Case C-108/24 [Biamek] [i]

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:

8 February 2024

Referring court:

Sąd Apelacyjny w Warszawie (Poland)

Date of the decision to refer:

31 January 2024

Appellant:

Bank Millennium S.A.

Respondent:

AC

Subject matter of the main proceedings

Action for payment on the grounds of sums unduly paid in performance of an agreement containing unfair terms concerning the exchange rates used to calculate loan instalments and the loan balance.

Subject matter and legal basis of the request

The interpretation of 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 interpretation of the principles of effectiveness, legal certainty and proportionality; legal basis: Article 267 TFEU.

[i] The present case is designated by a fictitious name which does not correspond to the actual name of a party to the proceedings.

Questions referred for a preliminary ruling

In cases where it is no longer possible for an agreement to continue in existence because unlawful terms have been removed from it, is the following interpretation of national law compatible with Article 6(1) and Article 7(1) of Directive 93/13/EEC and the principles of effectiveness, legal certainty and proportionality?

1. The limitation period for a seller or supplier's claim for restitution against a consumer shall not commence as long as the consumer performs the agreement and does not lodge any claims or raise any pleas against the seller or supplier on the grounds that the terms of the agreement are unlawful.

2. Consideration of the time-barred nature of a claim for restitution by the seller or supplier against the consumer is precluded by considerations of equity relating to the fact that the claim was not pursued as a result of the consumer's performance of the agreement and the consumer's failure to lodge any claims or raise any pleas on the grounds that the terms of the agreement were unlawful, and the fact that the consequences of removing from the agreement the unlawful terms, and the conditions under which claims for restitution were to be lodged by the parties, were not stated clearly and coherently in case-law.

Provisions of European Union law relied on

Treaty on the Functioning of the European Union, Article 169(1).

Charter of Fundamental Rights of the European Union, Article 38.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29 – special edition, in Polish, Chapter 15, Volume 2, p. 288): recitals 4, 21 and 24; Article 3(1) and (2); Article 4(2); Article 6(1) and Article7(1).

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC (OJ 2011 L 304, p. 64): recital 17 and Article 2(1).

Provisions of national law relied on

1. Constitution of the Republic of Poland of 2 April 1997: Article 76.

2. Law of 23 April 1964 – Civil Code (consolidated text: Dz. U. of 2023, item 1610, 'the Civil Code'):

A right may not be exercised in a manner which would be contrary to its social and economic purpose or to the principles of community coexistence. Any such

act or omission by the entitled person shall not be treated as an exercise of the right and shall not be protected (Article 5 of the Civil Code);

A 'consumer' is any natural person who concludes, with a seller or supplier, a legal transaction which has no direct link to that person's business or professional activity (Article 22^1 of the Civil Code);

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 where it provides that the invalid terms of the legal transaction are to be substituted by relevant provisions of law (Article 58(1) of the Civil Code);

Subject to the exceptions provided for by law, property-related claims shall be subject to a limitation period (Article 117(1) of the Civil Code);

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

Once the limitation period has expired, it shall no longer be possible to pursue a claim against a consumer (Article $117(2)^1$ of the Civil Code, applicable from 9 July 2018);

In exceptional cases, the court may, after weighing up the interests of the parties, disregard the expiry of the limitation period for a claim against a consumer if equity so requires (Article $117^1(1)$ of the Civil Code, applicable from 9 July 2018);

In exercising the power referred to in paragraph 1, the court shall take into account, in particular: 1) the duration of the limitation period; 2) the length of the period between the expiry of the limitation period and the submission of the claim; and 3) the nature of the circumstances which led the entitled person to not pursue his or her claim, including the effect of the obliged person's conduct on the entitled person's delay in pursuing his or her claim (Article $117^1(2)$ of the Civil Code, applicable from 9 July 2018);

Unless a specific provision provides otherwise, the limitation period shall be 10 years, and for claims concerning periodic payments, as well as claims related to the pursuit of a business activity, it shall be three years (Article 118 of the Civil Code in the version applicable 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 pursuit of a business activity, it shall be three years. However, the limitation period shall expire on the last day of the calendar year unless the limitation period

is shorter than two years (Article 118 of the Civil Code in the version applicable from 9 July 2018);

