Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 16 October 2014[1]

Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13

Unicaja Banco SA
v
José Hidalgo Rueda (C-482/13),
María del Carmen Vega Martín (C-482/13),
Gestión Patrimonial Hive SL (C-482/13),
Francisco Antonio López Reina (C-482/13),
Rosa María Hidalgo Vega (C-482/13),
Caixabank SA
v
Manuel María Rueda Ledesma (C-484/13),
Rosario Mesa Mesa (C-484/13),
José Labella Crespo (C-485/13),
Rosario Márquez Rodríguez (C-485/13),
Rafael Gallardo Salvat (C-485/13),
Manuela Márquez Rodríguez (C-485/13),
Alberto Galán Luna (C-487/13),
Domingo Galán Luna (C-487/13)

(Requests for a preliminary ruling from the Juzgado de Primera Instancia e Instrucción de Marchena (Spain))

(Directive 93/13/EEC — Consumer credit agreement — Unfair terms — Non-binding effect — Adequate and effective means of preventing the continued use of unfair terms — Mortgage enforcement proceedings)

1. At the time of its inception, it is likely that most Member States would not have foreseen the impact that Directive 93/13/EEC[2] was to have on their legal orders some 20 years later.

2. One such Member State is the Kingdom of Spain. In the wake of *Aziz*,[3] the Spanish legislature recently adopted new legislation[4] intended to rectify the problems identified by the Court in that ruling, amongst others. The Court has already had the opportunity to examine that legislation.[5] The cases that the referring court has brought to the Court's attention bring to light a facet of Law No 1/2013 which is different from that at issue in *Sánchez Morcillo and Abril García*. This time, the

1 — Original language: English.

2 — Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

3 — C-415/11, EU:C:2013:164.

4 — Law No 1/2013 of 14 May 2013 laying down measures for the strengthening of the protection of mortgagors, the restructuring of debt and social rent (Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social), 'Law No 1/2013', BOE No 116 of 15 May 2013, p. 36373.

5 — *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099.

question is not whether Spanish law makes it impossible or excessively difficult for consumers to appeal against a judicial decision ordering enforcement of a debt, but rather whether the Spanish procedural rules governing the enforcement of a mortgage satisfy the requirement of Directive 93/13 according to which Member States must ensure that consumers are not bound by unfair clauses.

3. More specifically, the Juzgado de Primera Instancia e Instrucción de Marchena (Court of First Instance and of Inquiry of Marchena) (Spain) has referred — along with a number of other Spanish courts[6] — questions to the Court essentially regarding one of the Transitional Provisions of Law No 1/2013. That provision imposes a ceiling on the default interest recoverable through the enforcement of a mortgage: the rate of default interest must not be more than three times the statutory interest rate. If that ceiling is exceeded, the courts are to give creditors the possibility of adjusting the default interest rate so that it falls within the statutory limit. These requests for a preliminary ruling give the Court yet another opportunity to clarify the limits of the influence of EU consumer law on national rules of that kind.

I – **Legal framework**

A – *Directive 93/13*

4. The 21st recital in the preamble to Directive 93/13 states:

'… Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions'.

5. Article 6(1) of Directive 93/13 is worded as follows:

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

6. Article 7(1) of Directive 93/13 provides:

'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.'

7. Under Article 8 of Directive 93/13, 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'.

B – *Spanish law*

8. Under Article 1911 of the Spanish Civil Code, a debtor is to be liable for settlement of his financial obligations using all his present and future assets.

6 — Apart from the present sets of proceedings, reference is also made to the following pending cases: C-548/13 *Caixabank*; C-602/13 *Banco Bilbao Vizcaya Argentaria*; C-75/14 *Banco de Caja España de Inversiones, Salamanca y Soria*; and C-90/14 *Banco Grupo Cajatres*.

9. Article 105 of the Law on Mortgages (Ley Hipotecaria), codified by Decree of 8 February 1946[7] as amended by Law No 1/2013, provides that a mortgage may be created as security for all types of obligations and that it is not to alter the unlimited personal liability of the debtor under Article 1911 of the Civil Code.

10. Article 552(1) of the Law on Civil Procedure (Ley de Enjuiciamiento Civil), as amended by Article 7(1) of Law No 1/2013, provides that, if a court finds that any of the terms appearing in certain enforceable instruments may be considered to be unfair, it is to hear the parties within 15 days. After hearing the parties, it must, within the next five days, make an appropriate order in accordance with Article 561(1)(3) of the Law on Civil Procedure.

