Case C-212/20

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

Date lodged:

12 May 2020

Referring court:

Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw, Poland)

Date of the decision to refer:

22 January 2020

Applicants:

M.P.

B.P.

Defendant:

'A.' operating through 'A.' S.A. [a limited company]

Subject matter of the case in the main proceedings

A claim for payment of the amount of PLN 50 000 as unjustified amounts received by the defendant on the basis of abusive clauses contained in a loan agreement with respect to the indexation of loan payment amounts and the amount of the applicants' debt.

Subject matter and legal basis of the request

Articles 3(1), 4(1) and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Directive 93/13').

Questions referred

1. In the light of Articles 3(1), 4(1) and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and its recitals, pursuant to which contracts must be drafted in plain and intelligible language and doubts must be interpreted in the consumer's favour, must a contractual term setting out the buying and selling rates of a foreign currency in a loan agreement indexed to a foreign currency be worded unequivocally, that is to say, in a manner that enables the borrower/consumer to determine that rate himself on any given day, or, in the light of the type of contract as referred to in Article 4(1) of Directive 93/13, the long-term nature (spanning several decades) of the contract and the fact that the amount in foreign currency is subject to constant changes (may change at any time), is it possible to formulate a more general wording of the contractual term, that is to say, one that refers to the market value of the foreign currency, in a manner which prevents a significant imbalance in the parties' rights and obligations to the detriment of the consumer within the meaning of Article 3(1) of that directive?

2. If the answer to the first [question] is in the affirmative, in the light of Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and its recitals, it is possible to interpret a contractual term concerning the determination by the creditor (bank) of the buying and selling rates of a foreign currency in such a manner as to resolve doubts in the consumer's favour and to assume that the contract determines the buying and selling rates of a foreign currency not in an arbitrary manner, but on free-market terms, especially if both parties had the same understanding of the contractual terms determining the buying and selling rates of the foreign currency or if the borrower/consumer was not interested in the disputed contractual term at the time of conclusion of the contract and during its performance, and was also not familiar with the content of the contract at the time of its conclusion and throughout its duration?

Applicable provisions of EU law

Directive 93/13: twentieth recital, Article 3(1), Article 4(1) and Article 5.

Applicable provisions of national law

Kodeks cywilny — ustawa z dnia 23 kwietnia 1964 r. (Law of 23 April 1964 — the Civil Code, *Journal of Laws* [Dz. U.], No 16, item 93, as amended; 'the CC').

Article 65

§ 1. A declaration of intent should be interpreted as required by the circumstances in which it was made, the rules of social conduct and established customs.

§ 2. Contracts should be examined from the point of view of the parties' intentions and the purpose of the contract rather than relying on the literal wording of the contract.

Article 353[1]

Contracting parties may arrange their legal relationship at their discretion as long as the substance or purpose of the contract are not contrary to the properties (nature) of the relationship, the law or the rules of social conduct.

Article 385[1]

§ 1. Provisions of a contract concluded with a consumer which have not been agreed individually shall not be binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his interests (abusive clauses).

This shall not apply to provisions setting forth the principal matters to be performed by the parties, including price or remuneration, so long as they are worded clearly.

§ 2. If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties.

§ 3. Provisions of a contract which are not agreed individually are those over the content of which the consumer had no genuine influence. This refers in particular to contractual provisions taken from a standard contract proposed to a consumer by a contracting party.

§ 4. The burden of proving that a provision has been agreed individually rests with the person relying thereon.

Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe (Banking Law of 29 August 1997, consolidated text: *Journal of Laws* [Dz. U.] of 2019, item 2357)

Article 69 in its current wording

1. In a loan agreement, the bank undertakes to place at the borrower's disposal for the period of time stipulated in the agreement a certain amount of money which can be used for a specified purpose, and the borrower undertakes to use this amount under the terms and conditions stipulated in the agreement, to return the amount of the utilised loan together with interest on set repayment dates and to pay a fee on the loan granted.

2. A loan agreement should be made in writing and stipulate, in particular:

(1) the parties to the agreement;

(2) the loan amount and currency;

(3) the purpose for which the loan was granted;

(4) the loan repayment terms and dates;

(4a) in the case of loans denominated in, or indexed to, a currency other than the Polish currency, detailed rules specifying the methods for, and dates of, determining the exchange rate which is used, n particular, to calculate the amount of the loan, its tranches and principal and interest payments as well as the rules for converting amounts to the currency in which the loan was disbursed or is being repaid;

(5) the loan interest rate and the conditions for changing it;

(6) the manner of securing repayment of the loan;

(7) the scope of the bank's rights related to controlling utilisation and repayment of the loan;

(8) the dates and manner of placing the funds at the borrower's disposal;

(9) the amount of fee, if provided for in the agreement;

(10) the conditions governing amendment and termination of the agreement.

