Case C-321/22

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:

5 May 2022

Referring court:

Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (Poland)

Date of the decision to refer:

22 February 2022

Applicants and counter-defendants:

ZL

KU

KM

Defendant and counter-applicant:

Provident Polska S.A.

Subject matter of the main proceedings

In their actions, ZL, KU and KM seek, in essence, for the loan agreements concluded by them to be declared void or ineffective in the part concerning non-interest credit costs, that is to say, commission fees and the fees charged for a flexible repayment plan or front-end fees.

Subject matter and legal basis of the request

First, the referring court has doubts as to whether Article 3(1) of Directive 93/13 allows contractual terms which set the amount of the fees or commissions payable to a seller or supplier to be regarded as unfair solely on the ground that those fees or commissions are disproportionately high. Second, according to the referring court, it is necessary to determine whether Article 7(1) of Directive 93/13 and the principle of effectiveness preclude a provision of national law (Article 189 of the

Kodeks Postępowania Cywilnego – Code of Civil Procedure) and the case-law of the national courts according to which the absence of legal interest precludes a declaratory action. Third, the referring court is considering whether, inter alia in the light of Article 6(1) of Directive 93/13, if terms of loan agreements that provide for payments thereunder being made exclusively in cash to the lender's employee at the borrower's place of residence constitute unfair contractual terms, the loan agreement may continue in existence or it must be declared void.

Questions referred for a preliminary ruling

1. Must Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as permitting a contractual term which grants a seller or supplier a fee or commission that is disproportionately high in relation to the service offered to be regarded as an unfair contractual term?

2. Must Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the principle of effectiveness be interpreted as precluding provisions of national law or a judicial interpretation of those provisions under which the consumer must have a legal interest in order for an action brought by the consumer against a seller or supplier for a declaration that a contract or part thereof that contains unfair terms is void or ineffective to be upheld?

3. Must Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts as well as the principles of effectiveness, proportionality and legal certainty be interpreted as permitting the finding that a loan agreement whose sole term which provides for the manner of loan repayment has been found to be unfair must not continue in force after that term has been excluded therefrom and is therefore void?

Provisions of European Union law relied on

1 Treaty on the Functioning of the European Union – Article 169(1).

2 Charter of Fundamental Rights of the European Union – Article 38.

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts – recitals 4, 21, 24; Article 3(1); Article 6(1); Article 7(1).

Provisions of national law relied on

4 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997) – Article 76.

5 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 – the Civil Code, 'the CC') – Article 5, Article 221, Article 431, Article 58(1)–(3), Article 65(1), Article 3531, Article 359, Article 3851, Article 3852, Article 405, Article 410 and Article 720(1).

6 Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 – Code of Civil Procedure, 'the CCP') – Article 189, Article 316(1), Article 363(1) and Article 365(1).

7 Ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Law of 12 May 2011 on Consumer Credit, 'the LCC') – Article 3(1), Article 3(2)(1), Article 4(1)(1), Article 5(6)–(8), Article 30(1) and Article 36a(2).

8 Obwieszczenie Ministra Sprawiedliwości z dnia 7 stycznia 2016 r. w sprawie wysokości odsetek ustawowych (Announcement of the Minister of Justice of 7 January 2016 on the amount of statutory interest).

Succinct presentation of the facts and procedure in the main proceedings

9 On 11 September 2019, ZL entered into a cash loan agreement (the 'Weekly Cash Loan' product) with Provident Polska S.A. ('Provident'); the term of the agreement was 90 weeks. The detailed provisions of the agreement were, inter alia, that the amount disbursed to the customer in cash and at the same time the total amount of the loan was PLN 8 100 (items A1 and A), the loan arrangement fee was PLN 4 050 (item B), the front-end fee was PLN 40 (item C), the fee for the Flexible Repayment Plan was PLN 2 066 (item D), the annual interest rate was 10% (item E), the total amount of interest was PLN 1 275.73 (item E), the gross amount of the loan was PLN 14 256 (item F), the total cost of the loan was PLN 7 431.73 (item G), the total amount payable by the consumer was PLN 15 531.73 (item H) and the annual percentage rate was 132.53% (item I).

