



**THE COMMENCEMENT OF PRESCRIPTION AND WHAT
THE CONSUMER'S AWARENESS OF THE UNFAIRNESS
IS WITHIN THE UNFAIR CONTRACT TERMS
DIRECTIVE**

ANTONIO RUIZ ARRANZ

PHD. UNIVERSIDAD AUTÓNOMA DE MADRID
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Abstract: Directive 93/13/ECC does not regulate prescriptions periods. However, some parameters can be drawn from the effectiveness principle that national legislation must consider to comply with Directive 93/13. This paper argues that the commencement of prescription for restitutionary claims following the unfairness of a term within the Directive 93/13 is determined with a reasonable discoverability criterion concerning the unfairness of the term. A consumer can discover the unfairness from the moment on which a litigation context concerning the term in question arises. Rather, the commencement of prescription cannot be postponed until a court of last resort has decided over the issue on the unfairness.

Keywords: extinctive prescription, limitation, *dies a quo*, suspension, Directive 93/13, consumer's awareness, reasonable discoverability, unreasonableness rule, litigation context

Título: El comienzo de la prescripción y el conocimiento del carácter abusivo de la cláusula por parte del consumidor en la Directiva sobre cláusulas contractuales abusivas.

Resumen: La Directiva 93/13/CEE no regula los plazos de prescripción. Sin embargo, del principio de efectividad se pueden extraer algunos parámetros que las legislaciones nacionales deben tener en cuenta para cumplir con ella. En este trabajo se argumenta que el inicio de la prescripción de las acciones de restitución, tras la declaración del carácter abusivo de una cláusula de acuerdo con la Directiva 93/13 se determina con el criterio de la posibilidad razonable de descubrir el carácter abusivo de la cláusula. Un consumidor puede descubrir el carácter abusivo de la cláusula a partir del momento en que surge un contexto de litigio relativo a la cláusula en cuestión. Se diría más bien que el inicio de la prescripción no debe aplazarse al momento en que un tribunal de última instancia se haya pronunciado sobre la cuestión del carácter abusivo.

Palabras clave: prescripción, *dies a quo*, suspensión, Directiva 93/13, conocimiento del consumidor, posibilidad razonable de descubrir la abusividad, criterio de la inexigibilidad, contexto de litigación

Títol: El començament de la prescripció i el coneixement del caràcter abusiu de la clàusula per part del consumidor en la Directiva sobre clàusules contractuals abusives.

Resum: La Directiva 93/13/ECC no regula els terminis de prescripció. Tanmateix, es poden extreure alguns paràmetres del principi d'eficàcia que la legislació nacional ha de tenir en compte per complir amb la Directiva 93/13. Aquest article argumenta que l'inici de la prescripció de les demandes de restitució després de la declaració d'abusivitat d'una clàusula d'acord amb la Directiva 93/13 es determina amb el criteri del descobriment raonable de l'abusivitat. Un consumidor és capaç de descobrir el caràcter abusiu de la clàusula des del moment en què sorgeix un context litigiós sobre el terme en qüestió. Mes aviat l'inici de la prescripció no s'ha veure ajornat fins el moment en què un jutjat d'última instància no s'hagi pronunciat sobre la qüestió de l'abusivitat

Paraules clau: prescripció, *dies a quo*, suspensió, Directiva 93/13, coneixement del consumidor, possibilitat raonable de descobrir l'abusivitat, criteri de la inexigibilitat, context de litigació

Titel: Der Beginn der Verjährung und das Bewusstsein des Verbrauchers für die Missbräuchlichkeit im Rahmen der Richtlinie über missbräuchliche Vertragsklauseln

Zusammenfassung: Verjährungsfristen sind in der Richtlinie 93/13/EWG nicht geregelt. Aus dem Effektivitätsprinzip ist es jedoch möglich, einige Kriterien abzuleiten, die nationale Rechtsordnungen berücksichtigen müssen, um die Richtlinie zu erfüllen. In diesem Aufsatz wird argumentiert, dass der Lauf der Verjährungsfrist sich nach dem Kriterium der „reasonable discoverability“ richtet. Der Verbraucher kann die Unwirksamkeit einer Klausel erst ab dem Zeitpunkt kennen, in dem ein Rechtsstreit über die betreffende Klausel entsteht. Der Beginn der Verjährungsfrist muss vielmehr nicht hinausgezögert werden, bis ein Gericht in letzter Instanz über die Unwirksamkeit entscheidet hat.

Schlüsselwörter: Verjährung, *dies a quo*, Hemmung, Richtlinie 93/13, Bewusstsein des Verbrauchers, reasonable discoverability, Unzumutbarkeit der Klageerhebung, Prozessualer Kontext

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I. INTRODUCTION

Prescription of claims¹ is one of the toughest issues to explain in a law lecture. The application by judges is not an easy task either. At first glance, the fact that the lapse of time may lead to a loss of someone's rights represents a violation on a very elementary idea of justice.² However, there are good reasons for the introduction of limitations periods, which may be summarised as the necessity to create legal security

¹ The author is aware of the different terminologies used by common lawyers and civil lawyers on the procedural or substantive nature of the lapse of time. As the practical differences are limited, the terms "prescription" and "limitation" will be used interchangeably in this paper. For further references on this see *Reinhard Zimmermann*, *Comparative foundations of a European Law of Set-Off and Prescription*, 2002, 69 ff.; *Prescription*, in *Max-EuP*, 2012.

² *Luis Díez-Picazo* (1963), *En torno al concepto de prescripción*, *Anuario de Derecho Civil (ADC)*, 16(4), 969 (989); *N. H. Andrews*, *Reform of Limitation of Actions: The Quest for Sound Policy*, 57 *Cambridge L.J.* (1998), 589 (590), who defined prescription as "truly the gateway to justice"; *Andreas Pieckenbrock*, *Prescription*, in *Stefan Leible and Matthias Lehmann*, *European Contract Law and German Law*, 2014, 717 (718); *Phillipe Malaurie/Laurent Aynès*, *Droit des obligations*, 7^e édition, 2015, para. 1200.

(“*ut sit finis litium*”)³ and to sanction the inactivity of the right holder.⁴ The undeniable practical importance of prescription was not accompanied by a profound legal development after the enactment of the national civil codes, but rather by an odd neglect.⁵ As *Jean Carbonnier* once wrote, it seems as if lawyers, having gone through past hundreds of articles in the codes, came to this point exhausted and their fatigue was reflected in its legal treatment.⁶ It is therefore no coincidence that over the past decades deficiencies in its regulation prompted a renewed interest in the European legal scholarship.⁷ That said, this enthusiasm for prescription has not yet reached all areas of private law. The Unfair Contract Terms Directive (hereinafter, “Directive 93/13”)⁸ illustrates well the loopholes that still need to be addressed.

In contrast to other legal acts of the European Union such as the Product Liability Directive⁹ or the Damages Directive¹⁰, which clearly establish rules on prescription, Directive 93/13 does not harmonise rules on prescription, which are subject to national law.¹¹ This does not mean, however, that no prescription can be drawn from this

³ *Karl Spiro*, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatafristen, 1975, 10 ff.; *Andrews* (1998) Cambridge L.J. 57(3), 589 (594-595); *Zimmermann* (fn 1), 62-65, 77, 80; *Christian von Bar/Eric Clive*, “III. – 7:101”, DCFR, Full ed., II, 1141; *Peter Møgelvang-Hansen* in Common European Sales Law (CESL), Chapter 18: Prescription, 2012, 723; *Salvatore Patti*, “Certeza e giustizia nel diritto della prescrizione in Europa”, *Rivista trimestrale di diritto e procedura civile* (RTDP), 64(1), 2010, 21 (23 ff.); *Andrew Burrows*, Some Recurring Issues in Relation to Limitation of Actions (January 3, 2014) in 'Defences in Tort' (Eds Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 2015, Hart), Oxford Legal Studies Research Paper No. 14/2018, Available at SSRN: <https://sspara.com/abstract=2979243>, 1 (1 ff); *Jean-Sébastien Borghetti*, Prescription, ZEuP 2016, 167 (169); *Gerald Spindler* in Beck Online Kommentar zum Bürgerlichen Gesetzbuch, 60th ed, BGB § 199 para. 19.

⁴ See *Díez-Picazo*, La prescripción extintiva. En el Código civil y en la jurisprudencia del Tribunal Supremo, 2003, 94 ff.; *Zimmermann*, Prescription, Max-EuP, 2012; *Thomas Meyer*, Kann das Verstreichen von Zeit die Zuschreibung retrospektiver Verantwortung gerechterweise aufheben? in Die zeitliche Dimension der Gerechtigkeit, 2020, 64 (80 ff).

⁵ *Zimmermann* (fn 1) 65-65; *Burrows* (fn 3) 1 (1); *Borghetti*, ZEuP 2016, 167 (168).

⁶ *Jean Carbonnier*, Notes sur la prescription extinctive, RTDC, 50, 1952, (171) 171. The literal quote says: “reléguée au bout du Code, comme pour défier les grands commentateurs d'y parvenir autrement qu'essoufflés ou morts”.

⁷ *Andrews* (1998) Cambridge L.J. 57(3), 589 (593 ff.); *Zimmermann* (fn 1) 66 ff; *Díez-Picazo* (fn 4) 93 ff.; *Salvatore Patti* (2010), RTDPC, 64(1), 21 (27-28); *Oliver Remien* (Ed.), Verjährungsrecht in Europa – zwischen Bewährung und Reform, 2011; *Manuel Marín López*, El *dies a quo* del plazo de prescripción extintiva: el artículo 1969 del Código civil, in La prescripción extintiva, 2014, 15 (19 ff. 28 ff.); *Borghetti*, ZEuP 2016, 167 (168).

⁸ Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

⁹ Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).

¹⁰ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

instrument against consumers.¹² National provisions on prescription affect consumers' rights and, in so doing, may compromise the principle of effectiveness.¹³ In this sense, each Member State is free to determine its prescription rules, provided they do not render practically impossible or excessively difficult the exercise of rights conferred by Directive 93/13.¹⁴ Hence, the principle of effectiveness allows to extract some rules or, rather, parameters on an issue that is not expressly regulated by Directive 93/13.¹⁵

Already in the early 2000s, the ECJ ruled that setting a limitation period for bringing an action raising the unfair nature of a term may compromise the protection intended by Arts. 6 and 7 of Directive 93/13.¹⁶ Yet the court did not specify anything further at that time. The problem of limitation periods under Directive 93/13 has recently been taken up again. Between 2020 and 2021, the ECJ has issued four important judgements directly addressing the commencement of prescription for restitution claims that derive from the unfairness of a term.¹⁷ However, these decisions have not answered all the questions on prescription that arise in relation to Directive 93/13. This has recently been evidenced by (i) the request for a preliminary ruling from the *Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie* (District Court for Warszawa-Śródmieście in Warsaw), whose outcome has been published recently¹⁸, as well as (ii) the three preliminary ruling requests referred by the Spanish courts.¹⁹ In these requests,

¹¹ See *European Union Court of Justice* (ECJ) 22.4.2021 – C-485/19, para. 52 – Profi Credit Slovakia.

