Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

15 June 2023 (*)

(Reference for a preliminary ruling – Unfair terms in consumer contracts – Directive 93/13/EEC – Article 6(1) and Article 7(1) – Mortgage loan indexed to a foreign currency – Conversion clauses – Determination of the exchange rate between that foreign currency and the national currency – Effects of a finding that a clause is unfair – Effects of the annulment of a contract in its entirety – Possibility of asserting claims that go beyond the reimbursement of the amounts agreed in the contract and the payment of default interest – Damage incurred by the consumer – Unavailability of the amount of the monthly instalments paid to the bank – Damage incurred by the bank – Unavailability of the amount of the capital paid to the consumer – Deterrent effect of the prohibition on unfair terms – Effective protection of the consumer – Judicial interpretation of national legislation)

In Case C-520/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court, Warsaw City Centre, Warsaw, Poland), made by decision of 12 August 2021, received at the Court on 24 August 2021, in the proceedings

Arkadiusz Szcześniak

v

Bank M. SA,

intervening parties:

Rzecznik Praw Obywatelskich,

Rzecznik Finansowy,

Prokurator Prokuratury Rejonowej Warszawa-Śródmieście w Warszawie,

Przewodniczący Komisji Nadzoru Finansowego,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, L.S. Rossi, J.-C. Bonichot, S. Rodin (Rapporteur) and O. Spineanu-Matei, Judges,

Advocate General: A.M. Collins,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 12 October 2022,

after considering the observations submitted on behalf of:

– Arkadiusz Szcześniak, by R. Górski and P. Pląska, radcowie prawni,

– Bank M. SA, by A. Cudna-Wagner and G. Marzec, radcowie prawni, and B. Miąskiewicz and M. Minkiewicz, adwokaci,

– the Rzecznik Praw Obywatelskich, by M. Taborowski, acting as Zastępca Rzecznika Praw Obywatelskich, B. Wojciechowska, radca prawny, and G. Heleniak, adwokat,

– the Rzecznik Finansowy, by B. Pretkiel, acting as the Rzecznik Finansowy, and by P. Tronowska and M. Obroślak, radcowie prawni,

– the Prokurator Prokuratury Rejonowej Warszawa – Śródmieście w Warszawie, by M. Dejak, prokurator delegowany do Prokuratury Regionalnej w Warszawie, and M. Dubowski, Prokurator Okręgowy w Warszawie,

– the Przewodniczący Komisji Nadzoru Finansowego, by J. Jastrzębski, Chair of the Board of the Financial Supervision Authority, K. Liberadzki and A. Tupaj-Cholewa, radca prawny

– the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,

– the Portuguese Government, by P. Barros da Costa, C. Chambel Alves, A. Cunha and S. Fernandes, acting as Agents,

– the European Commission, by N. Ruiz García and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and the principles of effectiveness, legal certainty and proportionality.

2 The request has been made in proceedings between Arkadiusz Szcześniak (‘A.S.’) and Bank M. SA, concerning an action for recovery of a debt which results from the use of funds derived

from a mortgage loan agreement that had to be annulled on the ground that that agreement cannot continue to exist after the removal of the unfair terms.

Legal context

European Union law

3 The 10th and 24th recitals of Directive 93/13 state:

‘Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; …

…

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts’

4 Article 6(1) of that directive is worded as follows:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

5 Article 7(1) of that directive provides:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

Polish law

6 Article 5 of the ustawa – Kodeks cywilny (Law on the Civil Code), of 23 April 1964 (Dz. U. of 1964, No 16), in the version applicable to the dispute in the main proceedings (‘the Civil Code’), provides:

‘A right may not be exercised in a manner which would be contrary to its social and economic purpose or to the principles of society. Any such act or omission by the rightholder shall not be treated as an exercise of the right and shall not be protected.’

7 Article 222(1) of that code provides:

‘An owner may require the person who is actually in possession of an object belonging to him to return it to him, unless that person has a right enforceable against the owner to be in possession of the property.’

8 According to Article 358^{1}(1) to (4) of that code:

‘1. Unless specifically provided otherwise, where an obligation relates to a sum of money from its inception, performance is effected by payment of the nominal value.

2. The parties may stipulate in the contract that the amount of the monetary consideration shall be determined by reference to a unit of value other than money.

