Case C-19/20

Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

16 January 2020

Referring court:

Sąd Okręgowy w Gdańsku (Regional Court in Gdańsk, Poland)

Date of the decision to refer:

30 December 2019

Applicants:

I.W.

R.W.

Defendant:

Bank BPH Spółka Akcyjna [Bank BPH Joint-Stock Company] with its seat in Gdańsk (Poland)

Subject matter of the case in the main proceedings

The annulment of a loan agreement on the ground that it is contrary to the mandatory provisions of national law given the unfair nature of its indexation clauses, and on the ground that it was concluded by the applicants under the influence of an error regarding the total cost of the credit and the invalidity of the agreement in its entirety, as well as a claim for the return by the bank of the amounts paid by way of principal and interest payments as well as fees.

Subject matter and legal basis of the reference

The interpretation of Articles 2, 3(1) and (2) in conjunction with Article 4(1) and Articles 6(1) and 7(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (‘Directive 93/13’) with respect to the court’s obligation to declare a term in a contract concluded with a consumer unfair where, as at the date

of the judgment, as a result of an amendment to the contract by way of an annex, the term in question has been amended such that it is no longer unfair and the declaration that the term in its original wording was unfair may result in the annulment of the entire contract, and with respect to the possibility of finding that only some elements of the contractual term concerning the exchange rate set by the bank are unfair, namely, by eliminating the provision allowing the bank's margin, which is a component of the exchange rate, to be determined unilaterally and in an unclear manner, as well as the question whether the public interest militates against the finding that only certain elements of the term in question are unfair in the manner described above. Furthermore, the question is whether the contract being annulled as a result of the exclusion of unfair terms amounts to a sanction understood as the result of a constitutive court decision with consequences from the date of conclusion of the contract and, also in the light of Article 47 of the Charter of Fundamental Rights of 30 March 2010, whether the national court is obliged to inform the consumer of the legal consequences of the contract being annulled, including of possible restitution claims by the trader.

Questions referred

1. Must Article 3(1) and (2) in conjunction with Article 4(1) and Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) be interpreted as meaning that the national court is obliged to declare that a term in a contract concluded with a consumer is unfair (within the meaning of Article 3(1) of the directive) including where, as a result of an amendment to the contract made by the parties by way of an annex, that term has been amended such that it is no longer unfair and a finding that the term in its original wording was unfair may result in the annulment (invalidation) of the entire contract?

2. Must Article 6(1), in conjunction with Article 3(1), the second sentence of Article 3(2) and Article 2 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) be interpreted as permitting a national court to find that only certain elements of a contract term relating to the exchange rate fixed by the bank for the currency to which the loan extended to the consumer is indexed (such as in the main proceedings) are unfair, namely, by eliminating the provision allowing the bank's margin, which is a component of the exchange rate, to be determined unilaterally and in an unclear manner, where leaving an unambiguous provision referring to the average exchange rate announced by the central bank (the Narodowy Bank Polski — National Bank of Poland), which does not require the eliminated term to be replaced with any legal provision, […] will result in real balance between the consumer and the trader being restored, although it will change the essence of the provision concerning the performance by the consumer of his obligation in a manner that is advantageous to him?

3. Must Article 6(1) in conjunction with Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) be interpreted as meaning that, even if the national legislature has introduced measures to prevent the continued use of unfair contract terms, such as that at issue in the main proceedings, by introducing provisions which require banks to stipulate in detail the methods and time limits for determining the exchange rate on the basis of which the amount of credit and principal and interest payments are calculated, and the rules for converting amounts into the currency in which the loan was disbursed or is to be repaid, the public interest militates against the finding that only certain elements of the term in question are unfair in the manner described in Question 2?

4. Should the annulment of the contract referred to in Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), as a result of the exclusion of unfair terms as defined in Article 2(a) in conjunction with Article 3 of the directive, be understood as a sanction resulting from a constitutive court decision made at the express request of the consumer with consequences from the date of conclusion of the contract, that is to say, *ex tunc*, and do restitution claims by the consumer and the trader become due and payable upon the judgment becoming final?

5. Must Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union of 30 March 2010 (OJ 2010 C 83, p. 389) be interpreted as imposing an obligation on the national court to inform a consumer who has requested that a contract be annulled in connection with the elimination of unfair terms of the legal consequences of such a judgment, including possible restitution claims by the trader (bank), even if such claims have not been raised in the proceedings in question, and also claims whose validity has not been clearly established, even if the consumer is represented by a professional legal representative?

