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Texte provisoire

ARRÊT DE LA COUR (quatrième chambre)
16 mars 2023 ( * )

« Renvoi préjudiciel – Protection des consommateurs – Directive 93/13/CEE – Articles 3, 4 et 5 – Contrats conclus avec les consommateurs – Prêts hypothécaires – Clauses contractuelles abusives – Clause relative aux frais de dossier de prêt – Requête en nullité de ladite clause et remboursement du montant payé à ce titre – Simplicité et intelligibilité des termes – Existence d'une législation nationale spécifique)

Dans l'affaire C-565/21,

DEMANDE de décision préjudicielle au titre de l'article 267 TFUE, adressée au Tribunal Supremo (Cour suprême, Espagne), rendue par décision du 10 septembre 2021, reçue à la Cour le 14 septembre 2021, dans la procédure

**CaixaBank, SA**

v

**X**

LA COUR (quatrième chambre),

composée de C. Lycourgos, président de chambre, LS Rossi, J.-C. Bonichot, S. Rodin (rapporteur) et O. Spineanu-Matei, juges,

avocat général : J. Kokott,

Greffier : A. Calot Escobar,

vu la procédure écrite,

après examen des observations présentées au nom de :

abank SA, par J. Gutiérrez de Cabiedes Hidalgo de Caviedes, abogado,

- le gouvernement espagnol, par MM. A. Gavela Llopis et MJ Ruiz Sánchez, en qualité d'agents,
- la Commission européenne, par MM. J. Baquero Cruz et N. Ruiz García, en qualité d'agents,

ayant décidé, l'avocat général entendu, de statuer sans conclusions,

donne ce qui suit

**Jugement**

La présente demande de décision préjudicielle concerne l'interprétation des articles 3 à 5 de la directive 93/13/CEE du Conseil, du 5 avril 1993, concernant les clauses abusives dans les contrats conclus avec les consommateurs (JO L 95, p. 29).

The request has been made in proceedings between Caixabank SA ('the banking institution') and Mr X. ('the consumer') concerning the alleged unfairness of a term of a credit agreement secured by a mortgage relating to a loan arrangement fee.

**Legal context**

***European Union law***

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

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

Under Article 4 of that directive:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language.'

Article 5 of that directive provides:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).'

Section 4 of Part B of Annex II to Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34), states in the first sentence of point 3:

'In the section on "other components of the [annual percentage rate of charge (APRC)]", all the other costs contained in the APRC shall be listed, including one-off costs such as administration fees, and regular costs, such

as annual administration fees.'

***Spanish law***

Paragraph 4 of Annex II to the Orden del Ministerio de la Presidencia, sobre transparencia de las condiciones financieras de los préstamos hipotecarios (Decree of the Ministry of the Presidency on the transparency of financial terms for mortgage loans) of 5 May 1994 (BOE No 112 of 11 May 1994, p. 14444), headed 'Fees', is worded as follows:

'1. Arrangement fee – All expenses relating to the examination of the loan application, the granting or processing of the mortgage loan, or other similar expenses inherent in the activity of the lending entity incurred in granting the loan, must be included in a single fee, known as the arrangement fee, and shall be payable only once. The amount, form and date of payment thereof shall be specified in that term.

…

2. Other fees and subsequent costs – In addition to the "arrangement fee", the following alone may, by agreement, be charged to the borrower:

…

Fees which, having been duly notified to the Bank of Spain in accordance with the provisions of the Decree of 12 December 1989 and regulations implementing the same, correspond to the supply of a specific service by the entity other than merely the ordinary administrative loan …'

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

On 21 September 2005, the consumer entered into a credit agreement secured by a mortgage with the banking institution, in the amount of EUR 130 000, which agreement provided for the payment of a sum of EUR 845 as an arrangement fee in respect of the service received.

On 24 April 2018, the consumer brought an action against the banking institution, seeking annulment of the term relating to the arrangement fee and reimbursement of the sum paid. That application was upheld by the Juzgado de Primera Instancia (Court of First Instance, Spain), which declared that term null and void and ordered the bank to reimburse the consumer for the amount paid.

The banking institution brought an appeal before the Audiencia Provincial de Palma de Mallorca (Provincial Court, Palma de Mallorca, Spain), which was dismissed on the ground that the banking institution had failed to establish that the amount of the fee corresponded to the provision of an actual service. Thereafter, the banking institution brought an appeal on a point of law before the Tribunal Supremo (Supreme Court, Spain), which is the referring court.

