ZWIĄZEK BANKÓW POLSKICH

Warsaw, 31 March 2022

POLISH BANK ASSOCIATION'S SECTORAL POSITION

in case C-6/22

FIRST QUESTION (a)

Must Council Directive 93/13/EEC, in the light of its objective of protecting consumers against unfair terms in contracts with sellers or suppliers, be interpreted as meaning that, once a contract is declared invalid by a court under the rules of that directive, that directive, along with the protection of the consumer, ceases to apply and the rules governing settlement for the consumer and the seller or supplier must be sought under the national contract law governing the settlement of an invalid contract?

I. PRELIMINARY REMARKS – THE ESSENCE OF REFERRING COURT'S QUESTION

1. In its first question, the referring court seeks to establish whether it is admissible to refer to the settlement rules for a collapsed loan agreement laid down by national law, where those rules do not provide for any preference for the consumer.

2. As the referring court points out, the system of protection introduced by Directive 93/13 is based on the premise that the consumer is the weaker party to the legal relationship. Although the provisions of Directive 93/13 do not require contracts which contain abusive clauses to be declared invalid, they provide for that possibility, unless the gap in the contract is filled by supplementary provisions in accordance with the principles developed by the CJEU. Since the referring court does not see any possibility of filling the gap in the contract under review with supplementary provisions (despite the fact that, contrary to the court's view, such provisions clearly exist, as will be seen below), the referring court sees a necessity to invalidate the contract in its entirety. The referring court is aware that, according to the CJEU case law, the consequences of the invalidation of a contract are governed entirely by national law. Nevertheless, the referring court is concerned that the Polish provisions on the consequences of contract's invalidation (concerning the so-called unjust enrichment) do not provide for any

preference for the consumer. Thus, in the referring court's view, the consumer is at risk that the contract will be settled on an equal basis, aimed at compensating for damages incurred, which may jeopardise the so-called deterrent effect of Directive 93/13.

3. The referring court's position is incorrect on many levels, as will be discussed below.

II. ERRONEOUS INTERPRETATION OF DIRECTIVE 93/13

4. **Firstly**, the referring court is wrong in stating that there are no supplementary provisions that could be applied in place of the eliminated abusive clauses. Unfortunately, the position of the referring court corresponds to a widespread approach in the Polish case law, according to which a court should seek to invalidate a foreign currency loan agreement in order to protect the consumer's interest by relieving him of the foreign currency risk associated with the conclusion of a foreign currency loan agreement. Such an approach is based on an erroneous and biased interpretation of the provisions of Directive 93/13. As the referring court itself points out, the CJEU case law makes it clear that the principle resulting from Directive 93/13 is that a contract remains in force after abusive clauses have been eliminated. Such position was also presented in the latest CJEU judgments of 29 April 2021, C-19/20 and of 2 September 2021, C-932/19. As it was indicated in the CJEU judgment in case C-19/20: *"the objective pursued by the EU legislature in the context of that directive is not to annul all contracts containing unfair terms"* (paragraph 55). The objective of Directive 93/13 *"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"* (paragraphs 54, 72). In turn, in its judgment in case C-932/19 the CJEU stated 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".*

5. Thus, despite the clear preference of Directive 93/13 for upholding the contract and allowing the application of the official rate instead of the bank rate, the referring court fails to see that, since 24 January 2009, Article 358(1) and (2) of the Civil Code has been in force in Poland, and this provision specifies the source of the exchange rate (the NBP average exchange rate) in the event that currency conversions are necessary for which the parties have not specified such a source. It should be reminded that the application of this provision leads to exactly the same consequences as specified in the judgment C-932/19, i.e. elimination of (allegedly) abusive clauses and their replacement with the official exchange rate. All the prerequisites for applying supplementary provisions, set out in the CJEU case law, were thus fulfilled (which, however, the referring court does not consider because it states that the relevant supplementary provisions do not exist). Moreover, the referring court also fails to recognize that the application of the official rate (the NBP average exchange rate) would fully realize the so-called deterrent effect of Directive 93/13. By replacing the bank rate with the official rate, the difference between the average rate and the bank rate (the so-called "currency spread") which was charged by the bank is reimbursed to the consumer for the whole duration of the loan agreement. This entails significant, negative financial consequences for banks. As calculated by the Polish Financial Supervision Authority (KNF), the replacement of the bank rate with the official rate in all loan agreements indexed and denominated to foreign currencies would entail a loss of PLN 8.8 billion for the sector (cf. Polish Financial Supervision Authority's position on the direction of resolving legal questions presented by the First President of the Polish Supreme Court concerning residential mortgage loans denominated or indexed to a foreign currency, p. 25). This is a severe sanction that is at the same time proportional to the alleged unlawfulness of banks.

