Case C-301/23

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:

10 May 2023

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

16 January 2023

Applicant:

AJ

Defendant:

Bank BPH S.A.

Subject matter of the main proceedings

Invalidity of a contract – Unfair contractual terms – Consumer not bound by certain contractual terms – Obligation of a court to inform the consumer of the legal consequences of a contract being declared invalid

Subject matter and legal basis of the request

Interpretation of EU law, in particular Articles 3(1), 4(2), 5, 6(1) and 7(1) of Council Directive 93/13/EEC and the principles of effectiveness and equivalence; Article 267 TFEU.

Questions referred for a preliminary ruling

1. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and the principle of effectiveness, be interpreted as precluding a judicial interpretation of national legislation pursuant to which a consumer may not effectively seek a declaration from a court that a

contract concluded by him or her contains contractual terms which are not binding on him or her or that that contract is invalid in its entirety?

2. Are Articles 4(2) and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts to be interpreted as meaning that the requirement that the contractual terms be drafted in plain, intelligible language is satisfied in relation to a credit agreement linked to a foreign currency exchange rate in the case where the bank has provided the borrower with:

a historical chart of the exchange rate of that foreign currency against the national currency showing that that exchange rate has changed by several dozen percentage points over several years, and

a simulation showing the effect of an increase of several dozen percentage points in the exchange rate of the foreign currency on the amount of the loan instalments?

3. Must Articles 4(2) and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that the requirement that the contractual terms be drafted in plain, intelligible language should be analysed against the model of the average consumer, or should the individual situation and characteristics of the consumer at the time of the conclusion of the contract be taken into account, including, in particular, his or her knowledge, education and experience?

4. Must Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that a contractual term which provides that the margin applied by a bank is to be the arithmetic mean of the margins applied by several other specifically named commercial banks is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer?

5. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and the principle of effectiveness, be interpreted as precluding a judicial interpretation of national legislation pursuant to which the national court may declare that the consumer is not bound only by the unfair element of the contractual term (providing for modification of the average rate of the National Bank of Poland by a spread margin), which does not constitute a separate contractual obligation, but that he or she is bound by the rest of that contractual term?

6. Must Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that the obligation on the national court to inform the consumer of the legal consequences which the declaration of invalidity of a contract may have covers only claims for restitution arising from the invalidity of the contract or as meaning that that obligation covers

any hypothetical legal consequences (even if they are doubtful, debatable or unlikely) which may result from the invalidity of the contract?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union: 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): Articles 3(1), 4(2), 5, 6(1) and 7(1).

Provisions of national law relied on

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code (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)).

The terms of a contract concluded with a consumer which have not been individually negotiated 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 (unlawful contractual clauses). 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 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).

Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure) (Dz. U. of 2021, item 1805, as amended; 'the Code of Civil Procedure')

Applicants may bring an action before the court for a declaration that a legal relationship or a right exists or does not exist, provided that they have a legitimate interest in bringing proceedings (Article 189).

A court may not decide on a claim that has not been put forward or award more than has been claimed (Article 321(1)).

Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe (Banking Law of 29 August 1997 (Dz. U. No 140, item 939, as amended)

In a loan agreement, the bank undertakes to place at the borrower's disposal for the period of time stipulated in the agreement a certain amount of money which can be used for a specified purpose, and the borrower undertakes to use that amount in accordance with the terms and conditions stipulated in the agreement, to return the amount of the utilised loan, together with interest, on set repayment dates and to pay a fee on the loan granted (Article 69(1) in the version in force on 1 October 2009).

A loan agreement must be made in writing and stipulate, in particular: (1) the parties to the agreement; (2) the loan amount and currency; (3) the purpose for which the loan was granted; (4) the terms and conditions of loan repayment; (5) the loan interest rate and the terms on which it may be changed; (6) the security for loan repayment; (7) the scope of the bank's rights related to control over utilisation and repayment of the loan; (8) the dates and manner of making funds available to the borrower; (9) the amount of commission, if provided for in the agreement; and (10) the terms on which the agreement may be amended and terminated (Article 69(2) in the version in force on 1 October 2009).

