Lingua del documento :
ECLI:EU:C:2023:911

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

23 November 2023 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Consumer credit agreement – Article 3(1) – Significant imbalance – Non-interest credit costs – Article 7(1) – Action for a declaratory judgment – Interest in bringing proceedings – Article 6(1) – Finding that a term is unfair – Consequences)

In Case C-321/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (District Court of Warsaw City Centre, Warsaw, Poland), made by decision of 22 February 2022, received at the Court on 5 May 2022, in the proceedings

ZL,

KU,

KM

v

Provident Polska S.A.,

THE COURT (Fourth Chamber),

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

Advocate General: P. Pikamäe,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 30 March 2023,

after considering the observations submitted on behalf of:

– Provident Polska S.A., by M. Modzelewska de Raad, adwokat, A. Salbert and B. Wodzicki, radcowie prawni,

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

– the European Commission, by M. Brauhoff and N. Ruiz García, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1), 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).

2 That request has been made in the context of three sets of proceedings between, respectively, ZL, KU and KM and Provident Polska S.A. concerning the validity of various terms in consumer credit agreements that ZL, KU and KM concluded with Provident Polska or another company which is its legal predecessor.

Legal context

European Union law

3 Article 3(1) of Directive 93/13 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.’

4 Article 4 of that 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 supplies in exchange, on the other, in so far as these terms are in plain intelligible language.’

5 Article 6(1) of that 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.'

6 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.'

7 Article 8 of Directive 93/13 states that:

'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

Polish law

The Civil Code

8 The ustawa – Kodeks cywilny (Law on the Civil Code), of 23 April 1964 (Dz. U. No 16, position 93), in the version applicable at the date of the facts of the dispute in the main proceedings ('the Civil Code'), provides in Article 58:

'§ 1. A legal act contrary to the law or intended to circumvent the law shall be void, unless a relevant provision provides otherwise, in particular that the invalid provisions of the legal act are to be replaced by the relevant provisions of the law.

§ 2. A legal act contrary to the rules of social conduct shall be void.

§ 3. If only part of the legal act is invalid, the other parts of the act shall remain in force, unless it is apparent from the circumstances that the act would not have been performed in the absence of the invalid provisions.'

9 Paragraphs (1) and (2) of Article 385^1 of that code provide:

'§ 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 contractual 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.'

10 Article 405 of that code provides:

'Any person who, without legal basis, has obtained a pecuniary benefit at the expense of another person shall be required to return that benefit in kind and, where that is not possible, to make good the value thereof.'

11 Article 410 of the Civil Code is worded as follows:

‘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.’

12 In accordance with Article 720(1) of that code:

‘By a loan agreement, the lender undertakes to transfer to the borrower ownership of a certain amount of money or quantity of items marked only in terms of their type, and the borrower undertakes to return the same amount of money or the same quantity of items of the same type and quality.’

The Code of Civil Procedure

13 The ustawa – Kodeks postępowania cywilnego (Law on the Code of Civil Procedure), of 17 November 1964 (Dz. U. No 43, position 296), in the version applicable at the date of the facts of the dispute in the main proceedings (‘the Code of Civil Procedure’), provides in Article 189:

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

14 In accordance with Article 316(1) of that code:

‘After the hearing is closed, the court shall deliver its judgment on the basis of the situation as it stood at the close of the hearing; in particular, the fact that a debt has become due in the course of the proceedings shall not preclude a judgment ordering payment of that debt.’

The Law on Consumer Credit

15 L’ustawa o kredycie konsumenckim (Law on Consumer Credit), of 12 May 2011 (Dz. U. No 126, position 715), in the version applicable at the date of the facts of the dispute in the main proceedings, provides in Article 3:

‘1. A “consumer credit agreement” is defined as a credit agreement the amount of which does not exceed 255 550 [Polish zlotys (PLN)] or the equivalent in a currency other than the Polish currency, with the creditor granting or promising to grant the credit to the consumer in the course of the creditor’s business.

2. The definition of “consumer credit agreement” includes, inter alia:

(1) a loan agreement;

…’

16 Paragraph 30(1) of that law, in the version applicable as at the date of the facts of the dispute in the main proceedings, provides:

‘A consumer credit agreement must specify

…

(3) the contract term

…

(8) the rules and deadlines with regard to repayment of the credit …

…’

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

17 ZL, KU and KM concluded consumer credit agreements with Provident Polska or with another company that is the legal predecessor of Provident Polska.

18 The agreement concluded with ZL on 11 September 2019 concerned a loan of 8 100 PLN (about EUR 1 810), at an interest rate of 10% per annum. In accordance with that agreement, the amount due is, in total, PLN 15 531.73 (about EUR 3 473), to be paid in 90 weekly payments of approximately PLN 172 (about EUR 38).

