

**Case C-6/22**

**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:**

4 January 2022

**Referring court:**

Sąd Rejonowy dla Warszawy-Woli w Warszawie (Poland)

**Date of the decision to refer:**

19 May 2021

**Applicant:**

M.B.

U.B.

M.B.

**Defendant:**

X. S.A.

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**Subject matter of the main proceedings**

A claim for repayment of sums paid in performance of a mortgage loan agreement, the amount of which was expressed in Polish currency indexed to a foreign currency (CHF).

**Subject matter and legal basis of the request**

Interpretation of EU law, in particular Article 3(1), Article 6(1), Article 7 and Article 8b of Council Directive 93/13/EEC; Article 19(3)(b) TEU and Article 267 TFEU.

### **Questions referred for a preliminary ruling**

a) Must Council Directive 93/13/EEC, in the light of its objective of protecting consumers against unfair terms in contracts with sellers or suppliers, be interpreted as meaning that, once a contract is declared invalid by a court under the rules of that directive, that directive, along with the protection of the consumer, ceases to apply and the rules governing settlement for the consumer and the seller or supplier must be sought under the national contract law governing the settlement of an invalid contract?

b) In the light of Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, where a court finds that the contractual term in question is unlawful and that the contract is not capable of continuing in existence after that term has been removed, in the absence of an agreement by the parties to fill the gap with clauses in accordance with their wishes and in the absence of supplementary provisions (directly applicable to the contract in the absence of an agreement by the parties), must that court declare the contract invalid on the basis of the wishes of the consumer who sought that declaration, or must the court examine, of its own motion, going beyond the form of order sought by the parties, the financial situation of the consumer in order to determine whether declaring the contract invalid would expose the consumer to particularly unfavourable consequences?

c) Must Article 6 of Directive 93/13 be interpreted as meaning that, if the court comes to the conclusion that declaring the contract invalid would be particularly unfavourable to the consumer and, despite having been encouraged to do so, the parties fail to reach an agreement on the fulfilment of the contract, the court may, taking into account the objective interest of the consumer, fill the gap in the contract, created after the unfair terms have been ‘removed’ from it, not with rules of national law which are supplementary within the meaning of the judgment in Case C-260/18, that is to say, rules which are directly applicable to the gap in the contract, but with specific provisions of national law which can be applied to the contract in question *mutatis mutandis* or by analogy and which reflect a rule of national contract law?

### **Provisions of European Union law relied on**

Council Directive 93/13/EEC of 13 April 1993 on unfair terms in consumer contracts (‘Directive 93/13/EEC’): recitals 6 and 13; Article 1(2), Article 3(1), Article 6(1), Article 7(1) and Article 8b(1)

### **Provisions of national law relied on**

Kodeks cywilny z dnia 23 kwietnia 1964 r. (tekst jednolity Dz. U. z 2020 r., pozycja 1740) (Civil Code of 23 April 1964, consolidated text, Dz. U. of 2020, item 1740)

#### Article 5

A right may not be exercised in a manner which would be contrary to its social and economic purpose or to the rules of social conduct. Any such act or omission by the entitled person shall not be treated as the exercise of the right and shall not be protected.

#### Article 56

A legal act shall give rise not only to the effects expressed therein, but also to those that arise from the law, from the rules of social conduct and from established customs.

#### Article 5

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

(2) A legal transaction that is contrary to the rules of social conduct shall be invalid.

(3) Where only part of the legal transaction is affected by the invalidity, the transaction shall remain in force as regards the remainder, except where circumstances show that without the terms affected by the invalidity the transaction would not be performed.

#### Article 385<sup>1</sup>

(1) The terms of a contract concluded with a consumer which have not been individually agreed shall not be binding on the consumer if his or her rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his or her interests (unfair contractual terms). This provision shall not apply to terms setting out the principal matters to be performed by the parties, including price or remuneration, so long as they are worded unambiguously.

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

(3) The terms shall be regarded as not having been agreed individually where the consumer did not have genuine influence on their content. This relates in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party.

