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EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Ninth Chamber)

22 January 2026 [*]

(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 indexed to a foreign currency and containing unfair terms – Effects of the finding that a contractual term is unfair – Void agreement – National case-law providing for two independent claims for restitution – Consumer action seeking repayment of monthly payments made under the agreement – Claim of the seller or supplier corresponding to the amount of the loan – Recovery – Right of the seller or supplier to raise a plea of set-off of its claim against that of the consumer – Rules on the award of costs – Dissuasive effect of the prohibition on unfair terms – Principle of effectiveness – Obligation to interpret national law in conformity with EU law)

In Case C-902/24 [Herchoski [i]],

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), made by decision of 19 December 2024, received at the Court on 22 December 2024, in the proceedings

RM,

EM

v

Santander Bank Polska S.A.,

THE COURT (Ninth Chamber),

[*] Language of the case: Polish.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

EN

composed of M. Condinanzi, President of the Chamber, N. Jääskinen and R. Frendo (Rapporteur), Judges,

Advocate General: R. Norkus,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– RM and EM, by B. Sobierajska, radca prawny,

– Santander Bank Polska S.A., by J. Kowalczyk, P. Litwiński, M. Valirakis-Wołyńska and R. Wechman, radcowie prawni,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Portuguese Government, by A. Pimenta and A. Rodrigues, acting as Agents,

– the European Commission, by P. Kienapfel and B. Sasinowska, 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) and the principles of effectiveness, equivalence, legal certainty and proportionality.

2 The request has been made in proceedings between RM and EM, two consumers residing in Poland, on the one hand, and Santander Bank Polska S.A. (‘SBP’), a bank established in Poland, on the other hand, concerning the claim made by those consumers seeking repayment of the sums paid to SBP under a mortgage loan agreement declared void and the plea raised by SBP, in the alternative, seeking to offset that claim against its own claim in respect of those consumers, corresponding to the amount of that loan.

Legal context

European Union law

3 The twenty-fourth recital of Directive 93/13 states that ‘the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts’.

4 Article 6(1) of that directive 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.’

5 Article 7(1) of that directive provides:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

Polish law

The Civil Code

6 Article 58(1) of the ustawa – Kodeks cywilny (Law establishing the Civil Code) of 23 April 1964 (Dz. U. of 1964, No 16, item 93), in the version applicable to the dispute in the main proceedings (‘the Civil Code’), provides:

‘A legal transaction which is contrary to the law or intended to circumvent the law shall be null and void, unless the relevant provision provides otherwise, in particular where it provides that the invalid terms of the legal transaction are to be substituted by relevant provisions of law.’

7 Article 405 of that code provides:

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

8 Article 410 of the Civil Code provides:

‘1. The provisions of the preceding articles shall apply in particular to an undue obligation.

2. An obligation shall be undue where the person who performed it was in no way obliged or was not obliged to the person for which it was performed, or where the basis of the obligation ceased to exist or the intended objective of the obligation was not attained, or where the legal transaction requiring performance of the obligation was void and did not become valid after the obligation was performed.'

9 Article 455 of that code is worded as follows:

'If the time limit for performing the obligation is not specified or if it does not result from the nature of the obligation, the obligation shall be performed promptly after the debtor has been called upon to perform it.'

10 Under Article 498(1) and (2) of the Civil Code:

'1. If two persons are simultaneously and mutually debtors and creditors with respect to each other, each of them may set off their claim against the claim of the other party, if the object of both claims is money or generic goods of the same quality, and both claims are due and can be enforced before a court or other State body.

2. As a result of the set-off, the two claims are offset against each other to the extent of the lower claim.'

11 Article 499 of that code is worded as follows:

'A set-off shall be effected by a declaration submitted to the other party. The declaration shall have retroactive effect from the moment when the set-off became possible.'

The Code of Civil Procedure

12 Article 98(1) of the ustawa – Kodeks postępowania cywilnego (Law establishing the Code of Civil Procedure) of 17 November 1964 (Dz. U. of 1964, No 43, item 296), in the version applicable to the dispute in the main proceedings ('the Code of Civil Procedure'), provides:

'The unsuccessful party shall be obliged to reimburse the opposing party, upon request by the latter, for any costs necessary for the purposes of duly enforcing or defending the opposing party's rights (costs of the proceedings).'

