



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

21 September 2023*

(Reference for a preliminary ruling – Directive 93/13/EC – Unfair terms in consumer contracts – Mortgage loan contract index-linked to a foreign currency – Criteria for assessment of whether a conversion clause is unfair – National register of standard business terms which are held to be unlawful – Duty to provide information)

In Case C-139/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (Warsaw District Court – Warsaw City Centre, Poland), made by decision of 18 January 2022, received at the Court on 25 February 2022, in the proceedings

AM,

PM

v

mBank S.A.,

intervening parties:

Rzecznik Finansowy,

THE COURT (Ninth Chamber),

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

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– AM and PM, by W. Bochenek and T. Zaremba, radcowie prawni,

* Language of the case: Polish.

- mBank S.A., by A. Cudna-Wagner, radca prawny, and B. Miąskiewicz, adwokat,
- the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,
- the Portuguese Government, by P. Barros da Costa, A. Cunha, B. Lavrador, L. Medeiros and A. Pimenta, acting as Agents,
- the European Commission, by I. Galindo Martín, S.L. Kaléda, U. Małecka, and N. Ruiz García, acting as Agents,

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

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The request has been made in proceedings between AM and PM, two consumers, on the one hand, and mBank S.A., on the other hand, concerning the latter’s use of standard business terms registered in the national register of the standard business terms which are held to be unlawful (‘the national register of unlawful terms’).

Legal context

European Union law

- 3 The 24th recital of Directive 93/13 states:

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

- 4 Article 2(b) of that directive provides:

‘For the purposes of this Directive:

...

(b) “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession’.

- 5 Article 3 of that directive provides:

‘1. 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.’

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

6 Under Article 4 of that directive:

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

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

7 Article 6(1) of Directive 93/13 is worded as follows:

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

8 Article 7(1) and (2) of that directive provides:

'1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

9 Article 8 of that directive provides:

'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

- 10 According to Article 76 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland):

‘Public authorities shall protect consumers, users and tenants against activities threatening their health, privacy and safety, and against unfair market practices. The scope of that protection shall be defined by law.’

- 11 Article 22¹ of the ustawa – Kodeks cywilny (Law on the Civil Code), of 23 April 1964 (Dz. U. of 1964, No 16, item 93), in the version thereof applicable to the main proceedings (‘the Civil Code’), provides:

‘A “consumer” is a natural person who, when concluding and performing a consumer contract, does not act in the course of his trade or of another commercial activity.’

- 12 Article 58(1) of the Civil Code states:

‘A legal transaction which is contrary to the law or intended to circumvent the law shall be void, unless the relevant provision provides otherwise, in particular that the invalid terms of the legal transaction are to be substituted by relevant provisions of the law.’

- 13 Under Article 385¹(1) and (3) of that Code:

‘1. Terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his or her rights and obligations are set forth in a way that is contrary to the accepted principles of morality and grossly infringes his or her interests (unlawful terms). This shall not apply to terms setting out the principal performances to be rendered by the parties, including those relating to price or remuneration, so long as they are worded clearly.

...

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

- 14 Article 385² of the Civil Code is worded as follows:

‘The compliance of contractual terms with the accepted principles of morality shall be assessed according to the state of affairs at the time when the contract was concluded, taking into account its content, the circumstances in which it was concluded and also other contracts connected with the contract which contains the provisions being assessed.’

- 15 Article 479³⁶ of the ustawa – Kodeks postępowania cywilnego (Law on the Code of Civil Procedure), of 17 November 1964 (Dz. U. of 1964, No 43, item 296), in the version thereof applicable to the main proceedings (‘the Code of Civil Procedure’), provided:

‘Cases for declaring standard contract terms as unlawful fall within the jurisdiction of the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw – Competition and Consumer Protection Court)’.

16 Article 479⁴²(1) of the Code of Civil Procedure provided:

‘If the application is granted, the court shall, in the operative part of its judgment, reproduce the content of the terms contained in the standard contract concerned which have been held to be unlawful and shall prohibit the use of those terms.’