3. In the case of loans denominated in, or indexed to, a currency other than the Polish currency, the borrower may make principal and interest payments as well as repay the loan early in full or in part directly in that currency. In this case, the loan agreement shall also set out the rules for opening and maintaining the account in which funds intended for repayment of the loan are accumulated and the rules for making payments using this account.

Article 69 in its wording as at the agreement conclusion date, that is, 16 May 2008

1. In a loan agreement, the bank undertakes to place at the borrower's disposal for the period of time stipulated in the agreement a certain amount of money which can be used for a specified purpose, and the borrower undertakes to use this amount under the terms and conditions stipulated in the agreement, to return the amount of the utilised loan together with interest on set repayment dates and to pay a fee on the loan granted.

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(4) the loan repayment terms and dates;

(5) the loan interest rate and the conditions for changing it;

(6) the manner of securing repayment of the loan;

(7) the scope of the bank's rights related to controlling utilisation and repayment of the loan;

(8) the dates and manner of placing the funds at the borrower's disposal;

(9) the amount of fee, if provided for in the agreement;

(10) the conditions governing amendment and termination of the agreement.

Article 111 in its wording as at the agreement conclusion date, that is, 16 May 2008

l. The Bank shall announce at the place where it conducts its business, in a generally accessible manner:

(1) the interest rates applicable to funds in bank accounts and to loans;

(2) the applicable fee rates and the amount of fees charged;

(3) the interest capitalisation dates;

(4) the exchange rates applied;

(5) the balance sheet, together with the opinion of the statutory auditor, for the most recent period subject to audit;

(6) the composition of the bank's Management Board and Supervisory Board;

(7) information on the terms on which cross-border transfers are executed;

(8) the names of persons authorised to enter into commitments on behalf of the bank or an organisational unit thereof;

(9) information on domestic or foreign entrepreneurs referred to in Article 6a(1) if those entrepreneurs have access to information protected by banking secrecy when performing the activities referred to in this provision for the benefit of an organisational unit of the bank.

2. In addition to the information referred to in subparagraph 1, cooperative banks shall also indicate their area of operation and their affiliating bank.

Ustawa o Narodowym Banku Polskim z dnia 29 sierpnia 1997 r. (Law on the National Bank of Poland of 29 August 1997, consolidated text: *Journal of Laws* [Dz. U.] of 2019, item 1810)

'Article 1

The National Bank of Poland ('the NBP') is the central bank of the Republic of Poland.

Article 24

1. The NBP shall implement the currency policy established by the Council of Ministers in consultation with the Council.

2. The rules for setting the exchange rate of the Polish złoty against foreign currencies shall be determined by the Council of Ministers in consultation with the Council.

3. The NBP shall publish current foreign currency exchange rates and other foreign exchange rates.'

Brief outline of the facts and procedure

1. On 16 May 2008, B.P. and M.P. (borrowers acting in their capacity as consumers) concluded a mortgage loan agreement with (A) S.A. [a limited company] on the basis of the contract template presented to them. Under the agreement, the bank undertook to make the amount of PLN 460 000 available to the borrowers. The loan was indexed to a foreign currency (the Swiss franc — CHF). The term of the loan was 480 months, and the interest rate was set as the sum of the LIBOR 3M (CHF) benchmark rate and the bank's fixed margin of 1.20 percentage points. The loan amount was disbursed to the applicants in three tranches at the buying rates stipulated in the defendant bank's tables. On 10 January 2013, the parties concluded an annex to the agreement providing for the possibility of repaying the indexed loan granted to the borrowers in CHF, that is, in the foreign currency to which the loan was indexed. The possibility of concluding such an annex had existed since 2009.

