Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 July 2021 [1]

Case C-869/19

L

v

Unicaja Banco, S.A., formerly Banco de Caja España de Inversiones, Salamanca y Soria, S.A.U.

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Article 6(1) – Principles of equivalence and effectiveness – Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980) – Limitation in time of the restitutory effects of the declaration of nullity of the unfair term – Scope of the review carried out by the national court ruling on appeal – Principle of the delimitation of the subject matter of an action by the parties – Principle of the correlation between the claims put forward in the action and the rulings contained in the operative part – Principle of the prohibition of *reformatio in peius* – Principle of *res judicata* – Time-barring)

I. Introduction

1. This request from the Tribunal Supremo (Supreme Court, Spain; 'the Supreme Court') concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [2] It is situated in the context of appeal proceedings brought in the wake of the judgment of the Grand Chamber of 21 December 2016, *Gutiérrez Naranjo and Others*. [3] In that judgment, the Court of Justice essentially held that national case-law established by the Supreme Court which imposed a temporal limitation on the repayment of amounts that consumers overpaid to banks based on an unfair term known as a 'floor clause' was contrary to Article 6(1) of Directive 93/13, which provides that unfair terms are not binding on the consumer, and thus that consumers were entitled to repayment in full of those amounts pursuant to that provision.

2. The problem arising in the present case stems from the fact that only the bank, and not the consumer, lodged an appeal against the first instance judgment that placed such a temporal limitation on repayment due to that national case-law, and the Court delivered the *Gutiérrez Naranjo* judgment after the time limit for lodging such an appeal had expired, but before the

[1] Original language: English.

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

[3] C-154/15, C-307/15 and C-308/15, EU:C:2016:980 ('the *Gutiérrez Naranjo* judgment'). See further point 50 of this Opinion.

national court hearing the appeal had rendered its decision. The main question before the Court is therefore whether a national court ruling on appeal in those circumstances must order of its own motion the repayment in full of amounts overpaid by the consumer in accordance with the *Gutiérrez Naranjo* judgment, despite certain principles of national procedural law, including the principles of the delimitation of the subject matter of an action by the parties, the correlation between the claims put forward in the action and the rulings contained in the operative part and the prohibition of *reformatio in peius*, which may be considered to prevent it from doing so.

3. The present case is being heard by the Court in parallel with four other cases (C-600/19, C-693/19, C-725/19 and C-831/19) in which my Opinions are being delivered today. Those cases are based on Spanish, Italian and Romanian requests for preliminary rulings and also touch on similar and potentially sensitive issues relating to the extent of the national court's obligation to examine of its own motion (*ex officio*) the unfairness of contractual terms in accordance with the Court's case-law interpreting Directive 93/13 and the relationship with the national procedural systems.

4. Consequently, the present case provides the Court with the opportunity to develop its case-law on Directive 93/13, and in particular to clarify issues regarding the application of those national procedural principles in connection with the judicial review of unfair terms under that directive.

II. Legal framework

A. Union law

5. 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.'

B. Spanish law

6. Article 1303 of the Código Civil español ('the Civil Code') states:

'When 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 together with interest, without prejudice to the following articles.'

7. Article 216 of the Ley de Enjuiciamiento Civil ('the Code of Civil Procedure') states:

'Civil courts before which cases are brought shall dispose of them on the basis of the facts, evidence and claims put forward by the parties, save where otherwise provided by law in specific cases.'

8. Article 218(1) of the Code of Civil Procedure states:

'1. Legal decisions must be clear and precise and must be commensurate with the request and other claims of the parties, made in a timely manner in the course of the proceedings. Those decisions must contain the requisite declarations, find in favour of or against the defendant and settle all points in dispute which form the subject matter of the litigation.

The court, without departing from the cause of action by accepting elements of fact or points of law other than those which the parties intended to raise, must give its decisions in accordance with the rules applicable to the case, even though they may not have been correctly cited or pleaded by the parties to the procedure.'

9. Article 412(1) of the Code of Civil Procedure states:

'Once the subject matter of the proceedings has been established in the application, in the defence, and, as the case may be, in the counterclaim, the parties may not vary it at a later date.'

10. Article 465(5) of the Code of Civil Procedure states:

'Orders or judgments issued in appeals must rule solely on the points and matters raised in the appeal and, where applicable, in the written statements of opposition or challenge referred to in Article 461. Decisions may not be to the detriment of the appellant, unless the detriment is the result of upholding a challenge to the decision in question brought by the original respondent.'

III. Facts, procedure and question referred

11. According to the order for reference, on 22 March 2006, the financial institution Banco de Caja España de Inversiones, Salamanca y Soria, S.A.U. ('Banco Ceiss'), which was later absorbed by Unicaja Banco, S.A. ('Unicaja Banco'), granted L, acting as a consumer, a loan of EUR 120 000, secured by a mortgage, to purchase her family home. L was to repay the loan over 30 years in 360 monthly payments.