11. Law No 1/2013 also added a new subparagraph 3 to Article 561(1) of the Law on Civil Procedure, worded as follows:

'When one or more clauses are deemed unfair, the order to be made shall determine the consequences of such unfairness, directing either that enforcement is unavailable or ordering enforcement without application of the clauses considered unfair.'

12. Furthermore, Article 3(2) of Law No 1/2013 amended Article 114 of the Law on Mortgages through the addition of a third paragraph worded as follows:

'Default interest on loans or credits for the purchase of a habitual dwelling, secured by mortgages charged on the dwelling in question, may not be more than three times the statutory rate of interest and may accrue only on the outstanding principal. Such default interest may not in any circumstances be capitalised, except in the case provided for in Article 579(2)(a) of the Law on Civil Procedure.'

13. Lastly, the Second Transitional Provision of Law No 1/2013 is worded as follows:

'The limitation of default interest on mortgages on habitual dwellings which is provided for in Article 3(2) shall apply to mortgages created after the entry into force of this Law.

Likewise, that limitation shall apply to default interest, provided for in mortgage loans secured on habitual dwellings and created before the entry into force of the Law, which falls due subsequently, and to any interest which, having accrued and fallen due by that date, has not been paid.

In proceedings for enforcement or extra-judicial sale commenced and not concluded by the time of the entry into force of this Law, and in proceedings in which the sum in respect of which an enforcement order or order for extrajudicial sale is sought has already been fixed, the Registrar of the court or the notary shall allow the party seeking enforcement a period of 10 days in order to adjust that sum in accordance with the preceding paragraph.'

II – **Facts, procedure and the questions referred**

14. The main proceedings concern four different sets of enforcement proceedings initiated by Unicaja Banco (Case C-482/13) and Caixabank (Cases C-484/13, C-485/13 and C-487/13) ('the banks') for the enforcement of a number of mortgages, all of which were arranged between 5 January 2007 and 20 August 2010 for amounts of EUR 249 000 or less.

7 — BOE No 58 of 27 February 1946, p. 1518.

15. In Case C-482/13, the mortgage loan was subject to an 18% default interest rate, which could be increased if the addition of four percentage points to the adjusted interest rate resulted in a higher interest rate, subject to a maximum nominal rate of 25% per annum. In Cases C-484/13, C-485/13 and C-487/13, the mortgage loans were subject to a default interest rate of 22.5%.

16. Moreover, all those contracts contained a clause allowing the lender to bring forward the maturity date initially agreed and require payment of all the outstanding capital debt, plus the agreed interest, default interest, commission, expenses and costs.

17. Between 21 March and 30 October 2012, the banks opened enforcement proceedings before the referring court. However, the referring court suspended those proceedings, as it had become aware that the contractual terms concerning the default interest rate and accelerated repayment might well be unfair. On that basis, the Juzgado de Primera Instancia e Instrucción de Marchena decided on 12 August 2013 to maintain the stay of proceedings and to refer the following questions for a preliminary ruling:

'(A) Under [Directive 93/13], and in particular Article 6(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, must a national court, when it finds there to be an unfair default-interest clause in mortgage loans, declare the clause void and not binding or, on the contrary, must it moderate the interest clause, referring the matter back to the party seeking enforcement, or to the lender, for adjustment of the interest?

(B) Is the Second Transitional Provision of [Law No 1/2013] nothing more than a clear limitation on the protection of consumer interests, in that it implicitly imposes upon the court the obligation to moderate a default-interest clause which is tainted by unfairness, adjusting the stipulated interest and maintaining in force a stipulation which was unfair, instead of declaring the clause to be void and not binding upon the consumer?

(C) Does the Second Transitional Provision of [Law No 1/2013] contravene [Directive 93/13], and in particular Article 6(1) thereof, by preventing application of the principles of equivalence and effectiveness in relation to consumer protection and avoiding application of the penalty of nullity and lack of binding force in respect of default-interest clauses tainted by unfairness and stipulated in mortgage loans entered into prior to the entry into force of [Law No 1/2013]?'

18. By decision of the President of the Court of Justice of 10 October 2013, all the cases were joined for the purposes of the written and oral procedure, as well as the judgment.

19. Written observations have been submitted by Unicaja Banco, Caixabank, the Spanish Government, and by the Commission, all of whom presented oral argument at the hearing on 10 September 2014.