That court considers that the answer given by the Court of Justice in the judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), to the questions referred to it in relation to the arrangement fee for mortgage loans and credits and the relevant settled case-law of the Court of Justice was determined by the fact that the referring courts presented the national legislation and case-law in a distorted manner. That led a significant number of Spanish courts to interpret that judgment of the Court of Justice as declaring the case-law of the Tribunal Supremo (Supreme Court) relating to arrangement fees contrary to EU law.

In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Do Article 3(1) and Articles 4 and 5 of Directive [93/13] preclude national case-law that, having regard to the specific rules of national law governing arrangement fees paid, in one instalment and generally at the time of concluding the contract, in consideration for services related to reviewing, granting or processing mortgages or loans or other similar services inherent in the lender's activity with a view to granting the loan, deems that the contractual term providing for that fee constitutes an essential element of the contract, since it represents a principal part of the cost of the loan and cannot be assessed as unfair if it is written in clear, intelligible language, within the broad meaning established in the case-law of the [Court of Justice of the European Union]?

Does Article 4(2) of Directive [93/13] preclude national case-law to the effect that, in order to assess whether the term constituting an essential element of the mortgage or loan agreement is clear and intelligible, account must be taken of issues such as consumers' general knowledge of that term, the mandatory information that financial institutions must provide to potential borrowers under regulations on standardised information sheets, advertising by banks, the particular attention paid to it by the average consumer as being part of the cost to be paid entirely at the time of taking out the loan, and constituting a substantial part of the economic consequences to them of securing the loan, and whether the wording, placement and structure of the term make it possible to conclude that it constitutes an essential element of the contract?

Does Article 3(1) of Directive [93/13] preclude national case-law that deems that a contractual term such as the one at issue in the main proceedings, relating to the arrangement fee for a loan agreement, whose purpose is remuneration for services relating to the review, design and individual processing of a loan application (reviewing the viability of the loan, the debtor's creditworthiness, the status of encumbrances on the property to be mortgaged, etc.) as prerequisites for granting the loan, which fee is expressly provided for in national legislation as constituting payment for the formalities inherent in granting the loan, does not, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer?'

**Consideration of the questions referred**

***The first question***

As a preliminary point, it should be noted that, inasmuch as it is apparent from the request for a preliminary ruling that the referring court, by its first question, seeks to ascertain whether the term at issue in the main proceedings may be regarded as being exempt from the mechanism for reviewing unfair terms as provided for in Article 3(1) and Article 4(1) of Directive 93/13, on the ground that an arrangement fee is one of the main components of the

price and, therefore, an essential element of the contract, the first question relates – notwithstanding the reference to Articles 3 to 5 of that directive – solely to the interpretation of Article 4(2) of that directive.

It must be held that, by its first question, the referring court is asking, in essence, whether Article 4(2) of Directive 93/13 must be interpreted as precluding national case-law which, in the light of national legislation which provides that the arrangement fee is to remunerate services connected with the examination, grant or processing of the mortgage loan or credit or other similar services, considers that the term establishing such a fee forms part of the 'main subject matter of the contract', within the meaning of that provision, on the ground that it represents one of the main components of the price.

Under that provision, assessment of the unfair nature of the terms is to relate neither to the definition of the main subject matter of the contract nor to the adequacy of, on the one hand, the price and remuneration and, on the other hand, the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.

Consequently, in the context of the dispute in the main proceedings, it is only if the term relating to the arrangement fee comes under either one of the two categories referred to in the preceding paragraph that the review of the unfair nature of that term might be limited in accordance with Article 4(2) of Directive 93/13. In the present case, the referring court asks the Court to clarify the scope of the first of those categories, namely that which refers to 'the main subject matter of the contract'.

In that connection, the Court has already held that contractual terms coming within the notion of the 'main subject matter of the contract', within the meaning of Article 4(2) of Directive 93/13, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within that concept (judgments of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraphs 35 and 36, and of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 32).

In the context of a loan agreement, the lender undertakes, in particular, to make available to the borrower a certain sum of money and the latter undertakes, in particular, to repay that sum, usually with interest, on the scheduled payment dates (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 57 and the case-law cited).

In its judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 64), the Court ruled that an arrangement fee cannot be considered to be an essential obligation of a mortgage loan agreement solely because it is included in the total cost of that agreement.

