

Case C-28/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

12 January 2022

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

19 November 2021

Applicants:

TL

WE

Defendant:

Getin Noble Bank S.A.

Subject matter of the main proceedings

The action for payment concerns the return of amounts paid by the applicants to the bank under a mortgage loan agreement that was subsequently declared invalid. The plea of retention raised by the defendant, which is based on claims against the borrowers for the repayment of amounts disbursed to them, enables the bank to withhold performance until the applicants either offer to repay the amounts received or provide security for the repayment of those amounts. The effectiveness of the plea of retention depends on the assessment of whether the bank's claim for repayment is time-barred.

Subject matter and legal basis of the request

Interpretation of Articles 6(1) and 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13') (OJ 1993 L 95, p. 29).

Questions referred for a preliminary ruling

1. Must Articles 6(1) and 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) be construed as precluding an interpretation of national law which, in the case where a contract is no longer capable of continuing in existence following the elimination of abusive clauses, makes the start of the limitation period for the claims of the seller or supplier for restitution conditional on the occurrence of any of the following events:
 - (a) the consumer making a claim or raising a plea against the seller or supplier on the grounds that contractual clauses are abusive, or a court, acting of its own motion, advising that contractual clauses may be declared abusive; or
 - (b) the consumer stating that he or she has been given comprehensive information on the effects (legal consequences) of the contract being no longer capable of continuing in existence, including information on the possible claims of the seller or supplier for restitution and the extent of those claims; or
 - (c) the consumer's knowledge (awareness) of the effects (legal consequences) of the contract being no longer capable of continuing in existence being established during court proceedings, or the court advising the consumer of such consequences; or
 - (d) the final court judgment resolving the dispute between the seller or supplier and the consumer being delivered?
2. Must Articles 6(1) and 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be construed as precluding an interpretation of national law which, in the case where a contract is no longer capable of continuing in existence following the elimination of abusive clauses, places no obligation on the seller or supplier against whom a consumer has brought a claim related to the presence of abusive clauses in the contract to take steps of its own motion to establish whether the consumer is aware of the consequences of abusive clauses being eliminated or of the contract being no longer capable of continuing in existence?
3. Must Articles 6(1) and 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be construed as precluding an interpretation of national law which, in the case where a contract is no longer capable of continuing in existence following the elimination of abusive clauses, provides that the limitation period for the consumer's claims for restitution starts to run before the limitation period for the claims of the seller or supplier for restitution?
4. Must Article 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be construed as precluding an interpretation of national

law which, in the case where a contract is no longer capable of continuing in existence following the elimination of abusive clauses, entitles the seller or supplier to make the repayment of the amounts received from the consumer conditional on the consumer at the same time offering to repay the amounts received from the seller or supplier or providing security for the repayment of those amounts, whereby the amount to be paid by the consumer does not include the sums which have become time-barred?

5. Must Article 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be construed as precluding an interpretation of national law which, in the case where a contract is no longer capable of continuing in existence following the elimination of abusive clauses, does not entitle the consumer in whole or in part to interest for late payment in respect of the period from the receipt by the seller or supplier of the demand for restitution in the event that the seller or supplier exercises the right referred to in Question 4?

Provisions of EU law and case-law relied on

Articles 6(1), 7(1) of Directive 93/13; judgment of the Court of Justice of 29 April 2021 in Case C-19/20 (*Bank BPH*)

Provisions of national law relied on

Article 117 of the Ustawa z dnia 23 kwietnia 1964 roku Kodeks cywilny (Law of 23 April 1964 – Civil Code, consolidated text: Dziennik Ustaw (Journal of Laws) of 2020, item 1740, ‘the CC’)

1. Subject to the exceptions provided for by statute, property-related claims shall be subject to limitation.

2. Following the expiry of the limitation period, a person against whom a claim is pursued may avoid the duty to satisfy it, unless he or she waives the right to use the defence of limitation. However, waiving the defence of limitation before the expiry of the limitation period shall be invalid.

2¹ Once the limitation period has expired, a claim against a consumer cannot be asserted.

Article 117¹ CC

1. In exceptional cases, the court may, after weighing the interests of the parties, disregard the expiry of the limitation period for a claim against a consumer if it is justified by reasons of equity.

