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Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

13 July 2023 (\*)

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Article 6(1) – General conditions of a mortgage loan agreement declared null and void by national courts – Legal action – Admission prior to any dispute – National legislation requiring a consumer to take steps prior to bringing proceedings against the seller or supplier concerned in order to guarantee the award of the costs of legal proceedings – Principle of sound administration of justice – Right to effective judicial protection)

In Case C-35/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Provincial de Málaga (Provincial Court, Málaga, Spain), made by decision of 14 December 2021, received at the Court on 17 January 2022, in the proceedings

**CAJASUR Banco SA**

v

**JO,**

**IM,**

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the Fourth Chamber, L.S. Rossi, S. Rodin (Rapporteur) and O. Spineanu-Matei, Judges,

Advocate General: A.M. Collins,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2023,

after considering the observations submitted on behalf of:

- CAJASUR Banco SA, by V. Rodríguez de Vera Casado,
- the Spanish Government, by A. Pérez-Zurita Gutiérrez, J. Ruiz Sánchez and J. Rodríguez de la Rúa Puig, acting as Agents,
- the European Commission, by J. Baquero Cruz and N. Ruiz García, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 March 2023,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between CAJASUR Banco SA, on the one hand, and JO and IM, on the other, concerning the costs incurred in legal proceedings instituted by the latter, seeking a declaration of invalidity of a term in the general terms and conditions of a mortgage loan agreement on grounds of, inter alia, unfairness.

## **Legal context**

### *European Union law*

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

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

4 Article 7(1) of that directive states:

‘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.’

### *Spanish law*

5 According to Article 1303 of the Código Civil (Civil Code):

‘When a contractual obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price together with interest, without prejudice to the following articles.’

6 Article 395 of Ley 1/2000, de Enjuiciamiento Civil (Law 1/2000 on the Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575), in the version applicable to

the dispute in the main proceedings ('the LEC'), which lays down the rules governing an order for costs in the event of admission, provides:

'1. Where a claim is admitted prior to a statement of defence being lodged, neither party should be ordered to pay the costs of the proceedings unless the court finds, on a duly reasoned basis, that the defendant has acted in bad faith.

Bad faith shall in any event be deemed to exist if, prior to any legal action, the defendant has received a due and substantiated demand for payment, mediation proceedings have been initiated or a request for conciliation has been made to him or her.'

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

7 The parties to the main proceedings concluded a mortgage loan agreement. In 2018, JO and IM brought an action before the Juzgado de Primera Instancia No 18 bis de Málaga (Court of First Instance No 18a, Málaga, Spain), seeking a declaration of invalidity of a term in the general terms and conditions of that agreement relating to mortgage costs and the reimbursement of the amount paid under that term on grounds of unfairness. Following the filing of that action, CAJASUR Banco conceded that that term was unfair, but, taking the view that the amount claimed in that respect was excessive, agreed to repay only part of that amount.

8 By judgment of 2 March 2020, the Juzgado de Primera Instancia No 18 bis de Málaga (Court of First Instance No 18a, Málaga) declared that term automatically void on grounds of unfairness and, on that basis, ordered CAJASUR Banco (i) to repay to JO and IM part of the amount claimed and (ii) to pay the costs of the proceedings.

9 Cajasur Banco brought an action before the Audiencia Provincial de Málaga (Provincial Court, Málaga, Spain), which is the referring court, solely as regards that order for costs. It claims that, since it admitted the claim before any dispute, that order to pay the costs is contrary to Article 395 of the LEC, in so far as that article provides that such an order may be imposed only where bad faith on the part of the defendant is established. In that regard, it recalls that, under that article, bad faith is deemed to exist only if, prior to any legal action, the defendant has received a due and substantiated demand for payment, mediation proceedings have been initiated or a request for conciliation has been made to him or her.

10 As is apparent from the order for reference, that position is consistent with settled case-law of the Tribunal Supremo (Supreme Court, Spain) on the application of that article.

11 It is also apparent from the order for reference that JO and IM did not take any steps prior to bringing proceedings vis-à-vis CAJASUR Banco.

12 In those circumstances, the Audiencia Provincial de Málaga (Provincial Court, Málaga) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it contrary to the right to effective judicial protection and Article 47 of the Charter of Fundamental Rights of the European Union to require that, before instituting legal proceedings, the consumer must first have issued an out-of-court demand for payment in order for the declaration as to the invalidity of a particular [term] of a contract on grounds of unfairness to give rise to all of the compensatory effects (including the costs of the legal proceedings) associated with such invalidity, pursuant to Article 6(1) of [Directive 93/13]?

(2) Is it compatible with the right to full compensation and the effectiveness of EU law and Article 6(1) of Directive 93/13 to make the imposition of costs (including legal fees) subject to a condition based on the existence of a prior out-of-court demand for payment issued by the consumer to the financial institution with a view to the removal of that term?’

### **Admissibility**

13 According to the Spanish Government, the request for a preliminary ruling must be declared inadmissible, since the legal and factual context of the case in the main proceedings was not correctly set out therein by the referring court. The referring court has not provided the Court with the factual and legal material necessary to give a useful answer to the questions referred, which are hypothetical, since, under national law, that court could resolve the dispute in the main proceedings without referring a question to the Court for a preliminary ruling in that regard.

