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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

18 November 2021 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Mortgage loan agreement indexed to a foreign currency – Contractual term relating to the buying and selling rates of a foreign currency – Requirement of intelligibility and transparency – Powers of the national court)

In Case C-212/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Warszawy-Woli w Warszawie II Wydział Cywilny (District Court for Warszawa-Wola, Second Civil Division, Warsaw, Poland), made by decision of 22 January 2020, received at the Court on 12 May 2020, in the proceedings

M.P.,

B.P.

v

‘A.’ prowadzący działalność za pośrednictwem ‘A.’ S.A.,

intervener:

Rzecznik Praw Obywatelskich,

THE COURT (Seventh Chamber),

composed of I. Ziemele (Rapporteur), President of the Sixth Chamber, acting as President of the Seventh Chamber, P.G. Xuereb and A. Kumin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- M.P. and B.P., by J. Mikołajek, radca prawny, and M. Szymański, adwokat,
- ‘A.’ prowadzący działalność za pośrednictwem ‘A.’ S.A., by M. Bakula, radca prawny,
- the Rzecznik Praw Obywatelskich, by M. Taborowski,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Portuguese Government, by L. Inez Fernandes, M. Queiroz Ribeiro, A. Rodrigues and P. Barros da Costa, acting as Agents,
- the European Commission, by S.L. Kalèda and N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1), Article 4(1) and Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings brought by M.P. and B.P. against the bank ‘A.’ prowadzący działalność za pośrednictwem ‘A.’ S.A. (‘A.’) concerning the repayment arrangements for a mortgage loan agreement indexed to a foreign currency that contains terms alleged to be unfair.

Legal context

European Union law

3 The eighth and twentieth recitals of Directive 93/13 are worded as follows:

‘... the two Community programmes for a consumer protection and information policy ... underlined the importance of safeguarding consumers in the matter of unfair terms of contract; ... this protection ought to be provided by laws and regulations which are either harmonised at Community level or adopted directly at that level;

...

... contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail’.

4 Article 3(1) of that directive provides:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’

5 Article 4 of the directive provides:

‘1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.’

6 Article 5 of Directive 93/13 provides:

‘In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).’

7 Article 6(1) of the directive provides:

‘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.’

8 Article 7(1) of the directive states:

‘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

9 Article 65 of the Kodeks cywilny (Civil Code) is worded as follows:

‘1. A declaration of intent should be interpreted in accordance with the principles of social conduct and with established customs, taking into account the circumstances in which the intent was expressed.

2. Contracts should be examined from the point of view of the parties' common intention and the purpose of the contract rather than relying on the literal wording of the contract.'

10 Article 385¹ of the Civil Code states:

'1. The terms of a contract concluded with a consumer which have not been agreed individually 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 provision shall not apply to terms setting out the principal matters to be performed by the parties, including price or remuneration, so long as they are worded 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.

3. The terms of a contract which are not agreed individually are those over the content of which the consumer had no actual influence. This relates in particular to contractual terms taken from a standard contract proposed to a consumer by a contracting party.

4. The burden of proving that a term has been agreed individually rests with the person relying thereon.'

11 Article 69(2) of the ustawa – Prawo bankowe (Law on banking law) of 29 August 1997 (Dz. U. No 140 of 1997, item 939), in the version in force at the material time, listed the information that had to be included in a loan agreement, such as the amount and currency of the loan (point 2), the rules and period for repayment of the loan (point 4), the amount of the interest rate and the conditions for changing it (point 5), and the conditions governing amendment and termination of the agreement (point 10).

12 The ustawa o zmianie ustawy – Prawo bankowe oraz niektórych innych ustaw (Law amending the Law on banking law) of 29 July 2011 (Dz. U. No 165 of 2011, item 984), which entered into force after the date on which the loan agreement at issue in the main proceedings was concluded, added point 4a to Article 69(2) of the Law on banking law and paragraph 3 to Article 69.

