Anonymised version

Case C-567/20

Request for a preliminary ruling

Date lodged:

29 October 2020

Referring court:

Općinski građanski sud u Zagrebu (Municipal Civil Court, Zagreb, Croatia)

Date of the decision to refer:

15 October 2020

Applicant:

A. H.

Defendant:

Zagrebačka banka d. d.

[…]

The općinski građanski sud u Zagrebu (Municipal Civil Court, Zagreb), […] in the dispute between applicant A. H., residing in Zagreb, […], […] and defendant Zagrebačka banka d. d., […], with its registered office in Zagreb […] […], seeking a declaration and payment, pursuant to Article 267 of the Treaty on the Functioning of the European Union, submits the following to the Court of Justice of the European Union:

REQUEST FOR A PRELIMINARY RULING

I. Referring court

II. […] Parties to the main proceedings

Applicant[:] A. H., residing in Z. […]

Defendant[:] Z. b. d. d. with its registered office in Z. […]

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of European Union law, namely Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts:

1. Must Article 6(1) of Directive 93/13 on unfair terms in consumer contracts, as interpreted in the case-law of the Court of Justice, in particular in Case C-118/17, *Dunai*, be interpreted as meaning that the legislature's intervention in the relationships between a consumer who is a borrower [**Or. 2**] and a bank cannot deprive consumers of their right to challenge in court the terms of the original contract, or of an annex to the contract concluded pursuant to statute, in order to exercise their right to reimbursement of all the advantages which the bank unduly obtained to the detriment of consumers as a result of applying unfair contract terms, where, following an intervention by the legislature, the consumers entered into an amendment of the original contractual relationship voluntarily on the basis of a statutory obligation imposed on banks to offer consumers this possibility, and not directly as a result of statutory intervention as was the case in *Dunai*?

2. If the answer to the first question is in the affirmative, is a national court ruling on a case between two parties (the borrower and the bank) – where that court is unable, following the interpretation adopted by the Vrhovni sud (Supreme Court, Croatia), to give an interpretation to the provisions of the national Zakon o izmjeni i dopunama Zakona o potrošačkom kreditiranju (Law Amending and Supplementing the Law on Consumer Credit) that would meet the requirements of Directive 93/13 – authorised and/or required, under that directive and under Articles 38 and 47 of the Charter of Fundamental Rights of the European Union, to disapply that national law as interpreted by the Supreme Court?

FACTS AND CIRCUMSTANCES OF THE CASE

1. On 15 October 2007, the applicant A. H., in her capacity as a consumer, concluded with the defendant Zagrebačka banka d. d., as the creditor, a housing loan agreement under which the bank made available to the consumer a loan expressed in Swiss francs in the amount of CHF 309 373,82, which was disbursed in Croatian kuna at the average exchange rate published by the Hrvatska narodna banka (National Bank of Croatia, 'the HNB') applicable as at the loan disbursement date, and the applicant was to repay the loan in kuna at the average HNB exchange rate of that currency against the Swiss franc.

2. In Article 1 of that previously formulated standard loan agreement, the defendant included a provision stating that the currency of the agreement was the Swiss franc; in Article 7 of the agreement, the repayment of the loan was linked to that currency in such a manner that both the monthly and total credit liabilities of the applicant were calculated in accordance with changes in the exchange rate of the national currency (the kuna) in relation to the Swiss franc; in Article 2 of the agreement, the defendant included a provision according to which the variable interest rate was to change on the basis of the bank's decisions, without indicating precise, clear and verifiable parameters for the change, that is to say without indicating how the terms and conditions of the agreement related to the determination of the applicant's total credit liability.

3. The applicant emphasises that the defendant included in the agreement an unfair and invalid term, according to which a foreign currency (the Swiss franc) was linked to the amount of principal, and also included an unfair term concerning changes in the interest rate, namely that the interest rate changed on the basis of the bank's decisions, and both before the conclusion of the agreement and for its duration, the defendant did not negotiate those terms individually with the applicant, did not explain the risks associated with choosing a currency such as the Swiss franc and did not establish the exact parameters and method for calculating the factors affecting changes in the interest rate, thus acting contrary to the provisions of the Zakon o zaštiti potrošača (Law on Consumer Protection, 'the ZZP'), the Zakon o obveznim odnosima (Law on Obligations, 'the ZOO') and the principles of good faith and fairness as fundamental principles of contract law, and also contrary to EU legislation, primarily Council Directive 93/13/EEC on unfair terms in consumer contracts ('Directive 93/13'), whose provisions were transposed into national law by the ZZP, as a result of which the defendant caused an imbalance in the rights and obligations of the parties to a contract to the detriment of the applicant as a consumer.

