



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

15 June 2023*

(Reference for a preliminary ruling – Consumer protection – Unfair terms in consumer contracts – Directive 93/13/EEC – Mortgage loan indexed to a foreign currency – Article 6(1) – Article 7(1) – Application for interim measures – Suspension of performance of the loan agreement – Ensuring full effectiveness of the restitutory effect)

In Case C-287/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Warszawie XXVIII Wydział Cywilny (Regional Court (XXVIIIth Civil Division), Warsaw, Poland), made by decision of 24 March 2022, received at the Court on 3 May 2022, in the proceedings

YQ,

RJ

v

Getin Noble Bank S.A.,

THE COURT (Ninth Chamber),

composed of L.S. Rossi, President of the Chamber, S. Rodin and O. Spineanu-Matei (Rapporteur), Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- RJ and YQ, by M. Pledziejewicz, radca prawny,
- Getin Noble Bank S.A., by Ł. Hejmej, K. Pękalski, M. Przygodzka and A. Szczęśniak, adwokaci,
- the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,

* Language of the case: Polish.

- the Portuguese Government, by P. Barros da Costa, C. Chambel Alves and A. Cunha, acting as Agents,
 - the European Commission, by I. Rubene, N. Ruiz García and A. Szmytkowska, acting as Agents,
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns 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 (OJ 1993 L 95, p. 29), read in the light of the principles of effectiveness and proportionality.
- 2 The request has been made in proceedings between YQ and RJ, on the one hand, and Getin Noble Bank S.A., on the other, concerning an application for the grant of interim measures ordering the suspension of the performance of a mortgage loan agreement indexed in a foreign currency, pending a final decision on the repayment of sums unduly paid pursuant to the unfair terms contained in that agreement.

Legal context

European Union law

- 3 Under Article 6(1) of Directive 93/13:

‘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 and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’
- 4 Article 7(1) of that directive provides:

‘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.’

Polish law

The Civil Code

- 5 The ustawa – Kodeks cywilny (Law establishing the Civil Code) of 23 April 1964 (Dz. U. No°16, item 93), consolidated version (Dz. U. of 2020, item 1740) ('the Civil Code'), provides in Article 385¹:

'1. 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 contractual terms). This provision shall not apply to terms setting out the parties' principal obligations, including price or remuneration, provided that they are worded clearly.

2. If a term of that contract is not binding on the consumer pursuant to paragraph 1, the other terms of the contract shall otherwise continue to be binding on the parties.

3. The terms of a contract which have not been individually negotiated are those contractual terms over whose content the consumer has had no actual influence. They include, in particular, contractual terms taken from a standard contract proposed to that consumer by his or her co-contracting party.

4. Whosoever alleges that a term has been individually negotiated shall have the burden of proving that allegation.'

- 6 Article 405 of the Civil Code states:

'Any person who, without legal basis, has obtained a pecuniary benefit at the expense of another person shall be required to return that benefit in kind and, where that is not possible, to make good the value thereof.'

- 7 Article 410 of that code provides:

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

2. A performance shall be undue if the person who rendered it was not under an obligation to render it or was not under an obligation to render it to the person to whom it was rendered, if the basis for the performance has ceased to exist, if the objective of the performance has not been achieved or if the legal act requiring that same performance was invalid and has not become valid since the performance was rendered.'

Code of Civil Procedure

- 8 The ustawa – Kodeks postępowania cywilnego (Law establishing the Code of Civil Procedure) of 17 November 1964 (Dz. U. No°43, item 296), consolidated version (Dz. U. of 2021, item 1805) ('the Code of Civil Procedure'), provides in Article 189:

'An applicant may apply to a court for a declaration that a legal relationship or a right does or does not exist, provided that the applicant has a legitimate interest in bringing proceedings.'

9 Article 730¹ of that code provides:

‘1. Any party to the proceedings may request preventive measures provided that it demonstrates the *prima facie* existence of its claim and of an interest in seeking those measures.

2. The interest in seeking the grant of preventive measures exists where the failure to grant those measures would prevent or seriously impede the enforcement of the forthcoming judgment in the case concerned or would otherwise prevent or seriously impede the achievement of the purpose of the proceedings in that case.