12. Pursuant to the general terms and conditions of the loan contract drawn up by Banco Ceiss, the interest rate on the loan was 3.350% per annum for the first year and then a variable interest rate applied, which was 0.52% above the 12-month Euribor rate.[4] However, the contract contained a clause stipulating that the interest rate on the loan would never fall below 3% per annum ('the floor clause'). When there was significant fall in the Euribor rate in 2009, that clause prevented the loan rate from falling below 3% per annum.

13. In January 2016, L lodged an action against Banco Ceiss before the Juzgado de Primera Instancia de Valladolid (Court of First Instance, Valladolid, Spain; 'the Court of First Instance'), in which she asked for the floor clause to be declared void on the grounds that it was unfair due to a lack of transparency pursuant to the Spanish legislation transposing Directive 93/13. In addition, L sought to have Banco Ceiss repay the total amount that had been overpaid under the floor clause. In the alternative, L requested that Banco Ceiss should be required to repay the amount received under that clause since 9 May 2013.

[4] Euribor denotes the Euro Interbank Offered rate. Euribor rates are based on the average interest rates at which banks borrow funds in euro from one another.

14. By judgment of 6 June 2016 ('the first instance judgment'), the Court of First Instance ruled that the floor clause was unfair due to a lack of transparency, and ordered Banco Ceiss to repay the amount received since 9 May 2013, plus interest, pursuant to the case-law established by the Supreme Court in the judgment of 9 May 2013 (No 241/2013, 'the judgment of 9 May 2013'). That court also ordered Banco Ceiss to pay the costs.

15. On 14 July 2016, Banco Ceiss brought an appeal against that judgment before the Audiencia Provincial de Valladolid (Provincial Court, Valladolid, Spain; 'the Provincial Court'). It challenged the order for costs against it on the grounds that the action had not been upheld in full, but only in part. L opposed that appeal.

16. On 21 December 2016, the Court of Justice delivered the *Gutiérrez Naranjo* judgment,[5] in which it held, in substance, that Article 6(1) of Directive 93/13 precludes national case-law, such as that established by the judgment of 9 May 2013, which temporally limits the restitutory effects of the declaration of nullity of an unfair term to amounts overpaid after the delivery of the decision in which the finding of unfairness is made.

17. By judgment of 13 January 2017, the Provincial Court upheld the appeal on the grounds that the action had been upheld only in part, and set aside the order for costs against Banco Ceiss. That court did not refer to the *Gutiérrez Naranjo* judgment, and nor did it alter the ruling in the first instance judgment regarding the restitutory effects of the nullity of the floor clause because that was not the subject of the appeal.

18. L lodged an appeal in cassation against that judgment before the Supreme Court. In support of that appeal, L argues that, in not applying the *Gutiérrez Naranjo* judgment and not making an order of the court's own motion for repayment of all the sums received under the floor clause, that judgment is in breach of, among other provisions, Article 1303 of the Civil Code, which governs the restitutory effects connected with the nullity of contractual obligations, read together with Article 6(1) of Directive 93/13, which establishes that unfair terms are not binding on the consumer. Banco Ceiss opposes the appeal, pointing out that since L did not lodge an appeal against the first instance judgment in order to challenge the temporal limitation on the restitutory effects of the nullity of the floor clause, it was not open to the Provincial Court to order that the repayment should extend to all sums paid.

19. The referring court explains that, in the judgment of 9 May 2013, the Supreme Court ruled that floor clauses contained in certain contracts between consumers and defendant banks in a collective action were void due to a lack of transparency, but that court placed a temporal limitation on the restitutory effects of the nullity of those clauses, in that it held that those effects did not apply to payments made before the date of publication of that judgment, that is, 9 May 2013; subsequent case-law endorsed that judgment in individual actions for redress. Thereafter, in the *Gutiérrez Naranjo* judgment, the Court of Justice found that such a temporal limitation in the national case-law established by the judgment of 9 May 2013 was contrary to Article 6(1) of Directive 93/13. Thus, as from the judgment of 24 February 2017 (No 123/2017), the Supreme Court has modified its case-law to reflect the *Gutiérrez Naranjo* judgment. Nevertheless, when the Court of Justice delivered that judgment, the Spanish courts were dealing with numerous cases concerning the nullity of floor clauses and, in cases like the present one, the application made by consumers for repayment of amounts overpaid, either in the principal claim

[5] C-154/15, C-307/15 and C-308/15, EU:C:2016:980.

or in the alternative, had been limited to payments made after 9 May 2013 due to the existence of the national case-law, and consumers did not appeal against judgments that placed a temporal limitation on repayment on account of that case-law.

20. The referring court indicates that Spanish civil proceedings are governed by the principles of the delimitation of the subject matter of an action by the parties, the time-barring of procedural steps, the prohibition of *mutatio libelli* or modification of the claim, the correlation between the claims put forward in the action and the rulings contained in the operative part (*principio de congruencia*) and, in the case of appeals, the prohibition of *reformatio in peius*. As recognised in the case-law of the Tribunal Constitucional (Constitutional Court, Spain; 'the Constitutional Court'), some of those principles, such as the prohibition of *reformatio in peius*, are rooted in the right to effective judicial protection enshrined in Article 24 of the Spanish Constitution, which has its equivalent in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). According to the referring court, it is evident that in this case those principles led the Provincial Court not to order the sums under the floor clause to be repaid in full, as L did not appeal against the ruling in the first instance judgment that ordered repayment of only the sums paid after 9 May 2013.

