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 June 2023

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

27 January 2023

Applicants:

KCB

MB

Defendant:

BNP Paribas Bank Polska S.A.

Subject matter of the main proceedings

Action for a declaration that a loan agreement is void and for payment of a sum of money, equal to the value of the monthly instalments paid, in respect of payments made but not due

Subject matter and legal basis of the request

Interpretation of Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; legal basis: Article 267 TFEU

Question referred

Should Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the principles of effectiveness and equivalence be interpreted as precluding a judicial interpretation of national legislation according to which:

1. the consumer may not validly pursue claims against a trader arising from the inclusion of unfair terms in an agreement until he or she has declared that he or she does not agree to the unfair terms remaining in force, agrees to exclude their application, and understands and accepts the consequences thereof, potentially including the invalidity of the entire agreement,

2. the consumer may not validly claim recovery from the trader of sums unduly paid on the basis of the unfair terms until he or she has made the above declaration,

3. the consumer's claim for recovery of sums unduly paid on the basis of the unfair terms does not become payable until he or she has made the above declaration,

4. the trader is not required to pay the consumer statutory interest for late performance until it has knowledge of the above declaration by the consumer?

Provisions of Community law relied on

Treaty on the Functioning of the European Union (TFEU): Article 169(1)

Charter of Fundamental Rights of the European Union: Article 38

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29 – (special edition in Polish, section 15 (2), p. 288): recitals 4, 21 and 24; Article 6(1) and Article 7(1).

Provisions of national law relied on

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997; 'the Constitution'): Article 76 (consumer protection rules).

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code; Journal of Laws (Dz.U.) No 16, item 93, as amended; 'the Civil Code').

A legal transaction which is contrary to the law or intended to circumvent the law shall be invalid, unless the relevant provision provides otherwise, in particular that the invalid terms of the legal transaction are to be substituted by relevant provisions of law (Article 58(1)).

Terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if they define his rights and obligations in a way that is contrary to good practice, grossly infringing his interests (unfair contractual terms). This shall not apply to terms setting out the

principal obligations of the parties, including price or remuneration, so long as they are worded clearly (Article 385^1(1)).

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 (Article 385^1(2)).

The compliance of a contractual term with good practice shall be assessed according to the state of affairs at the time when the contract was concluded, taking into account its content, the circumstances in which it was concluded and also other contracts connected with the contract which contains the term being assessed (Article 385^2).

Any person who, without legal grounds, obtains an economic advantage at the expense of another person shall be required to restore that advantage in kind and, where that is not possible, to return the value thereof (Article 405).

The provisions of the preceding articles shall apply in particular to an undue obligation (Article 410(1)).

An obligation shall be undue where the person who performed it was in no way obliged or was not obliged to the person for whom he performed it, or where the basis of the obligation ceased to exist or the intended objective of the obligation was not attained, or where the legal transaction requiring performance of the obligation was invalid and did not become valid after the obligation was performed (Article 410(2)).

If the time limit for the performance has not been specified or if it does not result from the nature of the obligation, the performance shall be rendered immediately after the debtor has been called upon to render it (Article 455).

If the debtor is late in making a payment, the creditor may claim interest for the duration of the delay even if the creditor has not suffered any damage and even if the delay was due to circumstances for which the debtor is not responsible (Article 481(1)).

[late payment interest rate] (Article 481(2)).

Succinct presentation of the facts of the case

1 In 2007, the applicants entered into a loan agreement for the sum of CHF 128 035.51 with the defendant's predecessor in law to finance the purchase of a residential property. Under the agreement, the maximum amount of the loan disbursed would be PLN 300 000; the loan was to be repaid from a bank account held in CHF and credited exclusively with funds in that currency. The terms and conditions for the loan product provided that, if, at the borrower's instruction, the loan was to be disbursed in a currency other than that of the loan, this would be done after conversion by the bank at the bank's prevailing buy/sell rate. If there

were insufficient funds in the borrower's account in the currency of the loan to repay what was owed by the borrower under the agreement, the bank could debit another account of the borrower, after currency conversion, if applicable.

