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Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

25 April 2024 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Mortgage loan contract – Term stipulating that costs relating to the contract are to be paid by the consumer – Final judicial decision finding that term unfair and declaring it void – Action for restitution of the sums paid pursuant to the unfair term – Point from which the limitation period for the action for restitution starts to run)

In Case C-561/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 22 July 2021, received at the Court on 10 September 2021, in the proceedings

GP,

BG

v

Banco Santander SA,

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,

after considering the observations submitted on behalf of:

- Banco Santander SA, by M.Á. Cepero Aránguez and M. García-Villarrubia Bernabé, abogados,
- the Spanish Government, by A. Ballesteros Panizo and A. Pérez-Zurita Gutiérrez, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Rocchitta, avvocato dello Stato,
- the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,
- the European Commission, by J. Baquero Cruz and N. Ruiz García, 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 GP and BG, two consumers, on the one hand, and Banco Santander SA, a credit institution, on the other, concerning a claim for restitution of sums paid on the basis of a contractual term that has been found to be unfair by a final judicial decision.

Legal context

European Union law

3 Article 6(1) of Directive 93/13 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 Article 7(1) of that directive is worded as follows:

‘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.’

Spanish law

5 The Código Civil (Civil Code), in the version applicable to the dispute in the main proceedings ('the Civil Code'), provides, in Article 1303:

'Where an obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price plus interest, subject to the provisions of the following articles.'

6 The first paragraph of Article 1896 of the Civil Code provides:

'Anyone who accepts an undue payment must, if he or she has acted in bad faith, pay statutory interest in the case of capital, or the profits derived or to be derived where these are produced by the thing received.'

7 Under Article 1964 of that code, in the version applicable to the dispute in the main proceedings:

'Mortgage enforcement proceedings shall become time-barred after 20 years and personal actions for which there is no special limitation period after 15 years.'

8 Article 1969 of the Civil Code is worded as follows:

'In the absence of any specific provision to the contrary, the limitation period for all types of legal action shall begin to run from the date on which the action may properly be brought.'

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

9 On 29 June 1999, the applicants in the main proceedings entered into, as consumers, a mortgage loan contract with Banco Santander, which included a term stipulating that they were to pay all the costs arising under the contract ('the costs clause').

10 On 28 October 2017, the applicants in the main proceedings lodged an application seeking a declaration that the costs clause was invalid and the restitution of the amounts paid pursuant to that clause.

11 The court of first instance declared the costs clause invalid and ordered Banco Santander to pay to the applicants in the main proceedings the amounts that they had paid in respect of notarial costs and registry and agency fees, as well as statutory interest on those amounts from the date on which they had been paid.

12 The Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain) allowed in part the appeal brought by Banco Santander against the decision at first instance, that court declaring that the claim relating to the amounts paid pursuant to the costs clause had become time-barred. The appeal court took the view that the starting point of the limitation period for the action for restitution of those amounts corresponded to the date on which the applicants in the main proceedings had made the undue payments, that is to say, to the time of conclusion of their mortgage loan contract, in 1999, and that more than 15 years had elapsed since that time.

13 The applicants in the main proceedings brought an appeal on a point of law against that judgment of the Audiencia Provincial de Barcelona (Provincial Court, Barcelona) before the Tribunal Supremo (Supreme Court, Spain), which is the referring court. In support of their action, they maintain that it follows from the case-law of the Court of Justice that the date on which the

limitation period starts to run for an action for restitution of the amounts paid pursuant to an unfair term cannot be set as the date on which the contract containing that term was concluded.

14 The referring court has doubts as to the starting point of the limitation period for an action for restitution of the amounts paid pursuant to an unfair term in the context of Directive 93/13.

15 According to that court, having the starting point of that period correspond to the date of the judicial decision establishing the unfairness of the contractual term concerned and declaring it invalid appears incompatible with the principle of legal certainty, since, in practice, that approach would mean that an action for restitution would not be subject to a time limit. Since the limitation period for that action cannot, in theory, start to run until an action for a declaration of invalidity of such a term has been upheld and that latter action is itself not subject to a time limit under national law, since it is concerned with absolute invalidity, the limitation period for an action for restitution may never begin to run. Furthermore, the principle of legal certainty would be seriously compromised if this were to lead to claims relating to contracts which may have ceased producing effects decades ago.