6. In light of the above, it appears that the referring court perceives the alleged abusiveness of certain provisions rather as a pretext to overturn the agreement which is binding the consumer, in order to solve the social problem caused by the increase in the exchange rate of the Swiss franc to the Polish zloty. This type of approach was accurately criticized by the KNF, which pointed out that*: "Possible abusiveness should not be used instrumentally to avoid negative consequences of the agreement (e.g. financial consequences of the materialization of the currency risk resting under the agreement on the client as a result of the depreciation of PLN against CHF) to the extent arising beyond the basis of abusiveness, and the pursuit of such use should not enjoy legal protection. It was stated earlier that the source of problems related to foreign currency residential loans and their inconvenience for clients are the changes on the foreign currency market, not the shape of specific contractual clauses in one or another form, which – as argued by some borrowers or persons and institutions representing them – are supposed to prove the possible abusiveness of these provisions. It is not the possible abusiveness*

of the exchange rate clause that is the real source of the social problem and court disputes, but the depreciation of PLN against CHF, which led to a significant increase in borrower's debt denominated in PLN and an increase in his monthly burdens. It is therefore questionable to look for a panacea for these ailments in the possible abusiveness of the exchange rate clauses" (cf. Polish Financial Supervision Authority's position on the direction of resolving legal questions presented by the First President of the Polish Supreme Court concerning residential mortgage loans denominated or indexed to a foreign currency, p. 11).

7. **Secondly**, the referring court erroneously interprets the meaning of the so-called deterrent effect of Directive 93/13. As already indicated above, according to the uniform CJEU case law, the essential objective of Directive 93/13 is to protect the consumer and to restore the balance between the parties. The CJEU does not identify deterrence as an objective of Directive 93/13 in this context. This is understandable, as Directive 93/13 is not part of criminal law, but part of civil law. At the same time, it is clear that the objective of Directive 93/13 is also to discourage sellers or suppliers from using abusive clauses. That objective must, however, be understood as an interpretative guideline which does not allow the provisions of Directive 93/13 to be interpreted in such a way that sellers or suppliers do not bear any negative consequences from the use of prohibited clauses. This would be the case, for example, if the so-called "reduction upholding effectiveness" were admissible. As the CJEU points out, the power of the courts to apply such a reduction would in fact contribute to eliminating the deterrent effect on sellers or suppliers by the mere non-application of such unfair terms to consumers, since they would still be encouraged to apply the terms in question, knowing that, even if they were to be invalidated, the contract could nevertheless be supplemented to the extent necessary by the national court so as to guarantee the interest of sellers or suppliers in question (judgments: of 14 June 2012, Banco Español de Crédito, C-618/10, EU:C:2012:349, paragraph 69; of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraph 79). The problem is that some courts in Poland (and, as it seems, also the referring court) do not see any limits in the use of deterrence and thus in the punishment of the bank for applying abusive clauses. According to them, no degree of preference for the consumer is disproportionate to the bank's alleged breaches. This is clearly apparent in the reasoning of the referring court, which cannot accept that national provisions on unjust enrichment do not provide for any preference for the consumer and seek to align the interests of the parties.

8. Thus, contrary to the referring court's findings, the deterrent effect of Directive 93/13 cannot be understood as imposing a requirement to maximize the sanction imposed on sellers or suppliers. That sanction must be effective and deterrent, but at the same time proportional. Only if the seller or supplier were to avoid any sanction, the deterrent effect makes it impossible to accept such a consequence. If, on the other hand, the seller or supplier bears significant negative

consequences of application, the imperative of deterrence must be weighed against the imperative of proportionality. Certainly, the deterrent objective of Directive 93/13 cannot have the effect of extending its scope of application. That is, in fact, what the referring court seeks to achieve by arguing that Polish provisions on unjust enrichment do not fulfill the deterrent objective.

9. It should be noted that if the referring court's position were correct, the application of national provisions on the settlement of a collapsed contract could not lead to consequences that are unfavourable to the consumer. Meanwhile the CJEU has repeatedly emphasized in its case law that the collapse of a contract may entail **particularly unfavourable, penalizing consequences** for the consumer (in particular the judgments: of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraphs 80, 83; of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, paragraph 56). A way of remedying those consequences is, for example, to allow the replacement of prohibited clauses with a supplementary provision of law. Thus, the referring court's position is entirely incorrect.

10. **Thirdly**, the referring court erroneously considers that Directive 93/13 could in any way affect parties' settlements after the loan agreement has been invalidated. However, Directive 93/13 does not contain any provision on settlements after the collapse of a contract. The referring court does not explain in any way how it understands the further application of Directive 93/13 at the stage of settlement of an invalidated loan agreement. The referring court probably means applying the dissuasive effect, i.e. interpreting all the provisions in such a way as to impose maximum burdens on banks.

11. The CJEU case law makes it clear that the consequences of contract's invalidation are a matter of national law. As it was indicated in paragraph 84 of judgment C-19/20: *"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)".*

12. Consequently, it is not possible to derive the effects of invalidity from Directive 93/13 itself. The only precept arising from Directive 93/13 is that the elimination of abusive clauses should lead to a restoration of the legal and factual situation in which the consumer would have found

himself in the absence of that clause. This entails a balance of interests and not a preference for the consumer. If the effect of terms' abusiveness is the invalidity and collapse of the entire contract, the situation in which the consumer would have found himself is the same as that created by the application of Polish provisions on unjust enrichment. Namely, the parties are obliged to return to each other all performances made under the collapsed contract.