10 The loan agreement also included a general part, which was Provident's standard contract template, according to which the total amount of the loan (item A) was the sum of all monies made available by the lender to the customer thereunder, not including, however, that part of the gross amount of the loan which was made available to the customer to cover the credit costs of the loan that the lender made available to the customer thereunder, that is to say, the costs payable by the customer upon conclusion of the agreement: the loan arrangement fee, the front-end fee and the fee for the Flexible Repayment Plan, which credit costs were deducted from the gross amount of the loan.

11 Under that general part of the agreement, the gross amount of the loan (item F) represented the total amount of the loan granted to the customer thereunder, including the total amount of the loan and the portion of the loan that was used to cover the credit costs, that is to say, the costs payable by the customer upon conclusion of the agreement, the loan arrangement fee, the front-end fee, and the fee for the Flexible Repayment Plan, which credit costs were deducted from the

gross amount of the loan. The gross amount of the loan equals the sum of the total amount of the loan (item A) and the fees listed in items B, C, and D.

12 Next, the total cost of the loan (item G) included all costs that the customer was obliged to pay in connection with the loan agreement, including, in particular: a) interest, fees and commissions; b) costs of additional services where those had to be incurred in order to obtain the loan or to obtain it on the terms and conditions offered. The total amount payable by the consumer (item H) was the sum of the total cost of the loan and the total amount of the loan. The basis for calculating the interest due to the lender from the customer was the gross amount of the loan (item F).

13 In the case of the Weekly Cash Loan, the customer agreed to repay the loan exclusively in cash through a relationship manager during the relationship manager's weekly visits to the customer's place of residence in the Republic of Poland.

14 The 'Flexible Repayment Plan' is a package of benefits under the agreement that allows the customer to manage his or her loan and consists of Repayment Deferral and a Guaranteed Waiver of Repayment Obligations. In exchange for those benefits, the lender charges a fee for the Flexible Repayment Plan (item D). 'Repayment Deferral' under the Weekly Cash Loan means that the lender allows the customer to defer the payments (from one to four payments) to be made under the original schedule set forth in the agreement without having to give a reason. 'Guaranteed Waiver of Repayment Obligations' means, in turn, that in the event of the customer's death during the term of the agreement, the lender releases the customer from his or her debt with respect to any obligations outstanding thereunder as of the date of the customer's death.

15 The loan agreements entered into between KU and Provident and between KM and IPF Polska sp. z o.o. (Provident's legal predecessor) contained terms and conditions similar to those described in paragraphs 9–14 above.

Essential arguments of the parties in the main proceedings

16 The applicants base their claims on the fact that the provisions of the loan agreement concerning the commission and the fee for the Flexible Repayment Plan and the front-end fee constitute unfair contractual terms due to their disproportionately high amounts. In essence, ZL and KU argue that the defendant may derive income from granting the loan, but that income must be limited to interest on principal and a reasonable front-end fee, that is to say, PLN 40. Charging additional fees to applicants that represent 75.5% (or 92.07% in the case of MC) of the principal made available to them is designed to maximise the defendant's profit and, as a result, the consumer is burdened with costs of obtaining the loan that are excessive and disproportionate in relation to the amount he or she receives when entering into the loan agreement. Such a high commission amount is contrary to good practice (including good commercial practice) and the

principle that the mutual obligations of the parties should be equivalent; it considerably exceeds the normal profit that an honest seller or supplier would expect to receive. It is also not justified by the business risk undertaken.

Succinct presentation of the reasoning in the request for a preliminary ruling

17 **The first question referred** concerns the interpretation of Article 3(1) of Directive 93/13. According to settled case-law, the jurisdiction of the Court extends to the interpretation of the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, and in particular when examining whether a term is unfair within the meaning of Article 3(1) of that directive, whereby it is for that court to determine whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair. [1]

18 The Court of Justice has also repeatedly found that as regards whether, contrary to the requirement of good faith, a term causes a significant imbalance in the contracting parties' rights and obligations arising under the contract to the detriment of the consumer, the national court must assess whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations. [2]

19 Moreover, the Court has held that, in order to determine whether a term causes a 'significant imbalance' in the parties' rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in

[1] See the judgments of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, paragraph 44; of 14 March 2013, *Aziz*, C-415/11, paragraph 66; of 21 March 2013, *RWE Vertrieb*, C-92/11, paragraph 48; of 16 January 2014, *Constructora Principado*, C-226/12, paragraph 20; order of 3 April 2014, *Sebestyén*, C-342/13, paragraph 25; judgments of 10 September 2014, *Kušionová*, C-34/13, paragraph 73; of 3 October 2019, *Kiss and CIB Bank*, C-621/17, paragraph 47; of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, paragraph 45; of 10 June 2021, *BNP Paribas Personal Finance*, C-609/19, paragraph 60; and of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, paragraph 92.

