



Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

29 April 2021 *

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Effects of a finding that a term is unfair – Mortgage loan agreement denominated in a foreign currency – Determination of the exchange rate between currencies – Novation agreement – Deterrent effect – Obligations of the national court – Article 6(1), and Article 7(1))

In Case C-19/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Gdańsku XV Wydział Cywilny (Regional Court, Gdańsk, XV Civil Division, Poland), made by decision of 30 December 2019, received at the Court on 16 January 2020, in the proceedings

I.W.,

R.W.

v

Bank BPH S.A.,

Third party:

Rzecznik Praw Obywatelskich,

THE COURT (Seventh Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– I.W. and R.W., by B. Garlacz, radca prawny,

* Language of the case: Polish.

- Bank BPH S.A., by A. Sienkiewicz, B. Krużewski, and A. Prokop, adwokaci, and by P. Bogdanowicz, radca prawny,
- Rzecznik Praw Obywatelskich, by M. Taborowski,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Spanish Government, by S. Centeno Huerta and L. Aguilera Ruiz, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, T. Paixão, M. Queiroz Ribeiro, A. Rodrigues and P. Barros da Costa, acting as Agents,
- the European Commission, by N. Ruiz García and M. Siekierzyńska, 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), in particular Articles 6 and 7 thereof.
- 2 The request has been made in proceedings between I.W. and R.W. and Bank BPH S.A. concerning the consequences of the unfairness of certain terms of a mortgage loan agreement concluded between those parties.

Legal context

European Union law

- 3 Under Article 2(a) of Directive 93/13, the concept of ‘unfair terms’ must be understood as ‘the terms of a contract as defined in Article 3’.
- 4 Article 3(1) of Directive 93/13 states:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’
- 5 Under Article 4 of Directive 93/13:

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

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

6 Article 6(1) of Directive 93/13 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.'

7 Article 7(1) of Directive 93/13 states:

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

Polish law

8 Article 58 of the Kodeks cywilny (Civil Code) is worded as follows:

'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 According to Article 120(1) of that code:

'The limitation period shall begin on the day on which the claim becomes due. If the enforceability of a claim depends on the adoption of a specific act by the rightholder, the period shall begin to run from the date on which the claim would have become due if the rightholder had adopted the act as soon as possible.'

10 Article 353¹ of that code provides as follows:

'Contracting parties may arrange their legal relationship at their own discretion as long as the substance or purpose of the contract is not contrary to the properties (nature) of the relationship, the law or the rules of social conduct.'

11 Article 358 of that code provides:

'1. If the subject matter of the obligation is a sum of money expressed in a foreign currency, the debtor may render performance in Polish currency, unless the law, a judicial decision giving rise to the obligation or a legal act provides for performance of the obligation in a foreign currency.'

2. The value of the foreign currency shall be calculated in accordance with the average rate determined by the National Bank of Poland on the day of the claim's maturity, unless legislation, a court ruling or a juridical act provides otherwise.

3. In the event of late payment, the creditor may claim performance in Polish currency at the average price set by the National Bank of Poland on the day on which the payment is made.'

12 Article 385¹ of the Civil Code states as follows:

'1. The terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his or her interests (unlawful terms). This provision shall not apply to terms setting out the principal obligations to be performed by the parties, including price or remuneration, so long as they are worded clearly.

2. If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties.

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

...'

13 Article 385² of that code is thus worded:

'The compliance of contractual terms with good practice shall be assessed according to the state of affairs at the time of conclusion of the contract, 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.'

14 The ustawa o zmianie ustawy – Prawo bankowe oraz niektórych innych ustaw (Law amending the Law on banking law and certain other laws), of 29 July 2011 (Dz. U. No 165 of 2011, item 984, 'the law of 29 July 2011'), entered into force on 26 August 2011.