¹² See *ECJ* 21.12.2016 – C-154/15, C-307/15 and C-308/15 para. 68-99 – Gutiérrez Naranjo.

¹³ *ECJ* C-485/19 para. 52 – Profi Credit Slovakia. See also, *Hans-W. Micklitz/Norbert Reich*, "The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive", *CMLR*, 51: 771-808, 2014, (797).

¹⁴ See *Arthur Hartkamp*, "The Law of Extinctive Prescription in the Netherlands", in Oliver Remien, *Verjährungsrecht in Europa – zwischen Bewahrung und Reform*, 2011, 199 (210 ff.); for further details, *Anthi Beka*, *The Active Role of Courts in Consumer Litigation*, 2018, 8 ff., 29 ff.; *Norbert Reich*, *General Principles of EU Civil Law*, 2013, 90 ff.; *Mario Mauro* (2014) *Prescrizione ed effettività*, in *dialogo tra Cassazione e Corti europee*, *Persona e Mercato*, 2, 1139 (1143 ff.).

¹⁵ On the importance of the principle of effectiveness for developing EU private law, see *Arthur Hartkamp*, *The Influence of Primary European Law on Private Law*, in A. Hartkamp, M. Hesselink, E. Hondius, C. Mak and E. Perron, *Towards a European Civil Code*, 4th ed., 2011, 127 (142-143).

¹⁶ See *European Union Court of Justice* (ECJ) 21.11.2002 – C-473/00 para. 35 – Cofidis SA.

¹⁷ See *European Union Court of Justice* (ECJ) 9.7.2020 – C-698/18 and C-699/18 – Raiffeisen Bank and Brd Groupe Société Générale; 16.7.2020 – C-224/19 and C-259/19 – Caixabank and Banco Bilbao Vizcaya Argentaria; 10.6.2021 – C-776/19 to C-782/19 – BNP Paribas Personal Finance, SA; and C-485/19 – Profi Credit Slovakia.

¹⁸ *ECJ* 8.9.2022 – C-80/21 to C82/21 – E.K. S.K. v. D.B.P. The case deals with a mortgage loan with a variable rate indexed to the Swiss franc, which was concluded on 8 August 2006. Because of the alleged invalidity of two clauses, the consumer requested the repayment of PLN 74 414.52, which was the difference between the sum of loan payments made and the correct amount of those payment. The borrower invoked however that the restitutionary claim was time-barred.

¹⁹ See below III.

the question concerning the moment from which prescription should start to run against a consumer bringing an action for restitution has been raised again.

A vital element of every law of prescription relates to its length.²⁰ However, the length of the period is not the only relevant factor. The date on which that period starts to run (*dies a quo*), must also be considered, as a creditor must have a fair opportunity of pursuing her claim.²¹ The same is true for consumers. That is why, the ECJ has declared that a prescription period is only compatible with the principle of effectiveness if the consumer has had the opportunity to become aware of his rights before that period begins to run or expires.²² Yet, the ECJ has so far not specified what exactly this opportunity to know requires. This explains why the Polish preliminary ruling request has sought to refine this criterion proposing the ECJ to speak out that Directive 93/13 precludes an interpretation of a national legislation “to the effect that a claim for the reimbursement of amounts unduly paid on the basis of an unfair term [...] is subject to a limitation period which starts to run before the consumer has become aware of the unfair nature of the term or before he or she reasonably should have become aware of it”. But when does such awareness (or duty to awareness) occurs? As will be shown below, this is a particularly complex area, since the moment in which a consumer becomes aware of the unfair nature of the term is situated on a legal –and not a factual– level within the Directive 93/13.²³

In this paper I will explain the parameters within which the commencement of prescription under Directive 93/13 meets the requirements of the effectiveness principle. I will argue that consumer’s awareness of the unfairness is subject to a “reasonable discoverability rule” that has to be connected to the existence of a litigation context over the respective clause. Conversely, I will claim that consumer’s awareness on the unfairness –and, with it, the beginning of prescription– cannot be delayed until a court of last instance has settled the issue of the unfairness.

Before going deeper into the subject, it is worth clarifying some general aspects of how prescription works.

²⁰ *Andrews* (1998) Cambridge L.J. 57(3), 589 (597) generally stated, “the limitation period must be long enough to allow the parties a good opportunity to collect their wits, review their finances, asses their chances and negotiate settlement”.

²¹ See *Matthias Storme*, Constitutional review of Disproportionately Different Periods of Limitation of Actions (Prescription), ERPL, 5(1), 1997, 79-100 (84); *Zimmermann* (fn 1) 78-79, 105, *Díez-Picazo* (fn 4) 128-129; *Michael Joachim Bonell*, Limitation Periods, in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. Perron and M. Veldman, *Towards a European Civil Code*, 3rd ed. 2004, 517 (522); *Marín López* (fn 7) 15 (52); *Anna Pozzato*, La prescrizione nelle prospettive storico-comparatistica, 2011, 86, 153.

²² See *ECJ C-698/18* and *C-699/18* para. 60-61– *Raiffeisen Bank and Brd Groupe Société Générale*; *ECJ C-485/19* para. 55 – *Profi Credit Slovakia* (also, Opinion of A. G. Szpunar in *-698/18* and *C-699/18* para. 70, note 27 – *Raiffeisen Bank*); and *ECJ -776/19* to *C-782/19* para 46 – *BNP Paribas Personal Finance SA*.

²³ I do use of an autonomous European concept of unfairness under Directive 93/13, which has been shaped by the ECJ. See *François Terré/Philippe Simler/Yves Lequette*, *Les obligations*, 2009, 10th ed., para. 324; *Nils Jansen*, in *Commentaries on European Contract Law*, 2018, Art: 6:201: Unfairness of a term para 15-20; *Marta Carballo Fidalgo*, *Hacia un concepto autónomo y uniforme de cláusula abusiva*, *InDret*, 1, 2019, 1 (9 ff.).

II. SHORT PERIOD OF PRESCRIPTION AND REASONABLE DISCOVERABILITY

With regard to the length of prescription periods there are two main models. The first one is short, the second one is long. Long periods are usually associated with an objective *dies a quo*, whereas short periods are complemented by subjective criteria.²⁴ While the former put the spotlight on the moment when the relevant cause of action accrues, the latter focus on the date when the potential claimant might reasonably be aware that such action resulted; it is thus known as the “reasonable discoverability” criterion.²⁵

Although this way of defining the date of awareness is not without problems,²⁶ the criterion of reasonable discoverability is gaining recognition as a way of determining the commencement of prescription or its suspension within a general trend towards shorter periods of prescription.²⁷ The preference for reasonable discoverability is easily explained by the fact that prescription should not operate until the creditor had a fair chance of pursuing his claim.²⁸

It is also to note that reasonable discoverability refers to the facts giving rise to the claim; not to their legal subsumption.²⁹ Thus, a mistake of law does not in principle prevent prescription from starting to run, as the “duty to know” also includes seeking

²⁴ See *Esther Arroyo i Amayuelas/Antoni Vaquer Aloy*, Prescription in the Proposal for a Common European Sales Law, ERCL 2013, 9(1), 38 (46); *Zimmermann* in Commentaries on European Contract Law, 2018, Art: 14:203 para. 1.

²⁵ See *Andrews* (1998) Cambridge L.J. 57(3), 589 (598); *Marín López* (fn 7) 15 (52-53)

²⁶ See *Burrows* (fn 3) 1 (9 ff.)

²⁷ See *Storme*, ERPL, 5(1), 79_100 (83-84); *Anne Danco*, Die Perspektiven der Anspruchsverjährung in Europa, 2001, 115; *Zimmermann* (fn 1) 92-95; *Bonell* (fn 21) 517 (519); *Christian von Bar/Eric Clive*, “III – 7:201”, DCFR, 2009, full ed., 1146-1147; “III.-7:301”, DCFR, 2009, full ed., 1161; *Salvatore Patti* (2010), RTDPC, 64(1), 21 (29 ff.); *Hugh Beale*, Reform of the Law of Limitation in England and Wales, in Oliver Remien, Verjährungsrecht in Europa, 2011, 45 (47-48, 51-52); *Dirk Looschelders*, Verjährungsbeginn und -frist im subjektiv-objektiven System, in Oliver Remien, Verjährungsrecht in Europa – zwischen Bewährung und Reform, 2011, 181 (188); *Zimmermann* in Commentaries on European Contract Law, 2018, Art. 14:301 para. 1; *Møgelvang-Hansen* in Common European Sales Law (CESL), “Chapter 18: Prescription”, 728-729; *Pozzato* (fn 21), 86, 154; *Marín López* (fn 7) 15 (119 ff. 162 ff.); *Borghetti*, ZEuP 2016, 167 (176, 178); *Pedro Del Olmo García*, Nulidad de pleno derecho y prescripción, Almacén de Derecho, Mar 10, 2021; *Samuel Beswick*, Error of Law: An Exception to the Discoverability Principle? *Osgoode Hall Law Journal* 57.2 (2021): 295 (298 ff.). See also the proposal of the Law Commission in *Limitation of Actions* (2001) Report No 270, para. 3.7. Nonetheless, arguing this position and that the discoverability criterion does not fulfil the basics requirements of clarity and immediacy (compared to the cause of action criterion), *Andrews* (1998) Cambridge L.J. 57(3), 589 (599-600).

²⁸ *Ole Lando/Eric Clive/Reinhard Zimmermann*, The Principles of European Contract Law, III, 2003, 175; *Looschelders* (fn 27) 181 (185).