2. *In exercising the authority under paragraph 1, the court should consider, in particular:*

- (1) *the length of the limitation period;*
- (2) *the length of time between the expiry of the limitation period and the assertion of the claim;*
- (3) *the nature of the circumstances that prevented the claimant from pursuing the claim, including the effect of the debtor's conduct on the claimant's delay in pursuing the claim.*

Article 118 CC

– in the wording in force from 1 October 1990 until 28 May 2018:

Unless a specific provision provides otherwise, the limitation period shall be 10 years, and for claims concerning periodic payments as well as claims related to the conduct of business activity, it shall be 3 years.

– in the wording in force as of 29 May 2018 pursuant to Article 1 of the Ustawa z dnia 13 kwietnia 2018 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Law of 13 April 2018 amending the Civil Code and certain other laws, *Dziennik Ustaw* (Journal of Laws) of 2018, item 1104):

Unless a specific provision provides otherwise, the limitation period shall be six years, and for claims concerning periodic payments as well as claims related to the conduct of business activity, it shall be three years. However, the end of the limitation period shall be the last day of the calendar year unless the limitation period is shorter than two years.

Article 120(1) CC

The limitation period shall commence on the day on which the claim becomes due. If the enforceability of a claim depends on the adoption of a specific act by the rightholder, the period shall begin to run from the date on which the claim would have become due if the rightholder had adopted the act as soon as possible.

Article 355 CC

1. *The debtor shall be obliged to show the diligence which is generally required in relations of a given kind (due diligence).*

2. *The debtor's due diligence within the scope of his or her economic activity shall be determined while taking into account the professional character of that activity.*

Article 385¹ CC

1. *The terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his or her rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his or her interests (abusive clauses). This provision shall not apply to terms setting forth the principal obligations to be performed by the parties, including price or remuneration, so long as they are worded clearly.*

2. *If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties.*

3. *The terms of a consumer contract which have not been individually negotiated are those over the content of which the consumer had no actual influence. This relates in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party.*

4. *The burden of proving that a contractual term has been individually negotiated rests with the person relying thereon.*

Article 405 CC

A person who has obtained a material benefit at the expense of another person with no legal basis shall be obliged to release the benefit in kind and, if that is not possible, to reimburse its value.

Article 410 CC

1. *The provisions of the preceding articles shall apply in particular to undue performance.*

2. *A performance is undue if the person who rendered it was not under any obligation at all or was not under any obligation towards the person to whom he or she rendered the performance, or if the basis for the performance has ceased to exist or if the intended purpose of the performance has not been achieved or if the transaction on which the obligation to render the performance was based was invalid and has not become valid since the performance was rendered.*

Article 455 CC

If the time limit for the performance has not been specified or if it does not result from the nature of the obligation, the performance shall be rendered immediately after the debtor has been called upon to render it.

Article 481(1) CC

If the debtor is late in making a payment, the creditor may claim interest for the duration of the delay even if the creditor has not suffered any damage and even if the delay was due to circumstances for which the debtor is not responsible.

Article 496 CC

If, as a result of withdrawal from the contract, the parties are to return their reciprocal performances, each of them shall have a right of retention until the other party either offers to return the performance received or provides security for the return of that performance.

Article 497 CC

The provision of the preceding article shall apply mutatis mutandis in the event of termination or invalidity of a reciprocal contract.

Article 5 of the Law of 13 April 2018 amending the Civil Code and certain other laws

1. *The provisions of the Law amended in Article 1, in the wording amended hereby, shall apply to claims arising prior to the date of entry into force hereof and not yet time-barred on that date.*

...