17 Article 479⁴³ of the Code of Civil Procedure was worded as follows:

‘A final judgment shall have effect against third parties from the moment the standard contract term held to be unlawful is entered in the register referred to in 479⁴⁵(2).’

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

18 On 7 October 2009, the applicants in the main proceedings, who are married to one another, concluded with mBank a mortgage loan contract for natural persons and index-linked to the exchange rate for the Swiss franc (CHF) (‘the loan agreement at issue in the main proceedings’). The subject matter of that contract was a loan of 246 500 Polish zlotys (PLN) (approximately EUR 54 560). The contract provided for a variable rate of interest, determined as the base rate of the *3 Month London Interbank Offered Rate* (LIBOR 3M) for the currency in which that loan had been granted, increased by the bank’s fixed margin of 2.70% throughout the loan term.

19 In the loan contract at issue in the main proceedings, the applicants in the main proceedings signed a declaration that they were aware of the risks involved in signing that contract and the conditions of that contract.

20 At the date of the loan application, AM, holder of a postgraduate degree, had been employed by mBank for three and a half years. One of mBank’s employees had shown to AM a historical chart of the evolution of the CHF/PLN exchange rate over the three years which preceded the submission of that application and a simulation anticipating the evolution of the amount of the debt and of the loan instalment amounts in the event of an increase of that exchange rate. On the other hand, PM, who signed the loan application and the loan contract at issue in the main proceedings, had not participated in the procedure for the grant of that loan or the meetings organised with mBank’s employees.

21 On 7 April 2020, AM and PM brought an action against mBank before the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (Warsaw District Court – Warsaw City Centre, Poland), which is the referring court, based on the invalidity of certain terms in the loan contract at issue in the main proceedings. In that action, they seek an order that mBank pay them PLN 37 439.70 (approximately EUR 8 290), plus statutory interest, as reimbursement of the instalments of capital and interest inasmuch as those instalments were collected unduly and, in the event that the referring court declares that contract invalid, the sum of PLN 74 768.63 (approximately EUR 16 550), plus statutory interest, as reimbursement for the funds received by the defendant in the main proceedings.

22 The referring court observes that, on 5 August 2014, the Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office of Competition and Consumer Protection, Poland) entered in the national register of unlawful terms the standard contract term used by mBank, according to which ‘the capital and interest instalments and the interest instalments are repaid in [Polish zlotys] after being converted according to the [Swiss franc] selling rate specified in the exchange rate table of ... Bank S.A. applicable on the day of repayment at 14.50’.