²⁹ See *Robert Wintgen* (2009) in Commentary on the Unidroit Principles of International Commercial Contracts (PICC), 2009, Article 10.2, para. 7; *von Bar/Clive* (fn 27) 1162; *Pieckenbrock* (fn 2), 717 (735); *Zimmermann* in Commentaries on European Contract Law, Art. 14:301, para. 1. See also, the recommendation of the Law Commission in *Limitation of Actions* (2001) Report No 270 para. 3.37.

legal advice if the potential plaintiff is unsure about the legal subsumption of the factual circumstances.³⁰

Theoretically, reasonable discoverability can work in two different ways.³¹ The first option is to consider reasonable discoverability as a prerequisite for the commencement of prescription.³² The second option is to suspend the running of prescription for as long as the creditor ignores the facts giving rise to the claim.³³ Non legislative codifications have either opted for one of these approaches.³⁴ Nevertheless, there is not such a great practical difference between both models.³⁵ For the first option, the period only starts to run from the occurrence of reasonable discoverability; for the second, the due date leads to an initial suspension of the beginning of prescription.³⁶

One could argue that there is a vital distinction in respect of the burden of proof: it is on the debtor if reasonable discoverability determines the commencement; but on the creditor if it is deemed to be a ground for suspension.³⁷ According to the supporters of this perspective, the first option would cause excessive difficulties for the debtor. However, this view overlooks that each party bears the burden of proving the factual assumption it invokes in its favour. Thus, the creditor (plaintiff) must indicate when the prescription period began; and if the debtor (defendant) submits that prescription commenced on an earlier date, she will have to prove this claim.³⁸

A more convincing objection against reasonable discoverability as a prerequisite for the commencement of prescription points to the situation that would arise if the

³⁰ See Art. 10.2(1) UNIDROIT PRINCIPLES 2016, 354. See also *Wintgen* in Commentary (PICC), Article 10.2, para. 7; *Pieckenbrock* (fn 2), 717 (735).

³¹ *Bonell* (fn 21) 517 (523).

³² German law follows this approach in § 199 (2) and (3) BGB. Similar provisions can be found in the *Burgerlijk Wetboek*; see *Hartkamp* (fn 14) 199 (200 ff.).

³³ Thus, in French law: Art. 2234 provides that “prescription does not run or is suspended against anyone who is unable to act as a result of an impediment resulting from the law, convention, or force majeure”.

³⁴ The general limitation period under Arts. 10.2(1) PICC and 180(1) CESL does not start to run until the obligee is aware of the facts giving rise to her claim, while Arts. 14:301 PECL and III.7:301 DCFR understand reasonable discoverability (ignorance) as a ground for suspension

³⁵ *Bonell* (fn 21) 517 (523, 525); *Arroyo i Amayuelas/Vaquero Aloy*, ECLR 2013, 9(1), 38 (48); *Beale* (fn 27); *Looschelders* (fn 27) 181 (186).

³⁶ See *Zimmermann* (fn 1) 105-106 (n. 216), 148-149; *Bonell* (fn 21) 517 (523); *von Bar/Clive* (fn 27) 1163.

³⁷ *Lando/Clive/Zimmermann* (fn 28), 177; *von Bar/Clive* (fn 27) 1164; *Zimmermann* in Commentaries on European Contract Law, Art. 14:301 para. 3; *Salvatore Patti* (2010), *RTDPC*, 64(1), 21 (31); *Marín López* (fn 7) 15 (123-124).

³⁸ *Looschelders* (fn 27) 181 (186-187); *Marín López* (fn 7) 15 (99 ff.). Aiming at the lack of differentiation between burden of proof and burden producing evidence, see also *Pieckenbrock* (fn 2), 717 (736). See also, *Borghetti*, ZEuP 2016, 167 (177), but this author ends up preferring the solution of the PECL and the DCFR.

creditor's ignorance was not "initial" but only occurred after the commencement of the limitation period, e.g., if the creditor died without her heir knowing that prescription period has begun, or if the creditor was judicially incapacitated and the appointed guardian was not aware of the claim.³⁹ Yet, it is doubtful to what extent these cases, which are specific to the creditor's sphere of risk, ought to justify a suspension or whether no other solution (e. g. an exceptional extension of the period⁴⁰) can be envisaged. Still, assuming that such cases exceptionally merit to suspend prescription,⁴¹ one could ask whether it makes sense to construct the general rule on the basis of these exceptions; or whether it would not be wiser to instead establish an exceptional ground for suspension when such cases arise.⁴²

Consequently, reasonable discoverability should rather represent a prerequisite for determining the start of prescription. Not only because it is more "lineal",⁴³ but also because it allows a more objective approach to the moment of discoverability considering external elements other than the creditor's mere omission.⁴⁴ This is particularly convenient when discoverability refers to a legal part of the claim, as in the case of restitutionary actions following the unfairness of a term in consumer law. Here, the awareness of the unfair nature of the term determines when the limitation period of the restitutionary claim begins. As anticipated, it is not clear, however, how the reasonable discoverability criterion operates for determining the commencement of prescription within Directive 93/13. The three preliminary ruling requests from Spain illustrate very well the difficulties.

III. THREE REQUESTS FOR PRELIMINARY RULINGS FROM SPAIN

The issue on the commencement of prescription within Directive 93/13 has been raised on up to three occasions from Spain.⁴⁵ The proceedings deal with reimbursement

³⁹ *von Bar/Clive* (fn 27) 1164; *Zimmermann* in Commentaries on European Contract Law, Art. 14:301 para. 3; *Marín López* (fn 7) 15 (123)

⁴⁰ See *Spiro* (fn 3) 184, 109 ff., 242 ff., 258 ff.; *Pieckenbrock* (fn 2), 717 (741), referring to § 211 BGB (Ablaufhemmung); *Beale* (fn 27) 45 (56). See also Art. 2941 *Codice civile*. In non-legislative codifications, see Arts. 14:305 PECL and III-7:205 DCFR)

⁴¹ As if they were cases of *vis major*. This reason is also given in favour of the wording of Art. 14:301 PECL by *Lando/Clive/Zimmermann* (fn 28) 177.

⁴² See, for instance, Art. 2942(1) *Codice civile*.

⁴³ *Bonell* (fn 21) 517 (723).

⁴⁴ Otherwise, prescription would become a mere "question of liability" (see *Carbonnier* (1952) RTDC, 50, 171 (181)) and would be reduced to a mere interindividual issue, easy modifiable on the basis of equity; see *Del Olmo García*, La suspensión de la prescripción liberatoria: fragmentos de tradición y algunas dudas, in *La Prescripción extintiva*, 2014, 316 (398-399); *Pieckenbrock* (fn 2), 717 (736).

⁴⁵ This is no coincidence, as this jurisdiction has more litigation on Directive 93/13 than any other. See *Fernando Gómez Pomar/Karolina Lyczkowska*, Spanish Courts, the Court of Justice of the European Union,

claims following the unfairness of the term which requires the consumer to pay all the costs deriving from creating the mortgage (hereinafter, the “borrowing costs clause”). In July 2021, the Spanish *Tribunal Supremo* submitted the first preliminary ruling procedure.⁴⁶ After rejecting the date of the payment as a reference, it proposed two points in time for the commencement of prescription: either when the nullity of the term was declared by a specific judgment, or when the Supreme Court itself released several uniform judgements in 2018, declaring the term invalid. Since the claim would be imprescriptible under the first option, the court favoured the second one.

On the same day, the District Court No 20 of Barcelona⁴⁷ submitted another request for a preliminary ruling. The Court highlighted the lack of criteria to determine the *dies a quo* of prescription⁴⁸ and asked: (i) whether the limitation period may commence before the unfairness of the term is declared; (ii) whether the limitation period may start running from the date when a high court –with the ability of creating case law– declares the unfairness of the term, regardless of whether the consumer knows this judgement; and (iii) whether the limitation period may begin at the date of the payment by the consumer.

Finally, the Provincial Court of Barcelona⁴⁹ asked whether the knowledge of the consumer only relates to the facts which prompt the unfairness of the term or whether also includes the legal assessment thereof. The former option would entail that prescription begins to run when the consumer made payments pursuant to the term in question. The latter option may shift the commencement of the prescription to a later moment, depending on when the consumer had legal knowledge of the unfairness of the borrowing costs clause. The court rejected the first option on the ground that it is not in line with the principle of effectiveness. Thus, it explored an innovative way: it might be sufficient that the consumer is aware that the restitutionary claim has a chance of success; until this moment, prescription does not start to run. To this effect, the court pointed out that “other legal systems” admit that the running of the limitation period can be postponed, if there is a “hostile case law situation”.⁵⁰ In the court’s view, such a situation, however, would not exist in Spanish jurisdiction with regard to the borrowing costs clause. To underpin this approach, it relied on three significant judgements that provide a good overview of the Spanish litigation context on unfair contract terms against financial entities.⁵¹

and Consumer Law, *InDret*, 4, 2014, 1 (4 ff.); *Javier Izquierdo/Marta Robles*, *The Banking Litigation Law Review: Spain*, in *The Banking Litigation Law Review*, 5th ed. 2021.

⁴⁶ *TS (Auto)*, 1^a, 22.7.2021.

⁴⁷ *Juzgado de Primera Instancia No 4 de Barcelona (Auto)*, 22.7.2021.

⁴⁸ The Court states that “clear criteria on what elements must be assessed when analysing whether the consumer is aware of the unfairness of a clause and, therefore, when the prescription period begins to run with respect to the amounts paid pursuant to a void term” (para. 23).

⁴⁹ *Audiencia Provincial de Barcelona*, Sec. 15th (Auto) 9.12.2021.

⁵⁰ See *Antonio Ruiz Arranz*, *Almacén de Derecho*, Nov 22, 2021.

Additionally, the Provincial Court asked whether the event that is decisive for the consumer's knowledge depends on the existence of consolidated case law on the unfairness of the clause, or whether the court may contemplate other circumstances instead. While the Provincial Court did not name it, at the core of its approach clearly lies the idea of postponing the commencement of prescription as long as the legal situation is unclear or entangled, i.e., the Court refers to the German system.

IV. THE POSTPONEMENT OF THE PRESCRIPTION COMMENCEMENT IN GERMAN LAW

The general prescription period in German law is three years (§ 195 BGB), a short period of prescription that is in line with the recent trends.⁵² Its commencement is set at the end of the year in which (1) the claim arose and (2) the creditor obtains knowledge of the circumstances giving rise to the claim and the identity of the debtor or would have obtained knowledge of them without gross negligence (§ 199(1) No. 1 and 2 BGB). This involves a subjective *dies a quo*.⁵³ In principle, creditor's knowledge refers to the facts sustaining the claim and to the person of the obligee; knowledge hereof already triggers the running of the limitation period, so that its legal qualification is not necessary.⁵⁴

For restitutionary claims based on unjust enrichment, the beginning of prescription does not require the creditor to know that the payment was undue or made without legal ground; the knowledge of the payment suffices.⁵⁵ However, a fundamental requirement of the unjust enrichment claim is of genuinely legal nature: the absence of a legal ground for the payment.⁵⁶ Thus, knowledge of the payment being undue should not be overlooked when deciding about the start of the prescription.⁵⁷ This is especially the case when an exceptional delay of its commencement comes into play.