Succinct presentation of the facts and procedure

1 In 2009, a loan agreement was concluded, pursuant to which the defendant's legal predecessor ('the bank') granted the applicant a loan in the amount of PLN 535 899.23, indexed to the CHF exchange rate, to finance the purchase of a residential property. Pursuant to the agreement, the loan was subject to a variable interest rate, namely the sum of the CHF 3M LIBOR rate and a fixed bank margin. Pursuant to the third sentence of Paragraph 1(1) of the agreement, as at the date of disbursement of the loan amount, the balance was expressed in the foreign currency to which the loan is indexed at the buying rate of that foreign currency, as specified in the bank's table of buying/selling rates for mortgage loans extended by the bank ('the bank's table of rates'), then the foreign currency balance was converted each day into PLN at the selling rate of the currency to which the loan is indexed, as specified in the bank's table of rates (third sentence of Paragraph 1(1)). Pursuant to Paragraph 6(3) of the agreement, when the loan is indexed to a foreign currency, a change in that exchange rate will affect the amount of the instalment and the balance of the loan debt, whereby the balance of the loan debt may exceed the value of the immovable property and the risk thereof is borne by the borrower.

2 On each occasion, the amount disbursed in PLN was to be converted into the currency to which the loan was indexed at the bank's buying rate for the currency

of the loan, as specified in the bank's table of rates in force as at the date on which the bank effected the disbursement (third sentence of Paragraph 7(2)).

3 The borrower declared that he was aware of the risk associated with loans indexed to a foreign currency, which arise from a change in the exchange rate of the loan index currency in relation to PLN. He further stated that he had been informed that, in the event of an increase in the exchange rate of the currency to which the loan was indexed in relation to PLN, there would be a corresponding increase in his debt to the bank in PLN in respect of the loan taken out and an increase in the amount of the loan instalment expressed in PLN, which might mean that the legal guarantee established would become insufficient and the borrower's ability to service the service the loan would deteriorate (Paragraph 11(5)). He also declared that he was aware of the effect of changes in the difference between the buying/selling rates and the buying rate of the loan indexation currency on the amount of the balance and loan instalments, and the level of the repayment burden in the case of loans where the disbursement or repayment was based on such rates (Paragraph 11(6)).

4 The buying/selling rates for mortgage loans extended by the bank of the currencies included in the bank's offer applicable as at the date of the transaction are to apply to the settlement of loan disbursement and payment transactions (Paragraph 17(1)). Buying (selling) rates are to be defined as the average PLN exchange rates vis-à-vis the currencies in question, as published in the National Bank of Poland's table of average exchange rates, minus the buying margin (plus the selling margin in the case of sale) established by a decision of the bank (Paragraph 17(2) and (3)). The PLN exchanges rate vis-à-vis the currencies in question, as published in the table of average exchange rates on the National Bank of Poland's website on the previous working day as adjusted by the bank's buying/selling margins, are to apply to the calculation of buying/selling rates for mortgage loans extended by the bank (Paragraph 17(4)). The buying and selling margins described in subparagraphs 2 and 3 are fixed once a month by a decision of the bank. Those margins are calculated by calculating the difference between the average PLN exchange rates vis-à-vis the currencies in question, as published in the National Bank of Poland's table of average exchange rates on the penultimate working day of the month preceding the period during which the calculated margins applied and the arithmetic mean of the buying/selling rates applied to retail transactions from five banks on the last working day of the month preceding the period during which the calculated margins applied.

5 Prior to signing the loan agreement, the applicant signed a declaration stating that he had familiarised himself with the historical charts and simulations prepared by the bank, which illustrated the USD, EUR and CHF exchange rates in relation to the PLN for the period from 2 June 2003 to 21 May 2009.