13. Any inference of the more far-reaching consequences of invalidity from Directive 93/13 is an obvious attempt of its overinterpretation in order to achieve preconceived ideas as to the degree of penalty to be imposed on the bank on account of the appearance of alleged abusive clauses in the contract.

14. **Fourthly** and finally, the referring court erroneously assumes that the settlement of the contract according to national provisions would not lead to imposing sanctions on banks. As the referring court points out: *"Applying the rules of national law would mean that the 'deterrent effect' of the directive (Article 7 of the directive) would not be applied, since the provisions of national law do not provide for sanctions that can be applied by a court ruling on an individual case of a consumer relying on the unfairness of certain contractual terms".* Meanwhile, the settlement of a loan agreement according to the principles of unjust enrichment leads to enormous losses on the part of banks. First of all, banks are obliged to write off from their balance sheets receivables due to borrowers expressed in foreign currencies, because these receivables result from an invalid agreement. They are replaced by receivables due to the customer resulting from unjust enrichment. On the assumption that the bank's receivable for unjust enrichment includes the loan principal paid to the customer in zloty and the cost of capital (an assumption strongly contested by borrowers' representatives), the resulting performance - after taking into account the amounts to be returned to the borrower - only partially compensates for the loss resulting from writing off the receivables in foreign currency. According to the KNF's assessment, the adoption of such a settlement method for all foreign currency loans leads to losses in the sector of PLN 56.4 billion (!) (cf. Polish Financial Supervision Authority's position on the direction of resolving legal questions presented by the First President of the Polish Supreme Court concerning residential mortgage loans denominated or indexed to a foreign currency, p. 25). Such losses can threaten the existence of many banking institutions. Therefore, it certainly cannot be said that the invalidation of a loan agreement and its settlement according to national provisions does not lead to bank's punishment. In fact, this is a penalty many times greater than any administrative penalty that could be imposed on banks. Moreover, it is a penalty that is **completely disproportionate** to the alleged unlawfulness of banks consisting in the inclusion of abusive clauses in contracts.

III. ANSWER PROPOSAL

15. The answer to the first question should read as follows:

Article 6(1) of Directive 93/13/EEC must be interpreted as meaning that the effects of a finding by a court that an entire contract has collapsed as a result of the existence of an unfair term in a contract concluded between a seller or supplier and a consumer are governed solely by provisions of national law.

SECOND QUESTION (b)

In the light of Articles 6 and 7 of Directive 93/13/EEC, where a court finds that the contractual term in question is unlawful and that the contract is not capable of continuing in existence after that term has been removed, in the absence of an agreement by the parties to fill the gap with clauses in accordance with their wishes and in the absence of supplementary provisions (directly applicable to the contract in the absence of an agreement by the parties), must that court declare the contract invalid on the basis of the wishes of the consumer who sought that declaration, or must the court examine, of its own motion, going beyond the form of order sought by the parties, the financial situation of the consumer in order to determine whether declaring the contract invalid would expose the consumer to particularly unfavourable consequences?

I. PRELIMINARY REMARKS – THE ESSENCE OF REFERRING COURT'S QUESTION

16. The essence of referring court's question comes down to establishing whether national court must examine of its own motion the consumer's financial situation where it finds that the contractual term in question is unlawful and that the contract is not capable of continuing in existence after that term has been removed, in the absence of an agreement by the parties to fill the gap with clauses in accordance with their wishes and in the absence of supplementary provisions**,** or whether it must declare the contract invalid on the basis of the wishes of the consumer.

17. By posing that question, the referring court wonders whether, for the purpose of objectively determining consumer's possible exposure to particularly unfavourable consequences of contract's invalidation, it may itself determine consumer's current financial situation, including, for example: whether and, if so, how much savings the consumer has, what is the current value of the real estate which he purchased with the loan in question and whether it is still his property. The referring court, following the Court's case law, notices that the consequence of a declaration of invalidity with regard to a contract would be that the outstanding balance of the loan would become due forthwith and would be likely to be in excess of the consumer's financial capacities (CJEU judgment of 25 November 2020, C-269/19 in case Banca B. SA v. A.A.A., CJEU judgment of 26 March 2019 in joined cases Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17).

18. By referring to the provisions of national law (Article 406 of the Civil Code) and the case law of the common courts and the Polish Supreme Court (judgment of the Court of Appeal in Warsaw of 24 June 2014, ref. no. VI ACa 1823/14, judgment of the Polish Supreme Court of 3 October 2019, ref. no. I CSK 122/16), the referring court indicates the potential consequence of loan agreement's invalidation, manifested in the possibility for the bank to demand the return of the real estate purchased with funds obtained from the loan (principle of surrogacy).

II. LIMITS AND SCOPE OF CONSUMER PROTECTION

19. When analysing the question formulated by the referring court, it is necessary to recall the basis of consumer protection in the area of unfair contractual terms that derives from Directive 93/13, in accordance with the interpretation made by the Court and reiterated in, inter alia, its judgment of 25 November 2020 in case C-269/19.