21. The referring court observes that, according to the Court of Justice's case-law, the principle that unfair terms are not binding on the consumer as set out in Article 6(1) of Directive 93/13 is incompatible with the establishment of a temporal limitation on repayment of sums overpaid by a consumer under an unfair term, but that principle is not absolute and is subject to restrictions linked to the sound administration of justice, such as *res judicata* and reasonable time limits for bringing proceedings. In that regard, the referring court notes that the rule in Spanish law, according to which, in an appeal, it is possible for the various rulings contained in a judgment to be challenged separately and, if a ruling is not challenged by any of the parties, the appellate court cannot set it aside or alter it, is similar in some respects to *res judicata*. The referring court therefore has doubts regarding the compatibility with Article 6(1) of Directive 93/13 of the principles of the delimitation of the subject matter of an action by the parties, the correlation between the claims put forward in the action and the rulings contained in the operative part and the prohibition of *reformatio in peius* as provided in national law, and in particular whether, once the Court of Justice delivered the *Gutiérrez Naranjo* judgment, a national court hearing proceedings in which only the bank appealed, and not the consumer, should order repayment of all the amounts received under the unfair term, even though this puts the bank in a worse position, contrary to the prohibition of *reformatio in peius*.

22. It was in those circumstances that the Supreme Court decided to stay the main proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 6(1) of Directive 93/13/EEC preclude the application of the procedural principles of delimitation of the subject matter of an action by the parties, correlation between the claims put forward in the action and the rulings contained in the operative part and prohibition of *reformatio in peius* that prevent the court seised of the appeal lodged by the bank against a judgment that placed a temporal limit on repayment of the amounts overpaid by the consumer under a "floor clause" subsequently declared void from ordering repayment in full of the said overpayments, thereby placing the appellant in a worse position, because the consumer has not appealed against the said limit?'

23. Written observations were submitted to the Court by L, Unicaja Banco, the Czech, Spanish, Italian and Norwegian Governments and the Commission.

24. A joint hearing with Case C-600/19 was held on 26 April 2021, at which L, Unicaja Banco, the Spanish, Italian and Norwegian Governments and the Commission presented oral argument.

IV. Summary of the observations of the parties

25. L submits that, on the basis of the *Gutiérrez Naranjo* judgment, the national court must order of its own motion the restitutory effects of the nullity of the floor clause, having regard to the duty to protect consumers under Directive 93/13. As L argued at the hearing, L did not challenge the first instance judgment due to the national case-law, and to do so would have made L liable to pay the costs. L claimed full repayment from the beginning, so there is no extension of the subject matter of the action, and as regards the temporal limitation, no final decision has been issued so there is no *res judicata*. Nor does L's position run counter to the prohibition of *reformatio in peius*, since the *Gutiérrez Naranjo* judgment must be respected; otherwise, L cannot be reimbursed and the bank retains the sums pursuant to the unfair term.

26. Unicaja Banco claims that Article 6(1) of Directive 93/13 does not require a national court hearing an appeal to draw *ex officio* the consequences arising from an unfair term where that action leads it to set aside the rule prohibiting *reformatio in peius*. There was nothing to prevent L from lodging an appeal or a cross-appeal against the first instance judgment, and L not only had the benefit of legal representation, but also was aware of the forthcoming *Gutiérrez Naranjo* judgment. The rule prohibiting *reformatio in peius* forms part of the right to effective judicial protection protected by Article 24 of the Spanish Constitution, and based on the judgment of 25 November 2008, *Heemskerk and Schaap*,[6] Directive 93/13 does not require that rule to be disregarded. As Unicaja Banco argued at the hearing, the principles of equivalence and effectiveness are respected, as the national case-law referred to by the Commission is not applicable, and changes in the case-law cannot lead to the reopening of decisions having the authority of *res judicata*.

27. The Czech Government submits that Article 6(1) of Directive 93/13 does not preclude the application of the national procedural principles at issue, which, as applied to appeals, also have a link with *res judicata*. Under the Court's case-law, such principles cannot be disregarded even in the interests of consumer protection, and the judgment of 11 March 2020, *Lintner*,[7] is applicable to this case.

28. The Spanish Government submits that Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter, does not preclude the national court from applying the national procedural principles at issue, which prevent full effect from being given to the nullity of an unfair term in accordance with the *Gutiérrez Naranjo* judgment, which was delivered after the first instance judgment became final. Granting protection to a consumer who refrained from making timely use of remedies provided in national law would infringe those principles, and the prohibition of *reformatio in peius* has a basis in the right to effective judicial protection as guaranteed by Article 47 of the Charter. The principle of effectiveness is respected, as national law allows the parties at first instance to assert their rights and the court to carry out an *ex officio* review of unfair terms, with the opportunity to appeal. As it argued at the hearing, this case concerns *res judicata*, and there is no valid comparison with respect to the national case-law cited by the Commission and hence no breach of the principle of equivalence.

