



## Reports of Cases

OPINION OF ADVOCATE GENERAL

PIKAMÄE

delivered on 22 June 2023<sup>1</sup>

**Case C-321/22**

**ZL,**

**KU,**

**KM**

**v**

**Provident Polska S.A.**

(Request for a preliminary ruling from the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie  
(District Court of Warsaw-Śródmieście, Warsaw, Poland))

(Reference for a preliminary ruling – Consumer protection – Unfair terms in consumer contracts – Consumer credit – Directive 93/13/EEC – Articles 6 and 7 – Action for a declaratory judgment – Legal interest in bringing proceedings – Consequences relating to the unfairness of a contractual term – Right to restitution – Principle of effectiveness)

1. The present case affords the Court of Justice an opportunity to supplement its case-law on the relationship between the requirement for the effective judicial protection of consumers under Directive 93/13/EEC<sup>2</sup> and the procedural autonomy of the Member States that allows them to define the detailed rules under which the unfairness of a contractual term is established and the actual legal effects of such a finding are produced.

2. The rule here at issue concerns the legal interest in bringing proceedings, which must be present in any action seeking a declaration that unfair contractual terms are unenforceable.

### **Legal framework**

#### ***European Union law***

3. In accordance with Article 6(1) of Directive 93/13:

‘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.’

<sup>1</sup> Original language: French.

<sup>2</sup> Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

4. Article 7(1) of that directive provides that:

‘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***

5. The ustawa – Kodeks postępowania cywilnego (Law establishing the Code of Civil Procedure) of 17 November 1964 (Dz. U., 1964, no 4), as amended, (‘the Code of Civil Procedure’) provides, in Article 189 thereof, that:

‘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.’

6. In accordance with Article 316(1) of the Code of Civil Procedure:

‘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 facts of the dispute in the main proceedings and the questions referred for a preliminary ruling**

7. Provident Polska S.A. or IPF Polska Sp. z o.o., Provident Polska’s legal predecessor, concluded consumer credit agreements with ZL, KU and KM. The latter separately 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 agreements between them and Provident Polska, on 15 April, 17 May and 14 September 2021 respectively.

8. In the final pleadings which they lodged with the referring court, each of them requested, essentially, a declaration that the terms of the agreements concluded with Provident Polska that relate to non-interest credit costs are not enforceable against them on account of their unfairness, the fees and commissions in question being 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.<sup>3</sup>

9. In its defence, Provident Polska contends that the actions brought by the borrowers should be dismissed and makes a counterclaim against each of them, seeking an order requiring them to pay it sums corresponding to a part of the fees and commissions due under the loan agreements and as yet unpaid. The applicants in the main proceedings also contend that those counterclaims should be dismissed.

<sup>3</sup> KU’s application also concerns a sum of 240 Polish zlotys (PLN) (approximately EUR 50.40) in connection with payment into an account of the borrower’s in accordance with the borrower’s instructions in the loan application.

10. 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.

11. 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.

12. Under Article 189 of the Code of Civil Procedure, an applicant may seek a declaration from a court that a legal relationship or a right exists or does not exist, provided that he or she has a legal interest in bringing proceedings. There being no definition in law of the concept of a legal interest in bringing proceedings, that concept has, according to the order for reference, been interpreted by the Sąd Najwyższy (Supreme Court) as being a substantive condition for an action for a declaratory judgment, the success of which will depend on the applicant's ability to demonstrate a legal interest in bringing proceedings, which must, in accordance with Article 316(1) of the Code of Civil Procedure, exist at the time the hearing is brought to a close.

13. According to the referring court, the legal interest in bringing proceedings should be understood as an objective need to protect the legal position of applicants whose rights have been infringed or might be infringed or where there is uncertainty as to the existence or content of those rights. The assessment of whether such an interest exists requires the court hearing the action to evaluate the effect of a declaratory judgment on the applicant's legal position, which is to say the possibility of putting a permanent end to an existing dispute or preventing a dispute from arising in the future. There will, on the other hand, be no legal interest in bringing proceedings when the applicant's rights are neither infringed nor threatened or when they could be better protected by means of an action of broader scope, such as an action for performance.