III – **Analysis**

A – *Preliminary remarks*

20. As is apparent from the orders for reference, the three questions referred are but different aspects of one larger question. The interested parties perceive those three aspects differently, however. [8]

21. From the outset, I would note that, by Question B, the referring court asks the Court to interpret — to the point of assessing its validity — national law. That lies beyond the scope of the Court's competences under Article 267 TFEU and, accordingly, the Court manifestly lacks jurisdiction to answer that question. However, the criticism which the referring court seems to be making of Law No 1/2013 is equally expressed in Question C, which is formulated in terms of the compatibility of the Second Transitional Provision of that law with Directive 93/13 and, in particular, with Article 6(1) of that directive. It follows that it is, in any event, possible for the Court to address the doubts which the referring court entertains in that respect.

22. Moreover, Questions A and C appear related inasmuch as they both inquire as to the legal consequences of a contractual term which has been deemed unfair. By Question A, the referring court essentially asks what competences and obligations a national court has under Directive 93/13 in respect of a default-interest clause which is held to be unfair. On the other hand, by Question C, that court instead asks, in substance, whether a provision such as the Second Transitional Provision of Law No 1/2013 is compatible with the directive in so far as it arguably limits those competences and obligations.

23. The approach which I will take is therefore divided into two parts. While the answer to Question A is readily apparent, the answer to be given to Question C ought, on the other hand, to be more nuanced, not least in the light of the observations submitted by the Spanish Government.

B – *The competences and obligations of the national court under Directive 93/13 in respect of a default-interest clause which is held to be unfair*

24. By Question A, the referring court asks whether Directive 93/13, and specifically Article 6(1) thereof, obliges it to set aside a contractual term setting the default interest rate that is deemed to be unfair, or whether it must instead moderate that interest rate — or tolerate such a moderation.

25. As can be seen from the reasoning of the orders for reference, the issue covered by Question A has already been resolved in *Banco Español de Crédito* [9] and *Asbeek Brusse and de Man Garabito*. [10] The ruling in *Kásler and Káslerné Rábai*, [11] handed down after the present orders for reference arrived at the Court, can also provide guidance.

8 — In the Commission's view, Question A deals with the powers of the national court in respect of unfair terms in mortgage agreements, whereas Questions B and C relate thereto indirectly in a manner which is linked to the Second Transitional Provision of Law No 1/2013. The Commission accordingly suggests that Questions B and C be addressed together. The Spanish Government, on the other hand, takes the view that Questions A and B both concern the compatibility with Directive 93/13 of the amendment to Article 114 of the Law on Mortgages, whereas Question C concerns a possible breach of the principles of equivalence and effectiveness by the Second Transitional Provision of Law No 1/2013. That government therefore proposes a joint answer to Questions A and B. The banks both find that the three questions present similarities. However, whereas Unicaja Banco provides an individual answer for each, Caixabank suggests giving a single answer.

9 — C-618/10, EU:C:2012:349.

10 — C-488/11, EU:C:2013:341.

11 — C-26/13, EU:C:2014:282.

26. According to those judgments, Article 6(1) of Directive 93/13 requires national courts to exclude the application of an unfair contractual term so that it does not produce binding effects with regard to the consumer, but does not authorise them to revise the content of that term. The consumer 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 such continuity of the contract is possible under the rules of national law. [12]

27. As concerns specifically penalty clauses, the Court has held that Article 6(1) of Directive 93/13 cannot be interpreted as allowing the national court, in the event that it establishes that a penalty clause in a contract between a seller or supplier and a consumer is unfair, to reduce the penalty imposed on the consumer instead of excluding the application of that clause in its entirety with regard to that consumer. [13]

28. In *Banco Español de Crédito*, the unfair term at issue governed the late payment of instalments in respect of a loan for the purchase of a vehicle. *Asbeek Brusse and de Man Garabito* concerned a penalty clause inserted in a tenancy agreement for residential purposes, which included default interest.