2 On 1 February 2021, the applicants filed a claim against the defendant bank with the referring court, seeking a declaration that the 2007 loan agreement was invalid and an order that the defendant pay them the sums of PLN 12 345.55 and CHF 69 589.67 (equivalent to the loan instalments paid to date) plus statutory interest for late payment. On 29 September 2022, the applicants submitted written declarations to the effect that they considered the provisions of the loan agreement concerning the conversion of the loan into CHF and into PLN to be unfair (abusive), and were therefore bringing an action against the bank. In addition, the applicants confirmed that they had been made aware of the unfair (abusive) nature of the conversion clauses, the possibility of the court declaring the agreement invalid, and the consequences of invalidity, in particular the obligation of the parties to the agreement mutually to reimburse payments made or the possibility of raising a plea of retention or set-off. A legal action may be brought for what is known as 'remuneration for the use of capital'. At the hearing on 27 January 2022, the referring court instructed the applicants about the consequences of the terms of the loan agreement being found to be unfair and of the consequences of the invalidity of the agreement. The information contained in the instruction was identical to that in the declaration of 29 September 2022.

The essential arguments of the parties to the main proceedings

3 The applicants believe that the loan agreement contains unfair terms which render it invalid, and that therefore the defendant must return to them all the payments received under that agreement. For its part, the defendant contended that the action should be dismissed, stating that the loan agreement was valid and contained no unfair terms and that the applicants had not made any payments to the defendant that were not due.

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

4 According to the court, the terms of the loan agreement concerning the method of disbursement of the loan and the arrangements for repayment of the monthly instalments were unfair. In so far as they provide that, in the case of disbursement and repayment in PLN, currency conversions are made using a rate fixed by the bank, they give the defendant complete freedom to determine the content of the parties' obligations. In addition, the agreement contains a restriction on the maximum amount that can be disbursed to the borrowers, but does not mention the minimum disbursable amount. Such a wide variance between the rights and obligations of the parties under the above contractual terms means that they are contrary to the requirement of good faith and cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Article 3(1) of Directive 93/13). Although the terms concern the

definition of the main subject matter of the contract, they are not in plain and intelligible language (Article 4(2) of Directive 93/13). Moreover, those conditions were not individually negotiated (Article 3(1) and (2) of Directive 93/13) and were included in a contract concluded between a seller or supplier and consumers.

5 According to the referring court, the agreement cannot in principle remain binding after removal of the unfair terms (Article 6(1) of Directive 93/13), and specifically of the provisions governing the method of disbursing the loan. The loan agreement did not rule out the possibility of disbursement in CHF, but, in the reality of the present case, this option did not exist in practice, since the loan had to be paid into the bank account indicated by the seller of the property which the applicants had purchased for a sum stated in PLN. The practical impossibility of disbursing the loan in CHF would have resulted in a failure to fulfil the purpose of the loan agreement (financing a residential property purchase). Performance of the agreement would not therefore be possible, as the bank would not have been able to disburse the loan. In this situation, according to the referring court, it must be concluded that the agreement is invalid (Article 58(1) of the Civil Code), which means that the parties must reimburse all payments made thereunder (Article 405 of the Civil Code in conjunction with Article 410(1)), and that therefore the bank should repay to the applicants the equivalent of all loan instalments, plus statutory interest calculated from the date on which the bank defaulted (Article 481(1) and (2) of the Civil Code). According to the alternative position in the case-law, which the court does not share, a foreign currency-denominated loan agreement may continue to bind the parties even after the removal of the unfair terms. Since the amount of the loan was set in CHF, the possibility of disbursing the loan directly in the foreign currency cannot be excluded on the grounds that the borrower undertook to pay the vendor of the property in PLN. As a separate contract, the property sale contract is of no relevance to the legal assessment of the loan agreement. Since the loan agreement, after the removal of the unfair terms, did not provide for the option of paying the loan in PLN, the amount disbursed to the applicants constituted an undue payment which they are obliged to repay. However, since they did not de facto receive the amount of the loan arising under the agreement, they were not obliged to make any repayments. If the agreement continues to exist after the unfair terms have been removed, all performance by the parties constitutes undue performance and should be repaid. However, this view should not be unconditionally rejected. This is important if the view is taken that Directive 93/13 does not apply to the reciprocal claims of the parties in the event that the contract is declared invalid. There can be no doubt that Directive 93/13 applies to the means of settling restitution claims among parties, as shown, inter alia, by the judgment of 21 December 2016 in joined cases C-154/15 (*Naranjo*), C-307/15 and C-308/15, which dealt with this very issue. In that judgment, the Court stated that Article 6(1) of Directive 93/13 precludes national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court (paragraph 75).