14. The applicants in the main proceedings find themselves in this latter situation. The referring court emphasises that each of them has already paid part of the disputed commissions and fees and that the remainder is claimed by the lender in a counterclaim lodged in each set of proceedings. It states that, in such a situation, the applicants are in a position to seek a refund of the commissions and fees they have already paid by means of an action of broader scope than an action for a declaratory judgment, such as an action for the recovery of undue payments. That should result in the dismissal of their present actions for want of a legal interest in bringing proceedings, even if it is held that the contractual terms at issue are unfair.

15. The referring court also points out that the assessment of whether particular consumers have a legal interest in bringing proceedings has, in very similar cases, led to different results. That is liable to compromise the attainment of the objectives of Directive 93/13. In particular, even where it is obvious that a term of a contract concluded with a seller or supplier is unfair, a consumer might be reluctant to bring an action for a declaration that the term in question is null and void or unenforceable, for fear that the court will find that he or she has no legal interest in bringing proceedings and dismiss the action on that ground alone and at the same time order the consumer to pay the costs.

16. In the third and last place, the referring court questions whether there are 'overriding reasons', in particular the principle of proportionality or the principle of legal certainty, which preclude the annulment of the agreements which ZL and KU entered into on the ground that the term relating to payment methods contained in those agreements is unfair.

17. It is in that context that the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court of Warsaw-Śródmieście, 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?’

### **The procedure before the Court**

18. The Polish Government and the European Commission have lodged written observations. The Polish Government provided a written reply to the Court’s questions on 7 March 2023. The defendant in the main proceedings, the Polish Government and the Commission made oral submissions at the hearing on 30 March 2023.

### **Analysis**

19. In accordance with the Court’s request, this Opinion will solely address the second question referred for a preliminary ruling, by which the national court asks, essentially, whether Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, precludes national legislation, as interpreted in the case-law, under which a consumer must prove a legal interest in bringing proceedings in order for his or her action for a declaration that unfair contractual terms are unenforceable to be upheld, such a legal interest being absent when another remedy is available to the individual concerned, one that affords better protection of his or her rights, such as an action for performance.

### ***The scope of the question referred***

20. I think it necessary to clarify the scope of this question, bearing in mind that, 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 determine the case before it.<sup>4</sup>

<sup>4</sup> Judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 37).

21. As mentioned, the disputes in the main proceedings are between consumers who initially brought actions to establish the unenforceability of certain unfair contractual terms relating to fees and commissions, and the lender,<sup>5</sup> which contends that those actions should be dismissed and has made counterclaims seeking orders requiring the applicants to pay it sums corresponding to a part of those fees and commissions due under the loan agreement and as yet unpaid. It is clear from the request for a preliminary ruling that, in these circumstances, the referring court is faced with two procedural issues.

22. Regarding the sums which the consumers have already paid in respect of the fees and commissions stipulated in the loan agreement, the referring court states that other remedies are available to the applicants that afford better protection of their rights than the actions for a declaratory judgment which they initiated, namely actions for the recovery of undue payments, based on Articles 405 and 410 of the Polish Civil Code, and that it will therefore be obliged to dismiss the actions in the main proceedings simply on the ground that the legal interest in bringing proceedings is absent, even if the agreements which the parties entered into contain unfair terms.<sup>6</sup>

23. As regards, on the other hand, the sums which the lender claims in its counterclaims, the reference for a preliminary ruling mentions that the applicants, defendants to the counterclaims, are at liberty to argue that the contractual terms are unfair in their responses to the counterclaims and that the referring court's judgment on that point will settle the dispute between the parties.<sup>7</sup> It is common ground that, as their last pleadings stand, the applicants oppose the counterclaims and contend that they should be dismissed.