13 Under Article 69(2)(4a) of the Law on banking law as thus amended, the loan agreement must specify, in particular, 'in the case of a loan agreement denominated in, or indexed to, a currency other than the Polish currency, detailed rules laying down the methods for, and dates of, determination of the exchange rate on the basis of which, in particular, the amount of the loan, its tranches, and capital and interest payments are calculated as well as the rules for converting amounts into the currency in which the loan was disbursed or is being repaid'.

14 Article 69(3) of the Law on banking law as amended provides:

'In the case of a loan agreement denominated in, or indexed to, a currency other than the Polish currency, the borrower may make capital and interest payments and repay the loan early, in full or in part, directly in that currency. In this case, the loan agreement shall also set out the rules for opening and maintaining the account in which funds intended for repayment of the loan are accumulated and the rules for making payments using that account.'

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

15 On 16 May 2008, M.P. and B.P. concluded a mortgage loan agreement with A, a bank established in Poland, in an amount of PLN 460 000 (approximately EUR 100 000) that was repayable in 480 monthly instalments. The loan was indexed to a foreign currency, namely the Swiss franc (CHF), and the interest rate corresponded to the LIBOR 3M (CHF) benchmark rate plus a fixed margin of 1.20 percentage points.

16 In the context of their loan application, the borrowers signed a statement to the effect that, while fully aware of the exchange rate risk, they were foregoing the possibility of taking out a loan in Polish zlotys and were choosing to take out a loan indexed to a foreign currency. That statement specified, furthermore, that the borrowers had been informed of the fact that the loan instalments were expressed in that foreign currency and had to be paid in Polish zlotys under the rules set out in the general conditions of the agreement, of which they were aware ('the general conditions').

17 It is apparent from clause 2(2) and (12) of the general conditions that a loan indexed to a foreign currency is a loan the interest rate of which is based on a benchmark rate relating to a currency other than the Polish zloty and the disbursement and repayment of which are effected in Polish zlotys on the basis of the exchange rate of the foreign currency set out in the currency exchange rate table in force at the bank.

18 According to clause 7(4) of the general conditions, funds are released in Polish zlotys at a rate that cannot be lower than the buying rate, under the table in force at the time of their release. The balance of the loan debt is expressed in the foreign currency and calculated at the exchange rate applied to the loan's release.

19 Under clause 9(2) of the general conditions, the loan instalments are expressed in the foreign currency and deducted from the borrower's bank account on the date on which they fall due, in accordance with the selling rate of the Swiss franc set out in the table in force at the bank at the end of the working day preceding the day on which the instalments fall due.

20 On 10 January 2013, M.P. and B.P. concluded with A a rider to the agreement at issue, under which the borrowers would themselves repay the loan in Swiss francs, without having recourse to the exchange transaction carried out by the bank.

21 The effect of the fluctuations in the rate of exchange between the Polish zloty and the Swiss franc was that the difference between the sum repaid by the applicants in the main proceedings in respect of the period from 16 May 2008 to 10 October 2014 and the sum that would have been repaid if the loan had been denominated in Polish zlotys and subject to the applicable interest rate amounted to PLN 30 601.01 (approximately EUR 6 732).

22 Since M.P. and B.P. took the view that the clause indexing the loan to a foreign currency was unfair on the ground that it did not specify the method to be employed by the bank when determining the exchange rate for the currencies, they brought an action seeking an order that A pay them the sum of PLN 50 000 (approximately EUR 10 850).

23 The referring court explains that the parties to the main proceedings are reading the indexation clause of the mortgage loan agreement differently. Whilst, for the bank, that clause provides that the exchange rate for the currency of the loan is to be determined in relation to the market rate, as set out daily in the bank's exchange rate table, the borrowers interpret that clause as providing that the currency's exchange rate is to be set on the basis of an objective rate, such as that set by the Narodowy Bank Polski (National Bank of Poland).

24 According to that court, the indexation clause at issue in the main proceedings displays a certain ambiguity because it is couched in general terms, and therefore the view should be taken that A did not fulfil its information and transparency obligations, as laid down in Article 5 of Directive 93/13.