The limitation period shall begin to run on the day on which the claim becomes due. Where the day on which a claim becomes due is dependent on the entitled person undertaking a specified act, the limitation period shall begin to run on the day on which the claim would have become due if the entitled person had undertaken that act at the earliest possible opportunity (Article 120(1) of the Civil Code);

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

Contracting parties may arrange their legal relationship at their discretion as long as the substance or purpose of the contract is not contrary to the properties (nature) of the relationship and the law, or to the principles of community co-existence (Article 353^1 of the Civil Code);

The debtor must act by exercising due diligence (duty of diligence) (Article 355(1) of the Civil Code);

The duty of diligence which a debtor must demonstrate in respect of the latter's business activity shall take into account the professional nature of this activity (Article 355(2) of the Civil Code);

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 the accepted principles of morality and grossly infringes his or her interests (unlawful terms). This shall not apply to terms setting out the principal obligations to be performed by the parties, including price or remuneration, so long as they are worded clearly (Article 385^1(1) of the Civil Code);

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) of the Civil Code);

The terms of a contract which have not been individually negotiated are those where the consumer had no actual influence over the content. 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) of the Civil Code);

The burden of proving that a contractual term has been individually negotiated shall lie with the person relying on that term (Article 385^1(4) of the Civil Code);

The compliance of contractual terms with the accepted principles of morality 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 of the Civil Code);

Any person who obtains an economic advantage at the expense of another person, without legal grounds, shall be required to restore that advantage in kind and, where that is not possible, to return the value of that advantage (Article 405 of the Civil Code);

The provisions of the preceding articles shall apply in particular to undue performance (Article 410 (1) and (2) of the Civil Code);

Performance shall be undue if the person who rendered it was not under any obligation at all or was not under any obligation towards the person to whom he or she rendered the performance, or where the basis of the performance has ceased to exist or the intended objective of the performance has not been achieved, or where the legal act on which the obligation to render the performance was based was invalid and has not become valid since the performance was rendered (Article 410(2) of the Civil Code);

If the time limit for performance has not been specified or if it does not follow from the nature of the obligation, performance shall be rendered immediately after the debtor has been called upon to render it (Article 455 of the Civil Code);

If a debtor is late in performing a financial obligation, the creditor may demand default interest, even if he or she has suffered no loss and even if the delay is due to circumstances for which the debtor is not responsible (Article 481(1) of the Civil Code);

If, following termination of the contract, the parties are required to return consideration, each of them has a right of retention until the other party offers to repay the benefit obtained or provides security for the right to restitution (Article 496 of the Civil Code);

The preceding article shall apply *mutatis mutandis* in the event of termination or invalidity of a reciprocal contract (Article 497 of the Civil Code).

3. Law of 13 April 2018 amending the Civil Code and certain other laws (Dz. U. of 2018, item 1104);

The provisions of the Civil Code, in the version of this Law, shall apply from the date of entry into force of this Law to claims arising before the date of entry into force of this Law and not yet time-barred on that date (Article 5(1));

The provisions of the Civil Code, in the version in force up to this day, shall apply to the claims of consumers arising before the entry into force of this Law and not

yet time-barred on that date, the limitation periods for which are defined in Article 118 and Article 125(1) of the Civil Code (Article 5(3));

Claims which are time-barred against a consumer in respect of which no plea of limitation has been raised on the date of entry into force of this Law shall, from that date, be subject to the effects of the limitation period laid down in the Civil Code, in the version set out in this Law (Article 5(4));

Succinct presentation of the facts and procedure in the main proceedings

1 On the basis of the mortgage loan agreement for PLN 140 000 concluded on 7 January 2008 by the applicant with Bank Millennium S.A., it was found that the loan was indexed to the Swiss franc (CHF), following a conversion of the amount paid out using the CHF buy rate according to the bank's table of foreign currency rates applicable on the date when the loan was received (Section 2(2)). The borrower undertook to pay the loan amount in CHF stated in PLN in 456 equal monthly instalments, using the CHF sell rate applicable on the mortgage instalment payment date according to Bank Millennium's table of foreign currency rates (Section 7). In the period from 15 February 2008 to 15 February 2021, AC paid the bank an amount of PLN 96 217.49 in principal and interest instalments.