24. It thus appears that, in the proceedings initiated by the consumers, the referring court should both dismiss their actions for a declaratory judgment, for want of a legal interest in bringing proceedings, and rule on the lender's counterclaim. It is in view of that situation that the referring court entertains doubts as to the compatibility of Polish judicial practice regarding the requirement of an interest in bringing proceedings with Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness.<sup>8</sup>

### ***The minimum harmonisation effected by Directive 93/13***

25. It should be recalled, as a preliminary point, that, in accordance with Article 6(1) of Directive 93/13, Member States are to provide that unfair terms used in a contract concluded with a consumer by a seller or supplier are not, as provided for under their national law, to be binding on the consumer and that the contract is to continue to bind the parties upon the same terms if it is capable of continuing in existence without the unfair terms. Furthermore, it is apparent from Article 7(1) of Directive 93/13, read together with recital 24 thereof, that the Member States must

<sup>5</sup> According to the information provided by the Polish Government, effect may be given to the rights and obligations arising under Directive 93/13 principally by means of two types of action governed by the Code of Civil Procedure, an action for a declaratory judgment concerning a right or a legal relationship (to establish that a contractual term is unfair) or an action for performance (seeking restitution of moneys unduly paid to the seller or supplier on the basis of contractual terms held to be unfair by the court hearing the action for performance).

<sup>6</sup> Paragraph 150 of the order for reference.

<sup>7</sup> Paragraph 149 of the order for reference.

<sup>8</sup> There is nothing in paragraph 149 of the order for reference to suggest that the referring court proposes to find that the applicants have no legal interest in bringing proceedings for a declaratory judgment for the reason that the lender has made counterclaims against them and consequently to dismiss both the consumers' actions and the lender's counterclaims. In addition to the express mention of the prospective dismissal solely of the actions in the main proceedings, it is apparent from the request for a preliminary ruling that a finding that there is no interest in bringing proceedings, as contemplated by Article 189 of the Code of Civil Procedure, has consequences only for the action for a declaratory judgment, in this case its dismissal.

ensure that judicial and administrative bodies have adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. In this connection, the Court has recalled 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.<sup>9</sup>

26. While the Court has already defined, in a number of respects and taking account of the requirements of Articles 6(1) and 7(1) of Directive 93/13, the way in which national courts must ensure that the rights which consumers derive from that directive are protected, the fact remains that, in principle, EU law does not harmonise the procedures for examining whether a contractual term is unfair and that those procedures accordingly fall within the domestic legal systems of the Member States. In accordance with the principle of procedural autonomy, it is for the Member States to define the detailed rules under which the unfairness of a contractual term is established and the actual legal effects of such a finding are produced. Nevertheless, those detailed rules must be no less favourable than those which govern similar domestic actions (the principle of equivalence) and must not be framed in such a way as to render it impossible in practice or excessively difficult to exercise the rights conferred by EU law (the principle of effectiveness).<sup>10</sup>

27. It follows that a condition which requires a consumer bringing an action seeking a declaration that unfair contractual terms are unenforceable to have a legal interest in bringing proceedings is a matter falling within the procedural autonomy of the Member States, subject to observance of the principles of equivalence and effectiveness. The same applies to the rules on the award of costs in such proceedings before the national courts, which is a question that has been raised by the referring court and is inextricably linked to the question of the legal interest in bringing proceedings, the absence of which entails, according to the information provided by the referring court, the dismissal of the consumer's action and a consequential order requiring the consumer, as applicant, to pay the costs.<sup>11</sup>

28. As regards the principle of effectiveness, which is the only principle mentioned in the referring court's questions, it is the Court's settled case-law 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, how it comes into play and its special features 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. In addition, the Court has stated that the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, particularly the rights deriving from Directive 93/13, implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, which applies, *inter alia*, to the definition of detailed procedural rules relating to actions based on such rights.<sup>12</sup>

<sup>9</sup> Judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraphs 31 and 33).