19 The total amount due comprises, in addition to the sum borrowed of PLN 8 100 (about EUR 1 810), a total cost of the loan to be paid by the borrower of PLN 7 431.73 (about EUR 1 662). The total cost is comprised of, on the one hand, interest in the amount of PLN 1 275.73 (about EUR 285) and, on the other hand, non-interest costs in the amount of PLN 6 156 (about EUR 1 377), namely a ‘disbursement commission’ of PLN 4 050 (about EUR 906), ‘administrative charges’ of PLN 40 (about EUR 9) and ‘flexible repayment plan fees’ of PLN 2 066 (about EUR 462).

20 The ‘flexible repayment plan’, to which the borrower was required to subscribe, is comprised of two parts. One part consists of granting the borrower, on the basis of certain conditions, the option of deferring a maximum number of four repayments, which are deferred to the end of the normal period for repayment, without any increase in interest. The second part consists of a ‘guaranteed waiver of repayment obligations’, by which the lender cancels any outstanding debt under a loan agreement in the event of the borrower’s death during the term of the contract.

21 In accordance with point 6.a of the loan agreement concerned, the amounts due in 90 weekly payments are payable only in cash in hand to an agent of the lender during visits made by that agent to the home of the borrower.

22 The agreement concluded with KU on 13 October 2020 concerned a loan of PLN 6 240 (about EUR 1 395), at an interest rate of 7.2% per annum. That amount is comprised of a sum of PLN 6 000 (about EUR 1 342) paid in cash and a sum of PLN 240 (about EUR 53) that the agreement states was paid into an account in accordance with the borrower’s instructions in the loan application. In accordance with that agreement, the amount due is, in total, PLN 9 450.71 (about EUR 2 113), to be paid in 60 weekly payments of approximately PLN 157 (about EUR 35).

23 The total amount due comprises, in addition to the sum borrowed of PLN 6 240 (about EUR 1 395), a total cost of the loan to be paid by the borrower of PLN 3 210.71 (about EUR 718). That total cost is comprised of, on the one hand, interest in the amount of PLN 385.87 (about EUR 86) and, on the other hand, non-interest costs in the amount of PLN 2 824.84 (about EUR 632), namely a ‘disbursement commission’ of PLN 556.96 (about EUR 125), ‘administrative

charges' of PLN 40 (about EUR 9) and 'flexible repayment plan fees' of PLN 2 227.88 (about EUR 498).

24 That agreement provides that the weekly payments are to be paid at the borrower's home, in the same way as described in paragraph 24 of the present judgment.

25 The agreement concluded with KM on 7 August 2019 concerned a loan of PLN 6 000 (about EUR 1 343), at an interest rate of 10% per annum. In accordance with that agreement, the amount due is, in total, PLN 12 318.03 (about EUR 2 757), which must be paid in 27 weekly payments of approximately PLN 456 (about EUR 102).

26 The total amount due comprises, in addition to the sum borrowed of PLN 6 000 (about EUR 1 343), a total cost of the loan to be paid by the borrower of PLN 6 318.03 (about EUR 1 414). That total cost is comprised of, on the one hand, interest in the amount of PLN 793.83 (about EUR 178) and, on the other hand, non-interest costs, namely a 'disbursement commission' of PLN 4 143.15 (about EUR 927) and 'administrative charges' of PLN 1 381.05 (about EUR 309).

27 ZL, KU and KM each brought actions before the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court of Warsaw-Śródmieście, Warsaw, Poland), which is the referring court, relating to the contracts between them and Provident Polska, on 15 April, 17 May and 14 September 2021 respectively.

28 In the final pleadings which they lodged with the referring court, each of them requested, in essence, a declaration that the terms of the contract concluded with Provident Polska that relate to non-interest credit costs are not enforceable against them on account of their unfairness, since the fees and commissions in question are clearly excessive and unreasonable. They allege that those fees and commissions are disproportionate to the amount of the loan granted and in fact constitute the lender's principal source of revenue.

29 KU's action also concerns the sum of PLN 240 (about EUR 53) referred to in the loan agreement relating to him as having been paid into an account in accordance with the borrower's instructions in the loan application.

30 Provident Polska submits that the actions brought by ZL, KU and KM should be rejected, and brought a counter-claim against each of them seeking an order that they pay to it sums corresponding to the part of the fees and commissions provided for under the loan agreement relating to them that remain unpaid. The applicants in the main proceedings contend that those counter-claims should be dismissed.

31 In the first place, the referring court questions whether Article 3(1) of Directive 93/13 must be interpreted as meaning that contractual terms setting the fees or commissions due to a seller or supplier may be declared unfair for the sole reason that those fees or commissions are clearly excessive in comparison with the service provided by the seller or supplier.

32 In that regard, it states that it is normal for a credit undertaking to seek to cover its operating costs and risks of payment default and to obtain a profit. However, it seems to it that, in the cases in the main proceedings, the remuneration sought by the lender within a relatively short time exceeds that norm, since that remuneration is several tens of percentage points of the amount loaned, or is close to that amount.