16 To that extent, the referring court asks whether the date on which the limitation period starts to run for an action for restitution should be set as the date on which that court gave a number of uniform judgments in which it found that terms pursuant to which a consumer was liable for payment of all the costs arising under a credit contract were unfair and decided how such costs were to be allocated after such a term had been declared invalid. It would also be conceivable to set that starting date as the date of decisions of the Court of Justice in which it interpreted Directive 93/13 as not precluding such an action for restitution from being subject to a limitation period provided that the principle of effectiveness is observed. The referring court doubts, however, whether an average consumer who is reasonably observant and circumspect would be aware of its case-law or that of the Court on the subject.

17 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is it compatible with the principle of legal certainty to interpret [Article] 6(1) and [Article] 7(1) of [Directive 93/13] as meaning that the limitation period for an action to recover payments made pursuant to an unfair term does not begin to run until that term has been declared invalid by a final judgment?’

(2) If such an interpretation is incompatible with the principle of legal certainty, do [Article 6(1) and Article 7(1) of Directive 93/13] preclude an interpretation according to which the starting point of the limitation period [for an action to recover payments made pursuant to an unfair term] is the date of the judgments of the Tribunal Supremo (Supreme Court) laying down case-law on the [restitutionary effects deriving from a declaration that such a term is invalid] (judgments of 23 January 2019)?

(3) If such an interpretation is incompatible with [Article 6(1) and Article 7(1) of Directive 93/13], do those articles preclude an interpretation according to which the starting point of the limitation period [for an action to recover payments made pursuant to an unfair term] is the date of the judgments of the [Court] holding that an action for restitution may be subject to a limitation period (essentially, [judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578], which confirmed the former)?’

Consideration of the questions referred

18 As a preliminary point, it should be noted that the Court has previously held that Article 6(1) of Directive 93/13 must be interpreted as meaning 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. Therefore, the determination by a court 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 if that term had not existed (judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 61, and of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 57).

19 It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutionary effect in respect of those amounts (judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 62, and of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 58).

20 The absence of such restitutionary effect 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 (judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 63, and of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 58).

21 It is true that Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms are not to be binding on the consumer, ‘as provided for under their national law’ (judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 57, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 64).

22 However, 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 (judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 65, and of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 60).

23 Consequently, while it is for the Member States, by means of their national legislation, to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced, the fact remains that such a finding must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had 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 (judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 66, and of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 61).

The first question

24 By its first question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 and the principle of legal certainty must be interpreted as precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on the date of that decision.

25 It should be borne in mind that the Court has consistently held that, in the absence of specific EU rules on the matter, it is for the national legal order of each Member State to establish, in accordance with the principle of procedural autonomy, procedural rules for actions intended to safeguard the rights that individuals derive from EU law, provided, however, that those rules are no less favourable than the rules governing similar domestic actions (the principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness) (judgment of 22 April 2021, *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paragraph 52 and the case-law cited).

26 As regards the principle of effectiveness, which is the only principle at issue in the present proceedings, it should be noted that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 28 and the case-law cited).

27 In addition, the Court has stated that the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, particularly the rights deriving from Directive 93/13, implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, which applies, *inter alia*, to the definition of detailed procedural rules relating to actions based on such rights (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 29 and the case-law cited).

28 As regards the analysis of the characteristics of a limitation period such as that at issue in the main proceedings, the Court has stated that that analysis must cover the duration of the limitation period and the detailed rules for its application, including the event used to start the period running (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 30 and the case-law cited).

29 While the Court has held that an application brought by a consumer for a declaration that a term contained in a contract concluded between him or her and a seller or supplier is unfair cannot be subject to any limitation period (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 38 and the case-law cited), it has stated that Article 6(1) and Article 7(1) of Directive 93/13 do not preclude national legislation which makes a claim by such a consumer for the restitutionary effects of such a finding subject to a limitation period, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 39 and the case-law cited).

30 It must therefore be held that the imposition of a limitation period on claims for restitution brought by consumers with a view to enforcing rights which they derive from Directive 93/13 is not, in itself, contrary to the principle of effectiveness, provided that its application does not in practice make it impossible or excessively difficult to exercise the rights conferred by that directive (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 40 and the case-law cited).

31 As regards the length of the limitation period to which a claim by a consumer for repayment of sums unduly paid on the basis of unfair terms within the meaning of Directive 93/13 is subject, it should be noted that the Court has already had occasion to rule, inter alia in the judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraphs 62 and 64); of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 87); and of 8 September 2022, *D.B.P. and Others (Mortgage loans denominated in foreign currency)* (C-80/21 to C-82/21, EU:C:2022:646, paragraph 92), on the compatibility with the principle of effectiveness of limitation periods of 3, 5 and 10 years, respectively, which were imposed on actions seeking to assert the restitutionary effects of a finding that a contractual term was unfair, such periods being, provided that they are established and known in advance, sufficient to enable the consumer concerned to prepare and bring an effective action.