3. *The provisions of the Law amended in Article 1, in the existing wording, shall apply to consumer claims arising prior to the date of entry into force hereof and not yet time-barred on that date the periods of limitation of which are stipulated in Article 118 and in Article 125(1) of the Law amended in Article 1.*

4. *Time-barred claims against a consumer in respect of which no defence of limitation was raised by the date of entry into force hereof shall be subject as of that date to the effects of limitation stipulated in the Law amended in Article 1, in the wording amended hereby.*

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 7 September 2007, the applicants (borrowers), acting as consumers, entered into a mortgage loan agreement with the bank of which the defendant is the legal successor. The loan was denominated in Polish zloty (PLN) and indexed to a foreign currency, namely the Swiss franc (CHF). The loan amount in PLN was converted into the amount in CHF at the buying rate set forth in the bank's table of exchange rates. The amount in CHF determined in that manner formed the basis for determining the amount of monthly loan repayments. The interest rate on the loan was linked to the LIBOR (CHF) rate. The borrowers were obliged to make monthly repayments in PLN in an amount equal to the equivalent of the monthly instalment expressed in CHF at the selling rate set forth in the bank's table of exchange rates as at the repayment date.
- 2 By judgment of 19 November 2021, it was determined that the loan agreement was invalid because it was not capable of continuing in existence following the elimination of abusive clauses. The application of unilaterally determined exchange rates by the bank and the application of different buying and selling rates to individual settlements were deemed to be abusive clauses.
- 3 In the course of the proceedings, the borrowers were advised by the court that the agreement might be invalid. They were also advised that in that case, they would be required to repay the loan principal as soon as the bank called upon them to do so, and that the bank could pursue claims against them for payment of higher amounts. The applicants maintained their position.
- 4 Both in the complaint addressed directly to the defendant and in their action, the applicants raised arguments indicating that the agreement contained abusive clauses and that it was invalid. The defendant consistently maintained its position that the agreement did not contain abusive clauses and that the conversion clauses contained therein were effective and valid. For those reasons, the defendant refused to repay the amounts received.
- 5 On 9 July 2021, letters from the bank were delivered to the applicants, stating that the bank had exercised its right to retain the amount, if any, due to the applicants until the applicants either offered to repay the amounts received in the form of the loan made available to them by the bank under the loan agreement or to provide security for their repayment.

The essential arguments of the parties in the main proceedings

- 6 The parties remain in dispute concerning the limitation period applicable to the bank's claim for repayment of the amount used by the applicants as loan principal.
- 7 The applicants take the view that the period of limitation applicable to the bank's claim began to run when the bank received the applicants' position stated in their demand for payment (complaint) challenging the validity of the agreement, or

when it received a copy of the statement of claim. Both events occurred in 2017, which means that the period of limitation for the bank's claim expired in 2020. The applicants go on to argue that a challenge to the validity of a contract or its clauses need not be limited to court proceedings. The opposite approach would, they submit, be overly stringent, since it would limit the ability of consumers to defend their interests under Directive 93/13.

- 8 Against this, the defendant argues that the limitation period for the bank's claim has not yet started to run. It argues that the limitation period for that claim will start to run as soon as the court finally resolves the dispute concerning the effectiveness of contractual terms and the validity of the loan agreement. The defendant also disputes the assumption that the standards stipulated in the directive may determine the rights and obligations of the parties to the proceedings.

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

- 9 The request for a preliminary ruling is based on the assumptions arising from national law, according to which the presence of abusive clauses in a contract and their subsequent elimination results in the invalidity of that contract, which in turn gives rise to a claim for the return of reciprocal performances arising from the obligation to return an undue performance (Article 410 CC). In view of the invalidity of the contract, the defendant is entitled to enter a plea of retention of the amounts received from the applicants until the latter either offer to repay the amount used or to secure the claim for its repayment, provided that the bank's claim is not time-barred at the time the plea is entered.
- 10 Following the resolution of 7 May 2021 of the Sąd Najwyższy (Supreme Court, Poland), Ref. No III CZP 6/21, the referring court instructed the parties that Article 385¹ CC, which implements Directive 93/13, including in particular Article 6 thereof, should be understood as meaning that an abusive clause has no effect from the outset (*ab initio*) and by operation of law (*ipso jure*), which the court is obliged to consider of its own motion. However, a consumer who is aware of the abusive nature of a clause may object to the refusal to apply it by consenting to that clause. This will be effective only if the consumer has received exhaustive information on the legal consequences that the definitive ineffectiveness (invalidity) of the clause in question may entail. The consumer should also be informed that he or she may consent to the clause within a reasonable time and that he or she has the option to express a binding opinion as to whether the consequences of the definitive ineffectiveness (invalidity) of the contract would be particularly disadvantageous to him or her. A refusal to consent will render the abusive clause definitively ineffective (invalid). If the loan agreement is not capable of continuing in existence without such a clause, the consumer and the lender have separate claims for the return of the respective amounts paid thereunder.

