation, places the consumer, as a debtor against whom mortgage enforcement proceedings are brought, in a weaker position compared with the seller or supplier, as a creditor bringing mortgage enforcement proceedings, as regards the judicial protection of the rights that he is entitled to rely on by virtue of Directive 93/13 against the use of unfair clauses. That situation places at risk the attainment of the objective pursued by Directive 93/13, since the imbalance between the procedural rights available to the parties simply accentuates the imbalance existing between the parties to the agreement (paragraphs 45 and 46).

Judgment of 1 October 2015, ERSTE Bank Hungary (C-32/14, [EU:C:2015:637](#))

Mortgage loan agreement – Stopping the use of unfair terms – Adequate and effective means – Acknowledgement of the debt – Notarised instrument – Affixation of the enforcement clause by a notary – Enforceable order – Notary's obligations – Examination by the national court of its own motion of unfair terms – Judicial review – Principles of equivalence and effectiveness

The dispute in the main proceedings concerned an application to have set aside an enforcement clause, affixed by a notarial act to the acknowledgement of a debt signed by a Hungarian consumer, on the basis of a loan agreement and a mortgage guarantee contract concluded by the parties.

The Court observes that Directive 93/13 does not regulate the issue of whether, in circumstances in which national legislation confers on notaries the power to affix the enforcement clause to a notarised document relating to a contract, and subsequently to cancel it, the authority to exercise powers which fall directly within the scope of the judicial function should be extended to notaries. Since EU law makes no provision for the harmonisation of national enforcement mechanisms and the role assigned to notaries in those mechanisms, it is for the legal order of each Member State to establish such rules, under the principle of procedural autonomy, provided, however, that the principles of equivalence and effectiveness are observed. As regards the principle of effectiveness, the Court holds that Directive 93/13 requires that the national court hearing a dispute between a seller or supplier and a consumer take positive action unconnected to the parties to the contract. Nonetheless, observance of the principle of effectiveness cannot be stretched so far as to make up fully for total inertia on the part of the consumer concerned (paragraphs 48, 49 and 62).

Therefore, the fact that the consumer may rely on the protection of legislative provisions on unfair terms only if he brings court proceedings against, in particular, the notarial act cannot be regarded in itself as contrary to the principle of effectiveness. The effective legal protection guaranteed by Directive 93/13 is based on the premiss that one of the parties to the contract will bring an action before the national courts (paragraph 63).

Judgment of 21 December 2016, Biuro podróży « Partner » (C-119/15, [EU:C:2016:987](#))

Erga omnes effect of unfair terms entered in a public register – Financial penalty imposed on a seller or supplier having used a term held to be equivalent to a term in the register – Seller or supplier who was not a party to the proceedings giving rise to the declaration that the term in question was unfair

By a decision of 22 November 2011, the President of the Polish Office of Competition and Consumer Protection found that Biuro Partner, a Polish company engaged in the tourism services sector, had used terms in its standard conditions of business which were considered equivalent to terms previously declared unlawful and then entered in the public register of unfair terms. According to the President of the Office of Competition and Consumer Protection, those terms used by Biuro Partner harmed the collective interests of consumers and justified the imposition of a fine of PLN 27 127 (Polish zlotys) (approximately EUR 6 400).

HK Zakład Usługowo Handlowy 'Partner', which succeeded Biuro Partner, challenged the finding that the clauses used by the earlier company were equivalent to those entered in the aforementioned register.

By a judgment of 19 November 2013, the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw – Competition and Consumer Protection Court, Poland) dismissed Biuro Partner's action brought against the decision of the President of the Office of Competition and Consumer Protection, upholding the President's finding that the clauses were equivalent.

Hearing the case on appeal, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) expressed doubts as to the interpretation to be given of Directives 93/13 and 2009/22 on injunctions for the protection of consumers' interests.⁴⁸

Therefore, the referring court asked the Court whether Article 6(1) and Article 7 of Directive 93/13, read in conjunction with Articles 1 and 2 of Directive 2009/22, must be interpreted as precluding the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in a register of such terms from being regarded, in relation to another seller or supplier which was not a party to the proceedings culminating in the entry in the register of unlawful standard contract terms, as an unlawful act for which a fine may be imposed.

By its judgment, the Court rules that Article 6(1) and Article 7 of Directive 93/13, read in conjunction with Articles 1 and 2 of Directive 2009/22, and in the light of Article 47 of the Charter, must be interpreted as not precluding the use of standard contract terms from being regarded, in relation to another seller or supplier which was not a party to the proceedings culminating in the entry in that register, as an unlawful act.