15 Under Article 1(1) of the law of 29 July 2011:

'The [ustawa – Prawo bankowe (Law on banking law), of 29 August 1997 (Dz. U. No 72 of 2002, item 665), as amended] is amended as follows:

1. in Article 69:

(a) in paragraph 2, the following paragraph 4a is inserted after paragraph 4:

"4a) in the case of a loan agreement denominated in, or indexed to, a currency other than the Polish currency, detailed rules laying down the procedures and dates for setting the currency rate on the basis of which, inter alia, the amount of the loan, its instalments and monthly repayments (capital and interest) are calculated and the currency conversion rules for disbursement or repayment of the loan [shall be specified],";

(b) a new paragraph 3, worded as follows, is added after paragraph 2:

“3. In the case of a credit agreement denominated in, or indexed to, a currency other than Polish currency, the borrower may repay the monthly instalments (capital and interest) and make an early repayment of the entirety or part of the amount of the loan directly in that currency. In that case, the credit agreement shall also set out the opening and holding of an account for the collection of funds intended for repayment of the credit and the repayment rules by means of this account.”

16 Article 4 of that law provides:

‘In the case of credit or money loans taken out by a borrower before the date of entry into force of this law, Article 69(2) (4a) and Article 75b of the law referred to in Article 1 [ustawa – Prawo bankowe (Law on banking law), of 29 August 1997] shall apply to credit or money loans which have not been repaid in full, in respect of the part of the loan or loan remaining to be repaid. In that regard, the bank amends the credit agreement or the loan agreement accordingly free of charge.’

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

17 In 2008, I.W. and R.W. concluded, as consumers, a mortgage loan agreement with Bank BPH’s predecessor in law, the term of that loan being 360 months (30 years). The contract was denominated in Polish zlotys (PLN), but indexed to a foreign currency, namely the Swiss franc (CHF).

18 It is apparent from the explanations provided by the referring court that those borrowers were informed that the Swiss franc exchange rate could increase, which would affect the amount of the monthly repayment instalments of that loan. Further to a request by the bank in that respect, those borrowers submitted a declaration that they wished to choose indexation of their loan to the Swiss franc rate, even though they had been duly informed of the risks in respect of a loan granted in a foreign currency.

19 Under the terms of that contract, repayment of the loan was made in Polish zlotys, the balance of the loan and the monthly repayments being calculated on the basis of the CHF currency exchange rate, plus the selling margin for the currency by the bank. The method for determining the bank’s margin was not specified in that contract.

20 Paragraph 1(1) of the loan agreement provides as follows:

‘The bank extends to the borrower a loan in the amount of PLN ..., indexed to the [Swiss franc] exchange rate ..., and the borrower undertakes to utilise the loan in accordance with the provisions of the agreement, to repay the amount of the loan utilised plus interest on the dates stipulated in the agreement and to pay to the bank the commissions, fees and other amounts due as set forth in the agreement. ...

As at the disbursement date, the loan balance is expressed in the currency to which the loan is indexed according to the buying rate of the currency to which the loan is indexed, as specified in the table of buying/selling rates for mortgage loans extended by the bank, which is described in detail in paragraph 17, and subsequently the foreign currency balance is converted each day into PLN according to the selling rate of the currency to which the loan is indexed, as specified in the table of

buying/selling rates for mortgage loans extended by the bank, which is described in detail in paragraph 17.’

21 Paragraph 7(2) of that agreement provides:

‘The disbursement of the amount of the loan indicated in the application for disbursement shall be effected by transfer to the domestic bank account indicated in the application. The date of the transfer shall be considered the date of disbursement of the loan utilised. On each occasion, the amount disbursed in PLN shall be converted into the currency to which the loan is indexed at the buying/selling rate for mortgage loans extended by the bank in force as at the date on which the bank effects the disbursement.’

22 Paragraph 10(6) of that agreement thus reads as follows:

‘Each payment made by the borrower shall be settled at the selling rate of the currency to which the loan is indexed, as specified in the table of buying/selling rates for mortgage loans extended by the bank in force as at the day of [receipt] of funds by the bank. ...’

23 Paragraph 17 of the loan agreement states:

‘1. The buying/selling rates for mortgage loans extended by the bank of the currencies included in the bank’s offer applicable as at the date of the transaction shall apply to the settlement of loan disbursements and payments.

2. Buying rates shall be defined as the average [Polish zloty] exchange rates vis-à-vis the currencies in question as published in the National Bank of Poland’s table of average exchange rates minus the purchase margin.

3. Selling rates shall be defined as the average [Polish zloty] exchange rates vis-à-vis the currencies in question as published in the National Bank of Poland’s table of average exchange rates plus the sale margin.