<sup>10</sup> See, to that effect, judgments of 22 September 2022, *Vicente (Action for the recovery of lawyers' fees)* (C-335/21, EU:C:2022:720, paragraphs 53 and 54), and of 22 September 2022, *Servicios prescriptor y medios de pagos EFC SAU* (C-215/21, EU:C:2022:723), paragraphs 33.

<sup>11</sup> See, to that effect, the judgment of 7 April 2022, *Caixabank* (C-385/20, EU:C:2022:278, paragraph 47).

<sup>12</sup> Judgments of 10 June 2021, *BNP Paribas Personal Finance* (C-776/19 to C-782/19, EU:C:2021:470, paragraphs 28 and 29), and of 22 September 2022, *Servicios prescriptor y medios de pagos EFC SAU* (C-215/21, EU:C:2022:723, paragraphs 35 and 36).

29. However, the Court has recognised that consumer protection is not absolute. Thus, the fact that a particular procedure comprises certain procedural requirements that the consumer must observe in order to assert his rights does not mean that he does not enjoy effective judicial protection. It should also be remembered that since the procedural rules relating to the structure of internal legal remedies pursue a general interest in the sound administration of justice and foreseeability, they must prevail over individual interests, meaning that they cannot be adapted to suit the specific financial situation of a party, provided that they do not go beyond what is necessary to achieve their objective.<sup>13</sup>

### ***Observance of the principle of effectiveness***

#### *The existence of a public interest objective*

30. It should be borne in mind that, in applying the principle of effectiveness, account must be taken, inter alia, of the basic principles of the domestic judicial system, such as the proper conduct of the proceedings.<sup>14</sup> The order for reference indicates that Polish civil procedure is based on the premiss that the exercise of rights through judicial channels must be targeted, as simple as possible, and granted without any multiplication of legal proceedings. That presumption is satisfied, in actions for a declaration that a legal relationship or a right exists (or does not exist), by the requirement that a legal interest in bringing proceedings must be proven, and by the principle that the possibility of obtaining more effective protection by means of a different type of action removes any legal interest in seeking a declaratory judgment.<sup>15</sup>

31. The requirement of a legal interest in bringing proceedings in any action for a declaration, in so far as its purpose is to confine such actions to situations where there is an actual infringement of, or a known threat to the applicant's legal rights, or where no other type of action that affords better protection of the applicant's rights is available, pursues the public interest objective of the sound administration of justice by preventing or reducing, as the case may be, any overburdening of the judicial system.<sup>16</sup> It is in order to ensure the sound administration of justice and to satisfy the requirement for procedural economy, by preventing the courts from having to deal with purely hypothetical questions and multiple appeals, that every individual must, regardless of the legal remedy chosen, have a legal interest in bringing proceedings. I would point out in this connection that the Court has held that rules which pursue such an objective, including those which require an additional effort from consumers who seek to enforce their rights, are likely to be justified, provided that they do not go beyond what is necessary to achieve that objective.<sup>17</sup>

32. Therefore, the requirement of a legal interest in bringing proceedings in any action for a declaration brought by a consumer in order to enforce the rights which he or she derives from Directive 93/13 should not, in itself, be considered contrary to the principle of effectiveness, provided that its application does not render it impossible in practice or excessively difficult to exercise the rights conferred by that directive.

<sup>13</sup> Judgments of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraphs 50 and 51), and of 12 February 2015, *Baczó and Vizsnyiczai* (C-567/13, EU:C:2015:88, paragraph 51).

<sup>14</sup> See to that effect, judgment of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 33).

<sup>15</sup> Paragraph 143 of the order for reference.

<sup>16</sup> In so far as concerns actions governed by EU law, the Court has held that the existence of an interest in bringing proceedings, which it is for the applicant to prove, 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).

<sup>17</sup> See, to that effect, the judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraph 51).