3. In the event of a substantial change in the purchasing power of the currency after the obligation has arisen, the court may, after taking into account the interests of the parties and in accordance with the rules of society, alter the amount or manner of provision of the monetary consideration, even if it has been fixed in a court decision or in the contract.

4. The seller or supplier may not require a change in the amount of the monetary consideration or in the manner in which it is provided, if it is related to the operation of his business.'

9 Article 361(1) and (2) of that code state:

'1. The person required to pay compensation shall be liable only for the normal consequences of the act or omission giving rise to the damage.

2. Within the limits defined above, unless otherwise provided by law or contractual term, compensation for damage shall cover the losses suffered by the injured party and the gains that that party would have made in the absence of the damage.'

10 Article 385^1(1) and (2) of the Civil Code is worded as follows:

'1. 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 terms). This shall not apply to terms setting out the principal performances to be rendered by the parties, including those relating to price or remuneration, so long as they are worded clearly.

2. 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.'

11 Article 405 of that code provides:

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

12 Article 410(1) and (2) of that code state:

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

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

The dispute in the main proceedings and the question referred for a preliminary ruling

13 On 25 July 2008, A.S. and his wife E.S. concluded a 336-month mortgage loan contract with Bank M. for an amount of 329 707.24 Polish zlotys (PLN) (approximately EUR 73 000), together

with interest at a variable rate (‘the mortgage loan agreement’). The terms of that agreement were not individually negotiated. The loan was indexed to the Swiss franc (CHF), the agreement providing that the monthly loan instalments were to be paid in Polish zlotys after conversion using the Swiss franc’s selling rate in accordance with the table of foreign currency rates applied by Bank M. on the date of payment of each monthly instalment. Following the conclusion of an amendment to that agreement, on 6 September 2011, A.S. and E.S. were given the opportunity to pay the monthly instalments of that loan directly in Swiss francs.

14 By an action brought on 31 May 2021, A.S. sought payment from Bank M. of PLN 3 660.76 (approximately EUR 800), together with default interest at the statutory rate from 8 June 2021 until the date of payment. In support of his action, A.S. claimed that the mortgage loan agreement contains unfair terms rendering it invalid, with the result that Bank M. had received the monthly loan instalments without a legal basis.

15 According to A.S., by using, from 1 October 2011 to 31 December 2020, the amount of PLN 7 769.06 (approximately EUR 1 700), corresponding to the monthly instalments paid during the period from June 2011 to September 2011, Bank M. made a gain of PLN 7 321.51 (approximately EUR 1 600). Consequently, A.S. claimed from Bank M. payment of half of that amount, namely PLN 3 660.76 (approximately EUR 800), the other half being paid to his wife E.S., who is not a party to the main proceedings.

16 In its response, lodged on 1 July 2021, Bank M. contended that A.S.’s action should be dismissed, claiming that the mortgage loan agreement need not be annulled in so far as it did not contain unfair terms and that, in any event, if that agreement were to be annulled, it would be Bank M. alone and not A.S. which would be in a position to claim payment of a debt in respect of the use of the capital without legal basis.

17 The Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (District Court, Warsaw City Centre, Warsaw), which is the referring court, observes that A.S. disputes the terms in Article 2(2) and Article 7(1) of the mortgage loan agreement, according to which the conversion of the Swiss francs into Polish zlotys and the Polish zlotys into Swiss francs, in respect of the loan principal and monthly instalments, is carried out using the exchange rate determined by Bank M. (‘conversion clauses’).

18 That court explains, first, that conversion clauses such as those at issue in the dispute in the main proceedings are uniformly regarded by the Polish courts as unlawful clauses and that they have been entered in the register of unlawful clauses maintained by the President of the Urząd Ochrony Konkurencji i Konsumentów (Office of Competition and Consumer Protection, Poland).

19 Second, the referring court notes that the national case-law is not yet unanimous on the question of the effects of the presence of such unfair conversion clauses in a mortgage loan agreement. However, since the judgment in *Dziubak* (C-260/18, EU:C:2019:819), delivered on 3 October 2019, the argument that the inclusion of such clauses in a loan agreement renders that agreement invalid clearly prevails in national case-law.