4. In the calculation of buying/selling rates for mortgage loans extended by the Bank, the [Polish zloty] exchange rate vis-à-vis the currencies in question as published in the National Bank of Poland’s table of average exchange rates on the business day in question as adjusted by the Bank’s purchase/sale margins shall apply.

5. The buying/selling rates applicable on a given working day for mortgage loans extended by the bank to the currencies included in its offer shall be determined by the bank after 15.00 on the preceding working day and be displayed at the bank’s head office and published on its website ...’

24 That loan agreement was the subject of an amendment signed by the parties on 7 March 2011 (‘the amendment’), which contained, first, provisions laying down the detailed rules for determining the margin of BPH Bank. Second, that amendment provided that the borrowers were henceforth entitled to repay their loan in the indexation currency chosen, namely the Swiss franc, which they could also obtain on the open market.

25 Faced with the increase in the exchange rate of the Swiss franc, I.W. and R.W. claimed that the indexing of the loan to the Swiss franc was unfair before the referring court, maintaining that the contract should be annulled and that all the amounts paid in respect of interest and costs relating to that contract should be reimbursed.

- 26 For the referring court, the terms relating to the indexation of the loan granted and the method of determining the exchange rate in which the loan is repayable relate to the main subject matter of the contract. To the extent that it considers that those terms were drafted in intelligible and plain terms and that the debtors had understood their scope and consequences, which they confirmed in writing to Bank BPH, it cannot be claimed that those terms were unfair.
- 27 By contrast, that same court considers those terms to be unfair, in so far as they allow Bank BPH to receive a margin linked to the transaction in respect of the purchase and sale of the currency. Since the method for determining that margin was not specified in the initial loan agreement, the referring court concluded that that margin created a significant imbalance to the detriment of the consumer.
- 28 Although, in its view, the unfair nature of the contractual provisions relating to Bank BPH's margin for the purchase/sale of the foreign currency disappeared when the parties concluded the amendment laying down the detailed rules for fixing such a margin by the bank, the referring court asks, in the first place, to what extent the initial unfairness of those terms is capable of having an effect on the validity of the indexation term, or even of the loan agreement in its entirety.
- 29 In the second place, the referring court wishes to know whether it can disapply only the contractual terms relating to the bank's margin while maintaining the validity of the indexation term and the contract, even though judicial intervention in that regard would have the effect of altering the meaning of that term.
- 30 In the third place, that court notes that the law of 29 July 2011 now lays down rules for determining the procedures for the conversion of foreign currency for loans denominated in foreign currencies. It concludes from this that the objective of deterring the use of unfair terms no longer justifies the prohibition of moderation or replacement of unfair terms by a national court which finds that such terms are included in a contract concluded between a seller or supplier and a consumer, in particular where such a finding is liable to entail the invalidity of the contract as a whole.
- 31 In the fourth place, the referring court asks whether the right to restitution arising with respect to the consumer following the invalidation of an unfair term is inherent in the decision of the national court finding that an unfair term is unfair or whether recognition of that right requires an express request on the part of the consumer in separate proceedings which may be subject to limitation periods.
- 32 In the fifth and last place, the referring court has doubts as to the scope of its obligation to provide information to the consumer, since the consumer should be given the opportunity to decide whether he or she wishes not to invoke the unfair nature of a term of a contract to which he or she is a party.

