Case C-140/22

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:

25 February 2022

Referring court:

Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (Poland)

Date of the decision to refer:

18 January 2022

Applicants:

SM

KM

Defendant:

mBank S.A.

Subject matter of the main proceedings

Unfair contractual terms – Invalidity of a contract – Consumer's obligation to make a declaration of intent – Limitation period for restitution claims – Claim for payment of a sum of money as reimbursement for undue payments made in connection with the invalidity of a mortgage agreement.

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 effectiveness and equivalence; Article 267 TFEU.

Questions referred for a preliminary ruling

Must Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and the principles of effectiveness and equivalence, be interpreted as precluding a judicial interpretation of national legislation pursuant to which, in the case where a contract contains an unfair term without which it cannot be performed:

1. the contract becomes definitively ineffective (invalid) retroactively from the time of its conclusion only after the consumer has made a declaration of intent that he or she does not consent to the unfair term remaining effective, is aware of the consequences of the invalidity of the contract and consents to the contract being invalidated;

2. the limitation period for a seller or supplier's claim for the return of undue payments under the contract begins to run only from the date on which the consumer made the declaration of intent referred to in point 1 above, even if the consumer had previously demanded payment from the seller or supplier and the seller or supplier could have been previously aware that the contract drawn up by it contained unfair terms;

3. the consumer may demand payment of statutory interest for late payment only from the date on which he or she made the declaration of intent referred to in point 1 above, even if he or she had previously demanded payment from the seller or supplier;

4. the consumer's claim for the return of payments which he or she made under the invalid loan agreement (loan instalments, fees, commissions and insurance premiums) must be reduced by the equivalent of the interest on principal to which the bank would have been entitled if the loan agreement had been valid, whereas the bank can demand the return of the payments which it made under the same invalid loan agreement (loan principal) in full?

Provisions of EU law relied on

Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016): Article 169(1).

Charter of Fundamental Rights of the European Union (OJ C 202, 7.6.2016, pp. 391–407): Article 38.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, Polish Special Edition, chapter 15, vol. 2, p. 288, 'Directive 93/13'): fourth, twenty-first and twenty-fourth recitals, and Articles 3(1), 6(1) and 7(1).

Provisions of national law relied on

Polish provisions.

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997)

Public authorities shall protect consumers, users and tenants against activities that threaten their health, privacy and safety and against unfair market practices. The scope of this protection shall be defined by law (Article 76).

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

One may not exercise one's right in a manner which would be contrary to its social and economic purpose or which is *contra bonos mores*. Any such act or omission by the rightholder shall not be treated as the 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 or her trade or of another commercial activity (Article 22^1).

A seller or supplier is a natural person, a legal person or an organisational unit referred to in Article 33^1(1) which carries on a commercial or professional activity in its own name (Article 43^1).

A legal transaction which is contrary to the law or intended to circumvent the law shall be invalid, unless the relevant provision provides otherwise, in particular that the invalid terms of the legal transaction are to be substituted by relevant provisions of law (Article 58(1)).

A legal transaction which is *contra bonos mores* shall be invalid (Article 58 (2)).

Where only part of the legal transaction is affected by the invalidity, the transaction shall remain in force as regards the remainder, except where circumstances show that, without the terms affected by the invalidity, the transaction would not be performed (Article 58(3)).

Subject to the exceptions provided for by statute, the intent of the person performing a legal transaction may be expressed by any conduct on the part of that person which manifests that intent in a sufficient manner, including the disclosure of that intent in electronic form (declaration of intent) (Article 60 of the CC).

A declaration of intent which is to be made to another person shall be deemed to have been made when it reaches that person in such a manner that he or she may become aware of its contents. A revocation of such a declaration shall be effective

if it reaches the person concerned at the same time as the declaration or earlier (Article 61(1)).

If the consent of a third party is required to perform a legal transaction, that third party may also give consent before or after the persons performing the legal transaction make their declaration. Consent given after the declaration shall have retroactive effect from the date of the declaration (Article 63(1)).

A declaration of intent should be interpreted as required by the circumstances in which it was made and by established customs, and must not be *contra bonos mores* (Article 65(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 limitation period, a person against whom a claim may be pursued may avoid the duty to satisfy it, unless he waives his or her right to use the defence of limitation. However, waiving the defence of limitation before the lapse of the limitation period shall be invalid (Article 117(2)).

In exceptional cases, the court may, after weighing the interests of the parties, disregard the lapse of the limitation period on a claim against a consumer if this is justified by reasons of equity (Article 117^1(1)).

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 lapse 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 obliged party's conduct on the claimant's delay in pursuing the claim (Article 117^1(2)).

Unless a specific provision provides otherwise, the limitation period shall be ten years, and for claims concerning periodic payments, as well as claims related to the conduct of 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 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 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 rightholder undertaking a specified act, the limitation period shall commence on the day on which the claim would have become due if the rightholder had undertaken that act at the earliest possible opportunity (Article 120(1)).

Contracting parties may arrange their legal relationship at their discretion as long as the substance or purpose of the contract are not contrary to the properties (nature) of the relationship, the law, and are not *contra bonos mores* (Article 353^1).

Interest on a sum of money shall be due only if it results from a legal act or from a statute, from a court decision or from a decision of another competent authority (Article 359(1)).

If the amount of interest is not otherwise specified, statutory interest shall be due in an amount equal to the sum of the National Bank of Poland benchmark rate and 3.5 percentage points (Article 359(2)).

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 (unlawful terms). This 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 (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)).

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 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 contractual term has been individually negotiated rests with the person relying thereon (Article 385^1(4)).

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

A person who, without legal basis, obtains a material benefit at the expense of another person shall be obliged to release the benefit in kind and, where that is not possible, to return the value thereof (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 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.

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 455).

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 481(1)).

Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe (Banking Law of 29 August 1997, Dziennik Ustaw (Journal of Laws) No 140, item 939m as amended)

In a loan agreement, the bank undertakes to place at the borrower's disposal for the period of time stipulated in the agreement a certain amount of money which can be used for a specified purpose, and the borrower undertakes to use that amount under the terms and conditions stipulated in the agreement, to return the amount of the utilised loan together with interest on set repayment dates and to pay a fee on the loan granted (Article 69(1)).