6 In 2009, the applicant had a degree in law (specialising in banking law) and had worked for three years at the National Bank of Poland (the Polish central bank,

which does not extend loans to natural persons), although his tasks were unrelated to exchange rate risk.

7 The applicant was warned by the court that if the loan agreement was invalid he would have to repay the equivalent of the loan principal to the bank and he could be sued by the bank for remuneration for the use of that principal in the absence of a contractual basis, whereupon he stated that he agreed to the loan agreement being declared invalid.

8 In his application, the applicant requested that the mortgage loan agreement of 24 September 2009 concluded between the parties be declared invalid. In the event that the court should grant that application, he requested a declaration that the terms contained in Paragraphs 1(1), 7(2) and 17(1) to (7) of that agreement constitute unlawful clauses and as such are not binding on him.

The essential arguments of the parties in the main proceedings

9 In support of his application, the applicant claimed that the contractual terms concerned are unfair and therefore not binding on him. Those terms, he argued, define the main subject matter of the contract and performance of the contract is not possible without them, and consequently the contract is invalid. In its defence, the defendant requested that the action be dismissed, stating that the contract is not invalid and does not contain unfair terms.

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

10 With regard to Question 1, applications seeking a declaration that a contract is invalid or that particular contractual terms are not binding have been regarded as applications seeking a declaration that there is no legal relationship as referred to in Article 189 of the Code of Civil Procedure. That practice was supported by the previous case-law of the Sąd Najwyższy (Supreme Court), which allowed not only an action for a declaration that a contract is invalid (judgment of the Sąd Najwyższy of 24 May 1995, I CRN 61/95), but also an action for a declaration that a unilateral legal act is invalid (resolution of a panel of seven judges of the Sąd Najwyższy with the force of law of 30 December 1968, III CZP 103/68), as well as an action for a declaration that there is ‘an act akin to a legislative act, if, in essence, it seeks to establish a right or a legal relationship’, which is essentially a declaration as to whether particular contractual terms shape the legal relationship between the parties to that contract (judgment of the Sąd Najwyższy of 25 June 1998, III CKN 563/97). According to an alternative position of the Sąd Najwyższy (judgment of 6 November 2015, II CSK 56/15), Article 189 of the Code of Civil Procedure allows an application seeking a declaration that a specific legal relationship or right exists or does not exist to be made, and the application for a declaration that a contract is invalid does not come within that scope, but the invalidity of the contract means that there is no legal relationship which is deemed to arise from that contract. Consequently, the application seeking a declaration

that a contract is invalid constitutes a shortcut, identifying a legal event which is deemed to be the source of a legal relationship with that relationship, and the application must therefore be interpreted as seeking a declaration that the legal relationship which is deemed to arise from the contract does not exist.

11 However, the previous interpretation of Article 189 of the Code of Civil Procedure was narrowed in the judgment of the Sąd Najwyższy of 1 June 2022, II CSKP 364/22, in which the Sąd Najwyższy ruled that an application seeking a declaration that the applicant is not bound by particular contractual terms does not meet the requirement of 'specifying precisely what shape – according to the applicant – the legal relationship to be protected is to take'. Lastly, the Sąd Najwyższy found that 'it is inconceivable that a court judgment upholding an action by finding that the applicants are not bound by contractual terms set out in great detail could remove uncertainty as to the existence or non-existence of a legal relationship.' Deficiencies in the application in that respect cannot be removed by the court, which is bound by the substance of the application (Article 321(1) of the Code of Civil Procedure), and thus may uphold the action in whole or in part or dismiss it, but may not rule on an application other than the one made in the action. In that judgment, the Sąd Najwyższy found that Article 189 of the Code of Civil Procedure also does not allow an effective application to be made for a declaration that a contract is invalid. Furthermore, in the view of the Sąd Najwyższy 'it does not come within the framework set out in Article 189 of the Code of Civil Procedure to seek the establishment of facts which occurred in the past, such as the conclusion of a contract, the non-conclusion of a contract, or the invalidity of a contract'. Consequently, the Sąd Najwyższy found that Article 189 of the Code of Civil Procedure excludes the possibility of seeking a declaration that a contract is invalid. Moreover, the Sąd Najwyższy ruled out the possibility, permitted in the judgment of the Sąd Najwyższy of 6 November 2015, II CSK 56/15, of a court declaring that there is no legal relationship arising from a contract in the case where an applicant seeks a declaration that the contract is invalid. To accept such an interpretation of Article 189 of the Code of Civil Procedure means that it is not possible to seek a declaration that a contract is invalid or that individual contractual terms are not binding, but only to seek a declaration that there is no legal relationship which arises or there is a relationship which is strictly defined. Consequently, it would have to be found that the application made in the present case was incorrectly formulated and should be dismissed.