The establishment of a register such as that at issue is compatible with EU law. In that regard, it is apparent from the provisions of Directive 93/13, in particular Article 8 thereof, that the Member States may draw up lists of terms deemed to be unfair. Under Article 8a of that directive, as amended by Directive 2011/83,⁴⁹ the Member States are required to inform the Commission when such lists are drawn up. It follows from those provisions that those lists or registers drawn up by national departments are, as a rule, done so in the interest of consumer protection under Directive 93/13. However, that register must be managed in a transparent manner in the interest not only of consumers, but also sellers or suppliers. That requirement implies *inter alia* that it must be structured in a clear manner, irrespective of the number of terms it contains. Moreover, the terms contained in the register concerned must be current, which means that the register must be carefully kept up to date and that, in keeping with the principle of legal certainty, terms that are no longer needed are removed promptly (paragraphs 36, 38 and 39).

⁴⁸ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30).

⁴⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304 p 64).

Moreover under the principle of effective judicial protection, a seller or supplier on whom a fine is imposed due to the use of a term held to be equivalent to a term in a register must, in particular, have the possibility of challenging that sanction. That right to a remedy must be able to challenge both the assessment of the conduct considered to be unlawful and the amount of the fine fixed by the competent national body. In that context, the assessment made by the court having jurisdiction must not be restricted to merely conducting a formal comparison of the terms examined with those included in the register. On the contrary, that assessment consists in appraising the content of the terms in dispute, in order to determine whether, in the light of all the relevant circumstances specific to each case, those terms are materially identical to those included in the register, having regard in particular to their harmful effects for consumers (paragraphs 40 and 42).

Judgment of 9 July 2020, Raiffeisen Bank and BRD Groupe Société Générale (C-698/18 and C-699/18, [EU:C:2020:537](#))

Personal loan agreement – Contract performed in full – Finding that contractual terms are unfair – Action for reimbursement of sums unduly paid on the basis of an unfair clause – Judicial arrangements – Point from which the limitation period starts to run – Objective point in time at which the consumer knows of the existence of the unfair term

Two borrowers concluded credit agreements for the grant of personal loans with Raiffeisen Bank and BRD Groupe Société Générale respectively. After those loans had been repaid in full, each of them brought an action before the Judecătoria Târgu Mureş (Court of First Instance, Târgu Mureş, Romania), seeking a declaration that a number of terms in those contracts were unfair as regards the payment of processing and monthly administration fees as well as the bank's power to alter interest rates.

Raiffeisen Bank and BRD Groupe Société Générale maintained that, when the actions were brought, since the loan agreements had come to an end on account of having been performed in full, the borrowers no longer had the status of consumer and were no longer entitled to bring proceedings.

The Judecătoria Târgu Mureş (Court of First Instance, Târgu Mureş) considered that full performance of a contract was not an obstacle to examining the unfair nature of its terms and found that those terms were unfair. That court therefore ordered the two banks to repay the sums paid by the two borrowers under those terms, along with statutory interest. Raiffeisen Bank and BRD Groupe Société Générale appealed against that decision.

In that context, the Tribunalul Specializat Mureş (Specialised Court, Mureş, Romania) asked the Court of Justice whether Directive 93/13 continues to apply after a contract has been performed in full and, where applicable, whether an action for reimbursement of sums received under contractual terms deemed unfair may be subject to a time limit of three years which starts to run from the time when the contract ended.

By its judgment, the Court points out, first of all, that the obligation for a national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails reimbursement of those amounts (paragraph 54).

However, the Court notes that, in the absence of rules under EU law, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights of EU citizens. Those rules must not, however, be less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness) (paragraph 57).

As regards the principle of effectiveness, the Court recalls that the system of protection implemented by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier. In that regard even if a three-year time limit appears, in principle, sufficient in practical terms to allow a consumer to prepare and bring an effective action, in so far as it starts to run from the date when the contract has been performed in full, it could, however, have expired before a consumer has even been able to find out about the unfair nature of a term contained in that contract. That time limit is not therefore capable of providing a consumer with effective protection (paragraphs 64, 66 and 67).

In those circumstances, limiting the protection conferred on a consumer solely to the period in which the contract in question was performed cannot be reconciled with the system of protection established by that directive. The principle of effectiveness therefore precludes an action for reimbursement from being subject to a limitation period of three years, which starts to run from the date on which the contract in question ends, irrespective of whether the consumer was, or could reasonably have been, aware on that date of the unfairness of a term of that contract (paragraphs 73 and 75).

As regards the principle of equivalence, the Court notes that observance of that principle requires the national rule in question to apply without distinction to actions based on an infringement of EU law and those based on an infringement of national law which have a similar purpose and cause of action. In that regard, it precludes an interpretation of national legislation whereby the limitation period applicable to a legal action for reimbursement of amounts unduly paid on the basis of an unfair term starts to run as from the date of the full performance of the contract, where that same period starts to run in the case of a similar domestic action as from the date of the judicial finding of the cause of the action (paragraphs 76, 77 and 82).