### *The initiation of separate proceedings*

33. According to settled case-law, it is for the national court, under Article 6(1) of Directive 93/13, to establish all the consequences, arising under national law, of a finding that a term is unfair, in order to ensure that the consumer concerned is not bound by that term. Such an obligation implies that it is for that court to exclude the application of the term regarded as being unfair so that that term does not produce binding effects with regard to that consumer. Since such a term must be regarded, in principle, as never having existed, so that it cannot have any effect on that consumer, the obligation for the national court to exclude the application of an unfair contract term which imposes the payment of an amount entails, in principle, a corresponding restitutory effect in respect of that amount.<sup>18</sup>

34. In that context, the Court has found that it is for the Member States, by means of their national legislation, to define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced. However, that finding must allow the restoration of the legal and factual situation that the consumer concerned would have been in if that unfair term had not existed, by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier concerned on the basis of that unfair term. Such regulation by national law of the protection guaranteed to consumers by Directive 93/13 may not adversely affect the substance of that protection.<sup>19</sup>

35. I note in this regard that the Court has, when examining whether a consumer does enjoy effective judicial protection in connection with the right to restitution just mentioned, taken account of the existence of a procedural remedy distinct from the proceedings initiated by or against the consumer before the referring court. It has thus held that national legislation under which the court to which an application for an order for payment has been made is required to reject that application to the extent that it is based on an unfair term, but is not permitted to offset *ex officio* the payments made on the basis of that term against the balance due, with the result that the debtor, *who does not take part in the order for payment proceedings*, is obliged to initiate separate proceedings to exercise his or her right to full restitution, is not, in principle, contrary to Article 6 of Directive 93/13.<sup>20</sup>

36. The Court went on to hold that national legislation in accordance with which the court does not have the power, in the context of order for payment proceedings, to determine whether the claim concerned exists and the consumer concerned is consequently obliged, in order to exercise the right to full restitution which arises under Article 6 of Directive 93/13, to conduct separate proceedings, does not make it impossible or excessively difficult to exercise that right, even though that obligation requires action on the part of the debtor concerned and the pursuit of adversarial proceedings.<sup>21</sup>

37. In another case, the Court drew a distinction between contractual terms that are deemed unfair under legislative provisions and other terms that may be unfair, both of which were the subject of a single action brought by a consumer, and held that the effectiveness of the protection

<sup>18</sup> Judgment of 30 June 2022, *Profi Credit Bulgaria* (Offsetting *ex officio* in the event of an unfair term) (C-170/21, EU:C:2022:518, paragraphs 41 and 42).

<sup>19</sup> Judgment of 30 June 2022, *Profi Credit Bulgaria* (Offsetting *ex officio* in the event of an unfair term) (C-170/21, EU:C:2022:518, paragraph 43).

<sup>20</sup> Judgment of 30 June 2022, *Profi Credit Bulgaria* (Offsetting *ex officio* in the event of an unfair term) (C-170/21, EU:C:2022:518, paragraph 45).

<sup>21</sup> Judgment of 30 June 2022, *Profi Credit Bulgaria* (Offsetting *ex officio* in the event of an unfair term) (C-170/21, EU:C:2022:518, paragraph 48).



intended by Directive 93/13 did not preclude national rules which provided for another effective procedural path enabling the individual concerned to request reimbursement of sums unduly paid under contractual terms of the second type.<sup>22</sup> That judicial solution seems to be explained by the existence in national law of a ‘special procedure’ for the first type of term only, which the consumer had nevertheless used for all of his claims against the lender.

38. In the present case, it is common ground that the loan agreements were partly performed, the borrowers having paid various sums in accordance with the terms relating to fees and commission the unfairness of which, if established by the referring court, must result in those consumers having a right to full restitution of the sums thus paid.<sup>23</sup> In light of the case-law to which I have referred, should it be accepted that the principle of effectiveness does not preclude that such a right must be exercised in separate proceedings, as a result of the application of the condition relating to the legal interest in bringing proceedings? In light of the particular circumstances of the present case, that question should, in my opinion, be answered in the negative.

