

Case C-230/24

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:

26 March 2024

Referring court:

Juzgado de Primera Instancia n.º 8 de A Coruña (Spain)

Date of the decision to refer:

12 March 2024

Applicant:

MF

Defendant:

Banco Santander, S.A.

Subject matter of the main proceedings

Action in which a consumer is claiming the return of the amounts unduly paid to a bank as a result of an unfair contract term.

Subject matter and legal basis of the request

Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Articles 6 and 7 – Consumer contracts – Unfair terms – Term charging all of the costs of creating a mortgage to the borrower – Effects of a declaration that those terms are invalid – Principle of equivalence – Possibility of recognising the inapplicability of a limitation period to the action seeking a declaration of invalidity and, at the same time, establishing a time limit for bringing the action seeking the return of the amounts unduly paid under that term

Question referred for a preliminary ruling

Is it contrary to Council Directive 93/13/EEC of 5 April 1993 and the principle of equivalence to apply the possibility of dissociating invalidity on the basis of unfairness from restitutory effects, whereby invalidity is not subject to a limitation period and, at the same time, actions for restitution *are* subject to a limitation period, when, in Spanish domestic law, there is no legislation or case-law which applies it to other legal relationships?

Provisions of European Union law and case-law relied on

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29)

Article 3(1): ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’

Article 4(1): ‘Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.’

Article 6(1): ‘**Member States** shall lay down that unfair terms used in a contract concluded with a **consumer** by a seller or supplier shall, as provided for under their national law, not be binding on the consumer ...’

Article 7(1): ‘**Member States** shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

Judgments of the Court of Justice referred to in the reasoning given in the request for a preliminary ruling.

Provisions of national law relied on

A) *Regarding the invalidity of unfair terms*

Article 82 of the texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Consolidated text of the General Law for the protection of consumers and users and other supplementary laws; ‘the **Consumer Protection Law**’), approved by Real Decreto Legislativo 1/2007, de 16 de noviembre (Royal **Legislative Decree** 1/2007 of 16 November 2007), provides:

‘1. All stipulations not negotiated individually and all practices not expressly agreed which, in contravention of the requirements of good faith, give rise, in a manner detrimental to the consumer or user, to a significant imbalance in the rights and obligations of the parties as arising from the contract, shall be regarded as unfair terms.

...

3. The unfairness of a contractual term shall be assessed in the light of the nature of the goods or services for which the contract was concluded and with reference to all the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent.

4. Notwithstanding the provisions of the foregoing paragraphs, terms shall be regarded as unfair if, in accordance with Articles 85 to 90, inclusive, they:

- (a) make the contract dependent on the wishes of the supplier or seller,
- (b) limit the rights of the consumer or user,
- (c) determine that there shall be no contractual reciprocity,
- (d) require the consumer or user to provide disproportionate guarantees or improperly impose upon him or her the burden of proof,
- (e) are disproportionate in relation to the formation and performance of the contract, or
- (f) contravene the rules on jurisdiction and applicable law.’

Article **83 of the Consumer Protection Law** states:

‘Unfair contractual terms shall automatically be void and shall be deemed not to have formed part of the contract. ...’

According to **Article 6(3)** of the Código Civil español (Spanish Civil Code; ‘the Civil Code’):

‘Acts contrary to mandatory rules or prohibitions shall automatically be void, except where they include provision for a different effect in the event of contravention.’

According to **Article 1303 of the Civil Code**:

‘When an obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price together with interest ...’

That provision and related provisions govern the issue of voidability or relative invalidity, although, in case-law, it is also applied, for the purposes of restitution of performance, to *ab initio*, fundamental or automatic invalidity, whether of a contract or of any of its terms.

B) Regarding the time-barring of actions

According to **Article 1964(2) of the Civil Code**, as it was worded when the contract was concluded:

‘Mortgage enforcement proceedings shall become time-barred after 20 years and personal actions not subject to a particular limitation period shall become time-barred after 15 years.’

Article 1964(2) of the Civil Code, as worded by Ley 42/2015, de 5 de octubre (Law 42/2015 of 5 October 2015; ‘Law 42/2015’), provides:

‘Personal actions not subject to a particular limitation period shall become time-barred five years from the date on which performance of the obligation becomes enforceable. ...’

The **fifth transitional provision of Law 42/2015** provides:

‘Limitation periods applicable to pre-existing legal relationships.

In the case of personal actions not subject to a particular limitation period, arising before the date on which this law entered into force, the limitation period shall be governed by Article 1939 of the Civil Code.’

