Case C-139/22

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:

25 February 2022

Referring court:

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

Date of the decision to refer:

18 January 2022

Applicants:

AM

PM

Defendant:

mBank S.A.

Subject matter of the case in the main proceedings

Unfair contractual terms – Invalidity of a contract – Duty to inform about the essential characteristics of a contract and the risks associated with the contract – Claim for payment of sum of money as reimbursement for undue performance in connection with the invalidity of a mortgage agreement.

Subject matter and legal basis of the reference

Interpretation of Union law, in particular Articles 3(1), 4(1), 6, 7(1) and (2) and 8 of Council Directive 93/13/EEC, and the principle of effectiveness; Article 267 TFEU.

Questions referred

1. Must Article 3(1), Article 7(1) and (2), and Article 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the principle of effectiveness be interpreted as meaning that, in order for a contractual term which has not been individually negotiated to be regarded as unfair, it is sufficient to ascertain that the content of that contractual term corresponds to that of a provision of a standard contract which has been entered in the register of unfair terms?

2. Must Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as precluding a judicial body from interpreting national provisions in such a way that an unfair contractual term loses its unfair character if the consumer can choose to perform his or her obligations arising from the contract concerned on the basis of another term of that contract which is fair?

3. Must Article 3(1) and Article 4(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that a seller or supplier is required to inform each consumer of the essential characteristics of the contract and the risks associated with the contract, even if the consumer in question has relevant knowledge of the subject matter?

4. Must Article 3(1), Article 6 […] and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that, where more than one consumer concludes the same contract with a single seller or supplier, the same contractual terms may be regarded as unfair to the first consumer and fair to the second and, if so, may the consequence be that the contract is invalid as far as the first consumer is concerned and valid as far as the second consumer is concerned, such that he or she is subject to all the obligations arising from that contract?

Provisions of Community law relied on

Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016): Article 169(1).

Charter of Fundamental Rights of the European Union (OJ C 202, 7.6.2016, pp. 391–407): Article 38

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, Polish Special Edition, chapter 15, vol. 2, p. 288, ‘Directive 93/13’): recitals 4, 21 and 24, Articles 3(1) and (2), 4(1) and (2), 5, 6(1), 7(1) and (2), and 8.

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).

Public authorities shall protect consumers, users and tenants against activities that threaten their health, privacy and safety and against unfair market practices. The scope of this protection is defined by law (Article 76).

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 – Civil Code) (Dziennik Ustaw (Journal of Laws) No 16, item 93, as amended), 'the CC'.

A 'consumer' is a natural person who, when concluding and performing a consumer contract, does not act in the course of his trade or of another commercial activity (Article 22^1).

A seller or supplier is a natural person, a legal person or an organisational unit referred to in Article 33^1(1) which carries on a commercial or professional activity in its own name (Article 43^1).

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).

A legal transaction which is *contra bonos mores* shall be invalid (Article 58 § 2).

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 58 § 3).

The terms of a contract concluded with a consumer which have not been individually negotiated 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 (unlawful terms). This shall not apply to terms setting forth the principal obligations to be performed by 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 terms of a consumer contract which have not been individually negotiated are those over the content of which the consumer had no actual influence. This shall refer in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party (Article 385^1(3)).

The compliance of contractual terms 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 provisions being assessed (Article 385^2).

A person who, without legal basis, obtains 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.

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

A performance is undue if the person who rendered it was not under any obligation or was not under any obligation towards the person to whom he 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 transaction on which the obligation to render the performance was based was invalid and has not become valid since the performance was rendered (Article 410 § 2).

Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 – Code of Civil Procedure) (Dziennik Ustaw (Journal of Laws) No 43, item 296, as amended) – Book One, Title VII, Section IVb – in the wording in force until 16 April 2016.

Cases for declaring standard contract terms as unlawful fall within the jurisdiction of the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw – Competition and Consumer Protection Court) (Article 479^{36} of the Code of Civil Procedure).

If the application is granted, the court shall, in the operative part of its judgment, reproduce the content of the terms contained in the standard contract which have been held to be unlawful and shall prohibit the use of those terms (Article 479^{42} of the Code of Civil Procedure).

A final judgment shall have effect against third parties from the moment the unlawful term contained in the standard contract is entered in the register referred to in Article 479^{45} § 2 (Article 479^{43} of the Code of Civil Procedure).

The Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office of Competition and Consumer Protection) shall maintain, on the basis of the judgments referred to in § 1, a register of unlawful standard contract terms (Article 479^{45} of the Code of Civil Procedure).

Ustawa z dnia 5 sierpnia 2015 r. o zmianie ustawy o ochronie konkurencji i konsumentów oraz niektórych innych ustaw (Law of 5 August 2015 amending the Law on Competition and Consumer Protection and certain other laws (Dziennik

Ustaw (Journal of Laws), item 1634), which came into force on 17 April 2016: Article 2(2), Article 8(1), Article 9 and Article 12.