32 Consequently, it must be held that, in so far as it is established and known in advance, a limitation period of 15 years, such as that at issue in the main proceedings, for a claim brought by a consumer for the restitution of sums unduly paid, on the basis of unfair terms within the meaning of Directive 93/13, does not appear to be such as to render the exercise of the rights conferred by Directive 93/13 practically impossible or excessively difficult. A period of that length is, in principle, sufficient in practice to enable the consumer to prepare and bring an effective action to enforce the rights which he or she derives from that directive, in particular in the form of restitutionary claims based on the unfairness of a contractual term (see, by analogy, judgment of 8 September 2022, *D.B.P. and Others (Mortgage loans denominated in foreign currency)*, C-80/21 to C-82/21, EU:C:2022:646, paragraph 93).

33 However, it is necessary to take account of the weaker position of consumers vis-à-vis the seller or supplier as regards both bargaining power and level of knowledge, which leads consumers to accept terms drawn up in advance by the seller or supplier, without being able to influence their content. Similarly, it is important to recall that consumers may be unaware of the unfairness of a term in a mortgage loan agreement or not appreciate the extent of their rights under Directive 93/13 (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 45 and the case-law cited).

34 In that context, the Court has held that the application of a limitation period that begins to run from the conclusion of the contract, in so far as it means that the consumer may seek the refund of payments made pursuant to a contractual term held to be unfair only during a specified period following the signing of that contract, irrespective of whether he or she was or could reasonably have been aware of the unfairness of that term, may make it excessively difficult for that consumer to exercise his or her rights under Directive 93/13, and, consequently, run counter to the principle of effectiveness read in conjunction with the principle of legal certainty (see, to that effect, judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 91; see also, by analogy, judgment of 22 April 2021, *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paragraph 63).

35 By contrast, in circumstances such as those in the main proceedings, on the date on which the decision finding the contractual term concerned to be unfair and declaring it void on that ground became final, the consumer is fully aware of the unlawfulness of that term. It is therefore, in principle, from that date that that consumer is in a position effectively to assert the rights conferred on him or her by Directive 93/13 and that, consequently, the limitation period for the action for restitution, the primary purpose of which is to restore the consumer to the legal and factual situation that he or she would have been in if that term had not existed, as is apparent from paragraphs 18 and 23 above, may begin to run.

36 At that time, because the aforesaid decision is a judicial decision which has the force of *res judicata* and is addressed to the consumer concerned, he or she is put in a position to become aware of the unfairness of the term in question and to assess himself or herself whether it is appropriate to bring an action for restitution of the sums paid pursuant to that term within the time limit prescribed by national law, or, if national procedural law so provides, the final judicial decision concerning the nullity of the unfair term permits the court to uphold the action for restitution which is its corollary.

37 Thus, a limitation period which begins to run from the date on which the decision finding a contractual term to be unfair and declaring it void on that ground becomes final is compatible with the principle of effectiveness, since the consumer has the opportunity to become aware of his or her rights before that period begins to run or expires (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 46 and the case-law cited).

38 However, it must be stated that, although, as is apparent from the case-law referred to in paragraph 34 above, Directive 93/13 precludes the limitation period for an action for restitution of the sums paid by a consumer pursuant to an unfair contractual term from beginning to run irrespective of whether that consumer was or could reasonably have been aware of the unfairness of that term, that directive does not preclude the seller or supplier from having the right to prove that that consumer was or could reasonably have been aware of that fact before the delivery of a judgment finding that term to be void.

39 Lastly, in so far as the referring court asks whether the fixing of the starting point of that limitation period at that time is liable to conflict with the principle of legal certainty, since it places the seller or supplier in a situation of uncertainty as regards the date on which that period starts to run, it should be borne in mind that limitation periods actually seek to ensure legal certainty (see, to that effect, judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 81 and the case-law cited).

40 However, as the Polish Government noted, in essence, in its written observations, by including an unfair term in a contract concluded with a consumer, the seller or supplier itself creates a situation which Directive 93/13 prohibits and seeks to avoid, in that it takes advantage of its position of superiority in order unilaterally to impose on consumers contractual obligations which are contrary to the requirements of good faith imposed by that directive and thus cause a significant imbalance in the parties' contractual rights and obligations to the detriment of consumers.

41 In any event, as is apparent from paragraph 38 above, the seller or supplier has the right to prove that the consumer was or could reasonably have been aware of the unfairness of the term concerned before the delivery of a judgment finding that term to be void, by submitting specific evidence relating to its dealings with that consumer in accordance with the applicable national rules of evidence.