20. The system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge and that is why he agrees to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. As regards such a position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair (judgment of 3 October 2019 in case C-260/18 Dziubak, EU:C:2019:819, paragraph 37 and case law cited therein).

21. As indicated in the cited judgment (C-260/18 Dziubak) in relation to Article 6 of Directive 93/13: *According to settled case-law, the purpose of that provision, and in particular of its second part, is not to cancel all contracts containing unfair terms but to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, it being specified that the contract at issue must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms. Provided that the latter condition is satisfied, the contract at issue may, 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 (see, to that effect, judgment of 14 March 2019, Dunai, C-118/17, EU:C:2019:207, paragraphs 40 and 51, and of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, paragraph 57).*

22. Thus the Court, referring to its earlier case law, confirmed the primacy of upholding a contract over declaring it invalid, making it clear that the purpose of **Article 6 of Directive 93/13 is not to invalidate all contracts containing unfair terms. <u>This view was confirmed by the Court in its judgment C-19/20, where it was firmly underlined that the objective of Directive</u>**

93/13 is not to punish the seller or supplier, but to restore the contractual balance between the parties.

23. In its case law to date, the Court has also held that, where a contract concluded between a seller or supplier and a consumer cannot continue in existence after the deletion of an unfair term, Article 6(1) of Directive 93/13 does not preclude the national court from applying the principles governing the law of contract and deleting an unfair term by substituting for it a supplementary provision of national law in situations where the invalidation of an unfair term would oblige the court to invalidate a contract in its entirety, thus exposing the consumer to particularly unfavourable consequences which would penalize him[1]. Such a substitution is consistent with the objective of Article 6(1) of Directive 93/13, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance, re-establishing the equality between them, without the necessity to invalidate all contracts containing unfair terms[2].

III. THE MOMENT OF EXAMINING CONSUMER'S FINANCIAL SITUATION

24. The Court has repeatedly underlined that, if the national court was unable to replace the unfair term with a supplementary provision of national law and was obliged to invalidate the contract in question in its entirety, the consumer could be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the invalidation of the contract could well be jeopardised. In case of a loan agreement, the consequence of such invalidation is, in general, that the outstanding balance of the loan becomes due forthwith. The CJEU underlines that this may exceed consumer's financial capacities and, as a result, penalise the consumer, which would be contrary to the objectives of Directive 93/13[3].

25. In the light of the question posed by the referring court, it is also relevant that, according to the Court's case law, the consequences of loan agreement's invalidation for the consumer must be assessed in relation to the circumstances existing or foreseeable at the time when the dispute arose (CJEU judgment of 3 October 2019 in case C-260/18 Dziubak, paragraphs 50 and 51),

[1] See, in particular, judgments: of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraphs 80, 83; of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, paragraph 56; of 3 October 2019, Dziubak, C-260/18, EU:C:2019:819, paragraph 48; of 3 March 2020, Gómez del Moral Guasch, C-125/18, EU:C:2020:138, paragraph 61.

[2] See, in particular, judgments: of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraphs 81, 82 and the case law cited therein; of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, paragraph 57; of 3 March 2020, Gómez del Moral Guasch, C-125/18, EU:C:2020:138, paragraph 62.

[3] See, in particular, judgments: of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraphs 83 and 84; of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, paragraph 58; of 3 March 2020, Gómez del Moral Guasch, C-125/18, EU:C:2020:138, paragraph 63.

since the possibility of unfair term's substitution serves to ensure that consumer protection is implemented, by safeguarding consumer's interests against all unfavourable consequences.

26. In this context, only taking account of consumer's actual and current interests (not the interests he had at the time when the contract was concluded) ensures proper protection of consumer's interests. Similarly, the consequences from which the consumer must be protected, in the context of his actual and current interests, are those that would actually have arisen in circumstances existing or foreseeable at the time when the dispute arose if the national court had invalidated the contract, not those consequences which would have resulted at the date of conclusion of that contract from its invalidation. **The need for the national court to take account of consumer's actual and current interests must therefore be understood as an obligation to update the state of consumer's interests at the time when the dispute is being determined by the national court, including, in particular, the time when the consumer is to take an informed decision in the ongoing court proceedings as to whether he wishes to use the protection provided for by Directive 93/13.** It must therefore be concluded that the national court has the power to examine consumer's financial situation before the dispute is resolved.

27. The CJEU case law does not without reason emphasize the leading role of the national court in consumer cases. The Court rightly points out that the inequality between the consumer and the seller or supplier can be remedied only by the active intervention of a third party, which is the national court[4]. Since the consequences of contract's invalidation may be unfavourable for the consumer, the consumer should be aware of those consequences and consider them before making a declaration of intent concerning the future of the contract. Lack of national court's active participation in this process may constitute an obstacle to ensuring for the consumer the fundamental rights guaranteed by the EU legislation.