33 It considers that the costs relating to the ‘flexible repayment plan’ and the ‘disbursement commission’ are very high and do not correspond to a real service, and that the real costs covered by the ‘administrative charges’ are negligible. It observes that those fees, like the ‘disbursement commission’, ultimately relate only to the grant of the loan concerned.

34 The examination of the information relating to the cases in the main proceedings and another ten cases that have been the subject of recent decisions from various chambers of the court of which the referring court is part leads it to consider that the economic model of the defendant in the main proceedings may consist of granting loans for small amounts for short periods and drawing profit not only from interest but above all from the non-interest credit costs, which generally represent between 70% and 90% of the amount loaned.

35 In addition, the referring court observes that a significant proportion of the loans granted by the defendant in the main proceedings concern the same people. It considers, in that regard, that it is well-known that people who take out short-term loans are generally those who are experiencing difficulty managing their finances and who, as they cannot obtain a loan from a bank, turn to credit institutions that grant loans on the basis of very unfavourable conditions, the costs of which are so high that the borrowers often have no other solution than to enter into a contract for a new loan in order to repay the previous one, thus entering a ‘debt spiral’, for increasing amounts, which end up greatly exceeding the sum originally borrowed.

36 In the second place, the referring court questions whether Article 189 and Article 316(1) of the Code of Civil Procedure, as interpreted by the Sąd Najwyższy (Supreme Court, Poland), are compatible with Article 7(1) of Directive 93/13 and the principle of effectiveness.

37 In accordance with those provisions of the Code of Civil Procedure, an action for a declaration may be upheld only if an applicant shows that he or she has an interest in bringing proceedings which persists until the hearing is closed. The referring court states that, according to the case-law of the Sąd Najwyższy (Supreme Court), there is such an interest where the clarification of a legal situation is objectively justified by doubts and is necessary. It would be excluded, inter alia, where more complete protection of an alleged right may be obtained by a different legal action, for example because there was a breach of that right which, in itself, gave rise to a claim capable of protection.

38 In the case of a debtor, he or she would have an interest in having a declaration of the extent, or even the existence, of his or her obligation for as long as the creditor has not sought the enforcement of the obligation. Where enforcement has been sought, it is in the context of the proceedings on that enforcement application that the debtor must mount his or her defence. Likewise, if a debtor has paid a sum in performance of an obligation that he or she considers doubtful, he or she would be able to bring a more extensive action than a declaratory action, namely an action for the recovery of sums unduly paid.

39 The referring court’s questions emerge from the fact that, even if a consumer shows that a contract, or parts thereof, is unenforceable or is null, his or her action for a declaration must be rejected if he or she cannot demonstrate an interest in bringing proceedings. In addition, the lack of a legal definition of that concept leads to divergences amongst the decisions handed down in that regard and, consequently, uncertainty for consumers, which could lead them to hesitate to bring an action for a declaration that a term in a contract with a seller or supplier is unfair, given the risk that that action would be rejected for lack of an interest in bringing proceedings and that they must therefore bear the costs.

40 In the third and last place, the referring court asks whether the principle of proportionality and the principle of legal certainty preclude the annulment of contracts concluded by ZL and KU as a result of the invalidity of the term according to which the weekly payments may only be made in cash to an agent of Provident Polska during that agent's visits to the home of the borrower. That term is unfair, in the view of the referring court, since it has no advantage for the borrower and prevents him or her from making the weekly payments by the usual means of bank transfers and can only be explained by the possibility that it offers the lender of exerting emotional pressure on the borrower. Consequently, that term cannot be binding on the borrower.

41 The referring court states in that regard that the deletion of the unfair element of the term fixing the means of repayment of the loan would amount to revising its content by affecting its substance, with the result that it is necessary for the entirety of that term not to be binding on the consumer. However, in the absence of that term, the contracts concerned can no longer be enforced since they would contain no provision regarding the methods of repayment and it is impossible to interpret them as authorising repayments by bank transfer, since the parties intended to exclude that means of payment. Furthermore, it is not appropriate to apply the supplementary provisions of national law, since the impossibility of enforcing the contracts concerned would not expose the consumers concerned to particularly damaging consequences because they would be required only to repay the amount of the principal loan.

42 It is in that context that the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court of Warsaw City Centre, Warsaw) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 3(1) of Directive 93/13 be interpreted as permitting a contractual term which grants a seller or supplier a fee or commission that is disproportionately high in relation to the service offered to be regarded as an unfair contractual term?

(2) Must Article 7(1) of [Directive 93/13] and the principle of effectiveness be interpreted as precluding provisions of national law or a judicial interpretation of those provisions under which the consumer must have a legal interest in bringing proceedings in order for an action brought by the consumer against a seller or supplier for a declaration that a contract or part thereof that contains unfair terms is void or ineffective to be upheld?