- 11 The penalty related to the inclusion of abusive clauses in the agreement is to have such an effect that as of the date of refusal to consent to a clause without which the loan agreement cannot remain binding, or as of the date on which the time limit to consent to that clause passes, the state of suspension (that is to say, the state of suspended ineffectiveness in which the agreement does not produce legal effects) ceases, and the agreement either becomes definitively ineffective (invalid) or takes effect retroactively (*ex tunc*) in a form that includes the replacement clause. However, the referring court recognises the dangers inherent in such a penalty, which arise from the fact that the consumer is in fact required to submit a declaration of intent to challenge the abusive clauses, and that declaration is subject to a number of formal requirements. In particular, there are doubts as to the consequences of that approach for the determination of the start of the limitation period of the claims of the seller or supplier and the due date of those claims, including the determination as to whether the debtor is late in making payments, which is the basis for the obligation to pay statutory interest for late payment.
- 12 In view of the failure to regulate those issues with relevant provisions, the court sees the need to adopt an interpretation of generally applicable laws which would reflect the objectives of Directive 93/13, including, in particular, the need to interpret its provisions in terms of their impact on the scope of the parties' settlements in the event that an agreement containing unfair contractual terms is not capable of continuing in existence.
- 13 It also appears necessary to clarify the scope of the requirement, resulting from the judgment of the Court of Justice of 29 April 2021 in Case C-19/20, to inform the consumer about the possible claims for restitution resulting from the ineffectiveness of unfair contractual terms. In particular, it should be clarified whether the assumption that such information must be provided may affect the scope of the parties' rights and obligations with respect to claims for restitution. In particular, the referring court takes note that the Court of Justice has already made it clear that the full effectiveness of the protection provided for by the directive requires that the national court which has found of its own motion that a term is unfair should be able to establish all the consequences of that finding, without waiting for the consumer, who has been fully informed of his or her rights, to submit a statement requesting that that term be declared invalid (judgment of 21 December 2016 in Joined Cases C-154/15, C-307/15 and C-308/15, paragraph 59 and the case-law cited).
- 14 Moreover, it would appear that all the consequences of a finding of unfairness of a term should also mean providing the consumer with effective claims for restitution.
- 15 As regards **Question 1 (point I.1)**, its purpose is to determine whether the wording of the provisions of Directive 93/13 has any effect on the interpretation of the provisions of national law concerning the time-barring of claims, principally claims for restitution arising where a loan agreement is invalid.

- 16 A claim for the return of an undue payment becomes due when it is not satisfied immediately after the demand, addressed to the debtor, stipulating a deadline for the return. If the enforceability of a claim depends on the adoption of a specific act by the rightholder, the limitation period begins to run from the date on which the claim would have become due if the rightholder had adopted the act as soon as possible.
- 17 Assuming that the limitation period for the claim of the seller or supplier for the return of undue payment may start only after the agreement has become definitely ineffective, it is pointed out that, as long as the agreement remains suspended, the seller or supplier cannot demand that the payments agreed therein be made. Nor can the seller or supplier claim the return of an undue payment that has been made, since the decision as to whether the clause and the agreement are binding lies, in principle, in the hands of the consumer. Since the seller or supplier cannot make such a demand and thus make its claims for restitution due, there is no question of the limitation period beginning to run. The situation changes only if the consumer consents to the abusive clause or refuses to consent to it.
- 18 The limitation period for the consumer's claims for restitution cannot begin to run until the consumer has become aware (or should reasonably have become aware) of the abusive nature of the relevant clause. Only then can the consumer call upon the seller or supplier to return the payment (Article 455 CC), that is to say, take the action referred to in Article 120(1) CC.
- 19 As regards **Question 1(a) (point I.1(a))**, in the light of the interpretation governing the limitation period for the claims of the seller or supplier which requires that the consumer be active in order for that period to start, doubts arise as to whether the effectiveness of the protection afforded to the consumer by Directive 93/13 is not undermined. In such a situation, a seller or supplier who offers to consumers contracts that contain unfair contractual terms may effectively be released from liability for the contents of those contracts if the consumer takes no action. The entire consumer protection scheme afforded by the directive is based on the assumption that the differences in the parties' bargaining power and awareness of their rights must be eliminated. Consumers may be unaware of the unfairness of a contractual term or not appreciate the extent of their rights under Directive 93/13 (judgment of the Court of Justice of 10 June 2021, *BNP Paribas Personal Finance SA*, C-776/19 to C-782/19, paragraph 45 and the case-law cited). The question also arises as to whether the obligation under Article 7(1) of the directive to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers is met.
- 20 It may also be questionable whether the obligation under Article 6(1) of the directive to ensure that unfair terms in a contract concluded with a consumer are not binding on the consumer under national law is met, since if it is assumed that, despite the inclusion of an unfair term in a contract, the seller or supplier is relieved of its duty to bring a claim for restitution in due time, then the consumer's