33 In those circumstances, the Sąd Okręgowy w Gdańsku XV Wydział Cywilny (Regional Court, Gdańsk, XV Civil Division, Poland) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Must Article 3(1) and (2) in conjunction with Article 4(1) and Articles 6(1) and 7(1) of Council Directive 93/13 ... be interpreted as meaning that the national court is obliged to declare that a term in a contract concluded with a consumer is unfair (within the meaning of Article 3(1) of the directive) including where, on the date of delivery of the judgment, as a result of an amendment to the contract made by the parties by way of an annex, that term has been amended such that it is no longer unfair and a finding that the term in its original wording was unfair may result in the annulment (invalidation) of the entire contract?
- (2) Must Article 6(1), in conjunction with Article 3(1), the second sentence of Article 3(2) and Article 2 of Council Directive 93/13 ... be interpreted as permitting a national court to find that only certain elements of a contract term relating to the exchange rate fixed by the bank for the currency to which the loan extended to the consumer is indexed (such as in the main proceedings) are unfair, namely, by eliminating the provision allowing the bank's margin, which is a component of the exchange rate, to be determined unilaterally and in an unclear manner, where leaving an unambiguous provision referring to the average exchange rate announced by the central bank (the Narodowy Bank Polski – National Bank of Poland), which does not require the eliminated term to be replaced with any legal provision, ... will result in real balance between the consumer and the trader being restored, although it will change the essence of the provision concerning the performance by the consumer of his obligation in a manner that is advantageous to him?
- (3) Must Article 6(1) in conjunction with Article 7(1) of Council Directive 93/13 ... be interpreted as meaning that, even if the national legislature has introduced measures to prevent the continued use of unfair contract terms, such as that at issue in the main proceedings, by introducing provisions which require banks to stipulate in detail the methods and time limits for determining the exchange rate on the basis of which the amount of credit and principal and interest payments are calculated, and the rules for converting amounts into the currency in which the loan was disbursed or is to be repaid, the public interest militates against the finding that only certain elements of the term in question are unfair in the manner described in Question 2?
- (4) Should the annulment of the contract referred to in Article 6(1) of Council Directive 93/13/EEC, as a result of the exclusion of unfair terms as defined in Article 2(a) in conjunction with Article 3 of [that] directive, be understood as a sanction resulting from a constitutive court decision made at the express request of the consumer with consequences from the date of conclusion of the contract, that is to say, *ex tunc*, and do restitution claims by the consumer and the trader become due and payable upon the judgment becoming final?
- (5) Must Article 6(1) of Council Directive 93/13 in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union of 30 March 2010 (OJ 2010 C 83, p. 389) be interpreted as imposing an obligation on the national court to inform a consumer who has requested that a contract be annulled in connection with the elimination of unfair terms of the legal consequences of such a judgment, including possible restitution claims by the trader (bank), even if such claims have not been raised in the proceedings in question, and also claims whose validity has not been clearly established, even if the consumer is represented by a professional legal representative?

Consideration of the questions referred

The first question

- 34 By its first question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that the national court is required to find that a term in a contract concluded between a seller or supplier and a consumer is unfair, even though the defect affecting that term was removed following the conclusion between those parties of an amendment to that contract and a finding that the term was unfair in its original version is capable of rendering the contract void.

Admissibility

- 35 I.W and R.W. claim that this question is inadmissible on the ground that the presentation of the facts in the order for reference does not reflect the reality of the facts of the case in the main proceedings. In particular, they dispute the fact that the amendment made it possible to remedy the unfairness of the original indexation term, since the indexation mechanism as a whole is unfair. They maintain that the referring court is wrong to take the view that only the element relating to Bank BPH's margin linked to the foreign exchange transactions is unfair.
- 36 In that regard, it should be noted that the referring court considers that, by virtue of Article 385¹ (1) and (3) of the Civil Code, the terms of the contract at issue in the main proceedings concerning the indexing of the amount of the loan as well as the terms relating to the rules determining the rate relate to the main subject matter of the contract, within the meaning of Article 4(2) of Directive 93/13. In addition, according to that court, only the terms concerning the indexation mechanism relating to the bank's margin were not drafted clearly and comprehensively. Thus, it concluded that the other elements of the terms relating to the indexation mechanism were not unfair.
- 37 It should be noted that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 46).
- 38 Accordingly, the Court is bound by the finding and assessment of the facts made by the referring court, so that I.W. and R.W. cannot call them into question in the present request for a preliminary ruling.
- 39 In addition, questions on the interpretation of EU law referred by a national court in the legislative and factual context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the dispute or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it (judgment of 19 September 2019, *Lovasné Tóth*, C-34/18, EU:C:2019:764, paragraph 40 and the case-law cited).

40 Since, in the present case, the referring court has defined the legislative and factual framework permitting the Court to answer the first question referred and since it is not for the Court to determine the accuracy of that context, it must be held that that question is admissible.

41 In those circumstances, there is no need to answer the first question referred for a preliminary ruling.

Substance

42 It should be noted that, under Article 6(1) of Directive 93/13, Member States are to lay down that unfair terms in a contract concluded with a consumer by a seller or supplier are not to be binding on consumers, as provided for under their national law (judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 22 and the case-law cited).