3. Specific procedural rules

Judgment of 21 April 2016, Radlinger and Radlingerová (C-377/14, [EU:C:2016:283](#))

National rules governing insolvency proceedings – Debts arising from a consumer credit agreement – Effective judicial remedy

The dispute in the main proceedings concerned Czech legislation which does not permit national courts to examine of their own motion whether sellers and suppliers have complied with the rules of EU law on consumer protection, in respect of, in particular, contractual terms contained in a consumer credit agreement.

The Court finds that Article 7(1) of Directive 93/13 precludes such national legislation which, first, does not permit that examination in respect of such contracts, even where the court has available to it the matters of law and fact necessary to that end, and secondly, permits the court to examine only certain claims, and solely in respect of a restricted number of grounds (operative part, paragraph 1).

Judgment of 31 May 2018, Sziber (C-483/16, [EU:C:2018:367](#))⁵⁰

Loan agreements denominated in foreign currency – National legislation providing for specific procedural requirements when the fairness of terms is challenged – Principle of equivalence – Right to effective judicial protection

The main proceedings involved a dispute between an individual and a Hungarian bank concerning an application for a declaration of unfairness of certain terms inserted into a loan agreement, for the purchase of a dwelling, paid out and repaid in Hungarian forints (HUF), but registered in Swiss francs (CHF) on the basis of the exchange rate in force on the day of payment.

The rules of national law impose additional requirements prejudicial to a party to proceedings, whether applicant or defendant, who, in the period from 1 May 2004 to 26 July 2014, has, in the capacity of a consumer, entered into a credit agreement containing an unfair contractual term relating to a difference in exchange rates, where those additional requirements stipulate, inter alia, in order that the rights arising from the invalidity of those agreements concluded with consumers may effectively be upheld before the courts and in order that the court may be able to examine the substance of a case, a civil procedural document must be presented with certain mandatory content (paragraph 27).

The Court recalls, first of all, that EU law does not harmonise the procedures which apply for the assessment of an allegedly unfair contractual term. Those procedures are thus a matter for the national legal order of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and that they afford effective judicial protection, as provided for in Article 47 of the Charter (principle of effectiveness) (paragraph 35).

In the first place, in the course of its examination of compliance with the principle of equivalence, the Court notes that the imposition of additional procedural requirements on consumers deriving rights from EU law does not, in itself, mean that those procedural requirements are less favourable. Indeed, it is important to analyse the situation taking account of the role of the procedural provisions concerned in the procedure viewed as a whole, of the conduct of that procedure and of the special features of those provisions, before the national instances (paragraph 43). The procedural requirements at issue in the main proceedings, having regard to their place in the system put in place by the Hungarian legislature seeking to resolve, within a reasonable time, a plethora of cases relating to loan agreements denominated in

⁵⁰ That judgment is also presented in Section I.1 'Scope *ratione loci*: the application of Directive 93/13 in the absence of any cross-border element'.

foreign currency and containing unfair terms, cannot, in principle, be regarded as less favourable than those relating to similar claims that do not concern rights deriving from EU law. Therefore, subject to the verification the referring court is called upon to make, such requirements cannot be regarded as incompatible with the principle of equivalence (paragraph 48).

As regards, in the second place, the principle of effective judicial protection, the Court points out that the obligation of Member States to lay down detailed procedural rules to ensure respect for the rights which individuals derive from Directive 93/13 against the use of unfair terms implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter. That protection must be assured both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules relating to such actions (paragraph 49). However, consumer protection is not absolute. Thus, the fact that a particular procedure comprises certain procedural requirements that the consumer must respect in order to assert his rights does not mean that he does not enjoy effective judicial protection. 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 need to comply with the principle of effective judicial protection does not, in principle, prevent that court from calling on the consumer to produce certain evidence in support of his claim (paragraph 50).

According to the Court, although it is true that the procedural rules at issue in the main proceedings require an additional effort from the consumer, the fact remains that those rules, in so far as they intend to unblock the judicial system, in view of the length of the proceedings at issue, are a response to an exceptional situation and pursue a general interest in the proper administration of justice. Those rules are, in themselves, likely to prevail over private interests, provided that they do not go beyond what is necessary to achieve their objective (paragraph 51). In the present case, having regard to the objective of unblocking the judicial system, it does not appear, which it is nevertheless for the referring court to ascertain, that the rules requiring the consumer to submit a claim containing actual figures consisting, at least in part, in a statement of accounts previously established by the financial institution concerned and to specify the legal consequence that he requests the national court to apply if the loan agreement in question, or some of its terms, is invalid, are so complex and include such onerous requirements that they disproportionately affect the consumer's right to effective judicial protection (paragraph 52).