20 As regards the consequences of the annulment of a contract under national law, the referring court states that a contract declared invalid is regarded as never having been concluded (*ex tunc* invalidity). Where the parties have performed certain services under that contract, they may claim reimbursement as undue performance.

21 Specifically, the referring court explains that, on one hand, the bank may require the borrower to repay the equivalent of the principal of the loan granted to him or her and, on the other hand, the borrower may claim repayment from the bank of the equivalent of the monthly loan instalments paid and the expenses received by the bank. That court states that each party may also claim payment of default interest at the statutory rate from the date on which notice is served.

22 However, the referring court points out that the national case-law is not uniform as regards the issue whether the parties to an invalid loan agreement may claim, in addition to payment of the amounts listed in paragraph 21 above, payment of other amounts on account of the use of funds over a certain period without any legal basis. The legal grounds most often invoked by the parties in support of such claims are said to be unjust enrichment and undue performance.

23 According to that court, the Court of Justice has not yet ruled, in the light of Directive 93/13, on the possibility for the parties to a loan agreement declared invalid to claim reimbursement of amounts exceeding the amounts paid by them respectively under that agreement.

24 The referring court takes the view that no claim on the part of the bank, beyond that of the reimbursement of the capital paid to the consumer (and, as appropriate, default interest at the statutory rate as of the service of notice), can be accepted if the objectives pursued by Directive 92/13 are not to be compromised. According to that court, since the invalidity of the loan agreement results from the conduct of the bank, which made use of unfair terms, it is necessary to prevent the bank obtaining a benefit from its conduct, which is contrary not only to Directive 93/13 but also to the requirements of good faith and morality. The granting of a benefit to sellers or suppliers who have used unfair terms would also run counter to the need to preserve the deterrent effect of the prohibition of such terms laid down in Directive 93/13.

25 Thus, according to the referring court, to accept such a solution would result in a consumer, who has become aware of the existence of an unfair term, preferring to continue to perform the contract rather than to assert his or her rights, in so far as the invalidity of the contract could expose him or her to adverse financial consequences such as the payment of remuneration in respect of the use of the capital.

26 On the other hand, the referring court observes that the possibility for the consumer to demand payment of amounts exceeding the monthly instalments which he or she has paid to the bank and, as appropriate, of default interest at the statutory rate from the time when notice is served, of fees, of commissions and of insurance premiums, does not appear to be contrary to the principle of effectiveness.

27 Nevertheless, according to that court, to allow consumers to claim from sellers or suppliers the payment of such amounts, in respect of the use without a legal basis of the amount of the monthly instalments, would amount to imposing a disproportionate penalty on sellers or suppliers.

28 Furthermore, the national court considers that the possible legal bases for such claims by consumers are of a very similar nature, so that there is no justification for creating the possibility of asserting so many claims simultaneously, as otherwise the principle of proportionality would be infringed. According to that court, to grant such a possibility would also conflict with the principle of legal certainty, which must be understood as meaning that, if a loan agreement is declared invalid in its entirety, both parties are obliged to repay all the monetary consideration provided in performance of that agreement, to the exclusion of any other claim.

29 In those circumstances, the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (District Court, Warsaw City Centre, Warsaw) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 6(1) and Article 7(1) of [Directive 93/13] and the principles of effectiveness, legal certainty and proportionality be interpreted as precluding a judicial interpretation of national legislation pursuant to which, where a loan agreement entered into by and between a bank and a consumer is found to have been null and void from the outset because it contains unfair terms, the parties, in addition to the reimbursement of the sums paid in the performance of that agreement (the bank – loan principal, and the consumer – monthly payments, fees, commissions and insurance premiums) and statutory interest for late payment from the date of the demand for payment, may pursue any other claims (including remuneration, compensation, reimbursement of expenses or indexation of the amounts paid) on the grounds that:

1. the person making the monetary consideration was temporarily deprived of the use of his or her money, so that he or she has lost the opportunity to invest it and thus to make a profit;

2. the person making the monetary consideration incurred the costs of servicing the loan agreement and of transferring the money to the other party;

3. the recipient of the monetary consideration had the benefit of being able to temporarily use someone else’s money, including being able to invest it and thus to make a profit;

4. the recipient of the monetary consideration was temporarily able to use someone else’s money free of charge, which would have been impossible under market conditions;

5. the purchasing power of the money has decreased with time, which translates to a loss in real terms for the person making the monetary consideration;

6. the temporary provision of money may be treated as rendering a service for which the person making the monetary consideration has not received remuneration?’