[Or. 3]

4. The applicant invokes the collective legal protection proceedings which were instituted against the defendant in order to protect the interests of consumers and thus also to protect the applicant's interests in the context of the present case. These proceedings were conducted and concluded before the Trgovački sud u Zagrebu (Commercial Court in Zagreb, Croatia), case ref. […].

5. The chronology of the collective legal protection proceedings, which lasted for seven years, is given below:

– On 4 July 2013, the Commercial Court in Zagreb, by judgment […], ruled that all eight defendant banks, [1] and thus also the defendant in the present case as the first defendant in those proceedings, infringed the collective interests and rights of

[1] At that time, Sberbank d. d. was excluded from the ruling, but later on, the same ruling was made against this bank as against the other banks.

consumers by concluding in the 2004–2008 period loan agreements which included invalid and unfair terms: in the consumer agreements in question, the Swiss franc was fixed as the currency to which repayment of the loan was linked, and the fixed standard interest rate during the term of the loan commitment was changed in accordance with the bank's unilateral decisions.

– On 13 June 2014, when ruling on the appeal lodged by the banks, including the defendant in the present case as the first defendant in those proceedings, the Visoki trgovački sud RH (Commercial Court of Appeal, Croatia), by judgment […], ruled that the term according to which the interest rate was changed on the basis of the bank's unilateral decisions was unfair and invalid, whereas the term which fixed the Swiss franc as the relevant currency was valid.

– On 9 April 2015, the Vrhovni sud RH (Supreme Court, Croatia), by judgment […], after hearing the appeal on a point of law lodged by the banks, including the defendant in the present case as the first defendant in those proceedings, upheld the judgment of the Commercial Court of Appeal, stating that the term according to which the interest rate was changed on the basis of the bank's unilateral decision was unfair and invalid, and, after hearing the appeal on a point of law lodged by the consumers' representative, held that the term which fixed the Swiss franc as the relevant currency was valid.

– On 13 December 2016, the Ustavni sud RH (Constitutional Court, Croatia), by judgment […], after hearing the constitutional complaint lodged by the consumers' representative, set aside the judgment of the Supreme Court in so far as it concerned fixing the Swiss franc as the relevant currency, and referred the case back to that court.

– On 3 October 2017, the Supreme Court delivered judgment […] by which the case was referred back to the Commercial Court of Appeal in the part concerning the fixing of the Swiss franc as the relevant currency.

– On 14 June 2018, the Commercial Court of Appeal delivered judgment […] by which it held that the term concerning the fixing of the Swiss franc as the relevant currency was unfair and invalid, and that the banks, including the defendant in the present case as the first defendant in those proceedings, concluded in the 2004–2008 period loan agreements which included invalid and unfair terms, namely terms in the contested consumer agreements that fixed the Swiss franc as the currency to which the repayment of the loan was linked. In the part concerning the fixing of the Swiss franc as the relevant currency, the Commercial Court of Appeal upheld vis-à-vis all banks, including the defendant in the present case, the first-instance judgment from 2013.

– On 3 September 2019, the Supreme Court, having heard the appeal on a point of law lodged by the banks, including the defendant in the present case as the first defendant in those proceedings, by judgment […], upheld the judgment of the Commercial Court of Appeal of 14 June 2018.

6. The result of the collective legal protection proceedings is that both the term fixing the Swiss franc as the relevant currency and the term according to which the interest rate was changed on the basis of the bank's decision have ultimately been considered unfair and [**Or. 4**] invalid in all loan agreements which contained a Swiss franc currency clause and were concluded with the defendant banks during the period in question, that is to say, it has been finally established that the defendant in the present case, Zagrebačka banka d. d. (as the first defendant in those proceedings), infringed the collective interests and rights of consumers, and thus the interests and rights of the applicant in the period from 10 September 2003 to 31 December 2008 by including an unfair contractual term in the loan agreements concluded, pursuant to which the fixed standard interest rate during the term of the loan commitment was changed in accordance with the bank's unilateral decisions, which term is invalid and was not negotiated individually; it has also been finally established that during the period from 1 April 2005 to 31 December 2008, the defendant infringed the interests and rights of consumers, and thus the interests and rights of the applicant, by concluding loan agreements in which it included invalid and unfair terms under which a foreign currency (the Swiss franc) was linked to the amount of principal; both before the conclusion of the agreements and for their duration, the defendant did not fully inform consumers, as a seller or supplier, of all the necessary parameters relevant to making a valid and fully informed decision, which resulted in an imbalance in the rights and obligations of the parties to the contract, and thus the defendant acted contrary to the provisions of the then applicable ZPP and contrary to the provisions of the ZOO.

