Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

2 September 2021 *

(Reference for a preliminary ruling – Consumer protection – Unfair terms – Directive 93/13/EEC – Article 1(2) – Article 6(1) – Loan denominated in foreign currency – Difference between the exchange rate applicable when the loaned funds are released and when they are repaid – Member State legislation providing for the replacement of an unfair term by a provision of national law – Possibility for the national court to invalidate the entire agreement containing the unfair term – Possible consideration of the protection offered by that legislation and of the consumer's wishes regarding its application)

In Case C-932/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Győri Ítélőtábla (Győr Regional Court of Appeal, Hungary), made by decision of 10 December 2019, received at the Court on 20 December 2019, in the proceedings

JZ

v

OTP Jelzálogbank Zrt.,

OTP Bank Nyrt.,

OTP Faktoring Követeléskezelő Zrt.,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, C. Toader and N. Jääskinen (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– JZ, by L. Marczingós, ügyvéd,

* Language of the case: Hungarian.

– OTP Jelzálogbank Zrt., OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt., by A. Lendvai, ügyvéd,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

– the European Commission, by L. Havas and N. Ruiz García, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) 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 JZ and OTP Jelzálogbank Zrt., OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt. (together, 'OTP Jelzálogbank and Others') concerning an application for cancellation of loan agreements based on the unfairness of certain terms in those agreements.

Legal context

European Union law

3 According to the thirteenth recital of Directive 93/13:

'Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'.

4 Article 1(2) of that directive provides:

'The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.'

5 Article 3 of that directive is worded as follows:

'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.

…'

6 Article 4(2) of the same directive states:

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

7 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.'

Hungarian law

8 Article 1(1) of the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law No XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan agreements concluded by financial institutions with consumers; 'Law DH 1') provides:

'This Law shall apply to loan agreements concluded with consumers between 1 May 2004 and the date of entry into force of this Law. For the purposes of this Law, loan or leasing agreements based on foreign currencies (registered in a foreign currency or granted in a foreign currency and repaid in forint) or on forint and concluded between a financial institution and a consumer shall be regarded as loan agreements concluded with consumers if a general term or a non-individually negotiated term within the meaning of Article 3(1) or Article 4(1) is incorporated into that agreement.'

9 Under Article 3(1) and (2) of that law:

'1. In loan agreements concluded with consumers, terms – with the exception of contractual terms which have been individually negotiated – pursuant to which the financial institution stipulates that, for the purpose of paying out the amount of finance granted for the purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was paid out, is to apply, are to be void.

2. Without prejudice to the provision contained in subparagraph 3, instead of the void term referred to in subparagraph 1, the official exchange rate set by the National Bank of Hungary for the foreign currency concerned is to apply in relation to the disbursement and repayment of the loan (including payment of the instalments and all the costs, fees and commissions expressed in foreign currency).'

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

10 The applicant in the main proceedings is a consumer domiciled in Hungary. The defendants in the main proceedings are three financial institutions whose registered office is also in Hungary.

11 On 16 May 2007, the applicant in the main proceedings concluded a personal loan agreement with OTP Bank. On 4 June 2007, he concluded, with OTP Jelzálogbank and OTP Bank, a housing loan agreement secured by a mortgage. On 4 September 2008, he entered into a loan agreement with OTP Bank with a view to repaying an earlier debt. The loans granted under those three agreements were all denominated in foreign currency.

12 Subsequently, the first two agreements were terminated by OTP Bank and OTP Jelzálogbank, which assigned their claims to OTP Faktoring Követeléskezelő. By contrast, the third agreement came to an end following its performance by the applicant in the main proceedings.

13 In the action which he brought before the Veszprémi Törvényszék (Court of Veszprem, Hungary) ruling at first instance, the applicant in the main proceedings claimed that the three abovementioned loan agreements were void, pleading, more specifically, the unfairness of the terms of those agreements which stipulated that the exchange rate applicable when the loaned funds were released was different from that applicable in respect of their repayment. By judgment of 3 July 2019, the court of first instance dismissed that action as unfounded.