43 Thus, a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer (judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 23 and the case-law cited).

44 Consequently, under Article 6(1) of Directive 93/13, it is for the national courts to exclude the application of unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (judgments of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 24 and the case-law cited, and of 25 November 2020, *Banca B.*, C-269/19, EU:C:2020:954, paragraph 29).

45 According to the referring court, the contractual change by the amendment which concerned the original indexation terms made it possible to eliminate the defect affecting them and restored the balance between the obligations and rights of the seller or supplier and consumers. Therefore, the indexation terms in their original version no longer bound the parties to the loan agreement as from the date on which the amendment was signed.

46 In that context, it should be stressed that the right to effective consumer protection includes the option to waive the exercise of one's rights, with the consequence that, where appropriate, account must be taken of the intention expressed by the consumer where, although aware of the non-binding nature of an unfair term, that consumer states nevertheless that he or she is opposed to that term being disregarded, thus giving his or her free and informed consent to the term in question (judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 25).

47 Directive 93/13 does not go as far as making the system of protection against the use of unfair terms by suppliers or sellers, a system which it introduced for the benefit of consumers, mandatory. Accordingly, where the consumer prefers not to rely on it, that system of protection is not applied (judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 26 and the case-law cited).

48 Similarly, a consumer may waive the right to rely on the unfairness of a contractual term by means of a novation agreement, whereby the consumer waives the effects that would result from that term being declared to be unfair, provided that that waiver is the result of free and informed consent. (judgment of 9 July 2020, *Ibercaja Banco*, C-452/18, EU:C:2020:536, paragraph 28).

- 49 It follows from the foregoing that the system laid down by Directive 93/13 cannot prevent the parties to a contract from remedying the unfairness of a term which it contains by making a contractual amendment, provided that, first, the consumer's waiver of the right to rely on unfairness is the result of his or her free and informed consent and, second, the new amending term is not itself unfair, which it is for the referring court to ascertain.
- 50 If the referring court were to consider, in the present case, that the consumers were not aware of the legal consequences arising for them from such a waiver, it would be necessary to note, as stated in paragraph 43 of the present judgment, that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer, and that it has the consequence of restoring the consumer to the legal and factual situation that he or she would have been in in the absence of that term (judgment of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 41 and the case-law cited).
- 51 The obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 62).
- 52 It is therefore for the referring court to restore the position in which I.W. and R.W. would have found themselves in the absence of the original term which it finds to be unfair.
- 53 As regards the effects of a finding that terms of a contract are unfair on the validity of the contract in question, it must be pointed out, first, that in accordance with the final part of Article 6(1) of Directive 93/13, 'the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'.
- 54 Next, according to the Court's settled case-law, Directive 93/13 does not require, in addition to the term declared unfair, the national court to set aside those terms which have not been classed as such. The objective pursued by 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 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 et C-94/17, EU:C:2018:643, paragraph 75).
- 55 In that regard, the objective pursued by the EU legislature in the context of that directive is not to annul all contracts containing unfair terms (judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 31).
- 56 Finally, as regards the criteria for assessing whether a contract can indeed continue to exist without the unfair terms, it must be noted that both the wording of Article 6(1) of Directive 93/13 and the requirements concerning the legal certainty of economic activities plead in favour of an objective approach in interpreting that provision, so that the situation of one of the parties to the contract cannot be regarded as the decisive criterion determining the fate of the contract (judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 32).
- 57 Thus, when assessing whether a contract containing one or more unfair terms can continue to exist without those terms, the court hearing the case cannot base its decision solely on a possible advantage for the consumer of the annulment of the contract as a whole (judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 33).