42 In the light of the foregoing considerations, the answer to the first question is that Article 6(1) and Article 7(1) of Directive 93/13 and the principle of legal certainty must be interpreted as not precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a contractual term that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on the date on which that decision becomes final, without prejudice to the right of the seller or supplier to prove that that consumer was or could reasonably have been aware of the unfairness of the term concerned before the delivery of that decision.

The second question

43 By its second question, read in the light of the information provided in the request 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 precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on an earlier date, on which the national supreme court delivered, in separate cases, judgments declaring standard terms corresponding to the term in question of that contract unfair.

44 Although the referring court asks that question in the event that the fixing of the starting point of that limitation period as the date of the final judicial decision finding the contractual term concerned to be unfair and declaring it invalid on that basis is incompatible with Article 6(1) and Article 7(1) of Directive 93/13, it is nevertheless necessary to answer it, in the light of the answer to the first question. Since that answer reserves the right for the seller or supplier to prove that the consumer was or could reasonably have been aware of the unfairness of that term before the delivery of that decision, it is necessary to provide the referring court with some guidance in that regard that appears useful for resolving the dispute before it.

45 In the light of the case-law cited at the outset and in the context of the Court's answer to the first question, the fixing of the starting point of the limitation period for an action for restitution of costs paid on the basis of a contractual term that has subsequently been found to be unfair by a court, at the date on which the national supreme court delivered judgments declaring standard terms corresponding to that contractual term unfair, cannot, in principle, be compatible with the principle of effectiveness.

46 As is apparent from the case-law referred to in paragraphs 18 and 23 above, Directive 93/13 seeks to allow the restoration of the legal and factual situation that the consumer would have been in if an unfair contractual term had 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 term.

47 However, the fixing of the starting point of the limitation period for an action for restitution of costs paid by a consumer, on the basis of an unfair contractual term, at the date on which the national supreme court delivered judgments declaring standard terms corresponding to the term included in the contract at issue unfair, would in many cases allow the seller or supplier to keep the sums wrongly obtained to the detriment of that consumer on the basis of the unfair term, which would be incompatible with the requirement arising from the case-law referred to in paragraph 34 above that that starting point cannot be set irrespective of whether that consumer was or could reasonably have been aware of the unfairness of that term giving rise to the right to restitution and without imposing on the seller or supplier an obligation of diligence and information in relation to

the consumer, thus exacerbating the latter's position of weakness that Directive 93/13 seeks to redress.

48 Furthermore, in the absence of an obligation of information in that regard on the part of the seller or supplier, it cannot be assumed that the consumer may reasonably be aware of the fact that a term contained in his or her contract is equivalent in scope to a standard term that has been found to be unfair by the national supreme court.

49 Although the case-law of a supreme court of a Member State may enable, subject to adequate publicity, an average consumer to become aware of the unfairness of a standard term included in his or her contract with a seller or supplier, it cannot, however, be expected that that consumer, whom Directive 93/13 seeks to protect in the light of his or her weaker position vis-à-vis the seller or supplier, perform steps which fall within the scope of legal research (see, to that effect, judgment of 13 July 2023, *Banco Santander (Reference to an official index)*, C-265/22, EU:C:2023:578, paragraph 60).

50 Furthermore, it should be noted, in that regard, that such national case-law is not necessarily such as to make it possible automatically to declare unfair all terms of that type included in all contracts between a seller or supplier and a consumer in that Member State. Where a standard term has been declared unfair by the national supreme court, it is still necessary, in principle, to determine, on a case-by-case basis, to what extent a term included in a particular contract corresponds to that standard term and is, like the latter, to be held to be unfair.

51 In accordance with Article 3(1) and Article 4(1) of Directive 93/13, the examination of the possible unfairness of a term of a contract concluded between a seller or supplier and a consumer, which requires it to be determined whether that term causes a significant imbalance in the rights and obligations of the parties to a contract, to the detriment of the consumer, must be carried out in the light, inter alia, of all the circumstances attending the conclusion of that contract. Such a case-by-case examination is all the more important since the unfairness of a term may result from a lack of transparency of that term. Thus, in principle, the unfairness of a particular contractual term cannot be assumed, since such a characterisation is likely to depend on the specific circumstances attending the conclusion of each contract and, in particular, on the specific information provided by each seller or supplier to each consumer.