Article 1939 of the Civil Code provides:

‘Limitation periods which commenced prior to the publication of this code shall be governed by the laws which preceded it; but where, since this code entered into force, the whole of the relevant limitation period specified in it has elapsed, this law shall take effect, even if those earlier laws require a longer period of time.’

Judgments of the Tribunal Supremo (Supreme Court, Spain) and the provisions cited therein, referred to in the reasoning set out in the request for a preliminary ruling.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 19 January 2009, the applicant, a consumer, concluded a loan agreement with Banco Santander, S. A., the clause five of which is worded as follows:

‘Costs and obligations to be met by the borrower.

5.1. The following costs shall be borne by the borrower:

5.1.1. Preparatory costs relating to the transaction: The costs included in this paragraph shall be borne by the applicant, even if the loan is not ultimately formalised.

* Costs involved in valuing the property.

* Costs involved in checking the registry records for the property.

5.1.2. The costs and taxes arising by reason of this agreement, its entry in the Land Register and the issuance of a certified copy for the Bank, as well as those resulting from its modification or cancellation, and the costs or taxes arising from the entry in the Land Register, where applicable, of any construction work and installations, in accordance with clause TWO ...'

- 2 On 27 February 2023, the consumer brought a claim before the referring court seeking a declaration of *ab initio* invalidity in respect of clause five and, consequently, the return to her of half of the costs paid by way of notary's fees and the entirety of the land registry fees paid, plus the relevant statutory interest on those amounts.

The essential arguments of the parties in the main proceedings

- 3 The bank maintains that, in accordance with Article 1964(2) of the Civil Code and the transitional rules established by Law 42/2015, the action for the return of the amounts claimed by the applicant is time-barred.

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

- 4 The referring court is uncertain as to whether EU law permits the situation whereby, while actions for a declaration of invalidity in respect of an unfair term are not subject to a limitation period, actions seeking the return of the amounts unduly paid under that term *are* subject to a limitation period. In particular, the referring court maintains that such a dissociation or difference between the rules is contrary to the principle of equivalence.

Starting point: discussion of the judgment of the Court of Justice of 16 July 2020, Caixabank (C-224/19) ('Caixabank')

- 5 The referring court focuses on the analysis of the thirteenth question submitted for a preliminary ruling in *Caixabank*, concerning whether the effects of the invalidity of an unfair term may be made subject to a limitation period, and in which the national court asked whether Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that they do not preclude national case-law which provides that the bringing of an action to enforce the restitutory effects of a finding that an unfair contractual term is void is subject to a limitation period, even though, under

national law, an action for a declaration that an unfair contractual term is void *ab initio* is not subject to a limitation period.

- 6 Paragraph 81 of that judgment states that the protection conferred on consumers by Directive 93/13 precludes a national provision which prohibits the national court, on expiry of a time limit, from finding that a term of a contract concluded between a seller or supplier and a consumer is unfair (judgment of 21 November 2002, *Cofidis*, C-473/00, EU:C:2002:705, paragraph 38). According to the referring court, the Court of Justice indicates that Directive 93/13 precludes the application of a time limit to a finding of unfairness in respect of a term. The referring court considers that that criterion is also applied in Spanish legislation and case-law, according to which *ab initio*, fundamental or automatic **invalidity is not**, as a general rule, **subject to any time limit**, on account of the fact that it contravenes mandatory legal rules. That being so, the question is whether, given that actions for a declaration of invalidity on the basis of unfairness are not subject to a limitation period, the same can be asserted with regard to the restitutory effects resulting from such a declaration, or, more specifically, whether national legislation or case-law which makes those effects subject to a time limit is consistent with that directive.
- 7 That criterion is, however, qualified in paragraph 82 of *Caixabank* when it states that the Court has already recognised that **consumer protection is not absolute** (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68) and that, in the interests of legal certainty, **it is compatible** with EU law **to lay down reasonable time limits** for bringing proceedings (judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 41, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 69). Discussing that paragraph, the referring court observes that the Court of Justice implies a possible dissociation between the fundamental invalidity of the term and its effects.
- 8 Paragraph 83 of *Caixabank* makes clear that the rules implementing consumer protection, provided for in Articles 6(1) and 7(1) of Directive 93/13, are a matter for the domestic legal order of the Member States, in accordance with the principle of the **procedural autonomy** of the latter. However, those rules must not be less favourable than those governing similar domestic actions (**principle of equivalence**); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (**principle of effectiveness**) (see, to that effect, inter alia, the judgment of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 24 and the case-law cited). Discussing that paragraph, the referring court observes that, while from the perspective of domestic law, a limitation period or time limit is not strictly speaking a procedural rule, but rather a substantive one, it *may* be included in the sphere of procedural autonomy, on account of being a means by which the Member State implements or incorporates a rule of EU law.