12 As regards the compatibility of the foregoing interpretation with Articles 6(1) and 7(1) of Directive 93/13 and the principle of effectiveness (an application seeking a declaration that a contract is invalid is covered by that directive since the invalidity of the contract is deemed to arise from unfair contractual terms contained therein), the referring court notes that excluding the possibility of bringing an action before the national courts for a declaration that a contract is invalid or that specific contractual terms are not binding appears to be a significant restriction on the rights of consumers protected by that directive. On the other hand, the rights of those consumers are not completely negated since

there is no doubt that Article 189 of the Code of Civil Procedure allows an application to be made for a declaration that there is no legal relationship arising from a contract. However, there are concerns regarding the position that a national court is precluded from declaring, in a judgment, that there is no legal relationship arising from a contract where an application 'only' seeks a declaration that the contract is invalid on the ground that the court is bound by the content of the application (Article 321(1) of the Code of Civil Procedure). In the view of the referring court, adopting such a restrictive approach may make it more difficult for consumers to assert their rights arising from Directive 93/13, thereby undermining the effectiveness of the protection guaranteed by that directive.

13 As regards Question 2, the Court of Justice held in its judgment in *Andriciuc and Others* [judgment of 20 September 2017, C-186/16, EU:C:2017:703] that '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' (judgment of 20 September 2017, C-186/16, paragraphs 49 and 50).

14 In its judgment in *BNP Paribas Personal Finance* [judgment of 10 June 2021, C-776/19 to C-782/19, EU:C:2021:470], the Court of Justice subsequently clarified 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 […] 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. […] 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 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' (judgment of the Court of Justice of 10 June 2021, C-776/19 to C-782/19, paragraphs 72 to 75).

15 Lastly, in its order of 6 December 2021 [in ERSTE Bank Hungary, C-670/20, EU:C:2021:1002], the Court of Justice stated that 'having regard to the obligation for the seller or supplier to provide information, a declaration by the consumer that he or she is fully aware of the potential risks arising from a loan denominated in a foreign currency cannot, in itself, have any relevance for the purposes of the assessment of whether that seller or supplier has met that requirement of transparency. (…) the requirement of transparency of terms of a loan agreement denominated in a foreign currency, which expose the borrower to a foreign exchange risk, is satisfied only where the seller or supplier has provided him or her with accurate and sufficient information on the foreign exchange risk, to enable an average consumer, who is reasonably well informed and reasonably observant and circumspect to evaluate the risk of potentially significant adverse economic consequences of such terms on his or her financial obligations throughout the term of the agreement. In that regard, the fact that the consumer declares himself or herself to be fully aware of the potential risks arising from entering into that agreement does not, in itself, have any relevance for the purposes of the assessment of whether the seller or supplier has met that requirement of transparency' (order of the Court of Justice of 6 December 2021, C-670/20, *ERSTE Bank Hungary*, paragraphs 32 and 34).