25 The referring court is uncertain, however, whether, having regard to the duration of the loan agreement, that is to say, 40 years, and to the very mechanism of indexation to a foreign currency, the exchange rate of which changes constantly, Article 5 of Directive 93/13 must nevertheless be interpreted as requiring the bank to draft the indexation clause in such a way as to enable the borrower to determine that rate independently at a given time. Such a level of precision would in practice be impossible to achieve.

26 In that regard, the referring court states that Article 65 of the Civil Code empowers it to seek to ascertain the common intention of the parties to a contract. In the present instance, it suggests that the market value of the foreign indexation currency could be the criterion for setting that currency's exchange rate under the agreement at issue in the main proceedings. It adds that such a solution would ensure a balancing of the rights and obligations of the parties to the agreement.

27 Furthermore, that court observes that, in accordance with the judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164), and of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60), it should be determined whether the contractual clause concerned allocates the rights and obligations in a way that would not have been accepted by the parties in negotiations conducted in good faith.

28 In the light of the circumstances in which the loan agreement at issue in the main proceedings was concluded and performed, first, the referring court does not rule out that the borrowers would have concluded that agreement all the same if they had understood its terms in the same way as the bank.

29 Second, according to the referring court, throughout the period of performance of the agreement, A applied, on the basis of its understanding thereof, the market exchange rates for the currencies and therefore cannot be regarded as having acted in bad faith. It might at most be accused of a degree of indifference, but not of the intention to shape the contractual clause with the objective of harming the consumer by applying foreign currency exchange rates that were arbitrary and detached from market rates.

30 In those circumstances, the Sąd Rejonowy dla Warszawy-Woli w Warszawie II Wydział Cywilny (District Court for Warszawa-Wola, Second Civil Division, Warsaw, Poland) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In the light of Article 3(1), Article 4(1) and Article 5 of [Directive 93/13] and its recitals, pursuant to which contracts must be drafted in plain and intelligible language and doubts must be interpreted in the consumer's favour, must a contractual term setting out the buying and selling rates of a foreign currency in a loan agreement indexed to a foreign currency be worded unequivocally, that is to say, in a manner that enables the borrower/consumer to determine that rate himself or herself on any given day, or, in the light of the type of contract as referred to in Article 4(1) of Directive 93/13, the long-term nature (spanning several decades) of the contract and the fact that the amount in foreign currency is subject to constant changes (may change at any time), is it possible to formulate a more general wording of the contractual term, that is to say, one that refers to the market value of the foreign currency, in a manner which prevents a significant imbalance in the

parties' rights and obligations to the detriment of the consumer within the meaning of Article 3(1) of that directive?

(2) If the answer to the first [question] is in the affirmative, in the light of Article 5 of [Directive 93/13] and its recitals, it is possible to interpret a contractual term concerning the determination by the creditor (bank) of the buying and selling rates of a foreign currency in such a manner as to resolve doubts in the consumer's favour and to assume that the contract determines the buying and selling rates of a foreign currency not in an arbitrary manner, but on free-market terms, especially if both parties had the same understanding of the contractual terms determining the buying and selling rates of the foreign currency or if the borrower/consumer was not interested in the disputed contractual term at the time of conclusion of the contract and during its performance, and was also not familiar with the content of the contract at the time of its conclusion and throughout its duration?'

Consideration of the questions referred

31 As a preliminary point, it is to be noted that, by its first question, the referring court asks, first, whether, in order to meet the requirement of transparency laid down in Article 4(1) and Article 5 of Directive 93/13, a clause providing for indexation to a foreign currency – such as that contained in the mortgage loan agreement at issue in the main proceedings, the term of which is particularly long – must be in plain, intelligible language so as to enable the consumer to determine himself or herself, at any time, that currency's exchange rate as applied by the bank. In that question, the referring court seeks to ascertain, second, whether a reference to the currency's market value is sufficient to safeguard the requirement of transparency laid down by those provisions.

32 In addition, by its second question, the referring court seeks to ascertain whether it is entitled to interpret an indexation clause such as that at issue in the main proceedings as referring to the market value of the foreign currency, in particular where such an interpretation enables the common intention of the parties to be reflected, thereby avoiding the invalidity of that clause.