(3) Must Article 6(1) of Directive 93/13 as well as the principles of effectiveness, proportionality and legal certainty be interpreted as permitting the finding that a loan agreement whose sole term providing for the manner of loan repayment has been found to be unfair must not continue in force after that term has been excluded therefrom and is therefore void?'

Consideration of the questions referred

The first question

43 By its first question, the referring court asks, in essence, whether Article 3(1) of Directive 93/13 must be interpreted as meaning that a term relating to the non-interest costs of a loan agreement between a seller or supplier and a consumer which provides for payment by the latter of fees or a commission in an amount that is manifestly disproportionate to the service provided in exchange may be unfair.

44 It should be noted that, under Article 3(1) of Directive 93/13, a contractual term that has not been individually negotiated is to 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.

45 It is established case-law that the examination as to whether there is such a significant imbalance 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 the contractual term in question, on the other. A significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions that apply, 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 of 16 March 2023, *Caixabank (Loan arrangement fees)*, C-565/21, EU:C:2023:212, paragraph 51).

46 It follows from that case-law that the national court, when it finds that a quantitative economic evaluation does not show that there is a significant imbalance, cannot restrict its examination to that assessment. It is incumbent upon it, in such a case, to examine whether such an imbalance results from another factor, such as a restriction on a right derived from national law or an additional obligation not provided for by that law.

47 By contrast, where the quantitative economic evaluation does show that there is a significant imbalance, that finding may be made without it being necessary to examine other factors. In the case of a credit agreement, such a finding may notably be made if the services provided in exchange for the non-interest costs were not reasonably covered in the context of the conclusion or management of that agreement, or if the amounts charged to the consumer in respect of the costs of granting and managing the loan are clearly disproportionate in relation to the amount of the loan. It is for the referring court to take account, in that regard, of the effect of other contractual terms in order to determine whether those terms create a significant imbalance to the borrower's detriment (see, to that effect, judgment of 3 September 2020, *Profi Credit Polska and Others*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 95).

48 In the present case, the referring court expresses doubts as to the proportionality of the amount loaned to each of the applicants in the main proceedings in relation to the total amount of the non-interest costs charged to them, the latter amount appearing, at the same time, to be manifestly disproportionate in relation to the services that are normally intrinsic to the grant and management of a loan and the amount of the loans granted. It is clear from the case-law recalled in the preceding paragraph that such a finding may substantiate a finding of a significant imbalance between the rights and obligations of the parties under the agreement, within the meaning of Article 3(1) of Directive 93/13.

49 However, the referring court is required to ascertain, as a first step, whether the examination of the possible unfairness of contractual terms at issue, namely those relating to the non-interest credit costs, is not precluded under Article 4(2) of Directive 93/13.

50 According to that provision, and subject to Article 8 of that directive, an assessment of the unfairness of contractual terms is to 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 those terms are drafted in plain intelligible language.

51 In that regard, it should be recalled that a commission fee covering remuneration for services connected with the examination, grant or treatment of the loan or credit or other similar services inherent in the lender's activity, arising from the granting of the loan or credit cannot be regarded as forming part of the main obligations arising from a credit agreement (see, to that effect, judgment of 16 March 2023, *Caixabank (Loan arrangement fees)*, C-565/21, EU:C:2023:212, paragraphs 22 and 23).

52 By contrast, terms relating to the consideration due by the consumer to the lender or having an impact on the actual price to be paid to the latter by the consumer thus, in principle, fall within the second category of terms covered by Article 4(2) of Directive 93/13 as regards the question whether the amount of consideration or the price as stipulated in the contract are adequate as compared with the service provided in exchange by the lender (see, to that effect, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 35 and the case-law cited).

53 The Polish Government states, however, that Article 3851(1) of the Civil Code, which transposes Article 4(2) of Directive 93/13 into Polish law, permits an examination of the relationship between the price and the service as regards terms that are not related to the parties' main services, thus establishing greater protection for the consumer. To the extent that such a national provision effectively confers a stricter scope on the exception established by that Article 4(2), by allowing for a more extensive review of the possible unfairness of contractual terms that fall within the scope of that directive, which it is for the referring court to ascertain, it shares the objective of protecting consumers pursued by that directive and falls within the power, conferred on Member States by Article 8 thereof, to adopt or retain more stringent measures which aim to ensure a maximum degree of protection for the consumer (see, to that effect, judgment of 3 September 2020, *Profi Credit Polska and Others*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraphs 83 to 85).

54 In addition, if the unfairness of such a term is alleged before the national court on the basis of the lack of any actual service provided by the lender that could constitute consideration for a commission fee that it provides for, the issue thus raised does not concern the adequacy of the amount of that commission fee as compared with a service provided by the lender, and does not therefore fall within the scope of Article 4(2) of Directive 93/13 (see, to that effect, judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 70 and the case-law cited).