Succinct presentation of the facts of the case and proceedings

On 7 October 2009, the applicants borrowers, acting as consumers, entered into an agreement with the bank for a mortgage loan indexed to the CHF exchange rate and bearing interest at a variable rate (§ 9(1)). Under that agreement the defendant bank granted a loan to the borrowers in the amount of PLN 246 500. The amount expressed in CHF was for information purposes only and did not constitute a liability of the bank. The value of the loan expressed in foreign currency on the date the loan was drawn may have been different from that stated. In addition, the agreement provided that the capital and interest instalments were to be repaid in PLN, having first been converted at the CHF exchange rate applicable on the day of repayment, as set out in the bank's table of exchange rates (§ 10(4)). The Regulations for Granting Mortgage Loans and Credit to Natural Persons constituted an integral part of the agreement. The borrowers stated that they had read that document and recognised its binding nature (§ 25(1)). The borrowers declared that they had been thoroughly acquainted with the terms and conditions of granting credit in PLN indexed to a foreign currency, including the rules concerning loan repayment, and fully accepted them. The borrowers were aware that the index-linked loan carried an exchange rate risk and a risk of changes in the currency spread, and that the consequences of those risks resulting from unfavourable fluctuations in the exchange rate of the PLN against foreign currencies could have an impact on the loan instalments and increase the loan servicing costs (§ 30.2). The Regulations for Granting Mortgage Loans and Credit in force on the date of the agreement provided, inter alia, that the buying and selling rates of currencies published in the bank's table of exchange rates were applied to the disbursement, repayment and reconversion of indexed loans and credits. The buying and selling rates of currencies applicable on a given business day could vary. The decision to change the rates, and the decision on how frequently those changes would take place, were taken independently by the bank. The amount of each interest or capital and interest instalment on a loan indexed to a foreign currency was determined in that currency and repaid in PLN, having first been converted at the bank's exchange rate on the day of repayment. The amount of interest and capital and interest instalments on an indexed loan denominated in PLN was subject to monthly modification depending on the selling rate of the foreign currency, according to the bank's table of exchange rates on the day of repayment. The Regulations also contained a definition of the currency spread.

At the time the application for the loan was made, the first applicant had been employed at the defendant bank for 3.5 years and held a university degree and a postgraduate degree in economics. An employee of bank presented the first applicant with a historical chart of the CHF/PLN exchange rate for the three years prior to the submission of the loan application as well as a simulation illustrating the changes in the loan debt and loan instalment amounts in the event of an

increase in the CHF/PLN exchange rate in the future. Despite concerns about the consequences of an increase in the CHF/PLN exchange rate, the first applicant decided to take out a loan linked to the CHF. The second applicant did not participate in the loan procedure or in meetings with bank employees – he only signed the loan application and the agreement. Both applicants were instructed by the referring court on the consequences of the invalidity of the loan agreement and stated that they understood the consequences of the invalidity of the loan agreement and accepted them.

In 2014 the Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office of Competition and Consumer Protection, 'the OCCP') entered in the register of unfair terms the following term from the standard contract used by mBank S.A.: 'The capital and interest instalments and the interest instalments are repaid in PLN after being converted according to the CHF selling rate specified in the exchange rate table of BRE Bank S.A. applicable on the day of repayment at 14.50' (decision No 5743). The basis for that entry was the judgment of the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw – Competition and Consumer Protection Court, 'the CCPC').

In 2021 the President of the Office of Competition and Consumer Protection entered in the register of terms the following term from the standard contract used by mBank S.A.: 'The buying and selling rates of currencies applicable on a given business day may vary. The decision to change the rates, and the decision on how frequently those changes will take place, are taken by the Bank while taking into account the factors listed in paragraph 6' (decision No 7771); 'The buying and selling rates of currencies, as well as the currency spread, are determined taking into account the following factors: 1) current exchange rates on the interbank market, 2) supply and demand for currencies on the domestic market, 3) interest rate differentials and inflation rates on the domestic market, 4) liquidity of the foreign exchange market, 5) the state of the balance of payments and trade'; 'The buying and selling rates of currencies applicable on a given business day may vary. The decision to change the rates, and the decision on how frequently those changes will take place, are taken by the Bank while taking into account the factors listed in paragraph 4'; 'The buying and selling rates of currencies, as well as the currency spread, are determined taking into account the following factors: 1) current exchange rates on the interbank market, 2) supply and demand for currencies on the domestic market, 3) interest rate differentials and inflation rates on the domestic market, 4) liquidity of the foreign exchange market, 5) the state of the balance of payments and trade'. The basis for those entries was the judgment of the CCPC.

The applicants in the present case demand that the defendant be ordered to pay them the sum of PLN 37 439.70 plus statutory default interest in respect of capital and interest instalments unduly collected by the defendant from the applicants in an amount higher than was due. At the same time, should the court find that the agreement is invalid, they demand that the defendant be ordered to pay them the sum of PLN 74 768.63 plus statutory default interest in respect of funds unduly

collected by the defendant from the applicants and that the agreement be declared invalid.