[6] C-455/06, EU:C:2008:650.

[7] C-511/17, EU:C:2020:188.

29. The Italian Government contends that Article 6(1) of Directive 93/13 does not preclude the application of the national procedural principles at issue. Following from the Court's case-law, the absence of an appeal against the unfavourable grounds of the first instance judgment implies *res judicata*, which prevents the incorrect interpretation of Union law contained in that judgment from being raised by the court of its own motion on appeal. This does not compromise the principle of effectiveness, since the consumer is free to lodge an appeal, and the subsequent reversal of national or Union case-law cannot justify setting aside the principle of *res judicata*. As the Italian Government emphasised at the hearing, Article 6 of Directive 93/13 must be invoked within the limits established by the national systems, which presupposes compliance with national procedural rules, such as *res judicata*.

30. The Norwegian Government claims that Article 6(1) of Directive 93/13 does not preclude the application of the national procedural principles at issue in appeal proceedings, even where the challenged judgment contains rulings that infringe Directive 93/13, provided that the time limits barring the procedural steps of the consumer comply with the principle of effectiveness. Those principles protect overriding interests common to the EU and European Free Trade Association Member States and must not be disregarded by stretching the principle of effectiveness. As the Norwegian Government emphasised at the hearing, if national courts misinterpret Union and European Economic Area law, there are other remedies available, such as State liability actions and national rules that allow final decisions to be reopened.

31. The Commission submits that Article 6(1) of Directive 93/13 precludes the application of the national procedural principles at issue, since the principles of equivalence and effectiveness are not respected. In its view, this case does not concern *res judicata*, since the proceedings are still ongoing. As regards the principle of equivalence, it asserts that there is consistent case-law of the Constitutional Court [8] and the Supreme Court [9] which recognises that the *ex officio* application of public policy rules constitutes an exception to the principles at issue; given that Article 6 of Directive 93/13 is recognised as a rule of public policy, the national court should have given full effect to that provision of its own motion without being limited by those principles. As regards the principle of effectiveness, it contends that the strict application of the principles at issue renders the exercise of the rights conferred by Directive 93/13 impossible or excessively difficult, as the national case-law deterred L from lodging an appeal at the appropriate time and that legal context, combined with those principles, deprived L of the only remedy to assert her rights under that directive. As it argued at the hearing, this case represents an exceptional situation, and while the national court must draw all the consequences arising from the unfair term, there is no impairment of the rights of the defence, since before exercising that obligation, the court will hear from the parties, so the right to an effective remedy is guaranteed throughout the proceedings.

V. Analysis

32. By its question, the referring court asks, in substance, whether Article 6(1) of Directive 93/13 precludes the application of certain principles of national procedural law – including the principles of the delimitation of the subject matter of an action by the parties, the correlation between the claims put forward in the action and the rulings contained in the operative part and the prohibition of *reformatio in peius* as laid down in Articles 216, 218(1) and 465(5) of the Code of Civil Procedure – which prevent a national court, seised of an appeal against a judgment that

[8] The Commission refers to the judgment of 10 March 2008 (No 41/2008) and the case-law cited therein.

[9] The Commission refers to the judgments of 20 June 2008 (No 3257/2008), and of 16 September 2009 (No 5696/2009).

placed a temporal limitation on the repayment of the amounts overpaid by a consumer under an unfair term, from ordering of its own motion full repayment of those amounts in accordance with the *Gutiérrez Naranjo* judgment because that limitation was not contested by the consumer.

33. As is apparent from the order for reference, that question arises from the interaction between the obligation under Article 6(1) of Directive 93/13 for a national court, including a court ruling in appeal proceedings, to examine of its own motion the unfairness of contractual terms and to draw all the consequences from the finding that a term is unfair, on the one hand, and the application of several principles of national procedural law which govern proceedings brought on the basis of that directive, on the other. Broadly speaking, the principle of the delimitation of the subject matter of an action by the parties means that it is for the parties to initiate or terminate the proceedings and to determine their subject matter. [10] That principle is related to the principle of the correlation between the claims put forward in the action and the rulings contained in the operative part, in so far as the court is required to ensure that decisions are consistent with requests made by the parties. [11] In addition, according to the principle of the prohibition of *reformatio in peius*, a party bringing an action before a higher court, such as an appeal, must not be placed in a worse position than if it had not brought that action. [12]

34. With a view to answering the question raised by the present case, I will first make a preliminary remark on the potential relevance of Article 47 of the Charter in this context (section A). I will then consider the Court's case-law regarding the national court's *ex officio* review of unfair terms under Directive 93/13, including the *Gutiérrez Naranjo* judgment (section B) and the application of the principles developed in that case-law to the circumstances of the present case (section C).

35. On the basis of that analysis, I have reached the conclusion that Article 6(1) of Directive 93/13, read in the light of the principle of effectiveness, precludes the application of the national procedural principles at issue in the circumstances of the present case.