(4) The burden of proving that a term has been agreed individually shall lie with the person relying thereon.

#### Article 405

A person who, with no legal basis, has obtained a material benefit at the expense of another person shall be obliged to release the benefit in kind and, where that is not possible, to return the value thereof.

#### Article 406

The obligation to release shall include not only the benefit directly obtained, but also everything that, in the event of disposal, loss or damage, was obtained in exchange for that benefit or as compensation for damage.

#### Article 409

The obligation to release the benefit or return the value thereof shall expire if the person who obtained that benefit has used or lost it in such a manner that he or she is no longer enriched, unless, by disposing or using that benefit, he or she should have expected that the obligation to return would ensue.

#### Article 410

(1) The provisions of the preceding articles shall apply in particular to undue performance.

(2) A performance shall be undue if the person who rendered it was not under any obligation or was not under any obligation towards the person to whom he or she rendered the performance, or if the basis for the performance has ceased to exist or if the intended purpose of the performance has not been achieved or if the legal act on which the obligation to render the performance was based was invalid and has not become valid since the performance was rendered.

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (tekst jednolity Dz. U. z 2021 r., pozycja 1805) (Law of 17 November 1964 – Code of Civil Procedure, consolidated text, Dz. U. of 2021, item 1805).

#### Articles 227 and 321

Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe (Dz. U. 1997 Nr 140 poz. 939 z późn. zmianami) (Law of 29 August 1997 Banking Law, Journal of Laws [Dz. U.] of 1997, No 140, item 939, as amended)

#### Article 69 (in the version applicable at the time of conclusion of the contract)

(1) Under a loan agreement, the bank undertakes to place at the borrower's disposal, for the period stipulated in the agreement, a certain amount of money allotted for a specified purpose, and the borrower undertakes to use that amount under the terms and conditions stipulated in the agreement, to return the amount of

the loan used together with interest on set repayment dates, and to pay a commission fee on the loan granted.

(2) A loan agreement should be concluded in writing and should, in particular, specify:

- 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;
- 5) the loan interest rate and the conditions under which the interest rate may be changed;
- 6) the manner of securing repayment of the loan;
- 7) the scope of the bank's rights related to monitoring use and repayment of the loan;
- 8) the dates and manner of placing the funds at the borrower's disposal;
- 9) the amount of commission fee, if provided for in the agreement;
- 10) the conditions governing amendment and termination of the agreement.

#### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 4 June 2007 the applicants, as consumers, entered with the defendant bank into a mortgage loan agreement for the amount of PLN 339 881.92, indexed to a foreign currency (CHF), for the purchase of a residential property. The repayment of the loan with an interest rate based on the LIBOR was to be made in 360 monthly instalments. The applicants repay it in Polish currency.
- 2 In accordance with the wording of the agreement, the amount of the applicants' liability is fixed as the equivalent of the required repayment expressed in CHF. The amount in foreign currency formed the basis for determining the borrower's debt balance and for calculating interest, and subsequently the instalment amounts.. The amount of the liability was fixed as the equivalent of the required repayment expressed in CHF after its conversion at the currency selling rate specified in the Table of Exchange Rates created by the bank. The currency rate which forms the basis for the calculation of the instalments was specified by the bank in an unlawful manner, since the bank could unilaterally determine it and, therefore, it could unilaterally determine the applicants' liability.