- 23 In addition, on 25 May 2021, the President of the Office of Competition and Consumer Protection entered in the national register of unlawful terms the standard contract terms used by mBank, according to which ‘the buying and selling rates of currencies applicable on a given business day may vary. The decision to change the rates, and the decision on how frequently those changes will take place, are taken by the Bank while taking into account the factors listed in paragraph 6’ and ‘the buying and selling rates of currencies, as well as the currency spread, are determined taking into account the following factors: (1) current exchange rates on the interbank market, (2) supply and demand for currencies on the domestic market, (3) interest rate differentials and inflation rates on the domestic market, (4) liquidity of the foreign exchange market, (5) the state of the balance of payments and trade’.
- 24 According to the referring court, contractual terms which are similar or identical to those registered, on 5 August 2014 and 25 May 2021, in the national register of unlawful terms are held to be unfair terms by the Polish courts on the ground that such contractual terms give the bank concerned the right to freely determine the exchange rate of the reference foreign currency and, consequently, the right to freely determine the amount of the performance to be made by the borrower, even though, meanwhile, that borrower is obliged to reimburse the loan in Polish zlotys exclusively.
- 25 That court notes further that the terms of the loan contract at issue in the main proceedings have the same content as the terms entered in the national register of unlawful terms referred to in paragraph 23 of the present judgment.
- 26 The court concerned asks whether a straightforward finding that a contract contains a term whose content corresponds to a term entered in the national register of unlawful terms is sufficient to find that that term constitutes an unlawful contractual term, without it being necessary to examine and to determine the circumstances in which that contract was concluded.
- 27 Although the loan contract at issue in the main proceedings contains terms stipulating that that loan is to be reimbursed in Polish zlotys while mBank converts that currency into Swiss francs at its own rate of exchange, it also contains a term, resulting from the new version of mBank’s standard business terms, dated 1 July 2009, which provides for the possibility for the applicants in the main proceedings to reimburse that loan directly in Swiss francs. Thus, the latter may convert the amount to be reimbursed monthly in accordance with the exchange rate of the banking institution of their choice and are not dependent on the exchange rate determined by mBank.
- 28 The domestic case-law diverges on the issue of whether a contractual term may cease to be considered unfair on account of another term of that contract which renders it optional.
- 29 Without prejudice to the issue of whether both terms concerned must automatically be declared unfair, the referring court must as a minimum assess whether the term stipulating that the loan contract at issue in the main proceedings is index-linked to the Swiss franc is unfair inasmuch as that term has never been entered in the national register of unlawful terms.
- 30 In that context, the referring court asks whether mBank should have been required to provide information as to the risk associated with the exchange rate also to AM, its employee at the date of the loan application, having regard to the training and professional experience of the latter.

- 31 In the negative, that is to say if, where a seller or supplier concludes a single contract with two consumers, it would be possible for the intensity of the duty to provide information borne by that seller or supplier to vary depending on the consumer concerned, that court raises the issue of the potential consequences, in particular regarding the possibility that the unfair nature of a term, or even the invalidity of that contract, might be found with respect to only one of those two consumers.
- 32 In those circumstances, the Sąd Rejonowy dla Warszawy – Śródmieścia w Warszawie (Warsaw District Court – Warsaw City Centre) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Article 3(1), Article 7(1) and (2), and Article 8 of [Directive 93/13] and the principle of effectiveness be interpreted as meaning that, in order for a contractual term which has not been individually negotiated to be regarded as unfair, it is sufficient to ascertain that the content of that contractual term corresponds to that of a provision of a standard contract which has been entered in the register of unlawful terms?
- (2) Must Article 3(1) of [Directive 93/13] be interpreted as precluding [national case-law to the effect] that an unfair contractual term loses its unfair character if the consumer can choose to perform his or her obligations arising from the contract concerned on the basis of another term of that contract which is fair?
- (3) Must Article 3(1) and Article 4(1) of [Directive 93/13] be interpreted as meaning that a seller or supplier is required to inform each consumer of the essential characteristics of the contract and the risks associated with the contract, even if the consumer in question has relevant knowledge of the subject matter?
- (4) Must Article 3(1), Article 6[(1)] and Article 7(1) of [Directive 93/13] be interpreted as meaning that, where more than one consumer concludes the same contract with a single seller or supplier, the same contractual terms may be regarded as unfair to the first consumer and fair to the second and, if so, may the consequence be that the contract is invalid as far as the first consumer is concerned and valid as far as the second consumer is concerned, such that he or she is subject to all the obligations arising from that contract?’

Consideration of the questions referred

The first question

- 33 By its first question, the referring court asks, in essence, whether Article 3(1), Article 7(1) and (2) and Article 8 of Directive 93/13 must be interpreted as precluding a contractual term which has not been individually negotiated from being regarded as unfair by the national authorities concerned merely by virtue of the fact that its content is equivalent to that of a standard contract term entered in the national register of unlawful terms.
- 34 According to settled case-law of the Court, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge (judgment of 4 May 2023, *BRD Groupe Société Générale and Next Capital Solutions*, C-200/21, EU:C:2023:380, paragraph 24 and the case-law cited).