situation (understood as his or her rights and obligations) is in fact affected by that term.

- 21 On the other hand, the determination that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in if that term had not existed. Achieving that effect does not require the consumer to be relieved of the obligation to repay the amount that he or she has unduly received.
- 22 Moreover, both Article 6(1) of Directive 93/13 and Article 385¹(1) CC provide that the unfair term (abusive clause) is only non-binding unilaterally: on the consumer. The seller or supplier may not unilaterally invoke the abusive nature of contractual clauses and bring claims against the consumer on that basis. Only the consumer is entitled to exercise the rights arising from the presence of abusive clauses in the contract. It does not appear that the intention of the application of the provisions meant to protect consumers is to place an obligation on the seller or supplier to make a claim for restitution immediately after the performance has been rendered (and an obligation on the consumer to return that performance). In that case, the consumer could be coerced by economic circumstances into agreeing to continue to be bound by unfair terms.
- 23 Therefore, the referring court, with the exceptions listed below, does not object to making the commencement of the limitation period for the claims of the seller or supplier dependent on the time when the seller or supplier becomes aware that the consumer is bringing claims against it on the basis of the presence of unfair terms in the contract. In order finally to clarify this issue, it must be assessed whether the principles set out in Articles 6(1) and 7(1) of Directive 93/13 have an impact on the interpretation of national law governing claims for restitution and settlements between the parties, and if so, the scope of that impact.
- 24 **Question 1(b) and (c) (point I(1)(b) and (c))** concerns doubts about imposing additional requirements on the consumer relating to the need for the consumer to state that he or she is aware of the consequences of challenging unfair contractual terms.
- 25 In the event that a consumer makes a claim for restitution which presupposes the definitive ineffectiveness (invalidity) of the entire contract, the seller or supplier (lender), when confronted with such a claim, may be unsure as to whether, in making that claim, the consumer was duly informed of the consequences of the abusive nature of the clause in question. This is an important issue, since it determines the start of the limitation period for the claims of the seller or supplier for restitution.
- 26 The seller or supplier is not entitled to access the information obtained by the consumer out of court. A consumer's claim for restitution based on the assertion that the loan agreement is entirely and definitively ineffective (invalid) cannot be regarded as tantamount to ending the state of suspended ineffectiveness of that

agreement if it is not accompanied by an express statement on the part of the consumer confirming that he or she has received exhaustive information. In the course of the proceedings, the court itself may remedy the absence of such a statement by complying with its duty to inform the customer, while the maintenance by the consumer of the claim for restitution – after having received the information in question – will be tantamount to a refusal to consent to the clause and (possibly) tantamount to an objection to being protected against the consequences of the complete and definitive ineffectiveness (invalidity) of the agreement.