28. According to the CJEU case law[5], a consumer may, after having been informed by the national court, refrain from invoking the unfair and non-binding status of a contractual term, thus giving his free and informed consent to that term[6]. It follows that the information which the national court should dispose of under national procedural provisions should be substantial enough to enable the consumer to decide whether he wishes to waive the protection afforded to him by Directive 93/13. However, in order to enable the consumer to give his free and informed consent, the national court must indicate to the parties, within the framework of national procedural rules and in the light of the principle of equity in civil proceedings, in an objective

[4] Cf. judgment in case Kancelaria Medius, C-495/19.
[5] CJEU judgment of 29 April 2021 in case C-19/20.
[6] Judgment of 3 October 2019, C-260/18 Dziubak, EU:C:2019:819, paragraph 66.

and exhaustive manner, the legal consequences which the removal of the unfair term may entail, irrespective of whether or not the parties are represented by a professional representative.

29. Such information is all the more significant because the non-application of an unfair term may lead to the invalidation of the entire contract, possibly exposing the consumer to a series of negative consequences. It is for the national court, which finds that a term in a contract concluded with a consumer by a seller or supplier is unfair, to inform the consumer, within the framework of national procedural rules and following an adversarial debate, about the legal consequences which the contract's invalidation may entail.

30. In judgment C-19/20, the CJEU aptly emphasized (paragraph 56 of the judgment) the importance of the so-called objective approach, reminding that the situation of one party and its will cannot determine the fate of a contract. Therefore, the possible invalidation of loan agreements should be a measure of last resort. On the basis of judgment rendered in cases C-260/18 and C-19/20, the national court should provide the consumer with information about the existing or foreseeable consequences of contract's invalidity even in a situation where the consumer is represented by a professional representative. According to the CJEU judgment in case C-260/18, it is for the national court to ascertain, by providing relevant information, whether claimant's will expressed by the request for contract's invalidation is fully informed.

31. Those steps must, however, be taken by the national court taking account of the fact that achieving balance between the parties, which Directive 93/13 seeks to achieve, must not mean favourizing the consumer. Article 6(1) of Directive 93/13 cannot therefore be interpreted as meaning that, when assessing whether a contract containing one or more unfair terms can continue in existence after the exclusion of those terms, the court hearing the dispute may take as a basis for its decision only the fact that the invalidation of that contract in its entirety would possibly be more favourable to the consumer. In its judgment of 25 November 2020, C-269/19 in case Banca B. SA v. A.A.A. the CJEU made it clear that Article 6(1) of Directive 93/13 must be interpreted correctly, i.e**. the court should not be guided by the request made by the borrower, but should carry out an in-depth analysis of consumer's interest and consequences related to the invalidation of the loan agreement**. As pointed out above, the main objective of the directive is to restore the balance which has been distorted by a prohibited term[7].

[7] Cf. opinion of Advocate General of 13 July 2016 in joined cases C-154/15, C-307/15 and C-308/15.

IV. THE POSSIBILITY FOR THE COURT TO EXAMINE CONSUMER'S FINANCIAL SITUATION

32. In Polish law, taking actions by the court ex officio constitutes a set of powers included in the so-called discretionary power of the court and is a breach of the adversarial principle (Article 232 of the Code of Civil Procedure). It should therefore be pointed out that under Polish law the court's power to take actions of its own motion may turn into an obligation only in exceptional situations. The assessment of this exceptionality must relate to specific circumstances of a given case, and at the same time should remain in accordance with the purpose and principles of the trial[8].

33. The CJEU has repeatedly underlined the importance of national court's obligation to act of its own motion in consumer cases in order to ensure that objectives of Directive 93/19 are effectively pursued. The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by it, with a view to ensuring that Directive 93/13 is fully effective and to achieving an outcome consistent with the objective pursued by it[9].

34. The obligation to act ex officio concretizes in a special way in cases concerning loans denominated/indexed to foreign currencies (due to the nature of these cases, which also involve an element of public interest, as well as the degree of their complexity) and concerns, in particular, the issue of consequences of a possible declaration of the prohibited nature of contractual clauses, including consumer's demand for a declaration of contract's invalidity/non-existence of the legal relationship arising from the loan agreement.

35. In the light of the CJEU case law it must therefore be held that, in disputes involving consumers, the national court should act in accordance with the axiology of Directive 93/13, the primary objective of which is to ensure a high level of consumer protection and to redress any imbalance in the consumer-seller or supplier relationship (which is also confirmed by Article 76 of the Constitution of the Republic of Poland, according to which the protection against unfair market practices is a constitutional task of public authority). **The above means that in disputes concerning loans denominated/indexed to foreign currencies the national court is obliged to examine of its own motion the borrower's financial situation in the context of determining the possible consequences of declaring the loan agreement invalid.** Such action guarantees the real protection of consumer, including his right to a fair trial, the purpose of

[8] Cf. Supreme Court's judgments of 3 September 2003, II CKN 425/01, LEX no. 137527; of 15 July 2010, IV CSK 84/10, LEX no. 621352; of 12 March 2010, II UK 286/09, OSNP 2011/17–18, item 237.
[9] CJEU judgment of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16.

which is to reverse any imbalance in the relationship between the consumer and the seller or supplier.

36. Such an interpretation of provisions of Directive 93/13 is also supported by the important role which the Court of Justice attaches to such defined duty of information. **Informing the consumer of the possible ways of ending the dispute should be done in a real manner.** This is not achieved by merely informing the consumer of the possible solutions and general, abstract legal consequences of each of them.