Applicable provisions of Community law

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: recitals 4, 21, 24 and Articles 3, 4 and 6;

Charter of Fundamental Rights of the European Union of 30 March 2010: Article 47.

Applicable provisions of national law

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Civil Code of 23 April 1964, 'the Civil Code') (consolidated text: *Journal of Laws* [Dz. U.] of 2019, item

1145): Articles 58, 120, 353^1, 358 [in the wording as at 23 October 2008 (*Journal of Laws* [Dz. U.] No 228, item 1506)], which entered into force on 24 January 2009), Articles 385^1, 385^2, 388, 405 and 410.

Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Code of Civil Procedure of 17 November 1964) (consolidated text of 19 July 2019: *Journal of Laws* [Dz. U.] of 2019 item 1460): Articles 5, 1561, 1562 and 212.

Ustawa z dnia 21 lipca 2011 r. o zmianie ustawy — Prawo bankowe oraz niektórych innych ustaw (Law of 21 July 2011 Amending the Banking Law and Certain Other Laws) (*Journal of Laws* [Dz. U.] No 165, item 984): Articles 1 and 4.

Succinct presentation of the facts and procedure

1 In 2008, the applicants, as consumers, entered into a mortgage loan agreement with a term of 360 months with the defendant bank's legal predecessor; the loan was intended to cover the costs of building a home. Before signing the loan agreement, the applicants held meetings with a financial advisor (intermediary), who recommended a loan indexed to the Swiss franc (CHF) and informed them that the CHF/PLN exchange rate could rise, which would affect the amount of their monthly payments. The applicants did not raise any questions about the structure of the indexed loan.

2 In their loan application, they stated that they were applying for a loan in PLN which would be indexed to the CHF exchange rate and, on a separate form supplied by the bank, they submitted a declaration that they had been offered a loan in PLN and that they had chosen a foreign-currency loan, having been informed about the risks of taking out a loan in a foreign currency.

3 Pursuant to the loan agreement, the loan is disbursed in PLN, and after its disbursement is indexed to the CHF in accordance with the defendant's buying rate as at the disbursement date, which is indicated in the bank's table of currency buying/selling rates. However, the loan repayments are made in PLN and are settled at the currency selling rate. The currency buying/selling rates stated in the bank's table refer to the average exchange rate of the National Bank of Poland and the bank's margin. The interest rate on the loan is based on the LIBOR 3M benchmark.

4 The provisions examined by the court as unfair read as follows:

'Paragraph 1(1). The Bank extends to the Borrower a Loan in the amount of PLN […], indexed to the CHF exchange rate […], and the Borrower undertakes to utilise the Loan in accordance with the provisions of the Agreement, to repay the amount of the Loan utilised plus interest on the dates stipulated in the agreement and to pay to the Bank the commissions, fees and other amounts due as set forth in the agreement. The loan amount comprises: […]

As at the disbursement date, the loan balance is expressed in the currency to which the Loan is indexed according to the buying rate of the currency to which the Loan is indexed, as specified in the Table of buying/selling rates for mortgage loans extended by the Bank, which is described in detail in paragraph 17, and subsequently the foreign currency balance is converted each day into PLN according to the selling rate of the currency to which the Loan is indexed, as specified in the Table of buying/selling rates for mortgage loans extended by the Bank, which is described in detail in paragraph 17'.

'Paragraph 7(2).

The disbursement of the amount of the Loan indicated in the Application for Disbursement shall be effected by transfer to the domestic bank account indicated in the Application. The date of the transfer shall be considered the date of disbursement of the Loan utilised. On each occasion, the amount disbursed in PLN shall be converted into the currency to which the Loan is indexed at the buying/selling rate for mortgage loans extended by the Bank in force as at the date on which the Bank effects the disbursement'.

'Paragraph 10(6).

Each payment made by the Borrower shall be settled at the selling rate of the currency to which the Loan is indexed, as specified in the Table of buying/selling rates for mortgage loans extended by the Bank in force as at the day of [receipt] of funds by the Bank. (...)'

'Paragraph 17.