The request that the oral part of the procedure be reopened

30 Following the delivery of the Advocate General’s Opinion, Bank M., by documents lodged at the Court Registry on 10 March 2023 and 26 April 2023, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

31 In support of its request, Bank M. submits that, in the first place, the Opinion of the Advocate General and, in particular, his observations in points 17, 19, 28, 29, 61, 62 and 66, do not make it possible to understand the scope of the claims of the seller or supplier and the consumer, which prevents the principles of proportionality and effectiveness from being applied correctly.

32 In the second place, Bank M. raises the issue of whether consumers who have taken out a mortgage loan in Poland would be placed in a more favourable situation than those who have taken out such a loan in another Member State, in the event that they obtain the right to pursue, in addition to the repayment of the monthly instalments and expenses, other claims with respect to the bank.

33 In the third place, Bank M. criticises certain observations made in the Advocate General’s Opinion.

34 In the fourth and last place, Bank M. submits that the oral procedure must be reopened in order to enable the Court to clarify the effect of the judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)* (C-100/21, EU:C:2023:229), on the case at issue in the main proceedings.

35 It must be noted in that regard, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 43 and the case-law cited).

36 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 44 and the case-law cited).

37 It is true that, in accordance with Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information, or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the interested persons as referred to in Article 23 of the Statute of the Court of Justice of the European Union.

38 However, in this instance, the Court notes that it has all the information necessary to give a ruling and that the present case does not have to be decided on the basis of arguments which have not been debated between the interested persons. Lastly, the request that the oral part of the procedure be reopened referred to in paragraph 30 above does not reveal any new fact which is of such a nature as to be a decisive factor for the decision which the Court is called upon to give in this case.

39 In those circumstances, the Court considers, after hearing the Advocate General, that there is no need to order that the oral part of the procedure be reopened.

Consideration of the question referred

Admissibility of the question referred and the jurisdiction of the Court to answer it

40 In its request for a preliminary ruling, the referring court raised the issue of the admissibility of the question which it referred to the Court, since that question relates both to the claims of the consumer and to those of the bank, in the event that a mortgage loan agreement is declared invalid, where that court is seised only of an action brought by the consumer.

41 It must be recalled that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute

has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 13 October 2022, *Baltijas Starptautiskā Akadēmija and Stockholm School of Economics in Riga*, C-164/21 and C-318/21, EU:C:2022:785, paragraph 32 and the case-law cited).

42 Questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the Court does not have before it the legal or factual material necessary to give a useful answer to the questions submitted to it or where the problem is hypothetical (judgment of 13 October 2022, *Baltijas Starptautiskā Akadēmija and Stockholm School of Economics in Riga*, C-164/21 and C-318/21, EU:C:2022:785, paragraph 33 and the case-law cited).

43 In the present case, in so far as part of the question referred for a preliminary ruling concerns the seller or supplier's claims against the consumer, even though, in the present case, no claim to that effect had been made by Bank M. on the date on which the request for a preliminary ruling was adopted, the referring court considers that the admissibility of that part of the question referred for a preliminary ruling is justified, in the first place, by the fact that the *ex tunc* annulment of a contract entails the restitution of undue performance rendered by each of the two contracting parties. Therefore, it argues, the answer to the whole of the question referred for a preliminary ruling is necessary for that court to rule on any pleas which the seller or supplier might raise in order to rebut the consumer's claim.

44 In the second place, that court informs the Court that, according to the interpretation which prevails in national case-law, if the two contracting parties have effected undue performance of the same nature and their performances arise out of the same legal relationship, only the party who received the performance of the greater value may be regarded as having been unjustifiably enriched. Consequently, in the case in the main proceedings, that court would, in any event, be obliged to analyse the merits of the claims of the two contracting parties.