[2] See the judgment of 14 March 2013, *Aziz*, C-415/11, paragraph 69; the orders of 21 March 2014, *Banco Popular Español*, C-537/12, paragraph 66, and of 3 April 2014, *Sebestyén*, C-342/13, paragraph 28; and the judgments of 3 October 2019, *Kiss and CIB Bank*, C-621/17, paragraph 50; of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, paragraph 55; of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, paragraph 93; of 10 June 2021, *BNP Paribas Personal Finance*, C-609/19, paragraph 66; and of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 – C-782/19, paragraph 97.

force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out. [3]

20 Finally, the Court of Justice has explained that a significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules. [4]

21 The purpose of the first question referred for a preliminary ruling is to establish whether the fact that a contractual term imposes on the consumer an obligation to pay an amount which is disproportionately high in relation to the service provided by the seller or supplier is sufficient for that contractual term to be regarded as unfair. In the view of the referring court, an analysis of the case-law of the Court of Justice to date does not provide a clear answer to that question.

22 In its judgment of 26 March 2020, the Court indicated that 'Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a contractual term which establishes non-interest credit costs in accordance with the ceiling value set by a provision of national legislation, without necessarily taking the costs actually incurred into account, does not fall outside the scope of that directive'. [5]

23 That idea was further developed in the Court's judgment of 3 September 2020, in which it was pointed out that the non-interest credit cost to the consumer, which is subject to an upper limit under national law, could nevertheless give rise to a significant imbalance within the meaning of the Court's case-law, even though it is set below that upper limit, if the services provided in return were not reasonably covered by the services provided in connection with the conclusion or management of the credit agreement, or if the amounts charged to the consumer in respect of the costs of granting and managing the loan are clearly disproportionate in relation to the amount of the loan. It is for the referring court to take account, in that regard, of the effect of other contractual terms in order to determine whether those terms create a significant imbalance to the borrower's detriment. In such

[3] See the judgment of 14 March 2013, *Aziz*, C-415/11, paragraph 68; the orders of 21 March 2014, *Banco Popular Español*, C-537/12, paragraph 65, and of 3 April 2014, *Sebestyén*, C-342/13, paragraph 27; and the judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, paragraph 48.

[4] See the judgments of 16 January 2014, *Constructora Principado*, C-226/12, paragraphs 21, 23; of 3 October 2019, *Kiss and CIB Bank*, C-621/17, paragraph 51; of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, paragraph 92; and of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, paragraph 49.

[5] Judgment of 26 March 2020, *Mikrokasa*, C-779/18, paragraph 58.

circumstances, taking into account the requirement of transparency arising from Article 5 of Directive 93/13, it cannot be considered that the seller or supplier could reasonably expect, when dealing with the consumer in a transparent manner, that the consumer would agree to such a term in contract negotiations. It follows from the above that Article 3(1) of Directive 93/13 must be interpreted as meaning that a contractual term relating to non-interest credit costs, which sets that cost below a statutory upper limit and which passes on to the consumer the costs of the lender's economic activity, is liable to cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer, where it imposes on that consumer costs which are disproportionate to the services provided and to the amount of the loan received, which it is for the referring court to ascertain. [6]

24 In addition, in its judgment of 16 July 2020 the Court of Justice held that a term in a loan agreement concluded between a consumer and a financial institution which requires the consumer to pay an arrangement fee is capable of creating, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties as arising from that agreement, contrary to the requirement of good faith, where the financial institution does not demonstrate that that fee corresponds to services actually provided and to costs it has incurred, which is a matter for the referring court to verify. [7]

25 In turn, in its judgment of 26 February 2015, the Court of Justice held that, in so far as they require the consumer to pay commission of a substantial amount which aims to ensure the repayment of the loan, even though that risk is already guaranteed by a mortgage and, in exchange for that charge, the bank does not provide a real service to the consumer, contractual terms must be regarded as unfair within the meaning of Directive 93/13. [8]

26 It appears from the above judgments that the Court of Justice allows the terms of a loan agreement setting the amount of a commission or fee to be regarded as unfair if those commissions or fees are disproportionately high or if the consumer does not receive any real service in return. However, an analysis of some other judgments of the Court of Justice seems to lead to different conclusions.