1. The buying/selling rates for mortgage loans extended by the Bank of the currencies included in the Bank's offer applicable as at the date of the transaction shall apply to the settlement of Loan disbursements and payments.

2. Buying rates shall be defined as the average PLN exchange rates vis-à-vis the currencies in question as published in the National Bank of Poland's table of average exchange rates minus the purchase margin.

3. Selling rates shall be defined as the average PLN exchange rates vis-à-vis the currencies in question as published in the National Bank of Poland's table of average exchange rates plus the sale margin.

4. In the calculation of buying/selling rates for mortgage loans extended by the Bank, the PLN exchange rate vis-à-vis the currencies in question as published in the National Bank of Poland's table of average exchange rates on the business day in question as adjusted by the Bank's purchase/sale margins shall apply [...]'.

5 When calculating the currency buying/selling rate, the bank took into account the average exchange rates calculated on each business day by the National Bank of Poland and added to (or deducted from) the rate in question the bank's margin, the

method of calculating which was not stipulated in the agreement. The currency buying/selling rate determined in this manner was published and applied to settlements on the following day.

6 On 7 March 2011, the parties concluded an annex to the loan agreement which provided for the possibility of making payments in either PLN or CHF. This annex contained provisions stipulating the method of calculating the bank's margin used to determine the buying/selling rate of the currency to which the loan was indexed. Since the annex was concluded, the applicants have been making loan payments in CHF, purchasing the currency on the free market.

7 After the appreciation of the CHF, which entailed a significant increase in loan payments expressed in PLN, measures were sought to remedy the difficult situation facing many consumers. Following the Court's judgment of 3 October 2019 in Case C-260/18, the Związek Banków Polskich (Polish Bank Association) published on its website an announcement indicating that if a loan agreement were to be annulled, the bank would have a claim for the repayment of the principal amount disbursed and also a claim for remuneration for the use of that principal amount for the period stipulated in the agreement.

8 The national court considers that pursuant to the provisions of Polish law, that is, Article 385^1(1) and (3) of the Civil Code, the provisions of the agreement concluded between the parties concerning the indexation of the loan amount expressed in Polish currency (PLN), and of interest and principal payments, to the Swiss franc (CHF) as well as the provisions concerning the rules for determining the exchange rate concern the main subject matter of the contract, also within the meaning of Article 4(2) of the directive (see the Court's judgment of 20 September 2017, *Andriciuc*, C-186/16, paragraph 38, and the Court's judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, paragraph 59). The provisions concerning the indexation mechanism were expressed in language sufficiently intelligible for the applicants as consumers, after meeting with their credit advisor, to be sufficiently aware of the risk relating to a change in the currency exchange rate (although in practice they did not expect the CHF to appreciate as significantly as it did against the PLN), which they confirmed by submitting a declaration to that effect. In these circumstances, the national court does not regard the terms relating to the indexation mechanism as unfair within the meaning of Article 385^1(1) and (3) of the Civil Code interpreted in accordance with Article 3(1), in conjunction with Article 4(2) of the directive. On the other hand, the national court finds that those terms of the agreement which concerned the method of determining the exchange rate were unfair under the aforementioned provisions, but only to the extent that they made the currency buying or selling rate dependent on the bank's margin, which was set unilaterally by the bank using mechanisms unknown to the consumer. The national court considers that those elements of the term relating to the exchange rate which refer to the average rate as published by the National Bank of Poland as the basis for determining the exchange rate were not unfair. The national court also takes the view that after the inclusion in the annex to the loan agreement concluded

between the parties of a clarification concerning the mechanism for determining the bank's margin as a component of the exchange rate, the term which concerned the method of determining the exchange rate ceased to be unfair.

Essential arguments of the parties in the main proceedings

9 The bank has moved for the action to be dismissed, stating that the agreement remains in compliance with national law, the consumers were not misled and the indexation clauses are not unfair. In addition, the defendant raised the plea that the applicants' monetary claims are time-barred. The bank has not filed any restitution claims.

