Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 16 February 2023 [1]

Case C-520/21

Arkadiusz Szcześniak
v
Bank M. SA,
joined parties:
Rzecznik Praw Obywatelskich,
Rzecznik Finansowy,
Prokurator Prokuratury Rejonowej Warszawa – Śródmieście w Warszawie
Przewodniczący Komisji Nadzoru Finansowego

(Request for a preliminary ruling from the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (District Court, Warsaw-Śródmieście, Warsaw, Poland))

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Article 6(1) and Article 7(1) – Mortgage loan agreement – Conversion clauses – Effects of a finding that a contract is void in its entirety on the ground that it contains unfair terms – Possibility to assert claims that go beyond reimbursement of monetary consideration – Unjust enrichment – Deterrent effect – Effectiveness)

I. Introduction

1. From the early 2000s, banks in Poland granted tens of thousands of mortgage loans denominated in or indexed to the Swiss franc (CHF) to consumers seeking to purchase properties. Since those mortgage loans afforded borrowers the benefit of interest rates far lower than those applicable to loans denominated in zlotys (PLN), they were very much in demand. With the onset of the global financial crisis, the exchange rate between the CHF and the PLN deteriorated from the perspective of holders of the latter currency. Thousands of borrowers, including the applicant in the main proceedings, filed lawsuits against the banks with which they had taken out their mortgages. They argued before the Polish courts that the clauses providing for conversion from PLN to CHF and from CHF to PLN ('the conversion clauses') in their mortgage loan agreements were unfair. In a significant number of cases the courts accepted that argument and deemed the mortgage loan agreement void in its entirety.

[1] Original language: English.

2. Arising out of one such dispute, the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (District Court, Warsaw-Śródmieście, Warsaw, Poland) asks the Court of Justice whether parties to a mortgage loan agreement between a consumer and a bank that has been declared void in its entirety on the ground that it contains an unfair term may pursue claims that go beyond reimbursement of the monetary consideration paid under that agreement and the payment of default interest at the statutory rate from the date of the request for reimbursement.

II. Legal framework

A. European Union law

3. Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [2] provides:

'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. Under Article 7(1) of Directive 93/13:

'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.'

5. Article 8 of Directive 93/13 states that:

'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

B. Polish law

6. Article 5 of the ustawa – Kodeks cywilny (Law on the Civil Code) of 23 April 1964 ('the Civil Code') [3] provides:

'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 rightholder shall not be treated as an exercise of the right and shall not be protected.'

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

[2] OJ 1993 L 95, p. 29.

[3] Dz. U. of 1964, No 16, item 93.

8. Under Article 385[1](1) and (2) of the Civil Code:

'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 shall not apply to terms setting out the principal performances to be rendered by the parties, including those relating to 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.'

9. Article 405 of the Civil Code states:

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

10. Article 406 of the Civil Code provides:

'The obligation to restore the economic advantage shall include not only the advantage directly obtained, but also everything that, if disposed of, lost or damaged, was obtained in exchange for the advantage or in order to remedy the damage.'

11. Under Article 410 of the Civil Code:

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

2. A performance is 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.'

12. By virtue of Article 455 of the Civil Code, 'if the time limit for the performance has not been specified or if it does not result from the nature of the obligation, the performance shall be rendered immediately after the debtor has been called upon to render it'.

13. Article 481(1) to (3) of the Civil Code states:

'1. If a debtor is late in making a payment, the creditor may claim interest for the duration of the delay, even if the creditor has not suffered any damage and even if the delay was due to circumstances for which the debtor is not responsible.

2. If the interest rate for late payment is not specified, statutory interest for late payment shall be payable at a rate corresponding to the sum of the reference rate of the National Bank of Poland plus 5.5 percentage points. However, where the claim bears interest at a higher rate, the creditor may claim interest for late payment at that higher rate.

…

3. In the event of default on the part of the debtor, the creditor may also demand that the damage be remedied on general terms.'

III. The facts of the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

14. On 25 July 2008, Arkadiusz Szcześniak ('A.S.') and his spouse, E.S., two consumers, concluded a mortgage loan agreement with Bank M., a Polish bank, in the sum of PLN 329 707.24 (approximately EUR 73 000), for the purpose of building a house. The duration of the loan, which was repayable in equal monthly instalments, was 336 months. The variable interest rate on the loan was set as the sum of the 3-month LIBOR (CHF) benchmark and the bank's fixed margin.

15. The loan amount was denominated and disbursed in PLN. That amount was indexed to CHF after conversion according to the CHF buying rate published in the table of exchange rates in force at the bank on the date of disbursement of the loan. Monthly loan instalments were to be paid in PLN after conversion according to the CHF selling rate published in the bank's table of exchange rates in force on the date each monthly loan instalment fell due. Those conversion clauses were taken from a standard agreement used by the bank. On 6 September 2011, the parties amended the mortgage loan agreement to allow A.S. and E.S. to pay the monthly loan instalments directly in CHF.