27 Namely, in its judgment of 16 April 2014, the Court of Justice indicated that the existence of a 'significant imbalance' does not necessarily require that the costs charged to the consumer by a contractual term have, as regards that consumer, a significant economic impact having regard to the value of the transaction in question, [9] and the question whether that significant imbalance exists cannot be

6 Judgment of 3 September 2020, *Profi Credit Polska*, C-84/19, paragraphs 95–97.

7 Judgment of 16 July 2020, *Caixabank*, C-224/19 and C-259/19, paragraph 79.

8 Judgment of 26 February 2015, *Matei*, C-143/13, paragraphs 70–71.

9 Judgment of 16 January 2014, *Constructora Principado*, C-226/12, paragraph 31.

limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause. [10]

28 Similarly, in its judgment of 18 November 2021, the Court of Justice indicated that the examination of whether there is a significant imbalance in the parties' rights and obligations arising under the agreement, to the detriment of the consumer, cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract, on the one hand, and the costs charged to the consumer under that clause, on the other. [11]

29 On the other hand, in its judgment of 3 October 2019, the Court held that Article 4(2) and Article 5 of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term be drafted in plain, intelligible language does not require that non-individually negotiated contractual terms in a loan contract concluded with a consumer, such as those at issue in the main proceedings, which specify the exact amount of management charges and of a disbursement commission to be borne by the consumer, their method of calculation and the time when they have to be paid, also have to indicate all of the services provided in return for the amounts concerned. [12] That conclusion is particularly significant if, in addition, account is taken of the view expressed in the same judgment that the transparent nature of a contractual term, as required under Article 5 of Directive 93/13, is one of the elements to be taken into account in the assessment of whether that term is unfair, which is for the national court to carry out pursuant to Article 3(1) of that directive. In that context, it is for that court to assess, having regard to all the circumstances of the case, first, the possible failure to observe the requirement of good faith and, second, the possible existence of a significant imbalance to the detriment of the consumer within the meaning of that provision. [13] The above considerations led the Court of Justice to conclude that Article 3(1) of Directive 93/13 must be interpreted as meaning that a contractual term such as that at issue in the main proceedings in relation to charges for the management of a loan contract, when it cannot be unequivocally determined what specific services are provided in return for those charges, does not in principle cause, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. [14]

10 Judgment of 16 January 2014, *Constructora Principado*, C-226/12, paragraph 22.

11 Judgment of 18 November 2021, *A.S.A.*, C-212/20, paragraph 66.

12 Judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, paragraph 45.

13 Judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, paragraph 49.

14 Judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, paragraph 56.

30 In the opinion of the referring court, it is understandable that lenders are businesses and therefore their main objective is to generate profit. A seller or supplier of that kind must not only cover the various costs associated with the operation of their business (employees, renting premises, taxes, office supplies and so on), but must also receive remuneration from consumers in an amount that guarantees a sufficiently high profit. It is also understandable that Provident must assume that some of its customers will not repay the monies lent to them, since their financial or personal circumstances will prevent them from doing so, and it is also possible that some borrowers will act in bad faith, effectively preventing the company from recovering the monies lent.

31 Nevertheless, the referring court takes the view that even after all the above facts have been taken into account, Provident is not justified in charging the amounts of remuneration shown in the agreements included in the case file.

32 The court points to the fact that in the case of the fee for the Flexible Repayment Plan, in exchange for being able to defer loan repayments a few times, which is a fairly minor benefit, the consumer is required to pay a very substantial fee. Of particular importance here is the fact that the borrower is unable to opt out of the above service, since each loan offered by Provident necessarily includes that service and thus requires that a significant fee be paid. This leads to the conclusion that, essentially, the service in question and the fee charged for it are primarily intended to increase the income Provident earns from each loan agreement rather than to offer borrowers a useful service. Thus, the service in the form of the Flexible Repayment Plan is indeed fictitious, and the real purpose of the terms and conditions relating to that service is to justify the additional fee charged to the consumer.