55 Furthermore, it is for the national court to ascertain whether the consumer has been informed of the reasons justifying the payment of that commission (see, to that effect, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 41).

56 Finally, it must be noted that the exclusion set out in Article 4(2) of Directive 93/13 is, in any event, without prejudice to compliance with the requirement of transparency imposed by that provision, the scope of which is the same as that of the requirement set out in Article 5 of that directive and must be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but that that consumer is also in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from it (see, to that effect, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 36 and 37 and the case-law cited).

57 In that regard, it should be recalled that, without the lender being required to specify in the contract concerned the nature of all the services provided in exchange for the charges laid down by one or more contractual terms, it is necessary, first, that the nature of the services actually provided

can reasonably be understood or inferred from a consideration of the contract as a whole and, second, that the consumer is able to ascertain that there is no overlap between those various costs or the services for which those costs are paid. That assessment must be made in the light of all the relevant facts, which include not only the terms of the relevant contract but also the promotional material and information provided by the lender in the negotiation of the agreement (see, to that effect, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraphs 44 and 45).

58 It follows that, if the referring court finds that the relevant terms are not drafted in plain intelligible language, those terms must, in any event, be subject to an assessment of their unfairness, even if that court also finds that those terms fall within the main subject matter of the contract or they are in fact challenged with regard to the adequacy of the price or the remuneration in relation to the services provided in exchange (see, to that effect, judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 72 and the case-law cited).

59 In the light of all the foregoing considerations, the answer to the first question is that Article 3(1) of Directive 93/13 must be interpreted as meaning that, provided the examination of the possible unfairness of a term relating to the non-interest costs of a loan agreement concluded between a seller or supplier and a consumer is not precluded by Article 4(2) of that directive, read in conjunction with Article 8 thereof, such a term may be held to be unfair as a result of the fact that that term provides for the payment by the consumer of charges or a commission fee in an amount that is manifestly disproportionate to the service provided in exchange.

The second question

60 By its second question, the referring court asks, in essence, whether Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding a national law which, as interpreted in the case-law, requires, in order for a consumer's action for a declaration that an unfair term in a contract concluded with a seller or supplier is unenforceable to be upheld, proof of an interest in bringing proceedings, where that legal interest is regarded as being absent where another remedy is available to the consumer which affords better protection of his or her rights, such as an action for the recovery of sums unduly paid, or where the consumer may raise that unenforceability as part of his or her defence to a counter-claim brought against him or her by that seller or supplier on the basis of that term.

61 As a preliminary matter, it should be recalled that, in the absence of specific EU rules governing the matter, the rules implementing the consumer protection provided for by Directive 93/13 are a matter for the domestic legal order of the Member States in accordance with the principle of the procedural autonomy of those Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 13 July 2023, *CAJASUR Banco*, C-35/22, EU:C:2023:569, paragraph 23 and the case-law cited).

62 Therefore, subject to compliance with those two principles, the question of a consumer's interest in bringing proceedings in the context of an action seeking a declaration that unfair terms are unenforceable, and likewise the apportionment of the costs of such an action, fall within the scope of the procedural autonomy of the Member States.

63 As regards more particularly the principle of effectiveness, which is the only one of those principles referred to in the present question, it should be noted that every case in which the

question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgment of 13 July 2023, *CAJASUR Banco*, C-35/22, EU:C:2023:569, paragraph 25 and the case-law cited).

64 Furthermore, it should be borne in mind that, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers, Directive 93/13 requires Member States, as is apparent from Article 7(1) thereof, read in conjunction with the twenty-fourth recital thereof, to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (judgment of 13 July 2023, *CAJASUR Banco*, C-35/22, EU:C:2023:569, paragraph 22 and the case-law cited).

65 Thus, that directive gives a consumer the right to apply to a court to have a term in a contract concluded between him or her and a seller or supplier declared unfair and disapplied (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 98 and the case-law cited).

66 Moreover, the obligation of Member States to lay down detailed procedural rules to ensure respect for the rights which individuals derive from Directive 93/13 against the use of unfair terms implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter. That protection must be afforded, in particular, to the definition of the detailed procedural rules relating to actions based on EU law. However, protection of the consumer is not absolute. Thus, the fact that a particular procedure comprises certain procedural requirements that the consumer must observe in order to assert his or her rights does not mean that he or she does not enjoy effective judicial protection (see, to that effect, judgment of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 49 and 50 and the case-law cited).

67 In that regard, it must be pointed out that an interest in bringing proceedings is an essential and fundamental prerequisite for any legal proceedings (judgment of 23 November 2017, *Bionorica and Diapharm* v *Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraph 83). By avoiding the courts being blocked with actions in fact seeking a legal consultation, the requirement for an interest in bringing proceedings pursues a general interest of the sound administration of justice which may prevail over individual interests (see, by analogy, judgment of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 51 and the case-law cited).