2 In an action brought on 22 June 2021, AC sought *inter alia* that the Bank be ordered to pay to her an amount of PLN 96 217.49 plus default interest at the statutory rate in repayment of sums that were paid unduly by her to the defendant bank in view of the invalidity of the agreement, and a finding that the mortgage loan agreement from 2008 was invalid. In a non-final judgment handed down on 12 May 2022, these forms of order were granted on the following grounds: first, that the agreement was contrary to the nature of the relationship; second, that the terms of the agreement concerning the exchange rates used to calculate the loan instalments and loan balance were unlawful; and third, that the consumer had not been adequately informed about the risk.

3 During the appeal proceedings, the applicant was also served with notice by the bank indicating that it was exercising the right to retain any amounts that might have been due to the applicant until that party offered to repay to the bank any reciprocal obligations, or in other words loan amounts made available by the bank to the applicant on the basis of the loan agreement.

The essential arguments of the parties in the main proceedings

4 To support the claim that the agreement and the claims for restitution arising on the basis of that agreement were invalid, the applicant submitted that the loan agreement had included unfair terms granting the bank the power to determine the exchange rate for indexation at its discretion, and that these terms had already been entered in 2014 on the register of unlawful terms maintained by the Urząd

Ochrony Konkurencji i Konsumenta (Office of Competition and Consumer Protection), which meant that these terms were also contrary to the nature of the relationship and unlawful. The applicant furthermore referred to the fact that she had borne the entirety of the foreign currency risk. During the appeal proceedings, AC raised a plea of limitation against the bank's claim to which the plea of retention pertained, submitting that the period of limitation of the bank's claim commenced on the date when performance was rendered, and at the latest when the disputed terms of the agreement were entered on the register as unfair terms, and that therefore the claim to which the plea of retention pertained was time-barred on the date when this plea was raised.

5 The defendant, however, argued that the claim was not time-barred. It furthermore relied on the contradiction between the plea of limitation and Article 5 of the Civil Code.

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

6 According to the terms of the loan agreement relating to conversions that were binding upon the parties in connection with payments and repayments in PLN, the exchange rate calculations were to be carried out using the exchange rate set by the bank, and the defendant thus had complete freedom to shape the substance of the performance obligations incumbent upon the parties. [1] EU case-law consistently reiterates that the use of foreign exchange rates from a table effective within a bank implies a violation of the equivalence of the parties to an agreement as a result of the unequal distribution of duties and powers between the parties to the debt relationship. [2]

7 Following a finding that a loan agreement is invalid, the parties should return to each other all payments made on the basis of that agreement (Article 405 of the Civil Code in conjunction with Article 410(1) of the Civil Code). Two distinct restitution obligations therefore arise between the bank and the former borrower: the obligation incumbent upon the former borrower to return the money provided by the bank, and the obligation incumbent upon the bank to return the payments made by the former borrower. [3] Directive 93/13/EEC applies to the method for settling claims for restitution between the parties, since Article 6(1) of this Directive precludes national case-law from limiting the restitutory effects

1 See the judgments of the Supreme Court of 22 January 2016, I CSK 1049/14, of 1 March 2017, of 11 December 2019, V CSK 382/18, of 20 June 2022, II CSKP 701/22, and of 8 November 2022, II CSKP 1153/22.

2 See judgments of the CJEU of 30 April 2014, C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai* v *OTP Jelzálogbank Zrt*, paragraph 75, and of 20 September 2017, C-186/16, *Ruxandra Paula Andriciuc and Others* v *Banca Românească SA*, paragraph 45.

3 See the decision of the Supreme Court of 16 February 2021, III CZP 11/20.

associated with a finding that a term of an agreement is unfair. [4] In the event that an agreement concluded between a consumer and a seller or supplier is declared invalid because one of its terms is unfair, it is for the Member States, by means of their national law, to make provision for the effects of that invalidation, in compliance with the protection granted to the consumer by that Directive, in particular, by ensuring the restoration of the legal and factual situation that he or she would have been in if that unfair term had not existed. [5]