In the present case, the referring court sets out, in its request for a preliminary ruling, its judgment 44/2019 of 23 January 2019, in which it was held that the arrangement fee constitutes, along with the compensatory interest, the price of the mortgage loan or credit agreement and, accordingly, comes within the concept of 'the main subject matter of the contract' for the purposes of Article 4(2) of Directive 93/13. That finding was made by taking into account, in particular, the relevant national legislation, which defines such arrangement fees as being remuneration in respect of services connected to the examination, granting or processing of the loan or credit or other similar services, but which remain inherent in the lender's activity.

In that regard, it should be recalled that Article 4(2) Directive 93/13 lays down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, and that that provision must therefore be strictly interpreted (judgment of 12 January 2023, *D. V. (Lawyer's fees – Basis of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 30 and the case-law cited).

It is apparent from the explanations provided by the referring court and from the wording of the first question that the arrangement fee covers remuneration for services connected with the examination, grant or treatment of the loan or credit or other similar services inherent in the lender's activity, arising from the granting of the loan or credit.

In the light of the obligation strictly to interpret Article 4(2) of Directive 93/13, the obligation to pay for such services cannot be regarded as forming part of the main obligations arising from a credit agreement as identified by the case-law cited in paragraph 18 of the present judgment, namely, first, the making available by the lender of a sum of money and, second, the repayment of that sum, usually with interest, on the scheduled payment dates. It would be contrary to that obligation of strict interpretation to include in the concept of 'the main subject matter of the contract' all services which are merely associated with the main subject matter itself and are therefore ancillary within the meaning of the case-law cited in paragraph 17 of the present judgment.

In the light of the foregoing, the answer to the first question is that Article 4(2) of Directive 93/13 must be interpreted as precluding national case-law which, in the light of national legislation providing that the arrangement fee pays for services connected with the examination, granting or processing of the mortgage loan or credit or other similar services, considers that the clause establishing such a fee comes within 'the main subject matter of the contract', within the meaning of that provision, on the ground that it represents one of the main components of the price.

***The second question***

By its second question, the referring court is asking, in essence, whether Article 4(2) of Directive 93/13 must be interpreted as precluding national case-law which, for the purposes of assessing whether a term governing an essential element of a mortgage loan or credit agreement is plain and intelligible, takes into consideration matters such as consumers' general knowledge of that term, the information which the financial institution is required to provide to the potential borrower in accordance with the legislation on standardised information sheets, the advertising by banking institutions and the particular attention paid by the average consumer to that term and the fact that the wording, location and structure of that term show that it constitutes an essential element of the contract.

As a preliminary point, it should be noted that this second question concerns the assessment of whether a term establishing an arrangement fee such as that at issue in the main proceedings is plain and intelligible within the meaning of Article 4(2) of Directive 93/13. It is apparent from the answer given to the first question that such a term does not fall within the 'main subject matter of the contract' within the meaning of that provision.

In the light of that answer, the final element mentioned by the referring court in the second question must be understood as referring to the fact that the wording, location and structure of the term establishing the arrangement fee show that that clause constitutes an 'important' element of the mortgage loan or credit agreement, since the classification as an 'essential' element is reserved for those elements falling within the 'main subject matter of the contract' for the purposes of Article 4(2) of Directive 93/13, as is apparent from the case-law referred to in paragraph 17 of the present judgment.

That said, the same transparency requirement as that referred to in Article 4(2) of Directive 93/13 also appears in Article 5 of that directive, which provides that contractual terms in writing must 'always' be drafted in plain, intelligible language As the Court has previously held, the transparency requirement as it appears in the first of those provisions has the same scope as that referred to in the second of those provisions (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 36 and the case-law cited).

Accordingly, in order to give a useful answer to the referring court, it must be held that, by its second question, that court is asking, in essence, whether Article 5 of Directive 93/13 must be interpreted as meaning that, for the purposes of assessing whether a term of a mortgage loan or credit agreement providing for the charging of a loan arrangement fee is plain and intelligible, factors such as consumers' general knowledge of that term, the information which the financial institution is legally required to give to the potential borrower, the advertising by banking institutions, the particular attention which the average consumer is liable to pay to that term, in so far as it provides for the payment in full of a substantial sum as soon as that loan or credit has been granted, and the fact that the wording, location and structure of the term show that it is an important element of the contract are all relevant.

The Court has pointed out that the transparency requirement set out in Article 5 of Directive 93/13 cannot be reduced merely to those terms being formally and grammatically intelligible, but that, to the contrary, since the system of protection introduced by that directive is based on the idea that consumers are in a position of weakness vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, that requirement, laid down by that directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent, must be understood in a broad sense (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 67 and the case-law cited).