68 Consequently, as the Advocate General essentially observed in points 30 to 32 of his Opinion, that requirement must, in principle, be regarded as legitimate.

69 It is only if those procedural rules were so complex and contained requirements so onerous that they went beyond what is necessary to achieve their objective that those rules would disproportionately affect the consumer's right to effective judicial protection (see, to that effect, the judgment of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 52) and, consequently, be contrary to the principle of effectiveness since they would render the exercise of the rights conferred on consumers by Directive 93/13 excessively difficult.

70 In the present case, it is apparent from the information available to the Court that the consumers, who are the applicants in the main proceedings, had already partially performed the

obligations stipulated in the terms concerned when they brought actions seeking a declaration that those terms are unfair. In that context, the referring court appears to indicate that, having regard to the relevant provisions of national law as interpreted in national case-law, the actions for a declaration thus brought before it should be dismissed for lack of interest in bringing proceedings, and the consumers ordered to pay the costs of those actions, for two reasons.

71 First, where a person has already performed a contractual obligation, in the present case partially, the lack of interest in bringing proceedings for a declaration that that obligation does not exist stems from the fact that an action is available to that person which is regarded as affording greater protection to his or her rights, namely an action for recovery of sums paid but not due, in which he or she could obtain an order that his or her co-contractor repay him or her the sums paid in performance of the obligation at issue.

72 Second, where a person disputes the existence of an obligation which he or she has not yet performed, even in part, that person loses his or her interest in bringing proceedings for a declaration where the other party to the contract brings an action seeking the enforcement of that obligation, in the present case by way of a counter-claim, on account of the possibility of submitting, in his or her defence to the co-contractor's action, that the obligation concerned does not exist.

73 The Polish Government disputes, however, that the case-law of the Sąd Najwyższy (Supreme Court) on the application of Article 189 and Article 316(1) of the Code of Civil Procedure has the implications described by the referring court. It should be recalled, however, that in the context of a reference for a preliminary ruling, it is not for the Court to rule on the interpretation of provisions of national law or to decide whether the interpretation or application of those provisions by the national court is correct, since such an interpretation falls within the exclusive jurisdiction of the national court (see, to that effect of 25 November 2020, *Sociálna poisťovňa*, C-799/19, EU:C:2020:960, paragraphs 44 and 45 and the case-law cited). The following considerations are therefore made on the basis of the information provided by the referring court.

74 In the first situation, referred to in paragraph 71 of the present judgment, as the Advocate General observed in point 41 of his Opinion, to dismiss a consumer's action for a declaration that contractual terms are unfair for lack of an appropriate interest in bringing proceedings, but not for lack of any interest at all in bringing proceedings, and to order that consumer to pay the costs by referring him or her to the best means of redress would be tantamount to introducing into procedures designed to afford consumers the intended protection of Directive 93/13 a source of unnecessary complexity, onerousness, costs and legal uncertainty, which is likely to deter them from asserting their rights under that directive, in breach of the principle of effectiveness.

75 Furthermore, as pointed out in the same point of the Advocate General's Opinion, in a context such as that of the cases in the main proceedings, the dismissal of the consumer's action for a declaratory judgment and the obligation for the consumer to bring an action that offers greater protection of his or her rights, notwithstanding that the referring court will in any event be required to examine the legal issues raised by that declaratory action in the context of the counter-claim brought by the seller or supplier, would be contrary to the public interest in the sound administration of justice, in particular the requirement for procedural economy.

76 Finally, in so far as it must be held that the second question also relates to the second situation, referred to in paragraph 72 of the present judgment, in which the consumer, after bringing an action for a declaration that a contractual term is unfair, would lose his or her interest in bringing proceedings in the course of those proceedings as a result of the seller or supplier bringing a

counter-claim seeking the enforcement of the obligations stipulated in that term, the dismissal of the consumer's action and an order for him or her to pay the costs thereof, irrespective of any finding of the unfairness of the unfair term, would amount to placing a financial risk on him or her, which is all the more unjustified because the materialisation of that risk would depend solely upon a procedural initiative of the seller or supplier. To make the outcome of the apportionment of costs of the consumer's action dependent on the initiative of the seller or supplier would be likely to deter the consumer from exercising his or her right to apply to a court for a declaration that a contractual term is unfair and to have it disapplied, in breach of the principle of effectiveness (see, to that effect, judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 98 and the case-law cited).

77 In the light of the foregoing considerations, the answer to the second question is that Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding a national law which, as interpreted in the case-law, requires, in order for a consumer's action for a declaration that an unfair term in a contract concluded with a seller or supplier is unenforceable to be upheld, proof of an interest in bringing proceedings, where that interest is regarded as being absent where the consumer may bring an action for the recovery of sums unduly paid or where the consumer may raise that unenforceability as part of his or her defence to a counter-claim brought against him or her by that seller or supplier on the basis of that term.