33 As far as the commission is concerned, Provident does not offer any service in return besides granting the loan itself, and thus the commission constitutes exclusively the lender's profit on the one hand, and the borrower's cost on the other. A similar conclusion applies to the so-called front-end fee, since it does not involve anything other than the granting of the loan itself, while the costs of presenting the agreement to the consumer (printer toner, paper, involvement of a company employee and so forth) are negligible and can in principle be ignored.

34 The figures related to the loans in question indicate that Provident appears to base its business model chiefly on providing fairly small loans (between PLN 4 000 and PLN 11 000) to consumers for terms ranging from one to two years. The company derives profit from interest, but it primarily derives profit from very high commissions and fees (mainly for the Flexible Repayment Plan). Although those charges fall within the upper limit stipulated in the provisions of the LCC, they represent a significant burden for the borrowers, usually amounting to between 70% and 90% of the loan amount (only in one case do they amount to 'just' 46% of the loan principal. Moreover, a significant proportion of Provident's customers are repeat customers, since many consumers who take out short-term loans are those who have trouble managing their finances and are therefore unable to obtain

a loan from a bank. As a result, they rely on the services of lenders offering loans on very unfavourable terms. The high cost of those loans means that the consumers concerned are unable to meet their obligations and take out further loans to repay the previous ones, thus falling into a debt spiral.

35 For instance, a person taking out a loan of PLN 5 000 with costs amounting to 90% of the loan amount will have to repay a total of PLN 9 500. If the consumer is unable to repay that amount and takes out a second loan, this time of PLN 9 500, but also with costs amounting to 90% of the loan amount, then the amount to be repaid will rise to PLN 18 050. If this cycle is repeated a few more times, the consumer will have to pay back: PLN 34 295 on the third loan, PLN 65 160 on the fourth, PLN 123 805 on the fifth, PLN 235 229 on the sixth, and finally PLN 446 936 on the seventh loan. In this scenario the lender's actual contribution (PLN 5 000) will constitute only 1% of the amount due, while 99% will be the lender's actual profit.

36 The above example clearly shows that even when the first loan is relatively small, but is taken out on very unfavourable terms, this pushes the consumer into a spiral of (exponentially rising) debt. This results in the consumer being unable to meet their obligations, and in extreme cases in losing all of their assets and having to declare bankruptcy. The danger of debt spirals has already been recognised in national law and has resulted in the introduction of provisions on maximum interest (Article 359(2¹) of the CC), which currently stands at 7.2% per annum, as well as on maximum non-interest consumer credit costs (Article 36a(2) of the LCC), which cannot exceed the total loan amount. Nevertheless, there are no provisions in national or Union law that would preclude the serial granting of very expensive short-term loans to consumers. Therefore, the only solution that offers a chance to protect consumers from falling into a debt spiral is to declare contractual terms that provide for disproportionately high fees and commissions to be unfair. This is because, essentially, the harm to the consumer does not arise from the fact that the seller or supplier has worded the agreement in the part concerning the cost of the loan in an incomprehensible manner or has failed to explain its consequences, but rather from the fact that the consumer has been burdened with disproportionately high costs.

37 By its **second question**, the referring court asks whether the requirement that legal interest be demonstrated when bringing an action for a declaration that an agreement or part thereof is void or ineffective is contrary to Article 7(1) of Directive 93/13 and the principle of effectiveness. The problem is that if a consumer seeks such a declaration and demonstrates the ineffectiveness or invalidity of the agreement or part thereof, but fails to demonstrate a legal interest, the national court will be forced, under Article 189 of the CCP, to dismiss the consumer's claim solely due to the lack of legal interest.

38 Pursuant to Article 189 of the CCP, a necessary prerequisite for the court to uphold a declaratory action is to establish legal interest, which must exist as at the date on which the hearing is brought to a close (Article 316(1) of the CCP). The

concept of legal interest has not been defined in national law, but has been repeatedly analysed in the case-law of Polish courts.