33 Consequently, in the second part of the first question, the referring court envisages reference to the general concept of market value as a means of ensuring that an indexation clause such as that at issue in the main proceedings is drafted in plain, intelligible language. Furthermore, it is apparent from the second question that, in particular, that reference would result from an interpretation of that contractual provision by the referring court, since it seeks to ascertain whether it is entitled, in the light of the particular circumstances of the dispute in the main proceedings, notably the long duration of the loan agreement and the lack of particular interest displayed by the borrowers when it was being performed, to reformulate the contractual provision at issue in the main proceedings more generally as referring to the market value of the foreign currency.

34 In those circumstances, it is appropriate to answer the first sub-question of the first question and then to examine the second sub-question of the first question together with the second question.

First sub-question of the first question

35 By the first sub-question of the first question, the referring court asks, in essence, whether Article 4(1) and Article 5 of Directive 93/13 must be interpreted as meaning that, in order to be regarded as being drafted in plain, intelligible language for the purpose of those provisions, the clause contained in a loan agreement concluded between a seller or supplier and a consumer that sets the buying and selling prices of the foreign currency to which the loan is indexed must be drafted so as to enable the consumer to determine independently, at any time when the agreement is

being performed, the currency exchange rate applied in order to set the amount of the instalments for repaying the loan.

36 First of all, it should be recalled that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 46 and the case-law cited).

37 In the present instance, whilst it is true that, in the first sub-question of the first question, the referring court makes reference to the requirement that the contractual terms be drafted in plain, intelligible language, as imposed in both Article 4 and Article 5 of Directive 93/13, the main proceedings relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other, within the meaning of Article 4(2) of that directive, with the result that the first sub-question of the first question referred for a preliminary ruling should be understood as relating solely to interpretation of the requirement of transparency referred to in Article 5 of the directive.

38 In that regard, it should be noted that, in any event, it is apparent from the Court's case-law, first, that the requirement for plain, intelligible drafting laid down in Article 5 of Directive 93/13 also applies when a contractual term falls within the scope of Article 4(2) of the directive (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 46) and, second, that the requirement appearing in that provision has the same scope as that referred to in Article 5 of the directive (judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 69).

39 In addition, in accordance with the wording of Article 5 of Directive 93/13, where terms of a contract concluded between a seller or supplier and a consumer are in writing, they 'must always be drafted in plain, intelligible language' and thus comply with the requirement of transparency.

40 Furthermore, as set out in the 20th recital of the directive, the consumer should actually be given an opportunity to examine all the terms of the contract.

41 In that regard, it should be noted that the requirement of transparency of contractual terms cannot be reduced merely to their being formally and grammatically plain and intelligible. As the system of protection introduced by Directive 93/13 is based on the idea that consumers are in a weak position vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, the requirement, laid down by the directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent must be understood in a broad sense (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 63 and the case-law cited).

42 Consequently, the requirement of transparency of contractual terms must be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but also that an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations (judgment of 10 June 2021, *BNP*

Paribas Personal Finance, C-776/19 to C-782/19, EU:C:2021:470, paragraph 64 and the case-law cited).

43 More specifically, the requirement for plain, intelligible drafting requires that, in the case of loan agreements, financial institutions must provide borrowers with sufficient information to enable them to take prudent and well-informed decisions. In particular, that requirement means that a term under which the loan has to be repaid in the same foreign currency as that in which it was taken out must be understood by the consumer both at the formal and grammatical level, and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, must be able not only to recognise the possibility of a rise or fall in the value of the foreign currency to which the loan is indexed but also to assess the potentially significant economic consequences of such a term for his or her financial obligations (order of 22 February 2018, *Lupean*, C-119/17, not published, EU:C:2018:103, paragraph 24 and the case-law cited).

44 Such an interpretation is borne out by the objective of Directive 93/13 which, as is apparent from its eighth recital, is, in particular, consumer protection. In that regard, the Court has already held that information provided before the conclusion of a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he or she wishes to become contractually bound to a seller or supplier by the terms previously drawn up by the latter (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 62 and the case-law cited).