13 Article 100 of the Code of Civil Procedure provides:

'In the event that the claims are upheld only in part, the costs shall cancel each other out or be proportionately shared. The court may however oblige one of the parties to reimburse all of the costs if the opposing party was awarded the vast majority of its claims, or if the amount owed to that party was determined on the basis of mutual settlement or the court's assessment.'

14 Article 102 of that code provides:

‘In particularly justified cases, the court may order the unsuccessful party to pay only part of the costs or no costs at all.’

15 According to Article 203(1) of that code:

‘The appeal may be withdrawn without the defendant’s consent until the beginning of the hearing or, if the withdrawal involves withdrawal of the action, until the judgment has been delivered.’

16 Article 203[1] of that code is worded as follows:

‘1. A plea of set-off may only be asserted on the basis of a claim:

(1) by the defendant on grounds arising under the same legal relationship as the claim lodged by the claimant, unless the claim is indisputable or confirmed by a final and binding ruling of a court or a ruling of an arbitration court, a settlement concluded before a court or an arbitration court or a settlement concluded before a mediator and confirmed by a court, or made plausible by means of a document confirming that it has been granted by the claimant;

(2) for reimbursement of a payment due to one of the joint and several debtors by the remaining co-debtors.

2. The defence of set-off may be asserted by the defendant at the latest when entering into a dispute on the merits, or within two weeks of the date on which his or her claim became due.

3. The defence of set-off may only be asserted in a procedural document. The provisions concerning statements of claims shall apply *mutatis mutandis* to this document, with the exception of the provisions concerning charges.’

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

17 On 28 August 2008, RM and EM entered into a mortgage loan agreement, denominated in Swiss francs, with SBP, under which SBP granted them a loan of 360 000 zlotys (PLN) (approximately EUR 84 634) to be repaid over a period of 360 months (‘the agreement at issue’).

18 The agreement at issue contained several clauses concerning the rules for conversion of the Swiss franc and the Polish zloty (‘the conversion clauses’).

19 Between 5 September 2008 and 15 March 2022, SBP received a total amount of PLN 327 338 (approximately EUR 76 956) from RM and EM by way of monthly repayments of that loan.

20 On 17 November 2022, RM and EM brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), which is the referring court, seeking (i) a declaration that the agreement at issue is void on the basis of the allegedly unfair nature of the conversion clauses, (ii) a declaration that that agreement cannot continue in existence without those clauses and (iii) an order that SBP repay them the amount of PLN 327 338 (approximately EUR 76 956), corresponding to the monthly instalments paid under that agreement, plus default interest at the statutory rate, from 7 September 2022, and that SBP pay the costs.

21 Before the referring court, SBP maintained that the agreement at issue was valid and contended that the action should be dismissed and that RM and EM should be ordered to pay the costs.

22 On 18 July 2024, SBP gave RM and EM formal notice to repay, by 5 August 2024 at the latest, the sum of PLN 360 000 (approximately EUR 84 634) which they had received in performance of the agreement at issue.

23 On 9 August 2024, SBP served on RM and EM a declaration informing them that it intended to set off its claim of PLN 360 000 (approximately EUR 84 634) against the claim relied on by them before the referring court.

24 On 14 August 2024, SBP raised, before that court, a plea of set-off between those two claims, which RM and EM opposed.

25 On 19 December 2024, the referring court delivered a partial judgment in which it declared the agreement at issue void on the basis of Article 58(1) of the Civil Code, on the ground that the conversion clauses were unfair and that that agreement could not continue in existence without those clauses.

26 As to the remainder, as regards the plea of set-off raised by SBP and the consequences attaching to a decision upholding it, the referring court asks whether the interpretation of the provisions of national law which would lead it to rule to that effect would not be incompatible with EU law.

27 According to that court, a declaration that an agreement is void means that, under Article 405 of the Civil Code, read in conjunction with Article 410 thereof, each party is required to reimburse the other for all payments made under that agreement, which must be regarded as undue as a result of that declaration.

28 That court states that each of the parties has a separate claim vis-à-vis the other party for reimbursement of undue payments. In particular, according to the ‘two claims’ theory, commonly applied in Polish case-law, the claims of both parties, arising from the nullity of a contract, exist independently. Thus, each party could assert its claim against the other in separate proceedings. By contrast, the court hearing an action for payment by one of the parties does not have the power to set off their reciprocal claims of its own motion. However, a party wishing to offset those claims may raise a plea of set-off under the conditions laid down in Article 203^1 of the Code of Civil Procedure.