16 In the light of the above case-law, the referring court is uncertain what specific information provided by the bank is sufficient to establish that that borrower was clearly informed of the fact that, on 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 (within the meaning of paragraph 49 of the judgment of the Court of Justice of 20 September 2017, C-186/16, *Andriciuc and Others*) and what specific information is to be deemed 'sufficient and accurate' in that context (within the meaning of paragraph 78 of the judgment of

the Court of Justice of 10 June 2021, C-776/19 to C-782/19, *BNP Paribas Personal Finance*). It is clear from the Court of Justice's abovementioned judgments that those criteria are not satisfied by the provision of general information on the existence of exchange rate risks linked to the contract concluded, nor by the presentation of simulations which are based on the assumption that the foreign currency exchange rate will be stable. In particular, in the circumstances of Cases C-776/19 to C-782/19, borrowers were provided with simulations which assumed currency fluctuations of approximately 10%, that is to say, between 1.43 and 1.59 EUR/CHF (see judgment of the Court of Justice of 10 June 2021, C-776/19 to C-782/19, *BNP Paribas Personal Finance*, paragraph 12).

17 In the situation in Case C-670/20, the attention of borrowers was drawn to the fact that any variations in the parity between the Hungarian forint and the Swiss franc could entail an additional cost for the borrower, of which neither the actual occurrence or the amount could be foreseen, but they were not provided with any specific information concerning the increase, potentially unlimited, of monthly repayment instalments that a significant fluctuation in exchange rates could cause since the information provided to them was based on the assumption that that parity would remain stable (see order of the Court of Justice of 6 December 2021, C-670/20, *ERSTE Bank Hungary*, paragraph 26). In the circumstances of the present case, the information presented to the borrower was more extensive. Prior to signing the agreement on 3 August 2009, the applicant signed a declaration that he had familiarised himself with the charts and simulations presented by the bank. The CHF/PLN exchange rate chart showed that between 2003 and 2009 the rate had first fallen from PLN 3 to PLN 2 and then risen to PLN 3.4. The simulation, on the other hand, assumed a scenario where the loan instalment rose from PLN 2 494 to PLN 4 067. […] The bank provided the borrower with information that the CHF/PLN exchange rate had been subject to significant fluctuations in the past and presented him with the potential effects of a significant increase in that rate. However, during the performance of the contract it transpired that the CHF/PLN rate was subject to even greater fluctuations, namely that that rate actually increased by 84%, but the increase by that amount occurred after 13 years of performance of the contract, while the simulation presented by the bank illustrated an increase in the CHF/PLN rate by 63% over six months.

18 With regard to Question 3, the referring court is also uncertain as to the interpretation to be placed on the requirement that the bank comply with its obligations to provide information to an 'average consumer, who is reasonably well informed and reasonably observant and circumspect', as referred to in paragraphs 64, 72 and 78 of the judgment of the Court of Justice of 10 June 2021, C-776/19 to C-782/19, *BNP Paribas Personal Finance*, paragraphs 43, 51 and 57 of the judgment of the Court of Justice of 10 June 2021, C-69/19, *BNP Paribas Personal Finance*, and paragraphs 23, 25 and 30 of the order of the Court of Justice of 6 December 2021, C-670/20, *ERSTE Bank Hungary*). The issue is essentially whether the scope of the information required should be referenced to an abstract model of the 'average consumer' or whether account should be taken

of the individual situation of the specific consumer, including his or her knowledge and experience.

19 Adopting an abstract consumer model would mean that the scope of the information provided by the bank as to a particular contract should always be the same, irrespective of the specific consumer concluding that contract. The disadvantage of such an approach is that it allows situations in which the bank will bear the negative consequences of failing to provide information to a consumer who already had such information due to his or her knowledge and experience. The opposite situation is also conceivable, namely that the bank would not bear any negative consequences in a situation where it had provided information which would be sufficient for a 'average consumer who is reasonably well informed and reasonably observant and circumspect', but proved to be insufficient for a particular consumer on account of his or her lack of knowledge or experience, or even limited perceptual capacity owing to a health condition or disability.