16. A.S. and E.S. regularly paid the monthly loan instalments as they fell due.

17. On 31 May 2021, A.S. brought an action against Bank M. before the referring court, seeking payment of the sum of PLN 3 660.76 (approximately EUR 800), plus statutory default interest from 8 June 2021 until the date of payment of that sum.[4] He argued that the mortgage loan agreement at issue contains unfair terms such as to render it void in its entirety. As a consequence, Bank M. had received the monthly loan instalments without any legal basis. During the period from June to September 2011 in particular, the bank received, from him and his spouse, monthly loan instalments amounting to PLN 7 769.06 (approximately EUR 1 700). As it used that amount during the period from October 2011 to December 2020, Bank M. made a profit of PLN 7 321.51 (approximately EUR 1 600).[5] A.S. calculates that sum by reference to the average interest rate of loan agreements in PLN afforded to households for consumer loans.[6]

18. Bank M. contends that A.S.'s action should be dismissed as unfounded. It asserts that the mortgage loan agreement at issue does not contain unfair terms and is thus valid. In the event that the agreement is deemed void, the bank, not the consumer, would have a claim for the use of the money received.

[4] A.S. also seeks reimbursement of all monthly loan instalments paid. That claim is not the subject of the dispute in the proceedings from which this reference for a preliminary ruling was made.

[5] A.S. seeks payment of half of the amount of PLN 7 321.51, the other half going to his spouse, who is not a party to the dispute in the main proceedings.

[6] A.S. puts forward three alternative methods for calculating the amount he is claiming from Bank M. First, the average interest rate of loan agreements in PLN granted to households for the purchase of residential property (PLN 3 472.35; approximately EUR 764). Second, the average interest rate on household deposits (PLN 1 553.82; approximately EUR 342). Third, the index of the evolution of the purchasing power of money over the years 2011 to 2020 (PLN 963.37; approximately EUR 212). A.S. states that the following facts may afford a basis for his claim against Bank M.: the transfer of money to the bank, the decrease in the purchasing power of the money transferred, the loss of his ability to use his money and the use of his money by Bank M.

19. The referring court observes that, as a matter of domestic law, conversion clauses in a loan agreement of the kind to which A.S.'s complaint relates are unfair and unlawful. Since the judgment of the Court in *Dziubak*,[7] the inclusion of such clauses in a loan agreement has led to the annulment of that agreement in its entirety. That annulment operates *ex tunc*, so that all of the services provided in the performance of the agreement must be reimbursed, pursuant to Article 405 of the Civil Code, read in conjunction with Article 410(1) of that code. A bank may thus require the borrower to reimburse the loan principal while the borrower may claim reimbursement of the monthly loan instalments, including costs such as commissions, administrative charges and insurance premiums. Each party may also require that the other pay default interest at the statutory rate from the date of formal notice.[8]

20. The question which arises in the context of the dispute before the referring court is whether the parties to an agreement that has been declared void are entitled to pursue additional claims, including remuneration, compensation, reimbursement of expenses or indexation of amounts paid, by reason of the use of the money for a certain period of time without any legal basis. That question and, in particular, the possible legal basis of such claims, are the subject of controversy in domestic case-law and amongst Polish commentators. The legal bases for such claims most frequently relied upon in domestic law are either Article 405 of the Civil Code (unjust enrichment) or that provision read in conjunction with Article 410(1) of the Civil Code (undue performance). The concept of 'undue performance' and, a fortiori, that of 'unjust enrichment' are relatively broad concepts which cover a wide range of matters, including, potentially, claims in relation to the use of money without a contractual basis.[9] The referring court states that most Polish commentators, national institutions and national courts deny the possibility of asserting such claims, while pointing out that, to date, the decisions of those courts concern claims made by banks, not by borrowers. The rationale given for the decisions to reject the banks' claims is that the latter would nullify the protective function of the provisions that relate to unfair terms or the purpose of those that require the annulment of contracts that contain such terms. The referring court accordingly considers that national law does not provide a clear answer to the question of whether, where money is paid under a contract subsequently declared void, the use of that money in the absence of any contractual basis can form the basis of a claim at law.

21. The referring court is uncertain whether the availability of an action of this nature is compatible with EU law, in particular Article 6(1) and Article 7(1) of Directive 93/13 and the principles of effectiveness, proportionality and legal certainty. It refers to the Court's case-law on the effects of a finding that terms in a consumer contract are unfair and on the rights that are vested in the parties to such a contract in those circumstances.[10] The referring court observes that the Court has not yet ruled on whether parties to a consumer contract declared void due to a failure to respect Article 6(1) and Article 7(1) of Directive 93/13 are entitled to pursue claims that go beyond reimbursement of the monetary consideration paid under that contract. In particular, the Court has not yet ruled as to whether parties may claim compensation for the use of money without a contractual basis, the loss of an opportunity to earn profit through the temporary inability to use one's money, the financial and organisational costs of performing the contract, and the decrease in the purchasing power of money over time. In so far as the Court

7 Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819).