45 In the third and last place, the referring court considers that the failure to answer the question referred as a whole would undermine the deterrent effect of Directive 93/13 inasmuch as the banks active in Poland publicly threaten consumers with serious consequences if they choose to pursue the invalidity of their mortgage loan agreement, on account of the fact that those sellers or suppliers will assert claims against consumers relating to the non-contractual use of the capital by those consumers.

46 Furthermore, at the hearing which took place before the Court on 12 October 2022, Bank M. informed the Court that it had initiated separate proceedings seeking compensation from A.S. for the non-contractual use of the capital loaned. Those proceedings would, however, be stayed pending the outcome of the present proceedings before the Court of Justice.

47 Here, as the Advocate General observed in points 31 to 33 of his Opinion, the present case does not fall within any of the situations listed in paragraph 42 above in which the presumption of relevance of a question referred for a preliminary ruling may be rebutted. It is apparent from the explanations provided to the Court, summarised in paragraphs 43 to 46 above, that the interpretation of EU law sought, in so far as it relates to the bank's claims for compensation going beyond repayment of the loan principal in the event of the invalidity of a mortgage loan agreement, has a

connection with the subject matter of the dispute in the main proceedings since the referring court may be required, if necessary of its own motion, to examine such claims. Furthermore, the Court has before it the legal and factual material necessary to give a useful answer to the question referred. Consequently, the question referred for a preliminary ruling is admissible.

48 Furthermore, 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 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 97).

49 Such information is, in particular, all the more important where non-application of the unfair term is liable to lead to the invalidation of the contract in its entirety, potentially exposing the consumer to claims for restitution (see, to that effect, judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 98).

50 In the present case, it is apparent from the file before the Court that the dispute before the referring court relates specifically to the legal consequences which the annulment of the mortgage loan agreement in its entirety may entail, because that agreement cannot continue in existence after the unfair terms have been removed, with the result that the answer to the part of the question referred which relates to the seller or supplier's claims against the consumer is necessary in order to enable the referring court to fulfil its obligation to inform A.S. of such consequences.

51 In addition, Bank M. stated that the Court does not have jurisdiction to answer that question inasmuch as it concerns the effects of the annulment of a contract, which are governed not by Directive 93/13 but by various provisions of national law whose interpretation falls within the exclusive jurisdiction of the national courts.

52 In this respect, while it is common ground that it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of such provisions is correct, as such an interpretation falls within the exclusive jurisdiction of the national courts (see, to that effect, judgment of 3 July 2019, *UniCredit Leasing*, C-242/18, EU:C:2019:558, paragraph 47 and the case-law cited), the fact remains, as the Advocate General noted in point 35 of his Opinion, that the question referred does not concern the interpretation of Polish law but the interpretation of Articles 6(1) and 7(1) of Directive 93/13 and of the principles of effectiveness, legal certainty and proportionality.

53 Consequently, the Court has jurisdiction to answer the question referred and the question referred is admissible.

Substance

– *Preliminary observations*

54 According to settled case-law, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (judgment of 26 March 2019, *Abanca Corporación Bancaria et Bankia,* C-70/17 and C-179/17, EU:C:2019:250, paragraph 49 and the case-law cited).

55 As regards such a position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair. In that context, it is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 50 and the case-law cited).

56 Given the nature and significance of the public interest constituted by the protection of consumers, Directive 93/13, as is apparent from Article 7(1) thereof, read in conjunction with its 24th recital, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. To do this, it is for the national courts to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 36 and the case-law cited, and, to that effect, judgment of 8 September 2022, *D.B.P. and Others (Mortgage loans denominated in foreign currency)*, C-80/21 to C-82/21, EU:C:2022:646, paragraph 58 and the case-law cited).

57 A contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in if that term had not existed (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 61).

58 In that regard, the Court has stated that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts, in so far as the absence of such restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that directive, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 62 and 63).

59 It should also be recalled that Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms are not to be binding on the consumer, ‘as provided for under their national law’ (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 64 and the case-law cited).

60 However, the regulation by national law of the protection guaranteed to consumers by Directive 93/13 may not alter the scope and, therefore, the substance of that protection and thus affect the strengthening of the effectiveness of that protection by the adoption of uniform rules of law in respect of unfair terms, which was the intention of the EU legislature, as stated in the 10th recital of Directive 93/13 (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 65).