- 35 Therefore, first, under Article 3(1) of that directive, a contractual term which 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 that contract, to the detriment of the consumer concerned, while, under Article 6(1) of that directive, such an unfair term does not bind that consumer. That latter provision aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (see, to that effect, judgment of 4 May 2023, *BRD Groupe Societ  Generale and Next Capital Solutions*, C-200/21, EU:C:2023:380, paragraph 25 and the case-law cited).
- 36 Next, given the nature and significance of the public interest constituted by the protection of consumers who are in such a position of weakness, Article 7(1) of that directive, read in conjunction with the 24th recital thereof, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (judgment of 4 May 2023, *BRD Groupe Societ  Generale and Next Capital Solutions*, C-200/21, EU:C:2023:380, paragraph 27 and the case-law cited).
- 37 As is apparent from Article 7(2) of Directive 93/13, the aforementioned means are to include the possibility for persons or organisations having a legitimate interest under national law in protecting consumers to take action in order to obtain a judicial decision as to whether contract terms drawn up for general use are unfair and, where appropriate, to have those terms prohibited (judgment of 26 April 2012, *Invitel*, C-472/10, EU:C:2012:242, paragraph 36).
- 38 In the present case, since the applicants in the main proceedings have seised the referring court by an application in relation to a specific contract, there is no need to answer the first question with regard to Article 7(2) of Directive 93/13.
- 39 According to the 12th recital of that directive, it provides for only partial and minimum harmonisation of national laws on unfair terms, leaving the Member States the option, with due regard for the FEU Treaty, to afford the consumer concerned a higher level of protection through national provisions that are more stringent than those of the directive. In addition, under Article 8 of the directive, Member States may adopt or retain the most stringent provisions compatible with that Treaty in the area covered by that directive, to ensure a maximum degree of protection for that consumer (see, to that effect, judgment of 21 December 2021, *Trapeza Peiraios*, C-243/20, EU:C:2021:1045, paragraph 54 and the case-law cited).
- 40 So far as concerns the national register of unlawful terms, the Court has held, first, that a mechanism such as that register, consisting in establishing a list of terms which must be regarded as unfair, is one of the more stringent measures that Member States may adopt or retain under Article 8 of Directive 93/13 (see, to that effect, judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 61) and that that register meets, in principle, the interest of consumer protection (see, to that effect, judgment of 21 December 2016, *Biuro podr zy 'Partner'*, C-119/15, EU:C:2016:987, paragraph 36).
- 41 A finding that a disputed contractual term is unfair based on a comparison of the content of that term with that of a term entered in the national register of unlawful terms is capable of swiftly contributing to unfair terms used in a significant number of contracts ceasing to have effects vis- -vis the consumers who are parties to those contracts.

- 42 Furthermore, the Court has indeed held, again on the basis of Article 8 of Directive 93/13, that Member States may extend the protection provided by Article 3(1) and (3) of that directive, read in conjunction with point 1 of the Annex to that directive, by declaring unfair in a general manner standard terms which are listed in that point, without the requirement for further examination in accordance with criteria set out in Article 3(1) of Directive 93/13 (judgment of 19 September 2019, *Lovasné Tóth*, C-34/18, EU:C:2019:764, paragraph 47).
- 43 Secondly, the Court has held that, provided that the national register of unlawful terms is managed in a transparent manner in the interest not only of consumers, but also sellers or suppliers, and that it is kept up to date, in keeping with the principle of legal certainty, the establishment of that register is compatible with EU law (see, to that effect, judgment of 21 December 2016, *Biuro podróży 'Partner'*, C-119/15, EU:C:2016:987, paragraphs 36 to 39 and 43).
- 44 The Court found that the application of the mechanism of the register of unlawful terms presupposes an assessment by the competent national court of the equivalence of the contested contractual term with a standard business term held to be unlawful and included in that register, the seller or supplier concerned having the option to challenge that equivalence before a national court in order to determine whether, in the light of all the relevant circumstances of the individual case at issue, that contractual term is materially identical to the term entered in such a register, having regard, inter alia, to the effects it produces (see, to that effect, judgment of 21 December 2016, *Biuro podróży 'Partner'*, C-119/15, EU:C:2016:987, paragraphs 40 to 42).
- 45 Moreover, it must also be recalled that although, under Article 8 of Directive 93/13, Member States remain free to make provision, in their national law, for a more extensive *ex officio* examination than that which their courts must carry out under that directive, or simplified procedures, such as that at issue in the main proceedings, to assess whether a contractual term is unfair, the national court is nevertheless, as a general rule, required to inform the parties to the dispute of that assessment and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure (see, to that effect, judgment of 11 March 2020, *Lintner*, C-511/17, EU:C:2020:188, paragraphs 41 and 42).
- 46 In those circumstances, the answer to the first question is that Article 3(1), Article 7(1) and Article 8 of Directive 93/13 must be interpreted as not precluding a contractual term which has not been individually negotiated from being regarded as unfair by the national authorities concerned merely by virtue of the fact that its content is equivalent to that of a standard contract term entered in the national register of unlawful terms.