6 The present reference for a preliminary ruling, to which the referring court proposes an affirmative answer, relates to the manner of interpreting Article 6(1)

of Directive 93/13. The mandatory nature of the provision is well established in the case-law of the Court (see judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, paragraph 40). This means, on the one hand, that if a national court notices an unfair contractual term, it is obliged to find ex officio that this term is not binding on the consumer. There is, however, one exception to this rule, which is that the consumer may decide that he or she wishes to be bound by the unfair term, in which case the contract is upheld in its entirety (see judgment of 29 April 2021, *Bank BPH*, C-19/20, paragraphs 94 and 95).

7 This exception and the right granted to consumers to agree to an unfair term has led to disparity in the case-law of the Polish courts. The first view in assessing the legal nature of a consumer's decision to uphold an unfair term assumes that, from the mandatory nature of Article 6(1) of Directive 93/13, it follows that an unfair term does not bind the consumer retroactively and that the court is obliged to exclude it from that contract regardless of the positions of the parties. The national court must find the term valid only if the consumer has agreed to be bound by that term. The consumer's declaration confirming an unfair term constitutes a substantive legal act with retroactive effect, remedying an agreement which was defective from the outset. The consumer, however, is not obliged to make any declaration (see the resolution of the Polish Supreme Court of 20 June 2018, III CZP 29/17, and the judgment of 28 October 2022, II CSKP 898/22). The second, opposing view essentially upholds the idea that an unfair term is, from the outset, automatically rendered ineffective in favour of the consumer, who may give free and informed consent to that term a posteriori, and thus restore its effect retroactively. However, according to that view, the national court can assess whether an unfair term is binding on the consumer only after the consumer has made the relevant declaration. Since the effectiveness of an unfair term depends on the consumer's decision, the term remains in a state of suspended ineffectiveness until the consumer makes that decision. However, if the unfair term is central to the existence of the contract as a whole, it means that the entire contract would be in a state of suspended ineffectiveness. As long as the consumer has not made a decision whether or not to confirm the unfair term, neither party can effectively demand either performance of the contractual obligation or restitution of performance under the unfair term, as it is not known until the consumer's decision whether or not the term is binding on the parties. If, however, the consumer has duly been informed of his or her rights before deciding to disagree to the unfair term and accepts the consequences thereof (including the potential invalidity of the contract), the state of suspended ineffectiveness ceases. In that case, the unfair term is not binding retroactively and any performance thereunder must be reversed. According to the referring court, that view better reflects the objectives of Directive 93/13, while the second view carries the risk of consequences which may run counter to Articles 6(1) and 7(1) of the Directive. As the national court is unable to draw the full consequences of the inclusion of unfair terms in an agreement without a prior declaration by the consumer, it implies a limitation of the scope of the protection afforded to the consumer by Directive 93/13, as that directive does not impose any obligation on consumers to take any action (including declarations relating to specific content) and does not