37. **The national court should present to the consumer in detail the rights, obligations and risks related to any possible outcome, including against the background of future claims against the consumer which may arise from the invalidation of the contract.** Such a broad understanding of national court's duty to inform makes it necessary for the court, in performing that duty, also to analyse the economic aspect of any future judgment. This can be achieved only if the national court takes steps to verify consumer's financial situation with regard to claims which the seller or supplier may pursue against the consumer under national law.

38. The foregoing is not contrary to the fact that the effectiveness of protection which, under Directive 93/13, the national court should on its own motion confer on the consumer, cannot go so far as to disregard or exceed the limits of the dispute's subject-matter set out by the parties in their claims, in the light of the objections put forward by them. It cannot be concluded on that basis that the national court hearing the case should, for the purposes of that examination, in all circumstances, rely solely on the elements of legal and factual situation raised by the parties.

39. It is within the limits of the subject-matter of the dispute at issue that the national court should examine of its own motion whether the invalidation of the contract will ensure protection which should be given to the consumer under Directive 93/13. In order for the consumer to benefit fully from the protection afforded to him by that directive, **the national court should not make a formalistic interpretation of the claims made but, on the contrary, should examine their content in the light of objective consumer protection and maintaining the balance between the parties.**

40. The Court has consistently held that national courts of the Member States are required to make a pro-EU interpretation of provisions of national law. This principle has been confirmed in numerous rulings of the Court of Justice, for example in the judgment in case 18/83 *Colson and Kamann (formerly European Court of Justice)*, and similarly in the judgment in case C-282/10 *Dominguez*, confirming the position that, when applying domestic law, national courts are obliged to interpret it, so far as possible, in the light of the wording and purpose of the said

Directive in order to achieve the result sought by the Directive, and thus to comply with the third paragraph of Article 288 TFEU[10].

41. Therefore, the Polish courts should do everything within their power, having regard to all the provisions of national law and applying the interpretative methods recognized by the Polish legal order, to guarantee the full effectiveness of Directive 93/13 and make a decision which is consistent with the objectives pursued by it and, since those objectives include consumer protection in the broad sense, national courts should examine consumer's financial situation, also to determine whether the invalidation of the contract will not expose the consumer to particularly unfavourable consequences.

42. Member States remain free to provide, in their national law, for a broader ex officio examination than that which the courts should carry out on the basis of Directive 93/13. It is the duty of the national court to use such regulations which ensure that each party is neither excessively burdened nor over-enriched. The national court should seek to strike a balance between the parties to the contract.

43. Summarizing the presented argumentation, the Polish Bank Association points out that while fulfilling the request for declaring a contract invalid would be a solution simple to meet in its construction, it is not, however, a solution most beneficial for the consumer. As presented in the earlier part of this position, a possible declaration of invalidity should be treated as a last resort solution. **It should therefore be pointed out once again that the invalidation of a contract is not an objective of Directive 93/13, since it will often fail to achieve the primary objective of the directive, which is consumer protection.** Without examining consumer's financial situation, however, it will not be possible to determine the consequences of invalidation of the loan agreement and the more it will not be possible to duly inform the consumer about those consequences. The provisions of EU law (in particular Article 6 of Directive 93/13) impose an obligation on national courts to inform consumers in cases concerning loan agreements denominated/indexed to foreign currencies of the legal consequences of contract's invalidation. The issue concerning the concretization of the abovementioned obligation has been addressed in the CJEU case law (see, among others, CJEU judgments of 3 October 2019, C-260/18 and 21 February 2013, C-472/11).

44. **It should be underlined that the fulfillment of duty of information must be neither of ostensible character nor of vague form.** It is for the national court to present all the possible consequences of a judgment invalidating a loan agreement, not only in legal aspect but also in economic terms, because only such a form of information will ensure the implementation of

[10] See, in particular, judgments: of 5 October 2004 in joined cases C-397/01 to C-403/01 Pfeiffer and Others, ECR p. I 8835, paragraph 114; of 23 April 2009 in joined cases C-378/07 to C-380/07 Angelidaki and Others, ECR p. I 3071, paragraphs 197, 198; of 19 January 2010 in case C-555/07 Kücükdeveci, ECR p. I 365, paragraph 48.

principle of parties' equality and enable the consumer to give a free and informed consent as to his will in relation to application for invalidating the contract. **For that reason, the assessment of whether the court should examine of its own motion the financial situation of the consumer should be performed also in the light of the obligation incumbent on the national court - the necessity to provide consumer with comprehensive and objective information requires national court's active intervention by examining consumer's financial situation. The national court cannot fully comply with its duty of information in isolation from the factual situation, without ascertaining the factual circumstances concerning a specific consumer (including, inter alia, consumer's wealth or creditworthiness and consumer's capacity to take out a loan for refinancing the repayment of his debt as a result of invalidating the loan agreement).**

45. It should be underlined that, in the long term, a consumer who seeks a declaration of invalidity of a loan agreement within pending proceedings may expose himself and his family to consequences that are completely outside the scope of the pending court proceedings. At the same time, it is not insignificant that even a potential, professional representative of a consumer in a dispute concerning the invalidation of a loan agreement is not, as a rule, obliged to instruct his client about the consequences of procedural decisions that go beyond the scope of the assignment to handle a court case. After all, according to the Court's current case law (CJEU judgment of 29 April 2021 in case C-19/20), it is in fact the national court and not the representative who plays the role of guardian of consumer's rights.