- 9 In paragraph 84 of *Caixabank*, the Court of Justice states that it follows that EU law does not preclude national legislation which, while providing that **an action for a declaration as to the invalidity** of an unfair term in a contract concluded between a seller or supplier and a consumer **is not subject to a limitation period, subjects to a limitation period an action to enforce the restitutory effects** of that declaration, provided that that legislation complies with the principles of equivalence and effectiveness. Discussing that paragraph, the referring court observes that it is possible for an action for a declaration of invalidity to succeed, because it is not subject to any time limit, and for the effects of such invalidity to be limited by a time-bar, and it expresses its view that such a result seems to leave consumers unprotected.
- 10 The referring court cites and discusses paragraphs 85 to 92 of *Caixabank*, which concern the **principle of effectiveness** and which state that, for the purposes of establishing compliance with that principle, it is necessary to take into account principles of national law, such as legal certainty, which may require actions for restitution to be subject to a limitation period. However, the question referred for a preliminary ruling does not relate to that principle, but rather to the principle of equivalence.
- 11 Paragraph 86 of *Caixabank* states that, in the case in the main proceedings, the issue was whether an action to enforce the restitutory effects of a finding that an unfair term in a mortgage contract is void is subject to the **five-year limitation period** laid down in Article 1964(2) of the Civil Code. According to paragraph 87 of that judgment, in so far as limitation periods of three years (judgment of 15 April 2010, *Barth*, C-542/08, EU:C:2010:193, paragraph 28) or two years (judgment of 15 December 2011, *Banca Antoniana Popolare Veneta*, C-427/10, EU:C:2011:844, paragraph 25) have been found, in the case-law of the Court, to be consistent with the **principle of effectiveness**, it must be held that a **five-year limitation period** applicable to an action to assert the restitutory effects of a finding that an unfair term is void **does not**, in principle, and subject to an assessment by the national court of the factors referred to in paragraph 85 of that judgment, **appear to be such as to render the exercise of the rights conferred by Directive 93/13 practically impossible or excessively difficult**. The referring court interprets that paragraph to mean that a limitation period of five years may be established for the action for restitution, even though the action for a declaration of invalidity in respect of the unfair term is not subject to a limitation period.
- 12 Next, the referring court analyses the two judgments cited in paragraph 87 of *Caixabank*. The **judgment of 15 April 2010, *Barth*, C-542/08**, concerned an action seeking payment of a special length-of-service increment in respect of the provision of services for a specific period by a migrant worker. In that judgment, the Court held that such an action could be subject to a limitation period (three years was considered to be sufficient). That situation differs from that analysed in *Caixabank*), in which it was argued that the effects of the *ab initio* invalidity of term in a contract concluded with a consumer may be subject to a time limit, but

never the invalidity itself. Thus, according to the referring court, in *Barth*, C-542/08, **there was no dissociation between the recognition of a right and the effects of that recognition** (specifically, the payment of a benefit to which an individual is entitled); it was simply considered that a limitation period of three years for actions claiming entitlement to a length-of-service increment in Austria was a reasonable time limit which was not contrary to the principle of effectiveness in relation to Article 7(1) of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

- 13 For its part, the **judgment of 15 December 2011, *Banca Antoniana Popolare Veneta*, C-427/10**, concerned a dispute between the Italian tax authority and a financial institution in which the latter sought to recover an amount of tax paid but not due. In that case, the Court of Justice ruled that **the principle of effectiveness permitted the existence of different time limits for bringing actions, depending on whether the claimant was the taxable person or the tax authority**. The referring court observes that that situation is also not comparable to the situation in *Caixabank*, since it concerned a different legal relationship (between the tax authority and the taxable person) of a different (public) nature.
- 14 Accordingly, in the opinion of the referring court, the examples mentioned in paragraph 87 of *Caixabank* do not sufficiently support the view held by the Court of Justice.
- 15 The referring court then goes on to discuss paragraphs 88 to 92 of *Caixabank*, dealing with the calculation of the limitation period and the determination of its starting point, taking into account the principle of effectiveness. The referring court itself states that ‘the purpose of our request is not ... to examine in depth ... the various points in the life of the agreement which may form the starting point for the limitation period applicable to actions for restitution’. It should be noted, however, that the referring court (i) asserts that the phrase ‘from the date on which performance of the obligation becomes enforceable’, in Article 1964(2) of the Civil Code, excludes the starting point coinciding with the date on which the agreement was concluded, and (ii) maintains, on the basis of paragraph 90 of *Caixabank*, that importance should be attached to the time at which the consumer becomes aware that the term is unfair, for example, following a Spanish judgment finding a term of that type to be unfair.
- 16 Summarising *Caixabank*, the referring court observes that, regarding the possibility of an action being time-barred, **the Court of Justice permits a distinction to be drawn between (i) actions for a declaration of invalidity** in respect of unfair terms (which are not subject to a limitation period), and (ii) **actions for the return** of the amounts paid under those terms (which may be subject to a limitation period, provided that it is not contrary to the principles of effectiveness and equivalence).