29 According to the referring court, in the present case, the plea of set-off raised by SBP satisfies those conditions and is based on a declaration of set-off in accordance with the conditions laid down in Articles 498 and 499 of the Civil Code. Accordingly, that plea of set-off should be upheld.

30 That court considers that, consequently, it should grant RM and EM's claim for reimbursement only in part, by deducting from the sum to be repaid to them the amount which is the subject of the set-off sought by SBP. In the present case, the sum which SBP should repay to RM and EM amounts to PLN 401 195 (approximately EUR 94 263), that is to say, PLN 327 338 (approximately EUR 76 956) by way of reimbursement of the monthly instalments paid, plus interest accrued between 7 September 2022 and 5 August 2024, namely PLN 73 857 (approximately EUR 17 363). Thus, following the set-off against its claim of PLN 360 000 (approximately EUR 84 634), SBP should be ordered to pay RM and EM the amount of PLN 41 195 (approximately EUR 9 685), plus default interest at the statutory rate from 6 August 2024 until the date of payment. As regards the costs, the referring court considers that it should allocate them on the basis of the proportion in which each party has been unsuccessful.

31 However, the referring court doubts whether such a decision is compatible with EU law.

32 In the first place, the referring court states that, on the one hand, the dismissal, to a significant extent, of RM's and EM's application risks undermining the restitutory effect and the dissuasive effect which, in accordance with the judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 62 and 63), Article 6(1) and Article 7(1) of Directive 93/13 are intended to attach to the finding that terms contained in consumer contracts are unfair.

33 On the other hand, to deprive the seller or supplier entirely of the possibility of relying on a plea of set-off would be liable to undermine the principles of equivalence, proportionality and legal certainty and the right of that seller or supplier to effective judicial protection. That deprivation would significantly limit the ability of that seller or supplier to defend him or herself before the courts, especially since the provisions of the Civil Code and the Code of Civil Procedure permit such a plea. However, the referring court notes that the Court, in particular in the judgment of 14 December 2023, *Getin Noble Bank (Limitation period for actions for restitution)* (C-28/22, EU:C:2023:992, paragraph 87), ruled out the possibility that a seller or supplier may rely on a plea of retention in circumstances which appear to it to be similar to those prevailing in the present case.

34 In the second place, the referring court states that Polish case-law allows a seller or supplier to raise, in the alternative, a plea of set-off where he or she claims, primarily, that the claim relied on by the consumer is not justified in principle or amount.

35 In that regard, that court notes that such a plea places the consumer in a procedural situation which could be incompatible with Article 7(1) of Directive 93/13 and with the principle of effectiveness. A consumer, faced with a plea of set-off validly submitted by the seller or supplier, should, in principle, withdraw his or her claim for payment, on the basis of Article 203(1) of the Code of Civil Procedure. However, in practice, it would be difficult for the consumer to make that withdrawal, since his or her claim for payment forms part of the action seeking a declaration that the agreement entered into with the seller or supplier is void. In the absence of withdrawal, the consumer risks having his or her action dismissed in part and, consequently, being ordered to pay part of the costs.

36 According to the referring court, the procedural situation of the consumer would be less complex if the seller or supplier were to rely on a plea of set-off while recognising, unconditionally, that the loan agreement concluded with that consumer was void and that the consumer had a claim against it in the amount equivalent to the monthly instalments of the loan. However, that court wonders whether the exclusion of the possibility for the seller or supplier to raise a plea of set-off in the alternative is not such as to undermine the principles of equivalence, proportionality and legal certainty, as well as its right to effective judicial protection.

37 Furthermore, that court states that it is true that, according to Polish case-law, it follows from Article 455 of the Civil Code that a claim arising from the obligation to return an undue payment made under a contract that is void becomes due, within the meaning of Article 498(1) of that code, after formal notice to pay a specific amount has been given. That being so, such a claim presupposes that that contract is void.