46. Such a position is all the more justified by the fact that well-thought marketing of professional representatives who wish to obtain as many clients (foreign currency borrowers) as possible usually omits or downplays the consequences of loan agreement's invalidation. As a result, there may be thousands of individual decisions made by consumers who, only in the course of time, will be confronted with more far-reaching consequences of loan agreement's invalidity - for example, the necessity to return the principal of the loan received, which in turn will expose them to subsequent court proceedings, costs of court and enforcement fees, enduring enforcement directed at all their assets, and ultimately even the risk of bankruptcy. Given the scale of the phenomenon of disputes concerning loans indexed or denominated in foreign currencies, the social and economic consequences may be far-reaching, also for consumers whose role is limited to observers not involved in the dispute.

47. Consequently, if the consumer's decision not to invoke the unfair and non-binding nature of a contractual term is to be expressed in an informed manner (after having considered all its relevant consequences), the court should have effective tools enabling it to provide the consumer with detailed information relating to the reality in which a given consumer functions. Such tools can be provided by an evidentiary initiative of the court, which the court can take on its own

motion and which may include a variety of evidence, such as hearing the parties, obliging the consumer to submit certain documents to the court or (as a last resort) admitting evidence from the opinion of a competent court expert.

V. ANSWER PROPOSAL

48. In light of the foregoing, it is reasonable to answer the second question as follows:

In the light of Articles 6 and 7 of Directive 93/13/EEC, where a court finds that the contractual term in question is unlawful and that the contract is not capable of continuing in existence after that term has been removed, in the absence of an agreement by the parties to fill the gap with clauses in accordance with their wishes and in the absence of supplementary provisions, that court must not declare the contract invalid on the basis of the wishes of the consumer who sought that declaration, but must examine the content of such form of order sought in the light of objective consumer protection and maintaining the balance between the parties, which demonstrates the appropriateness of the national court taking the evidentiary initiative of its own motion.

THIRD QUESTION (c)

Must Article 6 of Directive 93/13/EEC be interpreted as meaning that, if the court comes to the conclusion that declaring the contract invalid would be particularly unfavourable to the consumer and, despite having been encouraged to do so, the parties fail to reach an agreement on the fulfilment of the contract, the court may, taking into account the objective interest of the consumer, fill the gap in the contract, created after the unfair terms have been 'removed' from it, not with rules of national law which are supplementary within the meaning of the judgment in Case C-260/18, that is to say, rules which are directly applicable to the gap in the contract, but with specific provisions of national law which can be applied to the contract in question mutatis mutandis or by analogy and which reflect a rule of national contract law?

I. PRELIMINARY REMARKS – THE ESSENCE OF REFERRING COURT'S QUESTION

49. Polish Bank Association points out that the argumentation and proposed content of the answer to second question (b) clearly determine the shape of the answer to third question (c). It should be noted that both questions are functionally related.

50. A few preliminary remarks should be made at the outset of this consideration. The literal wording of the question comes down to establishing whether, if the national court concludes that declaring the contract invalid would be particularly unfavourable to the consumer, it is possible for the national court to fill the gaps resulting from the removal of terms which it found abusive with non-supplementary provisions of national law and thus – with provisions of a

general nature which can be applied to the contract in question mutatis mutandis or by analogy and which reflect a rule of national contract law.

51. The formulated question is based on the erroneous assumption of the referring court according to which it is necessary to make a gradation of directive's objectives and consider whether the primary objective remains the protection of consumer and thus protection from unfavourable consequences of contract's invalidation, or whether it is the achievement of the deterrent effect on the seller or supplier, i.e. the so-called sanction, which makes it impossible to fill the contract not with rules of national law which are supplementary within the meaning given by the Court in the judgment in case C-260/18. As it was already stated in this position (see paragraph 7), the objective expected from Member States by Directive 93/13 is protecting the consumer and restoring the balance between the parties, not punishing the seller or supplier. At the same time, the CJEU confirmed the primacy and priority of the continuation of a contract over its invalidity when a clause is considered abusive. It follows from the CJEU case law that national courts, in order to remedy the invalidity of a loan agreement, have at their disposal measures which will lead to fulfilling the primary objective of Directive 93/13, which is consumer protection and restoration of balance between the parties, while ensuring that the sanction imposed on the seller or supplier is proportional to the gravity of the breach identified.

52. Consequently, the court's assumption suggesting that it would be correct and fulfilling the objectives of Directive 93/13 for the national court to apply measures which pursue only one of the objectives set out by Directive 93/13 must be rejected. Accepting to any extent the narration of the referring court would mean that it would have to be assumed that, in certain cases, Directive 93/13 allows for the possibility of penalizing the seller or supplier in isolation from the principle of applying measures that are appropriate and aimed at restoring the actual contractual balance.