2. In accordance with the Loan Terms and Conditions in force at the Bank, a loan indexed to a foreign currency is a loan the interest rate of which is based on a benchmark rate applicable to a currency other than PLN and the disbursement and repayment of which are effected in PLN on the basis of the exchange rate of the foreign currency in question to PLN according to the table (§ 2(2)). According to the definition, the table means the foreign exchange rate table in force at the bank (§ 2(12)). In the case of loans indexed to a foreign currency, the loan was disbursed in PLN at a rate not lower than the buying rate in accordance with the table in force when the loan was disbursed. Where the loan was disbursed in tranches, the rate applied was not lower than the buying rate in accordance with

the table in force when the tranche in question was disbursed. The loan debt balance is expressed in foreign currency and calculated at the exchange rate applied upon disbursement of the loan (§ 7(4)). According to the Terms and Conditions, in the case of loans indexed to a foreign currency, loan payments are expressed in the foreign currency in question and on each subsequent loan payment date they are debited to the bank account referred to in subparagraph 1 at the selling rate in accordance with the exchange rate table in force at the Bank as at the end of the working day preceding the loan payment due date (§ 9(2)).

3. In connection with their application for a mortgage loan indexed to a foreign currency, the applicants signed a statement to the effect that they were fully aware of the exchange rate risk, that they chose not to take out a loan in PLN and instead chose to take out a loan indexed to the CHF, that they were aware of the provisions of (A) Terms and Conditions with respect to loans indexed to a foreign currency and that they had been informed that the current foreign currency exchange rates were published at the bank's branches. Moreover, the applicants acknowledged that they were aware that the exchange rate risk had an impact on their liability towards bank (A) and on the amount of loan payments, that the loan would be disbursed in PLN according to the rules stipulated in the Terms and Conditions and that the loan debt balance was expressed in foreign currency; the loan payments were expressed in foreign currency and were to be made in PLN according to the rules stipulated in the Terms and Conditions. The borrowers initialled every page of the loan application, agreement, Terms and Conditions and annex to the agreement. The applicants read the agreement and reviewed the Terms and Conditions, but without reading the latter carefully.

4. If it had been assumed that the loan was a PLN loan, the indexation clause had been omitted and the interest rate adopted had been the one applicable to a loan indexed to a foreign currency, namely, LIBOR 3M + margin, then the amount of payments due in the period from 16 May 2008 to 10 October 2014 would have been PLN 95 491.32. The difference between the amount actually paid by the applicants under the agreement and the amount that they would have paid if the disputed indexation clauses had been omitted is PLN 50 492.46 in favour of the applicants.

5. The exchange rates applied by the bank in its table were market rates, and the insignificant differences between the rates applied by different banks are attributable to differences in buying and selling prices on the interbank market. The bank's use of buying and selling rates results from the need to ensure the security of the funds entrusted to it by limiting the size of the currency position it opens. The bank's main method of eliminating foreign exchange risk is obtaining funding in Swiss francs on the interbank market.

6. The difference between the loan amount which the applicants would have to pay if they had concluded a PLN loan agreement with an interest rate applicable to such agreements (PLN 176 584.79) and the amount they actually paid under the agreement (PLN 145 983.78) in the period from 16 May 2008 to 10 October 2014

is PLN 30 601.01 to the detriment of the applicants. As at 11 February 2017, this difference amounts to PLN 24 803.31 to the detriment of the applicants.

7. During the period covered by the statement of claim, the payments for a loan indexed to the CHF were for the most part lower than payments for a PLN loan; at the same time, in the case of a loan indexed to the CHF, the principal is repaid at a rate that is several times higher than in the case of a PLN loan. As an example, on the basis of a selective analysis of payments in equal periods of six months, it can be shown that in July 2009, for instance, the monthly payment for a loan indexed to the CHF was PLN 1 825.06, of which the principal amounted to PLN 991.92, which is more than 54% of the payment, while the payment for a PLN loan was PLN 2 485.27, of which the principal amounted to PLN 288.73, which is more than 11% of the payment. In January 2010, the payment for a loan indexed to the CHF was PLN 1 712.60, of which the principal amounted to PLN 965.73, which is more than 56% of the payment, while the payment for a PLN loan was PLN 2 357.96, of which the principal amounted to PLN 255.56, which is more than 10% of the payment. In January 2013, the payment for a loan indexed to the CHF was PLN 2 019.29, of which the principal amounted to PLN 1 299.12, which is more than 64% of the payment, while the payment for a PLN loan was PLN 2 396.93, of which the principal amounted to PLN 298.60, which is more than 12% of the payment. In January 2014, the payment for a loan indexed to the CHF was PLN 2 030.99, of which the principal amounted to PLN 1 320.26, which is more than 65% of the payment, while the payment for a PLN loan was PLN 1 928.45, of which the principal amounted to PLN 484.85, which is more than 25% of the payment. Finally, in July 2014, the payment for a loan indexed to the CHF was PLN 2 041.59, of which the principal amounted to PLN 1 362.16, which is more than 66% of the payment, while the payment for a PLN loan was PLN 1 938.79, of which the principal amounted to PLN 537.15, which is more than 27% of the payment.