Thus, that requirement must be understood as requiring not only that the term in question be grammatically intelligible to the consumer, but also that the contract set out transparently the specific functioning of the mechanism to which the term in question relates and, where appropriate, the relationship between that mechanism and the mechanism laid down by other terms, so that the consumer is capable of evaluating, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 67 and the case-law cited).

Admittedly, it does not follow from that case-law that the lender is required to specify in the contract concerned the nature of all of the services provided in return for the charges laid down by one or more contractual terms. However, in the light of the protection that Directive 93/13 seeks to afford to the consumer by reason of the fact that he or she is in a weaker position vis-à-vis the seller or supplier, as regards both his or her bargaining power and level of knowledge, 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. Furthermore, the consumer must be able to ascertain that there is no overlap between those various costs or the services for which those costs are paid (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 43).

As is apparent from settled case-law, the plainness and intelligibility of the term at issue in the main proceedings must be examined by the referring 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 and the level of attention to be expected of the average consumer, who is reasonably well informed and reasonably observant and circumspect (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 68 and the case-law cited).

In paragraph 69 of the judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), the Court held that the transparency requirement, arising from both Article 4(2) and Article 5 of Directive 93/13, precludes national case-law to the effect that a contractual term is deemed to be transparent in itself, without it being necessary for the court having jurisdiction to carry out an examination such as that described in paragraphs 31 to 33 of the present judgment.

In that connection, in paragraph 70 of its judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), the Court stated that it is for the national court to determine whether the financial institution has provided the consumer with sufficient information to enable him or her to apprise himself or herself of the content and functioning of the term requiring him or her to pay an arrangement fee, and of the role of that term within the loan agreement. In this way, the consumer will be acquainted with the reasons justifying the remuneration corresponding to that charge (see, by analogy, judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 77), and will thus be able to assess the extent of his or her commitment and, in particular, the total cost of that contract.

In its request for a preliminary ruling, the Tribunal Supremo (Supreme Court, Spain) stated that, contrary to the information provided to the Court by the referring court in the cases *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19), it is in no way apparent from its own case-law that a contractual term establishing an arrangement fee, such as that at issue in the main proceedings, should be regarded as

automatically satisfying the transparency requirement arising from both Article 4(2) and Article 5 of Directive 93/12, having regard in particular to the obligations imposed by the relevant national legislation, It is in that context that the Tribunal Supremo (Supreme Court, Spain) asks the Court to clarify whether it is possible to take into account the elements referred to in the second question, for the purposes of assessing the plainness and intelligibility of such a term.

In that connection, it should be recalled that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and tribunals and the Court of Justice, any assessment of the facts and of national law is a matter for the national court or tribunal (see, in particular, judgment of 19 September 2019, *Lovasné Tóth*, C-34/18, EU:C:2019:764, paragraph 42). Furthermore, the Court has repeatedly held that it is not for it, in the context of a request for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation of such provisions is correct, as such an interpretation falls within the exclusive jurisdiction of the national courts (see, in particular, judgment of 25 November 2020, *Sociálna poisťovňa*, C-799/19, EU:C:2020:960, paragraph 45).

Consequently, the second question must be answered on the basis of the information provided by the referring court, from which it is apparent that, in accordance with the relevant national case-law, a contractual term establishing an arrangement fee, such as that at issue in the main proceedings, is not regarded as automatically satisfying the transparency required set out in Article 5 of Directive 93/13.

In so far as concerns the assessment of whether such a term is plain and intelligible, it is apparent from the case-law referred to in paragraphs 31 to 33 of the present judgment that the court having jurisdiction is required to ascertain, in the light of all the relevant facts, whether the borrower was indeed in a position to assess the economic consequences for him or her which derive from that term, to understand the nature of the services supplied in return for the costs provided for by that term, and to ascertain that there is no overlap between the various costs for which the agreement provides or between the services for which those costs are paid.

In the context of that assessment, account must be taken, inter alia, of the wording of the term under consideration, the information which the financial institution has provided to the borrower, including that which it is required to provide in accordance with the relevant national legislation, and the advertising by that institution in relation to the type of agreement entered into, by taking into account the level of attention which can be expected of an average consumer who is reasonably well informed and reasonably observant and circumspect, in accordance with the case-law referred to in paragraph 33 of the present judgment.