National case-law relating to the dissociation between invalidity and restitution and its relationship with the principle of equivalence

- 17 When faced with an action for a declaration of invalidity on the basis of unfairness and the restitutory effects which that gives rise to, it is common for banks to claim either the expiry of the time limit under Article 1301 of the Civil Code or that the action is time-barred under Article 1964 thereof.
- 18 It should be borne in mind that, in the present case, it is not a question of relative invalidity resulting from an error vitiating consent, but rather of automatic invalidity on the basis of the unfairness of a term. Such **automatic invalidity is not subject to the time limit** relating to voidability under Article 1301 of the Civil Code. Spain's Supreme Court ruled to that effect in its judgment of 16 October 2017 when it declared that (i) the unfair term is automatically void, which prevents the consumer from being bound by the unfair term (Article 6(1) of Directive 93/13), and (ii) the consumer cannot be granted less protection than would be granted on the basis of automatic invalidity in other areas of the legal system, since to grant less protection would infringe the principle of equivalence in EU law.
- 19 The referring court observes that, as regards **actions for a declaration of invalidity** in respect of an unfair term **not being subject to a limitation period**, the case-law of the Court of Justice and the Supreme Court are in agreement.
- 20 On the other hand, the referring court observes that, **in Spanish case-law, that dissociation between the inapplicability of a limitation period to actions for a declaration of invalidity and the applicability of a limitation period to actions to enforce the consequences of such a declaration does not occur**. Thus, according to the referring court, the **principle of equivalence** prevents different treatment being given to actions for a declaration of invalidity in respect of an unfair term (which are not subject to a limitation period) and actions for the return of the amounts unduly paid under that term (which may be subject to a limitation period). Thus, since actions for a declaration of *ab initio* invalidity are not subject to a time limit or a limitation period, the effects of such a declaration must not be either.
- 21 The referring court points to various similar situations in domestic law, in which such a dissociation does not occur and which are relevant for the purposes of applying the principle of equivalence. Thus:
- Articles 1301 and 1303 of the Civil Code provide for a single time limit of four years, without distinguishing between the declaration of invalidity and restitution;
 - actions for the division of jointly owned property are adjudged not to be subject to a limitation period and nor may delivery of the property awarded be made subject to a time-bar;

- actions to define the boundaries of adjacent properties are not subject to a limitation period, nor are actions relating to the marking of those boundaries;
 - actions for legal separation are not subject to a limitation period, nor is the dissolution of community of property arrangements as a result of such separation (Article 95 of the Civil Code);
 - actions for a declaration of automatic invalidity in respect of predatory loans are not subject to a limitation period, nor are actions to assert the rights arising from such declarations;
 - Article 6(3) of the Civil Code, in establishing the fundamental invalidity of acts contrary to mandatory rules or prohibitions, does not provide for the possibility of differentiating between invalidity and the effects of invalidity.
- 22 Nor, in the case-law, is there a single decision of the Supreme Court which unequivocally establishes different time-bar rules for invalidity and the effects of invalidity, such that, if the action is not subject to a limitation period, nor are its effects. That is to say, the indissoluble link between invalidity and its consequences is confirmed. In that regard, the referring court cites the following decisions:
- **Supreme Court judgment 491/2018 of 14 September 2018**, which prevents the limitation period for damages from being dissociated from the breach giving rise to those damages, where it declares that the root of the matter lies in determining whether redress for the damage caused by the breach of the duty of maintenance imposed on owners' associations by Article 10(1) of the Ley de Propiedad Horizontal (Law on commonhold property; 'the LPH') is subject to a limitation period of one year – on the basis that it is an instance of non-contractual liability – or the general limitation period of fifteen years (now five years) – on the basis that it is a personal action for which no particular limitation period has been established and which is subject to Article 1964 of the Civil Code. The opinion expressed in the judgment under appeal is that the requirement to comply with the maintenance obligation contained in Article 10(1) of the LPH is subject to the general limitation period for personal actions and, nevertheless, the requirement to provide redress for the damage caused by such a breach is subject to the limitation period of one year applicable to non-contractual liability. However, it is necessary to bear in mind that the starting point for the action for damages is the undisputed assertion that the damage caused has its exact origin in the breach of a legal obligation, imposed on owners' associations by Article 10 of the LPH, to carry out whatever work is necessary to maintain and repair the common parts, such that they do not cause any damage to other property in common or property owned individually. **The limitation period for actions to enforce compliance with legal obligations cannot be dissociated from the limitation period for actions seeking redress for the damage caused by breaching such obligations;**