- 58 In the present case, the referring court considers that, by concluding the amendment, the parties to the contract eliminated the defect which affected the unfair original terms and restored the balance between the obligations and rights of those parties arising from the contract.
- 59 The objectives of Directive 93/13, as set out in paragraph 54 above, are fully satisfied where the legal and factual situation in which the consumer would have been in the absence of the unfair term is restored and the defect which vitiated the contract was eliminated by the parties by the conclusion of an amendment, provided that, at the time of that conclusion, that consumer was aware that that term was not binding and of the consequences flowing therefrom.
- 60 Therefore, it does not follow from Article 6(1) of Directive 93/13 that, in a situation in which the consumer's waiver of the right to rely on unfairness is the result of his or her free and informed consent, a finding that the original terms of the contract concerned are unfair would lead to the annulment of the contract as altered by the amendment, even if, first, the removal of those terms would have led to the annulment of the contract as originally concluded in its entirety and, second, such invalidation would be to the advantage of the consumer.
- 61 In the light of the foregoing considerations, the answer to the first question is that Article 6(1) of Directive 93/13 must be interpreted as meaning that it is for the national court to find that a term in a contract concluded between a seller or supplier and a consumer is unfair, even if it has been contractually amended by those parties. Such a finding leads to the restoration of the situation that the consumer would have been in in the absence of the term found to be unfair, except where the consumer, by means of amendment of the unfair term, has waived such restoration by free and informed consent, which it is for the national court to ascertain. However, it does not follow from that provision that a finding that the original term is unfair would, in principle, lead to annulment of the contract, since the amendment of that term made it possible to restore the balance between the obligations and rights of those parties arising under the contract and to remove the defect which vitiated it.

Second and third questions referred

- 62 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding the national court from removing only the unfair element of a term in a contract concluded between a seller or supplier and a consumer, in particular where the deterrent objective pursued by that directive is ensured by national legislative provisions governing the use of that term.
- 63 As a preliminary point, it should be noted that I.W. and R.W. call into question the admissibility of the third question, since, by that question, the referring court requires the Court to interpret national law.
- 64 In that regard, it is necessary to state that, in accordance with the settled case-law cited in paragraph 37 of this judgment, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Consequently, when the question put by the national court concerns the interpretation of EU law, the Court is, in principle, bound to give a ruling.

- 65 Since the third question concerns the interpretation of Article 6(1) and Article 7(1) of Directive 93/13, the Court has jurisdiction to rule on it.
- 66 It must be recalled that, in accordance with Article 6(1) of Directive 93/13, national courts are merely required to refrain from applying an unfair contractual term in order that it may not produce binding effects with regard to the consumer, without being empowered to revise, in principle, the content of that term. That contract must continue in existence, in principle, without any amendment other than that resulting from the removal of that term, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible (judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 et C-94/17, EU:C:2018:643, paragraph 73).
- 67 Thus, if the national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, Article 6(1) of Directive 93/13 must be interpreted as prohibiting the national court from modifying that contract by revising the content of that term (judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 53 and the case-law cited).
- 68 If it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. Accordingly, that power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 54 and the case-law cited).
- 69 In the present case, the referring court states that the removal of the element of the indexing term of the mortgage loan at issue in the main proceedings relating to the bank's margin does not give rise to any lacuna that would require a positive intervention on its part. However, it points out that that removal alters the essence of the term in its original wording.
- 70 The Court has previously held 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 26 March 2019, *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 64).
- 71 It is only if the element of the indexation term in the mortgage loan at issue in the main proceedings relating to Bank BPH's margin consisted of a contractual obligation distinct from the other contractual terms, capable of being the subject of an individual examination of its unfairness, that the national court could remove it.
- 72 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 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 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 et C-94/17, EU:C:2018:643, paragraph 75).