A. Preliminary remark

36. It is apparent from the order for reference and the observations of Unicaja Banco and the Spanish Government that the question raised in the present case pertains to the compatibility with Article 6(1) of Directive 93/13 of certain national procedural principles that have a basis in the right to effective judicial protection as guaranteed by Article 24 of the Spanish Constitution and which has its analogue in Article 47 of the Charter. The Spanish Government also suggests that Article 47 of the Charter be taken into account for the purposes of answering that question.

37. According to settled case-law, Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, enshrines the right to an effective remedy before a tribunal for every person whose rights and freedoms guaranteed by Union law are infringed. [13]

[10] See, in that regard, my Opinion in *Lintner* (C-511/17, EU:C:2019:1141, point 43).

[11] See, in that regard, Muñoz-Perea Piñar, D., 'Ámbito del principio de congruencia a la luz de la jurisprudencia de la Sala Primera del Tribunal Supremo', *Noticias Jurídicas*, 2020.

[12] See, in that regard, Opinion of Advocate General Trstenjak in *Les Éditions Albert René* v *OHIM* (C-16/06 P, EU:C:2007:728, points 35 and 36).

[13] See judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 40).

There is no dispute about the applicability of Article 47 of the Charter in the present case, as the national legislation at issue falls within the scope of Directive 93/13 and thus constitutes an implementation of Union law for the purposes of Article 51(1) of the Charter. [14]

38. As I detailed in points 59 and 60 of my parallel Opinion in Cases C-693/19 and C-831/19, in the Court's case-law on Directive 93/13, there is a particular relationship between Article 47 of the Charter and the principle of effectiveness, which also embodies an obligation on the Member States to ensure the judicial protection of rights based on Union law (see point 45 of this Opinion). [15] In that regard, the Court has held that the obligation for the Member States to ensure the effectiveness of the rights that individuals derive from Directive 93/13 implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter, which applies, inter alia, to the detailed procedural rules relating to actions based on such rights. [16]

39. Furthermore, as illustrated by the Court's case-law on Directive 93/13 so far, Article 47 of the Charter appears to perform, to a large extent, a supporting or complementary role relative to the principle of effectiveness in connection with the assessment of the compatibility of national procedural rules with the requirements of that directive. For example, Article 47 of the Charter comes into play in this context with regard to matters relating to access to an effective remedy so that parties can exercise their rights based on Directive 93/13, [17] as well as matters relating to a fair trial, such as respect for the principles of equality of arms and *audi alteram partem* in the context of court proceedings where the lawfulness of terms with regard to that directive are at issue. [18]

40. In the present case, there is no dispute that the parties have been afforded access to effective remedies for asserting their rights with regard to Directive 93/13. Nor, as indicated by the Commission, does the obligation of the national court to draw all the consequences arising from the unfair term under Article 6(1) of that directive appear to present an impairment of the rights of the defence in the circumstances of the present case. In addition, it should be pointed out that, in the *Gutiérrez Naranjo* judgment, the Court based its reasoning on Article 6(1) of Directive 93/13 and found it unnecessary to address Article 47 of the Charter in that context. [19] Therefore, given that no freestanding arguments concerning Article 47 of the Charter have been put before the Court and that the matters raised in this case to date have not been dealt with by Article 47 of the Charter, there seems to me to be no reason to do so here.

[14] See, in that regard, judgment of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 47); see also Opinion of Advocate General Szpunar in *Finanmadrid EFC* (C-49/14, EU:C:2015:746, points 83 and 84).

[15] See, in that regard, Opinion of Advocate General Szpunar in *Finanmadrid EFC* (C-49/14, EU:C:2015:746, points 85 to 97). See further, for example, van Duin, A., 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC', *Journal of European Consumer and Market Law*, vol. 6, 2017, pp. 190-198.

[16] See judgment of 10 June 2021, *VB and Others* (C-776/19 to C-782/19, EU:C:2021:470, paragraph 29).

[17] See, inter alia, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, in particular paragraph 59); of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, in particular paragraphs 45, 47 and 66); and of 21 December 2016, *Biuro podróży 'Partner'* (C-119/15, EU:C:2016:987, paragraphs 23 to 47); compare judgment of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraphs 36 to 57).

[18] See, inter alia, judgments of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 29 to 36); of 17 July 2014, *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraphs 21 to 51); and of 29 April 2021, *Rzecznik Praw Obywatelskich* (C-19/20, EU:C:2021:341, paragraphs 91 to 99); compare order of 16 July 2015, *Sánchez Morcillo and Abril García* (C-539/14, EU:C:2015:508, paragraphs 23 to 50).

[19] See judgment of 21 December 2016 (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 42, 75 and 76).

B. Pertinent case-law of the Court on the ex officio review of unfair terms by national courts

41. It should be recalled that Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms are not binding on the consumer.[20] In addition, Article 7(1) of that directive, read in conjunction with the twenty-fourth recital thereof, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts.[21] While those provisions have given rise to an extensive body of case-law, I will outline the applicable principles drawn from that case-law relating to the existence and extent of the national court's duty to review *ex officio* the unfairness of contractual terms, along with the *Gutiérrez Naranjo* judgment, which are most pertinent to my analysis of the present case.