Brief statement of and reasons for the reference

First question

10 The essence of the problem is whether, where it is found that a contract term in its original wording was unfair, this state of affairs should result in legal consequences in a situation where the term in question has been amended by the parties? The determination that a term is unfair must have the consequence of eliminating that term and restoring the consumer to the legal and factual situation that he would have been in if that term had not existed (see the Court's judgments of 15 March 2012, *Pereničová and Perenič*, C-453/10, paragraph 31, of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraph 61, and of 14 March 2019, *Dunai*, C-118/17). If only part of an agreement term cannot be declared unfair, it may be necessary for the entire agreement to be annulled — and with effect from the date of its conclusion (*ex tunc*). This, in turn, appears to contradict the previously expressed will of both the consumer and the bank, who, by concluding an annex which amended the unfair term, restored real balance between the parties. Thus, the judgment of the court would concern an agreement in a different wording than that binding on the parties as at the date of the judgment. Finding that the agreement is invalid (its annulment) would result in the bank being obliged to return not only the amounts paid to it by consumers under the unfair terms, but also those paid under the fair terms as amended by the annex. Such a result appears to contradict the purpose of the directive, which is to restore the balance between the parties while in principle preserving the validity of the contract as a whole (see the Court's judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, paragraph 31).

11 As a result of the annex to the agreement concluded by the parties providing for a mechanism to calculate the bank's margin, which is a component of the exchange rate of the currency to which the loan is indexed, in the event that the consumer exercises his right to repay the loan in Polish currency, the unfair contract term in its original wording is no longer binding on the parties. However, the loan balance was determined using this unfair term and a number of principal and interest

payments were made on that basis. This, in turn, gives rise to restitution claims by the applicants, which claims are legitimate at least in part.

12 In its judgment of 20 September 2017, *Andriciuc*, C-186/16, the Court of Justice explained that the assessment of the unfairness of a contractual term must be made by reference to the time of conclusion of the contract at issue, taking account of all the circumstances which could have been known to the seller or supplier at that time, and which were such as to affect the future performance of that contract (paragraph 57). A similar view has also been established in the case-law of the Polish courts.

Second question

13 The clause examined in the main proceedings (paragraph 17(2), (3) and (4) of the agreement) was of an unfair nature as regards the bank's margin, which was calculated by the bank, and the original wording of the agreement did not include the rules for calculating that margin, which in the court's view was contrary to the requirements of good faith and caused a significant imbalance in rights to the detriment of the consumer. In the agreement, the currency buying rate was defined as the result of the following calculation: the average exchange rate published in the National Bank of Poland's table of exchange rates *minus the purchase margin*, and, conversely, the currency selling rate was defined as the result of the following calculation: the average exchange rate published in the National Bank of Poland's table of exchange rates plus the sale margin. In the present case, the elimination of the provision concerning the bank's margin, which is one of the two factors affecting the exchange rate, does not result in the consequent gap having to be replaced with any other provision. Although this operation changes the essence of the original wording of the contractual provision, since it deprives the bank of the profit resulting from the currency spread, it should be noted that it was precisely the bank's unclear amount of profit resulting from the exchange rate spread that made the term unfair. Therefore, its elimination remedies the unfairness.

14 The national court is facing the question whether, in the light of Article 3851(1) of the Civil Code as interpreted in accordance with EU law, in the context of Article 6(1) of the directive and the case-law of the Court of Justice to date, it is permissible to eliminate as unfair only one element of a contract term while leaving the rest intact. In the view of the national court, this situation differs from those on the basis of which the doctrine prohibiting the reduction of provisions in order to maintain their effectiveness was expounded, since it does not require the gap arising after the elimination of part of a term to be replaced by any other provision. On the other hand, it does not amount to a simple exclusion of an entire contractual provision. Therefore, in the view of the national court, there is a need clarify the doubts relating to the interpretation of Article 6(1) of the directive and to answer the question whether it is permissible to eliminate only part of a term which makes that term unfair, without the need to replace it with any other provision, even if that would change the essence of the term in question.