7. In the aforementioned collective legal proceedings, Directive 93/13 was applied, and when interpreting national law in their rulings, the courts used the interpretation of the Court of Justice of the European Union in C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid* and C-26/13, *Kásler*.

8. Pursuant to the legislation in force in the Republic of Croatia – the Zakon o parničnom postupku (Law on Civil Procedure) (Article 502c) and the ZZP (Article 138a) – and on the basis of the judgments delivered in collective legal protection proceedings, consumers, and therefore also the applicant, were granted the right to seek recovery in individual proceedings of the advantages unduly obtained by the banks, and therefore the consumer has brought the action now pending before the referring court, case ref. […].

INTERVENTION BY THE LEGISLATURE

9. On 30 September 2015, the Republic of Croatia adopted the Zakon o izmjeni i dopunama Zakona o potrošačkom kreditiranju (Law Amending and Supplementing the Law on Consumer Credit, 'the ZID ZPK 2015') and pursuant to that Law, borrowers were offered the possibility of converting their credit liabilities from the Swiss franc into the euro.

10. The applicant did so by concluding an annex to the loan agreement pursuant to which her loan was converted from the Swiss franc into the euro. The conversion was therefore not into the national currency (the kuna), but rather into another foreign currency (the euro).

11. The question of the legal implications of the ZID ZPK 2015 appears to be the key issue in the present case.

12. For conversion purposes, the ZID ZPK 2015 laid down a specific methodology for calculating consumers' new credit liability, which consisted, in essence, in converting the loan from the Swiss franc into the euro at the beginning of the lending term – in order to obtain the new amount of principal in euro as at 30 September 2015 according to which the borrower would continue to repay his loan. The manner of performing the conversion was stipulated in Article 19c of the ZID ZPK 2015: all of a consumer's payments under the actual loan were compared with the terms of a simulated fictitious [**Or. 5**] loan in euro, and the actual payments were set against the fictitious loan in order to calculate the loan balance as at 30 September 2015; this comparison yielded the amount by which the consumer had underpaid or overpaid. On the basis of those calculations, consumers were offered the option of concluding an annex to the loan agreement concerning further repayments of the loan, which was governed by Article 19e(1) of the ZID ZPK 2015.

13. Following that calculation of the loan amount, borrowers, and thus also the applicant, were able to sign annexes to their original loan agreements in accordance with the statutory 'izračun konverzije kredita' ('loan conversion calculator'); from 30 September 2015 onwards, the applicant, in accordance with the annex to her agreement, was repaying a loan indexed to the euro, with a new principal amount and with interest rates calculated for future periods.

14. The referring court points out that pursuant to Article 19e of the ZID ZPK 2015, the bank could offer the consumer either the conclusion of a new loan agreement or an annex to the 'old' loan agreement and that the bank decided to offer the borrower the conclusion of an annex to the loan agreement, which is clearly indicated in Article 1 of the annex to the agreement, where it is stated that the parties have concluded an annex to the agreement. Article 24 of the annex, in turn, reads as follows:

'Article 24.

The other terms and conditions of the original agreement and any annexes concluded to this day shall remain unchanged and shall remain in force'.

In this way, the continuity of the contractual relationship was ensured.

15. The purpose of the ZID ZPK 2015 was to put Swiss franc borrowers on an equal footing with euro borrowers, which was achieved in the manner described above, and that purpose was stated and defined in Article 19b of the ZID ZPK 2015.

16. The matter at issue in this case is the compensation for the applicant, since the applicant, as a consumer, claims that the ZID ZPK 2015 did not grant compensation to borrowers who had taken out Swiss franc loans in the form of the banks returning the advantages they had obtained on the basis of unfair and invalid loan agreements, that is to say, on the basis of unfair and invalid contractual terms concerning the fixing of the Swiss franc as the relevant currency and concerning interest, which would have restored the consumer's initial situation in both legal and factual terms.

17. As proof of this, the consumer emphasises that the conversion of the loan repaid until the conversion date, namely 30 September 2015, was carried on the basis of the term which fixed the Swiss franc as the relevant currency and also the term pursuant to which the interest rate was changed on the basis of the bank's decisions, and thus the conversion was subject to the Swiss franc currency clause, which was treated as valid, and during the conversion the unfair interest rates changed on the basis of the bank's unilateral decisions were applied, just as in the case of Swiss franc loans; after 30 September 2015, the loan was further repaid pursuant to a euro currency clause with a new interest rate defined for the future, which amounted to 5.84% and was again arbitrarily set by the defendant on a 'take it or leave it' basis.