8 See Article 481(1) and (2) and Article 455 of the Civil Code.

9 In the order for reference, the referring court uses the expression 'use of the capital without a contractual basis'. The expression 'use of the funds without a contractual basis' seems to me to be more appropriate, since it applies to the borrower's and to the bank's circumstances.

10 The referring court cites the judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 83 and 84); of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 61 and 62); and of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 43).

has examined similar claims, that examination took place in the context of the interpretation of directives in the field of consumer protection other than Directive 93/13 or in the context of a consumer's exercise of his or her right to withdraw from a contract.

22. According to the referring court, Article 6(1) and Article 7(1) of Directive 93/13 and the principle of effectiveness preclude a bank from asserting any claims against a consumer in connection with the latter's use of the loan capital or costs the bank had incurred in managing the loan. The bank's claim is limited to reimbursement of the sums it disbursed plus, possibly, default interest at the statutory rate. Were it otherwise, the bank would obtain an advantage from its introduction of unfair terms into the loan agreement and its engagement in conduct contrary to good faith and morality. Such an approach would also discourage consumers from asserting their rights under Directive 93/13 since to do so could have negative consequences, such as being liable to compensate the bank for the use of the loan capital.

23. The referring court considers that to afford the possibility to a consumer to assert claims against a bank that go beyond reimbursement of the monthly instalments paid and of costs such as commissions, administrative charges, insurance premiums, plus, possibly, default interest at the statutory rate, is not contrary to the principle of effectiveness. To admit such claims would be, however, contrary to the objective of Directive 93/13, which is to deter sellers or suppliers from using unfair terms and, where they do so, to require them to reimburse consumers for the payments received as a result thereof, liability for anything over and above that being disproportionate and excessive. It would also conflict with the principle of legal certainty. Where a loan agreement is declared void in its entirety on the ground that it contains unfair terms, that principle so operates so as to limit the parties' claims to payments made in connection with the performance of the contract.

24. In those circumstances, the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (District Court, Warsaw-Śródmieście, Warsaw) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 6(1) and Article 7(1) of [Directive 93/13] and the principles of effectiveness, legal certainty and proportionality be interpreted as precluding a judicial interpretation of national legislation pursuant to which, where a loan agreement entered into by and between a bank and a consumer is found to have been null and void from the outset because it contains unfair terms, the parties, in addition to the reimbursement of the sums paid in the performance of that agreement (the bank – loan principal, and the consumer – monthly payments, fees, commissions and insurance premiums) and statutory interest for late payment from the date of the demand for payment, may pursue any other claims (including remuneration, compensation, reimbursement of expenses or indexation of the amounts paid) on the grounds that:

(1) the person making the monetary consideration was temporarily deprived of the use of his or her money, so that he or she has lost the opportunity to invest it and thus to make a profit;

(2) the person making the monetary consideration incurred the costs of servicing the loan agreement and of transferring the money to the other party;

(3) the recipient of the monetary consideration had the benefit of being able to temporarily use someone else's money, including being able to invest it and thus to make a profit;

(4) the recipient of the monetary consideration was temporarily able to use someone else's money free of charge, which would have been impossible under market conditions;

(5) the purchasing power of the money has decreased with time, which translates to a loss in real terms for the person making the monetary consideration;

(6) the temporary provision of money may be treated as rendering a service for which the person making the monetary consideration has not received remuneration?'

25. A.S., Bank M., the Rzecznik Praw Obywatelskich (Commissioner for Human Rights, Poland), the Rzecznik Finansowy (Financial Ombudsman, Poland), the Prokurator Prokuratury Rejonowej Warszawa – Śródmieście w Warszawie (Public Prosecutor for the Warszawa – Śródmieście District, Poland), the Polish and Portuguese Governments and the European Commission submitted written observations. At the hearing of 12 October 2022, those parties, together with the Przewodniczący Komisji Nadzoru Finansowego (Chair of the Board of the Polish Financial Supervision Authority), presented oral argument and replied to the Court's questions.

IV. Analysis

A. Admissibility

26. The referring court observes that, in so far as it seeks guidance with respect to claims made by consumers and by banks, it formulated the question it referred for a preliminary ruling in general terms. Notwithstanding that the dispute before it concerns a claim pursued by a consumer, and not by a bank, it considers that the question it referred is admissible for the following three reasons.

27. First, a contract that is declared void under Polish law is deemed never to have been concluded, so that the parties thereto must each reimburse to the other any payments made thereunder. In court proceedings seeking the reimbursement of payments made under an invalid loan agreement, banks often raise a plea of retention or set-off[11] on the ground that they have a claim against the consumer for the reimbursement of the loan principal. Such a plea may be raised at any time until the end of the hearing of the proceedings at second instance. Should the Court answer the question referred solely with respect to the consumer's claim, it is likely that a second question on a similar claim by the bank will have to be referred at a later stage in the proceedings, thus prolonging the litigation unduly.[12] The justification the bank puts forward for its, albeit putative, claim against the consumer for the remuneration for the use of the loan capital without a contractual basis is thus not hypothetical.