The second question

- 47 By its second question, the referring court asks, in essence, whether Article 3(1) of Directive 93/13 must be interpreted as meaning that a contractual term which, because of the circumstances for the performance of certain obligations of the consumer concerned provided for by that term, must be regarded as unfair, may cease to be considered unfair on account of another term of that contract which provides for the possibility for that consumer to perform those obligations under different circumstances.

- 48 It is settled case-law that the jurisdiction of the Court extends to the interpretation of the concept of ‘unfair term’ used in Article 3(1) of that directive and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the national court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (judgment of 8 December 2022, *Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest*, C-600/21, EU:C:2022:970, paragraph 38).
- 49 It must be recalled in this connection that, when assessing whether a contractual term which has not been individually negotiated is unfair, it is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (see, to that effect, judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 50 and the case-law cited).
- 50 Admittedly, the national court must, in order to determine whether the contractual term on which the claim brought before it is based is unfair, take account of all the other terms of the contract in question (judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, EU:C:2021:68, paragraph 58 and the case-law cited), since, depending on the content of that contract, it may be necessary to assess the cumulative effect of all of its terms (see, to that effect, judgment of 11 March 2020, *Lintner*, C-511/17, EU:C:2020:188, paragraph 47 and the case-law cited).
- 51 However, the Court has stated that the national court must, when assessing whether a term is unfair, refer only to the date of conclusion of the contract concerned and assess, in particular, in the light of all the circumstances attending the conclusion of the contract, whether that term in itself gave rise to an imbalance between the rights and obligations of the parties in favour of the seller or supplier concerned, even though that imbalance could occur only if certain circumstances arose and, in other circumstances, that term could even benefit the consumer concerned (see, to that effect, judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, EU:C:2021:68, paragraphs 54 and 55).
- 52 In the present case, it is apparent from the request for a preliminary ruling that the loan contract at issue in the main proceedings contains terms whose content is equivalent to that of terms entered in the national register of unlawful terms, which oblige a borrower to reimburse a loan index-linked to a foreign currency exclusively in the national currency as converted according to a rate of exchange freely determined by the bank concerned.
- 53 Furthermore, the loan contract at issue in the main proceedings also includes other terms allowing the applicants in the main proceedings to reimburse the loan concerned directly in Swiss francs, with the result that they can obtain the amount to be reimbursed monthly in that currency from the institution of their choice, thus without leaving mBank to determine that amount freely. As pointed out by the European Commission in its written observations, those other terms therefore constitute an alternative method for reimbursement of the loan by the consumer concerned as against that provided for by the terms referred to in the preceding paragraph.