...

3. When ruling on a request for preventive measures, the court must take into account the interests of the parties to the proceedings so as to guarantee the beneficiary adequate legal protection and not oblige the debtor more than necessary.’

10 Under Article 731 of that code, the grant of a preventive measure is not intended to enforce a claim unless otherwise provided by law.

11 Article 755 of that code provides:

‘1. Where a request for the grant of preventive measures does not relate to pecuniary claims, the court shall order the protective measures it considers appropriate in the circumstances of the case, without excluding the grant of protective measures provided for in respect of pecuniary claims. In particular, the court may:

(1) fix the rights and obligations of the parties or participants in the enforcement proceedings concerned for the duration thereof;

(2) prohibit the disposal of the assets or rights concerned by those proceedings;

(3) suspend those proceedings or any other proceedings for the enforcement of the decision concerned;

(4) ...

(5) order that an appropriate entry be entered in the land register or any other relevant register.

2. ...

2¹. Article 731 shall not apply if the granting of the precautionary measures requested is necessary to avoid imminent harm or other adverse consequences for the beneficiary.

3. The court shall notify the debtor of an order made *in camera* requiring him or her to perform or refrain from performing an act or not to impede an act of the beneficiary. The present provision shall not apply to orders directing the transfer of things held by the debtor.’

The dispute in the main proceedings and the question referred for a preliminary ruling

- 12 In 2008, YQ and RJ concluded a mortgage loan agreement with Getin Noble Bank with a depreciation period of 360 months for an amount of 643 395.63 Polish zlotys (PLN) (approximately EUR 140 000) ('the loan agreement at issue in the main proceedings'). That loan agreement contained a clause converting that amount into Swiss francs (CHF) at the purchase rate fixed by that bank, with a variable interest rate. The monthly instalments, calculated in CHF, were repayable in PLN at the CHF sale rate, also fixed unilaterally by that bank. The applicants in the main proceedings were provided with information on the impact of the variations in the interest and exchange rates on that loan agreement in the form of a comparative table.
- 13 On 25 May 2021, those applicants brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), as the court ruling at first instance, seeking to have the loan agreement at issue in the main proceedings declared invalid and Getin Noble Bank ordered to pay the sum of PLN 375 042.34 (approximately EUR 94 000), that is to say, the amount of the monthly instalments which they had already paid on the date of lodging their application with that court, plus statutory default interest and costs. Those applicants claimed, in that regard, that the terms of that loan agreement relating to the indexation of the amount of the loan concerned to a foreign currency constituted 'unfair terms' within the meaning of Article 3(1) of Directive 93/13.
- 14 The applicants in the main proceedings also lodged an application for the grant of interim measures, seeking to determine the rights and obligations of the parties to the proceedings and consisting, for the duration of the proceedings, first, in suspending the obligation to pay the monthly instalments provided for in that loan agreement, in the amount and on the dates specified therein for the period from the lodging of the action at first instance until the final conclusion of the proceedings; next, prohibiting Getin Noble Bank from issuing them with a notice of termination; and, lastly, prohibiting Getin Noble Bank from publishing information with the Biuro Informacji Gospodarczej (Economic Information Office, Poland) about the failure by the applicants in the main proceedings to make payments on the loan concerned during the period from the grant of the interim measures sought until the conclusion of the proceedings.
- 15 However, that court dismissed the application for interim measures lodged by the applicants in the main proceedings. In its view, those applicants had not demonstrated the existence of a legitimate interest in applying for interim measures since there was nothing affirming that the failure to grant such measures would have prevented or seriously impeded the enforcement of the forthcoming judgment in the main proceedings or the achievement of the purpose of the proceedings in that case. Therefore, the conditions laid down in Article 730¹(1) and (2) of the Code of Civil Procedure were not satisfied.
- 16 The applicants in the main proceedings brought an appeal against that court's decision before the Sąd Okręgowy w Warszawie XXVIII Wydział Cywilny (Regional Court (XXVIIIth Civil Division), Warsaw, Poland), the referring court, claiming that they had a legitimate interest in seeking the grant of those interim measures. Getin Noble Bank disputed that claim, arguing, inter alia, that the prima facie existence of the applicants' claim had not been demonstrated. In addition, that bank questioned the unfairness of the terms of the loan agreement at issue in the main proceedings and stated that its financial situation was sound.
- 17 The referring court states that an application was made to it for the grant of interim measures consisting in the suspension of the obligation to pay the monthly instalments provided for in the loan agreement at issue in the main proceedings for the period from the date on which the action