20 By contrast, adopting an approach which takes account of the individual characteristics of the consumer makes it necessary to adapt the content and form of the information provided to a specific individual. The advantage of this approach is that it ensures that obligations on sellers or suppliers to provide information are genuinely tailored to the actual needs of consumers in that regard and therefore better achieves the objectives of Directive 93/13 and also of Article 169(1) of the Treaty on the Functioning of the European Union. However, implementation thereof may be difficult in practice. A seller or supplier may face significant difficulties as regards the method used to determine the scope of the information to be provided to a particular person. The foregoing is relevant from the point of view of the facts of the present case. It is a fact that the applicant did not, in his field, deal with loan agreements or issues related to exchange rate risk, but his knowledge of the fields of law, finance and banking was undoubtedly higher than average.

21 As regards Question 4, the agreement at issue, as a CHF-indexed loan agreement, contained clauses on how the bank was to carry out conversions from PLN to CHF and from CHF to PLN (so-called conversion clauses). The need to include such clauses arose from the fact that the amount of the loan expressed in PLN was then converted into CHF and, similarly, the individual loan instalments paid in PLN were converted into CHF, and it was necessary to apply a specific CHF/PLN exchange rate to both of those types of conversion.

22 In principle, the structure of the loan agreement at issue was similar to the agreement of the same bank of 8 April 2008, which was the subject of the judgment of the Court of Justice of 29 April 2021in Case C-19/20, *Bank BPH*. According to paragraph 2[7] of that judgment, the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk), the referring court, found the terms of the agreement of 8 April 2008 to be unfair, in so far as they allowed Bank BPH to receive a margin linked to the transaction in respect of the buying and selling of the currency. Since the method for determining that margin was not specified in the initial loan

agreement, the referring court concluded that that margin created a significant imbalance to the detriment of the consumer. However, the content of the two agreements differs in one detail. In the agreement at issue in Case C-19/20, the way in which the bank's margin was determined was not specified at all. By contrast, in the 2009 agreement the manner in which the bank's margin was determined was set out Paragraph 17(4), which provided that the margin was the arithmetic mean of the buying/selling rates applied to retail transactions by five banks on the last working day of the month preceding the period during which the calculated margins applied. The referring court is uncertain whether that contractual term can be regarded as unfair within the meaning of Article 3(1) of Directive 93/13. In this regard, the referring court has in mind that, according to settled case-law, the jurisdiction of the Court extends to the interpretation of the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, and in particular when examining whether a term is unfair within the meaning of Article 3(1) of that directive, it being for that national court to determine whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court of Justice must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (judgment of the Court of Justice of 10 June 2021, C-776/19 to C-782/19, *BNP Paribas Personal Finance*, paragraph 92). The referring court therefore requests the Court of Justice to provide such guidance.

23 In particular, the referring court considers whether it can justifiably be held that the method in question for determining the bank's margin is precise when it sets out (as in Paragraph 17(4) of the 2009 agreement) how this margin is calculated. Moreover, formulating the methodology for determining the margin in such a way appears to eliminate any freedom and decision-making ability on the part of the bank in that respect. The five banks referred to in Paragraph 17(4) of the agreement were the largest commercial banks in Poland in 2009, and none of the evidence submitted in the case shows that GE Money Bank S.A. was in a position to influence the decisions of any of those banks or that it was linked with them in terms of capital or personnel. On the other hand, the possibility cannot be ruled out that the five named banks may have agreed between them the level of foreign exchange rates to be applied, or may have set those rates at such a level that they were unfavourable to consumers.