39 According to the case-law of the Sąd Najwyższy (Supreme Court, Poland), legal interest should be understood as an objective need to protect the applicant's rights which are or may be threatened, or whose existence or essence is uncertain. The assessment of legal interest must be made on a case-by-case basis, using flexible criteria that take into account the purpose of an action under Article 189 of the CCP. One of the prerequisites examined when considering the purpose of a declaratory action is the significance that a declaratory judgment would have for the applicant's legal situation. The existence of a legal interest is indicated by the possibility of decisively resolving the dispute by way of such a judgment, whereas the possibility that the applicant could obtain more complete protection of his or her rights by way of another action militates against the existence of such interest.

40 Since the concept of 'legal interest' is not defined in national law, the assessment of whether an applicant has an interest in bringing proceedings is a matter for the national court to decide in each individual case. This means that in certain situations, the question of legal interest may be assessed differently by courts in very similar or even identical cases. For instance, in similar cases concerning the declaration of agreements concluded by consumers with Provident to be void or ineffective, some panels of the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court for Warsaw-Śródmieście in Warsaw) found that the consumers in question had a legal interest, while other panels of that court found that there was no legal interest, which constituted grounds for the dismissal of those actions. Significantly, in all of those cases, the courts were unanimous in their assessment that the terms of the defendant company's agreements setting disproportionately high commissions and fees for the Flexible Repayment Plan were unfair. It follows, therefore, that differences of opinion on whether an applicant has a legal interest in bringing proceedings may exist even within a single court. This fact may, in turn, hinder the attainment of the objectives of Directive 93/13 since, even where the terms of an agreement concluded with a seller or supplier are clearly unfair, a consumer may be uncertain as to whether he or she should bring an action for those contractual terms to be declared void or ineffective, for fear that a court may find that he or she has no legal interest in bringing proceedings and may dismiss the action on that ground alone, ordering the consumer to pay the costs.

41 In the view of the referring court, the applicants' legal interest in bringing a declaratory action has not been demonstrated. In that regard, the applicants are relying solely on the need to determine the amount of their liabilities, and thus on circumstances that are of purely subjective importance to them, rather than on an objective need to resolve a legal dispute. First and foremost, however, the applicants have other remedies which would allow them to exercise their rights to a greater degree than a declaratory action. Of relevance here is the fact that each of the applicants has already repaid part of the amounts due for the disputed commissions and fees, while the rest remains outstanding and is claimed by

Provident from each of the applicants in its counterclaim. In those circumstances, the amounts already repaid may be claimed by each of the applicants by way of an action for the return of undue payments (Article 405 of the CC read in conjunction with Article 410 of the CC), and thus the applicants may bring an action that goes further than a declaratory action. On the other hand, the outstanding amounts due for the fees and commissions charged have become the subject of court proceedings in the form of counterclaims lodged by Provident, and therefore the applicants (counter-defendants) may invoke the unfairness of contractual terms precisely within the framework of those counterclaims, and the judgment of the referring court in that regard will settle the dispute between the parties.

42 **The third question referred** is a reference to the question referred by the Sąd Rejonowy w Siemianowicach Śląskich (District Court in Siemianowice Śląskie) in its order of 10 November 2021 (case C-717/21 before the Court of Justice), which concerns the possibility of treating as unfair contractual terms which provide that loan repayment is only possible in cash via a Provident employee ('Relationship Manager') during weekly visits by the Relationship Manager to the borrower's place of residence. That contractual provision is standard in Provident's agreements and was also included in Section 6.a of the agreements concluded by ZL and KU. Although the applicants did not dispute the content of the provision, the referring court, in discharging its obligation under Directive 93/13 to examine consumer contracts for unfair terms, concluded that the provision in question should be regarded as unfair.

43 As regards the reasons for finding the above contractual terms unfair, the referring court shares, in principle, the position presented by the District Court in Siemianowice Śląskie in its order of 10 November 2021. First and foremost, however, the referring court is of the opinion that the purpose of stipulating that the loan may only be repaid in cash to the defendant's employee and preventing the consumer from repaying the loan by bank transfer in an era of cashless transactions is to exert emotional pressure on the consumer to settle his or her liabilities in a timely manner. Moreover, while those provisions set out the principal obligations of the parties, they are not expressed in plain intelligible language (Article 4(2) of Directive 93/13), for while it is true that Section 6.a of the loan agreements provides for payment of the amounts due during visits by a Provident employee to the consumer's place of residence, the general framework of those visits, their duration and permissible actions by the company's employee in the consumer's home and so on are not stipulated. Moreover, in the view of the referring court, a business which reserves for itself such a far-reaching right to interfere in a consumer's private life should give that consumer sufficient instruction (warning) of the potentially dangerous consequences of visits by a stranger to his or her home, particularly where that stranger is employed by the consumer's creditor. The analysed agreements lacked any such warnings. At the same time, the provisions in question are part of a standard contract drafted in advance by Provident, and thus they could not be individually negotiated (Article 3(2) of Directive 93/13).