A loan agreement must be made in writing and stipulate, in particular: (1) the parties to the agreement; (2) the loan amount and currency; (3) the purpose for which the loan was granted; (4) the terms and conditions of loan repayment; (5) the loan interest rate and terms on which it may be changed; (6) the security for loan repayment; (7) the scope of the bank's rights related to control over utilisation and repayment of the loan; (8) the dates and manner of making funds available to the borrower; (9) the amount of commission, if provided for in the agreement; (10) the terms on which the agreement may be amended and terminated (Article 69(2) in the wording in force as at the date on which the loan agreement was concluded).

Succinct presentation of the facts and procedure in the main proceedings

1 On 18 February 2009, the parties entered into an agreement for a mortgage loan indexed to the Swiss franc (CHF) exchange rate. The amount of the loan as expressed in the index currency as at 22 January 2009 according to the buying rate of that currency stated in the bank's table of exchange rates did not constitute a commitment on the part of the bank. The value of the loan expressed in foreign currency as at the date on which the loan was drawn may have been different from that stated (paragraph 1(3A)). The loan bore interest at a floating rate (paragraph 10(1)) being the sum of the LIBOR 3M benchmark rate and a fixed bank margin of 3.60%. Principal and interest payments as well as interest payments were made in PLN, having been converted at the CHF selling rate according to the bank's table of exchange rates in force as at the repayment date

(paragraph 10(5)). Any early repayment of the entire loan or an early principal and interest payment or a payment exceeding the amount due resulted in the payment amount being converted at the CHF selling rate stated in the bank's table of exchange rates in force on the date and at the time when the payment was made (paragraph 12(4)). The bank disbursed all the funds in PLN; no funds were disbursed by the bank in CHF. The applicants also made all payments under the loan in PLN. On the other hand, if it were assumed that the parties were not bound by paragraph 1(3A), paragraph 10(5) and paragraph 12(4) of the loan agreement while the other provisions of the agreement remained binding, the total amount of loan repayments in the period from 18 August 2009 to 18 March 2019 would be PLN 52 268.06 lower.

2 On 4 July 2019, the applicants submitted a complaint to the defendant bank, demanding that, due to the invalidity of the loan agreement, it should return within 30 days unduly received loan repayments amounting to PLN 242 238.61, and in the event that there were no grounds for declaring the agreement void, that it should return the amount of PLN 52 298.92 as reimbursement of the overpaid part of the principal and interest payments received by the bank in the period from 20 July 2009 to 18 March 2019. In a letter dated 16 July 2019, the bank responded to the complaint, indicating that the loan agreement complied with the law, was valid, and did not contain any unfair terms.

3 On 31 July 2019, the applicants filed a motion with the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court for Warszawa-Śródmieście in Warsaw, Poland) concerning the issuance of summons to a conciliation hearing, demanding that the defendant bank pay them the amount of PLN 242 238.61 on account of unduly received payments under the invalid loan agreement, or alternatively the amount of PLN 52 281.02 on account of overpaid principal and interest payments received by the bank. In response to the motion, the bank indicated that it did not see any possibility of reaching a settlement. Following a public hearing on 13 December 2019, the court found that no settlement had been reached and ordered that the case concerning the conciliatory hearing be closed.

In the statement of claim filed on 27 April 2020, the applicants requested that the amount of PLN 52 270 be awarded against the defendant together with statutory interest for late payment from 17 July 2019 until the date of payment on account of principal and interest payments unduly received by the defendant from the applicants in a higher amount than the applicants should have paid in the period from 18 August 2009 to 18 March 2019. In the main action, the applicants are seeking reimbursement of the overpayment, that is to say, the difference between the amount of payments actually received by the defendant bank and the amount of payments due, assuming that the parties are not bound by the aforementioned unfair contractual terms.

4 On the other hand, should the court find that the loan agreement cannot be performed without the said unfair contractual terms, the applicants filed an alternative claim in which they requested that the loan agreement of 18 February

2009 be declared void and that the amount of PLN 52 270 be awarded against the defendant together with statutory interest for late payment from 17 July 2019 until the date of payment on account of the funds unduly received by the defendant from the applicants in the period from 18 August 2009 to 19 December 2011 due to the invalidity of the loan agreement. In a written statement of 10 August 2020, the applicants indicated that they consented to the loan agreement being declared void in its entirety, considered the invalidation of the loan agreement to be in their favour, and accepted the consequences of the agreement's invalidity, including financial consequences. The applicants stated that they were aware of the fact that, as a result of the agreement being declared void in its entirety, the parties would be required to return to each other the payments made under the agreement, and they agreed to that. At the same time, the applicants stated that they were aware that the defendant bank could pursue claims against them for the use of capital without a contractual basis. The defendant bank moved for the claim to be dismissed in its entirety.

At the hearing on 27 October 2020, the court instructed the applicants as to the effects of the invalidity of the loan agreement, and the applicants stated that they understood the effects of the invalidity of the agreement and consented to the agreement being declared void.

The essential arguments of the parties in the main proceedings

The applicants substantiated their claim by pointing out that the agreement between the parties concluded on 18 February 2009 and concerning a mortgage loan indexed to the CHF exchange rate contained unfair terms – the so-called conversion clauses (paragraph 1(3A), paragraph 10(5) and paragraph 12(4)) under which the bank received excessively high payments from the applicants. The defendant bank claimed that the agreement concluded by the parties was valid and did not contain unfair terms.

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

5 According to the referring court's findings, the applicants entered into the agreement as consumers, and the defendant bank is a seller or supplier. Neither the terms of the loan agreement stipulating that the loan was to be indexed to a foreign currency (paragraph 1(3)) nor those authorising the bank to set the exchange rate of that foreign currency (paragraph 1(3A), paragraph 10(5) and paragraph 12(4)) were individually negotiated. Moreover, none of the above contractual provisions reflects applicable laws or regulations. Additionally, each of the above contractual terms defines the main subject matter of the contract, but at the same time they are not in plain, intelligible language. Finally, the referring court found that paragraph 1(3), paragraph 1(3A), paragraph 10(5), and paragraph 12(4) of the loan agreement are contrary to the requirements of good faith and cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, causing the referring

court to regard all those contract terms as unfair. Consequently, all of the above contractual terms are not binding on consumers, but at the same time it is not possible for the remainder of the loan agreement to continue to be binding on the parties after the unfair terms have been eliminated. Analogous or even identical contractual terms are considered unfair in national case-law. Furthermore, the recent case-law of the national courts also accepts that a loan agreement linked to a foreign currency cannot remain valid after the elimination of contractual terms such as those referred to above, which is in line with the case-law of the Court of Justice, [1] and the referring court concurs with that position.