18. Moreover, the applicant stresses that when concluding the annex to the agreement, the consumer did not have any option to negotiate the proposed annex, as raising objections to any part of the annex and refusing to sign it would have meant not being included in the conversion, which the consumer had to accept within 30 days as per Article 19e(5) of the ZID ZPK 2015.

19. Therefore, the applicant submits that compensation for her was not the subject of the ZID ZPK 2015 at all, the amount of compensation was not stipulated in that law, and neither the 'calculator' nor the annexes to the agreement included [**Or. 6**] any calculation of the individual advantage that the bank had unlawfully obtained under the loan agreement, and thus in the case of the applicant, no calculation of the amount of compensation due to her was made. The applicant demonstrates this by submitting a calculation together with her statement of claim. On the basis of the conversion calculator, after the conversion was carried out, an overpayment was established in favour of the consumer resulting from the difference between the payments made and the fictitious euro loan, amounting to HRK 119 406.91. This amount was not, however, paid back to the consumer. Instead, in accordance with Article 19c(1)(c) of the ZID ZPK 2015, it was credited against subsequent monthly loan payments following the conversion of the loan into euro, and in such a manner that the overpayment could cover a maximum of 50% of the monthly payment due. However, the consumer's calculations enclosed with the statement of claim demonstrate that during the conversion the bank unduly obtained, at the consumer's expense, an advantage of HRK 340 364.19.

20. On the other hand, the bank which is the defendant in the present case is of the opinion that by merely performing the conversion and concluding the annex to the

agreement, the applicant has lost the legal basis for claiming that the terms of the original agreement were unfair and, consequently, her right to compensation, because the loan was retroactively calculated as if it had been expressed in euro from day one, and thus there is no need for an expert opinion from a financial specialist to establish the exact amount that the bank unduly obtained under the unfair terms of the original agreement.

21. After reviewing the annex to the agreement, the referring court found that at no time had the applicant waived her claims, waived her right to full compensation or her right to bring a claim and her right to legal remedy, and that no such waiver was provided for by statute. Moreover, national legislation (Article 41 of the ZZP) provides that a consumer may not waive his rights and that these rights cannot be restricted; similarly, Article 19e of the ZID ZPK 2015 prohibits banks from including in the annexes to agreements any clauses amounting to waivers of any rights which consumers may have, and, in accordance with the referring court's interpretation of the judgment of the Court of Justice in C-452/18, *Ibercaja Banco*, a waiver by the consumer of the protection afforded to him by Directive 93/13 is only possible if the consumer wishes to do so and clearly expresses his free and informed consent.

22. In accordance with the reasoning of the referring court, the purpose of the ZID ZPK 2015 was primarily a social and economic one; the law was intended to make it easier for consumers to repay their loans and to bring about a situation where from 30 September 2015 they would repay their loans in the same manner as those consumers who had concluded loan agreements with euro currency clauses. This is also indicated by the fact that the ZID ZPK 2015 did not amend or correct the provisions on interest rates in force before 30 September 2015 and thus the ZID ZPK 2015 did not, for instance, lay down any special methodology for calculating interest in connection with the conversion; nor did it result in the conversion of loans into ones expressed in kuna by removing Swiss franc clauses.

23. The referring court also notes that the ZID ZPK 2015 did not determine for each consumer the individual amount corresponding to the damage suffered by that consumer as a result of the unfair terms of the loan agreement (concerning interest and currency), that is to say, it did not determine the amounts which the seller or supplier had unduly received.

24. The referring court points out that the ZID ZPK 2015 was adopted on 30 September 2015, that is, after the final ruling on the invalidity of the term relating to interest, but before the final ruling on the invalidity of the term that fixed the Swiss franc as the relevant currency. Thus, at the moment the ZID ZPK 2015 entered into force, the term fixing the Swiss franc as the relevant currency was not yet recognised by the courts as unfair and invalid; the final judgment in this regard was only delivered three years after the loan conversion, and the loan conversion was performed in a manner that respected as fully valid the term fixing the Swiss franc as the relevant currency. Therefore, since the loan was converted precisely on the basis of the terms that fixed the Swiss franc as the

relevant currency and allowed the interest rate to be changed on the basis of the bank's decisions and those terms were accounted for in the conversion calculator and, moreover, since in the ZID ZPK 2015 itself neither the term concerning the fixing of the relevant currency nor the one concerning interest rate changes on the basis of the bank's decisions [**Or. 7**] are recognised as unfair/fair or invalid/valid, this means that the issue was meant to be decided by courts from the outset.

25. The above circumstance is significant because both the adoption of the ZID ZPK 2015 and the conclusion of the annex to the agreement in 2016 occurred after the accession of the Republic of Croatia to the European Union, and thus the jurisdiction of the Court of Justice of the European Union is undisputed and the Court should give answers to the questions referred to it in a specific case.