44 However, the referring court wishes to consider the further effect of the consumer not being bound by those contractual terms in the event that they are found to be unfair, including, in particular, whether the loan agreement is capable of continuing in existence without those terms (Article 6(1) of Directive 93/13) in a situation where the term providing for the only possible method of repayment of the loan is found to be unfair. The answer to that question appears to be negative because, if Section 6.a is removed from the loan agreements in question, the agreements contain no provisions on how the borrower is to repay the loan. At the same time, it would be unacceptable to conclude in those circumstances that the borrower is simply relieved of his or her obligation to repay the loan, since this would essentially mean transforming the loan into a donation, and thus a completely different type of agreement that the parties certainly did not intend to conclude.

45 In view of the above, the only way for the loan agreements in question to continue in existence if the contractual terms included in Section 6.a are declared unfair would be to 'supplement' the agreements by allowing the consumer to repay the amounts due by bank transfer. However, such a solution appears to be incompatible with Article 6(1) of Directive 93/13.

46 Nevertheless, the Court has repeatedly indicated that an unfair condition is not binding in its entirety, not just in the part which is unfair, [15] and it is also in general not possible for a court to change the content of an unfair term [16] or interpret such a term so as to mitigate its unfairness. [17] On the other hand, a court may replace an unfair term with a supplementary provision of national law, but only if the elimination of the unfair term results in the entire contract that exposes the consumer to particularly unfavourable consequences being declared void. [18]

15 See the judgments of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraph 64, and of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 70 and 80.

16 See the judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, paragraphs 69–73; of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, paragraphs 57–58; of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, paragraphs 77–79; of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, paragraphs 28, 31–32; of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, paragraphs 97–98; of 21 December 2016, *Gutiérrez Naranjo*, C-154/15, C-307/15 and C-308/15, paragraphs 57, 60; of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, paragraph 73; of 13 September 2018, *Profi Credit Polska*, C-176/17, paragraph 41; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, paragraphs 53–54; of 7 November 2019, *Kanyeba*, C-349/18 – C-351/18, paragraph 67; of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, paragraphs 59–60; of 25 November 2020, *Banca B.*, C-269/19, paragraphs 30–31; of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, paragraphs 63–64; of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 67–68; and of 18 November 2021, *A. S.A.*, C-212/20, paragraphs 68–69, 71.

17 See the judgment of the Court of 18 November 2021, *A S.A.*, C-212/20, paragraph 79.

18 See the judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C- 26/13, paragraphs 80–85; of 21 January 2015, *Unicaja Banco and Caixabank*, C- 482/13, C- 484/13, C- 485/13 and C- 487/13, paragraph 33; of 7 August 2018, *Banco Santander and Escobedo Cortés*, C- 96/16

47 In the present cases, however, no such negative consequences can be discerned, since if the loan agreements at issue were declared void, the consumers would only be obliged to repay the loan principal without interest, commissions, fees or any other costs. Therefore, in the view of the referring court, in the light of Article 6(1) of the directive, the effect of excluding from the loan agreement contractual terms such as those included in Section 6.a of the agreements concluded by ZL and KU must be to render those agreements void in their entirety.

and C- 94/17, paragraph 74; of 20 September 2018, *OTP Bank and OTP Factoring*, C- 51/17, paragraphs 60–61; of 14 March 2019, *Dunai*, C- 118/17, paragraph 54; of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C- 70/17 and C- 179/17, paragraphs 56–59, 64; of 3 October 2019, *Dziubak*, C- 260/18, paragraphs 48–49, 58–59; of 7 November 2019, *Kanyeba*, C- 349/18 to C- 351/18, paragraph 70; of 3 March 2020, *Gómez del Moral Guasch*, C- 125/18, paragraphs 61–64; of 25 November 2020, *Banca B.*, C- 269/19, paragraphs 32–34.