Essential arguments of the parties in the main proceedings

The defendant has consistently maintained throughout the proceedings that the loan agreement is neither invalid nor contains unfair terms.

Brief statement of and reasons for the reference

1 The present case is distinguished by the fact that it concerns a contract formulated by the defendant bank in 2009, when the contractual provisions [hitherto] used by the bank were substantially amended and made more precise in relation to the previous provisions held to be invalid. Moreover, on the date on which the agreement was concluded, the first applicant had particular characteristics. Whether the provisions of the contract and of the Regulations relating to the imposition of exchange rate risk on the borrowers and authorising the bank to freely determine the exchange rate amounts and the spread constitute unfair contractual terms thus depends on whether 'contrary to the requirement of good faith', they give rise to 'a significant imbalance' within the meaning of Article 3(1) of Directive 93/13.

2 As regards the **first question referred for a preliminary ruling**, the issue is whether the mere finding that a contract concluded with consumers (such as the applicants) contains a term whose content corresponds to that of a term entered in the register of unfair terms is sufficient for that contractual term to be regarded as unlawful, without the need to examine and determine the circumstances of the conclusion of the contract in question (§10(4) of the loan agreement and §2(2) of the Regulations for Granting Mortgage Loans and Credit have the same content as, respectively, the provision entered in the register of unfair terms under No 5743 and the provision entered under nos 7771 and 7772. In turn, §2(4) of the Regulations has the same content as the provisions entered in the register under No 7772 and No 7775). The defendant bank was also the defendant in the proceedings which led to the final judgments underlying all of the above entries in the register of unfair terms. As the aforementioned contract terms were considered to be part of the standard conditions of business, they were presented to the consumer in the form of a preformulated standard contract, and thus were not individually negotiated within the meaning of Article 3(1) of Directive 93/13. This applies in particular to the terms of the Regulations, which are necessarily of a general nature, and it is not even possible to individually negotiate their content.

3 In the absence of a solution to this issue in national law, it is necessary to look at the problem from the perspective of EU law. The referring court points to the extended effectiveness of the legally binding effects of the judgments of the CCPC (and the consequent entries in the register of unfair terms) and emphasises that national courts generally take account of the positions of the Court of Justice

and the Sąd Najwyższy (Supreme Court), but that the understanding of the extended effects is nevertheless not uniform. In that regard, the referring court cites the judgment of the Court of Justice in the *Invitel* [1] case, in which it was held that 'the deterrent nature and dissuasive purpose of the measures to be adopted, together with their independence of any particular dispute, mean that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts … . The effective implementation of that objective requires … that terms of the GBC of consumer contracts which are declared to be unfair in an action for an injunction brought against the seller or supplier concerned, such as the term here at issue in the main proceedings, are not binding on either the consumers who are parties to the actions for an injunction or on those who have concluded with that seller or supplier a contract to which the same GBC apply. In the main proceedings, the national legislation provides that the declaration, by a court, of the invalidity of a term appearing in the GBC of consumer contracts is to apply to any consumer who has concluded a contract with a seller or supplier which includes that term. As is apparent from the case file in the main proceedings, the subject matter of the dispute concerns the use by the supplier of standard terms featuring the disputed term in contracts concluded with numerous consumers. It should be noted that … national legislation such as that referred to in the present paragraph satisfies the requirements of Article 6(1), read in conjunction with Article 7(1) and (2), of the Directive. The application of a penalty of invalidity of an unfair term with regard to all consumers who have concluded a consumer contract to which the same GBC apply ensures that those consumers will not be bound by that term, but does not exclude the application of other types of adequate and effective penalties provided for by national legislation. … It follows that, where the unfair nature of a term included in the GBC of consumer contracts has been recognised in an action for an injunction, such as that here at issue in the main proceedings, the national courts are required, of their own motion, and also as regards the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC apply will not be bound by that term. In the light of those considerations, the answer to the first question is that Article 6(1) of the Directive, read in conjunction with Article 7(1) and (2) thereof, must be interpreted as meaning that: it does not preclude the declaration of invalidity of an unfair term included in the GBC of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBC apply, including with regard to those consumers who were not party to the injunction proceedings; where the unfair nature of a term in the GBC has been acknowledged in such proceedings, national courts are required, of their own motion, and also with

[1] See the judgment of the Court of Justice of 26 April 2012, C-472/10, *Invitel*, paragraphs 37-40 and 43-44.

regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those GBC apply will not be bound by that term.'