26. Thus, the applicant, after the conversion and after the term fixing the Swiss franc as the relevant currency had been found to be unfair in the collective legal protection proceedings, and also after calculating the advantage which the bank unduly received as the amount of compensation, demands before the referring court the return of all advantages which the bank received under the loan agreement. The applicant claims and seeks to demonstrate that the performed conversion did not prevent the bank from returning those advantages, or alternatively that it only prevented it from doing so in part by means of a reduction in principal, but at the same time stresses that the remaining principal of the loan has remained higher than it should have been as at the conversion date had the unfair conditions fixing the Swiss franc as the relevant currency and allowing the interest rate to be changed on the basis of the bank's decisions been eliminated.

27. Therefore, the applicant in the present case seeks to demonstrate that as a result of the conversion, her initial situation, that is, the one that would have existed had there been no disputed terms or no agreement, was not restored; she is now repaying the simulated euro-linked loan and thus has not received compensation and the bank has not returned all the advantages it unlawfully obtained.

28. The amount of unduly received advantages can be determined in these court proceedings and the applicant has enclosed the relevant expert opinion with the statement of claim.

PROCEEDINGS UNIFYING THE INTERPRETATION OF LAW BEFORE THE SUPREME COURT

29. On 11 September 2019, at a time when this individual consumer case was pending, the Supreme Court, as the court of last instance, initiated so-called 'proceedings unifying the interpretation of law'.

30. This is a new institution within the legal system of the Republic of Croatia, which is governed by the Law on Civil Procedure, Article 502i et seq., and allows the Supreme Court to take a legal position on a specific issue. This position is then

binding on all lower courts hearing individual cases – both pending ones and those that will be initiated in future – as stipulated in Article 502n of the Law on Civil Procedure.

31. In the proceedings unifying the interpretation of law, case ref. […], the Supreme Court ruled on the following legal question:

'Must a loan conversion agreement concluded on the basis of the ZID ZPK 2015 (Narodne novine No 102/15) be deemed null and void if the terms of the original loan agreement in which a variable interest rate and a currency clause were agreed are invalid?'

On 4 March 2020, the Supreme Court issued the following ruling:

'A loan conversion agreement concluded on the basis of the ZID ZPK 2015 has legal effects and is valid even if **[Or. 8]** the terms of the original loan agreement concerning the variable interest rate and the currency clause are invalid'.

32. Subsequently, doubts were voiced in the case-law of the national courts and different interpretations emerged of that ruling, which had been delivered within the framework of proceedings unifying the interpretation of law; the doubts concerned the statements made in the ruling and its impact on consumer compensation under Directive 93/13 and, consequently, on the final ruling in the present case. Therefore, the referring court considers that the ruling of the Supreme Court, that is to say, its interpretation of the ZID ZPK 2015, must be regarded as incompatible with EU law in so far as the ZID ZPK 2015 is interpreted as precluding the payment of compensation to the consumer.

33. In the proceedings in question, the Supreme Court, when ruling on the validity of the annex to the agreement on the basis of which the loan conversion was effected, stated in the grounds of its ruling that the annex, as an addendum to the original loan agreement, could not be unfair and invalid even if its content were based on terms found to be unfair and invalid with *ex tunc* effect, for the reason that the annex to the loan agreement essentially established a new contractual relationship, which was entirely voluntary for the consumer and concluded on the basis of the ZID ZPK 2015, and the Supreme Court concluded that, for that reason alone, the annex to the loan agreement was lawful, fair and valid.

34. In fact, the Supreme Court refused to examine whether the annex to the agreement was fair and valid. It assumed that that was the case and did not provide for any option to assess or challenge the fairness and validity of the annex, although the main terms of the original loan agreement relating to its subject matter (fixing the Swiss franc as the relevant currency) and to its price (setting the interest rate) had already been found to be unfair and invalid with *ex tunc* effect.

35. Although in the proceedings in question the Supreme Court ruled on the application of EU law, that is to say, on the application and interpretation of Directive 93/13, which had been transposed into national law by the ZZP, it did

not refer a question to the Court of Justice of the European Union for a preliminary ruling on the interpretation of European Union law and, in its own ruling, did not provide any reasons as to why it had not referred a question to the Court of Justice for a preliminary ruling, and thus did not enable the Court of Justice to take a position on the correct interpretation of European Union law in connection with the questions which are now being asked in the present case.