24 With regard to Question 5, the Court of Justice held, in its judgment of 26 March 2019 [in *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250], that Articles 6 and 7 of Directive 93/13 preclude a term that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where that removal would be tantamount to revising the content of that term by altering its substance (judgment of the Court of Justice of 26 March 2019, C-70/17 and C-179/17, *Bankia*, paragraph 64). In its judgment of 29 April 2021 [in *Bank BPH*, C-19/20, EU:C:2021:341], the Court of Justice upheld that position and stated that 'it is only if the element of the indexation term in the mortgage loan at issue in the main proceedings relating to Bank BPH's

margin consisted of a contractual obligation distinct from the other contractual terms, capable of being the subject of an individual examination of its unfairness, that the national court could remove it.' In conclusion, the Court of Justice ruled that Articles 6(1) and 7(1) of Directive 93/13 of Directive 93/13 do not preclude the national court from removing only the unfair element of a term in a contract where the deterrent objective pursued by that directive is ensured by national legislative provisions governing the use of that term, provided that that element consists of a separate contractual obligation, capable of being subject to an individual examination as to its unfair nature, and do preclude the referring court from removing only the unfair element of a term in a contract where such removal would amount to revising the content of that term by altering its substance (judgment of the Court of Justice of 29 April 2021, C-19/20, *Bank BPH*, paragraphs 70, 71, and 80). The Court of Justice also upheld that position in its judgment of 8 September 2022 and held that a contractual term requiring the bank's consent to make CHF-denominated loan instalments directly in that currency does not constitute a separate contractual obligation (see judgment of the Court of Justice of 8 September 2022, C-80/21 to C-82/21, *DBP*, paragraphs 62 to 64).

25 It follows from the foregoing case-law that it is for the referring court to assess whether those parts of the terms of a CHF-indexed loan agreement which provide that the average NBP rate is to be reduced by a buying margin or increased by a selling margin are separate contractual obligations in nature. In the view of the referring court, the issue is essentially an assessment of those parts of Paragraph 17(2) and (3) of the agreement which read 'minus the buying margin determined by a decision of the bank' (Paragraph 17(2)) and 'plus the selling margin determined by a decision of the bank' (Paragraph 17(3)). In its judgment of [2]9 April 2021 [in Case C-19/20], the Court of Justice found that such an assessment remains within the jurisdiction of the national courts, but the case-law of the Polish courts on that assessment still differs.

26 The most serious concerns as regards consistency with the objectives of Directive 93/13 are raised by the assessment that the parts of the contractual terms which read 'minus the buying margin determined by a decision of the bank' and 'plus the selling margin determined by a decision of the bank' constitute separate contractual obligations which may be subject to an individual examination of their unfair nature, as referred to in paragraph 80 of the judgment of the Court of Justice of 29 April 2021, in Case C-19/20. It appears that since the parts of the terms in question only provide for modification of the National Bank of Poland's average rate, this demonstrates their accessory nature and that they therefore do not exist in isolation, separate from the rest of the contractual terms.

27 Furthermore, there are concerns as to the assessment whether the outcome of the review of the contractual terms as set out in the judgment of the Sąd Najwyższy of 1 June 2022, II CSKP 364/22, remains compatible with Article 7(1) of Directive 93/13 and the principle of effectiveness. The Sąd Najwyższy concluded that the defendant bank's loan agreement is valid and should remain in force, with the

only modification being that the average rates of the National Bank of Poland, unmodified by the defendant bank's margin, should apply to the exchange rate conversions. This implies minimal interference with the content of the agreement and an obligation on the bank to reimburse only a small part of the payments made to the borrower, equivalent to the exchange rate spread that was applied. On the other hand, the referring court is uncertain whether an effect of this kind pursues the objectives of Directive 93/13, including in particular the 'deterrent objective' referred to in paragraph 80 of the judgment of the Court of Justice of 29 April 2021 in Case C-19/20. The interpretation put forward appears to seek a similar result to that of altering the substance of an unfair contractual term, and that, as the Court of Justice has noted, 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 (see, to that effect, the order in [Case C-76/10] *Pohotovost'*, paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted 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' (judgment of the Court of Justice of 14 June 2012, C-618/10, *Banco Español de Credito*, paragraph 69).

