Case C-82/21

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:

9 February 2021

Referring court:

Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (Poland)

Date of the decision to refer:

13 October 2020

Applicants:

B.S.

Ł.S.

Defendant:

M.

Subject matter of the main proceedings

Application for a sum of money to be awarded in connection with undue payments having been made in respect of principal and interest under a mortgage loan agreement which contained abusive clauses.

Subject matter and legal basis of the request

Interpretation of EU law, in particular Articles 6(1) and 7(1) of Council Directive 93/13/EEC, and of the principles of equivalence, effectiveness and legal certainty; Article 267 TFEU.

Question referred

Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as well as the principles of equivalence,

effectiveness and legal certainty, be interpreted as precluding a judicial interpretation of national legislation to the effect that a consumer's claim for the reimbursement of amounts unduly paid on the basis of an unfair term in a contract concluded between a seller or supplier and a consumer is subject to a ten-year limitation period which begins to run from the date of each performance by the consumer, even in the case where the consumer was not aware of the unfair nature of that term?

Provisions of EU law invoked

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts – twenty-first and twenty-fourth recitals, Article 6(1), Article 7(1) and (2).

Provisions of national law invoked

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Civil Code of 23 April 1964, Dziennik Ustaw (*Journal of Laws*) No 16/1964, item 93, as amended; 'the CC').

A right may not be exercised in a manner which would be contrary to its social and economic purpose or to the principles of community coexistence. Any such act or omission by the entitled person shall not be treated as an exercise of the right and shall not be protected (Article 5).

A 'consumer' is a natural person who, when concluding and performing a consumer contract, does not act in the course of his trade or of another commercial activity (Article 22^1).

Subject to the exceptions provided for by statute, property-related claims shall be subject to limitation (Article 117(1)).

Following the lapse of the period of limitation, a person against whom a claim may be pursued may avoid the duty to satisfy it, unless he waives his right to use the defence of limitation. However, waiving the defence of limitation before the lapse of the period of limitation shall be invalid (Article 117(2)).

Unless a specific provision provides otherwise, the period of limitation shall amount to ten years, and for claims concerning periodic payments as well as for claims connected with conducting business activity, it shall be three years (Article 118 of the CC in the wording in force until 8 July 2018).

Unless a specific provision provides otherwise, the period of limitation shall amount to six years, and for claims concerning periodical payments as well as for claims connected with conducting 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 118 of the CC in the wording in force as of 9 July 2018).

The limitation period shall commence on the day when the claim becomes due. Where the claim becoming due is dependent on the entitled person undertaking a specified act, the limitation period shall commence on the day when the claim would have become due if the entitled person had undertaken that act at the earliest possible opportunity (Article 120(1)).

The limitation period shall be interrupted: (1) by any act before a court of law or other authority appointed to try cases or to enforce claims of a given kind or before an arbitration court, which activity is taken up directly to pursue or to establish or to satisfy or to secure a claim; (2) by the acknowledgement of a claim by a person against whom the claim may be pursued; (3) by initiating mediation (Article 123(1)).

Each interruption shall cause the limitation period to recommence (Article 124(1)).

If the limitation period is interrupted by an act in the course of proceedings before a court of law or another body appointed to try cases or to enforce claims of a given kind or before an arbitration court or by initiating mediation, the limitation period shall not recommence until the proceedings are over (Article 124(2)).

Provisions of a contract concluded with a consumer which have not been agreed individually shall not be binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his interests (abusive clauses). This shall not apply to provisions setting forth the principal matters to be performed by the parties, including price or remuneration, so long as they are worded clearly (Article 385^1(1)).

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 (Article 385^1(2)).

Provisions of a contract which are not agreed individually are those over the content of which the consumer had no genuine influence. This shall refer in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party (Article 385^1(3)).

The burden of proving that a provision has been agreed individually rests with the person relying thereon (Article 385^1(4)).

The compliance of a contractual provision with good practice shall be assessed according to the state of affairs at the time of conclusion of the contract, taking into account its content, the circumstances in which it was concluded and also the contracts connected with the contract which contains the provision assessed (Article 385^2).

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 this is not possible, to reimburse its value (Article 405).

The provisions of the preceding articles shall apply in particular to undue performance (Article 410(1)).

A performance is undue if the person who rendered it was not under any obligation or was not under any obligation towards the person to whom he 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 410(2)).

A claim for redress of the damage caused by an unlawful act shall be time-barred after three years from the date on which the injured party learned of the damage and of the person liable to redress it. However, this period may not be longer than ten years from the date on which the event causing the damage occurred (Article 442^1(1) of the CC in the wording in force up to 26 June 2017).