- 73 Thus, the Court has held, as regards terms of a loan agreement relating respectively to ordinary interest and default interest, that the annulment of the term in a loan agreement fixing the default rate of interest, on the ground of the unfairness of that term, cannot also bring about that of the term in that contract fixing the ordinary rate of interest, particularly as those different terms must be clearly distinguished (judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 et C-94/17, EU:C:2018:643, paragraph 76).
- 74 Those considerations apply regardless of the way in which the contractual term determining the default interest rate and that fixing the ordinary rate of interest are worded. In particular, they apply not only when the default interest rate is fixed independently of the ordinary interest rate, in a separate contractual term, but also when the default interest rate is fixed in the form of an increase in the ordinary interest rate by a certain number of percentage points. In the latter case, as the unfair term consists in that increase, Directive 93/13 requires solely that that increase be annulled (judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 et C-94/17, EU:C:2018:643, paragraph 77).
- 75 Moreover, the power of the national court, by way of exception, to remove the unfair element of a term in a contract binding a seller or supplier and a consumer cannot be called into question by the existence of national provisions which, in governing the use of such a term, guarantee the deterrent objective pursued by that directive, as recalled in paragraph 68 of the present judgment.
- 76 In the present case, it is apparent from the order for reference that, since the adoption of the Law of 29 July 2011, which took place after the conclusion of the contract, and the amendment at issue in the main proceedings, the banks have no longer been able to use indexation terms in a form such as that provided for in the present case. Under the provisions of that law, a loan agreement denominated in a foreign currency must now contain information on the procedures and dates for fixing the exchange rate on the basis of which the amount of the loan and the monthly repayments are calculated, as well as the rules for currency conversion.
- 77 The Court has previously held that, although Article 7(1) of Directive 93/13 does not preclude the Member States from using legislation to put an end to the use of unfair terms in contracts concluded with consumers by sellers or suppliers, the fact remains that the legislature must, in that context, respect the requirements deriving from Article 6(1) of that directive (judgment of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 42).
- 78 The fact that a contractual term was, on the basis of national legislation, declared unfair and void and replaced by a new term, cannot have the result of weakening the protection guaranteed to consumers, as set out in paragraph 54 of the present judgment (see, by analogy, judgment of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 43).
- 79 In those circumstances, the adoption by the legislature of provisions governing the use of a contractual term which contribute to ensuring the deterrent effect pursued by Directive 93/13 as regards the conduct of sellers or suppliers is without prejudice to the rights conferred on the consumer by that directive.

80 In the light of all the foregoing considerations, the answer to the second and third questions is that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that, first, they do not preclude the national court from removing only the unfair element of a term in a contract concluded between a seller or supplier and a consumer where the deterrent objective pursued by that directive is ensured by national legislative provisions governing the use of that term, provided that that element consists of a separate contractual obligation, capable of being subject to an individual examination of its unfair nature. Second, those provisions preclude the referring court from removing only the unfair element of a term in a contract concluded between a seller or supplier and a consumer where such removal would amount to revising the content of that term by altering its substance, which it is for that court to determine.

The fourth question

81 By its fourth question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that the invalidation of a contract concluded between a seller or supplier and a consumer on account of a finding that a term of that contract is unfair constitutes a sanction provided for by that directive arising either from a judicial decision given at the consumer's express request and giving rise to a right on the part of the consumer to restitution of the sums unduly received by the seller or supplier or, where that decision takes place by operation of law, independently of the intention of the consumer.

82 In that regard, it should be noted that, Article 6(1) of Directive 93/13 provides 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.

83 Thus, 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, pursuant to Article 6(1) of Directive 93/13, be continued as long as, in accordance with the rules of domestic law, such continuity of the contract is legally possible without the unfair terms, which is to be determined objectively (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 39 and the case-law cited).

84 It follows that the second part of Article 6(1) of Directive 93/13 does not itself set out the criteria governing the possibility of a contract continuing in existence without the unfair terms, but rather leaves it to the national legal order to determine those criteria in a manner consistent with EU law. Thus, it is for the Member States, by means of their national law, to define 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 (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).

- 85 It follows from the above factors that, first, 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 that contract from being annulled (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 43).
- 86 Thus, the invalidation of a contract which has been found to be unfair cannot constitute a sanction provided for by Directive 93/13.
- 87 Moreover, as regards, in particular, time limits for bringing an action, the Court has already held that in the interests of legal certainty it is compatible with EU law to lay down reasonable time limits for bringing proceedings (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 69).
- 88 Second, the question as from when the invalidation of the contract at issue in the main proceedings produces its effects depends exclusively on national law, provided that the protection guaranteed to consumers by the provisions of Directive 93/13 is ensured.
- 89 Third, the invalidation of the contract in the main proceedings cannot depend on an express request to that effect by consumers, but is a matter of objective application by the national court of the criteria established under national law.
- 90 In the light of all the foregoing considerations, the answer to the fourth question is that Article 6(1) of Directive 93/13 must be interpreted as meaning that the consequences of a judicial finding that a term of a contract concluded between a seller or supplier and a consumer is unfair are covered by national law and the question of continuity of the contract should be assessed by the national court of its own motion in accordance with an objective approach on the basis of those provisions.