14 It must be borne in mind that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 76, and of 22 September 2022, *Servicios Prescriptor y medios de pagos EFC*, C-215/21, EU:C:2022:723, paragraph 26).

15 Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 77, and of 22 September 2022, *Servicios Prescriptor y medios de pagos EFC*, C-215/21, EU:C:2022:723, paragraph 27).

16 That is not the situation here.

17 It should be stated that the request for a preliminary ruling concerns, *inter alia*, the interpretation of Article 6(1) of Directive 93/13 and seeks to determine whether that provision precludes a national rule, such as Article 395 of the LEC, relating to the allocation of costs in court proceedings brought by consumers in order to exercise their rights under that directive.

18 Furthermore, it is apparent from the file before the Court that, pursuant to Article 395 of the LEC, as interpreted by the national case-law, a consumer, within the meaning of Directive 93/13, risks being ordered to pay the costs relating to the legal proceedings which he or she has brought concerning terms in a contract concluded with a seller or supplier, despite a finding by the competent court that one of those terms is unfair.

19 In the light of the foregoing considerations, it must be held that the question referred is admissible.

### **Substance**

20 Although, by its first question, the referring court refers, *inter alia*, to Article 47 of the Charter of Fundamental Rights of the European Union, it is apparent from the grounds in the order for reference that that court is essentially uncertain as to the interpretation of Article 6 of Directive 93/13 in the light of the scope of the principle of effectiveness, which is referred to in the second question.

21 Accordingly, it must be held that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation under which, where a consumer has not taken any steps prior to bringing proceedings against a seller or supplier with whom he or she has concluded a contract containing an unfair term, that consumer must bear his or her own costs relating to the legal proceedings which he or she has instituted against that seller or supplier in order to assert the rights conferred on him or her by Directive 93/13, where that seller or supplier has admitted the claim of that consumer before any dispute, even if that term has been found to be unfair.

22 At the outset, it should be borne in mind that, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness *vis-à-vis* sellers or suppliers, Directive 93/13 requires Member States, as is apparent from Article 7(1) thereof, read in conjunction with the twenty-fourth recital in the preamble thereto, to provide for adequate and effective means ‘to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’ (judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 78 and the case-law cited).

23 In accordance with settled case-law, in the absence of specific EU rules governing the matter, the rules implementing the consumer protection provided for by Directive 93/13 are a matter for the domestic legal order of the Member States in accordance with the principle of the procedural autonomy of those Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 27 and the case-law cited).

24 In that regard, it is clear from the case-law of the Court that the award of the costs of legal proceedings before the national courts falls within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 95).

25 As regards the principle of effectiveness, which is the only principle referred to in the present order for reference, it should be noted that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see, in particular, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 28 and the case-law cited).

26 Directive 93/13 gives consumers the right to apply to a court to have a term in a contract concluded with a seller or supplier declared unfair and disapplied. In that regard, the Court has held that making the decision on the award of costs in such proceedings exclusively dependent on how much has been unduly paid and must be refunded is likely to deter consumers from exercising that right, given the costs which legal action would entail (see, to that effect, judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 98 and the case-law cited).

27 Likewise, the Court has ruled that Articles 6(1) and 7(1) of Directive 93/13 and the principle of effectiveness must be interpreted as precluding a system whereby the consumer may be made to bear part of the costs of proceedings depending on the level of the unduly paid sums which are refunded to him or her, following a finding that a contractual term is void for being unfair, given that such a system creates a substantial obstacle that is likely to discourage consumers from exercising the right to an effective judicial review of the potential unfairness of contractual terms such as that conferred by Directive 93/13 (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 99).

28 It should be also noted that, although the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for the total inertia on the part of the consumer concerned, it is nevertheless necessary to analyse whether there is, having regard to the specific characteristics of the national procedure concerned, a non-negligible risk that the latter is deterred from asserting rights conferred on him or her by Directive 93/13 (see, to that effect, judgment of 22 September 2022, *Vicente (Action for payment of lawyers' fees)*, C-335/21, EU:C:2022:720, paragraph 56 and the case-law cited therein).

29 In the present case, the referring court notes that Article 395 of the LEC, as interpreted by the Tribunal Supremo (Supreme Court, Spain), provides that an order that the defendant pay the costs of the legal proceedings is to be imposed only if bad faith on the part of the latter is established, which is deemed to exist if, prior to the legal proceedings brought, it is to no avail that the applicant has delivered a due and substantiated demand for payment to the defendant, mediation proceedings have been initiated by that applicant or a request for conciliation has been made to that defendant by that applicant.