A claim for redress of the damage caused by an unlawful act shall be time-barred after three years from the date on which the injured party learned or, by exercising due diligence, could have learned of the damage and of the person liable to redress it. However, this period may not be longer than ten years from the date on which the event causing the damage occurred (Article 442^1(1)) of the CC in the wording in force as of 27 June 2017).

Succinct presentation of the facts and procedure

1 In 2006, the parties entered into an agreement concerning a mortgage loan indexed to the Swiss franc (CHF); the subject of the agreement was the defendant providing the applicants with a loan to finance the costs of building a house. The currency to which the loan was indexed was the CHF. The lending period was 360 months, that is to say, from 8 August 2006 to 5 August 2036. The loan was to be repaid in decreasing principal and interest payments. The original interest rate on the loan was 2.25% per annum; it was temporarily (during the period when the loan was subject to insurance) raised to 3.25%. The bank granted a mortgage loan indexed to the CHF buying rate according to the bank's exchange rate table. The loan amount expressed in CHF was determined on the basis of the CHF buying rate specified in the bank's exchange rate table on the date and at the time of the loan/tranche disbursement. The loan bore interest at a variable rate, which as at the date of the agreement was set at the level stipulated in the agreement. The interest rate on the loan could be changed in the event of a change in the benchmark rate set for the currency in question and a change in the financial parameters of the money and capital markets in the country to whose currency the loan was indexed. The principal and interest payments were made in Polish złotys

(PLN), having been converted at the CHF selling rate according to the bank's exchange rate table in force on the repayment date.

2 On 8 December 2008, the parties concluded an annex to the loan agreement; according to that annex, the interest on the loan was to be the 3M LIBOR base rate increased by the bank's margin of 0.57 p.p., fixed throughout lending period.

3 In their application, the applicants requested that the defendant be ordered to pay them the sum of PLN 74 414.52 together with statutory default interest on account of the undue benefit obtained by the defendant at the applicants' expense in connection with the defendant having collected principal and interest payments from the applicants under an agreement for a mortgage loan indexed to the CHF dated 4 August 2006. At the same time, the applicants indicated that, if it were found that the abusive nature of the contractual provisions in question resulted in the entire loan agreement being null and void, the defendant should reimburse the applicants for all loan payments made in the period from 5 October 2006 until 5 March 2010. In response, the defendant moved for the claim to be dismissed.

4 At the hearing, the applicants testified that none of the provisions of the loan agreement which they were challenging had been individually agreed by them with the defendant bank. The bank's employees did not provide the applicants with historical CHF/PLN exchange rates and failed to inform the applicants that they would be exposed to currency spread costs and exchange rate risk in connection with the conclusion of the loan agreement. The applicants were not instructed on how to mitigate their exchange rate risk and it was not made clear to them how the defendant bank draws up its exchange rate table and how it determines the currency spread. The applicants were likewise not informed about the rules governing changes to the interest rate of their loan and, in particular, which parameters the bank would take into account when deciding to change the interest rate. At the date of the loan agreement, the applicants did not have any legal or economic training, had no experience of working at a bank or other financial institution and had no income or savings in CHF.

Essential arguments of the parties in the main proceedings

5 The applicants take the view that the agreement in question contains abusive clauses concerning the conversion of the loan principal and payments using the CHF exchange rate (paragraph 7(1) and paragraph 11(5)) and the defendant's right to change the loan interest rate (paragraph 10(2)). They contend that the invalidity of the above provisions of the agreement resulted in the defendant having collected excessively high loan payments from them, and therefore they demand payment by the defendant of the amount of PLN 74 414.52 representing the difference between the sum of loan payments made (PLN 213 305.35) and the correct amount of those payments (PLN 138 890.83) for the period from 7 September 2009 to 6 June 2017. The defendant, in turn, takes the position that

the loan agreement concluded by the parties neither is null and void nor contains abusive clauses. The defendant has also raised the defence of limitation.