36. It should be noted that as regards the application of EU law, and specifically the judgment in the *Dunai* case, the Supreme Court merely stated that the *Dunai* judgment was not applicable because the circumstances of the case were different and that in the *Dunai* case the legislature's intervention was a direct one, whereas in the Republic of Croatia the loan conversion was voluntary: the bank was obliged to offer conversion, but the consumer was not forced to accept it and could refuse to conclude an annex to the agreement, in which case the consumer would continue to repay the loan as before. Indeed, without the will of the parties to the agreement, no conversion would occur.

37. Nevertheless, the Supreme Court did not ask the Court of Justice of the European Union to interpret Directive 93/13 in those other circumstances.

38. The referring court would also like to clarify that in the proceedings unifying the interpretation of law, the Supreme Court did not clearly answer the key question, namely that of compensation for consumers in spite of the effected loan conversion. This question arises in the present case, and the bank stresses that the ruling of the Supreme Court must be interpreted as meaning that following loan conversion, the consumer no longer has any right to compensation whether or not he or she has actually received such compensation in full, and that there is no need even to determine the amount of the advantages allegedly obtained by the bank.

39. In so far as this is how the ruling of the Supreme Court (and thus also the ZID ZPK 2015) is interpreted, and in the present case the defendant interprets both the ruling and the ZID ZPK 2015 in precisely this manner, the referring court considers that this reasoning could be incompatible with the interpretation of the Court of Justice of the European Union [**Or. 9**] in *Dunai*, C-118/17, and, more specifically, this incompatibility concerns the interpretation of the level of protection guaranteed by Directive 93/13 which is at issue in the present case.

40. The referring court understands the judgment in the *Dunai* case to mean that the Court of Justice took a legal position on the impact of the legislature's intervention on consumer rights derived from Directive 93/13, finding that such an intervention does not deprive the consumer of his right to compensation and, above all, must not deprive the consumer of his right to seek the return of all the advantages which the seller or supplier has obtained under an unfair agreement or unfair contractual terms and that, in essence, the right to full compensation is not affected by the nature of that intervention, that is to say, whether it was direct or voluntary. Moreover, it would appear from the judgment in C-452/18, *Ibercaja Banco*, paragraph 29, that the consumer, when concluding a voluntary agreement,

cannot waive the protection afforded by Directive 93/13, and hence the right to full compensation, other than expressly and as a result of free and informed consent, and the referring court observes that in the present case, the consumer has not waived the protection guaranteed.

41. The referring court finds that this reasoning is confirmed in the judgment in *Dunai*, paragraph 41, and in the case-law cited therein, which indicates that where an agreement is declared unfair and invalid, this is intended to restore the consumer's initial situation in both legal and factual terms as if the unfair and invalid agreement (and thus unfair and invalid terms) had not existed, or in C-779/18, *Mikrokasa*, paragraph 50 and in other case-law in which the Court of Justice states that only as a matter of exception, a contractual term reflecting a statutory provision which is mandatory for both parties to the agreement may be excluded from the assessment whether it is fair or not, which is not the case here because both the conversion and the conclusion of the annex to the loan agreement depended on the will of the consumer for whom the conclusion of the annex was not mandatory and whose willingness to conclude it was the key element without which there would be neither an annex nor a conversion.

42. The referring court also finds confirmation for its position in Directive 93/13, which makes it clear in recital 10 that it applies to all contracts concluded between sellers or suppliers and consumers, which implies that both the original agreement and the annex thereto must be subject to an assessment of their transparency and fairness, as is also indicated in the judgment in C-452/18, *Ibercaja Banco*, paragraph 39, which states that a term in a contract concluded for the purpose of amending the original unfair term may itself be regarded as unfair if it was not individually negotiated and if it creates an imbalance in the rights and obligations of the parties.

43. In conclusion, the referring court understands Directive 93/13 and the judgments in *Dunai* and *Ibercaja Banco* to mean that, irrespective of how the national court assesses the annexes to agreements concluded as a result of the legislature's intervention – whether it assesses them as a direct intervention or as an expression of the free will of the parties – these annexes cannot (and must not) undermine the protection guaranteed by Directive 93/13: they must not prevent the return of all advantages which sellers or suppliers have unduly obtained, and in particular this must not be done against the will of the consumers, namely where the consumers have never waived such protection and compensation nor was such a waiver provided for by statute.

44. In the view of the referring court, this interpretation is also in accordance with the doctrine of interpretative effect, which is based on the principle that the intention of the legislature, as expressed here in the ZID ZPK 2015, is not to violate the directive but, on the contrary, to implement it, and thus the national legal norm must be interpreted as far as possible in accordance with the objectives that the EU legislation seeks to achieve and its underlying assumptions, that is to say, the

referring court considers that it is its duty to disapply a rule of national law which is interpreted as precluding a consumer's right from being legally protected.