45 In the present instance, according to the documents before the Court, at the time of conclusion of the agreement at issue in the main proceedings the borrowers understood the clause relating to the indexation of the agreement as providing for the buying and selling prices of the indexation currency to be set, for the purpose of calculating the monthly repayments, on the basis of an objectively determined exchange rate, such as that set by the Narodowy Bank Polski (National Bank of Poland).

46 On the other hand, A states that, under clause 9(2) of the general conditions, the buying and selling price of the currency was that indicated in the table in force at the bank and adds that, on the date of conclusion of the agreement at issue in the main proceedings, the laws and regulations in force did not require it to specify all the details of the calculation of the exchange rate applied. A explains that, in practice, the exchange rate was derived from the average currency rates published by the National Bank of Poland in conjunction with the overall situation on the foreign exchange market, the bank's position regarding currencies, and forecasts of rate movements.

47 It is apparent from the order for reference that neither the indexation clause at issue in the main proceedings nor the general conditions specify all the factors taken into account by the bank when setting the exchange rate applied in order to calculate the instalments for repayment of the mortgage loan at issue in the main proceedings.

48 Accordingly, subject to verification by the referring court, the indexation clause at issue in the main proceedings seems to be characterised less by ambiguous wording than by a failure to indicate the method for determining the exchange rate that was applied by A to calculate the repayment instalments.

49 The Court has already held, in respect of a contractual term on the basis of which the seller or supplier sets the amount of the monthly repayments owed by the consumer in accordance with the

selling rate of exchange of the foreign currency applied by that seller or supplier, that it is of fundamental importance for the purpose of compliance with the requirement of transparency to determine whether the loan agreement sets out transparently the reason for and the specific features of the mechanism for converting the foreign currency, and the relationship between that mechanism and the mechanism laid down by other terms of the agreement, so that the consumer is put in a position to understand, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from it (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 73).

50 Consequently, it is for the national court to determine, in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement at issue, whether an average consumer, who is reasonably well informed and reasonably observant and circumspect, may not only be aware of the existence of the variations in exchange rates generally observed on the foreign exchange market, but also assess the potentially significant economic consequences for him or her resulting from the application of the selling rate of exchange for the calculation of the repayments for which he or she will ultimately be liable and, therefore, estimate the total cost of the loan (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraphs 66 and 67 and the case-law cited).

51 It is true, as the referring court points out, that, in the case of a loan agreement indexed to a foreign currency that runs for a period of 40 years, the lender cannot foresee the changes in the economic burden to which the indexation mechanism laid down by that agreement may give rise.

52 In that regard, it should be noted that the question whether a seller or supplier has complied with the requirement of transparency envisaged in Article 5 of Directive 93/13 must be assessed in the light of the information available to it on the date when the contract with the consumer was concluded (order of 3 March 2021, *Ibercaja Banco*, C-13/19, not published, EU:C:2021:158, paragraph 57 and the case-law cited).

53 However, the fact that exchange rates change in the long term cannot justify a failure to mention, in the contractual provisions and in the context of the information provided by the seller or supplier at the time of negotiation of the contract, the criteria used by the bank to set the exchange rate that is applicable for calculating the repayment instalments, thereby enabling the consumer to determine that exchange rate at any time.

54 That finding is supported by the fact that, since the system of protection introduced by Directive 93/13 is based on the idea that consumers are in a weak position vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, the requirement, laid down by the directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent, must be understood as having to enable borrowers to understand what they are committing themselves to, in particular the method of calculating the monthly repayments of the loan taken out by them.

55 It follows from the foregoing considerations that Article 5 of Directive 93/13 must be interpreted as meaning that the content of a clause of a loan agreement concluded between a seller or supplier and a consumer that sets the buying and selling prices of a foreign currency to which the loan is indexed must enable a consumer who is reasonably well informed and reasonably observant and circumspect to understand, on the basis of clear and intelligible criteria, the way in which the foreign currency exchange rate used to calculate the amount of the repayment instalments is set, in

order that that consumer is able to determine himself or herself, at any time, the exchange rate applied by the seller or supplier.