In that connection, as regards the elements referred to in the second question, it should be noted, first, that consumers' general knowledge of a term providing for an arrangement fee is unconnected to the way in which such a term is drafted in the context of a particular agreement, such as that at issue in the main proceedings. Accordingly, the fact that such a term is well known is not a factor that may be taken into consideration in assessing whether that term is plain and intelligible.

Second, the information which the financial institution is required to provide to the potential borrower in accordance with national legislation is a relevant factor, for the purposes of assessing plainness and intelligibility, such as, in general, the information that the financial institution has given to that borrower in the negotiation of an agreement on the contractual terms and the consequences of entering into that agreement. Such information is of fundamental importance for a consumer, as it is on the basis of that information in particular that he or she decides whether he or she wishes to be bound by the terms previously drawn up by the seller or supplier (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 70).

Third, the promotional material provided by a financial institution on the type of agreement entered into must also be taken into consideration as information provided by the lender in the negotiation of the loan agreement (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 74, and of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 44).

Fourth, the particular attention which the average consumer pays to a term relating to an arrangement fee, inasmuch as that term provides for the payment in full of a substantial sum as soon as the loan or credit is granted, can be taken into consideration for the purposes of assessing whether such a term is plain and intelligible. In accordance with the case-law referred to in paragraph 33 of the present judgment, account must be taken, in the context of that assessment, of the level of attention which can be expected of an average consumer who is reasonably well informed and reasonably observant and circumspect.

Fifth and last, as regards the characteristic that the wording, location and structure of a term justify the finding that it is an essential element of the agreement, it should be observed that, in the light of the answer given to the first question, from which it follows that, in principle, a term such as that at issue in the main proceedings is not an essential element of a mortgage loan agreement, that characteristic corresponds to an incorrect assumption, with the result that it cannot be relevant in the case in the main proceedings.

However, the location and structure of the term in question make it possible to establish whether it constitutes an important element of the contract. Such elements will enable the borrower to assess the economic consequences of that term for him or her.

In the light of the foregoing, the answer to the second question is that Article 5 of Directive 93/13 must be interpreted as meaning that, for the purposes of assessing whether a contractual term providing for the payment by the borrower of an arrangement fee is plain and intelligible, the court having jurisdiction is required to ascertain, in the light of all the relevant facts, that the borrower has indeed been placed in a position to assess the economic consequences for him or her, to understand the nature of the services provided in return for the costs provided for by that term and to ascertain that there is no overlap between the various costs provided for in the contract or between the services for which those costs are paid.

***The third question***

By its third question, the referring court asks, in essence, whether Article 3(1) of Directive 93/13 must be interpreted as precluding national case-law which considers that a contractual term which, in accordance with the

relevant national legislation, provides for the payment by the borrower of an arrangement fee, intended as remuneration for services connected with the examination, constitution and personalised processing of an application for a mortgage loan or credit, does not cause a significant imbalance in the parties' rights and obligations arising under the agreement, to the detriment of the consumer.

According to settled case-law, the Court's jurisdiction in that regard 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, but that it is for the national court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 73).

As to whether the requirement of good faith, within the meaning of Article 3(1) of Directive 93/13, is satisfied, it is important to note that, regard being had to the sixteenth recital thereof, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations ((judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 74).

With regard to the examination as to whether there may be a significant imbalance, this cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract, on the one hand, and the costs charged to the consumer under that term, on the other. A significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, 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 the 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 (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 51).

Moreover, it is clear from Article 4(1) of Directive 93/13 that 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 the contract and to all the other terms of the contract or of another contract on which it is dependent (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 76).

The referring court and the banking institution take the view that paragraphs 78 and 79 of the judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578) were influenced by an incorrect presentation, in the request for a preliminary ruling relating to Case C-224/19, of both the Spanish legislation and the case-law of the Tribunal Supremo (Supreme Court), in that the referring court in that case failed to describe the rule which specifically governs the arrangement fee and which establishes rules, in respect of that fee, which differ from those of other banking fees.

Moreover, in the order for reference, the referring court states that there may be tension between, in essence, paragraphs 78 and 79 of the judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578) and paragraph 55 of the judgment of 3 October 2019, *Kiss and CIB Bank* (C-621/17, EU:C:2019:820).

In that regard, it should be recalled that the Court noted, in paragraph 78 of the judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), that, according to the information provided by one of the referring courts in those cases, Law 2/2009 required that the fees or costs passed on to the customer correspond to services actually provided or to costs incurred.