4 The referring court then cites the judgment in *Biuro Podróży Partner*, [2] in which the Court of Justice held that 'the means deployed under Polish law, including the keeping of a national register of unlawful standard contract terms, are aimed at ensuring the best possible fulfilment of the consumer protection obligations provided for in Directives 93/13 and 2009/22. The referring court describes that national register as pursuing three objectives, in order to enhance the effectiveness of the prohibition on the use of unfair contract terms. First of all, the register, which is public in nature and may therefore be consulted by any consumer and by any seller or supplier, is intended to facilitate the circulation and reproduction of terms held to be unlawful by sellers or suppliers other than those who are the reason behind the entry of such terms in the register concerned. Next, that register contributes to the transparency of the consumer protection scheme under Polish law and, therefore, the ensuing legal certainty. Lastly, the register reinforces the proper functioning of the national judicial system, by avoiding multiplication of judicial proceedings involving similar standard contract terms used by those other sellers or suppliers. With regards to such a register, firstly, it cannot be disputed that its establishment is compatible with EU law. It is apparent from the provisions of Directive 93/13, in particular Article 8 thereof, that the Member States may draw up lists of terms deemed to be unfair. Under Article 8a of that directive, as amended by Directive 2011/83, applicable to contracts concluded after 13 June 2014, the Member States are required to inform the Commission when such lists are drawn up. It follows from those provisions that those lists or registers drawn up by national departments are, as a rule, done so in the interest of consumer protection under Directive 93/13. Secondly, it is apparent from Article 8 of Directive 93/13 that not only the establishment of a register such as the one instituted in the present case by the Office of Competition and Consumer Protection, but also the management of that register must comply with the requirements laid down in that directive and, more generally, in EU law. It should be clarified in that regard that that register must be managed in a transparent manner in the interest not only of consumers, but also sellers or suppliers. That requirement implies inter alia that it must be structured in a clear manner, irrespective of the number of terms it contains. Moreover, the terms contained in the register concerned must be current, which means that the register must be carefully kept up to date and that, in keeping with the principle of legal certainty, terms that are no longer needed are removed promptly. Moreover under the principle of effective judicial protection, a seller or supplier on whom a fine is imposed due to the use of a term held to be equivalent to a term in the register concerned must, in particular, have the possibility of challenging that sanction. That right to a remedy must be able to challenge both the assessment of the

[2] See the judgment of the Court of Justice of 21 December 2016, C-119/15, *Biuro Podróży Partner*, paragraphs 33-47.

conduct considered to be unlawful and the amount of the fine fixed by the competent national body, in this case the Office of Competition and Consumer Protection. As regards that assessment, it is apparent from the file submitted to the Court that, under Polish law, the amount imposed on the seller or supplier is based on the finding that the term in dispute used by the seller or supplier is equivalent to a standard condition of business which has been declared unlawful and is included in the register kept by that office. In that regard the Polish system provides that the seller or supplier is entitled to challenge that equivalence before a specialized court, the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw – Competition and Consumer Protection Court). That court has the specific task of monitoring standard conditions of business and, therefore, of maintaining uniformity of the case-law on consumer protection. The evidence submitted to the Court indicates that the assessment made by the court having jurisdiction is not restricted to merely conducting a formal comparison of the terms examined with those included in the register concerned. On the contrary, that assessment consists in appraising the content of the terms in dispute, in order to determine whether, in the light of all the relevant circumstances specific to each case, those terms are materially identical to those included in the register, in the light of inter alia the effects they produce. In the light of the foregoing considerations, the accuracy of which it is for the referring court to verify, it cannot be argued that a national scheme such as the one at issue in the main proceedings, disregards the rights of the defence of the seller or supplier or the principle of effective judicial protection. Although the fixing of a fine due to use of a term that has been held to be unfair is undoubtedly one way of putting a stop to that use, it must nevertheless comply with the principle of proportionality. Thus, Member States must guarantee that any seller or supplier that believes that the fine imposed on it does not comply with that general principle of EU law has the possibility of bringing proceedings to challenge the amount of the fine. In the case in the main proceedings, it is for the referring court to verify if the Polish system in question confers on the seller or supplier on whom a fine has been imposed by the Office of Competition and Consumer Protection the right to bring proceedings in order to challenge the amount of that fine on grounds of non-compliance with the principle of proportionality. In the light of all the foregoing considerations, the answer to the first question is that Article 6(1) and Article 7 of Directive 93/13, read in conjunction with Articles 1 and 2 of Directive 2009/22 and in the light of Article 47 of the Charter, must be interpreted as not precluding the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in a national register of unlawful standard contract terms from being regarded, in relation to another seller or supplier which was not a party to the proceedings culminating in the entry in that register, as an unlawful act, provided, which it is for the referring court to verify, that that seller or supplier has an effective judicial remedy against the decision declaring the terms compared to be equivalent in terms of the question whether, in the light of all relevant circumstances particular to each case, those terms are materially identical, having regard in particular to their harmful effects for

consumers, and against the decision fixing the amount of the fine imposed, where applicable.'

5 In its resolution of 20 November 2015, the Sąd Najwyższy (Supreme Court) expressed the view that 'extending the effects of a judgment on the merits of a judgment upholding an action for declaring a standard contract term as unlawful is consistent with the requirement under Article 7(1) of Directive 93/13 that the means adopted at national level must be adequate and effective. The operation of that judgment for the benefit of all, but in relation to the defendant seller or supplier concerned, is proportionate, since it strikes a balance between the need to ensure the effectiveness of abstract review and the need to respect the right to be heard as a fundamental element of the right to a fair hearing arising from the right to a court. The legal protection afforded in the context of such a review remains effective in so far as its benefits vis-à-vis the seller or supplier can benefit anyone wishing to rely on the unfairness of a standard contract term applied by that seller or supplier and challenged by the Competition and Consumer Protection Court'.