Second sub-question of the first question and the second question

56 By these questions, which it is appropriate to examine together, the referring court seeks to ascertain, in essence, whether Articles 5 and 6 of Directive 93/13 must be interpreted as precluding the national court, which has found that a term, contained in a loan agreement concluded between a seller or supplier and a consumer, which indexes that agreement to a foreign currency is unfair, within the meaning of Article 3(1) of that directive, from interpreting that term in order to remedy its unfairness, by introducing into it the general concept of ‘market value’ of the foreign indexation currency, even if such an interpretation would correspond to the common intention of the parties to that agreement.

57 First, it should be pointed out that, if, in the light of all the circumstances of the main proceedings, the referring court were to find that the indexation clause at issue in those proceedings is unfair, it would fall to that court, in accordance with Article 6(1) of Directive 93/13, to disapply it.

58 In that regard, it is clear from the case-law that compliance with the requirement, laid down in Article 5 of Directive 93/13, that a contractual term must be plain and intelligible is one of the factors to be taken into account in the assessment of whether that term is unfair, which is for the national court to carry out pursuant to Article 3(1) of that directive. In that context, it is for that court to assess, having regard to all the circumstances of the case, first, the possible failure to observe the requirement of good faith and, second, the possible existence of a significant imbalance to the detriment of the consumer within the meaning of Article 3(1) (see, to that effect, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 49).

59 In addition, it has been held that a term of a loan agreement indexed to a foreign currency that stipulates that the repayment instalments must be paid in that currency places the exchange rate risk on the consumer in the event of the devaluation of the national currency against that currency (see, to that effect, order of 22 February 2018, *Lupean*, C-119/17, not published, EU:C:2018:103, paragraph 28).

60 In the present instance, it is apparent from the order for reference that Article 69(2) of the Law on banking law was amended after the mortgage loan agreement at issue in the main proceedings was concluded, with the result that, henceforth, a loan agreement indexed to a foreign currency must contain information relating to the methods for, and dates of, determination of the exchange rate on the basis of which the amount of the loan and the monthly repayments are calculated, as well as the rules for converting currencies.

61 In that regard, the Court has already held that, although Article 7(1) of Directive 93/13 does not preclude the Member States from using legislation to put an end to the use of unfair terms in contracts concluded with consumers by sellers or suppliers, the fact remains that the legislature must, in that context, respect the requirements deriving from Article 6(1) of that directive (judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 77 and the case-law cited).

62 The fact that a contractual term was, on the basis of national legislation, declared unfair and void and replaced by a new term cannot have the result of weakening the protection guaranteed to consumers (judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 78 and the case-law cited).

63 In those circumstances, the adoption by the legislature of provisions governing the use of a contractual term which contribute to ensuring the deterrent effect pursued by Directive 93/13 as regards the conduct of sellers or suppliers is without prejudice to the rights conferred on the consumer by that directive (judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 79).

64 Consequently, it is apparent from the circumstances set out and from paragraphs 50 and 52 of the present judgment that the indexation clause at issue in the main proceedings, which, subject to the verification which it is incumbent on the referring court to carry out, does not enable the consumer to determine himself or herself, at any time, the exchange rate applied by the seller or supplier, is unfair.

65 For that purpose, since the referring court has stated that A cannot be regarded as having acted in bad faith, it will be incumbent on that court in particular to examine whether there is a significant imbalance in the parties' rights and obligations arising under the agreement, to the detriment of the consumer.

66 Such an examination cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract, on the one hand, and the costs charged to the consumer under that clause, on the other. A significant imbalance may result from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed under the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he or she enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him or her of an additional obligation not envisaged by the national rules (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 51 and the case-law cited).

67 Second, the referring court explains that, under Article 65 of the Civil Code, it would be possible for it to remedy the lack of transparency of the indexation clause at issue in the main proceedings, which is liable to result in it being found unfair, by giving it an interpretation corresponding to the common intention of the parties to the agreement.

68 It must be pointed out, however, that if the national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, Article 6(1) of Directive 93/13 must be interpreted as precluding a rule of national law which allows the national court to modify that contract by revising the content of that term (judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 67 and the case-law cited).