Succinct presentation of the reasons for the request

6 In the present case, the applicants are challenging the so-called currency conversion clauses contained in the loan agreement and based on the standard contract used by the defendant bank (paragraph 7(1) and paragraph 11(4) of the agreement) as well as the so-called variable interest rate clause (paragraph 10(2) in its original wording). Those clauses have been repeatedly subject to judicial review and have been almost uniformly found to be abusive within the meaning of Article 385^1(1) of the CC. The subject of controversy, however, is the effects of the above clauses being abusive. As regards the effects of the parties not being bound by those clauses, two opposing views may be identified in the current case-law. According to the first view, after the removal of the currency conversion clauses a loan agreement indexed to a foreign currency should be treated as a loan agreement denominated in Polish złotys (PLN). According to the second view, the elimination of the abusive currency conversion clauses results in the entire loan agreement being null and void. With respect to the consequences of the parties not being bound by the variable interest rate clause (paragraph 10(2)), two lines of case-law have emerged as well. According to the first line, after the elimination of the variable interest rate clause a loan agreement should be treated as a fixed-rate agreement, with the same interest rate as on the date on which the loan agreement was concluded. According to the second (currently prevailing) line of case-law, the elimination of the variable interest rate clause from a loan agreement results in that agreement being null and void.

7 In view of the foregoing, the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court for Warszawa-Śródmieście in Warsaw) considers that the loan agreement concluded by the parties could be found null and void in its entirety, which could result either from the currency conversion clauses or the variable interest rate clause (paragraph 10(2)) or from both types of clauses being declared abusive. The court is mindful of the fact that paragraph 10(2) of the agreement was amended by the annex of 8 December 2008. Nevertheless, the assessment as to whether the contractual provisions in question are abusive clauses must be made as at the date of the agreement (Article 385^2 of the CC), and the recognition that paragraph 10(2) of the agreement is an abusive clause resulting in the agreement being null and void would cause the loan agreement to be null and void *ex tunc* (from the beginning), thus rendering the subsequent conclusion of the annex ineffective. The nullity of the loan agreement would mean that all performances rendered under the agreement would constitute undue performances pursuant to Article 410(2) of the CC and thus would have to be reimbursed pursuant to Article 405 of the CC, read in conjunction with Article 410(1) thereof. Thus, the defendant could demand from the applicants the return of the equivalent of the loan disbursed to them (PLN 455 000), whereas the

applicants could demand from the defendant the return of the equivalent of all the loan payments made to date.

8 In view of the defendant's plea of limitation, which could largely prevent the applicants' claim from being upheld, the court has examined its merits and finds that the provision on the general limitation period for claims, which is 10 years for claims arising before 9 July 2018 (Article 118 of the CC), should be applied to the applicants' claim. The fundamental question here is the assessment as to when the limitation period of the applicants' claim commenced, and the provision which is decisive in this regard is the first sentence of Article 120(1) of the CC. The case-law indicates that the limitation period for a claim for reimbursement of unjust enrichment (undue performance) commences from the date on which the benefit (performance) should have been returned if the creditor had called upon the debtor to perform the obligation at the earliest possible date, and thus within such time from the unjust benefit having been gained as is necessary to return it without undue delay. From the point of view of the start of the limitation period, it is irrelevant when the person rendering the performance learned that it was undue or when he actually called upon the debtor to return it. The above conclusions also apply to cases concerning the reimbursement of undue performance under invalid contractual provisions where a party was not aware of the invalidity of those provisions. In the present case, the consequence of the above view would be to recognise that the claim for return of each of the loan payments made between 5 October 2006 and 5 March 2010 would become time-barred after 10 years from the date on which the respective payments were made. Thus, as the action for payment in the present case was brought on 7 August 2019, this means that the claim for reimbursement of the equivalent of all payments made earlier than 10 years prior to the date on which the action was brought (7 August 2019), that is to say, before 7 August 2009, would be time-barred. In view of the foregoing, the court is considering whether the presented interpretation of Article 120 (1) of the CC is consistent with Articles 6(1) and 7(1) of Council Directive 93/13/EEC as well as with the principles of equivalence, effectiveness and legal certainty.

9 Consumer protection is not absolute [1] and it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty. [2] At the same time, national rules governing consumer protection must not be less favourable than those governing similar domestic situations (principle of equivalence) and they must not render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the European Union

[1] See the judgments of the Court of Justice of 21 December 2016, *Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, paragraph 68, and of 16 July 2020, *Caixabank*, C-224/19 and C-259/19, paragraph 82.

[2] See the judgments of the Court of Justice of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, paragraph 41; of 21 December 2016, *Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, paragraph 69; and of 16 July 2020, *Caixabank*, C-224/19 and C-259/19, paragraph 82.