8 In the context of these settlements, it is necessary to assess the plea of retention raised by the defendant. In that regard, the CJEU, in its judgment of 14 December 2023 (C-28/22, TL, *EC* v *Liquidator of Getin Noble Bank SA*, paragraphs 86 and 87), found that Article 6(1) and Article 7(1) of Directive 93/13/EEC, read in the light of the principle of effectiveness, must be interpreted as precluding a judicial interpretation of national law according to which, where a mortgage loan agreement concluded with a consumer by a seller or supplier is no longer capable of continuing in existence after the unfair terms in that agreement have been removed, that seller or supplier may rely on a right of retention which allows him or her to make the restitution of the sums which it has received from that consumer conditional on that consumer making an offer to repay the sums which he or she has himself or herself received from that seller or supplier or to provide a security for the repayment of those sums. This applies where the exercise by that seller or supplier of that right of retention entails the loss, for that consumer, of the right to obtain default interest as from the expiry of the time limit set for performance by the seller or supplier concerned, following receipt by that seller or supplier of a request to repay the sums he or she had been paid in performance of that agreement. The raising of a plea of retention against a consumer is therefore admissible per se and it is merely necessary for its inhibiting nature, which excludes the enforceability of the consumer's claim for restitution on the basis of the current interpretation of national law, to be mitigated [see judgments by the Supreme Court of 31 January 2002, IV CKN 651/00, and of 7 January 2005, IV CK 204/04]. If this feature is removed, the plea of retention may still fulfil its role of providing security and serve to ensure a balance in terms of protecting the legitimate mutual interests of the creditor and debtor, which cannot be regarded as being contrary to the purpose and recitals of Directive 93/13/EEC, since such a plea does not annul the consumer's claim in either legal or economic terms. If the consumer – having been duly informed *inter alia* about this aspect of an agreement's invalidity – fails to waive the protection, as in the present case, there are no grounds for assuming that the consumer will encounter any obstacle when exercising his or her protected rights, since he or she has the full opportunity to present his or her lesser debt for deduction from the bank's greater claim, and that deduction may be applied even after the judgment that is handed down in the case has become final. Furthermore, the raising of a plea of retention may not be

[4] See judgment of the CJEU of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraph 75.

[5] See judgment of the CJEU of 16 March 2023, C-6/22, paragraph 33.

regarded as an abuse of rights, since it represents the exercise of legitimate claims resulting from the consumer's informed use of protection, one element of which is an awareness of the obligation to return to the defendant the amount of capital paid out, which was covered by the relevant instruction. In the Court of Appeal's opinion, the legal institution of retention is therefore a useful tool that provides a balance in terms of protecting the legitimate mutual interests of the creditor and debtor. A finding that a loan agreement is invalid thus results, among other things, in the annulment of the securities provided to the bank (mortgage and other collateral). The absence of any option for securing that claim effectively may thus lead to a situation that is unacceptable (including in axiological terms) because the bank would in practice be deprived of the opportunity for it to be satisfied.

9 The effectiveness of the plea of retention depends *inter alia* on whether the bank's claim is time-barred, since the right of retention expires at the end of the period of limitation. In this context, it is of crucial importance to determine when the period of limitation for this claim commences in accordance with EU law, including in relation to the principles of effectiveness, legal certainty and proportionality.

10 The CJEU has repeatedly drawn attention to the fact that, in general, the consequence of the annulment of a loan agreement is that the outstanding balance of the loan becomes due forthwith. This balance is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender. [6] As a result, the CJEU has found that if the agreement cannot continue in existence after the relevant unfair terms have been removed from it, its annulment would result in particularly harmful consequences for the consumer, there are no appropriate provisions of national law that might replace those terms, and the consumer has not expressed a wish for the unfair terms to remain in force, the national court should take all steps necessary to protect the consumer against these particularly harmful consequences, with the proviso that the court's powers cannot go beyond what is strictly necessary in order to restore this balance, and thus provide the consumer with this protection (see judgment of 25 November 2020, C-[2]69/19, *Banca B. SA*, paragraphs 41-44).