28 With regard to Question 6, the Court of Justice has held that it is for the national court to indicate to the parties, in the context of national procedural rules and in the light of the principle of equity in civil proceedings, objectively and exhaustively the legal consequences which the removal of the unfair term may entail, irrespective of whether or not they are represented by a professional representative (judgment of the Court of Justice of 29 April 2021, C-19/20, *Bank BPH*, paragraphs 97 and 99). In this context, the referring court seeks guidance from the Court of Justice as to how the above obligation to provide information as to how 'the legal consequences which the removal of the unfair term may entail' should be understood, that is to say, how detailed the information about the consequences of the removal of the unfair term should be. This issue is not governed at all by Polish law and therefore comes within the scope of EU law.

29 In the context of the basic issues relating to the substantive-law and procedural consequences of the declaration of invalidity of a loan agreement containing unfair contractual terms, such as the loan agreement in question, it is possible to note, for example, the obligation of the parties to return to each other the payments made on the basis thereof (Article 405 of the Civil Code, in conjunction with Article 410(1) thereof) and it is possible to seek judicial adjustment of the payments, which means that those payments have to be returned in amounts higher than the nominal amounts (Article 358^1(3) of the Civil Code). Once the applicant has been called upon by the bank to pay, the latter will also be able to demand the payment of statutory default interest from him (Article 481(1) of the Civil Code). If the borrower fails to return to the bank the equivalent of the loan principal, the borrower could be sued by the bank for that payment, in which case the borrower would also be obliged to reimburse the bank for the legal costs incurred by the latter (Article 98(1) of the Code of Civil Procedure) and interest

on those costs (Article 98(11) of the Code of Civil Procedure) [together with any legal representation costs and, if applicable, also the costs of enforcement proceedings]. In addition, during the course of the proceedings, the parties may raise the pleas in law provided for in law and make applications, such as a plea of set-off (Article 203^1(1) of the Code of Civil Procedure), an application to make the payment awarded in instalments (Article 322 of the Code of Civil Procedure), or a plea of retention. The parties may also claim remuneration for non-contractual use of the principal. Pursuit of the parties' claims in court is not the only possible way of realising them; the parties may reach a settlement (Article 917 of the Civil Code), including a settlement in court proceedings.

30 The need for the consumer to be familiarised with the above information in court proceedings would entail serious difficulties and, in particular, would risk disrupting proceedings and could result in the case not being heard within a reasonable time. Furthermore, it raises concerns as to whether a consumer without legal training would actually be able to assimilate and fully understand such a substantial amount of information all at once.

31 The referring court notes that in the current practice of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) a warning with the following content is most frequently sent to consumers: 'Terms of an agreement concerning conversions of the amount of the loan into Swiss francs and the individual instalments into złotys are not permitted (unfair). Once they have been removed, the agreement could not be performed further and the Court will declare it invalid. This means that the agreement will be treated as if it had never been concluded. If the agreement is declared invalid, the parties are obliged to return to each other the payments made, and thus the bank is obliged to return the instalments paid and the borrower is obliged to return the loan principal paid to him or her. In addition, the parties may raise a plea of retention, which means that the borrower will have his or her payment returned only after the principal paid to him or her has been returned. The parties may also raise a plea of set-off, in which case only the difference between the parties' payments will remain to be recovered. The parties may raise further claims relating to the invalidity of the agreement. In particular, an action for "remuneration for the use of principal" is possible. Cases of this kind are already pending before the courts, but final judgments have yet to be given. In addition, a question has been referred to the Court of Justice of the European Union as to whether that type of claim is available to the parties. The borrower can prevent the agreement and its effects from becoming invalid by agreeing to the application of those unlawful clauses already from the time at which the agreement was concluded. However, giving such consent means that applications made in the action will be considered unfounded (the borrower will lose the case).' A warning to this effect would appear to be sufficient, but the referring court is asking the Court of Justice for guidance in that regard. Answering this question is relevant to assessing whether the warning given by the court to date has been sufficient.