6 The Court's case-law to date indicates that, under Article 6(1) of Directive 93/13, unfair contract terms are not binding on consumers. That provision of the directive is mandatory. [2] Moreover, national courts are required to find that a contract contains an unfair term. [3] In particular, courts are required to inform the parties to proceedings that a contract contains an unfair term [4] and to indicate objectively and exhaustively the legal consequences that may result from the removal of the unfair term, including, in particular, the invalidity of the entire contract and the resulting restitution claims. [5] Moreover, 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

1 See the judgments of the Court of 14 March 2019, *Dunai*, C-118/17, paragraph 52, and of 3 October 2019, *Dziubak*, C-260/18, paragraph 44.

2 See the judgments of the Court: of 26 October 2006, *Mostaza Claro*, C-168/05, paragraph 36; of 4 June 2009, *Pannon GSM*, C-243/08, paragraph 25; of 9 November 2010, *VB Pénzügyi Lizing*, C-137/08, paragraph 47; and the order of the Court of Justice of 16 November 2010, *Pohotovosť*, C-76/10, paragraph 38. See the judgments of the Court: of 15 March 2012, *Pereničová and Perenič*, C-453/10, paragraph 28; of 26 April 2012, *Invitel*, C-472/10, paragraph 34; of 26 January 2017, *Banco Primus*, C-421/14, paragraph 41; of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, paragraphs 27, 34; of 19 September 2018, *Bankia*, C-109/17, paragraphs 37 and 38; and of 11 March 2020, *Lintner*, C-511/17, paragraph 24.

3 See the judgments of the Court: of 27 June 2000, *Océano Grupo Editorial and Salvat Editores*, C-240/98 – C-244/98, paragraphs 26, 29; of 26 October 2006, *Mostaza Claro*, C-168/05, paragraphs 27–30, 38 and 39; of 28 July 2016, *Tomášová*, C-168/15, paragraphs 28–32; and the order of the Court of 26 October 2016, *Fernández Oliva*, C-568/14 – C-570/14, paragraph 24. See the judgments of the Court: of 26 January 2017, *Banco Primus*, C-421/14, paragraph 43; of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, paragraphs 29, 37; of 13 September 2018, *Profi Credit Polska*, C-176/17, paragraph 42; of 3 April 2019, *Aqua Med*, C-266/18, paragraphs 27, 52; and the order of the Court of 28 November 2018, *PKO Bank Polski*, C-632/17, paragraph 36.

4 See the judgments of the Court: of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraphs 29–36; of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, paragraphs 52 and 53; of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, paragraph 70; of 11 March 2020, *Lintner*, C-511/17, paragraph 42; and of 29 April 2021, *Bank BPH*, C-19/20, paragraph 93.

5 See the judgment of the Court of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 96–99.

his or her rights, to submit a declaration of intent requesting that that term be declared invalid. [6]

7 The consumer, upon being informed that the contract contains an unfair term, may give free and informed consent to the application of that term and thereby restore its effectiveness. [7] On the other hand, if the consumer does not give such consent, a contractual term that is deemed unfair must, as a rule, be regarded as never having existed, with the result that it cannot have any effect on the consumer, and that it has the consequence of restoring the consumer to the legal and factual situation that he would have been in the absence of that term. [8]

8 The foregoing implies a corresponding restitutory effect in respect of the amounts paid under the unfair contractual term. [9]

9 However, that restitutory effect, which includes an obligation to return the amounts unduly received under the unfair term, cannot be temporally limited only to the amounts paid after the judgment that declares the term unfair, since such protection would be incomplete and insufficient and would constitute neither an adequate nor an effective means of preventing the continued use of such terms. [10] An unfair condition binds in its entirety, not just in the part which is unfair. [11] It is also in general not possible for a court to change the content of an unfair term [12] or

6 See the judgments of the Court: of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraphs 28 and 36; of 30 May 2013, *Jőrös*, C-397/11, paragraphs 42 and 48; of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, paragraph 50; of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, paragraph 49; and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraph 59.

7 See the judgments of the Court: of 4 June 2009, *Pannon GSM*, C-243/08, paragraph 33; of 14 June 2012, *Banco Español de Crédito*, C-618/10, paragraph 63; and of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraph 27.

8 See the judgments of the Court: of 16 November 2010, *Pohotovosť*, C-76/10, paragraph 62; of 15 March 2012, *Pereničová and Perenič*, C-453/10, paragraph 30; of 26 April 2012, *Invitel*, C-472/10, paragraph 42; of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraph 27; of 30 May 2013, *Jőrös*, C-397/11, paragraphs 51 and 53; of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, paragraph 49; and the order of the Court of 3 April 2014, *Sebestyén*, C-342/13, paragraph 35.

9 See the judgments of the Court: of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraphs 62, 63, 66; of 9 July 2021, *Raiffeisen Bank and BRD Groupe Societé Générale*, C-698/18 and C-699/18, paragraph 54; of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, paragraph 53; and of 29 April 2021, *Bank BPH*, C-19/20, paragraph 51.

10 See the judgment of the Court of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraphs 73 and 75.

11 See the judgments of the Court of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraph 64, and of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 70 and 80.