- 54 It is apparent from paragraph 23 above that those latter terms were regarded as unfair on the ground that they give the bank concerned the right to determine freely the rate of exchange, and accordingly the performance outstanding, and that in so doing, they intrinsically create a significant imbalance between the rights and obligations of the parties to the advantage of the seller or supplier concerned. Therefore, the fact that that imbalance may not occur, because the consumer concerned may decide, during the performance of the contract, to have recourse to alternative methods of reimbursement of the loan provided for in that contract, has no bearing, as observed in paragraph 51 above, on the assessment of whether those latter terms are unfair as such.
- 55 It should be added that the inclusion in a contract concluded with a consumer of two alternative terms concerning performance of the same obligation borne by that consumer, one of which is unfair and the other lawful, enables the seller or supplier concerned to speculate on the fact that, through a lack of information, failure to pay due attention or a lack of understanding, that consumer will perform the obligation concerned under the term which creates a significant imbalance, to his or her detriment, in the parties' rights and obligations. Consequently, such a contractual mechanism is liable to be unfair per se.
- 56 Moreover, not finding that an unfair term is invalid is liable to undermine the achievement of the long-term objective referred to in Article 7 of Directive 93/13, which is to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
- 57 In those circumstances, the answer to the second question is that Article 3(1) of Directive 93/13 must be interpreted as meaning that a contractual term which, because of the circumstances for the performance of certain obligations of the consumer concerned provided for in that term, must be regarded as unfair, may not cease to be considered unfair on account of another term of that contract which provides for the possibility for that consumer to perform those obligations under different circumstances.

The third question

- 58 The third question, which is in relation to the interpretation of Article 3(1) and Article 4(1) of Directive 93/13, concerns the transparency requirement borne by a seller or supplier prior to the conclusion of a loan contract index-linked to a foreign currency vis-a-vis the loan applicant where the latter is its employee. However, that transparency requirement is provided for in Article 4(2) of that directive, in respect of terms such as those at issue in the main proceedings, and the concept of 'consumer' is defined in Article 2(b) of that directive.
- 59 Accordingly, it must be held that, by its third question, the referring court asks, in essence, whether Article 4(2) of Directive 93/13, read in conjunction with Article 2(b) thereof, must be interpreted as meaning that a seller or supplier is obliged to inform the consumer concerned of the essential characteristics of the contract concluded and the risks associated with that contract, even though that consumer is its employee and has relevant knowledge in the field of the contract.
- 60 It must be borne in mind that the requirement for contractual terms to be transparent, provided for in Article 4(2) of that directive must be understood as requiring not only that the term in question be formally and grammatically intelligible to a consumer, but also that an average consumer, who is reasonably well informed and reasonably observant and circumspect, be in a position to understand the specific functioning of that term and thus evaluate, on the basis of

clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 64 and the case-law cited).

- 61 That reference to the average consumer constitutes an objective criterion. Indeed, the concept of ‘consumer’, within the meaning of Article 2(b) of Directive 93/13, is objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has (see, to that effect, judgment of 21 March 2019, *Pouvin and Dijoux*, C-590/17, EU:C:2019:232, paragraph 24 and the case-law cited).
- 62 As regards, specifically, loan contracts which are index-linked to a foreign currency, such as that at issue in the main proceedings, the requirement of transparency of contractual terms requires, inter alia, that a seller or supplier must clearly inform the consumer concerned of the fact that, by concluding that contract, he or she is exposing him or herself to a certain foreign exchange risk which may be economically difficult to bear in the event of a depreciation of the currency in which the consumer receives his or her income. In addition, that seller or supplier must set out the possible variations in the exchange rate and the risks inherent in entering into such an agreement (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 71 and the case-law cited).
- 63 The information communicated by that seller or supplier must enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, not only to understand that, depending on exchange rate fluctuations, changes in the exchange rate between the account currency and settlement currency may have unfavourable consequences for his or her financial obligations, but also to understand, in the context of taking out a loan denominated in a foreign currency, the actual risk to which he or she is exposed, throughout the term of the agreement, in the event of a severe depreciation of the currency in which the borrower receives his or her income as against the account currency (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 72).
- 64 It is for the national court to ascertain, considering the circumstances surrounding the conclusion of the contract, whether all the information likely to have a bearing on the extent of his or her commitment has been communicated to the consumer concerned, enabling that consumer to estimate the financial consequences thereof (judgment of 12 January 2023, *D.V. (Lawyers’ fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 38 and the case-law cited).
- 65 In the present case, it is apparent from the information provided by the referring court that AM, who, jointly with PM, concluded a loan contract index-linked to a foreign currency, was an employee of mBank and, on account of her training and professional experience, had knowledge about the essential characteristics and risks associated with that loan contract which were those of a consumer who was better informed than the average consumer.
- 66 However, it follows from paragraphs 60 and 61 above that observance of the transparency requirement must be ascertained in relation to the objective standard of the average consumer, who is reasonably well informed and reasonably observant and circumspect. That standard cannot be deemed to correspond, inter alia, either to a consumer who is less well informed than that average consumer, or to a consumer who is better informed than the latter.