38 In the third place, the referring court is uncertain as to the compatibility with EU law of a repayment period as short as the two-week period required by SBP in its formal notice. In that regard, it follows from Polish case-law that the expression ‘promptly’, which appears in Article 455 of the Civil Code, should be understood as meaning that, in ordinary situations, the payment must be made within 14 days of formal notice being given. Since SBP acted in accordance with that case-law, its claim should be regarded as due from that point of view.

39 In particular, that court asks whether Article 7(1) of Directive 93/13 and the principle of effectiveness preclude a seller or supplier from being able to give notice to a consumer to pay, within a short period of time, an amount which appears to be high in the light of the consumer’s resources. However, it states that, in the present case, it previously informed RM and EM of the consequences of the nullity of the agreement at issue, in particular of the obligation to repay the amount equivalent to the loan capital.

40 In the fourth and last place, the referring court recalls that RM and EM have already been successful as regards the nullity of the agreement at issue. Thus, in the event that that court were to reject the plea of set-off raised by SBP and grant

RM and EM the entire amount which they claim, SBP would be entirely unsuccessful and would therefore have to bear all the costs, in accordance with Article 98(1) of the Code of Civil Procedure.

41 On the other hand, if it were to uphold that plea of set-off, it would not be able to order SBP to pay the costs in their entirety, but would have to order that part of the costs be borne by RM and EM, in so far as they wrongly claimed that that plea should be rejected. Following such division in accordance with the first sentence of Article 100 of the Code of Civil Procedure, RM and EM would be awarded only PLN 5 504 (approximately EUR 1 293) by way of recoverable costs, whereas their disbursements would in fact amount to PLN 17 334 (approximately EUR 4 071).

42 The referring court doubts whether such an outcome is compatible with Article 6(1) and Article 7(1) of Directive 93/13 and with the principle of effectiveness. It would however be possible for it to make a decision as to costs more favourable to RM and EM on the basis of Article 102 of the Code of Civil Procedure.

43 In those circumstances, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘In the context of a mortgage loan agreement declared invalid in its entirety on the grounds that it contains unfair terms without which it cannot continue in existence, must [Article] 6(1) and [Article] 7(1) of [Directive 93/13] and the principles of effectiveness, equivalence, proportionality and legal certainty be interpreted as precluding a judicial interpretation of national provisions according to which:

– in an action brought by a consumer against a bank for the return of the equivalent of the payments made under a loan, the bank may raise an effective plea of set-off of its claim for repayment of the equivalent of the loan principal against the consumer’s claim;

– the bank may effectively raise the above plea of set-off also in the alternative, while in principle its plea is that the loan agreement is valid and does not contain unfair contractual terms;

– the bank may effectively demand that the consumer return the equivalent of the loan principal disbursed in the performance of an invalid agreement (as a result of which the bank’s claim becomes due), while in principle the bank’s plea is that the loan agreement is valid and does not contain unfair contractual terms;

– the bank may set a two-week deadline for the return by the consumer of the equivalent of the entire loan principal (as a result of which the bank’s claim for the return of the equivalent of the entire loan principal becomes due);

– the consumer is ordered to pay part of the legal costs to the extent that his or her action for payment was dismissed due to the plea of set-off raised by the bank being upheld?’

The jurisdiction of the Court

44 The Portuguese Government submits that the Court does not have jurisdiction to hear and determine the request for a preliminary ruling, since, by that request, the referring court is asking the Court to interpret national law.

45 It is apparent from the wording of the question referred for a preliminary ruling that it does indeed concern the interpretation of provisions and principles of EU law.

46 Consequently, since the Court has jurisdiction to interpret the provisions and principles of EU law, it has jurisdiction to rule on the request for a preliminary ruling and to answer the question referred to it by the referring court.

Admissibility of the request for a preliminary ruling

47 The Polish Government submits that the part of the question referred for a preliminary ruling which concerns the possibility, for the seller or supplier, in the context of the dispute between it and a consumer who seeks the annulment of the mortgage loan agreement which they concluded together, of raising, in the alternative, an objection of compensation, while maintaining, primarily, that that agreement is valid, is inadmissible. The referring court has already decided, by the partial judgment referred to in paragraph 25 of the present judgment, that the agreement at issue was void.

48 In that regard, according to settled case-law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see judgments of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraph 18, and of 11 September 2025, *Banco Santander (Resolution of Banco Popular III)*, C-687/23, EU:C:2025:687, paragraph 35).