28. Second, the prevailing view in domestic case-law is that, in an action for restitution based on unjust enrichment, the court hearing the case may not confine itself to examining the merits of the applicant's claim while ignoring an identical claim that the respondent may assert, even if only the first of those claims is actually before it. That is because where the parties make undue considerations of the same nature (for instance, payments in the same currency), arising out of

[11] In its written observations, the Public Prosecutor for the Warszawa – Śródmieście District states that there is a strong probability that Bank M. will raise one of those pleas in the present case.

[12] By decision of 9 December 2022 lodged at the Court Registry on 14 December 2022 (Case C-756/22), the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), arising from an action by Bank M. against A.S. and E.S. concerning the same mortgage loan agreement, referred to the Court a question formulated in almost identical terms to those of the question referred in the present case.

the same legal relationship (for instance, a void loan agreement), only the party that received the higher amount is considered to have been unjustly enriched. Any unjust enrichment thus consists of the difference between the two amounts in dispute.

29. Third, banks in Poland publicly express the view that consumers who bring actions to annul loan agreements that contain unfair terms will suffer far-reaching negative consequences since, in the event of those actions succeeding, they will be required to pay remuneration for the use of the loan capital without a contractual basis and to reimburse certain costs. Those financial consequences discourage many consumers from exercising their rights under Directive 93/13. An unequivocal answer from the Court to the question as to whether banks are entitled to pursue such claims is thus essential to ensure respect for consumers' rights in Poland.

30. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which 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 it submits. Consequently, where the questions referred concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action 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 the questions submitted to it. [13]

31. In my view, the present case does not fall within any of the situations wherein the presumption of relevance may be rebutted.

32. It is true that the dispute before the referring court does not directly have as its subject matter a claim by a bank against a consumer for remuneration for the use of the loan capital without a contractual basis. The explanations the referring court provides disclose that, for it to rule on the dispute before it, it must examine, from the viewpoint of the consumer and of the bank, the consequences of the nullity of the mortgage loan agreement with regard to claims that go beyond reimbursement of the monetary consideration exchanged under the agreement. At the hearing, moreover, Bank M. stated that it asserted such a claim against A.S. in a separate action, which is suspended pending the referring court's decision in the present case. I also share the Polish Government's view that the clarification the referring court seeks with regard to claims by banks against consumers for remuneration for the use of loan capital without a contractual basis is necessary to enable that court to apprise A.S. of the full consequences of his application to annul the mortgage loan agreement.

33. It follows that, in my view, the question referred for a preliminary ruling has a direct relationship with the subject matter of the dispute in the main proceedings. It is thus not hypothetical as regards claims by banks against consumers for remuneration for the use of loan capital without a contractual basis. The order for reference contains all of the factual and legal elements necessary to answer the question referred. I therefore advise the Court that the question is admissible in its entirety.

[13] Judgment of 13 October 2022, *Baltijas Starptautiskā Akadēmija and Stockholm School of Economics in Riga* (C-164/21 and C-318/21, EU:C:2022:785, paragraphs 32 and 33 and the case-law cited).

34. That conclusion is unaltered by Bank M.'s submission that the effects of the nullity of a contract are matters of national law that do not fall within the scope of Directive 93/13. Bank M. observes, in particular, that the Court does not have jurisdiction to interpret the provisions of Polish law that govern, inter alia, so-called 'supplementary claims' (Article 224 and Article 225 of the Civil Code [14]), tortious liability (Article 415 of the Civil Code [15]), the so-called 'indexation of the monetary consideration' [Article 358[1](3) of the Civil Code [16]] or unjust enrichment (Article 405 and Article 410 of the Civil Code).

35. According to settled case-law, it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of such provisions is correct, as such an interpretation falls within the exclusive jurisdiction of the national courts. [17] Fortunately, the question as formulated by the referring court concerns the interpretation of EU law, more particularly Article 6(1) and Article 7(1) of Directive 93/13 and the EU principles of effectiveness, legal certainty and proportionality, which is clearly within the Court's jurisdiction. The referring court does not ask the Court to provide guidance on the national provisions upon which the consumers' and the banks' claims to which the order for reference refers may be based, but rather to indicate whether that directive and those principles of EU law allow such claims to be advanced. As point 41 of the present Opinion explains, national regulation of the protection Directive 93/13 guarantees to consumers may alter neither the scope nor the substance of that protection.

B. Substance

36. The referring court's question asks essentially whether Article 6(1) and Article 7(1) of Directive 93/13 and the principles of effectiveness, legal certainty and proportionality must be interpreted so as to preclude an interpretation of national legislation to the effect that, where a loan agreement concluded between a consumer and a bank is declared void in its entirety on the ground that it contains unfair terms, the parties are entitled to assert claims against each other that go beyond reimbursement of the monetary consideration paid under that agreement and the payment of default interest.