On the basis of those indications, and in accordance with the principles recalled in paragraph 51 of the present judgment, the Court held, in essence, that a term which would have the effect of exempting the seller or supplier from the obligation of demonstrating that the conditions laid down by that national legislation are satisfied in respect of an arrangement fee, was capable, subject to verification by the court having jurisdiction in the light of the terms of the agreement as a whole, of adversely affecting the legal position of the consumer as provided for by national law and, consequently, of causing a significant imbalance in the parties' rights and obligations arising under the that agreement, to the detriment of the consumer.

That said, the assessment of whether there is a significant imbalance in the parties' rights and obligations as regards the charging of an arrangement fee intended to cover the tasks involved in the examination, grant or processing of the mortgage loan or credit, in accordance with the relevant national legislation, must be carried out by the competent court in the light of all the criteria established by the settled case-law referred to in paragraphs 49 to 52 of the present judgment.

In that connection, with regard to terms of loan agreements relating to fees also provided for by national law, the Court applied those criteria in paragraph 55 of the judgment of 3 October 2019, *Kiss and CIB Bank* (C-621/17, EU:C:2019:820), holding that, unless the services provided in return do not reasonably relate to services provided in connection with the management or disbursement of the loan, or the amounts charged to the consumer in respect of those costs and that fee are disproportionate to the amount of the loan, it does not appear, subject to verification by the court having jurisdiction, that those terms adversely affect the legal position of the consumer as provided for by that national law.

On the same grounds, a contractual term governed by national law which establishes an arrangement fee, the purpose of which is to remunerate services relating to the examination, constitution and personalised processing of an application for a mortgage loan or credit which are necessary to obtain such a loan or credit, does not appear, subject to verification by the court having jurisdiction, capable of adversely affecting the legal position of the consumer as provided for by national law, unless the services provided in return do not reasonably fall within the

scope of the services described above or the amount charged to the consumer in respect of that fee is disproportionate to the amount of the loan.

It should also be stated that national case-law, from which it is apparent that a term establishing an arrangement fee cannot be regarded, in any event, as being unfair simply because it relates to services inherent in the lender institution's activity arising from the granting of the loan, which services are provided for under national legislation, would be contrary to Article 3(1) of Directive 93/13. Such case-law would in fact curb the powers of the national courts to carry out, including of their own motion, an examination of the potential unfairness of the terms concerned in accordance with that provision and, consequently, would fail to ensure the full effect of the rules laid down in that directive.

In the light of the foregoing, Article 3(1) of Directive 93/13 must be interpreted as not precluding national case-law which considers that a contractual term which, in accordance with the relevant national legislation, provides for the payment by the borrower of an arrangement fee intended to remunerate services connected with the examination, constitution and personal processing of an application for a mortgage loan or credit, may, as the case may be, not create a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer, provided that the possible existence of such an imbalance is subject to effective review by the court having jurisdiction, in accordance with the criteria set out in the case-law of the Court.

**Costs**

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national case-law which, in the light of national legislation providing that the arrangement fee pays for services connected with the examination, granting or processing of the mortgage loan or credit or other similar services, considers that the clause establishing such a fee comes within 'the main subject matter of the contract', within the meaning of that provision on the ground that it represents one of the main components of the price.**

**Article 5 of Directive 93/13 must be interpreted as meaning that, for the purposes of assessing whether a contractual term providing for the payment by the borrower of an arrangement fee is plain and intelligible, the court having jurisdiction is required to ascertain, in the light of all the relevant facts, that the borrower has indeed been placed in a position to assess the economic consequences for him or her, to understand the nature of the services provided in return for the costs provided for by that term and to ascertain that there is no overlap between the various costs provided for in the contract or between the services for which those costs are paid.**

**Article 3(1) of Directive 93/13 doit être interprétée en ce sens qu'elle ne s'oppose pas à une jurisprudence nationale qui considère qu'une clause contractuelle qui, conformément à la législation nationale pertinente, prévoit le paiement par l'emprunteur d'une commission de dossier destinée à rémunérer des prestations liées à l'examen, à la constitution et au traitement des données d'une demande de prêt ou de crédit hypothécaire, ne peut, le cas échéant, créer un déséquilibre significatif entre les droits et obligations des parties résultant du contrat au détriment du consommateur, pour autant que l'existence éventuelle d'un tel déséquilibre fait l'objet d'un contrôle effectif par la juridiction compétente, conformément aux critères énoncés dans la jurisprudence de la Cour.**

[Signatures]

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* Langue de procédure : espagnol.