49 In the present case, it is true that the referring court, by a partial judgment, declared the agreement at issue to be void. However, it decided, at the same time, to refer the present request for a preliminary ruling to the Court, considering that it required an interpretation of provisions and principles of EU law in order to be able to rule, in the same proceedings as those in which it gave that partial judgment, on the remainder of the action brought by RM and EM, in the light of a plea of set-off which, at the time it was submitted, was a defence in the alternative to reliance on the validity of that contract.

50 In those circumstances, it is not obvious that the answer to that part of the question referred for a preliminary ruling is hypothetical. That answer may be necessary in order to resolve the dispute in the main proceedings and, in particular, in order to determine whether national law is compatible with the provisions of EU law of which interpretation is sought.

51 Therefore, the request for a preliminary ruling is admissible in its entirety.

Consideration of the question referred

52 It should be noted as a preliminary point that, according to settled case-law, in the context of the cooperation between national courts and the Court of Justice laid down in Article 267 TFEU, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see judgments of 29 November 1978, *Redmond*, 83/78, EU:C:1978:214, paragraph 26, and of 25 February 2025, *Alphabet and Others*, C-233/23, EU:C:2025:110, paragraph 33 and the case-law cited).

53 In the present case, the request for a preliminary ruling does not contain any explanation as to how the principle of equivalence, which is mentioned in the question referred, is relevant.

54 Thus, it must be held that, by its single question, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 and the principle of effectiveness, read in the light of the principles of legal certainty and proportionality and the right to effective judicial protection, preclude a judicial interpretation of national law which, in proceedings brought by a consumer seeking a finding of invalidity of the mortgage loan agreement concluded with a seller or supplier and the repayment of the monthly instalments paid under that agreement, allows that seller or supplier, while maintaining, primarily, that that agreement is valid, to raise, in the alternative, a plea of set-off based on a claim corresponding to the amount of that mortgage loan, where that claim must be regarded as due on the ground that the two-week formal notice period determined for that consumer has expired and that the upholding of that plea entails, on account of the consumer’s having lodged an unsuccessful objection to it, the allocation of costs in proportion to the extent to which each party has been unsuccessful.

55 Under Article 6(1) of Directive 93/13, Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or a supplier are, as provided for under their national law, not to be binding on the consumer.

56 In addition, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers, 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 concluded with consumers by sellers or suppliers' (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 56 and the case-law cited).

57 Therefore, the national court is obliged to exclude an unfair contract term imposing the payment of amounts that prove not to be due. Such an obligation entails, in principle, a corresponding restitutory effect in respect of those same amounts, in so far as the absence of such a restitutory effect would call into question the dissuasive effect which Article 6(1) of that directive, read in conjunction with Article 7(1) thereof, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers (see, to that effect, judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 58 and the case-law cited).

58 However, Directive 93/13 does not expressly govern the consequences of the invalidity of a contract concluded between a seller or supplier and a consumer after the excision of the unfair terms in that contract. Accordingly, it is for the Member States to determine the consequences of such a finding, it being understood that the rules which they lay down in that regard must be compatible with EU law and, in particular, with the objectives pursued by that directive (judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 64 and the case-law cited).

59 In the present case, in the first place, it is apparent from the request for a preliminary ruling that the situation which led the referring court to make a that request to the Court stems from the 'two claims' theory, according to which the nullity of such a contract gives rise to two claims, which may be recovered independently.

60 In that regard, first of all, the Court has already held that Article 7(1) of Directive 93/13 must be interpreted as precluding national case-law according to which, where a term of a loan agreement classified as unfair renders that agreement invalid, the seller or supplier is entitled to require the consumer to repay the full nominal amount of the loan obtained, irrespective of the value of repayments made by the consumer in performance of that agreement and irrespective of the amount remaining due (judgment of 19 June 2025, *Lubreczlik*, C-396/24, EU:C:2025:460, paragraph 44).

61 It is apparent from the request for a preliminary ruling that upholding the plea of set-off raised by the seller or supplier in response to the consumer's request for repayment of the payments made by him or her in performance of a mortgage loan

agreement which has been declared void leads to a situation in which only the party with the highest claim continues to be a creditor vis-à-vis the other party. Therefore, in such a situation, the amount of the repayments made by the consumer in performance of the void agreement and the outstanding amount are indeed taken into account, with the result that that consumer is not required to repay the full nominal amount of the loan obtained.