provide for any negative consequences for consumers in the absence of such action. On the contrary, the Court has consistently held that unfair terms are not binding on consumers and must therefore be regarded as never having existed (see judgment of 21 December 2016 in joined cases C-154/15 (*Naranjo*), C-307/15 and C-308/15, paragraph 61). This is because Article 6(1) of the Directive is mandatory in nature, which means that the national court is required to declare of its own motion that the consumer is not bound by unfair terms. The Court has already stated, in paragraph 28 of the judgment of 21 February 2013, *Banif Plus Bank*, C-472/11, that 'the full effectiveness of the protection provided for by the Directive requires that the national court which has found of its own motion that a term is unfair should be able to establish all the consequences of that finding, without waiting for the consumer, who has been fully informed of his rights, to submit a statement requesting that that term be declared invalid' (see, to that effect, judgments of 30 May 2013, *Jőrös*, C-397/11, paragraph 42, and of 30 May 2013, *Asbeek Brusse and de Man Garabito*, C-488/11, paragraph 50). This means that the consumer has the choice of agreeing to unfair terms but is under no obligation to make any declaration in that regard. It is therefore not permissible to impose negative consequences on the consumer on the ground that the consumer did not make such a declaration or made it after the deadline set by the national court.

8 Meanwhile, judicial practice obliging a consumer to make a specific declaration would mean, in effect, that a consumer who does not fulfil that obligation would be unable to obtain legal protection in spite of the existence of unfair terms in an agreement to which he or she is party. This protection is also limited in a situation where the national court makes a statement that the consumer's claim for reimbursement of consideration wrongfully given on the basis of an unfair contractual term is due, and that the trader is in default of performance, dependent on the consumer making such a declaration. It should be noted that this can lead to practical complications, as there are cases where the courts do not accept declarations made by consumers themselves, but require them to be made on specific pre-printed forms. Furthermore, different courts have different instructions and declaration forms, which sometimes results in the court of second instance considering the declaration made by the consumer before the court of first instance to be incorrect or insufficient. In addition, in the case of written declarations by a consumer, a number of courts require that the declaration be served on the trader, whereby the consumer's claim is not payable until this is effected. This leads to considerable practical consequences. Since the consumer's claim would become payable only when a declaration in the form accepted by the national court is submitted and the trader would be in default with regard to performance, the period for which the consumer is due restitutionary claims depends on the date on which the consumer submits the declaration. The resolution of those doubts is relevant to the examination of the present case. The decision of the referring court regarding the date from which interest is to be awarded against the defendant will differ, depending on which of the dates (the date of lodging the statement of claim, the date of service, or the date of the declaration) is to be regarded as the date on which the applicants' claim is due.

9 The possibility of such a significant limitation on the scope of consumer claims for restitution raises doubts as to whether this is contrary to the principle of effectiveness. In a situation where, in principle, an action for reimbursement of an undue payment becomes due after a demand for payment has been made (Article 455 of the Civil Code), the imposition of additional requirements on consumers asserting their rights on the basis of unfair terms also seems to violate the principle of equivalence. Furthermore, as long as the consumer's claim is not due, the consumer cannot offset it against the debt payable by the consumer to the trader (Article 498(1) of the Civil Code). The lack of clarity as to when the consumer's claim is due also makes it difficult to establish the exact amount of the claim, since, if the debtor wishes to honour their foreign currency debt (in this case, CHF), the value of the foreign currency is determined on the basis of the average exchange rate published by the National Bank of Poland on the due date of the claim (Article 358(2) of the Civil Code).

10 The referring court does not dispute the importance of consumers being informed about the consequences of removing unfair terms. The obligation to provide such information is expressly set out in paragraph 99 of the judgment of 29 April 2021, *Bank BPH*, C-19/20. However, an interpretation by which the effectiveness and scope of the consumer's right of restitution are restricted by the need to provide the consumer with this information and to ensure that it has been understood would appear to be contrary to the objectives of the Directive. Similarly, the consumer's right to accept unfair terms (which may not be in his or her interest at all) must not place him or her in a less favourable legal position than if he or she had not been granted such a right.