39. In the present case, the borrowers are indeed parties to the proceedings under ordinary law for a declaration, since they themselves initiated them, although the subject matter of those proceedings changed as a result of the lender’s counterclaims for orders requiring payment, the admissibility of which is not in dispute. In the context of these broadened proceedings, the borrowers, as defendants to the counterclaims, oppose the lender’s claims for an order requiring them to pay fees and commissions based on contractual terms already characterised as unfair in their actions for a declaratory judgment and in respect of which no special procedure appears to be provided for by law.

40. I would point out, first, that, in the event that the consumers’ actions are dismissed for lack of a legal interest in bringing proceedings, the question of whether the contractual terms concerned are unfair or not will, in any event, have to be decided by the referring court in order for it to rule on the counterclaims. Second, if the borrowers bring an action for the recovery of sums unduly paid before another court, which would also have to determine whether the offending terms are unfair or not, that would raise an issue of legal certainty, because of the possibility of different rulings on the point.<sup>24</sup>

41. In this context, in addition to the fact that the borrowers in question cannot be accused of complete inertia,<sup>25</sup> it should be observed that the dismissal of the actions for a declaratory judgment and orders against the applicants to pay the costs incurred in those actions, along with directions to bring more suitable proceedings before a court having jurisdiction to examine an action for the recovery of sums paid but not due, are, because of the new procedural constraints, the time and costs expended in the new proceedings, in addition to those expended in the initial action, clearly a cause of needless complexity, effort, expenditure and legal uncertainty. In my view, such a situation would reflect an antagonistic duality between the *ratio legis* and the application of the condition relating to the legal interest in bringing proceedings imposed by Polish procedural law, in that it would be contrary to the sound administration of justice and to

<sup>22</sup> See, to that effect, the judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraph 54).

<sup>23</sup> I would reiterate that, according to the referring court, the applicants’ lack of a legal interest in bringing proceedings must result in the dismissal of the actions in the main proceedings, notwithstanding a finding that the contractual terms challenged are unfair.

<sup>24</sup> This is clear from the observations of the Polish Government (paragraph 48) concerning the concept of *res judicata* provided for in Article 366 of the Code of Civil Procedure.

<sup>25</sup> In its judgment of 22 September 2022, *Vicente (Action for the recovery of lawyers’ fees)* (C-335/21, EU:C:2022:720, paragraph 56), the Court noted that the need to comply with the principle of effectiveness could not be stretched so far as to make up fully for total inertia on the part of the consumer concerned.

the requirement of procedural economy to require an applicant to bring a new action in order for all the consequences of a single legal issue – whether or not the contractual terms are unfair – to be assessed.

42. According to the case-law, adequate and effective means to stop the use of unfair terms in consumer contracts must include provisions enabling consumers to be guaranteed effective judicial protection by making it possible for them to bring legal proceedings against the disputed contract under reasonable procedural conditions, so that the exercise of their rights is not subject to conditions, in particular time limits or costs, which make it excessively difficult or impossible to exercise the rights guaranteed by Directive 93/13.<sup>26</sup> That does not exactly seem to me to be the case for the consumers in the present case, given the case-law interpretation of the legal requirement for an interest in bringing proceedings in any action for a declaratory judgment. That should lead to the conclusion that it is incompatible with Directive 93/13.

43. The fact that, according to the information provided by the Polish Government in response to the Court's questions, the national court has a margin of discretion in ruling on costs and, in particularly justified cases, may make an exception to the principle that the unsuccessful party must bear the costs and order that party to pay only part of the costs or none at all, does not seem to me to be sufficient, in and of itself, to invalidate that conclusion.

### *The possibility of interpretation in conformity with EU law*

44. In its written observations and written reply to the Court's questions, the Polish Government took issue with the interpretation of national law adopted by the referring court and maintained that Articles 189 and 316(1) of the Code of Civil Procedure can be interpreted in a manner consistent with the requirements flowing from the principle of effectiveness.