- **Supreme Court judgment 178/2013 of 25 March 2013**, which examined the proposition of one of the parties that, although an action for a declaration that a legal transaction is a sham transaction is not subject to a limitation period, the action for restitution brought together with that action and seeking, with regard to the property forming the subject matter of the void contract, to restore the parties to their pre-contract position, *is* subject to a limitation period. The Supreme Court rejected that proposition, declaring that, in a case where the very title resulting from the sham agreement is fictitious, **the return of the property is subject to the same rules regarding the inapplicability of a limitation period as the action for a declaration that the agreement is a sham agreement**, since from nothing comes nothing – ‘*ex nihilo nihil*’.
- 23 The referring court acknowledges that there are two judgments of the Supreme Court which appear to accept a possible disaggregation of effects, although judgment 747/2010 of 30 December 2010 examines a very particular situation (the case of the brand ‘Havana Club’) and relates to a single decision, and the judgment of 27 February 1964 concerns a mere *obiter dictum*, as the Supreme Court accepts that the case at issue is one of voidability and not of fundamental invalidity. The Supreme Court, by an order of 22 July 2021, has also referred a question for a preliminary ruling which appears to suggest that, in that case, the Supreme Court will opt for dissociation, although that decision has not yet materialised.

Final remarks of the referring court

- 24 Should the dissociation discussed above be accepted, we would find ourselves in the absurd situation whereby ***ab initio* invalidity has no consequences whatsoever**, since, even if its existence were declared, the pre-contract positions of the parties could not be restored if the action for restitution were deemed to be time-barred.
- 25 Moreover, such a dissociation would frustrate the **dissuasive effect** declared by the Court of Justice (for example, in its judgment of 21 December 2016, *Gutiérrez Naranjo*, C-154/15), as the seller or supplier would be tempted to include such unfair terms in the hope that, even if they were declared invalid, they would not cause any detriment to that seller or supplier because the consumer would not be able to recover the amounts unduly paid. The dissuasive effect and the aim of preventing the use of unfair terms require that invalidity and the restitutory effects inherent in it should not be time-barred in any way, at any time.
- 26 The **proposition in favour of dissociation would lead to situations bordering on the absurd**. Indeed, in a situation of voidability on the basis of defective consent, if we apply the time limit of four years to the action for a declaration of invalidity itself (Article 1301 of the Civil Code) and that of five years (Article 1964 of the Civil Code) to the restitutory effects under Article 1303 of the Civil Code, we may find ourselves in a situation where the action for a declaration of invalidity is time-barred, while the action for restitution, on the other hand, is

not. But since the prerequisite for the latter (the declaration of invalidity) is missing, it cannot succeed. Another argument in support of the view that such a position is inconsistent is that, in those cases in which both parties are required to engage in restitution of performance (for example, the bank and the consumer), each of their claims for restitution would be subject to a limitation period, with potentially varying results.

- 27 In civil law cases, as the Supreme Court judgment of 25 March 2015 reminds us, **invalidity ‘requires that its consequences be destroyed and all traces of it be erased, as if they had not existed, and that any effects be thus prevented from arising from them**, in accordance with the classical rule *quod nullum est, nullum producit effectum*’. If the application of a limitation period to the restitutory effects were allowed, invalidity (whether automatic, *ab initio*, fundamental, not subject to a limitation period, not capable of validation, remediation or rectification, etc.) could indeed produce effects as a consequence of the application of that limitation period, thereby contravening that rule. Invalidity is linked to its effects to such an extent that the Supreme Court has itself held that it is not even necessary to seek a declaration of its effects, as they occur automatically, since restitution of performance is an *ex lege* effect of invalidity (Supreme Court judgments 537/2019 of 10 October 2019, specifically on invalidity on the basis of unfairness; 716/2016 of 30 November 2016; and 102/2015 of 10 March 2015).
- 28 If the aim is to make consumer protection consistent with the principle of legal certainty, a reasonable time limit/limitation period must be established for seeking the declaration of invalidity itself, but it is a legal artifice to draw a distinction between invalidity and its effects.