69 If it were open to the national court to revise the content of unfair terms included in such a contract, 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 still be 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 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 68 and the case-law cited).

70 It is apparent from the order for reference that the interpretative exercise contemplated by the referring court on the basis of Article 65 of the Civil Code would ultimately amount to revising the content of the indexation clause at issue in the main proceedings, as it would result in the

understanding of that clause being altered by the introduction into it of the reference to the ‘market value’ of the foreign currency.

71 Even if the interpretation proposed by the referring court were to be considered to correspond to the common understanding which, at the time of conclusion of the agreement, the parties thereto had of the indexation clause at issue in the main proceedings, which nevertheless seems to be contradicted by the written observations lodged by those parties before the Court, the fact remains that a term declared unfair by the national court must be disapplied pursuant to Article 6(1) of Directive 93/13, and its content cannot be altered.

72 It is only if the invalidity of the unfair term were to require the national court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences, so that the consumer would thus be penalised, that the national court might replace that term with a supplementary provision of national law (see, to that effect, order of 4 February 2021, *CDT*, C-321/20, not published, EU:C:2021:98, paragraph 43 and the case-law cited).

73 However, it has been held that Article 6(1) of Directive 93/13 precludes gaps in a contract caused by the removal of the unfair terms contained in that contract from being filled solely on the basis of national provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented, *inter alia*, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 62).

74 In the present instance, it is not apparent from the order for reference that the interpretative exercise contemplated by the referring court would have the aim of remedying the invalidity of the agreement on the ground that it could not continue in existence without the indexation clause at issue in the main proceedings.

75 Nor, subject to verification by the referring court, does it seem that Article 65 of the Civil Code, which contains a general rule of interpretation, constitutes a supplementary provision of national law.

76 Third, the principle that an unfair term has no effect, as provided for in Article 6(1) of Directive 93/13, cannot be called into question by considerations connected with the circumstances in which the contract at issue has been concluded and performed.

77 Indeed, the Court has held that, in order to ensure the dissuasive effect of Article 7 of Directive 93/13, the powers of the national court that finds an unfair term, within the meaning of Article 3(1) of that directive, cannot be contingent on the actual application of that term (order of 11 June 2015, *Banco Bilbao Vizcaya Argentaria*, C-602/13, not published, EU:C:2015:397, paragraph 50).

78 Accordingly, the fact that the applicants in the main proceedings showed little interest in the agreement’s indexation clause cannot call into question the principle noted in paragraph 57 of the present judgment that, where the national court finds that a term contained in a contract concluded between a seller or supplier and a consumer is unfair, it falls to that court, in accordance with Article 6(1) of Directive 93/13, to disapply it.

79 In the light of all the foregoing considerations, the answer to the second sub-question of the first question and the second question is that Articles 5 and 6 of Directive 93/13 must be interpreted

as precluding the national court, which has found that a term of a contract concluded between a seller or supplier and a consumer is unfair, within the meaning of Article 3(1) of that directive, from interpreting that term in order to remedy its unfairness, even if that interpretation would correspond to the common intention of the parties to that contract.

Costs

80 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 (Seventh Chamber) hereby rules:

1. **Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the content of a clause of a loan agreement concluded between a seller or supplier and a consumer that sets the buying and selling prices of a foreign currency to which the loan is indexed must enable a consumer who is reasonably well informed and reasonably observant and circumspect to understand, on the basis of clear and intelligible criteria, the way in which the foreign currency exchange rate used to calculate the amount of the repayment instalments is set, in order that that consumer is able to determine himself or herself, at any time, the exchange rate applied by the seller or supplier.**
2. **Articles 5 and 6 of Directive 93/13 must be interpreted as precluding the national court, which has found that a term of a contract concluded between a seller or supplier and a consumer is unfair, within the meaning of Article 3(1) of that directive, from interpreting that term in order to remedy its unfairness, even if that interpretation would correspond to the common intention of the parties to that contract.**

[Signatures]

* Language of the case: Polish.