[14] Under Article 224(1) and (2) of the Civil Code:
'1. An autonomous possessor acting in good faith shall not be obliged to pay for the use of the item and shall not be responsible for either its wear and tear or its deterioration or loss. He or she acquires ownership of the natural profits that were detached from the item during his or her possession of it, and retains the accrued civil profits, if during that time they became due and payable.
2. However, from the moment the autonomous possessor acting in good faith learns that an action for the surrender of the item has been brought against him or her, he or she shall be obliged to pay for the use of the item and shall be liable for its wear and tear, and deterioration or loss, unless the deterioration or loss occurred through no fault of his or her own. He or she shall be obliged to return the profits accrued from that moment which he or she has not used up and to pay the value of those which he or she has used up.'
Article 225 of the Civil Code states:
'The obligations of an autonomous possessor acting in bad faith towards the owner shall be the same as those of an autonomous possessor acting in good faith from the moment the latter learns that an action has been brought against him or her for the surrender of the item. However, an autonomous possessor acting in bad faith shall be further obliged to return the value of profits which he or she failed to obtain due to bad management, and shall be liable for any deterioration and loss of the item unless that item would also have deteriorated or been lost had it been in the possession of the rightholder.'

[15] Article 415 of the Civil Code provides that 'any individual who causes damage to another person shall be under an obligation to remedy that damage'. Under Article 361(2) of that code, injured persons may seek compensation not only for actual loss (*damnum emergens*), but also for loss of profit (*lucrum cessans*).

[16] Under Article 358[1](3) of the Civil Code, 'in the event of a significant change in the purchasing power of money after the obligation has arisen, the court may, having considered the parties' interests, and in accordance with the principles of community coexistence, change the amount or manner of monetary performance, even if that has been set in a court decision or contract'.

[17] Judgment of 3 July 2019, *UniCredit Leasing* (C-242/18, EU:C:2019:558, paragraph 47 and the case-law cited).

1. Preliminary observations

37. The Court has stated repeatedly that the system of protection Directive 93/13 introduces is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both his or her bargaining power and his or her level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence their content. [18]

38. Given the weakness of the consumer's position, Article 3(1) of Directive 93/13 prohibits standard contractual terms which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Article 6(1) of Directive 93/13 provides that unfair terms are not binding on consumers.

39. Directive 93/13, as is apparent from Article 7(1) thereof, read in conjunction with its twenty-fourth recital, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts sellers or suppliers conclude with consumers. Once a term is declared unfair and therefore void, it is for the national court purely and simply to exclude the application of that term so that it does not produce binding effects on the consumer, unless the latter objects. [19] It follows that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. A court determination that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in had that term not existed. [20]

40. In particular, the obligation for the national court to exclude an unfair contract term that requires the payment of sums that prove not to be due imposes a corresponding restitutionary duty with respect to those amounts. The absence of restitution would undermine the dissuasive effect of Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) thereof. [21]

41. Although Article 6(1) of Directive 93/13 requires the Member States to provide that unfair terms are not to be binding on the consumer, 'as provided for under their national law', national regulation of the protection guaranteed to consumers by that directive may not alter the scope and, therefore, the substance of that protection. It is, consequently, for the Member States to define the detailed rules under which the unfairness of a contractual term is to be established and the legal effects of that finding. Such a finding must always allow for the restoration of the legal and factual situation that the consumer would have been in had that unfair term not existed by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term. [22]

42. As regards the effects for the validity of a contract of a finding that some of its terms are unfair, by the second part of Article 6(1) of Directive 93/13 'the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'. The purpose of that provision is not to annul all contracts that contain unfair terms, but to

[18] See, for example, judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 49).

[19] Judgment of 10 June 2021, *BNP Paribas Personal Finance* (C-776/19 to C-782/19, EU:C:2021:470, paragraph 36).

[20] Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 61).

[21] Ibid., paragraphs 62 and 63.

[22] Ibid., paragraphs 64 to 66.

restore the balance between the parties while in principle preserving the validity of the contract as a whole.[23] In principle, the contract in question continues to exist without any modification other than that the removal of the unfair terms requires, in so far as, in accordance with domestic law, that continuity is legally possible, which is to be verified objectively.[24]

43. It is apparent from the order for reference that, as a matter of Polish law, the excision of unfair conversion clauses from a loan agreement leads to the annulment of that agreement in its entirety, since it cannot continue to exist without those clauses, and that such annulment operates *ex tunc*.

44. Directive 93/13 does not provide for the consequences of a finding that a contract concluded between a seller or supplier and a consumer does not legally exist after the excision of its unfair terms. No provision of that directive requires that, in such circumstances, Member States must enable parties to assert claims against each other that go beyond restitution of the amounts unduly paid on the basis of the unfair contractual term. As A.S., the Commissioner for Human Rights, the Financial Ombudsman, the Polish and Portuguese Governments and the Commission rightly submit, it is for the Member States, by means of their national law, to determine those consequences in a manner consistent with EU law.[25]

45. The referring court's question refers to two distinct situations, depending on whether the claim is by, or against, a consumer. I shall examine both situations separately in the light of the principles to which I have referred.