Essential arguments of the parties in the main proceedings

1. The applicants claim that the contractual terms were abusive owing to the fact that the defendant was free to set arbitrarily the CHF buying and selling rates in the bank's foreign exchange rate table for foreign currency loans and loans indexed to foreign currencies. In addition, they point out that there are no provisions in the agreement or in the Terms and Conditions on the method for measuring the values on the basis of which the CHF buying and selling rates are determined. The exchange rate published in the bank's table is determined on the basis of the exchange rate on the interbank market in the following manner: the buying or selling rate deviates in one direction or the other from the interbank rate in accordance with the decision of the bank's management, and consumers have no influence on the manner in which foreign currency buying and selling rates are determined. As a result, in determining the amount of the debt and the loan payments to be made on the basis of prohibited clauses, the defendant acted unlawfully and is obliged to return the sums unduly charged. The applicants'

claim concerns the difference between the amounts collected by the defendant as loan repayment and the amounts that would have been due in the absence of abusive clauses.

2. In its response to the claim, the defendant bank indicated that for over eight years the applicants had not questioned the validity of the loan agreement or its individual terms, had performed the agreement and had benefited economically from the choice of this type of loan in comparison with a PLN loan. The claim that their consumer interests have been infringed is an attempt to evade the effects of a financial decision that no longer delivers the expected benefits. According to the bank, the indexation clause is not subject to examination for compliance with Article 385[1] of the CC, since it was individually agreed upon by the parties and neither contains any provisions contrary to good practice nor infringes the interests of the consumer; furthermore, the bank does not determine the exchange rate table in a free and arbitrary manner, and the CHF buying and selling rates in the defendant’s exchange rate tables correspond to market values. The bank also pointed out that under Article 111 of the Banking Law, it is obliged to publish the exchange rates it applies in isolation from any contractual relationships and in isolation from any contractual templates, and at the time the agreement was concluded there were no legal regulations requiring banks to specify precise indicators and mathematical models for determining foreign currency exchange rates. The bank added that exchange rates, which can change in a fraction of a second, are determined on the basis of global market indicators, which are beyond the bank’s control, and policies for maintaining exchange rate tables are supervised by the Polish Financial Supervision Authority.

3. The defendant added that, in compliance with Recommendation S, from April 2009 it indicated in the Terms and Conditions that foreign exchange rates were determined taking into account the following factors: average exchange rates announced by the National Bank of Poland, the current situation in the foreign exchange market, the bank’s current foreign exchange position and expected movements in foreign exchange rates.

Brief statement of and reasons for the request

1 An analysis of Council Directive 93/13, which is implemented in the Polish legal system by, inter alia, Article 385[1] of the CC, of the provisions of Polish law cited above and of the case-law of the Court of Justice, including, in particular, the case-law relating to Article 5 of the directive and the judgments in Cases C-186/16, C-96/14 and C-26/13, has not provided answers to the questions posed by the referring court.

2 The court’s first doubt is whether, in the light of Articles 3(1), 4(1) and 5 of Council Directive 93/13/EEC and of Articles 69 and 111 of the Banking Law in their wording at the time when the agreement was concluded, it is possible to require the bank to ensure that the contractual term determining the foreign