at first instance was lodged to the final conclusion of the proceedings. As regards an application for interim measures, that court explains that it is ruling on the basis of a *prima facie* demonstration of the claims of the parties to the main proceedings.

- 18 In that regard, the referring court considers, first, in relation to the *prima facie* existence of the claim of the applicants in the main proceedings, that it has been established that some of the contractual terms concerned are unfair and that the loan agreement at issue in the main proceedings must be annulled, in that the performance of that contract is no longer objectively possible under Polish law. That court observes that, under Article 410 of the Civil Code, each of the parties to an invalid contract has a right, independent of that of the other party, to restitution of the performance completed.
- 19 Second, as regards the demonstration of the legitimate interest of the applicants in the main proceedings in bringing proceedings, the referring court notes that such an interest exists, in accordance with Article 730¹(2) of the Code of Civil Procedure, where the failure to grant interim measures would prevent or seriously impede the enforcement of the forthcoming judgment in the main proceedings or the achievement of the purpose of the proceedings in that case.
- 20 That court states that the national courts, however, rarely grant consumer applications for such interim measures in circumstances such as those at issue in the main proceedings. Some of those courts state that an action for a declaration that a contract is invalid due to the unfairness of a contractual term contained therein is not capable of leading to enforcement and therefore does not require the grant of interim measures. Other courts take the view that the grant of an interim measure must be intended not for the enforcement of a claim, but to avoid harm or other adverse consequences for the consumer concerned, with the result that the grant of such a measure is possible only if it is *prima facie* demonstrated that the bank concerned is in a poor financial situation. Lastly, there is case-law of those same courts according to which, in the event of the annulment of a loan agreement, the consumer concerned must discharge his or her obligations to that bank by repaying it the loan capital. Accordingly, that consumer would have no interest in seeking the grant of interim measures such as those applied for in the main proceedings, since he or she would in any event be required to make payments to that bank irrespective of the forthcoming final decision on the substance, by way of repayment of the capital used or even by way of ‘remuneration for the use of that capital’.
- 21 The referring court considers, *inter alia*, that, since Directive 93/13 seeks to protect the consumer concerned by restoring equality between the parties, that directive precludes a refusal to grant such interim measures. That court takes the view that, where the elimination of unfair contract terms means that a loan agreement is invalid in its entirety, the grant of appropriate interim measures, such as suspension of the obligation to pay the monthly instalments including the principal and the interest due under that loan agreement for the duration of the proceedings, is, in principle, necessary to ensure the full effectiveness of the forthcoming decision on the substance. According to that court, where, following the removal of unfair contractual terms of that loan agreement, performance of that agreement has been rendered objectively impossible, the refusal to grant such interim measures would undermine the restitutory effect required under Article 6(1) and Article 7(1) of Directive 93/13 and, therefore, the effectiveness of those provisions.
- 22 In that regard, the referring court states, *inter alia*, that Polish law lays down detailed procedural rules under which the amount of the claim is fixed at the date on which the application for a declaration of invalidity of the loan agreement concerned is lodged. A consumer can therefore

request reimbursement only of the amount of the monthly instalments already paid up to that date. Consequently, in the absence of the grant of an interim measure at the beginning of those proceedings, that consumer would be obliged, at the end of those proceedings, to bring new proceedings against the bank concerned, the object of which would be recovery of the monthly instalments paid by him or her during the period between the beginning and the end of those new proceedings. The referring court takes the view that such a situation would penalise that consumer and undermine the effectiveness of Directive 93/13. It would not fully restore the true balance between the rights and obligations of the parties either, since it would be the consumer who, in order to enforce his or her rights, would have to invest even more financial resources and time in initiating further legal proceedings.