12 See the judgments of the Court: of 14 June 2012, *Banco Español de Crédito*, C-618/10, paragraphs 69–73; of 13 September 2018, *Profi Credit Polska*, C-176/17, paragraph 41; of

interpret such a term so as to mitigate its unfairness. [13] On the other hand, a court may replace an unfair term with a supplementary provision of national law, but only if the elimination of the unfair term results in the invalidity of the entire contract, which exposes the consumer to particularly unfavourable consequences. [14] The assessment of whether that is the case must be made in the light of the circumstances at the time when the dispute arose, [15] and the consumer's position in this respect is binding on the court. [16] The contract, however, must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible, something which is to be determined objectively. [17]

10 However, if under the relevant provisions of national law, in the light of objective criteria it is not possible to uphold the contract without the unfair terms contained therein, it may be declared invalid. [18] On the other hand, the consequences of a judicial finding that a term of a contract concluded between a seller or supplier and a consumer is unfair depend exclusively on national law, provided that the protection guaranteed to consumers by the provisions of Directive 93/13 is ensured. [19]

26 March 2019, C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, paragraphs 53 and 54; of 7 November 2021, *Kanyeba*, C-349/18 – C-351/18, paragraph 67; and of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 67 and 68.

13 See the judgment of the Court of 18 November 2021, *A S.A.*, C-212/20, paragraph 79.

14 See the judgments of the Court: of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, paragraphs 80–85; of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, paragraph 33; of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, paragraph 74; of 20 September 2018, *OTP Bank and OTP Factoring*, C-51/17, paragraphs 60 and 61; of 14 March 2019, *Dunai*, C-118/17, paragraph 54; and of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraphs 56–59, 64.

15 See the judgment of the Court of 3 October 2019, *Dziubak*, C-260/18, paragraphs 50 and 56;

16 See the judgment of the Court of 3 October 2019, *Dziubak*, C-260/18, paragraphs 67 and 68.

17 See the judgments of the Court: of 10 June 2012, *Banco Español de Crédito*, C-618/10, paragraph 65; of 10 September 2014, *Kušionová*, C-34/13, paragraph 50; of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, paragraph 28; of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, paragraph 97; and of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, paragraph 73.

18 See the judgments of the Court: of 15 March 2012, *Pereničová and Perenič*, C-453/10, paragraphs 35 and 36; of 30 May 2013, *Jőrös*, C-397/11, paragraph 47; of 14 March 2019, *Dunai*, C-118/17, paragraph 56; of 3 October 2019, *Dziubak*, C-260/18, paragraphs 41–45 and 47; and of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 85 and 89.

19 See the judgment of the Court of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 88 and 90.

11 At the same time, the procedural rules of national law should remain compatible with the principle of effectiveness and the principle of proportionality. [20]

12 As regards the **first point of the question referred**, up to now the Polish courts have accepted that it follows from Article 385[1](1) of the CC that conversion clauses which constitute unfair terms are ineffective, that is to say, they are not binding on the consumer from the time at which the contract was concluded (*ex tunc*), and that, since those terms define the main subject matter of the contract, the contract cannot remain in force without them, and as a result the entire loan agreement is invalid from the outset (*ex tunc*). [21] This means that the parties to the agreement are entitled to mutual claims for the return of the equivalent of all undue payments made in the performance of the agreement pursuant to Article 405 of the CC, read in conjunction with Article 410(1) of the CC. By its nature, a claim for the return of undue payment has no specified due date, [22] and therefore it should be met by the enriched party immediately upon demand from the impoverished party (Article 455 of the CC).

13 However, the interpretation of national law set out in the previous paragraph changed after the Sąd Najwyższy (Supreme Court, Poland) issued its resolution of 7 May 2021 (Ref. No III CZP 7/21). It appears necessary to summarise that resolution here in order to verify whether the interpretation presented therein remains compatible with Directive 93/13. In the aforementioned resolution, the Supreme Court indicated that 'the finding 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 on the basis of the findings of fact made during the proceedings, corresponds to so-called absolute nullity […]. However, simple recourse to absolute nullity is precluded by the rule accepted in the case-law of the Court of Justice of the European Union that a consumer who is aware of the unfair nature of a term may oppose the refusal to apply that term by freely consenting to its application, which may be done both before the court, after the consumer has been fully informed of the legal consequences that the removal of the unfair term may entail, and out of court, by giving free and informed consent to the renewal of the obligation or amendment of the contract (containing the unfair term). On the other hand, national case-law and doctrine generally recognise that one of the characteristics of absolute nullity is its definitive nature […]. Moreover, granting the consumer the power to consent unilaterally to an

[20] See the judgment of the Court: of 26 October 2000, *Mostaza Claro*, C-168/05, paragraph 24; order of 16 November 2010, *Pohotovosť*, C-76/10, paragraph 47; judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, paragraph 46; of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraph 26; of 14 March 2013, *Aziz*, C-415/11, paragraph 50; of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, paragraph 51; of 29 October 2015, *BBVA*, C-8/14, paragraph 24; 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.

[21] See the case-law indicated in footnote 2.

[22] See the judgments of the Sąd Najwyższy (Supreme Court, Poland) of 22 March 2001, Ref. No V CKN 769/00, and of 29 September 2017, Ref. No V CSK 642/16.

unfair term, and thus to save the agreement, does not allow the conclusion that the ineffectiveness of that term could be invoked equally by any party to the contract as well as by any third party having a legal interest in the matter, which is how invalidity is traditionally characterised […]. On the other hand, the fact that an ineffective term may be cured by subsequent unilateral consent to be bound by that term, which consent replaces, in a sense, the initial absence of actual consent to that term (individual negotiations), brings to mind so-called suspended ineffectiveness, which – when applied to the contract as such – consists in the fact that the contract affected by such ineffectiveness (a so-called lame or incomplete transaction) does not produce the intended effects (by operation of law, from the outset, which the court should take into account of its own motion), and in particular it does not create an obligation to provide the agreed performance, but as opposed to an invalid contract, it may subsequently produce such effects retroactively if a declaration of intent that cures those defects is made by one of the parties or a third party, and if the party in question refuses to make such a declaration or the time limit for making such a declaration passes, the contract becomes definitively ineffective, that is to say, void […]. Suspended ineffectiveness differs from invalidity also in that the parties' declarations of intent retain their legal force during the period of suspension, that is to say, they may provide the basis for legal effects that arise in the future, and at least one of the parties who have made declarations of intent loses the ability to decide independently whether those effects arise, since it cannot freely revoke its declaration of intent and in that sense remains in a state of uncertainty, being "bound" by that declaration […]'.