⁵¹ (i) A decision of the Spanish Supreme Court (16.12.2009), resulting from a class action raised by a consumers' league in 2003, in which the validity of the clause was analysed; (ii) the process initiated in May 2010 against some Banks because of the alleged unfairness of the borrowing cost clause, which derived into the Supreme Court Judgment of 23 December 2015, declaring its unfairness; and (iii) the Spanish Supreme Court Judgment on 9 May 2013, declaring the unfairness of the "floor clauses", from which arose a general litigation context against banks because of the unfairness of their terms emerged affecting the borrowing cost clause.

⁵² See *Zimmermann* (fn 1) 86-89; *Pieckenbrock* (fn 2), 717 (728).

⁵³ *Looschelders* (fn 27) 181 (183).

⁵⁴ See *Helmut Grothe* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9th ed. 2021, BGB § 199 para. 28, 30; *Pieckenbrock* in Beck Online Großkommentar zum Bürgerlichen Gesetzbuch, 1.11.2021, BGB § 199 para. 85-86, 131-132; *Spindler* in BeckOK BGB § 199 para. 26; *Jürgen Ellenberger* in Palandt Kommentar zum Bürgerlichen Gesetzbuch, 78th ed., 2019, BGB § 199 para. 27.

⁵⁵ See *Grothe* in MüKoBGB § 199 para. 17, 29; *Pieckenbrock* in BeckOGK BGB § 199 para. 98; *Ellenberger* in PalandtBGB § 199 para. 2.

⁵⁶ *Grothe* in MüKoBGB § 199 para. 29.

⁵⁷ *Pieckenbrock* in BeckOGK BGB § 199 para. 98. See also, *Reinhard Zimmermann/Frank Peters*, Verjährungsfristen in Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, I, 1981, 77 (299, 305-306, 316).

1. THE UNREASONABLENESS CRITERION

An exception to the above surveyed *fact-based* knowledge is made in cases in which the legal situation is so entangled and confusing that it would be unreasonable for the creditor to bring an action (*Unzumutbarkeit der Klageerhebung* – “Unreasonableness of bringing an action”).⁵⁸ The creditor is not required to sue, if a well-informed third party, in view of the legal situation surrounding the case, would not have filed a lawsuit either.⁵⁹ In such a context, a creditor can only be expected to file a lawsuit when the legal situation becomes more clear.⁶⁰ This lack of clarity refers to a *legal* knowledge, deviating from the general rule,⁶¹ in order to give the creditor a fair chance of bringing his action on time.⁶²

As an extraordinary possibility of shifting the commencement of prescription, the unreasonableness rule has been interpreted in very restrictively.⁶³ There may well be divergence between high courts in a matter, but this fact alone does not make it unreasonable for the creditor to bring an action.⁶⁴ After all, the exercise of a creditor’s rights precisely serves to clarify the legal situation.⁶⁵

As a matter of fact, the BGH has hardly ever made use of the rule,⁶⁶ rejecting its application almost always.⁶⁷ Its exceptional character is well illustrated in the

⁵⁸ About this criterion see, in general, *Spindler* in BeckOK BGB § 199 para. 26; *Grothe* in MüKoBGB § 199 para. 29. For more details, *Kathrin Bär*, *Die Verjährung von Ansprüchen bei unsicherer und zweifelhafter Rechtslage*, 2014, 112 ff; *Georg Bitter* *Aufschub des Verjährungsbeginns bei unklarer und klarer Rechtslage?* JZ 4/2015, 170 (170-177); *Christian Abeling*, *Die Kenntnis im Verjährungsrecht*, 2016, 26 ff. 52 ff.; *Bernd Müller-Christmann*, *Zumutbarkeit der Klageerhebung als ungeschriebene Voraussetzung des Verjährungsbeginns*, FS Bamberger, 2017, 233 (234 ff.); *Pieckenbrock* in BeckOGK BGB § 199 para. 134-168

⁵⁹ *Spindler* in BeckOK BGB § 199 para. 26; *Pieckenbrock* in BeckOGK BGB § 199 para. 135; *Ellenberger* in PalandtBGB § 199 para. 27; *Abeling* (fn 58), 53.

⁶⁰ *Grothe* in MüKoBGB § 199 para. 29.

⁶¹ *Bär* (fn 58) 111; *Grothe* in MüKoBGB § 199 para. 29.

⁶² *Pieckenbrock* in BeckOGK BGB § 199 para. 136.

⁶³ *Grothe* in MüKoBGB § 199 para. 29; *Pieckenbrock* in BeckOGK BGB § 199 para. 137.1

⁶⁴ *Pieckenbrock* in BeckOGK BGB § 199 para. 139.

⁶⁵ *Spindler* in BeckOK BGB § 199 para. 26; *Pieckenbrock* in BeckOGK BGB § 199 para. 138.

⁶⁶ Since the fifties, typical cases of application of the unreasonableness rule were those concerning administrations or notary’s civil liability. See, thereon, *Bär* (fn 58) 120-122; *Bitter*, JZ 4/2015, 170 (173-174); *Müller-Christmann* FS Bamberger, 2017, 234 (247).

⁶⁷ This is illustrated in *BGH* 18.12.2008 – III ZR 132/08, NJW 2009, 984. In July 2003, the plaintiff had taken part with 5.000 euros in a pyramid scheme system, which is void under German law for contravening public policy (§ 138 BGB). On 29 December 2006, she sued to obtain restitution for the money delivered. As the restitutionary claim arose at the time the money contribution was made, prescription would begin in January 2004, ending on 31 December 2006. Nonetheless, the plaintiff argued that bringing an action

Volkswagen “diesel dupe”. In May 2020, the BGH ordered the company to pay compensation for damages caused by the purchase of a vehicle.⁶⁸ A few months later, the court examined the commencement of the limitation period of the claim against VW. In this later judgement,⁶⁹ the BGH placed the start of prescription when the plaintiff heard about the “notorious diesel scandal” for the first time at the company’s press conference (10 December 2015). From this moment, he was able to discover that his vehicle was among the affected. Thus, it was reasonable to sue even though a solid case-law was not established until May 2020. As a result, the BGH rejected to shift the commencement of prescription by means of the unreasonableness rule, situated it at the end of 2015,⁷⁰ and consequently declared that the claim was time-barred.⁷¹

Responding to the plaintiff’s claim against VW, the BGH emphasised three points concerning the possibility of displacing the commencement of the limitation period.⁷² (i) That to shift the commencement when the legal situation is unclear is an exception; (ii) that, while prescription serves to create legal certainty, the interests of both creditor and debtor must be considered, in order to give the former, exceptionally, a fair opportunity of pursuing his claim; and (iii) that the postponement of the beginning of prescription by means of the unreasonableness rule clearly goes beyond the wording of § 199(1) No. 2 BGB.

The general stance adopted by the BGH is to be welcomed. Otherwise, an oversimplified application of the unreasonableness rule (i.e., delaying the beginning of the limitation period until the legal situation becomes clear) would lead to a counter-intuitive consequence: prescription would only begin to run if someone were to bring

for that purpose was unreasonable until 2005, when the BGH made clear that the *soluti retentio* of § 817(2) BGB does not apply for nullity claims derived from pyramid schemes to prevent public policy from being perpetuated. The BGH rejected this approach and confirmed the court of appeal’s criterion. At least from the 1990s, there was, according to the BGH, already sufficient legal evidence that allowed a plaintiff to support a claim for restitution on that basis; this, even though the issue was still complex, there was contradictions in the higher courts’ case law, and the BGH did not settle it until 2005. The restitutionary action was thus time-barred.

⁶⁸ See *BGH* 25.5.2020 – VI ZR 252/19, *NJW* 2020, 1962 (1967 ff.), para. 44-83. The BGH declared that the commercialization of such diesel vehicles was an immoral behaviour (“*sittenwidriges Verhalten*”) and caused damages to the buyer, buying a non-desired car within an unbalanced agreement. This led to a compensation according to § 826 BGB, which allowed the client to recover the price paid minus the use made of the vehicle.

⁶⁹ See *BGH* 17.12.2020 – VI ZR 739/20, *NJW* 2021, 918 (929 ff.), para. 20-28.

⁷⁰ It needs to be borne in mind that under German law the standard limitation period of three years begins “at the end of the year” (§ 199(1) S. 1 BGB). For more detail about this particularity, see *Zimmermann* (fn 1) 152-153; *Grothe* in *MüKoBGB* § 199 para. 47

⁷¹ This judgment has been slightly criticized, since the scope of the engines’ manipulation was not clear at the time the press conference was broadcasted, but later in 2016. See *Pieckenbrock* in *BeckOGK BGB* § 199 para. 110.3; *Stefan Arnold*, *JuS* 2021, 687 (687-688).

⁷² See *BGH* VI ZR 739/20, *NJW* 2021, 918 (918-919), para. 10.

an action that he could not reasonably be expected to bring, so that the courts could clarify the legal situation.⁷³

2. HOSTILE CASE LAW AND THE PROCESSING FEES CLAUSE

German scholars usually distinguish “unreasonableness of bringing an action because of an unclear legal situation” from “unreasonableness because of hostile case law”.⁷⁴ This latter aspect of unreasonableness has been particularly heightened by reimbursement claims arising from unfair processing fees clauses stipulated by banks in loan agreements. This is a very similar case to those that have recently been referred to the ECJ. Actions for repayment of fees paid by the consumer hinge on the “performance-based” *condictio* (§ 812(1) 1 1. Alt BGB) and are subject to the three-year prescription period, starting to run from the date in which the consumer paid the corresponding fees (§ 199(1) No. 2 BGB).⁷⁵ Nonetheless, the BGH decided⁷⁶ that a reimbursement action brought in 2012 for a payment made in 2007 was not time-barred, since the commencement of prescription had been shifted to the end of 2011. It is worthy to explain how the BGH came up with this result.