11 A resolution handed down on 7 May 2021 by seven judges of the Supreme Court and vested with the force of legal principle (III CZP 6/21) attempted to reconcile, on the one hand, the rule whereby checks should be carried out on an *ex officio*

[6] See judgments of 30 April 2014, C-26/13, *Á. Kásler and H.K. Rábai* v *OTP Jelzálogbank Zrt*, paragraphs 80-84; of 21 January 2015, C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco SA* v *J.H. Rueda and Others* and *Caixabank SA* v *M.M. Rueda Ledesma and Others*, paragraph 33; of 20 September 2018, C-51/17, *OTP Bank Nyrt. and Others* v *Teréz llyés and Others*, paragraphs 60 and 61; of 26 March 2019, C-70/17, *Abanca Corporación Bancaria SA* v *Alberto García Salamanca Santos* and *Bankia SA* v *Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez*, paragraphs 56-58; of 3 October 2019, C-260/18, *Kamil Dziubak and Justyna Dziubak* v *Raiffeisen Bank International AG*, paragraph 48 et seq.; of 3 March 2020, C-125/18, *Marc Gómez del Moral Guasch* v *Bankia SA*, paragraphs 61-63; of 25 November 2020, C-269/19, *Banca B. SA*, paragraph 34; and of 27 January 2021, C-229/19 and C-289/19, *Dexia Nederland*, paragraphs 61-67.

basis to determine whether the terms of an agreement are unfair, and, on the other hand, an option for the consumer to accept the consequences of annulment of the agreement, while at the same time integrating the consumer protection regime into the Polish system of sanctions for harmful legal transactions. In this resolution, the Supreme Court made the enforceability of the bank's claim for repayment of the loan amount dependent on the definitive unenforceability of the agreement, which requires the consumer to have been duly informed about the effects of the agreement's unenforceability (invalidity). The situation where a 'legal act on which the obligation to render the performance was based was invalid and has not become valid since the performance was rendered' – as defined at the end of Article 410(2) of the Civil Code – only arises if the consumer accepts or refuses to accept the unfair term. From this point onwards, the enforceability of the performance to be rendered by the parties was tied to the repayment of the benefits gained without any legal basis (Article 410(2) of the Civil Code). From this perspective, this meant that the borrower could not assume that the bank's claim had become time-barred within a period calculated as if a call for repayment of the loan made available had already been made on the date it was made available (second sentence of Article 120(1) of the Civil Code). A key argument raised against the possibility of calculating the limitation period for the bank's claims from the date when the loan capital was made available to the borrower was the asymmetric nature of that sanction, which is for the consumer's benefit. Therefore, although the agreement, which was invalid as a result of the unenforceability of the terms specifying the main subject of the agreement, was defective *ab initio*, the interpretation of Article 120(1) of the Civil Code according to which the seller or supplier's claims would become time-barred before the latter had gained the legal possibility of making the debt due was unlawful on the grounds of the abovementioned resolution. The limitation period for the bank's claim was thus linked to the time when it learned of the consumer's definitive and informed wish to refuse the rectification of the unfair terms contained in the agreement, resulting in the annulment *ex tunc* of that agreement. The CJEU overturned this concept of suspended unenforceability based on the requirement to obtain a statement from the consumer accepting the consequences of the agreement's invalidity in a judgment dated 7 December 2023, [7] in which it found that the possibility open to a consumer to object to the application of Directive 93/13/EEC cannot be understood as imposing on him or her the positive obligation to rely on the provisions of that Directive by means of a formal declaration lodged before that court. That possibility consists solely in the option for the consumer, after having been provided with clarifications by the national court, not to assert the unfair and non-binding nature of a contractual term. The CJEU further dismantled the concept of suspended unenforceability in its judgment of 14 December 2023, C-28/22, *TL and WE* v *Liquidator of Getin Noble Bank SA* (paragraphs 59-75), by finding that the interpretation of Polish law adopted in the Supreme Court's resolution of 7 May 2021 (III CZP 6/21) results in an asymmetry of the possibilities for bringing an action. This asymmetry is likely

[7] See judgment C-140/22, *SM and KM* v *mBank S.A.*, paragraphs 56-61.

to encourage the seller or supplier, following an out-of-court complaint by the consumer, to remain inactive or to prolong the extra-judicial phase by extending negotiations, so that the limitation period for the consumer's claims expires, since, first, the limitation period laid down for his or her own claims does not begin to run until the date on which the definitive unenforceability of the mortgage loan agreement concerned is established by a court and, second, the duration of the extra-judicial phase has no impact on the interest payable to the consumer. Such asymmetry is therefore liable to infringe, in the first place, the principle of effectiveness, and also, in the Court's opinion, is liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that Directive, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers. As a result, Article 6(1) and Article 7(1) of Directive 93/13/EEC, read in the light of the principle of effectiveness, must be interpreted as precluding a judicial interpretation of national law according to which, following the finding that a mortgage loan agreement concluded with a consumer by a seller or supplier is invalid, on account of unfair terms contained in that agreement, the limitation period for the claims of that seller or supplier stemming from the nullity of that agreement starts to run only as from the date on which the agreement becomes definitively unenforceable, whereas the limitation period for the claims of that consumer stemming from the nullity of that agreement begin to run as from the day on which the consumer became aware, or should reasonably have become aware, of the unfair nature of the term entailing such nullity.