14 Thus, there are two main arguments which militate against accepting that unfair contractual terms are incurably void, while simultaneously justifying the conclusion that those terms are subject to so-called suspended ineffectiveness. The first argument is that the absolute nullity of a contract or of a term thereof is definitive, whereas an unfair contract term may be accepted by the consumer.

15 However, in the view of the referring court, nothing prevents national courts from interpreting the rules on the absolute nullity of legal transactions (Article 58(1) and (3) of the CC) in conformity in EU law, that is to say, in a manner which takes account of the objectives of Directive 93/13 and the case-law of the Court of Justice. Therefore, national courts could hold that an unfair term is invalid within the meaning of Article 58 of the CC, with the sole proviso that the consumer may remedy its defects (cure it) by making a declaration of intent that restores the effectiveness of that clause *ex tunc*.

16 The second argument presented before the Supreme Court is that, under Polish law, absolute nullity of a contract may be invoked by all parties thereto as well as by third parties, whereas only a consumer (but not a seller or supplier) may claim that he or she is not bound by an unfair contractual term. The Court of Justice itself notes the potential effect of eliminating an unfair term from a loan agreement, which results in the nullity of that agreement and, consequently, the

obligation on the borrower to repay the loan principal to the bank. [23] Thus, since the Court of Justice explicitly points to the bank's ability to demand repayment of the loan principal as a consequence of the consumer not being bound by an unfair contractual term, the logical conclusion is that it accepts the bank's ability to rely on the fact that that term is not binding and the consequent nullity of the loan agreement.

17 In view of the foregoing, there are no reasonable grounds to conclude that unfair terms should be deemed to result in suspended ineffectiveness. Above all, however, that solution does not appear to satisfy the requirements of Article 6(1) of Directive 93/13. Additionally, the Court of Justice orders the national court to consider all the consequences of the consumer not being bound by an unfair contractual term without waiting for the consumer to make the relevant declaration of intent. [24] Meanwhile, suspended ineffectiveness, as interpreted in the above resolution of the Supreme Court, actually obliges the national courts to wait for such a declaration of intent from the consumer, since prior to its submission the validity of the contractual term (and consequently of the entire agreement) remains suspended.

18 Pursuant to the above resolution, the consumer's declaration of intent should be highly formalised in terms of its content. The requirement to make such a declaration does not follow from Article 6(1) of Directive 93/13, Article 385[1] of the CC or any other provisions of EU or domestic law, nor was it indicated in the case-law prior to the resolution of the Supreme Court of 7 May 2021. Therefore, making the submission of the aforementioned declaration of intent mandatory for consumers (who are often unaware of the applicable laws in any case) and making the assessment as to whether Article 6(1) of Directive 93/13 is applicable dependent on the fulfilment of that condition appears contrary to the provision concerned and to the principle of effectiveness, and also raises doubts in the light of the principle of legal certainty.

19 As regards **the second point of the question referred**, the further consequences of treating unfair terms as subject to suspended ineffectiveness are also incompatible with Directive 93/13. As long as the state of suspension continues, the lender cannot demand the performance agreed in the contract. However, according to the existing case-law concerning the state of suspended ineffectiveness […], the lender can neither claim the return of an undue payment

[23] See the judgments of the Court: of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, paragraph 84; of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, paragraph 61; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraph 58; of 3 June 2020, *Gómez del Moral Guasch*, C-125/18, paragraph 63; and of 25 November 2020, *Banca B*, C-269/19, paragraph 34.

[24] See the judgments of the Court: of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraphs 28, 36; of 30 May 2013, *Jőrös*, C-397/11, paragraphs 42, 48; of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, paragraph 50; of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, paragraph 49; and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraph 59.

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 lender cannot make such a demand and thus make its claims for restitution due pursuant to Article 455 of the CC […], the limitation period on those claims beginning to run is out of the question. The situation changes only when the consumer either consents to the unfair term, in which case the clause and the entire contract become effective retroactively, or refuses to consent to it […], in which case the contract continues with a substitute provision (if the relevant conditions are met), or becomes entirely and definitively ineffective (void). That definitive ineffectiveness (invalidity) is tantamount to a state in which 'the transaction on which the obligation to perform was based had been invalid and has not become valid after the performance' within the meaning of the final part of Article 410(2) of the CC (*condictio sine causa*), and also to the 'invalidity of a legal transaction' within the meaning of Article 411(1) of the CC. The consumer's situation is more favourable than that of the seller or supplier, because the borrower may terminate the state of suspended ineffectiveness at any time by either consenting to be bound by the unfair term or by refusing to do so, although – in accordance with the case-law of the Court of Justice – the effectiveness of such declarations of intent depends on whether the borrower was first duly informed about the consequences of the unfair term. In that connection, the question may arise as to whether, and possibly when, a consumer making, even out of court, a demand for restitution which assumes that the entire contract is definitely ineffective (invalid) may be deemed to constitute an implied refusal to consent to the clause and acceptance of the consequences of the contract being voided and becoming definitively ineffective (invalid). The problem is that when confronted with such a demand, the lender may be unsure as to whether, in making that claim, the consumer was duly informed of the consequences of the unfair nature of the clause in question (for instance, about all restitution claims related to the complete and definitive ineffectiveness of the contract). This is an important issue, since it determines when the limitation period begins to run for the lender's restitution claims and whether it is possible for such claims to become due (Article 455 of the CC) and be subject to a set-off (Article 498(1) of the CC) […]'. [25]

20 The court's reservations concerning the aforementioned resolution of the Supreme Court arise primarily from the conclusion that the limitation period for the seller or supplier's claim for the return of the payment received by the consumer begins to run only at the moment when the consumer makes a declaration of intent as to whether he or she consents to voiding the unfair term and the entire contract, or whether he or she accepts that term. First of all, that position appears to infringe the principle of equivalence. The general principle of Polish civil law, arising from Article 120(1) of the CC, is that the limitation period for a claim for the return of undue performance begins to run from the date on which performance was made, [26] also where the performance was made under an invalid contract,

[25] See the resolution of 7 May 2021 by a panel of seven judges of the Supreme Court, Ref. No III CZP 6/21.