Processing fees clauses were widely admitted by German courts.⁷⁷ It was not until 2008 that their validity was first questioned by the then officiating chairperson of the civil senate for banking law (*XI Zivilrechtsenat*), Gerd Nobbe, in an essay arguing their unfairness.⁷⁸ The first class-action for injunction of these clauses was filed on the basis of this paper. Following *Nobbe’s* arguments, several higher regional courts (*Oberlandesgerichte*) began to declare processing fees clauses as unfair between 2010 and 2011.⁷⁹ The last word came from the BGH in 2014, confirming the unfairness of the term.⁸⁰ With reference to prescription, the court held that bringing the corresponding reimbursement action was not reasonable for the consumers until 2011.⁸¹ Only from this moment, there was a “sufficiently safe ground for a restitution action”.⁸²

⁷³ *Pieckenbrock* in BeckOGK BGB § 199 para. 135; *Spindler* in BeckOK BGB § 199 para. 26. But see *Abeling* (fn 58) 97-98.

⁷⁴ *Pieckenbrock* in BeckOGK BGB § 199 para. 137-137.1; *Ellenberger* in PalandtBGB § 199 para. 27; *Müller-Christmann* FS Bamberger, 2017, 234 (243).

⁷⁵ *Müller-Christmann* FS Bamberger, 2017, 234 (238-239).

⁷⁶ *BGH* 28.10.2014 – XI ZR 348/13, NJW 2014, 3713.

⁷⁷ See *Müller-Christmann* FS Bamberger, 2017, 234 (234-235).

⁷⁸ *Gerd Nobbe*, Zulässigkeit von Bankentgelten, WM 2008, 186 (193).

⁷⁹ *Müller-Christmann* FS Bamberger, 2017, 234 (236, 242-243).

⁸⁰ See *BGH* – XI ZR 348/13, NJW 2014, 3713 (3715), para. 33.

⁸¹ That is why the limitation period for the repayment action started under German law at the end of this year. See *BGH* – XI ZR 348/13, NJW 2014, 3713 (3716, 3717), para. 44 and 55.

Letting aside the implications of *Nobbe's* essay, the outcome of this decision can be summarised as follows: (i) the legal situation was sufficiently clear at least until 2010, because of a hostile case-law against consumers' claims; (ii) the first judgements in 2010 changed the legal situation; (iii) the situation became sufficiently clear again from 2011 onwards. The BGH has followed the line of argument set out in this judgement later on.⁸³ However, the approach has been severely criticized by many German scholars, not seeing a turning point in 2010⁸⁴ or warning that this was a solution merely based on considerations of "justice" against the banks which would have a negative impact on the business practice.⁸⁵

3. THE UNREASONABLENESS RULE AS JUDGE-MADE LAW

Along with the BGH case law, which refers to the unreasonableness rule as an "overarching requirement for the commencement of the prescription",⁸⁶ some scholars conceive the rule as a non-written element of § 199(1) BGB helping to establish prescription start date.⁸⁷

Yet, another sector in German legal writing claims that the rule exceeds the boundaries of what judicial development of the law ("*Richterliche Rechtsfortbildung*") permits.⁸⁸ Postponing the commencement of prescription in this way is said to deprive the meaning of prescription of any content.⁸⁹ Not even the laudable goal of consumer protection would justify displacing the commencement of prescription due to an unclear legal situation or hostile case law.⁹⁰ It has also been warned about the collision that

⁸² See *BGH – XI ZR 348/13*, NJW 2014, 3713 (3717), para. 59 ("ein hinreichend sicherer Boden für eine Rückforderungsklage").

⁸³ See *BGH 4.7.2017 – XI ZR 562/15*, NJW 2017, 2986 (2993), para. 89 ff.; *BGH 19.3.2019*, NJW 2019, 2162 (2163), para 33-34. Both proceedings did not involve a consumer.

⁸⁴ *Pieckenbrock* in BeckOGK BGB § 199 para. 162, 163.3, 163.4. However, see *Peter Büllow*, Verjährungsbeginn bei Unsicherheit über die Rückforderbarkeit formularmäßig vereinbarter Bearbeitungsentgelte, LMK 2015, 365722.

⁸⁵ *Bitter*, JZ 4/2015, 170 (174-176).

⁸⁶ "Zumutbarkeit der Klageerhebung als übergreifende Voraussetzung für den Verjährungsbeginn" See. *BGH 20.1.2009 – XI ZR 504/07*, NJW 2009, 2046 (2050), para. 47; *BGH 26.9.2012 – VIII ZR 279/11*, NJW 2013, 1077 (1080) para. 48; *BGH 22.7. 2014 – KZR 13/13*, NJW 2014, 3092 (3093), para. 23; or *BGH – XI ZR 348/13*, NJW 2014, 3713 (3715), para 35.

⁸⁷ *Pieckenbrock* in BeckOGK BGB § 199 para. 139.3; *Abeling* (fn 58) 46-47. See also, *Martin Schwab*, JuS 2015, 168 (170).

⁸⁸ *Carsten Herresthal*, Die Verschiebung des Verjährungsbeginns bei unsicherer und zweifelhafter Rechtslage – Contra legale Rechtsgewinnung im Verjährungsrecht–, WM 2018, 401 (404 ff.).

⁸⁹ *Herresthal* WM 2018, 401 (405); *Müller-Christmann* FS Bamberger, 2017, 234 (247-250); *Bär* (fn 58) 147-148.

would arise between those creditors who “took a risk” and those who did not. As pioneers, the former would be treated worse than the latter within a consumer context, which also provides a breeding ground for class-actions.⁹¹ Moreover, the unreasonableness rule raises doubts as to its constitutionality, as it allows the revisiting of long past issues and has retroactive effects in other proceedings.⁹² It would be contradictory to make the commencement of prescription in one proceeding dependent on the outcome of another proceeding and, at the same time, to affirm that precedents have formally no binding effects.⁹³ In this sense, critics warn that it is one thing to give the creditor a fair opportunity to bring an action and another to apply a rule that only benefits the creditor.⁹⁴ This would undermine the general trust in case law –and the authority of precedent within a civil law system⁹⁵– if debtors always had to be alert to potential case-law changes, which might trigger a displacement of the commencement of prescription and even compromise the ten-year long stop period.⁹⁶ This is why the most charitable scholars argue for the maintenance of the unreasonableness rule only where a claim is created out of the blue by judge-made law and nobody *de lege lata* could have anticipated the requirements of this claim.⁹⁷

4. INTERMEDIATE CONCLUSION

Despite the well-founded criticism of the unreasonableness rule, the question arises as to whether the rule could be used, with some adjustments, for the commencement of prescription for restitutionary claims following the unfairness of a term brought by a consumer, while complying with the principles of equivalence and effectiveness. More precisely, one could wonder whether the ECJ is already pointing towards a similar rule.

⁹⁰ *Herresthal* WM 2018, 401 (406); *Müller-Christmann* FS Bamberger, 2017, 234 (251).

⁹¹ *Herresthal* WM 2018, 401 (407-408). See also, *Müller-Christmann* FS Bamberger, 2017, 234 (251).

⁹² *Herresthal* WM 2018, 401 (409). However, see *Büllow*, LMK 2015, 365722.

⁹³ *Herresthal* WM 2018, 401 (409-410).

⁹⁴ *Müller-Christmann* FS Bamberger, 2017, 234 (248-249). Contrary to this opinion, *Pieckenbrock* in BeckOGK BGB § 199 para. 136.

⁹⁵ On this issue, see *Nils Jansen*, The oracles of the Codification: Informal Authority in Statutory Interpretation, in Timothy Endicott, Sebastian Lewis, Hafsteinn Dan Kristjánsson (eds.), *Philosophical Foundations of Precedent*, OUP 2022 Forthcoming

⁹⁶ *Müller-Christmann* FS Bamberger, 2017, 234 (251); *Bitter*, JZ 4/2015, 170 (175-176); *Bär* (fn 58) 147-148.

⁹⁷ See *Bär* (fn 58) 163 ff, 185 ff.; *Abeling* (fn 58) 48 ff.

V. WHAT ABOUT THE ECJ CASE LAW?

Since prescription provisions are not harmonised at the level of Directive 93/13,⁹⁸ the ECJ can only provide a guideline for its interpretation on the basis of the principle of effectiveness.⁹⁹ Thus, although it is not easy to predict the position that the ECJ will finally adopt when deciding on the preliminary ruling requests from Poland and Spain, one can trace the coordinates in which this decision ought to be issued according to the reasonable discoverability criterion.

1. THE CURRENT STATE OF THE ECJ CASE LAW ON PRESCRIPTION WITHIN DIRECTIVE 93/13

According to the ECJ,¹⁰⁰ the principle of effectiveness requires that the prescription of a restitution claim under Directive 93/13 does not run before the consumer “was aware or could have been reasonably aware” of the unfairness of the term”; limitation periods must be “capable of affording an effective protection to the consumer” and cannot lapse “even before the consumer becomes aware of the unfair nature of a term in the contract at issue”. Therefore, Arts. 6(1) and 7(1) of Directive 93/13 preclude national provisions that “may make it excessively difficult for that consumer to exercise his or her rights under Directive 93/13”.

The underlying idea is to ensure that the consumer has a fair chance to exercise his restitution claim. Hence, it is no coincidence that the recent ECJ case-law on Directive 93/13 constantly connects commencement of prescription with consumer’s awareness. This is a clear signal that the court is already referring to a reasonable discoverability criterion.¹⁰¹ Indeed, reasonable discoverability can be meaningfully applied to consumer claims against entrepreneurs.¹⁰² Now the question is how to interpret this yardstick within the framework of restitutionary actions following the unfairness of a term.

⁹⁸ See I.

⁹⁹ It would not be the first time that the ECJ has engaged in judicial law making on Directive 93/13 with the justification of the effectiveness principle. The outcome of *ECJ C-26/13* para. 76-85 – *Kásler and Kaslerné Rábai*, interpreting Art. 6(1) of Directive 93/13 is a good example of court-made law. For a closer examination of the extension of the originally limited impact of Directive 93/13 thanks to the ECJ case law, see *Micklitz/Reich*, CMLR 51: 771-808, 2014, (779 ff.); also *S. Weatherill*, Interpretation of the Directives: The Role of the Court, in A. Hartkamp, M. Hesselink, E. Hondious, C. Mak and E. Perron, *Towards a European Civil Code*, 4th ed., 2011, 185 (189 f., 195 f., 199 ff). On the general role of the ECJ as a source of legal authority, see *Nils Jansen*, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective*, 2010, 88.

¹⁰⁰ See *ECJ C-224/19* and *C-259/19* para. 91 – *Caixabank and Banco Bilbao Vizcaya Argentaria*; *ECJ C-776/19* to *C-782/19* para.47 – *BNP Paribas Personal Finance, SA.*; *ECJ C-485/19* para. 64 – *Profi Credit Slovakia*.

¹⁰¹ See II.