14 The applicant in the main proceedings brought an appeal against that judgment before the referring court, the Győri Ítélőtábla (Győr Regional Court of Appeal, Hungary), claiming in particular, first, that the consequences of the unfairness of such terms relating to an exchange difference had to be determined in accordance with the judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819), and, secondly, that the information which had been provided to him by the lenders regarding the exchange risk was insufficient.

15 It is apparent from the order for reference that, in 2014, the Hungarian legislature adopted various provisions designed to remedy terms which fix, in an unfair manner, the exchange rate in loan agreements denominated in foreign currency concluded with consumers. Thus, under Article 3(1) of Law DH 1, a term in such an agreement which stipulates that, as regards the release of funds, the buying rate of exchange of the currency concerned is applicable, whereas, as regards the repayment, it is the selling rate of exchange for that currency which is to be applied, or any other exchange rate different from that applied at the time of that release, is to be void, unless it has been individually negotiated. In addition, paragraph 2 of that article states that the term relating to the exchange difference thus declared void is to be replaced, under that law, by a provision intended to apply a single exchange rate, which is fixed by the National Bank of Hungary, for the currency concerned.

16 The order for reference also states that, following the judgments of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207), and of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819), more and more consumers are requesting Hungarian courts to annul their loan agreement in its entirety, rather than replacing the unfair term and upholding that agreement as to the remainder, because they consider that the application of the relevant provisions of national law would not protect them sufficiently. However, the majority of the courts seised take the view that, in so far as the unfairness of the exchange risk terms cannot be established, it is impossible for them to annul a loan agreement solely on the ground that the terms relating to the exchange

difference which it contains are invalid and, thus, to apply the legal consequences of the invalidity of those terms to the agreement as a whole, thereby disregarding the provisions of Article 3(1) and (2) of Law DH 1.

17 In addition, in a press release of 11 October 2019, the Kúria (Supreme Court) stated that the judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819), did not open up any new possibilities for Hungarian consumers to seek redress, since the considerations set out in that judgment, concerning the adequate remedy for the unfairness of the terms relating to the exchange difference and the exchange risk, were linked to the fact that Polish law, at issue in the case giving rise to that judgment, did not lay down suppletive rules such as those introduced by the Hungarian legislature which had been taken into consideration in the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282).

18 The referring court is therefore uncertain whether the provisions of Article 3(1) and (2) of Law DH 1 are incompatible with Article 6(1) of Directive 93/13, in that those provisions of national law apply even if the injured consumer has expressed contrary wishes, and whether, if so, those provisions should not be applied by the court seised.

19 In those circumstances, the Győri Ítélőtábla (Győr Regional Court of Appeal) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 6(1) [of Directive 93/13] preclude a rule of national law which, in loan agreements concluded with consumers, states that terms – with the exception of contractual terms which have been individually negotiated – pursuant to which the financial institution stipulates that, for the purpose of paying out the amount of finance granted for the purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was paid out, is to apply, are to be void, and replaces the void terms with a provision which, in the case of both disbursement and repayment, applies the official exchange rate set by the National Bank of Hungary for the currency in question, without considering whether – in the light of all of the terms in the agreement – that provision actually protects the consumer against particularly unfavourable consequences, and also without giving the consumer the opportunity to express a view as to whether he or she wishes to avail him or herself of the protection afforded by that legislative provision?'

Procedure before the Court

20 The referring court requested the Court of Justice to apply an expedited procedure to the present case, pursuant to Article 105(1) of its Rules of Procedure. In support of its request, that court stated that thousands of similar disputes were currently pending in Hungary and that a swift answer to the question referred to the Court would greatly contribute to legal certainty and the effective application of the law.

21 It follows from Article 105(1) of the Rules of Procedure that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.

22 On 6 February 2020, after hearing the Judge-Rapporteur and the Advocate General, the President of the Court decided to reject the application for an expedited procedure.