[Or. 10]

45. The referring court finds the specific purpose of Directive 93/13 as regards consumer protection and the proper interpretation of the directive in this respect in Joined Cases C-482/13 to 487/13, *Unicaja Banco and Caixabank*, paragraph 38, and the court takes into account the reasoning that national legislation may always provide a higher and stricter level of protection than the directive itself as the Court of Justice pointed out in its judgment in C-484/08, *Caja de Ahorros*, or in its judgment in C-96/14, *Van Hove*, paragraph 27.

46. On the other hand, if the ruling of the Supreme Court were to be applied to this particular case in such a manner that the ZID ZPK 2015 were to be interpreted as meaning that the consumer loses the right to all compensation by the mere conclusion of the annex to the agreement, the referring court considers that Directive 93/13 would then be interpreted to the detriment of the consumer, which would amount to a breach of the obligation of each national court or tribunal under the Treaty on the Functioning of the European Union according to which national law must be interpreted so as to achieve the objective and result sought by the directive.

47. An interpretation of the ruling of the Supreme Court according to which consumers have lost their right to receive compensation even though this was neither provided for by the ZID ZPK 2015 nor agreed between the parties – and consumers were not aware that they were waiving anything at the time they concluded the annex to the loan agreement – would, in the view of the referring court, infringe a fundamental principle of EU law according to which norms of European and national law must be interpreted in the light, and in the spirit, of their objectives; this interpretation would be incompatible with the position of the Court of Justice expressed in C-282/10, *Dominguez*, paragraphs 24 and 27, with the very purpose of the directive as set out in its recitals, and in particular in recital 9, and would also be incompatible with the judgment in *Dunai*, paragraph 41, and with the judgment in C-51/17, *OTP Bank and OTP Faktoring*, paragraph 83, in which the Court of Justice found that unfairness and invalidity are assessed and declared at the time of conclusion of the loan agreement, which is, moreover, expressly provided for in Article 4(1) of Directive 93/13 and, in that sense, any subsequent intervention of the legislature, whatever it may be, is completely irrelevant, since it cannot undermine such a finding of unfairness and invalidity.

48. The referring court also finds this reasoning confirmed in the following judgments: C-260/18, *Dziubak*, paragraph 52, Joined Cases C-482/13 to 487/13, *Unicaja Banco and Caixabank*, paragraph 37, C-421/14, *Banco Primus*, paragraph 61, C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo and Others*, paragraph 61.

49. The referring court understands Directive 93/13 to mean that it allows the legislatures of the Member States to intervene but only where they preserve or adopt rules which lay down higher protection standards than the provisions of the directive and, accordingly, a legislature may only intervene in contractual relationships if it complies with Directive 93/13 or does so within the framework of the maximum consumer protection standard laid down in Article 8 of Directive 93/13, and the intervention must not in any way undermine that protection; such reasoning can be found in the judgment in C-118/17, *Dunai*, paragraphs 43 and 44.

50. The referring court considers that when ruling on the present case, it must also take account of the provisions of the Charter of Fundamental Rights of the European Union ('the Charter'), and considers that the present case falls within the scope of EU law and therefore the guarantees afforded by the Charter to consumers should also apply, including without limitation with respect to the right to an effective remedy provided for in Article 47, which confers on everyone the rights which they may rely on before the courts of the Member States, including in disputes between individuals, and the principles of Articles 38 and 47 of the Charter concerning effective legal protection must also be observed in the application of Directive 93/13; the referring court finds such an interpretation in the judgments in C-34/13, *Kušionova*, paragraph 47, and in C-414/16, *Egenberger*, paragraphs 70 to 82.

[Or. 11]

51. In that sense, if the ZID ZPK 2015 were to be interpreted as meaning that, as a result of its application, namely by the mere conclusion of an annex to a loan agreement, the consumer loses the right to legal protection and to claim full compensation and the return of everything that was obtained under unfair and invalid agreements and pursuant to unfair and invalid contractual terms, the referring court considers that, in accordance with EU law and the principle of effective judicial protection within the meaning of Article 47 of the Charter, it is its obligation is to guarantee the full effect of Directive 93/13 and to do so by disapplying every provision of the ZID ZPK 2015 which is incompatible with the directive; in other words, if the ZID ZPK 2015 were to be interpreted in the above manner, it would not apply and all annexes to agreements concluded on its basis would consequently be ineffective and invalid.

52. In accordance with the foregoing, the referring court understands Directive 93/13 to mean that no statutory provision, including that contained in the ZID ZPK 2015, may have the effect of undermining the rights to which the applicant is entitled under Directive 93/13 or the ZPP, whose imperative is to restore the initial legal and factual situation by eliminating unfair terms as if they had never existed and, in particular, returning all advantages which the defendant unduly obtained to the applicant's detriment precisely on the basis of those terms.