62 Therefore, the principles recalled in paragraph 60 of the present judgment do not preclude an interpretation of the relevant rules of national law which makes it possible to arrive at a situation where, following a set-off between two mutual claims, the respective amounts of which are not identical, only the party which remains the debtor of the amount not covered by its own claim against the other party is ordered to pay that amount to the latter.

63 Therefore, it is true that, according to the case-law, Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, preclude a judicial interpretation of national law according to which, where a mortgage loan agreement concluded with a consumer by a seller or supplier is no longer capable of continuing in existence after the unfair terms in that agreement have been removed, that seller or supplier may rely on a right of retention which allows him or her to make the restitution of the sums which it has received from that consumer conditional on that consumer making an offer to repay the sums which he or she has himself or herself received from that seller or supplier or to provide a security for the repayment of those sums, where the exercise by that seller or supplier of that right of retention entails the loss, for that consumer, of the right to obtain default interest (see, to that effect, judgment of 14 December 2023, *Getin Noble Bank (Limitation period for actions for restitution)*, C-28/22, EU:C:2023:992, paragraph 87, and order of 8 May 2024, *Santander Bank Polska*, C-424/22, EU:C:2024:398, paragraph 38).

64 However, the right of retention at issue in the cases which gave rise to that case-law consisted in the first party's making the repayment of a sum owed to the second party subject to the condition that the second party undertake to repay the sum provided to it by the first party. In addition, it is apparent from the request for a preliminary ruling that, if the plea of set-off raised by SBP were upheld, the amount of RM's and EM's primary claim would, in any event, be increased by default interest.

65 By contrast, subject to verification by the referring court, it is apparent from the request for a preliminary ruling that, under Polish law, set-off has an effect equivalent to rendering of the payments by both parties.

66 Thus, in such circumstances, unlike the exercise of the right of retention at issue in the cases cited in paragraph 63 of the present judgment, a set-off between the respective claims of the seller or supplier and the consumer is not, in principle, liable to undermine the protection which Directive 93/13 guarantees to the consumer.

67 Lastly, for the purposes of assessing the consequences for the consumer's situation caused by the invalidation of a contract as a whole, the intention expressed by the consumer is decisive. The system of protection envisaged by Directive 93/13 does not apply if the consumer objects to it. The consumer is entitled, after having been informed by the national court, not to assert the unfair and non-binding nature of a term, thus giving free and informed consent to the term in question and thereby avoiding the invalidation of the contract. In order for the consumer to be able to give free and informed consent, it is for the national court to indicate to the parties, in the context of national procedural rules and in the light of the principle of equity in civil proceedings, objectively and exhaustively the legal consequences which the removal of the unfair term may entail. Such information is, in particular, all the more important where non-application of the unfair term is liable to lead to the invalidation of the contract in its entirety, potentially exposing the consumer to claims for restitution (see, to that effect, judgment of 16 March 2023, *M.B. and Others (Effects of the invalidation of a contract)*, C-6/22, EU:C:2023:216, paragraphs 38 to 41 and the case-law cited).

68 That being so, where the consumer, although having received, from the court having jurisdiction, information relating to the consequences likely to derive from the invalidation of the agreement binding him or her to the seller or supplier, decides not to oppose that court's declaration that that agreement is invalid, it must be held that the fact that that court upholds that seller or supplier's request that the respective claims of the two parties, resulting from that declaration of invalidity, be offset against each other is not contrary to the protection guaranteed to the consumer by Directive 93/13. Such compensation constitutes one way among others, for the seller or supplier, to obtain repayment of the loan capital, to which he or she is entitled following the invalidation of that contract.

69 Furthermore, such a set-off mechanism makes it possible to prevent the seller or supplier from choosing to bring a separate action in order to assert his or her claim against the consumer, resulting in multiple proceedings and, therefore, in additional costs, which would not be in the consumer's interest.