currency buying and selling rates in a loan agreement indexed to a foreign currency are formulated in a completely unambiguous manner — that is to say, in such a manner that the borrower/consumer would be able to determine that rate himself on any given day — in the context of the nature of that agreement, national legislation and established customs at the time when the agreement is concluded. On the day on which the agreement was signed, there were no provisions obliging [the bank] to indicate the rules for determining foreign exchange rates, and Article 69(2) of the Banking Law, in its then wording, included a requirement that a loan agreement had to be made in writing and listed the mandatory elements of such an agreement (for instance, the amount and currency of the loan, the purpose for which the loan was being granted, the loan repayment terms and dates or the loan interest rate and the conditions governing any change to it). The situation changed on 26 August 2011, that is to say, more than 3 years after the agreement had been signed, with the introduction of Article 69(2)(4a) of the Banking Law, which stipulated that, in the case of loans denominated in, or indexed to, a currency other than the Polish currency, the loan agreement should include detailed rules specifying the methods for, 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 for converting amounts to the currency in which the loan was disbursed or is being repaid. However, this provision did not exclude the bank's freedom to determine the amount of foreign currency; it only introduced an obligation to specify the rules for, and dates of, determining exchange rates. In the draft explanatory memorandum to the law which added point 4a it was stated, inter alia, that, as a result of this provision being introduced, the borrower would be adequately informed by the bank about the essential rules relating to loan repayment. Thanks to this solution, banks would compete with one another on currency spreads. The referring court points out that there is no provision in national law stipulating how exchange rates should be determined, which appears appropriate in a free market environment.

3 In this context, the referring court points out that when assessing the possibility of unambiguously formulating the rules for determining exchange rates, the rules for determining exchange rates applied by the NBP as at the agreement conclusion date cannot be disregarded. Pursuant to § 2(1) of Resolution No 51/2002 of the NBP Management Board of 23 September 2002 on the method for calculating and announcing current foreign exchange rates, average EUR/PLN and USD/PLN exchange rates are calculated on the basis of so-called quotations. The quotation mechanism consists in sending daily enquiries to 10 banks from the 'List of banks which are candidates for performing the role of money market dealers according to turnover volumes on the interbank foreign exchange market — spot transactions in the PLN area' concerning the EUR and USD buying and selling rates in PLN applied at those banks. In accordance with § 2(2) of the resolution, the exchange rates of foreign currencies such as the CHF are calculated on the basis of the EUR/PLN exchange rate calculated in accordance with § 2(1) and the EUR market exchange rates vis-à-vis individual currencies as at 11 a.m. The defendant bank was on the list of banks which are candidates for performing the

role of money market dealers, which means that the exchange rates from the defendant bank’s tables formed the basis for determining the NBP exchange rate. It should be added here that the NBP, as an entity with a systemic function mentioned in Article 227 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland), the operation of which is governed by statute and which implements monetary policy and, more importantly, currency policy, changed the rules for setting exchange rates three times in 18 years, that is to say, within a period shorter than the term of the agreement.

4 Therefore, it is questionable whether, in the light of the long-term nature of the loan agreement indexed to a foreign currency and the unforeseeable nature of changes in the foreign exchange market, it is at all possible to require the defendant to specify, precisely and strictly, the rules for determining the foreign exchange rate or rather, taking into account the type of service, pursuant to Article 4(1) of Directive 93/13, it is possible to refer to the more general concept of a free market exchange rate, especially as the bank’s potential freedom to determine the exchange rate of a foreign currency — within the range set by the market — would not result in a significant economic imbalance to the detriment of the consumer within the meaning of Article 3(1) of the directive. This doubt appears to be confirmed by the Terms and Conditions applied by the defendant after the introduction of Article 69(2)(4a) of the Banking Law. As the defendant pointed out, from the moment the amendment in question was introduced, pursuant to the Terms and Conditions, foreign exchange rates have been determined by taking into account the following factors: average exchange rates announced by the National Bank of Poland, the current situation in the foreign exchange market, the bank’s current foreign exchange position and expected movements in foreign exchange rates. This wording of the Terms and Conditions, although it indicates the criteria for determining the foreign currency exchange rate, does in fact make it impossible to determine this exchange rate on account of the rules being vague and imprecise.

5 If it is considered that in the case of a loan agreement indexed to a foreign currency the contractual provision concerning the rules for determining exchange rates can be general in nature and refer to a market rate, another doubt arises as to whether it is possible to interpret a contractual term concerning the determination by the creditor (bank) of the buying and selling rates of a foreign currency in such a manner as to resolve doubts in the consumer’s favour and to assume that the agreement determines the buying and selling rates of a foreign currency not in an entirely arbitrary manner, but on market terms.