12 Given the Court's rejection of an asymmetric solution to the detriment of the consumer, the date when the limitation period for the bank's claim for restitution commences is of particular importance. In a judgment of 16 March 2023, C-6/22 (paragraph 30), the Court objected in plain terms to the uniform distribution of losses between the parties, since it might eliminate the dissuasive effect with regard to the use of unfair terms towards consumers. At the same time, the Court questioned whether it was possible for a seller or supplier to seek amounts other than the loan capital paid out on the basis of the agreement. [8] It may therefore be argued that repayment of the loan capital itself constitutes an undisputed obligation on the part of the consumer, which is not contrary to the goal of restoring the situation in which the consumer would have been had the unfair term not existed.

13 Nevertheless, it is necessary to reconcile the nature of consumer protection, which is granted automatically and continues unconditionally from the time when the agreement is concluded, with the need to allow the consumer to waive this protection. One can therefore conclude from the Court's case-law [9] that the

[8] See judgment of 15 June 2023, C-520/21, *Arkadiusz Szcześniak* v *Bank M. SA*; and orders of 11 December 2023, C-756/22, and 12 January 2024, C-488/23.

[9] See judgments of 7 December 2023, C-140/22, *SM and KM* v *mBank S.A.*, and of 14 December 2023, C-28/22, *TL and WE* v *Liquidator of Getin Noble Bank SA*, paragraphs 59-75.

inclusion of unlawful terms in an agreement is not subject to the sanction of suspended unenforceability in the sense outlined by the Supreme Court in its resolution of 7 May 2021 (III CZP 6/21), one of the factors of which was an expression (explicit or tacit) within a specified deadline of the consumer's desire to benefit from the protection, representing a demarcation of sorts between a scenario where the enforceability of the agreement is suspended and a scenario where the agreement is rendered unenforceable with retroactive effect. The 'removal' of this demarcation by the Court means that in order to achieve an interpretation that accords with European law, it is necessary at present to assume that this protection extends from the outset up until the point where it is waived by the consumer, thereby approximating it to the absolute invalidity of the agreement. This raises questions about the point in time that initiates the limitation period for the bank's claim for restitution. The CJEU's case-law does not clearly define when the limitation period for the seller or supplier's claim commences. What matters is ensuring that it does not interfere with the exercise of rights granted to the consumer under Directive 93/13/EEC, and does not as a result violate the principle of effectiveness in connection with the principles of legal certainty and proportionality, construed as the adequacy of the consequences in relation to the actual significance of the pleas raised against the bank.

14 In the case of indefinite obligations, which include the obligation to repay sums unduly paid, the due date depends on when the debtor is served notice to perform (Article 455 of the Civil Code) and dictates whether it is possible to demand interest (Article 481 of the Civil Code). The limitation period of the claim, however, commences on the earliest possible day when the claim would have become due (second sentence of Article 120(1) of the Civil Code). It is therefore assumed that the limitation period for a claim resulting from an undue payment made in performance of an unconditionally invalid legal transaction commences on the earliest possible date when the entitled person could have demanded payment from the obliged person, regardless of when the creditor became aware that the payment had been undue or when the creditor actually demanded repayment of the unduly paid sum from the debtor. [10]

15 In the context of the sanctions arising from the inclusion in the agreement of unlawful terms, the fact that the provisions of Article 6 of Directive 93/13/EEC have not been transposed into Polish law means that the legal basis for the annulment of the agreement containing the unlawful terms is unclear. Doubts have been expressed as to whether the commencement date of a limitation period for a claim for restitution by the seller or supplier can be determined by way of analogy to cases where an agreement becomes unconditionally invalid, without taking into account the need to consider the consumer's wishes and the consumer's ability to remedy the unlawful terms, thus making it possible for the agreement to continue and broadly safeguarding the consumer's interests. Alignment of these sanctions