2. The consumer's claim against the bank

46. A.S. argues, in essence, that he is entitled to remuneration from Bank M. for the latter's use of part of the monthly loan instalments that he paid in the performance of the mortgage loan agreement.

47. Directive 93/13 aims at providing consumers with a high level of protection.[26] The Court's case-law described in points 39 to 41 of the present Opinion makes it clear that that objective is achieved by ensuring, inter alia, that the consumer is not bound by an unfair term and that he or she is restored to the factual and legal position that he or she would have been in had that term not existed.

48. According to the twelfth recital of Directive 93/13, that directive introduces a partial and minimum harmonisation of national laws relating to unfair terms, leaving it open to the Member States, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those contained in that directive. Article 8 of Directive 93/13 reflects that idea.

49. Directive 93/13 is thus no obstacle to national legislative provisions, or national case-law interpreting those provisions, that grant consumers more extensive rights than those contained therein. A Member State could, hypothetically, allow borrowers, in the event of the annulment of

[23] Judgment of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207, paragraph 40 and the case-law cited).

[24] Ibid., paragraph 51 and the case-law cited. The Court added that the second part of Article 6(1) of Directive 93/13 does not set out the criteria whereby a contract may continue to exist without the unfair terms, but rather leaves it to the national legal order to determine those criteria in a manner consistent with EU law (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 40).

[25] See, to that effect, judgments of 29 April 2021, *Bank BPH* (C-19/20, EU:C:2021:341, paragraph 84), and of 2 September 2021, *OTP Jelzálogbank and Others* (C-932/19, EU:C:2021:673, paragraph 49).

[26] See, for example, judgment of 25 November 2020, *Banca B.* (C-269/19, EU:C:2020:954, paragraphs 37, 41 and 43).

a mortgage loan agreement following the removal of its unfair terms, to assert claims against banks that go beyond reimbursement of the loan instalments paid thereunder plus default interest at the statutory rate. It is thus a matter for the referring court to determine, by reference to its domestic law, whether consumers have the right to assert claims of that nature and, if so, to rule on their merits.

50. According to the order for reference, domestic case-law and Polish commentators most frequently rely upon the concept of unjust enrichment as the legal basis for the aforementioned claims. In the present case, should A.S., after Bank M. had reimbursed the monthly instalments paid under the invalid mortgage loan agreement, be worse off as a consequence of that agreement, it would be a matter for the national court to examine whether the conditions for unjust enrichment at national law had been met, to make all of the appropriate findings of fact in relation to that issue and to draw the necessary conclusions therefrom. A parallel may be drawn with the judgment in *Kanyeba and Others*, where the Court ruled that the question of whether circumstances such as those at issue in the main proceedings in that case were capable of falling within the ambit of the law governing non-contractual liability came within the scope of national law, and not Directive 93/13. [27]

51. As the Commission rightly observed at the hearing, the fact that, in a situation such as that before the referring court, consumers might theoretically assert claims based on the concept of unjust enrichment under national law does not mean that those claims must succeed. In such cases, the conditions Polish law lays down to succeed in an action for unjust enrichment must be met. National courts may also exercise a jurisdiction to dismiss such actions where they constitute an abuse of rights.

52. In my view, the possibility, under national law, that a borrower may assert against a bank claims that go beyond reimbursement of monthly loan instalments paid and payment of default interest in the event of the annulment of a loan agreement that contains unfair terms does not undermine the effectiveness of Directive 93/13. On the contrary, that possibility may encourage borrowers to exercise the rights they derive from that directive as consumers, while deterring banks from introducing unfair terms in their contracts.

53. It is true, as Bank M. observes, that the Court ruled that Article 6(1) of Directive 93/13 is a mandatory provision that is intended to replace the formal balance the contract establishes between the rights and obligations of the parties with an effective balance that re-establishes equality between them. [28] I do not believe, however, that the possibility, under national law, for a consumer to assert against a seller or supplier claims that go beyond restitution of the sums the latter received under a contract declared void undermines the attainment of that objective. As the Court emphasised in its judgment in *Banco Santander and Escobedo Cortés*, it follows from both Article 3(1) of Directive 93/13 and the general scheme of that directive that the latter do not so much aim to guarantee an overall contractual balance between the rights and obligations of the parties to an agreement as prevent an imbalance between those rights and obligations from arising to the detriment of consumers. [29]

[27] Judgment of 7 November 2019, *Kanyeba and Others* (C-349/18 to C-351/18, EU:C:2019:936, paragraphs 72 and 73).

[28] Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 55 and the case-law cited).

[29] Judgment of 7 August 2018, *Banco Santander and Escobedo Cortés* (C-96/16 and C-94/17, EU:C:2018:643, paragraph 69).