61 Consequently, while it is for the Member States, by means of their national legislation, to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced, the fact remains that such a finding must allow the

restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 66).

62 It is in the light of those observations that the question referred for a preliminary ruling must be examined.

– *Consideration of the question referred*

63 By its question, the referring court asks, in essence, whether, in the context of the annulment in its entirety of a mortgage loan agreement on the ground that it cannot continue in existence after the excision of the unfair terms, Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as:

– precluding a judicial interpretation of national law according to which the consumer is entitled to seek compensation from the credit institution going beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served; and

– precluding a judicial interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served.

64 It must be stated that Directive 93/13 does not expressly govern the consequences of the invalidity of a contract concluded between a seller or supplier and a consumer after the excision of the unfair terms in that contract, as the Advocate General observed in point 44 of his Opinion. Accordingly, it is for the Member States to determine the consequences of such a finding, it being understood that the rules which they lay down in that regard must be compatible with EU law and, in particular, with the objectives pursued by that directive.

65 Furthermore, as stated in paragraph 57 above, a contractual term held to be 'unfair' must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in if that term had not existed by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term (see, to that effect, judgment of 31 March 2022, *Lombard Lízing*, C-472/20, EU:C:2022:242, paragraphs 50 and 55 and the case-law cited).

66 In so far as, as is apparent from the case-law cited in paragraph 58 above, the absence of such an effect would be liable to undermine the deterrent effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that directive, seeks to attach to a finding that the terms in contracts concluded with consumers by a seller or supplier are unfair, a similar restitutory effect must be recognised where the unfairness of terms of a contract concluded between a consumer and a seller or supplier results not only in the invalidity of those terms, but also in the invalidity of that contract in its entirety.

67 Furthermore, it is apparent from Article 7(1) of Directive 93/13, read in conjunction with the 24th recital of that directive, that an objective of that directive is also to deter sellers or suppliers from using unfair terms in consumer contracts.

68 It follows that the compatibility with EU law of national rules governing the practical consequences of the invalidity of a mortgage loan agreement on account of the presence of unfair terms depends on whether those rules, first, make it possible to restore, in law and in fact, the situation which the consumer would have been in had that contract not existed and, second, do not undermine the deterrent effect sought by Directive 93/13.

69 In the present case, as regards, in the first place, the possibility for a consumer, in the event of annulment of a mortgage loan agreement, to assert claims that go beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that agreement together with, where applicable, payment of default interest at the statutory rate from the date on which notice is served, it does not appear, subject to determination by the referring court, that such a possibility undermines the objectives referred to in paragraph 68 above.

70 In that regard, it is for the referring court to examine, in the light of all the circumstances of the case before it, whether the relevant national rules enable the restoration in law and in fact of the situation which the consumer would have been in had that contract not existed.

71 As regards the deterrent effect sought by Article 7(1) of Directive 93/13, it should be noted that the possibility referred to in paragraph 69 above may help to deter sellers or suppliers from including unfair terms in contracts concluded with consumers inasmuch as the inclusion of such terms leading to the nullity of a contract in its entirety could lead to financial consequences exceeding the restitution of the amounts paid by the consumer and, where appropriate, the payment of default interest.

72 It should be added that the adoption, by the competent court, of measures such as those referred to in paragraph 69 above cannot be regarded as contrary to the principle of legal certainty, since it constitutes the practical implementation of the prohibition of unfair terms provided for by Directive 93/13.

73 In addition, the principle of proportionality, which is a general principle of EU law, requires that the national legislation implementing that law does not go beyond what is necessary to achieve the objectives pursued (see, to that effect, judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 74 and of 8 December 2022, *BTA Baltic Insurance Company*, C-769/21, EU:C:2022:973, paragraph 34). Consequently, it is for the referring court to assess, in the light of all the facts of the dispute in the main proceedings, whether and to what extent upholding the consumer's claims, such as those referred to in paragraph 69 above, goes beyond what is necessary to achieve the objectives referred to in paragraph 68 above.

74 It follows that, in the context of the annulment in its entirety of a mortgage loan agreement on the ground that it cannot continue in existence after the removal of the unfair terms contained therein, Directive 93/13 does not preclude an interpretation of national law according to which the consumer has the right to seek compensation from the credit institution going beyond reimbursement of the monthly instalments and expenses paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served, provided that the objectives of Directive 93/13 and the principle of proportionality are observed.