Third question

15 In the view of the referring court, it is necessary to interpret Article 6(1) in conjunction with Article 7(1) and recitals 1, 2, 3, 6, 7, 8 and 21 of the directive to decide whether, where a Member State has adopted legislation which has the effect of preventing unfair terms (such as those at issue in the main proceedings) from being included in a contract, it is still necessary to discourage traders from using such terms by penalising them where it is found that a contract provision is unfair. The court has doubts as to whether there is justification for prohibiting the reduction of provisions in order to maintain their effectiveness (understood as the permissibility of eliminating part of a contractual term), which may lead to the entire contract being annulled, as it is not the judgment which will cause banks to refrain from including in their agreements terms such as the one at issue in the main proceedings, since they will be prevented from including such terms by the law adopted by the Member State. As a result of the banks' practices in regard to granting loans indexed to foreign currencies, the Polish legislature, by adopting the Law of 29 July 2011 Amending the Banking Law and Certain Other Laws, introduced, as a significant element of loans denominated in, or indexed to, a currency other than the Polish currency, detailed rules for establishing the methods and dates of determining the exchange rate, which is used in particular to calculate the amount of the loan, its tranches and principal and interest payments as well as the rules of converting amounts to the currency in which the loan was disbursed or is being repaid (Article 1(1)). Thus, in the view of the court, the Polish legislature has fulfilled its obligation arising from recitals 4 and 21 and Article 7(1) of the directive.

16 The case-law to date, in which the Court of Justice prohibited the reduction of provisions in order to maintain their effectiveness, concerned a situation in which the eliminated part of a contract term was to be replaced by a legal provision or by a ruling made by the court itself. The Court justified the prohibition on such actions aimed at preserving the binding effect of a contract term while eliminating those elements which were unfair by citing the public interest protected by the directive (Court judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, paragraphs 67–69). This public interest is described in the directive's recitals and consists in protecting citizens as consumers against abuse by sellers or suppliers, in particular against the unfair exclusion or restriction of consumer rights in contracts. This purpose should in principle be achieved through the adoption of legal norms which implement the directive. The directive assumes that sanctions consisting in the invalidation of unfair terms, and sometimes of the entire contract, by court rulings should have a dissuasive effect for the future. The courts' creative jurisprudence could undermine this objective (Court judgment of 12 June 2012, *Banco Español de Crédito*, C-618/10, paragraphs 65–69; Court judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, paragraphs 56–57 and 60–61).

Fourth question

17 In the view of the referring court, the Polish legislature, contrary to recital 21 and Article 6(1) of the directive, has not fully implemented into the Polish legal order the objectives of the directive consisting in the need to ensure that a contract concluded between a consumer and a seller (supplier) is not binding if this is not possible after unfair terms have been excluded therefrom. Pursuant to Article 385^1(2) of the Civil Code, if a contractual provision is not binding on the consumer, the contract shall otherwise continue to be binding on the parties. The national legislature has omitted the reservation 'if it is capable of continuing in existence without the unfair terms' stipulated in Article 6(1) of the directive. Under the Polish Civil Code, it is permissible to invalidate a contract with retroactive effect (that is, from the date of conclusion) on the basis of a constitutive court decision issued at the request of a party to the contract under the exploitation clause (Article 388 of the Civil Code). Obviously, the conditions for the exercise of that right by a party to the contract are clearly different from those set out in Article 3(1) and (2) of the directive.

18 However, the case-law of the Court concerning the interpretation of Article 6(1) of the directive points to aspects of the sanction of annulling the contract (where it is not possible for it to continue after abusive clauses have been removed from it) which are different than those presented in the case-law of Polish courts. In its judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, paragraph 84, the Court found that, in general, the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith. In its judgment of 3 October 2019, *Dziubak*, C-260/18, the Court indicated that maintaining the contract in force or its annulment by the court after unfair terms have been removed depends on the consumer's will (see paragraphs 2 and 4 of the operative part). On the other hand, in its judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, the Court emphasises the consumer's right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term (see paragraph 66). This could mean that the annulment of the contract after the elimination of abusive clauses occurs as a result of a constitutive court decision and not by operation of law, and occurs at the request of just one party to the contract (the consumer), resulting in the consumer's claim for the restitution of advantages wrongly obtained by the trader. On the basis of the judgments cited, the national court has doubts as to whether this is the meaning of the sanction consisting in the contract being annulled.

19 The interpretation of Article 6(1) of the directive on the substance of the contract being annulled is required for the referring court to interpret the national law in accordance with the purpose of the directive. Determining the nature of this sanction is necessary in order to assess the due date of the restitution claims raised by the applicants and the validity of the defendant's plea that these claims are time-barred. Consequently, it is important from the point of view of assessing whether contract annulment is in the consumer's interest, since if a judgment

declaring the contract to be invalid (annulling the contract) is assumed to be constitutive in nature, it cannot be ruled out that in other proceedings the bank will seek the repayment of the disbursed (utilised) loan from the consumer and it can be assumed that this claim will not be time-barred. Ultimately, a discrepancy between the interpretation of Article 6(1) of the directive and national law and the impossibility of interpreting national law in accordance with the purpose of the directive could indicate that the directive has not been correctly implemented and this could result in the liability of the Polish State for damages.