54. The Commission's written observations rely, inter alia, upon Article 8 of Directive 93/13. It seems to me that what is at issue in the present case is not a national rule that is intended to reinforce the level of consumer protection that Directive 93/13 confers, but rather the interpretation of certain provisions of the Civil Code that are of general application. Provisions of that nature do not constitute measures that Member States may adopt or retain under Article 8 of Directive 93/13.[30] Should the national court interpret those provisions in the sense described in point 49 of the present Opinion, that interpretation would nevertheless be consistent with the objective of consumer protection that Directive 93/13 pursues.

55. In the light of those considerations, I am of the view, like A.S., the Financial Ombudsman, the Polish and Portuguese Governments,[31] and the Commission, that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding a judicial interpretation of national law under which, where a loan agreement concluded between a consumer and a bank is found to be void from the outset on the ground that it contains unfair terms, the consumer, in addition to reimbursement of the sums paid under that agreement and to payment of default interest at the statutory rate from the date of the request for reimbursement, may pursue additional claims against the bank as a consequence of that finding. It is a matter for the national court to determine, by reference to national law, whether consumers have the right to assert such claims and, if so, to rule on their merits.

3. The bank's claim against the consumer

56. Bank M. submits that it is entitled to claim from A.S. not only reimbursement of the loan capital transferred, plus default interest at the statutory rate, but also remuneration for the use of that money without a contractual basis for a certain period of time.[32] Bank M. asserts that, by making funds available to A.S. for a certain number of years, it provided him with a service of a non-pecuniary nature with its own economic value, distinct from the transfer of the funds.[33] Its claim for such remuneration is grounded essentially upon the concept of unjust enrichment.

57. As in the case of consumers, examined above, it is, in principle, a matter for the national court to determine, by reference to domestic law, whether, following an annulment of a mortgage loan agreement on the ground that it contains unfair terms, a bank is entitled to assert against a consumer claims that go beyond reimbursement of the loan capital transferred and payment of default interest at the statutory rate. However, contrary to the solution that I propose in respect of A.S.'s claim, for the reasons set out below, I am of the opinion that Bank M. is not entitled to pursue such claims.

58. I first observe that any annulment of the mortgage loan agreement would arise as a consequence of Bank M. having introduced unfair terms into that agreement. As the Commission rightly submits in its written observations, having regard to the generally accepted legal principle *nemo auditur propriam turpitudinem allegans*, a party cannot derive any

[30] See, to that effect, judgment of 7 August 2018, *Banco Santander and Escobedo Cortés* (C-96/16 and C-94/17, EU:C:2018:643, paragraph 69).

[31] The Portuguese Government is of the view that both the consumer and the bank are entitled to assert such claims. Bank M. submits that the parties to the loan agreement are entitled 'to assert claims intended not to favour the consumer but to restore real equality between the parties and, in particular, to claim restitution of unjust enrichment'.

[32] Bank M. seems to also include in that additional claim remuneration for certain ancillary services linked to the management of the mortgage loan, such as, inter alia, processing the information in the loan application, examining the borrower's creditworthiness, receiving loan instalments, monitoring balances and updating the schedule.

[33] In the order for reference, the referring court observes that most Polish commentators consider that such a distinction is artificial, and that there is only one service, namely a transfer of funds.

economic advantage from a situation it has created by its own unlawful conduct. In particular, should a bank suffer any disadvantage following the annulment of a mortgage loan agreement containing unfair terms, it should not be compensated for that disadvantage since it arose as the exclusive result of its own unlawful conduct.

59. I would next observe that if, in a situation such as that which arises in the main proceedings, a bank were allowed to assert against a consumer claims that go beyond reimbursement of the loan principal, plus default interest at the statutory rate, in particular remuneration for the use of the loan capital without a contractual basis, that would deprive Directive 93/13 of its effectiveness and lead to an outcome inconsistent with the objectives it pursues.

60. As A.S., the Commissioner for Human Rights, the Financial Ombudsman and the Commission point out, that possibility is liable to undermine the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) thereof, seeks to attach to a finding of the presence of unfair terms in contracts between consumers and sellers or suppliers. [34] The Court's judgment in *Banco Español de Crédito*, where it held that, were it open to national courts to revise the content of unfair terms included in such contracts, the exercise of that power would be liable to compromise the attainment of the long-term objective of Article 7 of Directive 93/13, illustrates that. Sellers or suppliers would remain tempted to use unfair terms in the knowledge that, even were they declared invalid, the contract could be modified by the national court in such a way as to safeguard the interest of those sellers or suppliers. Such a power could thus contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application of unfair terms to consumers. [35] Similarly, in a case such as the present one, the bank would not be deterred from using unfair terms in its loan agreements with consumers if, despite the annulment of those agreements, it could charge consumers remuneration at the market rate for the use of the loan capital. Such a situation might even make it profitable for the bank to impose unfair terms on consumers. At the very least there would be a significant reduction in the economic risk the bank would face in doing so.