- 67 Furthermore, it is apparent from the wording of Article 2(b) of Directive 93/13 that the protection granted by that directive depends on the purposes for which a natural person is acting, namely those which are outside his or her trade, business or profession, and not any specialised knowledge held by that person.
- 68 That broad definition of the concept of ‘consumer’, guarantees the protection granted by that directive to all natural persons finding themselves in the weaker position vis-à-vis a seller or supplier, as regards both the level of knowledge and the bargaining power of those natural persons, a situation that leads to those natural persons agreeing to terms drawn up in advance by that seller or supplier without being able to influence the content of those terms (judgment of 21 March 2019, *Pouvin and Dijoux*, C-590/17, EU:C:2019:232, paragraphs 25 and 28).
- 69 Thus, the fact that a natural person concludes a contract, other than an employment contract, with his or her employer, does not, in itself, prevent that person from being classified as a ‘consumer’ for the purposes of Article 2(b) of Directive 93/13 (judgment of 21 March 2019, *Pouvin and Dijoux*, C-590/17, EU:C:2019:232, paragraph 29).
- 70 In those circumstances, the answer to the third question is that Article 4(2) of Directive 93/13, read in conjunction with Article 2(b) thereof, must be interpreted as meaning that a seller or supplier is obliged to inform the consumer concerned of the essential characteristics of the contract concluded with that seller or supplier and the risks associated with that contract, even though that consumer is its employee and has relevant knowledge in the field of the contract.

The fourth question

- 71 By its fourth question, the referring court asks, in essence, whether the provisions of Directive 93/13 must be interpreted as meaning that, where two consumers conclude one and the same contract with a seller or supplier, the same contractual terms may be regarded as unfair in respect of the first consumer and fair in respect of the second.
- 72 As is apparent from paragraph 31 of the present judgment, that question was asked only in the event that the third question should be answered in the negative. Since that was not the case, there is no need to answer the fourth question.

Costs

- 73 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 (Ninth Chamber) hereby rules:

1. Article 3(1), Article 7(1) and Article 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

must be interpreted as not precluding a contractual term which has not been individually negotiated from being regarded as unfair by the national authorities concerned merely by virtue of the fact that its content is equivalent to that of a

standard contract term entered in the national register of standard business terms held to be unlawful.

2. Article 3(1) of Directive 93/13

must be interpreted as meaning that a contractual term which, because of the circumstances for the performance of certain obligations of the consumer concerned provided for in that term, must be regarded as unfair, may not cease to be considered unfair on account of another term of that contract which provides for the possibility for that consumer to perform those obligations under different circumstances.

3. Article 4(2) of Directive 93/13, read in conjunction with Article 2(b) thereof,

must be interpreted as meaning that a seller or supplier is obliged to inform the consumer concerned of the essential characteristics of the contract concluded with that seller or supplier and the risks associated with that contract, even though that consumer is its employee and has relevant knowledge in the field of the contract.

[Signatures]