- 23 In those circumstances, the Sąd Okręgowy w Warszawie XXVIII Wydział Cywilny (Regional Court (XXVIIIth Civil Division), Warsaw) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘In the light of the principles of effectiveness and proportionality, do Article 6(1) and Article 7(1) of Directive 93/13 preclude an interpretation of national legislation or of national case-law according to which a national court may, in particular because of a consumer’s obligations to settle payments with a seller or supplier or the sound financial situation of the seller or supplier, dismiss a consumer’s application for an interim measure (securing of the action) to suspend, during the course of the proceedings, the performance of a contract which is likely to be declared invalid as a result of the removal of the unfair terms from it?’

Consideration of the question referred

Admissibility

- 24 Getin Noble Bank disputes the admissibility of the request for a preliminary ruling.
- 25 In essence, the defendant in the main proceedings submits, in that regard, in the first place, that that request does not concern the interpretation of EU law, since the provisions of Directive 93/13 are not applicable to the effects of the removal of unfair terms, given that the objective of that directive is achieved when the balance between the parties is restored. The effects of the invalidation of a contract containing unfair terms are therefore a matter for national law. Therefore, the referring court’s question relates, in reality, to the conditions for the application of interim measures in circumstances where, as a result of the annulment of the contract concerned, the parties to that contract have been placed on an equal footing and are no longer in a relationship between a consumer and a seller or supplier. Thus, there is no need to apply the provisions of that directive in order to assess the merits of the application for the grant of those interim measures.
- 26 In that regard, it should be recalled that it is solely for the national court before which the dispute in the main proceedings has been brought to assess the need for a preliminary ruling and the relevance of the questions which it submits to the Court, which enjoy a presumption of relevance. Thus, the Court is, in principle, bound to give a ruling where the question submitted concerns the interpretation or the validity of a rule of EU law, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main proceedings or its purpose,

where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to that question (see, to that effect, judgment of 5 May 2022, *Zagrebačka banka*, C-567/20, EU:C:2022:352, paragraph 43 and the case-law cited).

- 27 Moreover, in accordance with settled case-law, where it is not obvious that the interpretation of an EU law provision bears no relation to the facts of the main proceedings or its purpose, the objection alleging the inapplicability of that provision to the case in the main proceedings does not relate to the admissibility of the request for a preliminary ruling, but concerns the substance of the questions (judgments of 4 July 2019, *Kirschstein*, C-393/17, EU:C:2019:563, paragraph 28, and of 27 April 2023, *M.D. (Ban on entering Hungary)*, C-528/21, EU:C:2023:341, paragraph 52 and the case-law cited).
- 28 In the present case, first, the dispute in the main proceedings concerns an application for the grant of interim measures seeking inter alia suspension of the performance of a mortgage loan agreement concluded with consumers by a seller or supplier, pending a final decision on the invalidity of that agreement on grounds of the unfair nature of the terms contained therein. Second, the question referred concerns the interpretation of the provisions of Directive 93/13, which require inter alia 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, and aims to determine whether those provisions preclude national case-law allowing for such applications to be dismissed.
- 29 In those circumstances, it is not self-evident that the interpretation of Directive 93/13 that is sought bears no relation to the actual facts of the main proceedings or its purpose or that the problem raised is hypothetical.
- 30 It must also be borne in mind that the protection granted by Directive 93/13 cannot be limited solely to the duration of the performance of a contract concluded with a consumer by a seller or supplier, but also applies after the performance of that contract. Thus, while it is indeed for the Member States, in the event of invalidity of a contract concluded between a consumer and a seller or supplier because one of the terms in that contract is unfair, to regulate, by means of their national law, the effects of that invalidation, the fact remains that that must be done in compliance with the protection granted by that directive to a consumer, in particular, by ensuring that the legal and factual situation of that consumer would have been restored in the absence of that unfair term (see, to that effect, judgment of 16 March 2023, *M.B. and Others (Effects of the invalidation of a contract)*, C-6/22, EU:C:2023:216, paragraphs 21 and 22).
- 31 In the second place, Getin Noble Bank submits that the Court does not have before it the factual or legal material necessary to give a useful answer to the question referred, since the classification of the applicants in the main proceedings as consumers by the referring court is incorrect in the light of the circumstances of the present case.
- 32 In that regard, it should be observed that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Furthermore, in the context of a reference for a preliminary ruling, it is not for the Court to rule on the interpretation of provisions of national law or to decide whether the interpretation or application of those provisions by the national court is correct, since such an

interpretation falls within the exclusive jurisdiction of the national court (see, to that effect, judgment of 25 November 2020, *Sociálna poisťovňa*, C-799/19, EU:C:2020:960, paragraphs 44 and 45 and the case-law cited).