NATIONAL LAW

53. As regards the relevant provisions of national law, the referring court points out that the ZOO stipulates that an invalid contract and invalid contractual terms and conditions cannot be cured, and in accordance with Articles 322 and 326 of the ZOO, invalidity is assessed with *ex tunc effect* and is therefore assessed and declared in relation to the time of conclusion of the contract. Therefore, the referring court considers that these provisions are compatible with Directive 93/13.

54. The ZOO provides that an invalid contract does not become valid by virtue of the subsequent removal of the cause of its invalidity, nor can it become valid by virtue of its renewal (Article 145); it likewise cannot become valid on the basis of a settlement (Article 158(2)). This is irrespective of the legal classification of the annex to the agreement, which the parties concluded pursuant to the ZID ZPK 2015, as indicated by Article 148(1) of the ZOO, which states that renewal is ineffective if the previous obligation was invalid, and by Article 158(2) ZOO, which states that a settlement concerning an invalid legal transaction is also invalid. Indeed, according to national legislation, if the contract was invalid or if any term of that contract was invalid, the parties cannot strengthen these invalid terms, modify them or make them valid in any manner (renewal, settlement, etc.), since this is clearly contrary to Article 322 of the ZOO, according to which an invalid legal transaction is deemed not to have taken place at all. It is a fundamental principle of national contract law whose rationale is that this type of violation of public interest and of public policy cannot be cured by the passage of time.

55. The referring court considers that these provisions are also compatible with EU law, as explained, for instance, in the judgment in C-421/14, *Banco Primus*, paragraphs 42 and 43. The referring court also considers that it is not permitted, on the basis of its own interpretations, to replace unfair terms with terms that were not agreed; this conclusion can be drawn from judgments C-70/17 and C-179/17, *Abanca Corporation Bancaria*, paragraphs 54 and 55, and such unfair terms must be invalidated with *ex tunc* effect.

[Or. 12]

56. With respect to the existing case-law of national supreme courts, the referring court refers to the existing case-law of the Supreme Court, which on 27 June 2001, in case […], ruled that the validity of a legal transaction must be assessed in accordance with the circumstances and laws in force at the time of conclusion of the contract, and the same position was taken, for instance, in the ruling of the Supreme Court […] of 28 October 2008 as well as in the rulings of the Supreme Court […] of 11 April 2007 and […] of 26 October 2010; there is also settled case-law of the Constitutional Court in this respect, such as ruling […] of 17 September 2003.

57. In the case-law and legal positions expressed by the Supreme Court regarding the impossibility of curing invalid terms either on the basis of a renewal or a settlement, references are made to ruling […] of 8 September 2010, according to which an invalid legal transaction cannot be cured by way of a settlement, whereas according to ruling […] an invalid legal transaction cannot be cured by way of a renewal, which is in line with Article 148 of the ZOO.

58. Finally, the referring court would also like to refer to the ruling of the Supreme Court, […] of 12 February 2019, in which the Supreme Court states that consumers who converted their loans pursuant to the ZID ZPK 2015 have a legal interest in contractual terms being declared unfair and invalid so that these consumers can exercise their rights to which they are entitled on the basis of that declaration; in that ruling, the Supreme Court ruled precisely on whether an invalid contract can be cured and took the position that invalidity results directly from statute and exists from the point in time the legal transaction is effected, and an invalid contract does not become valid even if the reason for its invalidity is subsequently removed, except in the special circumstances set out in Article 326(2) of the ZOO, which circumstances are not present in the case at issue (as the reason for invalidity in the case considered by the Supreme Court was a prohibition of lesser importance and the contract had been performed in full). Moreover, the referring court likewise refers to the ruling of the Supreme Court, […] of 26 May 2020, which also states that consumers who have had their loans converted are entitled to have the terms of the initial loan agreement declared unfair and to exercise their rights resulting from that declaration.

59. The referring court submits an extract from the provisions of national law in a separate document as Appendices 1 and 2, and the statement of claim and the parties' pleadings as Appendix 3.

Zagreb, 15 October 2020

List of appendices:

1. The applicant's statement of claim of 12 June 2019.

2. The defendant's statement of defence of 2 September 2019.

3. The defendant's pleading of 29 June 2020.

[Or. 13]

4. The applicant's pleading of 2 October 2020.

5. The applicant's pleading of 7 October 2020.

6. The Zakon o izmjeni i dopunama Zakona o potrošačkom kreditiranju [Law Amending and Supplementing the Law on Consumer Credit].

7. National legislation.

[Or. 14]

[…]

[…]