30 In that regard, it should be noted that, in the context of typical proceedings instituted pursuant to Article 6(1) of Directive 93/13, the 'consumer', within the meaning of that directive, is, in most cases, the applicant and the 'seller or supplier', within the meaning of that directive, is, in most cases, the defendant, which means that Article 395 of the LEC, as interpreted by the Tribunal Supremo (Supreme Court, Spain), in fact requires a consumer, prior to any legal action, to deliver a due and substantiated demand for payment to the seller or supplier concerned, to initiate mediation proceedings with that seller or supplier, or to make a request for conciliation to that seller or supplier. Otherwise, in the event that the claim is admitted by that seller or supplier before any dispute, the latter is presumed to have acted in good faith and cannot be ordered to pay the costs, even if the legal proceedings thus initiated have made it possible to find that a term set out in the contract concerned is unfair.

31 Although, as the Spanish Government has stated, the objectives pursued by Article 395, namely relieving the pressure on the national judicial system and the sound administration of justice, must be regarded as legitimate and, as the Advocate General observed in point 48 of his Opinion, the delivery of one of the steps prior to bringing proceedings referred to in that provision appears to constitute, for the consumer concerned, a reasonable procedural requirement, the fact

remains that the obligation to carry out certain steps prior to commencing litigation ultimately falls exclusively on that consumer.

32 In the area of unfair terms in contracts concluded by a seller or supplier with a consumer, which are the subject of extensive national case-law, such an obligation should be imposed equally on both contracting parties. Where the unfairness of certain standard terms has been established by settled national case-law, banking institutions may also be expected to take the initiative of approaching those customers whose contracts contain such terms, prior to any legal action instituted by those customers in order to disapply those terms.

33 Furthermore, even though it cannot be ruled out that the general interest in the sound administration of justice may, as such, prevail over the individual interests of consumers, the fact remains that the procedural rules aimed at implementing that general interest must not make it impossible or excessively difficult to exercise the rights consumers enjoy under Directive 93/13 (see, to that effect, judgment of 12 February 2015, *Baczó and Vizsnyiczai*, C-567/13, EU:C:2015:88, paragraphs 51 and 52 and the case-law cited).

34 In addition, national legislation, such as Article 395 of the LEC, which imposes the entire responsibility for taking steps prior to bringing proceedings on the consumer concerned is not such as to encourage sellers or suppliers to draw, voluntarily and spontaneously, all the consequences of the case-law on unfair contract terms and thus promotes the continuation of the effects of those terms. Finally, by placing an additional financial risk on that consumer, such legislation could create an obstacle liable to discourage that consumer from exercising his or her right to effective judicial review of the potential unfairness of terms set out in the contract between him or her and a seller or supplier.

35 Lastly, a consumer who has concluded a contract containing an unfair term cannot be criticised for having applied to the national court having jurisdiction in order to exercise the rights guaranteed to him or her by Directive 93/13 in the event of inertia on the part of the seller or supplier concerned despite settled national case-law to the effect that similar terms are unfair, which should have prompted the seller or supplier concerned to approach, on his or her own initiative, that consumer and to disapply that unfair term as soon as possible.

36 According to the referring court, there is settled case-law of the Tribunal Supremo (Supreme Court) establishing the unfairness of the same type of contractual term as that at issue in the dispute in the main proceedings. It states, in that regard, that banking institutions tend, instead of informing consumers of the consequences of the national case-law on unfair contract terms, to wait for service of a letter before claim, with which they then comply, or to wait until legal proceedings have been instituted, in which case they immediately admit the claim, before lodging any defence, in order to avoid having to pay the costs of the proceedings.

37 As the Advocate General stated in point 50 of his Opinion, in the light of the knowledge that those institutions can be expected to have of such matters and the consumers' position of weakness in relation to those institutions, the conduct referred to in paragraph 36 of this judgment may constitute serious evidence of bad faith on the part of those institutions. It therefore matters that the competent court is able to make the necessary determinations in that regard and, where appropriate, draw the appropriate conclusions.

38 In the light of all the foregoing considerations, Article 6(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as not precluding national legislation under which, where a consumer has not taken any steps prior to bringing proceedings against a

seller or supplier with whom he or she has concluded a contract containing an unfair term, that consumer must bear his or her own costs relating to the legal proceedings which he or she has instituted against that seller or supplier in order to assert the rights conferred on him or her by Directive 93/13 where that seller or supplier has admitted the claim of that consumer before any dispute, even if that term has been found to be unfair, provided that the competent national court is able to take account of the existence of settled national case-law finding similar terms and the conduct of the seller or supplier to be unfair in order to conclude that that seller or supplier acted in bad faith and, if appropriate, order him or her to pay those costs.

### **Costs**

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

**Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the principle of effectiveness,**

**must be interpreted as not precluding national legislation under which, where a consumer has not taken any steps prior to bringing proceedings against a seller or supplier with whom he or she has concluded a contract containing an unfair term, that consumer must bear his or her own costs relating to the legal proceedings which he or she has instituted against that seller or supplier in order to assert the rights conferred on him or her by Directive 93/13 where that seller or supplier has admitted the claim of that consumer before any dispute, even if that term has been found to be unfair, provided that the competent national court is able to take account of the existence of settled national case-law finding similar terms and the conduct of the seller or supplier to be unfair in order to conclude that that seller or supplier acted in bad faith and, if appropriate, order him or her to pay those costs.**

[Signatures]

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\* Language of the case: Spanish.