Fifth question

20 The answer to this question will be relevant to the main proceedings if the Court finds that under Article 6(1) of the directive, the court is obliged to examine the unfairness of a term even if that term has been subsequently amended by the parties, and this precludes only certain elements of a contract term from being considered unfair. In this case, there will be grounds to declare the entire contract invalid.

21 According to the case-law of the Court of Justice concerning the interpretation of Article 6(1), consumer protection can be assured only if account is taken of the consumer's actual and therefore current interests. Similarly, the consequences against which those interests must be protected are those which would actually occur, in the circumstances existing or foreseeable at the time when the dispute arose, if the court were to annul that contract (Court judgment of 3 October 2019, *Dziubak*, C-260/18, paragraph 53, and Court judgment of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraphs 23, 27 and 35). The Court also pointed out that Directive 93/13 does not go as far as making the system of protection against the use of unfair terms by suppliers or sellers, a system which it introduced for the benefit of consumers, mandatory. Accordingly, where the consumer prefers not to rely on it, that system of protection is not applied. The consumer must *a fortiori* be entitled to object to being protected, under that same system, against the unfavourable consequences caused by the contract being annulled (Court judgment of 3 October 2019, *Dziubak*, C-260/18, paragraphs 54 and 55).

22 Since Directive 93/13 assumes that consumers are the weaker party to the contract and to the judicial process (recital 5 and Article 7(1) of the Directive), appropriate safeguards should be provided for them to pursue their claims in court. As a consequence, the court is obliged not only to examine of its own motion the unfairness of contractual provisions, but also to inform the consumer and the trader about the unfair terms identified. The requirements of effective judicial protection of the rights that individuals derive from EU law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, impose on the national court which has found of its own motion that a contractual term is unfair the obligation to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter (see Court judgment of 21 February 2013, *Banif Plus Bank*, C-472/11, paragraphs 29 and 36). However, a consumer can only make the decision as to whether or not to avail himself of the

protection of the system established under Directive 93/13 and the subsequent provisions of national law which implement it only if he is aware not only of the unfairness of the contractual term itself, but also of the effects of the system of protection being put into motion, that is, the elimination of unfair terms from the contract, the ability of the contract to continue and the consumer's rights and obligations which result from the exclusion of unfair terms or from the annulment of the contract. In its judgment in *Dziubak*, C-260/18, paragraph 66, the Court indicated that where the national court considers a contractual term to be unfair, it is required not to apply it, an obligation from which there is no derogation unless the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status. However, the Court did not define the scope of the court's obligation to provide information in this respect. In particular, it is important whether this obligation to provide information only concerns the mere finding that a term is unfair or whether it extends to the legal and, subsequently, economic consequences of that finding. In the view of the referring court, only the provision of full information to the consumer, that is, information on the unfairness of the term or the need for the contract to be annulled, and further on the effects of its annulment consisting in the requirement on both parties to return the consideration obtained from the other (and other possible effects under national law, for instance concerning the limitation period on claims) will allow the consumer to make an informed decision on whether to use the protection system.

23 Consumers who are not entirely aware of their legal situation may be exposed to the risk of making procedural decisions without being fully informed, relying on the suggestions of their legal representative. On the other hand, national legislation is based on the assumption that a party to the proceedings has confidence in his legal representative, and where a party to the proceedings is represented by a legal representative, this relieves the court of a number of information obligations. The point is simply to establish whether the risk of assessing the legal consequences of the consumer's decision to use the protection system should be left to the consumer himself and his attorney. The consumer's decision to request annulment of the contract may only be made once he has been informed of all the possible consequences of that request being granted in the judgment.

24 In order to interpret the national law governing civil procedure in accordance with the purpose of the directive, Article 6(1) of the directive must be interpreted with respect to the scope of the court's information obligations in proceedings involving consumers. In the court's view, certain procedural provisions may be interpreted in such a manner as to achieve the objectives of the directive provided that the national court's duty to provide information is clarified by the Court's interpretation.