The third question

78 By its third question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13, read in the light of the principles of effectiveness, proportionality and legal certainty, must be interpreted as precluding a declaration that a loan agreement concluded between a seller or supplier and a consumer is null and void where it is found that only the term of that agreement setting out the specific arrangements for payment of the sums due by periodic instalments is unfair and that that agreement cannot continue in existence without that term.

79 The referring court states in that regard that the only term setting out all the arrangements and instalments for repayment of the loans concerned contains a stipulation that the consumer is only able make weekly payments in cash through an agent of Provident Polska during the visits of that agent to the consumer's home. It considers that such a stipulation is unfair on the ground, in essence, that it serves no purpose other than to put the lender in a position to exert unlawful pressure on the borrower. Consequently, it is necessary to declare that that stipulation and, consequently, the whole of the term of which it forms part is invalid, since an intervention limited to the deletion of that stipulation would amount to revising the content of that term by altering its substance. In the absence of other terms making it possible to determine the arrangements for the repayment of those loans, it would be impossible to perform the contracts concerned.

80 As regards the consequences to be drawn from a finding that a term in a contract between a consumer and a seller or supplier is unfair, Article 6(1) of Directive 93/13 provides that Member States are to provide that unfair terms used in a contract concluded with a consumer by a seller or supplier are, as provided for under their national law, not to be binding on the consumer, and that the contract is to continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

81 According to the Court's settled case-law, the purpose of that provision, and in particular of its second part, is not to cancel all contracts containing unfair terms but to substitute for the formal balance, established by the contract between the rights and obligations of the parties, real balance

re-establishing equality between them, it being specified that the contract at issue must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms. Provided that the latter condition is satisfied, the contract at issue may be continued as long as, in accordance with the rules of domestic law, that continuity of the contract is legally possible without the unfair terms, which is to be determined objectively (see, to that effect, judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 39 and the case-law cited).

82 That objective approach implies, in particular, that the situation of one of the parties to the contract cannot be regarded as the decisive criterion determining the fate of the contract containing one or more unfair terms, such that the assessment by the national court of the possibility of such a contract continuing without those terms cannot be based solely on a possible advantage for the consumer of the annulment of the contract as a whole (see, to that effect, judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraphs 56 and 57 and the case-law cited).

83 The second part of Article 6(1) of Directive 93/13 thus does not itself set out the criteria governing the possibility of a contract continuing to exist without the unfair terms, but leaves it to the Member States to define, in their national law, the detailed rules under which the unfairness of a contractual term is established and the actual legal effects of that finding are produced. In any event, such a finding must make it possible to restore the legal and factual situation of the consumer in the absence of that unfair term (see, to that effect, the 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).

84 Consequently, where a national court considers that, pursuant to the relevant provisions of its domestic law, it is impossible to uphold a contract without the unfair terms which it contains, Article 6(1) of Directive 93/13 does not in principle preclude the annulment of that contract (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 43).

85 Nevertheless, the objective of restoring the consumer's legal and factual situation as it would have been in the absence of the unfair term must be pursued in a manner that complies with the principle of proportionality, which is a general principle of EU law, which requires that the national legislation implementing that law must not go beyond what is necessary to attain the objective pursued (see, to that effect, judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 73 and the case-law cited).

86 Consequently, unless the objective determination of the consequences to be drawn, in accordance with national law, from a finding that a term is unfair as regards the continuation or otherwise of the contract of which it forms part leaves no discretion or room for interpretation to the national court, that court cannot conclude that that contract is null and void if it is possible to restore the consumer's legal and factual situation as it would have been in the absence of that unfair term whilst allowing that contract to continue in existence.

87 In that regard, it should be recalled that the national court may substitute for an unfair term a supplementary provision of national law or a provision applicable where the parties to the contract at issue so agree, on the condition that that substitution is consistent with the objective of Article 6(1) of Directive 93/13 and enables real balance between the rights and obligations of the parties to the contract to be restored. However, that exceptional possibility is limited to cases in which declaring the unfair term invalid would oblige the court to annul the contract in its entirety, which would result in exposing the consumer to particularly unfavourable consequences, such that the consumer would be penalised (see, to that effect, judgments of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraph 33 and the

case-law cited, and of 12 January 2023, *D.V. (Lawyers' fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 60).

88 In the present case, the referring court rejects that possibility since a declaration of the invalidity of the contracts concerned would not be detrimental to the consumers who entered into them.

89 It should also be recalled that the provisions of Directive 93/13 preclude a term that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where that removal would be tantamount to revising the content of that term by altering its substance (judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 70 and the case-law cited).

90 That is not the case, however, where the unfair element of a term consists of a contractual obligation distinct from the other requirements and capable of being the subject of an individual examination of its unfairness (see, to that effect, judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 71), since the stipulation laying down such an obligation may be regarded as severable from the other requirements under the term concerned.