**The essential arguments of the parties in the main proceedings**

- 3 The applicants based their claim on the assertion that the mortgage loan agreement contains unlawful terms which, being unfair, do not bind the parties. The amount claimed by the applicants was indicated without legal basis, since the terms of the agreement used to determine the CHF exchange rate constituted unlawful contractual terms, which results in them being ineffective. The agreement cannot therefore be fulfilled in that regard, which justifies the conclusion that the clause of the agreement concerning the indexation of the loan amount is also invalid. The amount of the claim was calculated as if the loan had been granted in Polish currency without indexation, but at the interest rate for a loan indexed to a foreign currency. The applicants also explained that they accept that the national court may declare the contract invalid.
- 4 According to the applicants, the contractual clauses in § 9(2) and § 10(3) are unfair, since they allowed the bank to freely shape the indexation currency exchange rates and did not specify any rules for such shaping, thus enabling the bank to unilaterally determine the applicants' obligations. Declaring those contractual clauses to be unlawful will preclude the determination of the indexation currency exchange rate. Therefore, the applicants submit that the terms concerning the indexation of the loan should be removed from the contract and the applicants' due liability should be determined without the reference to the clauses concerning indexation, thus rendering the applicants liable to repay instalments as if it was a loan in PLN with an interest rate based on the LIBOR.
- 5 The applicants also explained that they accept that the contract may be declared invalid by the Court on a preliminary basis.
- 6 According to the defendant, such a framework for a loan in PLN indexed to a foreign currency falls within the framework of a bank loan and did not infringe Article 69 of the Banking Law. As regards the applicants' argument that the contract should be settled on the basis of the interest rate applicable to the indexation currency, but as if the loan had been granted in Polish currency without indexation, the defendant contended that this would amount to creating a contract contrary to the parties' intentions, which would be incompatible with the provisions of the law. The defendant also pointed out that the alleged unfairness of the contractual terms in the part providing for currency conversion at the rate in force at the defendant bank was misplaced, since the Bank applied the market exchange rates.

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

The questions referred for a preliminary ruling aim to determine the correct procedure that the court should follow in applying the provisions of Directive 93/13/EEC and the provisions of Polish law transposing that directive into the Polish legal order.

The concept of a loan agreement indexed to a currency other than Polish currency only appeared in Polish law in 2011, with the amendment to the Banking Law. That legislation was limited to introducing the obligation to specify in the contract the detailed rules for determining the currency exchange rate on the basis of which the amount of the loan and the capital and interest instalments are calculated and the rules for converting them to the currency in which the loan is disbursed, as well as to enabling the borrower to repay the loan in foreign currency. The purpose of the 'indexation of the loan amount' was to apply the interest rate applicable to loans in the currency of indexation, which was significantly lower than the interest rate for loans in Polish currency. On the other hand, that indexation made the amount of the debt dependent on the currency exchange rate applicable on a given date.

As regards the **first question**, according to the settled case-law of the Court, the system of protection introduced by Directive 93/13/EEC is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence their content (judgments: C-484/08 and C-70/17).

The Court has also held that the objective of Directive 93/13/EEC consists in protecting the consumer and restoring the balance between the parties by not applying those contractual terms held to be unfair, whilst maintaining, in principle, the validity of the other terms of the agreement at issue (CJEU judgments C-96/16, C-94/17 and C-19/20).

The Court of Justice of the European Union held, in Case C-260/18, that where a contract contains unlawful contractual terms, the rules of the directive are not intended to declare that the loan agreement is invalid but merely allow for that possibility. Accordingly, if the court finds that the conversion clauses are unfair and do not bind the parties from the outset, and filling that gap in the contract is necessary for the contract to continue as the parties intended, that gap in the contract may be filled in such a way that the judgment may contain the parties' consensus as to the supplementing of the content of the contract. If no such consensus is reached, the gap created after a part of the contract is found to be unfair may be filled by the court with the supplementary provisions specified in the judgment, that is to say, provisions directly applicable to that type of contract (laid down by the national legislature for that purpose) in the absence of contractual rules to the contrary. If the contract is not supplemented as provided for above, the national court may declare the contract invalid.

In the absence, in Polish law, as indicated by the referring court, of directly applicable, supplementary provisions that could fill that gap in the contract, the only alternative is to declare the contract invalid. In that case, it appears that the effects of such a declaration of invalidity should be sought under national law. In its judgment C-349/18, the Court, while examining a contract of carriage, held, by relying on Directive 93/13/EEC, that the consequences of such an invalidated

relationship do not fall within the scope of that directive, but within the scope of national law.