6 In the light of the above, two mutually exclusive lines of case-law can be distinguished. According to the first, what an entry in the register of unfair terms simply means is that it is only standard contract terms used by the seller or supplier that can be 'automatically' regarded as unlawful, but not the terms of individual contracts which the seller or supplier has concluded with particular consumers. By contrast, the second line of case-law holds that an entry in the register of unfair terms has the effect of declaring as unlawful all contractual terms in all contracts concluded by the seller or supplier with all consumers, provided that the content of those terms corresponds to the content of the entry in the register of unfair terms. When assessing which of those positions complies with Directive 93/13 (or at least pursues its objectives to greater effect), the court observes that Articles 7(2) and 8 of Directive 93/13, unlike the earlier provisions of that directive, are not mandatory in nature. In particular, Member States are not obliged to introduce proceedings for declaring standard contract terms as unfair, as referred to in Article 7(2) of Directive 93/13. However, if a Member State introduces such proceedings, their design cannot remain entirely arbitrary and it must comply with the other provisions of that directive, in particular Article 7(1), to which Article 7(2) expressly refers. Moreover, proceedings for declaring standard contract terms as unfair and the effects of the judgment issued in those proceedings should remain in accordance with the principles of effectiveness and equivalence.

7 The referring court therefore holds that the provisions of Article 7(1) and (2) of Directive 93/13 and the principle of effectiveness are given greater effect by an interpretation of Article 479^{43} of the Code of Civil Procedure according to which the entry of a standard contract term in the register of unfair terms means that all the terms of contracts concluded by the seller or supplier with consumers must be regarded as unfair, without there being any need to carry out a case-by-case examination of whether a specific term is contrary to the requirements of good faith and causes a significant imbalance in the rights and obligations arising under

the contract to the detriment of the consumer. The following arguments support that position.

8 Firstly, that position is consistent with the principle of legal certainty and with Article 7(1) of Directive 93/13, since the consumer will be certain that, in the event of any legal action, a term in his contract which has the same content as an entry in the register of unfair terms will be regarded as an unfair term. Logical reasoning dictates that if a standard contract term with a specific content is unfair, then any contractual provision with identical content will also be unfair. To adopt a contrary position would mean that the court's decision would be unpredictable from the consumer's point of view and that, therefore, the initiation of legal proceedings by the consumer would involve substantial risk. That, in turn, could discourage many consumers from asserting their rights, despite those rights being grounded in the provisions of Directive 93/13. Secondly, such an interpretation of Directive 93/13 is required by the reality of civil proceedings involving consumers in Polish courts, and a different interpretation might make it impossible to ensure effective consumer protection. Consequently, there would be an infringement of Article 7(1) of Directive 93/13. On the other hand, the assumption that an entry in the register of unfair terms has an extended legal force which has the effect of declaring all contractual terms with identical content to be unfair is consistent with the aforementioned provision and with the principle of effectiveness, which allows the national court to limit the taking of evidence to an examination of the content of the relevant documents. The court's task is only to determine whether the borrower is a consumer and whether the contractual provisions have been individually negotiated. At the same time, however, the fact that a contractual term is identical in wording to a standard contract term means that it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term – it has been presented to the consumer in the form of a pre-formulated standard contract and thus individual negotiation has not been possible at all (Article 3(2) of Directive 93/13). To proceed in this way shifts the role of the court mainly towards assessing the consequences of the unfair terms in the contract and enables proceedings initiated by consumers to be conducted efficiently, thus implementing the principle of effectiveness. Thirdly, the extended effectiveness of rulings by the CCPC resulting in the entry of a standard contract term in the register of unfair terms remains in line with the principle of effectiveness. It makes the practical implementation of consumer rights much simpler. At the same time, a dissuasive effect is achieved in so far as the seller or supplier suffers the negative consequences of concluding an unfair term in any contract concluded with a consumer. Thus, the negative consequences for the seller or supplier are more severe the more contracts it has concluded with unfair contractual terms.

9 As regards the **second question**, if the first question is answered in the negative, it will be for the referring court to examine whether the contractual terms referred to above are unfair. Of key importance here is § 10(4) of the agreement, which provides that the loan is to be repaid in PLN, but that the defendant bank converts the repayment amounts into CHF at its own selling rate. Analogous or even

identical contractual terms are uniformly considered unfair by national courts. However, the agreement concluded by the applicants with the defendant has a slightly different structure than most CHF-indexed agreements, due to the fact that § 24(1) of the Regulations (amended as of 1 July 2009) provided for the possibility of repaying the loan instalments in CHF from the outset. Although it is true that, as a result of a change in the Regulations by the defendant bank on 1 July 2009, all borrowers were able to repay loan instalments directly in foreign currency, the fact remains that, from the point of view of the rules on unfair contractual terms, it is necessary to assess whether a contractual term was unfair at the time when the agreement was concluded.