- 33 In the present case, since the referring court has taken the view that the applicants in the main proceedings were consumers, it is not for the Court to rule on such a classification. The Court thus has before it the factual and legal material necessary to give a useful answer to the question referred.
- 34 Accordingly, the reference for a preliminary ruling must be held to be admissible.

Substance

- 35 By its single question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding national case-law according to which a national court may dismiss an application for the grant of interim measures lodged by a consumer seeking the suspension, pending a final decision on the invalidity of the loan agreement concluded by that consumer on the ground that that loan agreement contains unfair terms, of the payment of the monthly instalments due under that loan agreement, where the grant of those interim measures is necessary to ensure the full effectiveness of that decision.
- 36 As a preliminary point, it should be borne in mind that the objective of Directive 93/13 is to ensure a high level of consumer protection (see, to that effect, judgment of 25 November 2020, *Banca B.*, C-269/19, EU:C:2020:954, paragraph 37).
- 37 To that end, Article 6(1) of Directive 93/13 requires Member States to ensure that unfair contract terms are not binding on the consumer, without the consumer having to bring an action and obtain a judgment confirming the unfairness of those terms (judgment of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraphs 20 to 28). It follows that the national courts are required to exclude the application of those terms so that they do not produce binding effects with regard to a consumer, unless the consumer objects (judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 52 and the case-law cited).
- 38 Under Article 7(1) of Directive 93/13, Member States are to 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.
- 39 In that context, the Court has held that it is for the Member States, by means of their national legislation, to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced. However, that finding must enable the legal and factual situation of the consumer concerned to be restored in the absence of that unfair term. Such a framework in national law of the protection guaranteed to consumers by Directive 93/13 cannot adversely affect the substance of that protection (see, to that effect, judgment of 30 June 2022, *Profi Credit Bulgaria (Offsetting ex officio in the event of an unfair term)*, C-170/21, EU:C:2022:518, paragraph 43 and the case-law cited).

- 40 In accordance with settled case-law, in the absence of specific EU rules governing the matter, the rules implementing the consumer protection provided for by 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 those States. 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 EU law (principle of effectiveness) (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 27 and the case-law cited).
- 41 Thus, as regards, in particular, the interim measures sought in order to assert the rights arising from Directive 93/13, the Court was able to hold that that directive precludes national legislation which does not allow the court adjudicating on the substance, which has jurisdiction to assess the unfairness of a contractual term, to grant interim measures, such as staying enforcement proceedings, where the grant of such measures is necessary to ensure the full effectiveness of its final decision, that legislation being liable to undermine the effectiveness of the protection intended by that directive (see, to that effect, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraphs 59, 60 and 64).
- 42 In addition, the Court has had occasion to state that it may be necessary to grant such measures, inter alia, where there is a risk that that consumer will pay, in the course of legal proceedings the duration of which may be considerable, monthly instalments of a higher amount than that actually due if the term concerned were to be disregarded (see, to that effect, order of 26 October 2016, *Fernández Oliva and Others*, C-568/14 to C-570/14, EU:C:2016:828, paragraphs 34 to 36).
- 43 Accordingly, the protection guaranteed to consumers by Directive 93/13, in particular by Article 6(1) and Article 7(1) thereof, requires that the national court must be able to grant an appropriate interim measure, if that is necessary to ensure the full effectiveness of the forthcoming decision on the unfairness of contractual terms.
- 44 In the present case, as regards the principle of equivalence, it is not apparent from the information provided by the referring court that the relevant national legislation on interim measures is applied differently depending on whether a dispute concerns rights derived from national law or rights derived from EU law.
- 45 As regards the principle of effectiveness, it should be noted that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (see, to that effect, judgment of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 43). The same is necessarily true as regards a judicial interpretation of that national provision.
- 46 In that regard, it follows from the information in the request for a preliminary ruling and from the written observations submitted to the Court, inter alia, by the Polish Government, that the Code of Civil Procedure allows the Polish court hearing proceedings for a declaration of invalidity of a contract on grounds of an unfair contractual term contained therein to grant interim measures. The referring court refers, in that regard, to Article 730¹ of the Code of Civil Procedure, concerning the conditions for granting interim measures, and to Article 755(2)¹ of that code, under which that court may grant a preventive measure, even if it was intended to enforce a claim, where that is necessary to avoid imminent harm or other adverse consequences for the beneficiary.