61. A.S. and the Financial Ombudsman also rightly submit that were a bank entitled to assert claims against a consumer going beyond reimbursement of the loan capital, plus default interest at the statutory rate, that would be liable to undermine the effectiveness of the protection that Directive 93/13 affords consumers. In the present case, it is apparent from A.S.'s and Bank M.'s written and oral observations that the latter's claim against the former in respect of remuneration for the use of the loan capital without a contractual basis is PLN 192 812.51 (approximately EUR 41 484.26), equivalent to approximately two thirds of the loan capital. At the hearing, the Financial Ombudsman stated that he was aware of cases in Poland in which the amount of remuneration banks claimed from consumers exceeded that of the credit afforded. Making consumers' ability to release themselves from unfair terms subject to the payment of such a high level of remuneration is likely to give rise to a situation where they would be better off performing the contract that included the unfair term rather than seeking to exercise their rights under Directive 93/13. Moreover, as A.S. states in his written and oral observations, given the opaque, complex and discretionary nature of the criteria upon which banks make their calculations, borrowers are generally not in a position to assess with sufficient precision the amount the bank could claim from them before deciding whether it is in their interests to challenge the legality of the unfair terms. It may also be added that the banks, like Bank M. in the present case, generally take the view that the sums allegedly due by the consumers as remuneration for the use of the loan capital without a contractual basis are payable immediately.

[34] See also point 39 of the present Opinion.

[35] Judgment of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 69).

By contrast, in the case of a loan agreement, instalments are due at regular intervals, thereby enabling the borrower to plan his or her repayments. All of these factors are such as to discourage consumers from exercising the rights conferred on them by Directive 93/13.

62. I am also of the opinion that the argument Bank M. and the Financial Supervisory Board put forward to the effect that if the bank is not entitled to claim remuneration from A.S. for the use of the loan capital without a contractual basis, that would amount to offering him 'free credit' to build a house, cannot be accepted. First, such a situation is the normal consequence of the *ex tunc* annulment of the loan agreement upon the removal of its unfair terms. Second, as the Polish Government rightly submits in its written observations, the fact that the seller or supplier loses the anticipated profit from the performance of a loan agreement in the event of a breach of its obligations under EU law is not a novel feature of the Court's case-law on consumer protection. For example, in the judgment in *Home Credit Slovakia*, the Court upheld the proportional nature of national legislation that provided for forfeiture by the creditor of the entitlement to interest and charges in the event of a failure to include in a credit agreement some of the information required by Directive 2008/48.[36]

63. Bank M. and the Financial Supervisory Board also assert that the stability of the financial markets in Poland and throughout the European Union would be threatened were banks deprived of the possibility to claim remuneration for the use of loan capital without a contractual basis in a situation such as that at issue in the main proceedings. That argument has no weight in the context of the interpretation of Directive 93/13, the objective of which is not to preserve the stability of financial markets but, above all, to protect consumers. In any event, as creatures of the law, banks are under a duty to arrange their affairs in such a manner as to respect all of its provisions.

64. In the light of those considerations, I advise the Court, like A.S., the Commissioner for Human Rights, the Financial Ombudsman, the Public Prosecutor for the Warszawa – Śródmieście District,[37] the Polish Government and the Commission, that Article 6(1) and Article 7(1) of Directive 93/13 are to be interpreted as precluding a judicial interpretation of national law under which, where a loan agreement concluded between a consumer and a bank is found to be void from the outset on the ground that it contains unfair terms, the bank, in addition to reimbursement of the sums paid under that agreement and to payment of default interest from the date of the request for reimbursement, may pursue additional claims against the consumer as a consequence of that finding.

V. Conclusion

65. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (District Court, Warsaw-Śródmieście, Warsaw, Poland) as follows:

(1) Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

[36] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66). See judgment of 9 November 2016, *Home Credit Slovakia* (C-42/15, EU:C:2016:842, paragraph 71) and, to the same effect, order of 16 November 2010, *Pohotovosť* (C-76/10, EU:C:2010:685, paragraph 76).

[37] The Commissioner for Human Rights and the Public Prosecutor for the Warszawa – Śródmieście District are of the view that neither the consumer nor the bank are entitled to assert such claims.

must be interpreted as not precluding a judicial interpretation of national law under which, where a loan agreement concluded between a consumer and a bank is found to be void from the outset on the ground that it contains unfair terms, the consumer, in addition to reimbursement of the sums paid under that agreement and to payment of default interest at the statutory rate from the date of the request for reimbursement, may pursue additional claims against the bank as a consequence of that finding.

It is a matter for the national court to determine, by reference to national law, whether consumers have the right to assert such claims and, if so, to rule on their merits.

(2) Article 6(1) and Article 7(1) of Directive 93/13

must be interpreted as precluding a judicial interpretation of national law under which, where a loan agreement concluded between a consumer and a bank is found to be void from the outset on the ground that it contains unfair terms, the bank, in addition to reimbursement of the sums paid under that agreement and to payment of default interest at the statutory rate from the date of the request for reimbursement, may pursue additional claims against the consumer as a consequence of that finding.