- 27 In the referring court's view, imposing an obligation on the consumer to make further representations in addition to submitting claims against the seller or supplier, let alone a requirement that those representations be verified only in the course of court proceedings, may render the exercise of rights conferred on the consumer by Directive 93/13 practically impossible or excessively difficult.
- 28 In its judgment of 29 April 2021 in Case C-19/20, *Bank BPH*, the Court of Justice indicated that Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is for the national court, finding that a term in a contract concluded between a seller or supplier and a consumer is unfair, to inform the consumer, in the context of the national procedural rules, after both parties have been heard, of the legal consequences which annulment of the contract may entail, irrespective of whether the consumer is represented by a professional representative. That obligation appears to apply (paragraphs 92 and 93 of the judgment) to a situation where the court determines the existence of an unfair contract term and the consequences thereof when examining the matter of its own motion.
- 29 It is also unreasonable to assume that, despite having received certain claims and having been made aware of the consumer's position, the seller or supplier may remain passive and not take any actions before they become time-barred.
- 30 In addition, the ineffectiveness of the consumer's demand which does not meet the requirements set forth by the Supreme Court will also have the effect of the seller or supplier delaying the fulfilment of its performance until the judgment becomes final. This will preclude the consumer from being awarded interest for the period from the submission of the claim until the date on which the judgment becomes final. This would mean accepting a situation where the seller or supplier can not only reject the claims but also continue to wait for the consumer's further actions without any significant adverse consequences, hoping that the latter may not be interested or able to initiate litigation.
- 31 In the view of the referring court, that would not only make it excessively difficult for consumers to exercise the rights conferred by the directive, but would also to a significant extent eliminate the deterrent effect which the consumer protection scheme should have. Indeed, the seller or supplier could count on the fact that

some consumers, having had their demands rejected, would no longer try to pursue their rights, and even if the consumer demonstrated reasonable determination, there would be no practical consequences for the seller or supplier of a delay in meeting the consumer's legitimate claims.

- 32 Notwithstanding the foregoing, the adopted solution appears to run counter to the principle of equivalence, because a party to an agreement which has been found to be invalid for a reason other than as a result of the presence of unfair contractual terms is not expected to fulfil any requirements other than submitting a demand for restitution in order for the claim for restitution to become due.
- 33 However, the principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar (judgment of the Court of Justice in Joined Cases C-698/18 and C-699/18, paragraph 76 and the case-law cited).
- 34 As regards **Question 1(d) (point I(1)(d))**, where the condition for the contract to be definitively non-binding is a final court judgment confirming the unfair nature of its terms, this appears to weaken the consumer's position to an extent which jeopardises the objectives of Directive 93/13, since in that case the consumer loses the right to submit a declaration of intent to be bound by the abusive clauses or to replace them with another provision only after the dispute has been finally resolved. At that time, the seller or supplier becomes able to bring claims based on the invalidity of the contract. This affects not only the time at which the limitation period for the claims of the seller or supplier begins to run, but also has the effect of preventing the award to the consumer of interest for the period from the submission of his or her claim until the date on which the judgment becomes final. In that situation, the seller or supplier will not be interested in satisfying the consumer's claims arising from the provisions implementing Directive 93/13. It appears that the obligation in Article 7(1) of the directive to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers will be jeopardised as a result.
- 35 In addition, the obligation stipulated in Article 6(1) of the directive will be breached as a result of the extension until the end of the dispute of the period during which unfair contractual terms will actually affect consumers' rights and obligations.
- 36 Accepting that it is necessary for the court to deliver a final judgment would also appear to undermine the assumption that an unfair term must be regarded as never having existed rather than only being set aside by the court's ruling, which assumption is fundamental to the consumer protection scheme established by Directive 93/13.
- 37 Therefore, in the view of the referring court, Articles 6(1) and 7(1) of Directive 93/13 must be construed as precluding an interpretation of national law which,

where a contract is no longer capable of continuing in existence following the elimination of abusive clauses, makes the start of the limitation period for the claims of the seller or supplier for restitution conditional not only on the consumer making a claim or raising a plea against the seller or supplier on the grounds that contractual clauses are abusive (or a court, acting of its own motion, advising that contractual clauses may be declared abusive), but also on the consumer making further representations or the consumer's knowledge (awareness) of the effects (legal consequences) of the contract being no longer capable of continuing in existence being established during court proceedings, or the court advising the consumer of such consequences, and in particular on the court delivering a final judgment resolving the dispute between the seller or supplier and the consumer.