(principle of effectiveness). [3] The adequate and effective means that are to guarantee consumers a right to an effective remedy must include the possibility of bringing an action or lodging an objection under reasonable procedural conditions, so that the exercise of their rights is not subject to conditions, in particular time limits or costs, which reduce exercise of the rights guaranteed by Directive 93/13. [4] It follows that EU law does not preclude national legislation that temporally limits the restitutory effects of such a declaration of invalidity, subject to its compliance with the principles of equivalence and effectiveness. [5] It is therefore necessary to analyse whether the specific provision concerning the limitation period for the consumer's property-related claim ensures compliance with the principles of equivalence and effectiveness. This period must be sufficient in practical terms to enable the applicant to prepare and bring an effective action. [6] An analysis of the provisions governing the limitation period for a consumer's claim cannot, however, be limited to considering the duration of that period, but should also cover the rules for its application, including, in particular, the mechanism adopted to start that period running. [7] Here, particular attention should be paid to two judgments of the Court of Justice. In its judgment of 9 July [2020], the Court found that a limitation period of three years which starts to run from the date of full performance of the contract is not capable of affording the consumer effective protection, since that period is likely to have expired even before the consumer has been able to become aware of the unfair nature of a term contained in that contract. Such a period therefore makes it excessively difficult to exercise the rights of that consumer conferred by Directive 93/13. [8] It follows from the foregoing that the principle of effectiveness precludes an action for reimbursement from being subject to a limitation period of three years, which starts to run from the date on which the contract in question ends, irrespective of the question as to whether the consumer was, or could reasonably have been, aware on that date of the unfairness of a term of that contract relied on in support of his or her action for reimbursement, since such limitation rules are likely to render excessively difficult the exercise of that consumer's rights conferred by

3 See the judgments of the Court of Justice of 26 October 2006, *Mostaza Claro*, C-168/05, paragraph 24; of 3 April 2019, *Aqua Med*, C-266/18, paragraph 47; of 26 June 2019, *Addiko Bank*, C-407/18, paragraph 46; and of 16 July 2020, *Caixabank*, C-224/19 and C-259/19, paragraph 83.

4 See the judgments of the Court of Justice of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, paragraph 59; of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, paragraph 40; and of 13 September 2018, *Profi Credit Polska*, C-176/17, paragraph 63.

5 See judgment of the Court of Justice of 16 July 2020, *Caixabank*, C-224/19 and C-259/19, paragraph 83.

6 See the judgment of the Court of Justice of 29 October 2015, *BBVA*, C-8/14, paragraph 29.

7 See the judgment of the Court of Justice of 9 July 2020, *SC Raiffeisen Bank*, C-698/18 and C-699/18, paragraph 61.

8 See the judgment of the Court of Justice of 9 July 2020, *SC Raiffeisen Bank*, C-698/18 and C-699/18, paragraph 67.

Directive 93/13. [9] Further, in its judgment of 16 July [2020], the Court of Justice held that the application of a five-year limitation period starting from the conclusion of the contract – which means that a consumer can only claim reimbursement of fees paid on the basis of a contractual term deemed unfair for the first five years after the signature of the contract, irrespective of whether he had or could reasonably have been aware of the unfair nature of that term – is liable to render practically impossible or excessively difficult the exercise of the rights conferred on the consumer by Directive 93/13 and consequently to breach the principle of effectiveness in conjunction with the principle of legal certainty. [10] Therefore, according to the Court of Justice, when analysing national limitation rules in the light of their compliance with the principle of effectiveness, particular attention should be paid to the date on which the limitation period for a consumer's claim starts to run. In this respect, it must be borne in mind that the system of protection implemented by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. [11] It is therefore possible that consumers are not aware of the unfair nature of a term contained in a mortgage loan agreement or do not appreciate the extent of their rights under Directive 93/13. [12] An analysis of the above case-law would appear to suggest that the limitation period of a consumer's claim should not begin to run until the consumer becomes aware of the unfair nature of the term, or at least until he reasonably should have become aware of it. Such a conclusion would appear to be particularly appropriate in the case of a loan agreement concluded for a period of 30 years. A consumer who has performed a contract which contained unfair terms for more than ten years is unlikely to have been aware of their unfair nature from the outset.

10 In view of the foregoing, it appears that the restrictive interpretation of Article 120(1) of the CC presented earlier infringes Articles 6(1) and 7(1) of Council Directive 93/13/EEC as well as the principles of effectiveness and legal certainty. Therefore, that provision of national law must be interpreted as meaning that the limitation period for a consumer's claim for reimbursement of performance rendered under a contract containing abusive clauses must in each case commence not from the time the performance is rendered, but from the time

9 See the judgment of the Court of Justice of 9 July 2020, *SC Raiffeisen Bank*, C-698/18 and C-699/18, paragraph 75.

10 See the judgment of the Court of Justice of 16 July 2020, *Caixabank*, C-224/19 and C-259/19, paragraph 91.

11 See the judgments of the Court of Justice of 19 December 2019, *Bondora*, C-453/18 and C-494/18, paragraph 40, and of 9 July 2020, *SC Raiffeisen Bank*, C-698/18 and C-699/18, paragraph 67.