29. By contrast, *Kásler and Káslerné Rábai* concerned a unique situation of restitution. In that case, the referring court asked whether it was permissible for a national court to substitute declaratory provisions of national law for an unfair term in a consumer credit contract in circumstances where, if the contract could not continue to exist without the term in question, invalidation of the contract might be detrimental to the consumer. The Court stated that the consequence of the invalidation of an entire consumer credit contract is generally that the outstanding balance of the loan becomes due, which tends to penalise the consumer rather than the lender. In that special situation, the Court therefore held that Article 6(1) of Directive 93/13 must be interpreted as not precluding a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law. [14]

30. However, *Kásler and Káslerné Rábai* is not relevant to the cases under consideration here. It is unclear how invalidation of an unfair default-interest clause, such as the clause at issue, would be detrimental to a borrowing consumer, rather than eliminating altogether the right to such interest of a creditor who has had recourse to the unfair term. Moreover, in spite of what the banks argued at the hearing, the fact that moderating powers might be conferred by a provision of national law rather than being an expression of judicial discretion is irrelevant. Indeed, as is stated in Article 8 thereof, Directive 93/13 provides for minimum harmonisation, which means that Member States may only adopt or retain rules providing for *greater* consumer protection than that already granted under the directive. Accordingly, the answer to Question A should not be different from the answer given in *Banco Español de Crédito* and *Asbeek Brusse and de Man Garabito*, which I have summarised above in point 26.

C – The compatibility of the Second Transitional Provision of Law No 1/2013 with Directive 93/13, in view of the obligation of the national court under that directive to set unfair contractual terms aside

31. Question C concerns the compatibility with Directive 93/13 — and, in particular, with Article 6(1) thereof — of the Second Transitional Provision of Law No 1/2013, which applies to proceedings for enforcement or extra-judicial sale commenced but not concluded before 15 May 2013, as well as proceedings in which the sum in respect of which an enforcement order or order for extrajudicial sale

12 — See *Asbeek Brusse and de Man Garabito*, EU:C:2013:341, paragraph 57 and case-law cited.

13 — *Asbeek Brusse and de Man Garabito*, EU:C:2013:341, paragraph 59.

14 — EU:C:2014:282, paragraphs 80 to 85, and point 3 in the operative part.

is sought has already been fixed. Essentially, the referring court wishes to know whether, in proceedings for enforcement of a mortgage, a creditor claiming default interest on the basis of a contractual term setting such interest at a rate higher than the statutory ceiling (three times the statutory interest rate) may adjust the default interest rate so that it does not exceed that limit.

32. From the outset, and even though this issue has not been raised by the referring court, it appears useful to address briefly the question whether Article 1(2) of Directive 93/13 precludes the Court from answering the question regarding the compatibility, under that directive, of the national provision at issue.[15] Indeed, the banks argue that the Second Transitional Provision of Law No 1/2013 is a mandatory provision which applies regardless of the will of the parties and does not come within the scope of Directive 93/13.

33. I have already dealt with a similar argument in *Sánchez Morcillo and Abril García*.[16] Unlike in that case, in the present cases the referring court has explicitly called into question the fairness of the default-interest clauses in the mortgage agreements at issue. In that connection, the referring court wishes to know the extent of its competences and obligations under Directive 93/13, if such a clause is held to be unfair. This is therefore an entirely different situation from that which arose in *Barclays Bank*,[17] where the Court held that the national provisions at issue in that case, which governed the Spanish enforcement procedure, were laws or regulations that were not set out in the contested contract and that fell outwith the scope of the directive.

34. Moving swiftly on, I will begin by recalling that, although in proceedings under Article 267 TFEU the Court may not rule upon the compatibility of a provision of national law with EU law or interpret national legislation, it may nevertheless provide the national court with an interpretation of EU law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it.[18] Providing such assistance invariably requires a modicum of understanding by the Court of the relevant applicable national rules, even though that understanding obviously remains entirely subject to verification by the national court. With this general caveat in mind, I will state the following.

35. In view of the rulings of the Court in *Banco Español de Crédito* and *Asbeek Brusse and de Man Garabito*, it is understandable that the Second Transitional Provision of Law No 1/2013 might have caused some controversy, in so far as it could be viewed as obliging the national court to tolerate a reduction of the default interest rate, instead of declaring the related contractual term void, to the detriment of consumers. However, I would caution against drawing such an inference, which appears to be predicated on a basic misunderstanding. Such a perception is founded on the rather appealing idea that the Second Transitional Provision of Law No 1/2013 somehow (i) determines the circumstances in which a contractual default interest rate is fair and (ii) interferes with the duty of a national court to set aside a clause which is held to be unfair. However, the provisions of national law produced before the Court cannot sustain that hypothesis. Questioned on this point at the hearing, the Spanish Government confirmed that the assumption was erroneous. The other parties present at the hearing did not disagree (at least not in theory).