91 Directive 93/13 does not require that the national court set aside, in addition to the term declared unfair, those not classed as such, since the objective pursued by the legislature in the context of that directive consists in protecting the consumer and restoring the balance between the parties by not applying those contractual terms held to be unfair, whilst maintaining, in principle, the validity of the other terms of the contract at issue (judgment of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 72 and the case-law cited). That case-law also applies to the various stipulations under the same term, provided that the deletion of an unfair stipulation does not adversely affect the very substance of that term.

92 In the present case, it is apparent from the order for reference that the only term setting out all the conditions relating to the repayment of the loans concerned, such as the amounts to be paid and the various payment dates, also contains a stipulation concerning the specific arrangements under which those payments are to be made, namely at the borrower's home in cash in hand to an agent of the lender.

93 Subject to the assessment which it will be for the referring court to make having regard to all the circumstances relating to the contracts concerned and to the relevant provisions of national law, it appears that a stipulation determining such specific arrangements for the performance of the consumer's payment obligation constitutes a contractual obligation distinct from the other stipulations of a single term, as described in the preceding paragraph of the present judgment, and is ancillary to the elements of the contract which define the substance of that term, such as those relating to the determination of the amounts to be paid and the dates on which those payments must be made. Furthermore, the deletion of that stipulation does not appear to be such as to affect the very substance of the term concerned, since the consumer continues to be obliged to perform his or her repayment obligation in accordance with the other conditions laid down in that term by choosing any method of payment from among those which are permissible under national law.

94 Finally, it should be added, first, that a judicial finding that a term or, as the case may be, one element of a term of a contract covered by Directive 93/13 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 or element had not existed (see, to that effect, judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 57 and

the case-law cited). Observance of the principle of effectiveness therefore depends, in principle, on the adoption of measures that allow that situation to be restored.

95 Secondly, measures which constitute the practical implementation of the prohibition of unfair terms cannot be regarded as contrary to the principle of legal certainty (see, to that effect, judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)*, C-520/21, EU:C:2023:478, paragraph 72). Subject, in particular, to the application of certain domestic rules of procedure, notably those conferring the force of *res judicata* on a judicial decision, that principle cannot undermine the substance of the right that consumers derive from Article 6(1) of Directive 93/13 not to be bound by a term deemed to be unfair (see, to that effect, the judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 67, 68 and 71).

96 In the light of all the foregoing considerations, the answer to the third question is that Article 6(1) of Directive 93/13, read in the light of the principles of effectiveness, proportionality and legal certainty, must be interpreted as not precluding a declaration that a loan agreement concluded between a seller or supplier and a consumer is null and void where it is found that only the term of that agreement setting out the specific arrangements for payment of the sums due by periodic instalments is unfair and that that agreement cannot continue in existence without that term. Nevertheless, where a term contains a stipulation that is separable from the other stipulations under that term and capable of being the subject of an individual examination of its unfairness, the removal of which would make it possible to restore real balance between the parties without affecting the substance of the contract concerned, that provision, read in the light of those principles, does not mean that that term, or even that contract, should be declared invalid in their entirety.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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:

1. **Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts**

must be interpreted as meaning that, provided that the examination of the possible unfairness of a term relating to the non-interest costs of a loan agreement concluded between a seller or supplier and a consumer is not precluded by Article 4(2) of that directive, read in conjunction with Article 8 thereof, such a term may be held to be unfair as a result of the fact that that term provides for the payment by the consumer of charges or a commission fee in an amount that is manifestly disproportionate to the service provided in exchange.

2. **Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness,**

must be interpreted as precluding a national law which, as interpreted in the case-law, requires, in order for a consumer's action for a declaration that an unfair term in a contract concluded with a seller or supplier is unenforceable to be upheld, proof of an interest in bringing proceedings, where that interest is regarded as being absent where the consumer may bring an action for the recovery of sums unduly paid, or where the consumer may raise

that unenforceability as part of his or her defence to a counter-claim brought against him or her by that seller or supplier on the basis of that term.

3. **Article 6(1) of Directive 93/13, read in the light of the principle of effectiveness, proportionality and legal certainty,**

must be interpreted as not precluding a declaration that a loan agreement concluded between a seller or supplier and a consumer is null and void where it is found that only the term of that agreement setting out the specific arrangements for payment of the sums due by periodic instalments is unfair and that that agreement cannot continue in existence without that term. Nevertheless, where a term which contains a stipulation that is separable from the other stipulations of that term and capable of being the subject of an individual examination of its unfairness, the removal of which would make it possible to restore real balance between the parties without affecting the substance of the contract concerned, that provision, read in the light of those principles, does not mean that that term, or even that contract, should be declared invalid in their entirety.

[Signatures]

---

* Language of the case: Polish.