10 The possibility of repaying loan instalments indexed to a foreign currency directly in that currency is important for assessing whether the conversion rules set out in the agreement (§10(4)) are unfair. In the case of agreements allowing for loan instalments to be repaid in CHF, the borrower may, on each occasion, buy CHF in advance at a currency exchange office and pay the loan instalments in that currency. Therefore, if that were the borrower's intention, he would be able to pay all the instalments of the loan in CHF and the bank would not be able to influence the amount of their performance. In that situation the question of whether § 10(4) of the loan agreement would apply is entirely at the borrower's discretion. Consequently, the referring court is considering whether that question is relevant for the purposes of determining whether § 10(4) of the loan agreement is unfair. The case-law of the national courts is not uniform on this point. Therefore, the Sąd Najwyższy (Supreme Court) has held that the terms of a mortgage loan agreement which may, according to the consumer's wishes, be drawn and repaid in both CHF and PLN using the bank's exchange table, cannot in any way be considered unfair. The decision to draw and repay the loan in PLN is the consumer's sole decision and cannot change the nature of the loan. It cannot therefore be argued that the failure to undertake repayment in CHF satisfies the conditions of Article 385^1(1) of the Civil Code and renders the disputed provision ineffective. [3] On the other hand, there is a different view in national case-law, according to which the unfair nature of a single contractual term does not disappear merely because the consumer is not compelled to use it. In particular, the consumer's choice between two options cannot be reduced to a choice between an abusive and a non-abusive option. In the opinion of the CCPC, the choice is therefore between a potentially more expensive but more convenient option, and a cheaper option but one that requires the consumer to be proactive. All provisions of the contract and of the regulations must be consistent with good practice and not violate the interests of the consumer. [4] Every option must comply with consumer legislation. To accept that an unfair term is unfair in all cases, even if the consumer can opt out of it, is consistent with the objective of Directive 93/13, which is to deter sellers or suppliers from using unfair terms. To adopt a contrary position might even

[3] See the judgment of the Supreme Court of 9 October 2020, III CSK 99/18.

[4] See the judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) of 13 December 2017, VII ACa 1036/17.

encourage sellers or suppliers to formulate their contracts in such a way as to provide for a choice between fair and unfair terms. Sellers or suppliers who structured contracts in such a way could easily exempt themselves from liability towards consumers by pointing out that the consumers could have opted for the contractual terms that were fair.

11 It follows from the above that neither national law nor the case-law of the national courts can resolve the problem at hand, and thus there is a need to refer the matter to the Court of Justice. An analysis of the case-law of the Court of Justice to date suggests that the Court has not yet examined this issue, although it has previously ruled on similar issues. The judgment of 27 January 2021 is particularly noteworthy in that regard. In that judgment the Court held that 'Article 4(1) of Directive 93/13 states 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 concerned was concluded and all the circumstances attending the conclusion of the contract and all the other terms of that contract or of another contract on which it is dependent. It follows from that provision, and from Article 3 of that directive, as interpreted by the Court, that the assessment of the unfairness of a contractual term must be carried out by reference to the date of conclusion of the contract concerned (see, to that effect, judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 48). According to settled case-law, the circumstances referred to in Article 4(1) of that directive are those which could have been known to the seller or supplier at that time the agreement was concluded and which were of such a nature that they could affect the future performance of the agreement, since a contractual term may give rise to an imbalance between the parties which only manifests itself during the performance of the contract … Thus, it is apparent from that case-law that, pursuant to Directive 93/13, the national court must, when assessing whether a term is unfair, refer only to the date of conclusion of the contract concerned and assess, in the light of all the circumstances attending the conclusion of the contract, whether that term in itself gave rise to an imbalance between the rights and obligations of the parties in favour of the seller or supplier. While such an assessment may take account of the performance of the contract, it cannot, under any circumstances, depend on the occurrence of events subsequent to the conclusion of the contract that are beyond the control of the parties. Therefore, while it is indisputable that, in certain situations, the imbalance referred to in Article 3(1) of Directive 93/13 can arise only during the performance of the contract, it is necessary to ascertain whether, from the date on which the contract was concluded, the terms of that contract gave rise to that imbalance, even though that imbalance could occur only if certain circumstances arose and, in other circumstances, that term could even benefit the consumer. First, the opposite line of reasoning would amount to making the assessment of the unfairness of a term subject to the circumstances in which the performance of the contract takes place and to any future changes in circumstances which have an effect on that performance, with the result that sellers or suppliers could speculate on that performance and those developments and include a potentially unfair term, by relying on the fact that that term will escape classification as unfair in certain circumstances. Secondly, it should be recalled that Article 6(1) of Directive 93/13

provides that unfair terms are not binding on the consumer and must, therefore, be deemed never to have existed. If the assessment of the unfairness of a term could depend on events occurring after the conclusion of the contract that are independent of the will of the parties, the national court could confine itself to excluding the application of the term at issue only in respect of those periods where the term in question must be regarded as unfair.' In view of the fact that the consumer's ability to choose which of the two contractual terms will apply is precisely a circumstance which arises after the conclusion of the contract and is dependent on the consumer's will, the cited judgment does not clarify the doubts raised in the second question referred for a preliminary ruling.

