



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

7 December 2023*

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Article 6(1) and Article 7(1) – Effects of a finding that a term is unfair – Mortgage loan agreement indexed to a foreign currency containing unfair terms concerning the exchange rate – Nullity of that contract – Claims for restitution – Statutory interest – Limitation period)

In Case C-140/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court, Warsaw City Centre, Warsaw, Poland), made by decision of 18 January 2022, received at the Court on 25 February 2022, in the proceedings

SM,

KM

v

mBank S.A.,

intervening party:

Rzecznik Finansowy,

THE COURT (Ninth Chamber),

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

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Polish.

after considering the observations submitted on behalf of:

- KM and SM, by W. Bochenek and P. Stalski, radcowie prawni,
- mBank S.A., by A. Cudna-Wagner and K. Stokłosa, radcowie prawni and B. Miąskiewicz, adwokat,
- the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,
- the Portuguese Government, by C. Alves, P. Barros da Costa, A. Cunha, B. Lavrador and A. Pimenta, acting as Agents,
- the European Commission, by 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).
- 2 The request has been made in proceedings between SM and KM, on the one hand, and mBank S.A., a banking institution, on the other, concerning reimbursement of sums paid to that banking institution in respect of a mortgage loan which had to be cancelled on the ground that it contains unfair terms.

Legal context

European Union law

- 3 The tenth recital of Directive 93/13 states:

‘Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; ...’

- 4 Article 6(1) of that directive is worded as follows:

‘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.’

5 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

6 Article 60 of the ustawa – Kodeks cywilny (Law on the Civil Code), of 23 April 1964 (Dz. U. No 16, item 93), in the version applicable to the dispute in the main proceedings (‘the Civil Code’), provides:

‘Subject to the exceptions provided for by law, the intent of the person performing a legal transaction may be expressed by any conduct on the part of that person which manifests that intent in a sufficient manner, including the disclosure of that intent in electronic form.’

7 Article 117 of that code is worded as follows:

‘1. Subject to the exceptions provided for by law, pecuniary claims shall be subject to a limitation period.

2. 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 limitation period shall be invalid.’

2¹. Once the limitation period has expired, it shall no longer be possible to pursue a claim against a consumer.’

8 Article 117¹ of that code provides:

‘1. In exceptional cases, the court may, after weighing up the interests of the parties, disregard the expiry of the limitation period for an action against a consumer if equity so requires.

2. 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;

(3) the nature of the circumstances which led the creditor not to pursue his or her claim, including the effect of the debtor’s conduct on the delay in pursuing his or her claim.’

9 Article 118 of that code, in the version in force until 8 July 2018, was worded as follows:

‘Unless a specific provision provides otherwise, the limitation period shall be 10 years, and for claims concerning periodic payments as well as for claims connected with the pursuit of a business activity, it shall be 3 years.’

10 Article 118 of the Civil Code, in its version in force since 8 July 2018:

‘Unless a specific provision provides otherwise, the limitation period shall be 6 years, and for claims concerning periodic payments as well as for claims connected with the pursuit of a business activity, it shall be 3 years. However, the limitation period shall expire on the last day of the calendar year, unless it is shorter than two years.’

11 According to Article 120(1) of that code:

‘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 rightholder undertaking a specified act, the limitation period shall begin to run on the day when the claim would have become due if the rightholder had undertaken that act at the earliest possible opportunity.’

12 Article 385¹ of that code provides as follows:

‘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 terms). This provision shall not apply to terms setting out the parties’ main obligations, including price or remuneration, so long as they are worded clearly.

2. 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.

3. The terms of a contract which have not been individually negotiated are those over whose content the consumer had no actual influence. This shall refer in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party.

4. The burden of proving that a term has been individually negotiated shall lie with the person relying thereon.’

13 Article 405 of that code provides:

‘Any person who, without legal grounds, obtains an economic advantage at the expense of another person shall be required to restore that benefit in kind and, where that is not possible, to return the value thereof.’

14 Article 410 of the Civil Code reads as follows:

‘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 any obligation at all or was not under any obligation towards the person to whom he or she rendered the performance, or if the basis for the performance has ceased to exist or if the intended purpose of the performance has not been achieved, or if the legal act on which the obligation to render the performance was based was invalid and has not become valid since the performance was rendered.’