- 38 By **Question 2 (point I.2)**, the referring court asks whether, in a situation where the seller or supplier must be aware that clauses in the contract concluded with the consumer are abusive or where the consumer has brought a claim against the seller or supplier, the seller or supplier is released from taking steps to establish whether it is necessary to call upon the consumer to return the performance in connection with the claims of the seller or supplier for restitution becoming due.
- 39 If Articles 6(1) and 7(1) of the directive do not preclude the assumption that all the consequences of the invalidity of a contract arise only after the consumer has stated that he or she has received exhaustive information on the legal consequences, it must be clarified whether, in order for the consumer protection scheme to be effective, it is not necessary for the seller or supplier to take steps of its own motion to establish whether the consumer is aware of the possibility of the contract becoming invalid and the ensuing consequences. Those steps may consist in giving the consumer adequate instructions on the parties' mutual rights and obligations in the event of the contract becoming invalid, in particular regarding the claims to which the consumer would then be entitled.
- 40 It appears that imposing an obligation on the seller or supplier to take steps of its own motion to determine the effectiveness of the consumer's statement, and taking the failure of the seller or supplier to do so into account when assessing whether its claims are time-barred, would be symmetrical to recognising that the start or lapse of the limitation period for the consumer's claims depends on whether the consumer has had an opportunity to learn about his or her rights. Both parties to the contract would then have a duty to act to protect their rights, as part of their duty to exercise due diligence, when a reasonable assessment of the circumstances indicated that there was a need to do so. Any failure to do so would result in claims for restitution potentially becoming time-barred. Such an obligation should apply in particular to those sellers or suppliers whose standard contract terms, subsequently transferred to contracts concluded with consumers, have already been subject to abstract review resulting in their entry in the register of abusive clauses (see judgment of the Court of Justice of 21 December 2016, *Biuro podróży Partner*, C-119/15).

- 41 Accordingly, in the view of the referring court, Articles 6(1) and 7(1) of Directive 93/13 must be construed as precluding an interpretation of national law which, in the context of determining the start of the limitation period, does not take into account the obligation of the seller or supplier to take steps of its own motion in order to establish whether the consumer is aware of the consequences of the elimination of abusive clauses from the contract or of the contract not being capable of continuing in existence.
- 42 The answer to **Question 3 (point I.3)** becomes relevant if the answers to Questions 1 and 2 accept that the start of the limitation period for the claims of the seller or supplier may be made dependent on any event subsequent to the receipt by the seller or supplier of the consumer's demand for restitution or any other challenge to the effectiveness of contractual terms or to the contract's validity.
- 43 The question of the limitation period for a consumer's claims against a seller or supplier is also the subject of the request for a preliminary ruling in Case C-81/21. In Case C-81/21, the court has doubts about the compatibility with Articles 6(1) and 7(1) of Directive 93/13 of an interpretation which provides that the limitation period for a consumer's claims for restitution begins when the performance in question is made.
- 44 In view of the long, 10-year limitation period for consumer claims, there are no grounds for extending that time limit excessively by seeking circumstances that postpone its start, as long as the limitation period lapses at a point when the consumer has already had, or reasonably could have had, the opportunity to learn about the unfair nature of the contractual term, and also the opportunity to pursue the relevant claims.
- 45 Such a position may not be valid, however, if it is assumed that the limitation period for the seller or supplier does not start to run not just until the consumer makes a claim, but until additional conditions have been met as well.
- 46 It is obvious that the consumer learns, and certainly can learn, of his or her claims before he or she demands restitution from the seller or supplier, and even more so before the consumer makes a possible statement that he or she is aware of the consequences related to the invalidity of the contract. The disadvantages resulting from this state of affairs are mitigated by the different limitation periods (3 years for the claims of the seller or supplier versus 10 or 6 years for the consumer's claims). However, it is still possible to envisage a situation in which at least some of the consumer's claims will be found to be time-barred before the consumer decides to demand restitution from the seller or supplier or to initiate litigation.
- 47 In the view of the referring court, it is therefore necessary to consider whether, if it is accepted that the limitation period for the claims of the seller or supplier begins to run upon the occurrence of one of the events described in Question 1, the effectiveness of consumer protection afforded by Directive 93/13 does not

require that the limitation period for the consumer's claims cannot begin, or at least lapse, before that event occurs.