¹⁰² See *Andrews* (1998) Cambridge L.J. 57(3), 589 (601-602, 609), when addressing claims made by individuals not engaged in trade or business. As a criterion, reasonable discoverability is used, for instance, in Art. 10(1) Product Liability Directive; see *Zimmermann* (fn 1) 95.

2. REASONABLE DISCOVERABILITY AND RESTITUTIONARY CLAIMS IN CONSUMER LAW

As noted above, reasonable discoverability primarily relates to the facts giving rise to a claim.¹⁰³ But can it also include a “legal awareness”? Following the German practice,¹⁰⁴ this question has been answered in the affirmative for the general limitation period of Art. 10.2(1) PICC: since the reason for not taking the legal assessment of the circumstances into account was the possibility of seeking legal advice, the limitation period should not commence where ignorance of law makes the legal issue so unclear or entangled that even seeking legal advice would not have clarified the matter.¹⁰⁵

The same result can be seen in the English law of restitution. Since *Kleinwort v Lincoln City Council* ([1999] 2 A.C. 349), mistake of law is also included in the exception of Section 32(1)(c) Limitation Act 1980.¹⁰⁶ As a result, the limitation period shall not begin to run until the plaintiff has discovered the mistake (of law) or could with reasonable diligence have discovered it. To put it simply, mistake of law is not a bar for restitution anymore.¹⁰⁷ This understanding of the discoverability criterion for mistake of law cases is also gaining recognition from scholars in other common law jurisdictions such as Canada.¹⁰⁸

For its part, the French *Cour de cassation* has declared that the beginning of prescription of the nullity and restitution claims against the interest rate term runs from the date on which the plaintiff (and consumer) knew or should have known that the interest rate has been miscalculated according to a legal provision.¹⁰⁹ In the same vein,

¹⁰³ See II.

¹⁰⁴ See IV.1 and 2.

¹⁰⁵ *Wintgen* in Commentary (PICC), Article 10.2, para. 7

¹⁰⁶ Here, the House of Lords first considered that mistakes of law are all normal mistakes and, thus, that a sum paid under such a mistake was recoverable (and falls within the ambit of section 32(1)(c)). The case dealt with swaps contracts celebrated between a bank and a local authority. In an earlier decision (*Hazell v Hammersmith and Fulham London Borough Council*, [1992] 2 AC 1) such contracts were deemed to be void, since they were beyond the council’s borrowing powers (*ultra vires*). The particularity in *Kleinwort* was that the bank claimed for restitution of sums paid during the contract. If the limitation period had been settled from the normal date when the cause of action accrued (the date of payment), the restitution claim would have been time-barred. Yet, if those payments were made under mistake of law, section 32(1)(c) Limitation Act 1980 could apply. As a result, the House of Lords decided that the mistake of law about payments made under those contracts was only discoverable from the date its decision in *Hazell* was handed down.

¹⁰⁷ See *Peter Birks*, *Unjust Enrichment*, 2005, 112, 135, 239-240 (although the author does not consider the mistake of law but the absence of basis for the claimant’s entitlement to the benefit of section 32(1)(c)); *Hugh Beale* in *Chitty on Contracts*, 30th ed., 2008, para. 5-054; *Graham Virgo* in *Chitty on Contracts*, 30th ed., para. 29-046 to 048; *Aruna Nair*, ‘Mistakes of Law’ and Legal Reasoning: Interpreting *Kleinwort Benson v Lincoln City Council* in Robert Chambers, Charles Mitchell, and James Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment*, 2009, 373 (390 ff.)

¹⁰⁸ See *Beswick* (2020) 57 *Osgoode Hall Journal*, 295 (324 ff. 330 ff.)

the Spanish *Tribunal Supremo* has also resorted to reasonable discoverability of the legal ground of a claim, in order to decide when prescription commenced in cases of annulment of a contract vitiated by misrepresentation.¹¹⁰

As can be seen, a strictly fact-related understanding of reasonable discoverability does not seem apt to determine the commencement of prescription for restitutionary claims in general. For those claims, the key moment should be the one when a person reasonably should have known that she has given or paid something without legal ground.¹¹¹ This must also be the starting point for consumer restitutionary claims based on the unfairness of a term. Payments made under a term later declared to be unfair are not due; they are considered to be made under error and may be recovered under the general umbrella of the *condictio indebiti*¹¹² or the unjust factors theory.¹¹³ Therefore, the commencement of prescription of restitution claims resulting from the unfairness of a contractual clause is tied to the consumer's awareness of the unfairness.¹¹⁴

Awareness of the unfairness of a contractual term is evidently a legal –not a factual– element.¹¹⁵ Yet, this is not an obstacle to correctly determining the beginning of prescription. In this sense, the ECJ has already held that the following provisions from national law are incompatible with Directive 93/13: (i) a three-year limitation period, which commences on the date of full performance of the contract;¹¹⁶ (ii) a five-year

¹⁰⁹ See *Cour de cassation*, civile, Chambre Commerciale, 10.6.2008 (06-19.452); and 10.6.2008, 06-19.905. The specific provision allowing the consumer to claim for nullity and restitution was Art. 313-2 *Code de la Consommation*.

¹¹⁰ See STS, 1^a (Pleno) No 769/2014.

¹¹¹ *Spiro* (fn 3) 184, 186, 188, 712 ff.; *Zimmermann* (fn 1) 97; *Marín López* (fn 7) 15 (152-153). This is literally acknowledged in Art. 67(1) S.1 OR (“The claim for enrichment becomes time-barred three years after the injured party had knowledge of his claim”); Knowledge of the claim is given if the injured party has no reason and no possibility for further clarification and has sufficient documents to file an action (see *Claire Huguenin/Florent Thouvenin*, Verjährung und Reform in der Schweiz, in Oliver Remien Verjährungsrecht in Europa – zwischen Bewährung und Reform, 2011, 301 (308). A similar provision can be found in Art. 3:309 Burgerlijk Wetboek. For its part, the Law Commission in *Limitation of Actions* (2001) Report No 271 para. 3.38 also recommended to make an exception to the rule of factual knowledge for claims to recover money paid (or other restitutionary claims for) mistake of law, since it would be unjust that the understanding of the law on which the payment was made was mistaken

¹¹² See *Antonio Ruiz Arranz*, Restitución derivada de la nulidad de las condiciones generales de la contratación en contratos con consumidores, *InDret*, 1, 2020, 56 (119 ff.). In Germany, see *Harry Schmidt* in *AGB Recht Kommentar*, 12th ed. 2016 BGB § 306 para. 32.

¹¹³ See *Global Ltd. v Finney* [2010] 4 WLUK 591.

¹¹⁴ See *ECJ C-776/19 to C-782/19* para. 90– BNP Paribas Personal Finance, SA; *ECJ C-485/19* para. 61 – Profi Credit Slovakia.

¹¹⁵ Near, *Pieckenbrock* in *BeckOGK BGB* § 199 para. 98; *Bär* (fn 58) 169; *Del Olmo García* (2021), *Almacén de Derecho*.

¹¹⁶ See *ECJ C-698/18 and C-699/18* para. 83 – Raiffeisen Bank and Brd Groupe Société Générale.

limitation period, which begins to run from the signing of the contract;¹¹⁷ (iii) a five-year limitation period, which begins to run from the date of acceptance of the loan offer;¹¹⁸ (iv) a three-years limitation period which begins to run from the day on which the unjust enrichment (payment) occurred;¹¹⁹ and (v) a ten-year limitation period, which begins to run from on the date of each performance, even if the consumer was not in the position at that date to assess the unfairness of the term for herself.¹²⁰ This context may have paved the way for a response in terms of reasonable discoverability. However, we still lack a parameter that allows us to pinpoint more precisely the moment at which consumer's awareness occurs (in order to determine the *dies a quo*).

As pointed out above, it is generally preferable to understand reasonable discoverability as a prerequisite for the commencement of prescription, rather than as a ground for suspension.¹²¹ The appropriateness of this way of understanding reasonable discoverability can be seen in cases when awareness refers to the law and not to facts, as in the case of consumer restitution claims.¹²² Here, it seems more suitable that the time does not start to run until the consumer (creditor) becomes aware (or could have reasonably become aware) of the absence of a legal ground justifying the payment, i.e., the unfairness of the term.¹²³ The question is how to determine this moment. The ECJ has already highlighted that a consumer might not invoke the unfair nature of a term, either because he is unaware of his rights or because she is deterred from enforcing them due to the costs of legal proceedings.¹²⁴ Here, one might be tempted to assert that Arts. 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that prescription only begins to run from the date on which the consumer becomes aware of the unfair nature of a term, thanks to a final judicial decision from a supreme court –or the ECJ itself–.¹²⁵ In what follows, I will explain why this position is flawed.

¹¹⁷ See *ECJ C-224/19* and *C-259/19* para. 88, 91– *Caixabank and Banco Bilbao Vizcaya Argentaria*.

¹¹⁸ See *ECJ C-776/19* to *C-782/19* para.47 – *BNP Paribas Personal Finance, SA*.

¹¹⁹ See *ECJ C-485/19* para. 64-66 – *Profi Credit Slovakia*.

¹²⁰ See *ECJ C-80/21* to *82/21* para 97 to 100 – *E.K. S.K. v. D.B.P.*

¹²¹ See II.

¹²² See *Wintgen* in *Commentary (PICC)*, Article 10.2, para. 7.

¹²³ However, see *Marín López*, *La doctrina del TJUE sobre el inicio del plazo de prescripción de la acción de restitución de los gastos hipotecarios*, *Revista Cesco Derecho de Consumo (CESCO)* 2022, 38 ff, 45, who assumes that suspension is desirable, but without fully explaining why. This approach also makes things terribly complicated for the consumer. As the author overlooks that this case would lead to an initial suspension of the *dies a quo*, he concludes that suspension period begins once it is possible for the consumer to know that the term is unfair.

¹²⁴ See *ECJ C-473/00* para. 34 – *Cofidis SA*.

¹²⁵ *Del Olmo García* (2021), *Almacén de Derecho*, who solely relies on judgements of the Spanish Supreme Court as “wake-up calls” on the unfair nature of a term.