15 Article 455 of that code provides:

‘If the time limit for performance is not specified or if it does not follow from the nature of the obligation, the performance shall be rendered in a timely manner after the debtor has been called upon to render it.’

16 Article 481(1) of the Civil Code states:

‘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.’

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

17 On 18 February 2009, SM and KM entered into a mortgage loan agreement with mBank – which includes interest at a variable rate – denominated in Polish zlotys (PLN) and indexed to the Swiss franc (CHF) (‘the loan agreement’).

18 According to the terms of that agreement, SM and KM were required to pay monthly instalments in Polish zlotys, the amount of which was determined by applying the buying rate for the Swiss franc published in mBank’s table of exchange rates on the payment date of those monthly instalments (‘the conversion clauses’).

19 Taking the view that the conversion clauses were unfair, SM and KM lodged a complaint with mBank on 4 July 2019. By that complaint, SM and KM requested reimbursement, within 30 days, of the monthly loan instalments unduly received by that bank on account of the invalidity of the loan agreement, amounting to PLN 242 238.61 (approximately EUR 52 277), and, should there be no grounds allowing for that agreement to be declared invalid, payment of an amount of PLN 52 298.92 (approximately EUR 11 288) in respect of reimbursement of overpaid monthly instalments (capital and interest) received by that bank during the period from 20 July 2009 to 18 March 2019.

20 By letter of 16 July 2019, mBank replied to that complaint, stating that the loan agreement was lawful and valid and did not contain any unfair terms.

21 On 31 July 2019, SM and KM filed an application with the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court, Warsaw City Centre, Warsaw, Poland), the referring court, for a conciliation requesting that mBank pay them the amounts referred to in paragraph 19 of this judgment.

22 On 4 December 2019, mBank replied to that application stating that it was of the view that an agreement appeared impossible to reach.

23 On 13 December 2019, at a public hearing at which mBank was not present, SM and KM appeared before the referring court and confirmed their application. That court therefore found that no agreement had been reached and ordered that the conciliation file be closed.

- 24 On 10 August 2020, SM and KM indicated that they consented to the loan agreement being declared void in its entirety, considered the cancellation of that agreement to be in their favour, and accepted the consequences of the agreement's invalidity, including the legal and financial consequences.
- 25 After the referring court had informed SM and KM of the consequences of the cancellation of the loan agreement, they stated, at a hearing held on 27 October 2020 before that court, that they understood those consequences and accepted the cancellation of that agreement.
- 26 That court found that the conversion clauses contained in the loan agreement are unfair and that that agreement could not remain in force if those clauses were annulled.
- 27 In the light of the case-law of the Court concerning Directive 93/13, the referring court observes that, in so far as the nullity of the unfair terms entails the cancellation, in its entirety, of the loan agreement, the consequence of that cancellation is that the contracting parties have claims against each other for reimbursement of the equivalent of all the sums unduly paid in the performance of that agreement.
- 28 The referring court states that the interpretation of Polish law on the effects of the non-binding nature of unlawful contractual terms had been regarded as well-established until a resolution of the Sąd Najwyższy (Supreme Court, Poland) of 7 May 2021.
- 29 According to the referring court, by that resolution, the Sąd Najwyższy (Supreme Court) found that the interpretation according to which the Polish courts are required to examine of their own motion the possible existence of any unfair terms in agreements concluded with consumers and to find the absolute nullity of those terms was not consistent with the case-law of the Court pursuant to which a consumer may consent to the application of an unfair term. First, in so far as, in such a case, the unfair term concerned produces its full effects, the penalty which must be set is not the absolute nullity of that term, but rather its 'suspended unenforceability'. Secondly, the Sąd Najwyższy (Supreme Court) found that, to the extent that, in the event of the cancellation of a loan agreement containing an unfair term, the seller or supplier concerned is entitled to seek reimbursement of the capital loaned, the seller or supplier must also be granted the right to rely on the unenforceability of that term and on the resulting cancellation of that agreement.
- 30 The referring court has doubts as to the compatibility of the concept of 'suspended unenforceability' with Directive 93/13. That court states that that concept implies that an act remains valid but is deprived of its effects until the consumer, if at all, expresses his or her consent. Yet it follows from the case-law of the Court that an unfair term must be regarded as not having existed and that a national court must draw all the consequences of the unenforceability of a contractual term which has been found to be unfair, without expecting the consumer to lodge a declaration to that effect.
- 31 Moreover, the referring court notes that it follows from the resolution of the Sąd Najwyższy (Supreme Court) of 7 May 2021 that an unfair term remains in a state of 'suspension' until the consumer lodges a formal declaration by which he or she states, first, not to consent to that term remaining effective, secondly, to be aware of (i) the fact that the nullity of that term entails the cancellation of that agreement of which it forms part and, (ii) the consequences of that cancellation and, thirdly, to consent to the cancellation of that agreement ('the formal declaration'). However, according to the referring court, the obligation to lodge such a