1. Existence of the national court's duty of ex officio review

42. According to settled case-law, the system of protection implemented by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both bargaining power and level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.[22] In order to guarantee the protection intended by Directive 93/13, the imbalance that exists between the consumer and the seller or supplier may be corrected only by positive action unconnected to the parties to the contract.[23] Therefore, in the light of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, the national court is required to assess of its own motion whether a contractual term is unfair and, in doing so, compensate for that imbalance between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task.[24]

2. Extent of the national court's duty of ex officio review

43. In respect of the implementation of that obligation by a national court ruling in appeal proceedings, it is equally settled that, in the absence of Union legislation, the procedural rules governing appeal proceedings for safeguarding the rights that individuals derive from Union law fall within the legal systems of the Member States, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and do not make it impossible or excessively difficult to exercise the rights conferred by Union law (principle of effectiveness).[25]

44. As regards the principle of equivalence, it is for the national court which has direct knowledge of the detailed procedural rules in the national legal system to determine whether that principle is observed, taking account of the subject matter, cause of action and their essential elements.[26] In that regard, the Court has established that Article 6 of Directive 93/13 constitutes a provision of

[20] See judgment of 27 January 2021, *Dexia Nederland* (C-229/19 and C-289/19, EU:C:2021:68, paragraph 57). See also the twenty-first recital of Directive 93/13.

[21] See judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 52).

[22] See judgments of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 25), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 49).

[23] See judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 48), and of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 25).

[24] See judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 32), and of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraph 37).

[25] See judgment of 30 May 2013, *Jőrös* (C-397/11, EU:C:2013:340, paragraph 29).

[26] See judgment of 20 September 2018, *Danko and Danková* (C-448/17, EU:C:2018:745, paragraph 40).

equal standing to national rules which rank, within the domestic legal system, as rules of public policy.[27] It follows that, where a national court in appeal proceedings has a discretion or the obligation under national procedural rules to examine of its own motion the validity of a legal measure in the light of national rules of public policy, even though no conflict in that area was raised at first instance, it must also exercise such a power for the purposes of assessing, of its own motion and in the light of Directive 93/13, whether a term is unfair.[28]

45. As regards the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural rule makes the application of Union law impossible or excessively difficult must be analysed by reference to the role of that rule in the procedure, its conduct and its special features viewed as a whole, along with, where relevant, the principles underlying 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.[29] In that connection, the Court has considered that the need to comply with that principle cannot be stretched so far as to make up fully for the total inertia on the part of the consumer.[30]

46. Furthermore, the Court has recognised that consumer protection is not absolute and that Union law does not require a national court to disapply domestic procedural rules conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13.[31] Indeed, the Court has emphasised the importance, both for the Union legal order and the national legal systems, of the principle of *res judicata*, and that, in order to ensure stability of the law and legal relations as well as the sound administration of justice, judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question.[32]

47. For example, in the judgment of 6 October 2009, *Asturcom Telecomunicaciones*,[33] the Court held, in particular, that national rules imposing a two-month time limit, upon the expiry of which, in the absence of any action for annulment, an arbitration award had become final and thus had acquired *res judicata*, were consistent with the principle of effectiveness, noting that that principle could not be stretched so far as to make up fully for the total inertia on the part of a consumer who had not brought any proceedings to assert his or her rights.

48. By contrast, in the judgment of 18 February 2016, *Finanmadrid EFC*,[34] the Court ruled that national legislation providing for the principle of *res judicata* in the context of the order for payment procedure ran counter to the principle of effectiveness, given that the decision of the authority closing the order for payment proceedings became *res judicata*, which made it impossible to check the unfairness of the contractual terms at the enforcement stage simply because the consumer did not lodge an objection within the prescribed time limit, and there was a significant risk that the consumer would not do so.

27 See judgment of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraph 35).

28 See judgment of 30 May 2013, *Jőrös* (C-397/11, EU:C:2013:340, paragraph 30).

29 See judgment of 22 April 2021, *PROFI CREDIT Slovakia* (C-485/19, EU:C:2021:313, paragraph 53).

30 See judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 62).

31 See judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68).

32 See judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraph 46).

33 C-40/08, EU:C:2009:615, paragraphs 34 to 48.

34 C-49/14, EU:C:2016:98, paragraphs 45 to 55.

3. The Gutiérrez Naranjo judgment

49. Lastly, as regards the consequences arising from a finding that a contractual term is unfair, the Court has held that, under Article 6(1) of Directive 93/13, it is for the national court to exclude the application of the unfair term so that it does not produce binding effects with regard to the consumer, unless the consumer objects.[35] The national court must draw all the consequences which under national law result from a finding that the term is unfair in order to achieve the result set out in that provision.[36]