52 It follows from those considerations that an average consumer who is reasonably observant and circumspect cannot be required not only to keep himself or herself regularly informed, on his or her own initiative, of decisions of the national supreme court relating to standard terms contained in contracts of a similar nature to those which he or she has concluded with sellers or suppliers, but also to determine, on the basis of a judgment of a national supreme court, whether terms included in a particular contract are unfair.

53 Moreover, it would be contrary to Directive 93/13 to allow the seller or supplier to benefit from its inaction in the face of such unlawfulness found by the national supreme court. In circumstances such as those of the case in the main proceedings, the seller or supplier, as a banking institution, generally has a legal department specialised in the matter – such a legal department having drafted the contract in question in that case – which is able to follow the development of the case-law of that court and to draw conclusions from it regarding the contracts already concluded by that institution. Such a banking institution generally also has a customer service department which has all the information necessary in order easily to contact the customers concerned.

54 In the light of the foregoing considerations, the answer to the second question is that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on an earlier date, on which the national supreme court delivered, in separate cases, judgments declaring standard terms corresponding to the term in question of that contract unfair.

The third question

55 By its third question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding the limitation period for an action for restitution of costs paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision, from beginning to run on the date of certain judgments of the Court that have confirmed, in principle, that limitation periods for actions for restitution are compatible with EU law provided that they observe the principles of equivalence and effectiveness.

56 Like the second question, the third question must be answered in the affirmative, since the starting point envisaged therein is similar to that referred to in the second question.

57 The reasons, set out in paragraphs 47 and 48 above, according to which the delivery of judgments by a national supreme court finding certain standard terms to be unfair cannot, in itself, mean that a consumer is or may reasonably be aware of the unfairness of a similar term of a contract that he or she has concluded with a seller or supplier, apply, *mutatis mutandis*, as regards preliminary rulings of the Court on the interpretation of EU law.

58 In addition, it should be noted that, although preliminary rulings of the Court on the interpretation of EU law are published in such a manner as to facilitate access to them, including for consumers, the Court does not determine whether particular terms are unfair and consistently leaves the specific examination of those terms to the national court, since that examination does not, in principle, fall within the jurisdiction of the Court (see, to that effect, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 57 and the case-law cited).

59 It follows that a consumer, even if he or she is directly concerned by the main proceedings, cannot infer from such a decision of the Court any certainty as to the unfairness of a contractual term contained in a contract that he or she has concluded with a seller or supplier, with the result that the judgments of the Court cited by the referring court cannot be regarded as a source of information for the average consumer as to the unfairness of a particular contractual term.

60 In any event, in the judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale* (C-698/18 and C-699/18, EU:C:2020:537), and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), specifically referred to by the referring court in its third question, the Court merely held that it is not, in principle, contrary to Directive 93/13 for the bringing of an action to enforce the restitutionary effects of a finding that an unfair contractual term is void to be subject to a limitation period, provided that that period is not less favourable than those governing similar domestic actions (principle of equivalence) and that it does not render practically impossible or excessively difficult the exercise of rights conferred by the EU legal order, in particular Directive 93/13 (principle of effectiveness). In addition, in the first of those judgments, the Court held that that directive precluded a three-year limitation period which runs from the date of full performance of a contract concluded by a seller or supplier with a

consumer, where it is assumed, without need for verification, that on that date the consumer should have known about the unfair nature of the term in question or where for similar actions, based on certain provisions of national law, that same period starts to run only from the time when a court finds there to be a cause of those actions.

61 In the light of the foregoing considerations, the answer to the third question is that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding the limitation period for an action for restitution of costs paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision, from beginning to run on the date of certain judgments of the Court that have confirmed, in principle, that limitation periods for actions for restitution are compatible with EU law provided that they observe the principles of equivalence and effectiveness.

Costs

62 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:

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

must be interpreted as not precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a contractual term that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on the date on which that decision becomes final, without prejudice to the right of the seller or supplier to prove that that consumer was or could reasonably have been aware of the unfairness of the term concerned before the delivery of that decision.

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

must be interpreted as precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision given subsequent to the payment of those costs, from beginning to run on an earlier date, on which the national supreme court delivered, in separate cases, judgments declaring standard terms corresponding to the term in question of that contract unfair.

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

must be interpreted as precluding the limitation period for an action for restitution of costs that were paid by the consumer, pursuant to a term of a contract concluded with a seller or supplier that has been found to be unfair by a final judicial decision, from beginning to run on the date of certain judgments of the Court that have confirmed, in principle, that limitation periods for actions for restitution are compatible with EU law provided that they observe the principles of equivalence and effectiveness.

[Signatures]

* Language of the case: Spanish.