declaration is not apparent from Directive 93/13 or from the case-law of the Court. The referring court concludes therefrom that to render the applicability of Article 6(1) of Directive 93/13 subject to the lodging of a formal declaration infringes that provision.

- 32 The referring court also notes that, as long as the state of suspension of an agreement continues, the seller or supplier concerned cannot require that payments due under that agreement be made with the result that the limitation period cannot begin to run for that seller or supplier.
- 33 Furthermore, according to that court, when a consumer makes an out-of-court request for the annulment of an unfair term, a seller or supplier is not in a position to ascertain whether that consumer has been informed of his or her rights and of the consequences of the annulment of that term. The point in time at which a consumer brought an application for annulment and stated that he or she is aware of his or her rights and of the consequences of the annulment of an unfair term is important, since it determines the starting point of the limitation period for the lender's restitution claims, the possibility to require that such claims become payable and to make them subject to compensation.
- 34 The referring court has doubts as regards the interpretation of Polish law by the Sąd Najwyższy (Supreme Court) in its resolution of 7 May 2021, according to which the limitation period in respect of a seller or supplier's claim seeking reimbursement by a consumer of a payment received by that consumer on account of the cancellation of an agreement begins to run only on the day on which that consumer lodges a formal declaration, in so far as it is contrary to the principle of effectiveness.
- 35 The referring court notes that, according to that interpretation, if the consumer does not lodge any formal declaration, that claim will never be time-barred. In addition, even if the consumer lodges such a declaration, but the seller or supplier disputes that it constitutes 'the consumer's express declaration confirming that he or she had been comprehensively informed', as required by the Sąd Najwyższy (Supreme Court) and, consequently, submits that it has produced no effects, the limitation period for that claim will not begin to run.
- 36 The referring court states that such an interpretation places the seller or supplier in a better legal position than the consumer, since the limitation period for the seller or supplier's claim always begins to run much later than that of the consumer's claim. It would also begin to run later than that of the bank's claim in the event of invalidity of a contract which does not contain unfair terms, with the result that the principle of equivalence would be infringed. In addition, the referring court takes the view that the fact that the seller or supplier is in such a favourable position also infringes the principle of effectiveness and Article 7(1) of Directive 93/13, since a seller or supplier which draws up a contract containing unfair terms is de facto guaranteed that claim will not be time-barred if the consumer does not expressly inform that seller or supplier beforehand that he or she is aware of the fact that that contract contains unfair terms and of the legal consequences which arise therefrom.
- 37 In the opinion of the referring court, the date from which the limitation period begins to run for the seller or supplier's claim must be, at the latest, the date on which the seller or supplier receives the consumer's first letter claiming that the contract is void or alleging the existence of unfair terms. In that case, the seller or supplier should understand that the consumer is aware of the consequences of cancelling that contract and that he or she accepts those consequences.