23 It is clear from the Court's settled case-law that the large number of persons or legal situations which may be affected by the decision that a referring court must give after making a request to the Court for a preliminary ruling does not, as such, constitute an exceptional circumstance justifying the application of the expedited procedure. The same is true where a large number of cases may be stayed pending the preliminary ruling of the Court (see, to that effect, judgments of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)*, C-584/19, EU:C:2020:1002, paragraph 36, and of 25 February 2021, *Gmina Wrocław (Conversion of usufruct right)*, C-604/19, EU:C:2021:132, paragraph 47).

24 In addition, in the light of the information provided by the referring court in this regard, it must be stated that a difference in the interpretation of a provision of EU law within the national courts is not sufficient, in itself, to justify that the reference for a preliminary ruling be determined pursuant to an expedited procedure. The importance of ensuring uniform application within the European Union of all the provisions which form part of its legal order is inherent in any request made under Article 267 TFEU (see, to that effect, judgment of 14 January 2021, *The International Protection Appeals Tribunal and Others*, C-322/19 and C-385/19, EU:C:2021:11, paragraph 49 and the case-law cited).

Consideration of the question referred

Admissibility

25 In their written observations, OTP Jelzálogbank and Others submit, in essence, that the question referred for a preliminary ruling is inadmissible as it is irrelevant to the dispute in the main proceedings and hypothetical, on the grounds that, first, terms relating to the exchange difference which are the subject of the dispute in the main proceedings are excluded from the scope of Directive 93/13 by virtue of Article 1(2) thereof and, secondly, those terms are non-existent as a result of their retroactive annulment under Article 3(1) of Law DH 1, and the wishes of the consumer concerned cannot have any effect in that regard.

26 In that connection, it follows from settled case-law of the Court that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, which enjoy a presumption of relevance. Therefore, since the question referred concerned the interpretation or validity of a rule of Union law, the Court is, in principle, required to give a ruling, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action, it is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it (see, to that effect, judgments of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, paragraphs 21 and 22, and of 22 April 2021, *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paragraph 38).

27 As regards the case in the main proceedings, it is apparent from the material in the file before the Court that each of the loan agreements at issue in the main proceedings was denominated in a foreign currency and contained, inter alia, a term under which the funds released for the benefit

of the consumer concerned had to be converted into forint on the basis of the buying rate of exchange for that currency applied by the lending financial institution, while the calculation of the monthly instalments of the loan repayments was to be carried out on the basis of the selling rate of exchange for that currency applied by that same institution. Moreover, it is apparent from the order for reference that Article 3 of Law DH 1 provides that such terms relating to the exchange difference are to be declared void, except where they have been individually negotiated, and are to be replaced by a provision requiring the application of a single official exchange rate, which is fixed by the National Bank of Hungary.

28 Admittedly, Article 1(2) of Directive 93/13 excludes from the scope of that directive contractual terms which reflect 'mandatory statutory or regulatory provisions', an expression which, in the light of the thirteenth recital of that directive, encompasses both provisions of national law which apply between contracting parties irrespective of their choice and those which are supplementary in nature, that is to say, which apply by default, in the absence of other arrangements established by the parties (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraphs 29 to 32, and order of 14 April 2021, *Credit Europe Ipotecar IFN and Credit Europe Bank*, C-364/19, EU:C:2021:306, paragraph 27 and the case-law cited).

29 Furthermore, the Court has already ruled that Article 1(2) must be interpreted as meaning that the scope of Directive 93/13 does not cover terms reflecting mandatory provisions of national law, inserted after the conclusion of a loan agreement concluded with a consumer and intended to remove a term which is null and void from that agreement, by imposing an exchange rate set by the National Bank of the Member State concerned, as provided for by Hungarian legislation, and in particular by the provisions of Article 3(1) and (2) of Law DH 1 (see, to that effect, judgments of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraphs 62 to 64 and 70, and of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 37).