- 47 According to the referring court, however, there is a significant trend in national case-law towards dismissing applications for interim measures in circumstances such as those at issue in the main proceedings, that is, where an application is made for suspension, until delivery of the final decision on the substance, of the monthly instalments due under a loan agreement which may be declared invalid on account of the unfair terms which it contains. According to that case-law, such a dismissal is justified by the fact that the consumer concerned has no ‘interest in bringing proceedings’ for the reasons summarised in paragraph 20 of the present judgment.
- 48 It is apparent from the information in the request for a preliminary ruling and the written observations submitted to the Court by the Polish Government that, in the context of the examination of an action for a declaration of invalidity of a contract on the ground that a contractual term contained therein is unfair, the national court is to rule, in principle, if it is not to rule *ultra petita*, on the forms of order sought in the action, that is to say, on the amounts paid up to the date on which the action is brought before it, unless the scope of that action is extended. Consequently, where that court finds on the substance that, following the removal of that term, that contract can no longer objectively be performed, as is the case in the main proceedings, and that it is necessary to return to the consumer concerned the amounts which he or she has unduly paid under that agreement, the dismissal of an application for an interim measure seeking suspension of payment of the monthly instalments due under that contract would render, at least in part, ineffective the forthcoming final decision on the substance. Such a final decision would not have the effect of restoring the legal and factual situation of that consumer in the absence of that unfair term, in accordance with the case-law cited in paragraph 39 of the present judgment, since, under the applicable procedural rules, only a part of the amount already paid could be the subject of that final decision.
- 49 It follows that, in such circumstances, the grant of an interim measure suspending payment of the monthly instalments due under a loan agreement which may be invalidated because of an unfair term contained therein could be necessary in order to ensure the full effectiveness of the forthcoming decision, the restitutory effect which that decision entails and, therefore, the effectiveness of the protection guaranteed by Directive 93/13.
- 50 As is apparent from the request for a preliminary ruling, in the absence of an interim measure suspending his or her contractual obligation to pay those monthly instalments, a consumer, in order to avoid a final decision on the invalidity of the loan agreement concerned consisting only in the partial restoration of his or her situation, would have to either extend the scope of his or her initial application, after payment of each monthly instalment, or, following a decision annulling that loan agreement, bring a new action, the purpose of which would be to settle the monthly instalments paid during the first proceedings. In that regard, it should be noted that, in its written observations, the Polish Government observes that, under Article 25a of the *ustawa o kosztach sądowych w sprawach cywilnych* (Law on legal costs in civil proceedings) of 28 July 2005 (Dz. U. No°167, item 1398), consolidated version (Dz. U. of 2022, item 1125), any extension of the scope of an action is subject to legal costs.
- 51 Furthermore, the bringing of a new action by a consumer is, according to the referring court, necessary in any event where the first proceedings for a declaration of invalidity of a loan agreement on the ground that a contractual term contained therein is unfair are followed by appeal proceedings, since, in that scenario, the procedural rules of Polish law would not provide for the possibility of extending the scope of the action at first instance. In those circumstances, it is clear that, in the absence of the grant of interim measures suspending the obligation to pay the monthly instalments due under that loan agreement, the decision invalidating that agreement and

ordering the repayment of the amounts already paid by that consumer would not enable attainment of the objective of Directive 93/13 of restoring that consumer's legal and factual situation.