- 38 That court even takes the view that, in accordance with the general rule, the limitation period for a seller or supplier's claim must begin to run from the date on which it provides its service or from a slightly later date. In that respect, the referring court states that, having regard to its level of expertise, a bank which draws up a contract containing unfair terms may be regarded as knowing, from the outset, that that contract contains such terms and that that entails the restitution of the reciprocal payments provided for under that contract. That court adds that, on 27 December 2010, the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court of Warsaw – Competition and Consumer Protection Court, Poland) has already held, in a case in which mBank was one of the parties, that a term such as that at issue in the main proceedings was unlawful. It concludes therefrom that accepting that the limitation period for the claim of a bank seeking reimbursement of the capital loaned begins to run only from the date on which the consumer concerned lodges a formal declaration is tantamount not only to accepting unlawful conduct on the part of the seller or supplier but also to encouraging that seller or supplier to adopt such conduct, in infringement of Directive 93/13.
- 39 The referring court observes that some Polish courts accept that the interpretation adopted by the Sąd Najwyższy (Supreme Court) leads to a consumer's claim vis-à-vis a bank becoming due only after that consumer has freely and knowingly declared to consent to the cancellation of the contract.
- 40 If that interpretation were to be accepted, it would follow, according to the referring court, that, even if a consumer made a prior request to a bank to reimburse the sums unduly paid on account of the nullity of the contract concluded with that bank, his or her claim will not fall due, with the result that he or she will be able to claim statutory default interest only from the date he or she lodges such a declaration. According to that court, the fact of making the exercise of the consumer's right to obtain default interest subject to a new condition infringes the principle of equivalence, in so far as, in accordance with the general principles of Polish civil law, a claim which cannot become time-barred falls due as soon as reimbursement is requested. Besides the fact that that interpretation is contrary to the Court's case-law, it encourages conduct by a seller or supplier consisting in deliberately delaying the reimbursement of a consumer's claim and thus prolongs the legal proceedings concerned.
- 41 Lastly, the referring court states that, according to the interpretation of the Sąd Najwyższy (Supreme Court), the consumer's claim for reimbursement of the payments he or she made under an invalid loan agreement because it contains unfair terms must be reduced to the amount of interest on the capital which he or she should have paid to the bank concerned had the loan agreement been valid. That court is uncertain whether Directive 93/13 and the principles of effectiveness and equivalence make it possible to limit the consumer's claim for reimbursement in that way.
- 42 In that regard, the referring court states that the need for such a reduction of the consumer's claim is explained by the fact that the restitution of all the payments up to their total amount would entail the unjust enrichment of the consumer. However, it takes the view that that interpretation is contrary to the principle of equivalence, since it limits the consumer's right to reimbursement of the sums he or she unduly paid to a bank, whereas that bank may demand reimbursement of the undue sums which it provided to that consumer in full.
- 43 Furthermore, that interpretation is also contrary to the principle of effectiveness. The referring court is of the opinion that such an interpretation, first, infringes that principle in the same way as if banks were accorded the right to recover debts from consumers in respect of a

non-contractual use of the capital and, secondly, is similar to a temporal limitation on a consumer's claim for restitution which is contrary to Directive 93/13, by reference to the judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980).

44 In those circumstances, the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court, Warsaw City Centre, Warsaw) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 6(1) and Article 7(1) of Directive [93/13] and the principles of effectiveness and equivalence, be interpreted as precluding a judicial interpretation of national legislation pursuant to which, in the case where a contract contains an unfair term without which it cannot be performed:

- (1) the contract becomes definitively ineffective (invalid) retroactively from the time of its conclusion only after the consumer has made a declaration of intent that he or she does not consent to the unfair term remaining effective, is aware of the consequences of the invalidity of the contract and consents to the contract being invalidated;
- (2) the limitation period for a seller or supplier's claim for the return of undue payments under the contract begins to run only from the date on which the consumer made the declaration of intent referred to in point 1 above, even if the consumer had previously demanded payment [of the sums unduly paid to him or her] from the seller or supplier and the seller or supplier could have been previously aware that the contract drawn up by it contained unfair terms;
- (3) the consumer may demand payment of statutory [default interest] only from the date on which he or she made the declaration of intent referred to in point 1 above, even if he or she had previously demanded payment from the seller or supplier [of those sums];
- (4) the consumer's claim for the return of payments which he or she made under the invalid loan agreement (loan instalments, fees, commissions and insurance premiums) must be reduced by the equivalent of the interest on principal to which the bank would have been entitled if the loan agreement had been valid, whereas the bank can demand the return of the payments which it made under the same invalid loan agreement (loan principal) in full?