12 See the judgments of the Court of Justice of 13 September 2018, *Profi Credit Polska*, C-176/17, paragraph 69, and of 16 July 2020, *Caixabank*, C-224/19 and C-259/19, paragraph 90.

the consumer becomes aware that the clause in question is abusive. The desired effect cannot be achieved exclusively by applying Article 5 of the CC interpreted as a provision which allows the defence of limitation to be deemed an abuse by the defendant of his subjective right and, consequently, raising this defence has no legal effect.

11 Loan agreements (and in particular mortgage loan agreements) are often concluded for many years, and a dispute as to whether a contractual provision is permissible or abusive may arise more than 10 years after the agreement was concluded. The question may therefore arise as to whether the rule of national law is compatible with Article 6(1) of Directive 93/13/EEC, since it limits the restitutory effects of a contractual clause being declared abusive (resulting in the risk that the consumer will recover only part of the amount unduly paid if the defence of limitation is raised). For example, in the case of currency spreads charged by banks in connection with the conversion of payments made by consumers in PLN into a foreign currency, there will be a number of claims for currency spread reimbursement the limitation periods for which will start separately with respect to each loan payment made by the borrower.

12 With respect to the question of the limitation period for the bank's claim for the repayment of loan principal, the Court of Justice itself points out that annulling a contract in its entirety as a consequence of the abusive nature of some of its terms has in principle the same effect as that of making the outstanding balance of the loan due forthwith. [13] There is no doubt that the limitation period for the bank's claim, since it is related to its business activity, is three years (Article 118 of the CC). On the other hand, the application of Article 120(1) of the CC, in accordance with the case-law cited above, would mean that the period should start to run already from the date of loan disbursement, and thus, in this case, the bank's claim for repayment of the equivalent of the loan principal would be time-barred in its entirety.

13 Thus, a situation in which a consumer's claim for payment arising from an undue performance under a null and void loan agreement is regarded as even partially time-barred, whereas the bank's corresponding claim is not time-barred at all (and this notwithstanding a formally shorter limitation period), would be particularly detrimental to consumers and would certainly not be in line with the guarantees arising from Directive 93/13. In this case, even those consumers who knew and understood their rights could be dissuaded from asserting them for fear that, at best, they might only be reimbursed for part of the performance they had rendered, whereas the bank would be entitled to claim from them the entire performance rendered.

[13] See the judgments of the Court of Justice of 30 April 2014, *Kásler*, C-26/13, paragraph 84, and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraph 58.

14 It is therefore legitimate to ask whether finding that the consumer's claim is time-barred on the above grounds breaches the principle of equivalence. It is apparent from the case-law of the Court of Justice that the principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is one of EU law or of national law, where the purpose and cause of action are similar. [14] A breach of the principle of equivalence may be found here for yet another reason, namely, due to the significant difference between the start of the limitation period for claims for the redress of damage caused by tort (Article 442^1(1) of the CC), which cannot begin until the injured party learns of the damage and of the person liable to redress it, and for claims for the reimbursement of undue performance (Article 120(1) of the CC). Both of these claims have certain features in common, namely, that they are examples of claims arising from liabilities which have their source not in legal transactions (including contracts), but rather in certain factual events to which the law attaches certain legal consequences. Therefore, such a difference breaches the principle of equivalence. Indeed, if the consumer lost funds to the bank as a result of a tortious act by the bank or by persons for whom the bank is liable, the limitation period for the consumer's claim would start later pursuant to Article 442^1(1) of the CC. It is thus difficult to see any reason that would justify a difference in the consumer's position in the two cases presented.

15 The referring court proposes that the Court of Justice answer the question as follows: Articles 6(1) and 7(1) of Council Directive 93/13/EEC, as well as the principles of equivalence, effectiveness and legal certainty, must be interpreted as precluding a judicial interpretation of national legislation to the effect that a claim for the reimbursement of amounts unduly paid on the basis of an unfair term in a contract concluded between a seller or supplier and a consumer is subject to a limitation period which starts to run before the consumer has become aware of the unfair nature of the term or before he or she reasonably should have become aware of it.

[14] See the judgments of the Court of Justice of 27 February 2014, *Pohotovost'*, C-470/12, paragraph 47, and of 9 July 2020, *SC Raiffeisen Bank*, C-698/18 and C-699/18, paragraph 67.