30 However, as is apparent from the order for reference, the question referred does not concern the contractual terms inserted a posteriori under the relevant Hungarian legislation in the loan agreements as such, but the effects of that legislation on the protection guarantees arising from Article 6(1) of Directive 93/13 in relation to the exchange difference term initially included in the loan agreements concerned. In a similar factual and legislative context, in the case which gave rise to the judgment of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207), the Court proceeded to interpret that article. Accordingly, it does not appear that the subject matter of the dispute in the main proceedings falls outside the scope of that directive, as defined by Article 1(2) thereof.

31 More specifically, the question referred seeks, in essence, to determine whether the Hungarian case-law referred to in paragraph 16 of this judgment, according to which the contractual relationship as a whole cannot be terminated solely on the ground that the terms relating to the exchange difference are invalid, is compatible with the system of consumer protection established by Directive 93/13, in so far as the replacement of such terms by a legal provision is carried out objectively and automatically, without allowing the national courts to take account of all the circumstances of the case, and in particular of contrary wishes on the part of the consumer.

32 Since an answer to that question will be of use to the referring court in order to enable it to resolve the dispute before it, it follows that the present request for a preliminary ruling is admissible.

Substance

33 By its question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as precluding national legislation which, as regards loan agreements concluded with a consumer, renders void a term relating to the exchange difference considered to be unfair and requires the national court with jurisdiction to replace that term with a provision of national law imposing the use of an official exchange rate, without providing for the possibility, for that court, to grant the application of the consumer concerned for the annulment of the loan agreement in its entirety, even if that court considers that the continuation of that agreement would be contrary to the interests of the consumer, in particular with regard to the exchange risk which the latter would continue to bear by virtue of another term in that agreement.

34 In respect of the context in which that question arises, it is apparent from the file before the Court and from the judgments of the Court relating to the relevant Hungarian legislation (see, to that effect, judgments of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794, paragraphs 43 and 44, and of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraphs 26 and 27) that, in the wake of the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282), the Kúria (Supreme Court) delivered its decision No 2/2014 PJE (*Magyar Közlöny* 2014/91, p. 10975) in the interest of uniformity of civil law and concerning loan agreements concluded between sellers or suppliers and consumers. According to that decision, the terms relating to the exchange difference in loan agreements denominated in foreign currency, in so far as they provide for an asymmetry between the buying rate of exchange for that currency applied when the loan was paid out and its selling rate of exchange applied for the calculation of the monthly instalments of the loan repayments, must be regarded as unfair, since, in particular, the bank receives from the consumer remuneration equal to the difference between those rates without providing it with a service in return. On the other hand, as regards terms relating to the exchange risk, which have the effect that the risk of an increase in the value of that currency is borne solely by the consumer in return for a more advantageous interest rate than that offered for a loan denominated in national currency, that decision states that those terms cannot be reviewed as to their unfairness, given that, in principle, they relate to the main subject matter of the agreement, within the meaning of the national legislation transposing Article 4(2) of Directive 93/13.

35 It was in that context that Law DH 1 was adopted (see, to that effect, judgment of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 36), the effects of which are disputed by the applicant in the main proceedings. More specifically, the applicant in the main proceedings asks the referring court to refrain from applying Article 3(1) and (2) of that law in the present case, since he considers that it would be in his best interests for each of the agreements at issue in the main proceedings not merely to be amended but annulled in their entirety, on the basis that each of them contains a term relating to the exchange difference which has been declared unfair and void.

36 The referring court has doubts as to whether that request can be granted, in view of the prevailing case-law in Hungary which applies Law DH 1 strictly, merely replacing with retroactive effect any term relating to the exchange difference that is void, pursuant to Article 3(1) of that law, with a provision of national law, namely that in Article 3(2) of that law, which requires the use of the official exchange rate established by the National Bank of Hungary, without invalidating the agreement at issue in its entirety.

37 The referring court wishes to know, in the first place, whether Article 6(1) of Directive 93/13 precludes a provision of national law, such as that contained in Article 3 of Law DH 1, which prevents the court seised of the case from granting an application by a consumer for the annulment of a loan agreement based on the unfairness of a term relating to the exchange difference, even if that court considers that the continuation of the agreement would be contrary to the interests of the consumer, in particular with regard to the exchange rate risk which the latter would continue to bear by virtue of another term in that agreement.