6 In this context, it is necessary to determine whether it is possible to remove the ambiguity of the contractual term setting the rules for determining the foreign currency exchange rate in accordance with the recitals and Article 5 of Directive 93/13 without removing the disputed contractual provision itself. Such a solution might be indicated by the distinction between the possibility of interpreting contractual terms in the consumer’s favour under Article 5 of the directive and the possibility of excluding a contractual term which has been found to be unfair

under Article 6 of the directive. The interpretation of declarations of intent and contracts in the national legal order is governed by Article 65 of the CC, which takes as its point of reference the rules of social conduct and established customs in the case of declarations of intent and, in the case of contracts, the joint intention of the parties and the purpose of the contract. In essence, then, the question is whether an ambiguous provision present in a contract concluded with a consumer can be removed by way of interpreting the joint intention of the parties and the purpose of the contract, or whether such a contractual provision should be automatically considered ineffective within the meaning of Article 385^1 of the CC. This is important in the context of the applicants' testimony that at the time when the agreement was concluded they believed that an objective exchange rate, for example the NBP rate, would be used for conversion purposes, and in the context of the defendant's claims that the rate which it used was a market rate rather than an arbitrary one.

7 There is also doubt concerning the procedure for assessing whether a contractual term is unfair. In the light of the position taken by national authorities such as the Urząd Ochrony Konkurencji i Konsumentów (Office of Competition and Consumer Protection) and the Rzecznik Finansowy (Financial Ombudsman) as well as the case-law of the national courts, it may be assumed that the assessment as to whether a contractual term concerning the determination of the buying and selling rates of a foreign currency in a loan agreement indexed to a foreign currency is unfair in the light of Directive 93/13 can be made only on the basis of the literal wording of the agreement. However, in the light of the judgments of the Court of Justice (of 26 January 2017 in Case C-421/14 and the reference therein to the judgment of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 39, and of 14 March 2013, *Aziz* v *Catalunyacaixa*, C-415/11), the assessment of a contractual term must be carried out in the light of all the relevant circumstances. While contractual terms in such cases are identical or similar, the circumstances attending the conclusion of such contracts by the parties justify the question whether issues such as the following are relevant to assessing whether a contractual term is prohibited: (a) the performance of the contract which is intended to reproduce the circumstances at the time of its conclusion; (b) the failure to sign an annex to the contract enabling the loan to be repaid directly in a foreign currency; (c) the effect of the disputed contractual terms on the consumer's willingness to conclude the contract; (d) the consumer's understanding of the disputed contractual term; or (e) the consumer's lack of interest in the disputed contractual term at the time when the contract is concluded and performed, including the consumer's failure to read the contract at the time of its conclusion and throughout its duration. This doubt arises from the thesis expressed in the judgments in Cases C-415/11 and C-421/14, in which it was pointed out that an imbalance contrary to the principle of good faith can be said to exist when contractual provisions establish rights and obligations in a manner that would not be accepted by the parties in the course of fair negotiations. In the view of the referring court, an assessment of the circumstances in which the contract was concluded, including the joint intention of the parties to determine what foreign exchange rates would apply during the performance of the contract, must

be conducted in the light of the thesis expressed in the judgments of the Court of Justice in Cases C-415/11 and C-421/14. The referring court take the view in his context that more than marginal significance attaches to the actions of the parties at the time of the conclusion of the contract, as mentioned above in points (a) to (e).

8 The question of whether a particular contractual provision would be accepted by the parties can be answered on the basis of the above considerations. In particular, the issues of contract performance, the fact of the consumers not attaching importance to the rules for determining the foreign exchange rate and their lack of familiarity with the contract throughout its duration allow the conclusion to be drawn that the contract would have been concluded even if the consumers had learned the details of the bank’s method for determining the foreign exchange rate in the course of fair negotiations. In the present case, these doubts are compounded by the fact that one of the applicants has testified that he expected the exchange rate to be determined in an objective manner, pointing to the NBP rate as an example. On the other hand, the defendant states that it was obliged to apply a market exchange rate, and therefore, in fact, also an objective one. It may therefore be the case that the parties had a joint understanding of the contractual provision in question, which would have been accepted in the course of fair negotiations, thus meeting the requirement of good faith as referred to in the judgments of the Court of Justice in Cases C-415/11 and C-421/14. This justifies the doubt as to whether the parties’ joint willingness to use an objective rate allows the contractual term in question to be regarded as unfair, or whether it is possible, in this respect, to remove doubts in such a way as to take the view that the foreign exchange rate in the bank’s table is not an arbitrary exchange rate, but rather an exchange rate determined freely as allowed by Articles 69 and 111 of the Banking Law, but only within the market range.