70 In the second place, it should be pointed out that, while the alleged victims of an infringement of EU law may rely on the right to a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, that right also protects the defendant, including where the latter has previously been found to have infringed Directive 93/13. The right to a fair trial protects each legal person individually. Thus, consumer disputes are not exempt from the procedural guarantees deriving from that article (see, by analogy with Article 101 TFEU, judgment of 11 July 2024, *Volvo (Service of summons at the registered office of a subsidiary of the defendant)*, C-632/22, EU:C:2024:601, paragraph 54).

71 If the seller or supplier were deprived of the possibility, provided for by the applicable national law, of raising a plea of set-off in respect of the consumer, his or her right to effective judicial protection would be disproportionately impaired, in so far as he or she could not rely on that defence.

72 Therefore, since a consumer may seek that the court having jurisdiction, if it invalidates the agreement which that consumer has concluded with a seller or supplier, order that seller or supplier to return the benefits received by that consumer pursuant to that agreement, the principle of equality of arms, which is a corollary of the very concept of a fair hearing (see, to that effect, judgment of 12 July 2022, *Nord Stream 2* v *Parliament and Council*, C-348/20 P, EU:C:2022:548, paragraph 128 and the case-law cited), requires that that seller or supplier in turn be afforded such an opportunity to obtain restitution of the sums it has paid to the same consumer, including by way of a plea of set-off submitted in the alternative, in the event that that seller or supplier's principal defence alleging that that agreement is valid is rejected.

73 In that context, it should be noted, however, that it follows from the case-law that Article 6(1) and Article 7(1) of Directive 93/13 preclude a judicial interpretation of the law of a Member State according to which, following a declaration that a mortgage loan agreement is void, the bank has the right to seek from the consumer an amount going beyond reimbursement of the capital paid in respect of the performance of that agreement and payment of default interest at the statutory rate from the date on which notice is served. Subject to that reservation concerning default interest at the statutory rate, the bank is not entitled to receive remuneration for the use of that capital by the consumer (see, to that effect, judgment of 7 December 2023, *mBank (Consumer declaration)*, C-140/22, EU:C:2023:965, paragraphs 62 and 63 and the case-law cited).

74 In the context of a plea of set-off raised in the alternative, that proviso means that, as long as the seller or supplier claims that the agreement concluded with the consumer is valid, any formal notice served on the consumer with a view to repayment of the loan capital cannot have any effect, in particular for the purposes of the payment of default interest, until the invalidity of that agreement is definitively established.

75 In the third place, as regards the duration of the time limit for payment which may be set by the seller or supplier in the formal notice which it gives to the consumer, it must be held that that period is covered by all the information relating to the consequences of the invalidation of the agreement which the court having jurisdiction must provide to that consumer, in accordance with the case-law referred to in paragraph 67 of the present judgment, before such invalidation takes effect. Although the determination of that duration depends on national law, that court must nevertheless ensure, in the light of all the relevant circumstances, that it is not such as to deter, or prevent, the consumer from relying on the protection conferred on him or her by Directive 93/13.

76 In the fourth and last place, as regards the consequences that the upholding of the plea of set-off raised by the seller or supplier may have on the costs of the proceedings, it must be noted that the award of the costs of judicial proceedings before the national courts falls within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness

(judgment of 22 September 2022, *Servicios prescriptor y medios de pagos EFC*, C-215/21, EU:C:2022:723, paragraph 34 and the case-law cited).

77 As regards the principle of effectiveness, which alone is the subject of the views expressed by the referring court in that regard, it should be borne in mind 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 22 September 2022, *Servicios prescriptor y medios de pagos EFC*, C-215/21, EU:C:2022:723, paragraph 35 and the case-law cited).

78 Although the principle of effectiveness does not preclude, in general, the consumer from incurring certain legal costs when he or she brings proceedings for a declaration that a contractual term is unfair (judgment of 7 April 2022, *Caixabank*, C-385/20, EU:C:2022:278, paragraph 51), it should also be observed that Directive 93/13 confers on consumers the right to apply to a court to have a contractual term declared unfair and disapplied, a right the effectiveness of which must be preserved. As a result, the rules on allocating the costs for such proceedings must not deter a consumer from exercising that right (see, to that effect, judgment of 22 September 2022, *Servicios prescriptor y medios de pagos EFC*, C-215/21, EU:C:2022:723, paragraph 37 and the case-law cited).