38 In the case which gave rise to the judgment of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207), which has a legal and factual background similar to that of the present case, the Court has already been called upon to answer a similar question.

39 The Court first of all held, in paragraphs 36 and 37 of that judgment, as regards terms which replace the unfair term relating to the exchange difference and which are retroactively included in the loan agreements concerned under the Hungarian legislation at issue in that case, in particular Article 3 of Law DH 1, that such terms, in so far as they reflect mandatory statutory provisions, do not fall within the scope of Directive 93/13, since that directive does not apply, in accordance with Article 1(2) thereof, to conditions contained in agreements between a seller or supplier and a consumer which are determined by national legislation.

40 Next, as regards the term relating to the exchange difference which was initially included in the loan agreements and the impact of that legislation on the protection guarantees resulting from Article 6(1) of Directive 93/13 in relation to that term, the Court held, in essence, in paragraphs 38 and 40 of that judgment, that, in so far as the Hungarian legislature has remedied the problems connected with the practice relating to agreements containing a term relating to the exchange difference, by requiring the replacement of that term and by safeguarding the validity of the agreements concerned, such an approach corresponds to the objective pursued by the Union legislature in the context of that directive, and in particular Article 6(1) thereof, namely to restore the balance between the parties while in principle preserving the validity of the agreement as a whole, and not to cancel all agreements containing unfair terms.

41 The Court has stated that the national legislature remained bound to respect the requirements deriving from Article 6(1) of Directive 93/13 and that the fact that a contractual term was, by means of legislation, declared to be unfair and void and then replaced, in order to allow the continued existence of the agreement at issue, cannot have the result of weakening the protection guaranteed to consumers by that directive, as noted in paragraph 39 of the present judgment (see, to that effect, judgments of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraphs 41 to 43, and of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraphs 77 to 79).

42 Finally, as regards the limits which a Member State may place on the power of the courts to annul the agreement as a whole on account of the existence of an unfair term, the Court has held that Article 6(1) of Directive 93/13 does not preclude national legislation preventing the court seised of the case from granting an application for the cancellation of a loan agreement on the basis of the unfair nature of a term relating to the exchange difference, provided that the finding that such a term is unfair allows the legal and factual situation that the consumer would have been in in the absence of that unfair term to be restored, in particular by giving rise to a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term, which it is for the court seised of the case to ascertain (see, to that effect, judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15

and C-308/15, EU:C:2016:980, paragraphs 61 to 66; of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraphs 44, 45 and 56; as well as of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraphs 51 and 52).

43 All those considerations are fully transposable to a dispute such as that at issue in the main proceedings and relevant for the purpose of answering the question referred in the present case.

44 Thus, in accordance with the case-law of the Court referred to in paragraphs 41 and 42 of the present judgment, in so far as the action brought is based on the term relating to the exchange difference which was included initially in the loan agreements concluded with OTP Jelzálogbank and Others, it is for the referring court to ascertain whether the applicable national legislation, under which terms of that nature are void and replaced, allowed the legal and factual situation in which the applicant in the main proceedings would have been in in the absence of such an unfair term to be restored, in particular by giving that consumer a right to repayment of the sums wrongly received by the sellers or suppliers concerned (see, by analogy, judgments of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 44 and the case-law cited, and of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraphs 51 and 52).

45 It should be added that the referring court's review of the term relating to the exchange difference is without prejudice to the review that may be carried out, in the light of Directive 93/13, with regard to the other terms of the agreements at issue in the main proceedings, such as those relating to the exchange rate risk, taking into account, however, the factors for excluding the assessment of the unfairness of contractual terms set out in Article 4(2) of that directive.

46 In the second place, the referring court asks the Court whether it is possible, or even necessary, for any court seised of the matter to grant the application of the consumer concerned for the loan agreement in question to be annulled in its entirety, rather than annulling only the term relating to the exchange difference and replacing it with a national provision, as provided for by the national legislation applicable in the main proceedings.