The jurisdiction of the Court

45 mBank submits that points 1 to 3 of the question referred for a preliminary ruling seek, in essence, to obtain the Court's interpretation of the rules of Polish law, which it claims falls outside the Court's jurisdiction.

46 In that regard, mBank contends that the choice of penalties which must be applied in a situation where an agreement is not consistent with Directive 93/13 and, therefore, cannot continue to exist without a term regarded as unfair is covered by national law with the result that it is not for the Court but for the national court to interpret and apply that law.

47 It must be recalled that the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and the national courts by means of which the Court provides national courts with the criteria of interpretation of EU law which they need in order to decide

the disputes before them. In the context of that cooperation, it is for the national court before which the dispute has been brought, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (order of 16 December 2021, *Fedasil*, C-505/21, EU:C:2021:1049, paragraph 38 and the case-law cited).

- 48 In that respect, it should be borne in mind that the regulation by national law of the protection guaranteed to consumers by Directive 93/13 may not alter the scope and, therefore, the substance of that protection and thus affect the strengthening of the effectiveness of that protection by the adoption of uniform rules of law in respect of unfair terms, which was the intention of the EU legislature, as stated in the tenth recital of Directive 93/13 (judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 60 and the case-law cited).
- 49 Furthermore, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of Directive 93/13 in order to achieve the result sought by that directive, the requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgment of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, paragraphs 47 and 50 and the case-law cited).
- 50 In the present case, since points 1 to 3 of the question referred for a preliminary ruling concern the interpretation of provisions of Directive 93/13 and not the interpretation of national rules, mBank's argument alleging the Court lacks jurisdiction must be rejected.
- 51 It follows that the Court has jurisdiction to reply to points 1 to 3 of the question referred for a preliminary ruling.

Consideration of the question referred

- 52 By its question referred for a preliminary ruling, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that, in the context of the cancellation, in its entirety, of a mortgage loan agreement concluded with a consumer by a banking institution on the ground that that agreement contains an unfair term without which it cannot continue in existence:
- they preclude the judicial interpretation of national law according to which the exercise of the rights which that consumer draws from that directive is conditional on the lodging, by that consumer, before a court, of a declaration by which he or she states, first, not to consent to that unfair term remaining effective, secondly, to be aware of the fact that the nullity of that term entails the cancellation of that agreement and, moreover, of the consequences of that cancellation and, thirdly, to consent to the cancellation of that agreement;
 - they preclude the compensation sought by the consumer concerned in respect of the restitution of the sums paid by him or her in the performance of the agreement at issue being

reduced by the equivalent of the interest which that banking institution would have received if that agreement had remained in force.

- 53 To answer that question it must be borne in mind that Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (judgment of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 27, and the case-law cited).
- 54 In addition, in the exercise of the functions incumbent upon it pursuant to the provisions of Directive 93/13, a national court is required to assess of its own motion whether a contractual term is unfair and, in so doing, correct the imbalance that exists between the consumer and the seller or supplier (judgment of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 29 and the case-law cited).
- 55 Consequently, pursuant to Article 6(1) of that directive, it is for the referring courts to exclude the application of the unfair terms so that they do not produce binding effects with regard to the 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).
- 56 However, the possibility open to a consumer to object to the application of Directive 93/13 cannot be understood as imposing on him or her, in order to assert the rights he or she derives from that directive, the positive obligation to rely on the provisions of that directive by means of a formal declaration lodged before that court.
- 57 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, thus giving his free and informed consent to the term in question (see, to that effect, judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 53 and the case-law cited). The possibility of exercising that option, which constitutes a waiver of reliance on the protection provided for by Directive 93/13, implies in itself that the consumer benefits from that protection from the outset.
- 58 Thus, as is clear from the settled case-law referred to in paragraphs 53 and 55 of this judgment, Article 6(1) of Directive 93/13 requires that unfair terms do not bind consumers, without it being possible to suspend such a consequence or make it subject to conditions laid down by national law or derived from national case-law.
- 59 Accordingly, Article 6(1) of Directive 93/13 precludes an interpretation of national law according to which a consumer is required, in order to assert the rights he or she derives from that directive, to lodge a formal declaration before a court.
- 60 In addition, the obligation for a national court, referred to in paragraphs 54 and 55 of this judgment, to exclude, if necessary of its own motion, the application of unfair terms so that they do not produce binding effects with regard to the consumer, even where that consumer has failed to appear, also precludes such an interpretation (see, to that effect, judgment of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, paragraph 52).