The fifth question

- 91 By its fifth question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), must be interpreted as meaning that it is for the national court, on finding that a term of a contract concluded by a seller or supplier with a consumer is unfair, to inform the consumer of the legal consequences that the annulment of such a contract may entail, irrespective of whether the consumer is represented by a professional representative.
- 92 In that regard, it follows from settled case-law that it is for the national court, which has found a term to be unfair and must draw the legal conclusions therefrom, to comply with the requirements of effective judicial protection of an individual's rights under EU law, as guaranteed by Article 47 of the Charter. Among those requirements is the principle of *audi alteram partem*, as part of the rights of defence and which is binding on that court, in particular when it decides a dispute on a ground that it has identified of its own motion (judgment of 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 29 and the case-law cited).
- 93 In addition, the Court has held that, where the national court, which has established, on the basis of the elements of fact and of law available to it, that a term falls within the scope of directive 93/13, finds that that term is unfair, it is, as a general rule, required to inform the parties to the dispute of that fact and to invite 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 by the national rules of procedure (judgment of 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraph 31).

- 94 Therefore, since the system of protection against unfair terms does not apply if the consumer objects to it, that consumer must a fortiori be entitled to object to being protected, under that same system, against the unfavourable consequences caused by the contract being invalidated in its entirety where he or she does not wish to rely on that protection (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 55).
- 95 In that context, the consumer is entitled, after having been informed by the national court, not to assert the unfair and non-binding nature of a term, thus giving free and informed consent to the term in question (judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraph 66).
- 96 It follows from the foregoing that the information which may be available to the national court on the basis of national procedural rules appears all the more important, since it enables the consumer to decide whether he or she wishes to waive the protection guaranteed under Directive 93/13.
- 97 In order for the consumer to be able to give free and informed consent, it is for the national court to indicate to the parties, in the context of national procedural rules and in the light of the principle of equity in civil proceedings, objectively and exhaustively the legal consequences which the removal of the unfair term may entail, irrespective of whether or not they are represented by a professional representative.
- 98 Such information is, in particular, all the more important where non-application of the unfair term is liable to lead to the invalidation of the contract in its entirety, potentially exposing the consumer to claims for restitution, as envisaged by the referring court in the case in the main proceedings.
- 99 In the light of all the foregoing considerations, the answer to the fifth question is that Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter of must be interpreted as meaning that it is for the national court, finding that a term in a contract concluded between a seller or supplier and a consumer is unfair, to inform the consumer, in the context of the national procedural rules, after both parties have been heard, of the legal consequences which annulment of the contract may entail, irrespective of whether the consumer is represented by a professional representative.

Costs

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

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

1. **Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that it is for the national court to find that a term in a contract concluded between a seller or supplier and a consumer is unfair, even if it has been contractually amended by those parties. Such a finding leads to the restoration of the situation that the consumer would have been in in the absence of the term found to be unfair, except where the consumer, by means of amendment of the unfair term, has waived such restoration by free and informed consent, which it is for the national court to ascertain. However, it does not follow from that provision that a finding that the original term is unfair would, in principle, lead to annulment of the contract, since the amendment of that term made it possible to restore the balance between the obligations and rights of those parties arising under the contract and to remove the defect which vitiated it.**
2. **Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that, first, they do not preclude the national court from removing only the unfair element of a term in a contract concluded between a seller or supplier and a consumer where the deterrent objective pursued by that directive is ensured by national legislative provisions governing the use of that term, provided that that element consists of a separate contractual obligation, capable of being subject to an individual examination of its unfair nature. Second, those provisions preclude the referring court from removing only the unfair element of a term in a contract concluded between a seller or supplier and a consumer where such removal would amount to revising the content of that term by altering its substance, which it is for that court to determine.**
3. **Article 6(1) of Directive 93/13 must be interpreted as meaning that the consequences of a judicial finding that a term in a contract concluded between a seller or supplier and a consumer is unfair are covered by national law and the question of continuity of the contract should be assessed by the national court of its own motion in accordance with an objective approach on the basis of those provisions.**
4. **Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that it is for the national court, finding that a term in a contract concluded between a seller or supplier and a consumer, to inform the consumer, in the context of the national procedural rules after both parties have been heard, of the legal consequences entailed by annulment of the contract, irrespective of whether the consumer is represented by a professional representative.**

[Signatures]