9 All of the above questions referred for a preliminary ruling are relevant to determining the correct standard arising from the provisions of Directive 93/13 and, consequently, are also highly relevant to the provisions of national law. In view of the large number of cases against various banks pending before the national courts, in which the first and primary argument is usually the lack of freedom in determining foreign currency exchange rates, the Court’s reply will be extremely useful in resolving not only the dispute pending before the referring court but also many other domestic legal disputes of this type. A negative answer to the first question will essentially allow similar cases to be resolved efficiently without the need to consider other issues, including foreign exchange risk.

10 The fact that the nature of a mortgage loan indexed to a foreign currency, where the agreement is concluded for several decades (in the case under consideration — for 40 years), probably makes it impossible to formulate the contractual provision in such an unambiguous manner that it applies for the entire duration of the contract would suggest that the question should be answered in the affirmative. Since the NBP changed its rules for determining foreign exchange rates three times in 18 years, it appears reasonable to doubt whether a commercial bank can

be required to adopt an unambiguous solution in this regard, and for such a long period.

11 Reference to an arithmetic formula which would take into account interbank market rates indicated by the Reuters or Bloomberg news services, adjusted for margins, might not make the contractual term in question sufficiently clear and certain. In view of such a long contract term and the unpredictability of the economic situation, reference to data from these news services could prove insufficient and their reliability cannot be checked. It should be noted, however, that since the NBP exchange rate results from the exchange rates set by commercial banks (including the defendant bank) in their tables, a reference to the NBP rate in the agreement could also be challenged as being arbitrary owing to the indirect influence of commercial banks on the NBP rate. Therefore, the possibility of considering the NBP rate as an objective indicator which is independent of the will of commercial banks is also questionable. In this situation, perhaps the only certain, albeit quite general, contractual provision would be one referring to the market buying and selling rates of the foreign currency in question. At the same time, the certain generality of the disputed contractual provision could be justified, in the light of Article 3(1) of the directive, by the nature of a loan agreement indexed to a foreign currency, which is concluded for several decades. At the same time, allowing the bank some freedom to determine exchange rates — only within the market range — prevents such a contractual provision from being assessed as creating a significant imbalance to the detriment of the consumer under Article 4(1) of the directive. National legislation does not prohibit banks from determining their own exchange rates in accordance with Articles 69 and 111 of the Banking Law, and the free market could possibly guarantee realistic and objective foreign exchange rates.

12 As regards an affirmative answer to the second question, it should be noted that since Directive 93/13 makes a distinction between the possibility of removing the ambiguity of a contractual term under Article 5 and the requirement to remove the disputed contractual term under Article 6, it appears that the more lenient solution should be used first and an attempt should be made to remove the contractual ambiguity, thus making it possible for the contract to remain fully in force in accordance with the parties' will. The will of the parties may be determined using Article 65 of the CC. This is supported by the fact that the parties indicated that exchange rates under the agreement must be objective, which the defendant understood as the market rate, while the applicants did not have a specific position in this regard, indicating the NBP exchange rate, for instance.

13 In particular in its judgment in Case C-421/14, the Court of Justice indicated that it is for the national court to determine, in the light of the criteria indicated, whether a particular contractual term is actually unfair in the circumstances of the case (paragraph 57). In paragraph 61 of that judgment, the Court also pointed out that, pursuant to Article 4(1) of Directive 93/13, the unfairness of a contractual term must be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of

the contract, to all of the circumstances attending its conclusion. The judgment also refers to the judgment in Case C-243/08 (paragraph 39), in which the Court indicates that Article 4 of the Directive provides that the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it (see also the Court’s judgment in Case C-415/11, paragraph 71).

14 In addition, it should be noted that the disputed contractual provision, although not sufficiently precise, does not allow bad faith to be attributed to the defendant bank since throughout the entire period of performance of the contract it used, in accordance with its understanding of the contract, market exchange rates, also at a time when the issue of abusive contractual provisions did not arise. In this respect, the bank cannot be said to have shaped the contractual term in such a manner as to place the consumer at a disadvantage by using arbitrary foreign exchange rates which are detached from market rates. Similar contractual provisions in loan agreements of this type were common practice at other banks as well. Economic considerations may also militate in favour of recognising that these exchange rates are market rates. It should be noted that, even where the bank had the freedom to set exchange rates within the market range, the result was that the borrowers in the present case were in a more favourable economic situation than if they had been party to a PLN loan agreement with the interest rate applicable to such agreements.