[10] See the judgments of the Supreme Court of 29 April 2009, II CSK 625/08, and of 16 December 2014, III CSK 36/14.

would not accord with the principles of Directive 93/13/EEC, although it would bring about a consequence that is beneficial to the consumer, namely the time-barring of the seller or supplier's claim, since the latter, by breaching the obligations arising under EU law, would take upon himself or herself the risk of claims becoming time-barred. Another possible solution is to link the limitation period for the bank's claim to the objective possibility of it gaining knowledge about the unfairness of the terms of the agreement or their possible consequence in the form of annulment of the agreement. This solution mirrors the interpretation developed on the basis of EU law regarding the commencement of the limitation period of the consumer's claim for restitution. This would mean detaching the limitation period for the bank's claim from the position of the specific consumer to allow for the potential risk that the consumer does not waive the protection. This arises in circumstances such as the entry of a standard contract term into the register (an argument relied upon by the applicant in her action), or the handing down by the CJEU of the abovementioned judgment in Case C-260/18, *Dziubak*, which highlighted the fact that it is questionable whether an indexed loan agreement would be able to continue in existence in Poland following the removal from it of the unlawful terms. Evidence in favour of this solution may be found in the position outlined by the CJEU in the judgment of 21 September 2023, C-139/22, *AM and PM* v *mBank SA*, paragraph 46, in which it was held that the provisions of Directive 93/13/EEC do not preclude a contractual term which has not been individually negotiated from being regarded as unfair by the national authorities concerned merely by virtue of the fact that its content is equivalent to that of a standard contract term entered in the national register of unlawful terms. The CJEU therefore raised the issue of the removal of a standard contract term that had been subject to a negative abstract review and was performed in each individual relationship. The CJEU developed this theory [11] by finding that this effect also concerns sellers or suppliers other than the seller or supplier against whom the proceedings to enter the relevant term into the national register were conducted, and situations where the term does not have the same wording as the term entered into the abovementioned register, but has the same meaning and results in identical consequences for the relevant consumer. Such wide-ranging effects of an abstract review of a standard contract may lead one to conclude that, from the date when this review is performed for each individual relationship, the seller or supplier is aware that the contract is unfair when it is concluded, which should entail the commencement of the limitation period for any of its claims that may arise on the basis of an acceptance that the standard contract is unlawful. Yet this approach, like the one set out above, does not take into account the option of a specific consumer waiving this protection.

16 The Court of Appeal is therefore in favour of a binding position based on the resolution of 7 May 2021 (III CZP6/21), amended as per the abovementioned judgment in Case C-28/22 (paragraphs 66-75), which is based on the symmetrical shifting of the date from which the limitation period for the bank's claim should

[11] See judgment of 18 January 2024, C-531/22, paragraph 78.

commence to the point in time where the bank is served with a demand for payment or another document, including a legal action, expressing a wish to benefit from consumer protection. The consumer is thus entitled to enforce the rights arising under Directive 93/13/EEC both in the courts and by any other means, in order to be able potentially to remedy the unfairness of a term by making a contractual amendment (see the judgment of the CJEU of 29 April 2021, *Bank BPH*, C-19/20, paragraph 49), whereby this right is not limited by national law. This solution allows account to be taken of the specific nature of consumer protection, namely that the consumer decides whether or not to take advantage of such protection. Until this is the case, a failure by the seller or supplier to pursue claims resulting from this protection should not result in negative consequences for the seller or supplier in a scenario where the consumer fulfils the agreement and the bank is obliged to render performance. After all, this protection is based on the assumption that the annulment of the agreement is detrimental to the consumer and the latter decides whether to accept it, and if so, the consequences of the annulment of the agreement should be distributed symmetrically in terms of the option of making due the debts of both parties to the agreement, and their limitation periods. The judgment of the CJEU of 15 June 2023, C-520/21, *Arkadiusz Szczęśniak* v *Bank M.*, paragraphs 73 and 74, stipulates that even the option for the consumer to demand statutory default interest depends on compliance with the principle of proportionality.

17 Nevertheless, the question arises as to whether the effects of removing unlawful contractual terms – when interpreted in this way – are compatible with the nature of consumer protection, which continues from the conclusion of the agreement and is granted automatically without any need for the consumer to raise it, and with the earlier entry of the unlawful standard contract into the register with the consequences described above. Since it follows from the CJEU's case-law cited above that the granting of protection requires no action on the part of the consumer, but instead a failure to remedy the unlawful contractual terms, the question that arises is whether making the commencement of the limitation period for the bank's claim dependent on such action is compatible with the protection.