12 As regards the **third question**, it should be stressed that the issue of information obligations imposed on sellers or suppliers (including banks) and the imposition of exchange rate risk on borrowers has been analysed by the Court of Justice in, for instance, the *RWE Vertrieb* and *Kàsler* judgments, in which the Court noted that 'Information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.'[5]

13 Subsequently, in its judgments in *Andriciuc* and *OTP Bank*, the Court pointed out that 'first, the borrower must be clearly informed of the fact that, in entering into a loan agreement denominated in a foreign currency, he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income. Second, the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency. Therefore, it is for the national court to check that the seller or supplier has communicated to the consumers concerned all the relevant information enabling them to assess the economic consequences of a term, such as that at issue in the main proceedings, on their financial obligations. In the light of the foregoing, the answer to the second question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term must be drafted in plain intelligible language requires, in the case of loan agreements, financial institutions to provide borrowers with sufficient information to enable them to take prudent and well-informed decisions. In that connection, that requirement means that a term under which the loan must be repaid in the same foreign currency as that in which it was contracted must be understood by the consumer both at the formal and grammatical level, and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would be aware both of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out,

[5] See the judgments of the Court of Justice of 21 March 2013, C-92/11 *RWE Vertrieb*, paragraph 44, and of 30 April 2014, C-26/13, *Kàsler*, paragraph 70.

and would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations. It is for the national court to carry out the necessary checks in that regard.'[6]

14 Finally, in its judgment in *BNP Paribas Personal Finance*, the Court found that 'As regards loan agreements denominated in a foreign currency, such as those at issue in the main proceedings, it should be noted, in the first place, that any information provided by the seller or supplier which seeks to inform the consumer about the functioning of the exchange mechanism and the risk associated with it is relevant for the purposes of that assessment. Details of the risks faced by the borrower in the event of a severe depreciation of the legal tender of the Member State in which the borrower is domiciled and an increase in foreign interest rates are factors of particular importance. … It follows that, in order to comply with the requirement of transparency, the information communicated by the seller or supplier must enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, not only to understand that, depending on exchange rate fluctuations, changes in the exchange rate between the account currency and settlement currency may have unfavourable consequences for his or her financial obligations, but also to understand, in the context of taking out a loan denominated in a foreign currency, the actual risk to which he or she is exposed, throughout the term of the agreement, in the event of a severe depreciation of the currency in which the borrower receives his or her income as against the account currency. In that context, it is important to point out that quantitative simulations, such as those included in some of the loan offers at issue in the main proceedings, may constitute a useful piece of information if they are based on sufficient and accurate data and contain objective assessments which are communicated to the consumer in plain, intelligible language. It is only on those conditions that such simulations may enable the seller or supplier to draw the consumer's attention to the risk of potentially significant adverse economic consequences of the contractual terms at issue. Like any other information relating to the scope of the consumer's commitment communicated by the seller or supplier, quantitative simulations must help the consumer to understand the actual scope of the risk, in the long term, associated with possible exchange rate fluctuations and thus the risks inherent in entering into a loan agreement denominated in a foreign currency. Accordingly, in the context of a loan agreement denominated in a foreign currency that exposes the consumer to a foreign exchange risk, the requirement of transparency cannot be satisfied by communicating to the consumer information – even a large amount of information – if that information is based on the assumption that the exchange rate between the account currency and settlement currency will remain stable throughout the term of the agreement. That is the case, in particular, where the consumer has not been informed by the seller or supplier of the economic context liable to have an impact on exchange rate variations, with the result that the consumer was not given the opportunity to

[6] See judgments of the Court of Justice of 20 September 2017, *Andriciuc*, paragraphs 50-51, and of 20 September 2018, C-51/17, *OTP Bank*, paragraphs 74 and 78.

understand in concrete terms the potentially serious consequences on his or her financial situation which might result from taking out a loan denominated in a foreign currency. In the second place, the relevant factors for the purposes of the assessment referred to in paragraph 67 above include the language used by the financial institution in the pre-contractual and contractual documentation. In particular, the absence of terms or explanations expressly informing the borrower of the existence of specific risks associated with loan agreements denominated in a foreign currency may confirm that the requirement of transparency, as resulting, inter alia, from Article 4(2) of Directive 93/13, is not satisfied.'[7]

15 A bank which offers to the consumer a loan linked to a foreign currency, in the context of an obligation to provide information on the exchange rate risk to which the consumer is subject, must at least provide the consumer with information on the fluctuations in the exchange rate of the domestic currency against the foreign currency over a reasonable period. The bank must also provide a simulation showing how the loan instalments and amount of loan debt might change in the event of a decrease in the value of the domestic currency against the foreign currency. The issue to be resolved is whether the above information obligations of the bank also apply to a consumer who, because of his education or professional experience, already possesses such information.