3. THE ROLE OF PRECEDENTS FOR REASONABLE DISCOVERABILITY: THE *DIES A QUO* CANNOT BE POSTPONED UNTIL A COURT OF LAST INSTANCE SETTLES THE ISSUE

The unreasonableness rule, explained above for the German system, may provide some help to map out when the consumer was aware or could have reasonably been aware of the unfairness of the term.¹²⁶ According to this rule, the running of the prescription can be delayed in an unclear or entangled legal situation, if it is unreasonable for the creditor to sue. However, the BGH has convincingly rejected to link the commencement of prescription to the moment when the legal issue is settled by a judicial decision of last resort.¹²⁷ The United Kingdom Supreme Court (hereinafter, the “UKSC”) has recently reached a similar opinion in *Test Claimants in the Franked Investment Income Group Litigation v HMRC*.¹²⁸

Plaintiffs basically sought the repayment of tax wrongly paid, since the differences between their tax treatment and that of wholly UK-resident companies breached some capital treaty provisions. Under English law, restitutionary claims are subject to a limitation period of six years from the date when the cause of action (here: the payment) accrued (section 5 Limitation Act 1980). Accordingly, many claims were time-barred, unless section 32(1)(c) Limitation Act 1980 applied. As seen above, this section enables to postpone the commencement of prescription in cases of mistake, until the plaintiff has discovered his mistake or could have discovered it with reasonable diligence. The core question of the case concerned the moment when the plaintiffs could have reasonably discovered the existence of their cause of action, i.e., when they could have realised that they had paid under mistake of law. The majority of judges considered that section 32(1)(c) did not intend to postpone the commencement of the limitation period until the claimant discovers that his claim is certain to succeed thanks to a decision of last resort. This outcome forced the UKSC to overrule and depart from the decision in *Deutsche Morgan Grenfell*,¹²⁹ i.e. that mistake of law are reasonably discoverable no earlier than “when the point has been authoritatively resolved by a final court”.¹³⁰ For the majority in *Test Claimants*, tying the discoverability of a mistake of law to the date of a judicial decision which establishes that a mistake was made (as was decided in *Deutsche Morgan*) would lead to the paradox that mistakes are not

¹²⁶ From a German perspective, the criterion of the unreasonableness to sue is in accordance with the principle of effectiveness. See *Pieckenbrock* in BeckOGK BGB § 199 para. 136.

¹²⁷ See, for restitutionary claims following the unfairness of processing fees clauses, IV.2.

¹²⁸ [2020] UKSC 47.

¹²⁹ [2006] UKHL 49 (25 October). Therefore, the majority adhered to the decision issued in *Kleinwort Benson v Lincoln City Council* [1999] [1999] 2 AC 349 (see note 110).

¹³⁰ In *Deutsche Morgan Grenfell*, the date of discoverability for a restitutionary action for tax paid under mistake of law was tied to the date on which the ECJ pronounced its judgement declaring the British legislation incompatible with EU law (ECJ 8.3.2001 – C-397/98 and C-410/98 – Hoechst AG). The outcome of this decision was followed in *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2016] EWCA Civ 1180.

discoverable by a claimant until she knows her claim succeeds.¹³¹ Consequently, the UKSC held that the limitation period started to run from the date when the plaintiff could with reasonable diligence have discovered, to the standard of knowing that they had a worthwhile claim, that they had paid tax under a mistaken understanding that they were liable to do so.

From *Test Claimants* rightly follows that, even for the English law, the date of an overruling decision “cannot be the first possible date of the mistake’s reasonable discoverability but that it is possible to discover the error earlier”.¹³² Indeed, a case can only be overruled because someone once believed that the established legal position could be challenged.¹³³ It would be otherwise contradictory if prescription only commences for a plaintiff, because another plaintiff earlier concluded she had a cause of action¹³⁴; or, if the claim is the very first of its kind and the claimant succeeds, that the limitation period even starts to run from the date when the decision was delivered (years after he issued his claim).¹³⁵ Moreover, legal advisors can always find a better interpretation of the law, even if this interpretation is contrary to a certain case law, before the overruling decision is published.¹³⁶ Otherwise, the law would be immutable.¹³⁷ Finally, reasonable discoverability does not mean that the plaintiff knows that his claim will almost certainly be upheld.¹³⁸

Coming back to the problem of prescription within Directive 93/13 it seems clear that the “due date” for bringing an action against the business cannot be the moment when the legal dispute has reached an end before the last judicial instance of a legal system (even though this is what the Spanish Supreme Court upholds).¹³⁹ The reasons are the same as those set out in the previous paragraph, unless it is said that consumer protection implies that consumers must always play safe. In this regard, it must be stressed that nowadays there are plenty of consumer law firms that provide specialised advice to sue against entrepreneurs because unfair terms. Such firms sometimes even make their fees dependent on the success of the proceedings against the company

¹³¹ See paras. 173-174, 178-179, 213 of *Test Claimants*. The majority held (para. 174) that “‘Paradoxical’ is indeed a generous term. One might say more candidly that this approach has consequences which are illogical, and which frustrate the purpose of the legislation”.

¹³² *Duncan Sheehan* (2021) *Mistake of law and limitation periods*, Cambridge LJ, 80(3), 446 (448).

¹³³ *Duncan Sheehan* (2000) *What is a mistake?* Legal Studies, 20(4), 538 (560).

¹³⁴ *Pieckenbrock* in BeckOGK BGB § 199 para. 135; *Spindler* in BeckOK BGB § 199 para. 26. In Spain, *Alicia Agüero Ortiz*, *Nulidad de la cláusula de gastos de formalización: alcance y consecuencias* (Conferencia), in *Acta del Curso de Verano, CESCO*, 22, 2017, 1 (16).

¹³⁵ *Test Claimants in the Franked Investment Income Group Litigation v HMRC*, para. 173-174.

¹³⁶ *Sheehan* (2021), Cambridge LJ, 80(3), 446 (448).

¹³⁷ *Test Claimants* – para. 178 (I recommend the reader to take a look at this paragraph).

¹³⁸ *Beswick* (2020) 57 *Osgoode Hall Law Journal*, 295 (333-335).

¹³⁹ See III.

(contingency fees).¹⁴⁰ Likewise, consumer litigation is often launched through class-actions by consumer associations, which certainly serve as spearhead for the upcoming plaintiffs¹⁴¹ and which not even always carry the full effects of *res judicata*.¹⁴² Therefore, reasonable discoverability of the unfair nature of the term cannot be linked to the moment in which the unfairness is confirmed by the precedent of a court of last resort, but much more earlier.

It could always be argued that if a supreme court, with a ground-breaking decision, “creates” a claim out-of-the-blue in a way that no legal advisor would have come up with, the commencement of prescription might be exceptionally placed on the date this decision was published.¹⁴³ This is, however, not convincing, since, no matter how disruptive a judicial decision may be, it does not occur on its own;¹⁴⁴ not even in the ECJ case law, whose decisions do not arise in the vacuum either.¹⁴⁵ Even if judges –and in particular those belonging to a supreme court– are vested with an undeniable law-making authority, this does not entail that they “create” the law, as they are subject to the legal system as a whole.¹⁴⁶ The fact that they decide ultimately on the particularities of a claim, shaping it in the practice, should not lead us to think that they create the existing law thereby.

¹⁴⁰ See *Giuliana Palumbo/Giulia Giupponi/Luca Nunziata/Juan Mora Sanguinetti*, The Economics of Civil Justice: New Cross-Country Data and Empirics in OECD Economics Department Working Papers No. 1060, 1 (14). For further details on contingent fees across some European countries, see *Florian Baumann/Tim Friehe* (2012) Contingent fees meet the British rule: an exploratory study, *Public Choice*, 150, 499–510.

¹⁴¹ *Herresthal* WM 2018, 401 (408).

¹⁴² See, addressing the Spanish litigation for consumer protection, *Carles Vendrell Cervantes*, *Jurisprudencia europea y Española sobre protección del consumidor hipotecario*, in *Ganuzo/Gómez Pomar*, *Presente y futuro del mercado hipotecario español: un análisis económico y jurídico*, 2018, 371 (453-459).

¹⁴³ *Bär* (fn 58) 163 ff 185 ff.

¹⁴⁴ In Spain, this is well-illustrated by the “floor clauses” which stipulated mortgage rate interest minimum within a variable interest loan, preventing consumers from profiting from a falling EURIBOR. Floor clauses were declared void due to a lack of transparency and clarity by the STS, 1^a, No 241/2013. At the time of this judgement, the transparency test of Art. 4(2) Directive 93/13 had not been transposed by the Spanish legislator (see *European Union Court of Justice* 3.6.2010 – C-484/08 para. 24-44 – *Caja de Ahorros y Monte de Piedad de Madrid*). This Supreme Court decision recognised the transparency test, setting up a novel Spanish case law on Art. 4(2) Directive 93/13). Yet, it would be incorrect to claim that this transparency test was unknown for the Spanish legal practitioners and courts before May 2013. Rather, its broad lines had already been outlined by some scholars, cited by some dissenting opinion of magistrates, and enshrined by another STS, 1^a, No 406/2012 (see *Vendrell Cervantes* (fn 141), 371, (389); *Fernando Gómez Pomar*, *ECLR* 2019, 15(2): 177 (183)).

¹⁴⁵ Even an innovative judgment like *ECJ* C-26/13 para. 76-85 – *Kásler and Kaslerné Rábai* (see note 99) on the interpretation of Art. 6(1) Directive 93/13 was cemented on the earlier Opinion of Advocate General Wahl of 12 February 2014. This opinion was also based on the outcomes of two earlier decisions: *ECJ* 15.3.2012 – C-453/10 para. 31 – *Pereničová and Perenič*; and *ECJ* 14.6.2012 – C-618/10 para. 40, 69-70 – *Banco Español de Crédito*. But see *Abeling* (fn 58), 90-91, 98-99, for whom, when it comes to EU directives, only the ECJ can clarify an unclear situation; therefore, the due date refers to the moment in which the ECJ clarified the issue.

¹⁴⁶ See *Jansen* (fn 99), 87.

4. THE DATE OF PAYMENT IS NOT A REFERENCE EITHER

Strictly speaking, consumer's awareness of the unfair nature of the term does not need to be confirmed by a judicial decision. This would be certainly the point if one takes a "Dworkinian" approach arguing that there is always a right answer to any question of law; and that this answer is accessible to everyone –a "merely human observer", not an "herculean" one– by following a legal interpretation.¹⁴⁷ Such an approach would contend that the key is not on a judicial decision but on the creditor's (here, consumer's) ability to discover that he had a worthwhile claim.¹⁴⁸ From this perspective, consumer's awareness of the unfair nature of the term could be discovered from the very first moment in which she paid a sum pursuant to this term.¹⁴⁹

The approach described above is based on a specific conception of what the creditor is wrong about, so that the legal truth (here, the unfair nature of the term) can (and must) accordingly be "discovered". Yet, if we say that the unfairness, as "legal truth", can always be discovered by applying the correct premises (here, the correct unfairness test), we are turning to a normative legal reasoning that the consumer must follow. Under this perspective, it would have to be assumed that the consumer pays pursuant to a contractual term, which is later deemed to be void, because of his mistaken legal assessment of its unfairness. In my view, this way of thinking is far away from the reality in a consumer context (and probably in a B2B context too), since it bypasses the decision-making process of the one who pays under "mistake of law", i.e., without knowing that the term was or could have been unfair.¹⁵⁰

Consumer's payment is based on the existence of a pre-drafted term, which validity is not legally questioned at the time of payment, so the consumer relies on it. Therefore, if the term is subsequently found to be unfair in a proceeding, it is possible to say that he committed a "prospective mistake of law".¹⁵¹ But this mistake is not "normative".¹⁵² The mistake of law does not relate to the consumer's legal assessment

¹⁴⁷ *Sheehan* (2000), *Legal Studies*, 20(4), 538 (559-560, 565).