The referring court notes in that context that the rules of national contract law are intended to preserve equality between the rights of both parties. The effects of such an invalidated contract under national law are defined by the rules governing undue performance and are not intended to establish equal losses for both parties, without regard for the need to protect one of the parties, that is to say, the consumer.

Applying the rules of national law would mean that the ‘deterrent effect’ of the directive (Article 7 of the directive) would not be applied, since the provisions of national law do not provide for sanctions that can be applied by a court ruling on an individual case of a consumer relying on the unfairness of certain contractual terms.

As regards the **second question**, if the answer to the first question is in the affirmative, there is a need to interpret the Court’s line of reasoning in cases which are based on Directive 93/13/EEC.

In its judgment C-70/17 and judgment C-269/19, the Court indicated that the consequence of a declaration of invalidity with regard to a contract would be that the outstanding balance of the loan would become due forthwith and would be likely to be in excess of the consumer’s financial capacities. Such a situation can arise where the consumer has little or no savings and where the value of the property purchased has increased.

In its judgment C-19/20, the Court pointed out that the invalidity of a contract cannot depend on an express request to that effect by a consumer, but should be a matter of objective application by the national court of the criteria established under national law. The applicable rules of procedure under Polish law provide that a ruling should be given in the context of the applicant’s claims and the allegations made against the defendant. They do not provide for a possibility for the court to examine factual circumstances which are not relied on by any of the parties. The question to be decided is whether the national court, having instructed the consumer on the consequences of a finding that the contract is invalid, should rely on the course of action resulting from the pleas made by the parties and restrict itself to evidence submitted by them or whether, in order to determine objectively whether the invalidity of the contract would expose the consumer to particularly unfavourable consequences, the national court may determine the consumer’s financial situation on its own initiative.

As regards the **third question**, where a national court finds, having regard to the criteria laid down in Articles 3 and 5 of Directive 93/13/EEC, that, in the light of the particular circumstances of the case, a term in a contract between a seller or supplier and a consumer does not meet the requirements of good faith, balance and transparency, thus constituting an unfair term of the contract, and is invalid by

operation of law, the court may not, pursuant to Article 6(1) of the directive, modify that contract by revising that term (judgments: C-618/10, C-26/13, C-70/17).

In its judgment C-125/18, the Court held that if it were open to the national court to revise the content of unfair terms, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13/EEC. This would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be encouraged to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.

In its judgment C-260/18, the Court pointed out that, exceptionally, a gap in a contract, created as a result of the declaration of invalidity of unfair contractual terms, may be replaced by supplementary provisions, established by the national legislature for the contracts in question, in order to preserve the balance between the rights and obligations of the parties to the contract; only such provisions are covered by the presumption that they are fair.

The referring court points out that such provisions, which could be applied directly to the contract, do not exist in the Polish legal system.

In that judgment, the Court indicated that Article 6 of Directive 93/13/EEC precludes the gap in the contract from being filled solely on the basis of national provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented by the effects arising from the principle of equity or from established customs.

In its judgment of 25 November 2020, C-269/19, the Court stated that, where the national court takes the view that the agreement at issue cannot, in accordance with contract law, legally continue to exist after the unfair terms in question have been removed, and where there are no supplementary provisions of national law and where the consumer has not expressed his or her wish to retain the unfair clauses, and/or annulling the contract would expose the consumer to particularly unfavourable consequences, the system of consumer protection established in Directive 93/13/EEC demands that, in order to restore the effective balance between the reciprocal rights and obligations of the parties, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the loan agreement in question (paragraph 41).

The referring court asks the Court about the correct interpretation of Directive 93/13/EEC in a situation where it is not possible to achieve both objectives, that is to say, which of the objectives of the directive is more important, the protection of

the consumer, including protection against the unfavourable effects resulting from declaring the contract invalid, or the achievement of a deterrent effect on a seller or supplier, that is to say, a ‘sanction’ which precludes the contract from being filled by rules of national law which are not supplementary within the meaning attributed to that concept by the Court in its judgment C-260/18.

WORKING DOCUMENT