[26] [Empty]

even if the person making the performance was not aware that the contract was invalid and that the performance he or she was making was undue.[27] If the consumer did not make any declaration of intent at all (and at the same time was not given a time limit to make that declaration), the seller or supplier's claim against that consumer would never become time-barred. Another possible consequence is a situation where a consumer makes, prior to the commencement of a civil case, a declaration of intent stating that he or she does not consent to the unfair terms contained in the contract, and consents to the contract being voided. In the consumer's view, such a declaration of intent would be sufficient and would trigger the commencement of the limitation period on the bank's claim; however, the bank, in the course of the subsequent civil case, could argue that the consumer's declaration of intent had no legal effect because it was 'not accompanied by the consumer's express statement confirming that he or she had been comprehensively informed' about the consequences of the loan agreement being voided. Thus, the consumer's alleged lack of knowledge would be used against the consumer himself/herself, and such Machiavellian tactics by the seller or supplier would be supported by national laws as interpreted in accordance with the resolution of the Supreme Court of 7 May 2021.

21 Moreover, another consequence of the Supreme Court's position discussed here is that the limitation period for the seller or supplier's claim always begins to run later than the limitation period for the consumer's claim.

22 Additionally, in the situation described here, the seller or supplier is in a better legal position not just vis-à-vis a consumer with whom it has concluded a contract that contains unfair terms, resulting in the invalidity of that contract. Namely, if the bank concluded a loan agreement that turned out to be incurably void, that is to say, invalid because it was contrary to the law or was *contra bonos mores* (Article 58(1) and (2) of the CC) rather than because it included unfair terms (Article 385^1(1) of the CC), then the limitation period for the bank's claim on the borrower for the return of principal would begin to run already from the moment at which that principal was disbursed, pursuant to the aforementioned general rule arising from Article 120(1) of the CC. Thus, in such a case, the bank's claim would become time-barred much earlier than an identical claim based on the invalidity of the contract due to the presence of unfair contractual terms. Thus, the limitation period for the bank's claims begins at the latest point if the contract becomes invalid due to the presence of unfair contractual terms. The limitation period for the bank's claims would begin later both if the contract did not contain unfair terms and if it were incurably void. Also, the limitation period for a consumer's claim for the return of undue performance begins to run earlier.

[27] See the judgments of the Supreme Court: of 8 July 2010, Ref. No II CSK 126/10; of 16 December 2014, Ref. No III CSK 36/14; and of 23 June 2016, Ref. No V CNP 55/15.

23 Thus, a bank which has drafted a contract containing unfair terms without which that contract cannot continue is in a better legal position than the entities in each of the three situations discussed. The bank's considerably privileged position appears to be incompatible with the principle of equivalence. It is also doubtful whether placing the seller or supplier in such a privileged legal position does not additionally infringe the principle of effectiveness and Article 7(1) of Directive 93/13, since in fact the seller or supplier who drafted the unfair contract obtains a guarantee that its claim will not become time-barred unless the consumer has first expressly informed the seller or supplier that he or she is aware of the unfair terms included in the contract and of the resulting legal consequences. Moreover, if the consumer fails to make such a declaration of intent at all (which is realistic, especially considering that consumers are often unaware of their rights), the seller or supplier's claim for the return of its performance will never become time-barred (even after many years), which in turn is completely unprecedented in the Polish civil-law system, the basic principle of which is that property claims are subject to the statute of limitations (Article 117 of the CC).

24 Since the consumer seeks payment from the seller or supplier on the basis of the claim that the contract entered into by the parties is invalid due to the presence of unfair terms, the logical consequence is that the consumer does not consent to those clauses and is aware of the consequences of the contract's invalidity. The content of such a declaration of intent is clear (Article 65(1) of the CC), and the consumer manifests his or her intent in a sufficient manner (Article 60(1) of the CC). Therefore, a seller or supplier which receives such a declaration of intent from the consumer (Article 61(1) of the CC) should be aware that the consumer knows the consequences of the contract's invalidity and accepts them. Therefore, the limitation period for the seller or supplier's claim should begin to run at that point at the latest.

25 Furthermore, at least in some cases, there are arguments that justify an even more far-reaching position, namely that, as a general rule, the limitation period for a bank's claim already runs from the time at which the bank makes its performance under the contract or from a slightly later date. Since the bank has at its disposal very highly qualified legal services, it appears reasonable to conclude that, by exercising due diligence, it should have become aware much earlier that there were unfair terms in the contract which it had drafted. Thus, since the bank should have been aware from the outset that the contract contained unfair terms, resulting in the parties returning their performance thereunder, due diligence required that it take steps already at that point to recover its performance or at least reach an agreement with the consumer.

26 It should also be noted that already in its judgment of 27 December 2010, the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court in Warsaw – Competition and Consumer Protection Court, Poland) held the following standard clause to be unfair and prohibited the defendant bank from using it in agreements with consumers: 'agreement on a mortgage loan for individuals […] indexed to the CHF exchange rate', the wording of which is

identical to paragraph 10(5) of the loan agreement concluded by the parties, and therefore from the date of that clause being entered in the register of unfair terms at the latest, the defendant bank was aware that it constituted an unfair term.

27 Even if one were to assume that it is up to the consumer whether the contract becomes definitively ineffective (invalid), it is impossible to condone the conduct of a bank which is aware of the presence of unfair terms in the contract it has drafted, but still denies that fact or even conceals it from the consumer. On the other hand, accepting that the limitation period for the bank's claim for the return of loan principal runs only from the time when the consumer makes a formal declaration of intent does not just condone the seller or supplier's conduct, but actually promotes it, since by doing so the seller of supplier can guarantee that its claim will not be time-barred. For that very reason, in the view of the referring court, the position discussed here is incompatible with Article 7(1) of Directive 93/13 and with the principle of effectiveness.

28 As regards the **third point of the question referred**, it should be emphasised that it is assumed that a consumer's claim for the return of undue performance becomes due (Article 455 of the CC) only after the consumer has made an informed and free declaration of intent in which he or she consents to the contract being found void. Since suspended ineffectiveness continues until the above declaration of intent is made, the consumer cannot effectively demand the return of the undue payment made by him or her, and therefore it is only from the date of that declaration that the bank is obliged to pay statutory interest for late payment (Article 481(1) and (2) of the CC).