¹⁴⁸ *Beswick* (2020) 57 *Osgoode Hall law Journal*, 295 (331, 333). See also, *Test Claimants* – para. 178.

¹⁴⁹ This point of view is widespread, for instance, in Spain, although the reasoning is not that profound but merely is based on the fact of the payment. See *Ángel Carrasco Perera*, *A vueltas (y esperemos que la última) sobre el plazo de prescripción de la acción nacida de la nulidad de la cláusula de repercusión al prestatario de todos los gastos hipotecarios*, *CESCO*, 2017. For repayment actions following the nullity it also seems to be the prevailing view in Italy (see *Mauro* (2014), *Persona e Mercato*, 2, 1135 (1149-1150)).

¹⁵⁰ See *Nair* (fn 107) 373 (383-387).

¹⁵¹ I am aware that the semantics of the mistake of law might not be entirely exact, once the Dworkinian approach is rejected: it is flawed to say that one can be wrong on an issue on which there is no absolute (legal) truth. Thus, it can be said that in these cases the error made by the consumer when paying in application of a term that is later declared unfair is merely "prospective".

¹⁵² See *Nair* (fn 107) 373 (390-391).

that the term was unfair, but to the fact that the term under which he paid was not completely free from an “unfairness reproach” in the legal community; thus, that it might have been void and the payment not due.

An average consumer is, by definition, a layperson in a position which undermines his ability of discovering the unfair nature of the term on his own account. Even an entrepreneur, counting on legal assistance, is in the end not much better off to detect whether a term in her contract is unfair;¹⁵³ at least outside some “blacklists” of unfair terms provided by some jurisdictions.¹⁵⁴ That is why, (i) the starting point of prescription for restitutionary claims following the unfairness of a term must move further away from the date of payment; and (ii) consumer’s awareness also includes that of a legal adviser.

5. LITIGATION CONTEXT AS REFERENCE POINT FOR REASONABLE DISCOVERABILITY

The commencement of the limitation period for restitution is neither the date of the payment nor the moment when the issue became finally settled by a court of last resort. The decisive factor for reasonable discoverability is whether there objectively existed a “litigation breeding ground” relating to the term in question in the lower courts, although its outcomes may not be entirely favourable to the consumers. This litigation context allows the consumer to discover, by seeking legal advice, that the state of things on which he relied to pay might not be true, i.e., that the term might have been unfair. As indicated, the existence of consumer associations or specialised law firms plays a crucial role in creating this context.¹⁵⁵ Within this context, if the consumer seeks legal advice, an average diligent lawyer will be in the position to inform him that he might have a worthwhile claim because of the potential unfair nature of the term. The consumer can therefore reasonably be expected to bring an action and prescription should start to run. Reasonable discoverability is therefore not limited to the mere subjectivity of the consumer, but also refers to the knowledge of an average legal advisor –to whom the consumer can turn– that there is a litigation context.

In a recent decision, the ECJ has apparently linked reasonable discoverability with the ability of the consumer “to assess the unfairness of the contractual term himself or herself”.¹⁵⁶ It is early to know the intended scope of this “himself or herself” and whether it is merely an *obiter*. Even so, it seems clear to me, from a realist perspective, that such an expression cannot be reduced to the solo assessment of the unfairness of the term by the consumer himself but must be interpreted in a context in which consumers are certainly informed of their rights by professionals.

¹⁵³ See Katharina Uffmann, *Das Verbot der geltungserkaltenden Reduktion*, 2010, 225 ff. 269 ff.; Jürgen Basedow in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th ed. 2019, BGB § 306, para. 51; Terré/Simler/Lequette (fn 23) para. 325.

¹⁵⁴ See Art. R212-1 Code de la consommation; Art. 85-89 Real Decreto Legislativo 1/2007, § 309 BGB or § 6.1 Konsumentenschutzgesetz (Austria).

¹⁵⁵ See V.3.

¹⁵⁶ See *ECJ* 80/21 to 82/21 para. 100.

One could fairly argue that the “breeding ground criterium” does not provide an exact “cut-off” point from which prescription starts to run. However, the aim is not to give the judge an exact formula for calculating when that moment occurs –no prescription rule does exactly that–, but to give her the parameters within which she can best determinate this moment.¹⁵⁷ The aim is, let us not forget, to check whether the principle of effectiveness is met, i.e., whether the way of determining the commencement renders practically impossible or excessively difficult the exercise of rights conferred by Directive 93/13.

One could also always disagree by arguing that if despite the existence of a litigation context, an entrepreneur consistently includes an unfair term in his general terms and conditions, prescription is hindered from running until a court of last resort decides over the issue and establishes a precedent. However, this objection would not be convincing either. Relying on the effectiveness of an own term and keeping on inserting it on a contract –defending, if necessary, this position before the courts– is a legitimate strategy that, by no means, renders consumer’s potential claim unreasonable, unless again we say that consumers should not take any risk when litigating.

VI. BACK TO SPANISH LAW

There are some peculiarities under Spanish law on prescription that might affect the outcome of the three preliminary ruling requests coming from this jurisdiction. Since 2015, Art. 1964 CC prescribes a five-year general prescription period¹⁵⁸ that runs from the day when the action could be brought, unless otherwise established (Art. 1969 CC). Despite this vague wording, it is now accepted that Spanish Law acknowledges a subjective standard for the commencement of prescription.¹⁵⁹ Under Art. 1969 CC, the moment “in which the action could be brought” cannot occur as long as the entitled person does not know that she can sue,¹⁶⁰ i.e., as long as consumer, in the way described, was aware of (or could have reasonably been aware) the litigation context.¹⁶¹

¹⁵⁷ See *Test Claimants* – para. 255.

¹⁵⁸ Until 2015, the general limitation period under Spanish law was 15 years. This period still applies to proceedings already on discussion before

¹⁵⁹ See *Tribunal Supremo*, 1ª; No 728/2012. See also *Magdalena Ureña Martínez*, La suspensión de la prescripción extintiva en el derecho civil, 1997, 96 ff.; *Rivero Hernández*, La suspensión de la prescripción en el Código civil español, 2002, 120 ff.; *Peña López*, *InDret*, 4, 2011, 1 (18 ff.), *Marín López* (fn 7) 15 (80 ff. 96 ff. 124 ff.); *Del Olmo García* (2021), *Almacén de Derecho*. However, see *Ana Cañizares Laso* (2018) “Algunas claves para la reforma de la prescripción En especial el *dies a quo*”, *Revista de Derecho civil*, 5(4), 89 (122)

¹⁶⁰ *Peña López*, *InDret*, 4, 2011, 1 (19, 22-23); *Marín López* (fn 7) 15 (73 ff. 125 ff).

¹⁶¹ See V.2.

Another particularity of the Spanish law is the acknowledgement of an extrajudicial interruption of prescription.¹⁶² Any declaration of will geared against the debtor (a letter, a telegram, an Email or even a talk between the parties) serves this purpose, provided it is adequately proved.¹⁶³ But does this feature impact on our approach about the commencement of prescription for consumers' restitutionary claims? Not in my view.¹⁶⁴ The interruption of prescription (renewal) strictly depends on an active performance of the creditor. This is actually eased by the extrajudicial option. Yet, it does not add anything to when it was reasonable for the creditor to sue.

Finally, under the Catalan civil law –applicable in two of the preliminary ruling requests–, the general limitation-period is ten years starting from the date in which the creditor knows or can reasonably know the circumstances giving rise to the claim and the person against whom it can be exercised (Arts. 121-20, 121-23 CCCat). These rules enshrine an odd conception of prescription that combines a long period with a discoverability yardstick. Thus, a commencement of prescription from the moment on which a litigation context relating the borrowing cost clause arose would meet the requirements of the effectiveness principle in any case.

VII. CONCLUSION

Although prescription is not harmonised by Directive 93/13, the principle of effectiveness makes it possible to outline some parameters that the national legislation must consider in order to comply with this principle as far as the commencement of prescription is concerned.

The commencement of prescription for bringing an action for restitution of sums paid but not due by a consumer, pursuant to an unfair term, is subject to the reasonable discoverability criterion. So, prescription does not start to run until the consumer becomes aware of the unfair nature of the term. Such awareness refers to a legal and not a factual element. Accordingly, it does not coincide with the mere date of payment. Payments made under a contract term subsequently declared unfair are made in mistake of law. Yet, this mistake does not concern the possibility of normatively assessing the unfair nature of the term by the consumer. Rather, discoverability refers to the possibility for the consumer to discover the fact that the clause, under which he paid, has ended up presenting problems of unfairness within the legal (and judicial) community. In other words, reasonable discoverability is not about the consumer discovering the “legal truth”, but the legal context that would justify him bringing an action. Therefore, the relevant and objective moment for commencement is not when a court of last resort decides over the issue; the BGH and the UKSC have also generally reached this conclusion. The due date is when a litigation context arises, so that, if the consumer seeks legal advice, a diligent lawyer can inform him that he might have a

¹⁶² Art. 1973 II CC. Also, Art. 121-11 CCCat.

¹⁶³ See *Díez-Picazo* (fn 4) 184-185.

¹⁶⁴ See, however, *Marín López*, CESCO (2022) 77 f.

worthwhile claim against the entrepreneur due to the unfairness of the term and ask for restitution of the money paid.

This assumption brings together consumer rights, on the one side, and the prescription of claims, as a matter of legal certainty, on the other side. The ECJ is therefore expected to rule in this regard when it decides on the preliminary ruling requests from Spain. In the end, this judgement will (and should) have an impact on all EU jurisdictions, which “tomorrow in the battle” will have to think whether they comply with it and, therefore, with the effectiveness principle under Directive 93/13.



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