75 In the second place, as regards the seller or supplier's claims against the consumer, it should be noted that, like the possibility for a consumer to assert claims resulting from the invalidity of the mortgage loan agreement, such claims could be accepted only if they do not undermine the objectives referred to in paragraph 68 above.

76 To grant a credit institution the right to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement and, as the case may be, the payment of default interest, would be liable to call into question the deterrent effect sought by Directive 93/13, as the Advocate General observed in point 60 of his Opinion.

77 The Court has already had the opportunity to state, in another context, that if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would 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 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 69).

78 Similarly, an interpretation of national law to the effect that the credit institution would have the right to seek compensation from the consumer going beyond repayment of the capital paid in respect of the performance of that agreement and, therefore, to receive remuneration for the use of that capital by the consumer, would contribute to eliminating the deterrent effect on sellers or suppliers of the annulment of that agreement.

79 Moreover, the effectiveness of the protection conferred on consumers by Directive 93/13 would be undermined if they were, when relying on their rights under that directive, exposed to the risk of having to pay such compensation. As the Advocate General stated in point 61 of his Opinion, such an interpretation would risk creating situations in which it would be more advantageous for the consumer to continue the performance of the contract containing an unfair term rather than exercising his or her rights under that directive.

80 That reasoning cannot be called into question by Bank M.'s arguments that, in the absence of the possibility for sellers or suppliers to seek compensation going beyond repayment of the capital paid in respect of the performance of that contract and, as the case may be, the payment of default interest, consumers would obtain a loan 'free of charge'. Nor can it be called into question by the arguments of Bank M. and of the Przewodniczący Komisji Nadzoru Finansowego (Chair of the Board of the Financial Supervision Authority, Poland) that the stability of the financial markets would be threatened if banks were not allowed to seek such compensation from consumers.

81 In that regard, in the first place, in accordance with the principle *nemo auditur propriam turpitudinem allegans* (no one may rely on his or her own wrongdoing), a party cannot be allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct.

82 In the present case, as the Advocate General observed, in essence, in point 58 of his Opinion, any annulment of the mortgage loan agreement is a consequence of Bank M.'s use of unfair terms. Accordingly, it cannot be compensated for the loss of a profit similar to that which it hoped to derive from that contract.

83 In the second place, as the Advocate General stated in point 63 of his Opinion, the argument relating to the stability of the financial markets is not relevant in the context of the interpretation of Directive 93/13, which is intended to protect consumers. Furthermore, it cannot be accepted that sellers or suppliers may circumvent the objectives pursued by Directive 93/13 on the ground of preserving the stability of the financial markets. Banking institutions are under a duty to organise their activities in in a manner which complies with that directive.

84 Consequently, in the context of the annulment in its entirety of a mortgage loan agreement on the ground that that agreement cannot continue in existence after the removal of the unfair terms contained therein, Directive 93/13 precludes an interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served.

85 In the light of all the foregoing considerations, the answer to the question referred is that, in the context of the annulment in its entirety of a mortgage loan agreement on the ground that it cannot continue in existence after the removal of the unfair terms, Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as:

– not precluding a judicial interpretation of national law according to which the consumer has the right to seek compensation from the credit institution going beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served, provided that the objectives of Directive 93/13 and the principle of proportionality are observed and,

– precluding a judicial interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

In the context of the annulment in its entirety of a mortgage loan agreement on the ground that it cannot continue in existence after the removal of the unfair terms,

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

must be interpreted as:

– **not precluding a judicial interpretation of national law according to which the consumer has the right to seek compensation from the credit institution going beyond reimbursement of the monthly instalments paid and the expenses paid in respect of the performance of that agreement together with the payment of default interest at the statutory**

rate from the date on which notice is served, provided that the objectives of Directive 93/13 and the principle of proportionality are observed and,

– **precluding a judicial interpretation of national law according to which the credit institution is entitled to seek compensation from the consumer going beyond reimbursement of the capital paid in respect of the performance of that agreement together with the payment of default interest at the statutory rate from the date on which notice is served.**

[Signatures]

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* Languages of the case: French and Polish.