15 — Article 1(2) of Directive 93/13 provides: '[t]he contractual terms which reflect mandatory statutory or regulatory provisions … shall not be subject to the provisions of this Directive'.

16 — View, C-169/14, EU:C:2014:2110, points 22 to 28.

17 — C-280/13, EU:C:2014:279, paragraphs 40 and 42. See also, to that effect, order of 8 November 2012 in *SKP*, C-433/11, EU:C:2012:702, paragraphs 32 to 34, and *Kušionová*, C-34/13, EU:C:2014:2189, paragraphs 76 to 80.

18 — See, inter alia, *KGH Belgium*, C-351/11, EU:C:2012:699, paragraph 17 and case-law cited.

36. The possibility open to a creditor under the Second Transitional Provision of Law No 1/2013 of adjusting, in the course of enforcement proceedings, the default interest rate so that it falls under the statutory ceiling for default interest recoverable through enforcement of a mortgage — subject to certain requirements — appears in fact to be wholly separate from the question whether or not the contractual term which forms the basis of the enforcement procedure is fair. The very wording of that provision suggests that it applies to *both fair and unfair* contractual terms.

37. In the same vein, it also seems that the Second Transitional Provision of Law No 1/2013 applies to contractual terms whose fairness is not open to review under Directive 93/13. For instance, Law No 1/2013 appears to apply to terms which have been negotiated individually and which fall outside the scope of the directive as determined by Article 3(1) thereof. Secondly, assuming that the payment of default interest — as one type of interest — can be characterised as one of the essential obligations of a mortgage loan in that it forms part of the *quid pro quo* for the line of credit granted,[19] the fairness of a term governing default interest in a consumer credit contract would be exempt from scrutiny under Article 4(2) of the directive (provided that it is drafted in plain, intelligible language). In both situations described above, the directive cannot in theory be relied upon in order to challenge the default interest clause. Regardless, the amount of default interest for which the mortgage serves as security, and which may therefore be recovered in the course of enforcement proceedings, is still open to adjustment under the Second Transitional Provision of Law No 1/2013, where the rate applied to such default interest is above the statutory ceiling.

38. This lack of immediacy between the Second Transitional Provision of Law No 1/2013 and Directive 93/13 becomes even more apparent, given the fact that the Law on Mortgages and, in particular, the third sentence of Article 114 thereof — to which the Second Transitional Provision of Law No 1/2013 relates — applies only to certain rates of interest in the context of mortgage enforcement proceedings, whether or not the lender is a trader and the debtor a consumer. By contrast, under Article 1 of Directive 93/13, the directive applies horizontally to all types of contracts, provided that they have been concluded between a consumer and a trader.

39. In its written observations, the Spanish Government states more specifically in this regard that the aim of the third sentence of Article 114 of the Law on Mortgages and, by the same token, of the Second Transitional Provision of Law No 1/2013, is to limit the maximum amount secured by the mortgaged property in order to limit the extent of the contractual obligations enforceable under a mortgage vis-à-vis third parties. The limit on recoverable default interest set out in those provisions, which cannot be more than three times the statutory rate of interest and may accrue only on the outstanding principal, applies to mortgage loans on the principal residence of the debtor. At the hearing, the Spanish Government confirmed that those provisions only limit the amount of default interest in relation to the mortgaged property, to the exclusion of the remainder of the debtor's assets, in relation to which the creditor may still seek full redemption of the outstanding amount in accordance with Article 1911 of the Spanish Civil Code. In the light of the observations of that government, it would appear to me that the third sentence of Article 114 of the Law on Mortgages and, in respect of transitional situations, the Second Transitional Provision of Law No 1/2013 do not in fact regulate the default interest rate as such, which remains a purely contractual matter, but only set a limit to the amount of default interest recoverable through the enforcement of a mortgage. Thus, a lender may still seek full redemption of any outstanding amounts from the debtor's other assets. If this reading of Spanish law is correct — which is a matter for the referring court to verify — I do not see how those provisions have anything to do with, let alone how they can restrict, the rights which consumers derive under Directive 93/13.

19 — See on this issue my Opinion in *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:85, points 58 to 61.