16 In the opinion of the referring court, the bank failed to meet its information requirements vis-à-vis the second applicant. The situation of the first applicant, who at the time the contract was concluded possessed high professional qualifications and had experience working for the defendant bank, is different. The first applicant also admitted that she was aware of the bank's offer and was aware of the exchange rate risk arising from the foreign currency indexed loan she had taken out. In view of the above, the court seeks to determine whether Articles 3(1) and 4(1) of Directive 93/13 require that a seller or supplier, when informing a consumer of the essential features of a contract, should refer to an objective consumer model or rather to the individual characteristics of the person in question.

17 The answer to the above question is material to the outcome of this case. A finding that a seller or supplier has a duty to provide each consumer with complete and comprehensible information on the characteristics of the contract (in particular, on the risks inherent in concluding the contract) may mean that the information given by the defendant bank to the two applicants was inadequate, which would imply that, in the case of both applicants, the contractual terms were ambiguous and unfair. On the other hand, to accept that the scope of the information obligations on the part of the seller or supplier must be appropriate to the consumer concerned may lead to a finding that the terms of the contract in question were incomprehensible and unfair vis-à-vis the second applicant only.

[7] See the judgment of the Court of Justice of 10 June 2021, C-776/19 – C-782/19, *BNP Paribas Personal Finance*, paragraphs 69 and 72-75.

18 As regards the final, **fourth question referred for a preliminary ruling**, which arises, as it were, from the third question, in view of the first applicant's de facto better position compared to that of the second applicant (level of knowledge and experience), the referring court is considering a ruling whereby the contractual terms relating to the imposition of exchange rate risk on the applicants and allowing the bank to freely determine the exchange rates are unfair only with regard to the second applicant, but not the first applicant. This would mean that the loan agreement is invalid only in so far as it concerns the second applicant (on the assumption that, given that those contractual provisions are deemed to be principal obligations, their exclusion must result in the invalidity of the agreement). Such an arrangement is permissible both under domestic law and in the case-law of the Polish courts. However, the question arises as to the compatibility of such a solution with the provisions of Directive 93/13 (in particular Articles 6(1) and 7(1)). Such a solution, which is undoubtedly favourable to the second applicant, would at the same time put the first applicant in an even worse position than if the agreement were valid in its entirety vis-à-vis both applicants (in which case they would be jointly and severally liable towards the bank). The result would be that liability for compliance with the obligations under the loan agreement would fall entirely on the first applicant. Consequently, the exercise of rights under Directive 93/13 by the second applicant would result in negative consequences for the first applicant, which, however, would violate the provisions of Directive 93/13.

19 In the opinion of the referring court, an alternative solution consistent with Directive 93/13 would be to take the view that a contract may either be declared invalid in respect of all consumers or it may not be declared invalid at all. Such a solution appears to be incorrect, however, in so far as it would imply that the rights of a consumer under Directive 93/13 are limited solely on account of the difference in the legal situation of another consumer who is a party to the same contract. In such a case, the rights of a consumer in respect of whom contractual terms are unfair would be nullified without a legal basis in Directive 93/13.

20 The third possible solution is based on an interpretation consistent with European Union law and is a compromise. It amounts to recognising that the agreement is invalid with respect to the second applicant, while reducing by half the total contractual performance. As a result, the first applicant and the bank would remain parties to the agreement, while the second applicant would not be obliged to repay any loan instalments and would also be entitled to a claim for reimbursement of half of the loan instalments already paid. The above solution is a compromise in that, on the one hand, the second applicant's claim is satisfied and, on the other, the legal position of the first applicant is not worsened. A doubt arises in respect of that solution under Article 6(1) of Directive 93/13, however, on account of the interference by the court in the content of a contract which goes beyond declaring unfair contractual terms to be non-existent.

21 According to the fourth solution, which is pro-consumer in nature, but raises doubts from the point of view of the principle of legal certainty, a finding that the

terms of the agreement are unfair vis-à-vis only one of the consumers would entail the invalidity of the agreement in its entirety. This solution avoids the problems of the three solutions described above. In this case, the claims of all consumers would be satisfied, since the consumers would unanimously demand that the contract be declared invalid and would accept the resulting consequences. The adoption of this solution would mean that the referring court would allow any claim by the applicants in its entirety. In the view of the referring court, this solution is optimal and would ensure that both applicants are protected by Directive 93/13.

22 The referring court therefore proposes an affirmative answer to the first three questions. As regards the fourth question, the referring court proposes the following answer: a finding that a contractual term is unfair in relation to at least one of the consumers who are parties to a contract with a seller or supplier necessarily means that the term is likewise unfair in relation to all the other parties to that contract and, if the contract cannot be performed without that term, the result is that the contract is invalid for all the parties thereto.