18 A related issue to be settled, if it is assumed that the bank's claim is time-barred, is the compatibility with EU law of an interpretation of law that allows this circumstance to be ignored based on the principle of equity. As can be seen from Article 7(1) thereof, read in conjunction with the twenty-fourth recital thereof, Directive 93/13/EEC requires Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. Those means must therefore have a deterrent effect on sellers and suppliers. [12] Therefore a crucial question concerns the compatibility with this effect of a finding that failure by the seller or supplier to pursue a claim is justified. After all, a seller or supplier might delay the pursuit

[12] See judgment of the CJEU of 27 June 2000, *Océano Grupo Editorial and Salvat Editores*, C-240/98 to C-244/98, paragraph 28.

of claims, despite knowing that such claims might exist, in order then to rely on the principles of equity associated with the consumer's inactivity or the lack of certainty regarding the protection to be afforded the consumer and its effects.

19 However balancing the interests of both parties, within the limits of the protection afforded them and while maintaining an appropriate relationship between them, may lead to the conclusion that the consumer's legitimate interest can and should be taken into account, but only to the point of conflict with the seller or supplier's interest that is worthy of protection. A refusal to take into account the expiry of the limitation period should be the outcome of an appreciation by the court – as in the case at hand – of the specific facts of the case, which mean that the legislator's fundamental approval of the time-barring of claims is obsolete in this situation. Another factor of crucial importance is the imbalance in the duration of the limitation period for the consumer's and the bank's claims for restitution, which arise on the basis of the same legal relationship. The legislator's appreciation of this fact is indicated by the current wording of Article 117^1(2)(1) of the Civil Code. There are therefore limits to the protection of the consumer against time bars and limitation periods, and that protection cannot result in an imbalance in favour of the consumer, which could invite abuse. [13] Since consumers might assert claims based on the concept of unjust enrichment, subject to meeting the conditions Polish law lays down to succeed in such an action, and the national courts may also exercise a jurisdiction to dismiss such actions where they constitute an abuse of rights (see Opinion of the Advocate General delivered on 16 February 2023 in Case C-520/21, paragraph 51), the possibility of rejecting a plea based on the time-barring of a claim directed against the consumer should also be allowed on the same grounds.

20 It must also not be overlooked that in so far as the bank may have been aware of the unfair nature of the contractual terms that were entered into the register from the first decisions on this matter, it could not have been aware of the consequences, since the case-law concerning the consequences of this unfair nature in terms of the legal existence of the agreement had not yet started to be developed, and the conclusions thereafter drawn from this case-law differed from the current position, since preference was given to the option of keeping the agreement in force (see the judgments of the Supreme Court of 4 April 2019, III CSK 159/17, and of 9 May 2019, I CSK 242/18). This continued until the abovementioned judgment was handed down by the CJEU in Case C-260/18, paragraph 44, which did not curtail the emergence of differing opinions in national jurisprudence (see the judgments of the Supreme Court of 19 September 2023, II CSKP 1627/22, II CSKP 1110/22 and II CSKP 1627/22). The resolution handed down on 7 May 2021 by seven judges, which was vested with the force of legal principle (III CZP 6/21), may again have given banks some assurance – until the CJEU handed down its judgments in December – that the limitation period for

13 See the Opinion of the Advocate General delivered on 14 November 2019 in C-616/18, *Cofidis SA* v *YU and ZT* and in C-679/18, *OPR-Finance s.r.o.* v *GK*, paragraph 74.

their claims did not commence before a statement had been obtained from the consumer indicating that the latter accepted the consequences of the invalidity of the agreement. The bank can hardly be expected to predict the direction in which case-law will evolve. The application of Article 5 of the Civil Code may lead to the conclusion that it is unjustifiable to impose on the seller or supplier the burden of the negative consequences of actions aimed at securing claims for the repayment of capital through the raising of a plea of retention after the expiry of the limitation period for such claims. Adequate sanctions are imposed on the bank by depriving it of the interest, commission and other revenues resulting from the loan agreement, which achieves the goal of a deterrent effect.