79 In the present case, the referring court considers that, if it were to uphold the plea of set-off raised by SBP, it would not be able to apply Article 98(1) of the Code of Civil Procedure in order to order SBP to pay all the costs of the proceedings, given that RM and EM would be unsuccessful in the part of their claim seeking repayment of the sums which they paid to SBP under the agreement at issue, the amount of that restitution having to be reduced by the amount corresponding to the amount of SBP’s claim against them. That court states that it could have relied on that provision if RM and EM had not challenged the plea of set-off raised by SBP and had partially withdrawn their application. In those circumstances, that court considers itself bound to apply the first sentence of Article 100 of that code and to order that the costs be shared, taking into account the extent to which each party has been unsuccessful. Nevertheless, that court refers to the possibility of relying on Article 102 of the Code of Civil Procedure, which allows it to order the unsuccessful party to pay only part of the costs or not to order it to pay the costs at all, thus making a decision as to costs which is more favourable to the applicants.

80 In that context, it is important to recall that the principle that national law must be interpreted in conformity with EU law requires national courts, in observance, inter alia, of the prohibition on interpretation of national law *contra legem*, to do whatever lies within their jurisdiction, taking the whole body of domestic law into

consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see, to that effect, judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 118 and 119, and of 15 October 2024, *KUBERA*, C-144/23, EU:C:2024:881, paragraph 51 and the case-law cited).

81 In its written observations, the Polish Government states that national courts have at their disposal sufficient legal instruments to ensure the effectiveness of the rights which consumers derive from Directive 93/13. In particular, those courts could order the reimbursement of costs, on the basis of Article 102 of the Code of Civil Procedure, which lays down a principle of equity. In accordance with the principle that national law should be interpreted in conformity with EU law, those courts may depart from a restrictive interpretation of that article.

82 It is ultimately for the referring court to examine whether the national legislation at issue in the main proceedings may be interpreted in conformity with Directive 93/13 and, if so, to draw the appropriate legal conclusions.

83 In particular, that court must, first, ensure the effectiveness of RM's and EM's right to obtain a finding of invalidity in respect of the agreement at issue, containing unfair terms, and the restitution of the payments unduly received by the seller or supplier, by preventing the rules on the allocation of costs from deterring consumers from relying on the rights conferred on them by Directive 93/13.

84 Second, that court must also be in a position to assess all the circumstances of the case before it in order to take into account, where appropriate, any bad faith on the part of consumers who, in spite of the information received from the court, wrongly challenge the set-off of claims owed by those consumers and the seller or supplier to one another (see, to that effect, judgment of 22 September 2022, *Servicios prescriptor y medios de pagos EFC*, C-215/21, EU:C:2022:723, paragraphs 42 and 43).

85 In the light of the foregoing, the answer to the question referred is that Article 6(1) and Article 7(1) of Directive 93/13 and the principle of effectiveness, read in the light of the principles of legal certainty and proportionality and the right to effective judicial protection, must be interpreted as not precluding a judicial interpretation of national law which, in proceedings brought by a consumer seeking to have the mortgage loan agreement concluded with a seller or supplier declared invalid and to obtain the repayment of the monthly instalments paid under that agreement, allows that seller or supplier, whilst maintaining, primarily, that that agreement is valid, to raise, in the alternative, a plea of set-off based on a claim corresponding to the amount of that mortgage loan, provided, first, that the latter claim is not deemed to be due before the court having jurisdiction has found that agreement to be invalid and, second, that upholding such a claim does not result in a decision on the costs of the proceedings likely to dissuade the consumer from exercising the rights conferred on him or her by that directive.

Costs

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

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

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and the principle of effectiveness, read in the light of the principles of legal certainty and proportionality and of the right to effective judicial protection,

must be interpreted as not precluding a judicial interpretation of national law which, in proceedings brought by a consumer seeking to have the mortgage loan agreement concluded with a seller or supplier declared invalid and to obtain the repayment of the monthly instalments paid under that agreement, allows that seller or supplier, whilst maintaining, primarily, that that agreement is valid, to raise, in the alternative, a plea of set-off based on a claim corresponding to the amount of that mortgage loan, provided, first, that the latter claim is not deemed to be due before the court having jurisdiction has found that agreement to be invalid and, second, that upholding such a claim does not result in a decision on the costs of the proceedings likely to dissuade the consumer from exercising the rights conferred on him or her by that directive.

[Signatures]