40. It could, of course, be argued that the maximum default interest rate for mortgage loans, set out in the third sentence of Article 114 of the Law on Mortgages — and, by the same token, the Second Transitional Provision of Law No 1/2013 — somehow 'taints' the assessment as to whether or not a particular interest rate is fair under Directive 93/13, in that it might be construed as authorising an approach whereby all default interest rates below or equal to three times the statutory interest rate can be said to be fair and, conversely, all above that threshold would not be fair.[20] In fact, the referring court states that the Second Transitional Provision of Law No 1/2013 'implicitly' requires Spanish courts to amend a default-interest clause which is deemed to be unfair. However, it does not explain why it is implicit. On that point, I would make the following observations.

41. Pursuant to Article 4(1) of Directive 93/13, in assessing the unfairness of a contractual term, account must be taken of the nature of the goods or services for which the contract was concluded and reference must be made, at the time of conclusion of the contract, to all the circumstances attending its conclusion. It follows that the consequences of the term under the law applicable to the contract must also be taken into account, which requires that consideration be given to national law.[21]

42. In this respect, although the third sentence of Article 114 of the Law on Mortgages and, in respect of the interim period, the Second Transitional Provision of Law No 1/2013 limit, in the context of enforcement proceedings, the amount of default interest recoverable through the enforcement of a mortgage to three times the statutory interest rate, this means neither that any contractual rate above is automatically unfair under the directive, nor that anything below is automatically fair. There is no golden rule as to when a clause setting a default interest rate will automatically qualify as unfair. Maximum interest rates set out in a particular field of national law are but one factor to be taken into account. Clearly, it is simply impossible to adopt an informed position regarding the fairness of a default interest clause just by comparing it with a multiple of the statutory interest rate. This is well illustrated by point (e) of the Annex to Directive 93/13,[22] which mentions 'requiring any consumer who fails to fulfil his obligation to pay a *disproportionately* high sum in compensation' (emphasis added), as by definition only a case-by-case assessment can determine whether or not the compensation is proportionate in a given situation. In this respect, it would seem to me that the assessment of the fairness of a default interest rate in a credit agreement (assuming, once again, that such interest does not form part of the *essentialia negotii* or is otherwise exempt from review) would have as its starting point the sum lent and the duration of the loan, which may vary from contract to contract. In the final analysis, however, such an assessment is not a matter for the Court but rather for the national courts, which are better placed to weigh all the relevant circumstances of each particular case and which are perfectly acquainted with the regime generally applicable under national law.[23]

43. In any event, if, for the sake of argument, a consumer contract for a mortgage loan stipulates a default interest rate which is below three times the statutory interest rate but which, in the specific circumstances, appears to be unfair under Directive 93/13, there is no question that Article 6 of the directive precludes the replacement of that unfair contractual default interest rate with a lower and therefore arguably less offending rate set out in national law. In that regard, nothing suggests that a Spanish court is prevented from setting an unfair term aside in full under Article 561(1)(3) of the Law on Civil Procedure. A restriction to that effect would seem to require, at the very least, giving priority to the third sentence of Article 114 of the Law on Mortgages — and, in respect of transitional situations, the Second Transitional Provision of Law No 1/2013 — over Article 561(1)(3) of the Law on Civil Procedure. However, there is nothing in the orders for reference to suggest that Spanish law is to be interpreted in such a way. On the contrary, the Spanish Government states that it is only

20 — At the hearing, the Spanish Government referred to this as one of the 'collateral' or 'secondary' effects of those provisions; the banks (perhaps somewhat surprisingly) also alluded to such an effect.

21 — Order of 3 April 2014, *Sebestyén*, C-342/13, EU:C:2014:1857, paragraph 29 and case-law cited.

22 — The Annex to Directive 93/13 contains an indicative and non-exhaustive list of terms which may be regarded as unfair; see ibid., paragraph 31 and case-law cited.

23 — See, to that effect, *Freiburger Kommunalbauten*, C-237/02, EU:C:2004:209, paragraphs 22 and 25, and *Kušionová*, EU:C:2014:2189, paragraph 73.

where a contractual clause is held *not* to be unfair that, as a *supplementary* measure for the protection of the primary residence, the cap set out in the third sentence of Article 114 of the Law on Mortgages — and, in respect of transitional situations, the Second Transitional Provision of Law No 1/2013 — applies. This is of course subject to verification by the referring court, which alone remains competent to interpret national law. [24]

44. That said, when interpreting national law in accordance with Directive 93/13, the referring court must take the whole body of that law into consideration and apply the interpretative methods recognised by national law in such a way as to achieve the result desired under Article 6(1) of that directive to ensure that the rights of consumers are effectively protected. [25] In point of fact, it would seem to me that the way in which the Spanish Government construes Spanish law — giving priority to the non-application, pursuant to the directive, of an unfair default-interest clause over mere adjustment of the default interest rate — is the only interpretation which ensures the compatibility of Law No 1/2013 with the requirements laid down in Article 6(1) of Directive 93/13. Moreover, the point of view stated by that government also suggests that such an interpretation is indeed possible under Spanish law.