- 61 Moreover, to require the consumer to lodge a formal declaration to assert the rights would be 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 (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 63), to the extent that it would encourage sellers or suppliers to refuse out-of-court consumer requests for the annulment of unfair terms, bearing in mind that those consumers are required, in order to assert the rights they derive from that directive, to lodge a formal declaration before that court.
- 62 Furthermore, as regards the possibility for a court seised of a claim for restitution following the cancellation of a mortgage loan agreement concluded with a consumer by a banking institution on the ground that that agreement contains unfair terms without which it cannot continue in existence, to reduce the compensation claimed by that consumer in respect of the restitution of the sums paid by him or her in the performance of that agreement by the equivalent of the interest which that banking institution would have received if that agreement had remained in force, the Court held that, in such a context, Article 6(1) and Article 7(1) of Directive 93/13 preclude a judicial interpretation of national law according to which that banking institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served (see, to that effect, judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 84).
- 63 Subject to that reservation concerning the default interest at the statutory rate, the Court has held that an interpretation of national law to the effect that the banking institution would have the right to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement and, therefore, to receive remuneration for the use of that capital by the consumer, would contribute to eliminating the deterrent effect on sellers or suppliers of the cancellation of that agreement, and thus compromise attainment of the long-term objective of Article 7 of Directive 93/13 (see, to that effect, judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraphs 76 to 78).
- 64 Consequently, inasmuch as Directive 93/13 precludes the possibility, for a banking institution, to claim compensation going beyond reimbursement of the capital paid in respect of the performance of the cancelled agreement together with the payment of default interest at the statutory rate from the date on which notice is served, that directive also precludes compensation being granted to that institution by reducing the compensation sought by the consumer concerned in respect of the restitution of sums which he or she paid in the performance of the agreement at issue up to the equivalent of the interest which that institution would have received if that agreement had remained in force.
- 65 In the light of the foregoing, Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that, in the context of the cancellation, in its entirety, of a mortgage loan agreement concluded with a consumer by a banking institution on the ground that that agreement contains an unfair term without which it cannot continue in existence:
- they preclude the judicial interpretation of national law according to which the exercise of the rights which that consumer draws from that directive is conditional on the lodging, by that

consumer, before a court, of a declaration by which he or she states, first, not to consent to that unfair term remaining effective, secondly, to be aware of the fact that the nullity of that term entails the cancellation of that agreement and, moreover, of the consequences of that cancellation and, thirdly, to consent to the cancellation of that agreement;

- they preclude the compensation sought by the consumer concerned in respect of the restitution of the sums paid by him or her in the performance of the agreement at issue being reduced by the equivalent of the interest which that banking institution would have received if that agreement had remained in force.

Costs

- 66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 must be interpreted as meaning that, in the context of the cancellation, in its entirety, of a mortgage loan agreement concluded with a consumer by a banking institution on the ground that that agreement contains an unfair term without which it cannot continue in existence:

- **they preclude the judicial interpretation of national law according to which the exercise of the rights which that consumer draws from that directive is conditional on the lodging, by that consumer, before a court, of a declaration by which he or she states, first, not to consent to that unfair term remaining effective, secondly, to be aware of the fact that the nullity of that term entails the cancellation of that agreement and, moreover, of the consequences of that cancellation and, thirdly, to consent to the cancellation of that agreement;**
- **they preclude the compensation sought by the consumer concerned in respect of the restitution of the sums paid by him or her in the performance of the agreement at issue being reduced by the equivalent of the interest which that banking institution would have received if that agreement had remained in force.**

[Signatures]