45. More specifically, the Polish Government submits that the principle that there is no legal interest in bringing an action for a declaratory judgment where the applicant is able to have his or her rights upheld by means of an action for performance is not an absolute principle. It refers to recent case-law of the Sąd Najwyższy (Supreme Court) according to which, in matters of consumer law, the applicant will, subject to certain conditions, continue to have a legal interest in bringing proceedings for a declaration that a legal relationship does not exist even if he or she is able to bring an action for performance or if such an action has been brought against him or her by the opposing party on the basis of the legal relationship at issue,<sup>27</sup> something which the referring court itself does not appear to rule out.<sup>28</sup>

46. In its written reply to the Court's questions, the Polish Government also mentioned that the applicants' pleadings could be amended following the lodging of a counterclaim. Thus, it would appear that, in proceedings such as those before the referring court, the borrowers may seek, in addition to the dismissal of the lender's counterclaim on the ground of the unfairness of the offending contractual terms, repayment of the sums paid under those terms in partial performance of the loan agreement, and thus lead the court to settle the dispute in a single set of

<sup>26</sup> Judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 59).

<sup>27</sup> Paragraph 40 of the Polish Government's observations and paragraph 11 of its reply to the Court's questions. The Polish Government also states that, having regard to the national courts' interpretation of the concept of *res judicata*, the assertion that an action for performance would necessarily afford better protection of consumers than an action for a declaratory judgment is mistaken (paragraphs 45 to 51 of the Polish Government's observations).

<sup>28</sup> The referring court's mention of different approaches being taken in national case-law interpreting the condition relating to the legal interest in bringing proceedings confirms the possibility of interpretation in conformity with EU law.

proceedings. Thus, it seems that the possibility of the dispute being definitively resolved by the court depends solely on whether the applicants take the initiative to amend their original pleadings, something which the seller or supplier may not oppose,<sup>29</sup> and that the requirement of a legal interest in bringing the action for a declaratory judgment will fall away, given the change in the subject matter of the dispute.

47. In that regard, it is important to recall that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it. As the Court has also held, that requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law.<sup>30</sup>

48. In view of the circumstances referred to in points 45 and 46 of this Opinion, it is for the referring court to examine whether the national legislation at issue in the main proceedings can indeed be interpreted in conformity with Directive 93/13 and, if so, to draw the legal conclusions from that.<sup>31</sup>

## Conclusion

49. In the light of the foregoing considerations, I suggest that the second question referred by the Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie (District Court of Warsaw-Śródmieście, Warsaw, Poland) for a preliminary ruling be answered as follows:

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the principle of effectiveness,

must be interpreted as precluding provisions of national law and any judicial interpretation thereof according to which an action brought by a consumer for a declaration that unfair contractual terms are unenforceable, followed by a counterclaim by the seller or supplier for payment of sums due under those same terms, will be dismissed and the consumer ordered to pay the costs on the ground that the consumer has no legal interest in bringing the action because another legal remedy is available whereby the sums already paid to the seller or supplier pursuant to those terms may be recovered.

<sup>29</sup> In the present case, the applicants appear to confine themselves to seeking the dismissal of the counterclaims, without requesting repayment of the sums paid in respect of the fees and commissions stipulated in the offending contractual terms. I would observe in that connection that, in its judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188), in paragraph 31, the Court held that the principle that the subject matter of an action is delimited by the parties, as well as the principle of *ne ultra petita*, according to which the court cannot rule beyond the pleadings of the parties, risk being disregarded if national courts were required, under Directive 93/13, to ignore or exceed the limitations of the subject matter of the dispute established by the forms of order sought and the pleas in law of the parties.

<sup>30</sup> Judgment of 26 June 2019, *Addiko Bank* (C-407/18, EU:C:2019:537, paragraphs 65 and 66).

<sup>31</sup> See, to that effect, the judgment of 26 June 2019, *Addiko Bank* (C-407/18, EU:C:2019:537, paragraph 67).