- 52 Furthermore, as observed in paragraph 42 of the present judgment, the grant of such an interim measure seems all the more necessary where that consumer has paid the bank concerned an amount greater than that of the sum borrowed even before he or she has initiated proceedings.
- 53 Lastly, it cannot be ruled out that, in the absence of the grant of an interim measure seeking suspension of the contractual obligation of the same consumer, the extension of the proceedings concerned would lead to a deterioration of the consumer's financial situation to such an extent that the consumer would no longer have the means to bring the actions necessary to obtain reimbursement of the sums to which he or she is entitled under the contract declared invalid.
- 54 Such circumstances could also increase the risk that a consumer would no longer be able to pay the monthly instalments due under that loan agreement, which could lead the bank concerned to initiate enforcement proceedings for its claim on the basis of a loan agreement that could be invalidated.
- 55 It follows from the foregoing that national case-law according to which the grant of interim measures to suspend payment of monthly instalments due under a loan agreement is refused, whereas those measures are necessary in order to guarantee the protection granted to consumers by Directive 93/13, does not appear, in the light of its position in all the procedural rules laid down in Polish law, to be consistent with the principle of effectiveness and, therefore, is not compatible with Article 6(1) and Article 7(1) of Directive 93/13.
- 56 That being so, it should be borne in mind that national courts must do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 59 and the case-law cited).
- 57 The requirement of such an interpretation entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraph 66 and the case-law cited).
- 58 In the present case, the referring court and the Polish Government take the view that the legislation concerned and, more specifically, the second condition to which the grant of interim measures in Polish law is subject, namely the condition of the existence of an 'interest in bringing proceedings' laid down in Article 730¹ of the Code of Civil Procedure, may be interpreted in a manner consistent with EU law.
- 59 In the second place, it should be noted, first of all, that the national case-law referred to in paragraph 55 of the present judgment can be classified as incompatible with EU law only where that court finds that the grant of the interim measures sought is necessary in order to ensure the

full effectiveness of the forthcoming final decision on the substance. In that regard, first, it must have sufficient evidence as to the unfairness of one or more contractual terms so that it is likely that the loan agreement concerned is invalid or, at the very least, that a repayment of the monthly instalments due under that agreement will have to be made to the consumer concerned. Second, it is for that court to determine, in the light of all the circumstances of the case, whether the suspension of that consumer's obligation to pay those monthly instalments for the duration of the proceedings concerned is necessary in order to ensure the restoration of the legal and factual situation in which that consumer would have been in the absence of that term or those terms. Thus, that court will be able to take into account, in particular, the financial situation of the same consumer and the risk that he or she runs of having to repay to the bank concerned an amount which exceeds that which he or she has borrowed from that bank.

- 60 Therefore, if the national court considers, first, that there is sufficient evidence that the contractual terms concerned are unfair and that repayment of the sums paid by the consumer concerned under the loan agreement at issue in the main proceedings is therefore likely and, second, that, if interim measures to suspend payment of the monthly instalments due under that agreement are not granted, the full effectiveness of the final decision on the substance of the case cannot be guaranteed, which it is for the national court to assess by taking into account all the circumstances of the case, that court must grant interim measures consisting in suspension of that consumer's obligation to make payments on the basis of that contract.
- 61 In the light of all the foregoing, the answer to the question referred is that Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding national case-law according to which a national court may dismiss an application for the grant of interim measures lodged by a consumer seeking the suspension, pending a final decision on the invalidity of the loan agreement concluded by that consumer on the ground that that loan agreement contains unfair terms, of the payment of the monthly instalments due under that loan agreement, where the grant of those interim measures is necessary to ensure the full effectiveness of that decision.

Costs

- 62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the principle of effectiveness,

must be interpreted as precluding national case-law according to which a national court may dismiss an application for the grant of interim measures lodged by a consumer seeking the suspension, pending a final decision on the invalidity of the loan agreement concluded by that consumer on the ground that that loan agreement contains unfair terms, of the payment of the monthly instalments due under that loan agreement, where the grant of those interim measures is necessary to ensure the full effectiveness of that decision.

[Signatures]