The Court therefore rules that Article 7 of Directive 93/13 does not preclude, in principle, national legislation which lays down specific procedural requirements in respect of actions brought by consumers who concluded loan agreements denominated in foreign currency, containing a term on the difference in exchange rates and/or a term stipulating an option of unilateral amendment, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had those unfair terms not existed (operative part, paragraph 1).

Judgment of 13 September 2018, Profi Credit Polska (C-176/17, [EU:C:2018:711](#))***Order for payment procedure founded on a promissory note that secures the obligations arising from a consumer credit agreement***

In 2015, the undertaking Profi Credit Polska granted a consumer loan to a borrower. Under a term in that standard-form agreement, repayment of the loan was secured by a promissory note signed by the debtor, in an amount that was not specified.

Following failure by the debtor to make payment, the financial institution informed him that the promissory note had been completed in the amount that remained payable. Furthermore, that undertaking applied to the Sąd Rejonowy w Siemianowicach Śląskich I Wydział Cywilny (District Court, Siemianowice Śląskie (First Civil Division), Poland; 'the national court') for an order for payment against the debtor on the basis of that promissory note.

Under Polish procedural law, the order for payment procedure consists of two stages. In the first stage, whilst the assessment of the promissory note's validity can be carried out by the court of its own motion, that assessment is confined to examination of whether the promissory note is formally valid. In the second stage, if the debtor under that promissory note has lodged an objection against the order for payment, he may contest not only the obligation under the promissory note but also the underlying relationship that exists, including for example the consumer credit agreement.

In the present case, the national court was nevertheless uncertain whether the order for payment procedure founded on a promissory note was consistent with Directive 93/13. It stated that, in practice, an application for an order for payment is accompanied only by the duly completed promissory note, and not by the consumer credit agreement. Thus, for the purpose of issuing an order for payment, it is sufficient to establish that the promissory note has been correctly drawn up, in compliance with the Polish legislation on bills of exchange and promissory notes. Consequently, the review by the national court can relate only to the content of the promissory note and it may not review the consumer credit agreement, even if it is aware of that agreement. It is therefore for the consumer to lodge an objection against the order for payment in order for it to be established whether certain terms in that agreement are unfair.

Having been requested to give a preliminary ruling, the Court rules that Article 7(1) of Directive 93/13 precludes national legislation which permits issue of an order for payment founded on a valid promissory note that secures a claim arising from a consumer credit agreement, where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair. It states that that incompatibility remains if the detailed rules for exercising the right to lodge an objection against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured (operative part).

The Court notes that that national court's obligation to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, provided that it has the legal and factual elements necessary for that task, also applies in respect of an order for payment procedure. In that regard, the Court points out that effective protection of the rights conferred on the consumer by that directive can be guaranteed only if the national procedural

system allows the court, during the order for payment procedure or the enforcement proceedings concerning that order for payment, to check of its own motion whether terms of the contract concerned are unfair. In the present case, the Court concludes that, in so far as the review by the national court is confined to the promissory note, and cannot relate to the consumer credit agreement, that court is not in a position to examine whether a contractual term is unfair as long as it does not have available to it all the factual and legal elements for that purpose (paragraphs 42 to 47).

Moreover, the Court recalls that, in the absence of harmonisation in EU law of the procedures applicable to examining whether a contractual term is unfair, those procedures, in accordance with the principle of procedural autonomy, fall within the domestic legal system of the Member States, on condition, that they comply with the principle of equivalence and that they provide for a right to an effective remedy. Thus, first, the Court notes that it does not have anything before it which is capable of giving rise to doubt as to whether the Polish legislation on the order for payment procedure founded on a promissory note complies with that principle. Secondly, as regards the right to an effective remedy, the Court points out that the national court must determine whether the detailed rules of the opposition procedure which national law lays down give rise to a significant risk that the consumers concerned will not lodge the objection required. Thus, in order to guarantee consumers a right to an effective remedy, they must have the possibility of bringing an action or lodging an objection under reasonable procedural conditions, so that the exercise of their rights under Directive 93/13 is not weakened, in particular because of any time limits or costs applicable to them (paragraphs 57, 58, 61 and 63).

In the present case, the Court emphasises that, although the Polish consumer has the right to contest the order for payment, exercise of that right of objection is subject to particularly restrictive conditions. More specifically, the Court notes that that consumer has a time limit of two weeks in which to lodge an objection, and he must pay three quarters of the court fee where he lodges an objection. Thus, given that the consumer is required to adduce, within two weeks of service of the order for payment, the factual and legal elements that enable the court to carry out the assessment of his objection, and that he is penalised by the way in which the court fee is calculated, the Court concludes that there is a significant risk that that consumer will not lodge the objection required (paragraphs 64 to 68 and 70).

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