29 In the view of the referring court, limiting the consumer's right to claim interest for late payment in such a manner is contrary to the principle of equivalence because, according to the general principles of civil law, a claim without a specified due date becomes due on demand. Thus, imposing an additional requirement renders the consumer's situation less favourable and limits his or her rights. Such a position is incompatible with Articles 6(1) and 7(1) of Directive 93/13, and also with the principle of effectiveness. The Court itself noted this in finding that 'default interest is intended to penalise the debtor's failure to fulfil his or her obligation to make the loan repayments on the dates contractually agreed, to deter the debtor from falling behind in the performance of his or her obligations and, where appropriate, to compensate the lender for the loss suffered as a result of a late payment'. [28] By contrast, the temporal limitation of the right to claim that interest must be regarded as equivalent to temporally limiting the consumer's right to pursue a restitution claim in regard to the seller or supplier having received an amount on the basis of unfair contractual terms, which the Court of Justice has

[28] See the judgments of the Court of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, paragraph 76, and of 10 June 2021, *Prima Banka Slovensko*, C-192/20, paragraph 39.

held to be inadmissible. [29] Consequently, limiting a consumer's right to claim statutory interest for late payment would appear incompatible with the principle of effectiveness, all the more so since it also amounts to condoning the conduct of a seller or supplier which deliberately delays the settlement of a consumer's claim, including with a view to prolonging the duration of court proceedings.

30 As regards the **fourth point of the question referred**, the referring court would first like to draw attention to the order of the Supreme Court of 29 July 2021 (Ref. No I CSKP 146/21), according to which 'where a loan agreement is declared invalid, the parties should return to each other the undue performances, that is to say, what they have actually received. The bank should therefore return to the borrower the amounts received as loan payments in excess of those due, that is to say, those calculated without the application of indexing clauses, together with interest, as well as commissions, margins, low down payment insurance, and so on, also calculated without taking those clauses into account. It should be stressed that the defendant bank actually received the repayment of principal with interest at the LIBOR rate, and therefore it appears doubtful to assume that the settlement between the parties should include interest at the WIBOR rate, which the bank would have received if a valid PLN loan agreement had been concluded. In that context, it should be emphasised that a restitution claim related to an undue payment, just as in the case of unjust enrichment, is not meant to compensate for the loss suffered by the impoverished party, but rather to recover the value that has unjustly passed into the property of another party, such that the impoverished party's claim is limited to the return of what the enriched party has obtained. Another important aspect is that the finding that a loan agreement is void must not result in the consumers being deprived of the protection guaranteed by the provisions of Directive 93/13, which is intended, inter alia, to have a preventive effect, as provided for in Article 7 therein. However, it cannot be overlooked that if the interest rate on principal payments were to be set according to the LIBOR rate after the loan agreement indexed to the Swiss franc has been declared invalid and, consequently, payments were to be made without taking into account foreign currency indexing (that is to say, if it were hypothetically assumed that a PLN loan had been granted), this would entail a severe penalty for the lender and, irrespective of that, would unjustifiably place the borrower in a more favourable position in comparison with that of a borrower who had taken out a loan in PLN at the WIBOR interest rate, which is higher'.

31 In the view of the Supreme Court, the consumer's claim should be reduced by the equivalent of the interest on principal that the bank would have been entitled to receive from the borrower if, hypothetically, the loan agreement had been valid. The need for such a reduction in the consumer's claim is based on the fact that returning all amounts to the consumer in full would result in the consumer being unjustly enriched.

[29] See the judgment of the Court of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraphs 73 and 75.

32 The referring court questions whether that position is compatible with the provisions of Directive 93/13. Pursuant to Article 405 of the CC, read in conjunction with Article 410(1) thereof, an undue performance is to be returned. Those provisions do not provide for the possibility of limiting a restitution claim by the equivalent of the potential benefits resulting from the savings in expenses that the person who has made that performance would have had to incur had he or she entered into a valid contract. The presented position of the Supreme Court appears to be contrary to the principle of equivalence, since it limits consumers' rights to the return of the undue performance they have made to other persons (who have also made an undue performance but who may demand the return of that performance in full). Moreover, a consumer who has made an undue performance under an invalid contract is in an unfavourable position vis-à-vis the bank itself, which may demand that the consumer return the entire loan principal.

33 In the view of the referring court, the situation described above is also contrary to the principle of effectiveness, since it means that the consumer is treated less favourably than the seller or supplier, which, on the one hand, may dissuade the consumer from pursuing his or her claims, and, on the other hand, may encourage the seller or supplier to use unfair terms. It is worth noting that, although the loan agreement is invalid as a result of unfair terms, in practice the balance of receivables between the borrower and the bank is almost identical to that between parties bound by a valid loan agreement. The amount of the parties' mutual payments will be nearly the same as if the borrower had repaid the loan principal plus interest. At the same time, accepting that a consumer's claim may be reduced by the equivalent of notional interest on principal would infringe the principle of effectiveness in the same way as granting banks the right to recover from consumers the amount due for the use of capital without a contractual basis (which is the subject of Case C-520/21).

34 Moreover, the discussed limitation of a consumer's claim for the return of payments made under a contract that is invalid due to the inclusion of unfair contractual terms appears to be very similar to the temporal limitation of a consumer's restitution claim, which was declared inadmissible by the Court of Justice in its judgment of 21 December 2016. [30] The only difference is that the consequence of the Supreme Court's order of 29 July 2021 is to limit the amount of the consumer's claim for restitution, whereas the Court's judgment of 21 December 2016 concerned the temporal limitation of the consumer's claim for restitution. For that reason, reducing the consumer's claim for the return of undue payments made under an invalid contract by the equivalent of notional interest on principal may, in the view of the referring court, be regarded as infringing the principles of effectiveness and equivalence but also as being directly contrary to Articles 6(1) and 7(1) of Directive 93/13.

[30] See the judgment of the Court of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraphs 73 and 75.