50. In that regard, it should be made clear that, in the *Gutiérrez Naranjo* judgment,[37] the Court ruled that Article 6(1) of Directive 93/13 precludes national case-law, such as that established by the judgment of 9 May 2013, which temporally limits the restitutory effects of the annulment of an unfair term to amounts overpaid under such a term after the delivery of the decision in which the finding of unfairness is made. In particular, the Court held that an unfair term must be regarded in principle as never having existed, so that it cannot have any effect on the consumer. Thus, the determination by a court that 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. Accordingly, the obligation for the national court to exclude an unfair term imposing the payment of amounts that prove not to be due entails in principle a corresponding restitutory effect in respect of those same amounts. The Court emphasised that national law must not adversely affect the substance of the right that consumers acquire under Article 6(1) of Directive 93/13 not to be bound by an unfair term.

51. Consequently, it follows from the foregoing case-law that the Member States are not required by Directive 93/13 to adopt a particular procedural system for the *ex officio* review of unfair terms by national courts, provided that they comply with their obligations under Union law, including the principles of equivalence and effectiveness. Moreover, according to the Court's case-law, while consumer protection is not absolute, neither are national procedural principles governing proceedings involving the assessment of unfair terms under that directive. As illustrated by the judgments mentioned in points 47, 48 and 50 of this Opinion, the Court takes a balanced approach with regard to the interaction between national procedural rules and the requirements of Directive 93/13, whilst ensuring that such rules do not undermine the system of consumer protection established by that directive.

52. It is in the light of those principles developed in the Court's case-law that it is necessary to examine the circumstances of the present case.

C. Application of the principles developed in the Court's case-law to the circumstances of the present case

53. It should be noted at the outset that, while the Czech, Spanish, Italian and Norwegian Governments consider that the principle of *res judicata* is at issue in the present case, L and the Commission disagree. It appears from the order for reference that, although the principle of *res judicata* is not mentioned in the question, the referring court seems nonetheless to be concerned

35 See judgment of 3 March 2020, *Gómez del Moral Guasch* (C-125/18, EU:C:2020:138, paragraph 58).

36 See judgment of 25 November 2020, *Banca B.* (C-269/19, EU:C:2020:954, paragraph 43).

37 See judgment of 21 December 2016 (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 61 to 75). For a detailed discussion, see, for example, Leskinen, C. and de Elizalde, F., 'The control of terms that define the essential obligations of the parties under the Unfair Contract Terms Directive: *Gutiérrez Naranjo*', *Common Market Law Review*, vol. 55, 2018, pp. 1595-1618.

with national procedural rules which are similar to *res judicata* (see point 21 of this Opinion). According to settled case-law, the national court alone has jurisdiction to interpret and apply national law.[38] Consequently, while my analysis focuses on the national procedural principles put at issue by the question, namely, the principles of the delimitation of the subject matter of an action by the parties, the correlation between the claims put forward in the action and the rulings contained in the operative part and the prohibition of *reformatio in peius*, I see no reason why it could not be applied with respect to national procedural rules on *res judicata* in so far as the referring court considers them to be engaged in the circumstances of the present case.

54. As regards the principle of equivalence, the Commission claims that there is consistent case-law of the Constitutional Court and the Supreme Court which recognises that the *ex officio* application of public policy rules constitutes an exception to the national procedural principles at issue, whereas Unicaja Banco and the Spanish Government take a different view (see points 26, 28 and 31 of this Opinion). In the light of the Court of Justice's case-law referred to in point 44 of this Opinion and the fact that Article 6 of Directive 93/13 constitutes a provision equivalent to that of national public policy rules, it follows that, if under national law such rules are regarded as an exception to the application of the national procedural principles at issue, then the national court hearing the appeal must give full effect to Article 6(1) of Directive 93/13 of its own motion without being limited by those principles.[39] It is therefore for the referring court to ascertain whether that national case-law is applicable to the main proceedings and, if that is the case, it seems to me that the application of those national procedural principles which preclude L's right to rely on the case-law of the Court concerning her rights under Directive 93/13 would constitute a breach of the principle of equivalence.

55. As regards the principle of effectiveness, there are, in my view, strong indications, based on the Court's case-law, that Article 6(1) of Directive 93/13, read in the light of that principle, precludes the application of the national procedural principles at issue in the circumstances of the present case.

56. It is true that L did not lodge an appeal or a cross-appeal against the ruling in the first instance judgment which imposed a temporal limitation on the restitutory effects of the amounts received under the unfair term and that, in the light of the Court's case-law mentioned in point 45 of this Opinion, the total inertia on the part of the consumer can limit the principle of effectiveness. However, it should be pointed out that, in the circumstances of the present case, the failure on the part of a consumer, such as L, to take action at the appropriate time can be attributed to the fact that, when the Court delivered the *Gutiérrez Naranjo* judgment – which made it clear that the national case-law established by the judgment of 9 May 2013 was contrary to Article 6(1) of Directive 93/13 – the time limit for lodging an appeal or a cross-appeal under national law had already expired.