45. To resume, I take the view that Directive 93/13 is not concerned with provisions of national law under which default interest rates are to be adjusted for the purposes of mortgage enforcement proceedings, where such provisions apply regardless of the fairness of the interest rate in question. If a provision of national law (such as the Second Transitional Provision of Law No 1/2013) limits, in the context of enforcement proceedings, the amount of default interest recoverable through the enforcement of a mortgage, then that benefits all mortgage debtors (and not necessarily consumers). In so far as consumers are concerned, to the extent that such a provision supplements their rights under Directive 93/13 — for instance, in respect of clauses which are not unfair or which do not come within the scope of that directive — it ensures them better protection, as encouraged by Article 8 of the directive. [26]

46. Yet, in the final analysis, the approach which I have taken may not prove to be decisive for the outcome of the main proceedings. Judging from the tenor of the orders for reference, it seems that the referring court inclines to the view that the default interest rates attaching to the mortgage loans at issue *are* actually unfair. If, on the basis of an overall assessment, it holds this to be so, it follows from my answer to Question A above that the referring court must ensure that consumers are not bound by those terms, without moderating the rate itself or replacing it with a rate set out in Spanish legislation.

47. Lastly, I have taken note of the fact that, in the wording of Question C, reference is made to the principles of equivalence and effectiveness. However, in the light of the above, those principles do not appear to be affected in any way, and they therefore do not give rise to any further remarks on my part.

24 — At the hearing, the Spanish Government stated that in the course of the proceedings before the Court, the wording of Article 83 of Royal Legislative Decree No 1/2007 of 16 November 2007 approving the consolidated version of the General Law for the protection of consumers and users and other supplementary laws (Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias; BOE No 287 of 30 November 2007, p. 49181) — which may have been at the root of the issue of the competence of the judge under Spanish law to moderate a clause held to be unfair — had since been amended by Law No 3/2014 of 27 March 2014 (BOE No 76 of 28 March 2014). That provision now reads: 'Unfair contract terms shall be automatically void and deemed not to have formed part of the contract. To that end, after having heard the parties, the judge shall declare the ineffectiveness of unfair clauses in the contract, the latter, however, still binding the parties upon those same terms if it can continue to exist without such clauses.'

25 — See, to that effect, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 31. See also *Jőrös*, C-397/11, EU:C:2013:340, paragraph 52, and judgment of the EFTA Court of 28 August 2014 in Case E-25/13 *Engilbertsson*, paragraph 163.

26 — See, to that effect, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraphs 34 and 35.

IV – **Conclusion**

48. In the light of the foregoing, I propose that the Court reply to the questions referred by the Juzgado de Primera Instancia e Instrucción de Marchena (Spain) as follows:

(1) Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts requires national courts to exclude the application of an unfair contractual term so that it does not produce binding effects with regard to the consumer, but does not authorise them to revise the content of that term. The consumer contract must continue to exist, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as such continuity of the contract is possible under national law.

(2) A provision of national law, such as the Second Transitional Provision of Law No 1/2013 of 14 May 2013 laying down measures for the strengthening of the protection of mortgagors, the restructuring of debt and social rent (Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social), under which a creditor seeking enforcement, on the basis of a mortgage agreement containing a clause setting default interest at a rate higher than three times the statutory interest rate, may adjust the amount of default interest recoverable through the enforcement of a mortgage so that it does not exceed that threshold, is compatible with Directive 93/13 and, in particular, with Article 6(1) thereof, in so far as the application of such a provision is without prejudice to the obligation of national courts under that directive to exclude the application of an unfair contractual term in consumer contracts so that it does not produce binding effects with regard to the consumer, but without revising its content. It is for the referring court to determine whether that is the case, taking the whole body of national law into consideration and applying the interpretative methods recognised by that law.