35 **Relationship between the questions referred and the resolution of the case at issue**

36 In the case at issue, the court has a duty to determine all the consequences of the invalidity of the loan agreement and to instruct the parties to the proceedings, especially the applicants, on those consequences. The obligation to inform the consumer about the consequences of the invalidity of a contract which contains unfair terms results from both EU [31] and national regulations. [32] A fundamental consequence of the invalidity of a loan agreement is that the bank has a claim for the return of loan principal, and it is of crucial importance for both parties to the proceedings to determine whether that claim is time-barred. Thus, the referring court finds it necessary to analyse this matter in the case at issue and to inform the parties of the results of that analysis. Although the court instructed the applicants on 27 October 2020 that the invalidity of the contract would result in a claim by the bank for the return of loan principal, it did not advise them whether that claim was time-barred.

37 It is also crucial to determine the starting date from which the applicants are entitled to statutory interest for late payment from the defendant bank. According to recent case-law (which arose following the Supreme Court's resolution of 7 May 2021), the interest would be due only from the date of the consumer's informed and free declaration of intent that he or she is aware of, and consents to, the effects of the invalidity of the contract. That issue has significant financial implications.

38 Also of considerable significance is the question whether the applicants' claim against the defendant should be reduced by the equivalent of the interest that the bank would have been entitled to hypothetically had the loan agreement not been invalid. Namely, under the alternative claim, the applicants seek from the defendant the return of PLN 52 270 as the equivalent of all principal and interest payments made under the loan in the period from 18 August 2009 to 19 December 2011 in connection with the invalidity of the agreement. If it were accepted that the applicants could demand all payments made under the loan, the above alternative claim for payment would be allowed in full. On the other hand, that alternative claim would have to be dismissed in part if it were accepted that the applicants' claim should be reduced by the equivalent of the notional interest on principal that would have been due to the defendant bank from the applicants had the contract been valid. The exact amount of notional interest by which the applicants' claim should be reduced would have to be precisely calculated.

39 **Question referred and proposed answer**

31 See the judgment of the Court of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 96–99.

32 See the resolution of the Supreme Court of 15 September 2020, Ref. No III CZP 87/19, the resolution of the Supreme Court of 7 May 2021, Ref. No III CZP 6/21, and the judgment of the Supreme Court of 27 July 2021, Ref. No V CSKP 49/21.

40 The referring court accordingly proposes that the Court of Justice answer the question referred in the affirmative in view of the above arguments, which can be summarised as follows.

41 Firstly, suspended ineffectiveness does not satisfy the requirement that unfair contractual terms (and the contracts that contain them) be deemed 'never to have existed and to have no effect on the consumer'. In addition, Directive 93/13 provides that an unfair term is not binding on the consumer from the time of the conclusion of the contract (*ex tunc*) and the national court is required to ascertain that of its own motion and without waiting for the consumer to take a position, whereas in the case of the contract's (contractual term's) suspended ineffectiveness, the consumer ceases to be bound by that contract (term) only after he has made a formal declaration of intent or the time limit for making that declaration has expired. Making the protection afforded to the consumer by Directive 93/13 conditional on such a declaration of intent is not justified by the wording of Article 6(1) of Directive 93/13, does not achieve the objective pursued by Article 7(1) of Directive 93/13 and, above all, infringes the principle of effectiveness.

42 Secondly, if it is accepted that the limitation period for the bank's claim for the return of the principal disbursed in the performance of an invalid loan agreement begins to run from the consumer's declaration of intent to the effect that he or she does not consent to the unfair terms, is aware of the consequences of the invalidity of the agreement and consents to that invalidity, this places the bank in a privileged position both vis-à-vis the consumer and vis-à-vis other sellers or suppliers in a similar legal position. As the limitation period for the bank's claim begins later than if the agreement were incurably void, this means that, from this point of view, concluding an agreement with a consumer that contains unfair terms is more advantageous for the bank. That is incompatible with the principle of equivalence, as is the fact that a bank's claim may become time-barred later than a consumer's claim or may even never become time-barred (if the consumer does not become aware that the contract contains unfair terms, or even if he or she does become aware but fails to make the relevant declaration of intent or makes such a declaration but its content proves insufficient). At the same time, to privilege so considerably a bank that uses unfair contractual terms does not achieve the objective of Article 7(1) of Directive 93/13. Finally, if that view is adopted, the consumer remains in a state of permanent uncertainty as to when the bank's claim becomes time-barred, since even a declaration of intent by the consumer to the effect that he or she does not consent to the unfair terms and is aware of, and accepts, the consequences of the invalidity of the contract may prove insufficient, as the bank may argue that the consumer was not fully aware of his or her rights when making the above declaration.

43 Thirdly, the assumption that it is only when the consumer has made the aforementioned declaration of intent that his or her claim for the return of undue payments becomes due, and that it is only then that he or she becomes entitled to statutory interest for late payment from the seller or supplier, is also contrary to

the principle of equivalence. In similar situations, a claim for the return of undue payments becomes due immediately after the submission of a demand for payment, without the need to make a formal declaration of intent. Moreover, the consequence of that view is that the interest claim is subject to considerable temporal limitations and as a result the consumer is not compensated in any manner for the loss of use and loss of value of the money owed to him or her due to inflation, which infringes Article 6(1) of Directive 93/13 and the principle of effectiveness. Furthermore, the seller or supplier does not bear any negative consequences of delaying the return of the funds owed to the consumer and of prolonging the potential court proceedings, which does not achieve the objective of Article 7(1) of Directive 93/13.

44 Fourthly, the view that, on the one hand, a loan agreement is invalid because it contains unfair contractual terms but, on the other hand, the consumer cannot recover the full amount of the loan payments made thereunder to the bank, is also contrary to the provisions of Directive 93/13. When a contract is invalid on other legal grounds, the parties have a claim for the return of all payments, without any limitation on their amount, and thus placing such a limitation on the consumer is contrary to the principle of equivalence. What is more, a reduction in the amount of the consumer's claim does not meet the requirement of Article 6(1) of Directive 93/13 and renders the protection afforded to the consumer incomplete. Ultimately, the consequence is that, from the point of view of cash flows between the parties, the situation is analogous to one in which the parties entered into a valid contract from which the bank profits. As a result, the seller or supplier derives income from a contract that is invalid because it contains unfair contractual terms, which is contrary to the principle of effectiveness.