57. To my mind, in such a situation, it is difficult to blame a consumer, such as L, for not having lodged an appeal or a cross-appeal at the appropriate time in order to challenge the national case-law established by the judgment of 9 May 2013 which would not have enabled her to win her case. The fact that, as indicated by Unicaja Banco and the Spanish Government, national law provides for a possibility to adjust the awarding of costs to be paid by the relevant party fails to

[38] See judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 46).

[39] It is worth noting that the Court has recognised that the duty to examine *ex officio* the unfairness of contractual terms under Directive 93/13 constitutes a procedural rule placed on the national courts. See judgment of 7 November 2019, *Profi Credit Polska* (C-419/18 and C-483/18, EU:C:2019:930, paragraph 74). Thus, the fact that, as indicated by Unicaja Banco and the Spanish Government, that national case-law pertains to public policy rules of a procedural nature may not in itself preclude its application in the present case.

convince me otherwise, given the existence of that national case-law. Likewise, contrary to what Unicaja Banco contends, the fact that L had the benefit of legal representation and was apparently aware of the pending *Gutiérrez Naranjo* judgment does not invalidate this analysis. As the Court has ruled, the fact that a consumer has legal representation does not affect the obligation incumbent on the national court with regard to the assessment of unfair terms under Directive 93/13.[40] Moreover, it should be noted that the Opinion of Advocate General Mengozzi in that case, which was delivered on 13 July 2016,[41] came to a different conclusion than that of the Court and thus may have reinforced the purported compatibility of that national case-law with Directive 93/13 before the *Gutiérrez Naranjo* judgment was delivered.

58. Therefore, in those circumstances, it should be considered that, as indicated by the Commission, the existence of the national case-law established by the judgment of 9 May 2013, in conjunction with the application of the national procedural principles at issue, had the result that L was deprived of the procedural means to assert her rights based on Directive 93/13. In addition, as indicated by L, a finding that those national procedural principles prevent a national court hearing an appeal from ordering *ex officio* the repayment of all sums unduly paid by the consumer under an unfair term in accordance with the *Gutiérrez Naranjo* judgment would mean that a consumer in L's position would not have any possibility of being reimbursed in full and that the bank would retain the amounts overpaid on the basis of the unfair term. In this respect, as the Court underlined in that judgment, national law must not be applied in such a way as to undermine the substance of the right afforded to consumers under Article 6(1) of Directive 93/13 not to be bound by an unfair term (see point 50 of this Opinion).

59. It should also be pointed out that the circumstances of the present case differ, in my view, from those giving rise to the judgment of 11 March 2020, *Lintner*.[42] In that judgment, the Court essentially held, in line with my Opinion in that case, that the *ex officio* review of unfair terms under Directive 93/13 does not require the national court to disregard, in particular, the principle of the delimitation of the subject matter of an action by the parties in order to cover all the terms of the contract, even those which do not form part of the subject matter of the dispute. By contrast, in the present case, L lodged a claim for full repayment of the sums unduly paid under the unfair term at the outset and thus that claim has remained within the subject matter of the action (see points 13 and 25 of this Opinion).

60. Furthermore, the Court's approach in the judgment of 25 November 2008, *Heemskerk and Schaap*,[43] seems to me to be inapplicable to the present case. That judgment concerned the interpretation of certain Union measures generally related to export refunds on agricultural products. Accordingly, the Court's ruling that Union law does not oblige a national court to apply of its own motion Union legislation where this would have the effect of denying the national procedural principle of the prohibition of *reformatio in peius* can be distinguished from the specific context of ensuring effective protection for consumers under Directive 93/13,[44] as is the case here.

[40] See, in that regard, judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 40), and my Opinion in *Lintner* (C-511/17, EU:C:2019:1141, points 65 to 69).

[41] See Opinion of Advocate General Mengozzi in *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:552, in particular points 38 to 76).

[42] C-511/17, EU:C:2020:188, paragraphs 28 to 34. See also my Opinion in *Lintner* (C-511/17, EU:C:2019:1141, points 49 to 53).

[43] C-455/06, EU:C:2008:650, paragraphs 44 to 48. Compare judgment of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 37).

[44] See, in that regard, judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraphs 39 and 40).

61. Consequently, it should be considered that the national procedural principles at issue run counter to the principle of effectiveness, since they make it impossible or excessively difficult to ensure the protection conferred on consumers by Directive 93/13.

62. I therefore conclude that Article 6(1) of Directive 93/13, read in the light of the principle of effectiveness, precludes the application of the national procedural principles at issue in the circumstances of the present case.

VI. Conclusion

63. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Tribunal Supremo (Supreme Court, Spain) as follows:

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted, in the light of the principle of effectiveness, as precluding the application of the national procedural principles of the delimitation of the subject matter of an action by the parties, the correlation between the claims put forward in the action and the rulings contained in the operative part and the prohibition of *reformatio in peius*, which prevent the national court seised of an appeal lodged by a bank against a judgment that placed a temporal limitation on repayment of the amounts overpaid by a consumer under a floor clause subsequently declared void from ordering repayment in full of the said overpayments.