- 48 The answer to **Question 4 (point I.4)** becomes necessary if it is accepted that there is no obstacle to the consumer's claims for restitution being time-barred independently from the claims of the seller or supplier, including before those claims.
- 49 If a consumer's claim for restitution is time-barred before the seller or supplier has raised a retention plea covering all the amounts made available to the consumer, a situation arises where the consumer's ability to receive part of the amount paid to the seller or supplier will depend on the consumer offering to return all the amounts made available by the seller or supplier. Therefore, the claims for restitution to which the parties are entitled will not be identical in scope.
- 50 The Court of Justice has already held (paragraphs 39 and 40 of the judgment of 10 June 2021 in Joined Cases C-776/19 to C-782/19, *BNP Paribas Personal Finance*, and the case-law cited) that Articles 6(1) and 7(1) of the directive do not preclude national legislation which lays down a time limit for bringing an action seeking to rely on the restitutory effects of a finding that a contractual term is unfair. The application of a limitation period to claims for restitution brought by consumers in order to enforce rights which they derive from Directive 93/13 is not, in itself, contrary to the principle of effectiveness, but its application must not make it in practice impossible or excessively difficult to exercise the rights conferred by that directive.
- 51 It does not appear that the requirements outlined by the Court can be met in circumstances where only the consumer's claims for restitution are time limited. The primary threat to the effectiveness of the rights conferred by the directive and the consumer's ability to exercise them is that the limitation period for the claims of the seller or supplier is postponed to such an extent that, despite that period being much shorter, those claims will always become time-barred after the point at which some of the consumer's claims may become time-barred.
- 52 As regards **Question 5 (point I.5)**, the court seeks to assess the compatibility with the principles of consumer protection arising from Directive 93/13 of an interpretation of national law which restricts the consumer's rights in respect of claims for restitution by excluding the liability of the seller or supplier for any delay in meeting the consumer's legitimate claims.
- 53 Two issues are of concern to the court, the first arising from the fact that if it is assumed that the contract remains in a suspended state until any of the events described in Question 1, letters (b) to (d), occur, the seller or supplier will not be considered late in making its payments from the time it is called upon to return the undue performance, but only from the time when it is established that the consumer is aware of the consequences of the contract not being capable of

continuing in existence (the contract's invalidity) and waives his or her protection against such consequences.

- 54 An interpretation that makes the consumer's claims becoming due conditional on the consumer making an appropriate statement effectively deprives the consumer of his or her right to interest for late payment for a period that may extend to several years due to the length of court proceedings. This would have the result of significantly undermining the effectiveness of consumer protection, while at the same time infringing the principle of equivalence.
- 55 The second issue is related to the determination of the point in time at which a debtor ceases to be late in making payments upon exercising the right to retain the amount due to the other party until the other party offers to meet the debtor's claim or to provide security for that claim. It should be noted that the debtor being late in making payments is the basic prerequisite for the obligation to pay interest for late payment.
- 56 Depending on the interpretation adopted, the debtor either ceases to be late in making payments entirely (the plea of retention has retroactive effect) or ceases to be late at the time of submission of the statement that the debtor raises the plea of retention, in which case interest for late payment would be due to the consumer from the lapse of the time limit for payment by the seller or supplier after it has received the relevant demand until the time at which the plea of retention is invoked.
- 57 In the context of disputes over loan agreements, such as the present case, a plea of retention is contingent (the seller or supplier, in principle, denies the validity of the consumer's claims), as the seller or supplier is not willing to make the performance demanded by the consumer, and the right of retention is not the only reason for withholding performance. Therefore, doubts arise as to whether the hitherto interpretation of national law related to the consequences of a plea of retention being raised is compatible with the principle of the effectiveness of the protection afforded to consumers by Directive 93/13 and the obligation to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers (Article 7(1) of the Directive).
- 58 It should therefore be assumed that Article 7(1) of Directive 93/13 must be construed as precluding an interpretation of national law which, in the case where a contract is no longer capable of continuing in existence following the elimination of abusive clauses, in any way limits the liability of the seller or supplier for delay in satisfying the consumer's claim for restitution, which delay includes the entire period from the time when the consumer challenges the effectiveness of abusive clauses or the validity of the agreement until the time when the seller or supplier has demonstrated its willingness to satisfy the consumer's claim.