47 In that regard, it is apparent from the case-law of the Court that the right to effective consumer protection includes the option to waive the exercise of the rights arising from the system of protection against the use of unfair terms by sellers or suppliers which Directive 93/13 established for the benefit of consumers. It is thus incumbent on the national court to take account, where appropriate, of the wishes 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 that term (see, to that effect, judgments of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraphs 53 and 54; of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraphs 46 and 47; as well as order of 1 June 2021, *Banco Santander*, C-268/19, not published, EU:C:2021:423, paragraphs 30 and 31).

48 In addition, the Court has held that, similarly, since that system of protection against unfair terms does not apply if the consumer objects to it, he or she must a fortiori be entitled to object to being protected, under that same system, against the unfavourable consequences caused by the agreement being annulled in its entirety where he or she does not wish to rely on that protection, in the circumstances referred to in the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282), namely in the situation in which the removal of the unfair term would require the court to annul that agreement in its entirety, thereby exposing the consumer to

particularly unfavourable consequences, with the result that the consumer would thus be penalised (see, to that effect, judgment of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraphs 46 to 48, 55 and 56).

49 However, as regards the criteria for assessing whether an agreement can continue to exist without the unfair terms and the limits imposed by EU law which must be observed by the Member States in that regard, the Court has stated that Article 6(1) of Directive 93/13 cannot be interpreted as meaning that, when making that assessment, the court hearing the case can base its decision solely on a possible advantage for the consumer of the annulment of the agreement at issue as a whole. It is in principle in the light of the criteria laid down in national law that it is necessary to examine, in a specific situation, the possibility of upholding an agreement some terms of which have been declared invalid and, in accordance with the objective approach adopted by the Court, the situation of one of the parties to the agreement cannot be regarded, under national law, as the decisive criterion determining the fate of the agreement (see, to that effect, judgments of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraphs 32 and 33; of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819, paragraphs 40 and 41; and of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraphs 56, 83 and 90).

50 Thus, the wishes expressed by the consumer concerned cannot prevail over the assessment, which falls within the sovereign power of the court seised of the matter, of whether the implementation of the measures provided for by the relevant national legislation makes it possible to re-establish the legal and factual situation which would have existed for the consumer in the absence of that unfair term.

51 In the light of all the foregoing, the answer to the question referred is that Article 6(1) of Directive 93/13 must be interpreted as not precluding national legislation which, in relation to loan agreements concluded with a consumer, renders void a term relating to the exchange difference that is regarded as unfair and requires the national court with jurisdiction to replace that term with a provision of national law imposing the use of an official exchange rate, without providing for the possibility, for that court, to grant the application of the consumer concerned for the annulment of the loan agreement in its entirety, even if that court considers that the continuation of that agreement would be contrary to the interests of the consumer, in particular with regard to the exchange risk which the latter would continue to bear by virtue of another term in that agreement, in so far as the court is, however, in a position to make a finding – in the exercise of its sovereign discretion, over which the consumer's expressed wishes cannot prevail – that the implementation of the measures thus provided for by that national legislation makes it possible to re-establish the legal and factual situation which would have existed for the consumer in the absence of that unfair term.

Costs

52 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 (Sixth Chamber) hereby rules:

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation which, in relation to

loan agreements concluded with a consumer, renders void a term relating to the exchange difference that is regarded as unfair and requires the national court with jurisdiction to replace that term with a provision of national law imposing the use of an official exchange rate, without providing for the possibility, for that court, to grant the application of the consumer concerned for the annulment of the loan agreement in its entirety, even if that court considers that the continuation of that agreement would be contrary to the interests of the consumer, in particular with regard to the exchange risk which the latter would continue to bear by virtue of another term in that agreement, in so far as the court is, however, in a position to make a finding – in the exercise of its sovereign discretion, over which the consumer's expressed wishes cannot prevail – that the implementation of the measures thus provided for by that national legislation makes it possible to re-establish the legal and factual situation which would have existed for the consumer in the absence of that unfair term.

[Signatures]