53. However, the referring court seems to overlook that the CJEU explicitly confirms the primacy of upholding a contract over invalidity while pointing out the necessity of applying the so-called objective approach.

54. It should be emphasized that, in the current case law of the Court, measures other than invalidation of the loan agreement have already been indicated, which fully implement the objective of Directive 93/13 stemming from Article 7(1) of Directive 93/13 and consist in preventing the use of unfair terms while at the same time implementing the postulate of restoring the actual contractual balance. Such measures may include, respectively, application of the average exchange rate published by the central bank (the National Bank of Poland) to concluded loan agreements or implementation of the *blue pencil* doctrine allowed by the CJEU judgment of 29 April 2021 in case C-19/20.

55. In analysing the issue raised in the question posed, consideration should also be given to the concept of "declaring the contract invalid with the benefit to the consumer", which is unjustifiably interpreted too literally, in a manner limited to a simple economic calculation, and in complete disregard for broadly understood consumer law, the primary objective of which is to restore the balance of rights and obligations. Consumer protection cannot lead to unreflective adoption of solutions that lead to excessive and uncritical privileges for the consumer at the expense of the seller or supplier. An understanding of the concept of "declaring the contract invalid with the benefit to the consumer" must not depart from the essential tasks of Directive 93/13. The economic interest of the consumer must not be decisive. Consumer protection must have reasonable limits. Releasing, in the name of indiscriminate consumer protection, from full responsibility for obligations knowingly entered into by consumers violates elementary principles of contract law and general social sense of justice, especially among borrowers who have chosen the “more expensive” PLN loans with WIBOR interest rate.

II. RESTORING THE BALANCE BETWEEN THE PARTIES

56. In the light of preliminary remarks, it should be pointed out that any attempts to gradate the importance of interests of parties to loan agreements are contrary to the objective of Directive 93/13. In the position taken by the CJEU it is expressly stated that the introduction of Directive 93/13 was not intended to eliminate from the market all contracts containing unfair terms, and the possible declaration of contract’s invalidity must result from provisions of national law, *ergo* not only do the provisions of Directive 93/13 not lay down criteria for the possibility of continuing the contract without unfair terms, but they also do not constitute an independent basis for declaring the invalidity of a contract, and the question of upholding such a contract should be assessed by the national court of its own motion in accordance with an objective approach on the basis of those provisions.

57. Therefore, bearing in mind the above, the possibility of applying the *blue pencil* clause to loan agreements indexed/denominated to a foreign currency should be considered. The admissibility of applying this solution was confirmed by the Court of Justice of the European Union in its judgment of 29 April 2021, C-19/20, which, referring to case law presented so far, inter alia, in cases Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17 and Banco Santander and Escobedo Cortës, C-96/16 and C-94/17, unequivocally supported the legitimacy of this concept.

58. Moreover, the Court also pointed out[11] that provisions of Directive 93/13 are not precluding the national court from compensating for the invalidity of an unfair term by replacing that term with the new wording of the legislative provision on which it was based, introduced after the

[11] Abanca Corporación Bancaria and Bankia, C-70/17.

conclusion of the contract the terms of which are affected by abusiveness, which is important from the point of view of the possibility to apply the rule resulting from Article 358 § 2 of the Civil Code to contracts concluded before that provision came into force.

59. Thus the *blue pencil* doctrine refers to the possibility of deleting the whole or part of a term in order to eliminate its abusive nature, while at the same time not allowing to change the essence of that term. In this regard, reference should also be made to the possibility, permitted by the Court, of applying the rule of substitution of an unfair contractual term where its elimination would require the national court to invalidate the contract in its entirety - judgment of 30 April 2014, Kósler and Kóslernë Róbai, C-26/13. In its judgment, the Court emphasised that such actions pursue the objectives of Directive 93/13, including Article 6 of that directive, because the primary objective pursued by the protection resulting from that provision is 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. In the context of that judgment, it should also be emphasised that the Court regarded the invalidation of a contract as being in principle unfavourable to the borrower, since it leads, in general, to the outstanding balance of the loan becoming due forthwith.

60. The above position corresponds with the most recent case law of the Polish Supreme Court, which in a resolution adopted by seven judges on 7 May 2021 in case no. III CZP 6/21 resolved the ongoing dispute as to the nature of the sanction imposed on a contract containing prohibited contractual provisions, qualifying it as a suspended ineffectiveness.

III. THE POSSIBILITY OF APPLYING PROVISIONS OF A NON-SUPPLEMENTARY NATURE

61. Therefore, taking into account the admissibility of applying the *blue pencil* concept in national law, **the answer to the question discussed within this study can only be in the affirmative, i.e. when a gap arises in the contract after individual terms have been removed from it, the court should fill it with non-supplementary provisions of national law.**

    In judgment of 3 October 2019, C-260/18 Dziubak, the Court of Justice of the European Union indicated that Article 6(1) of Directive 93/13 must be interpreted as precluding gaps in a contract caused by the removal of the unfair terms contained in that contract from being filled solely on the basis of national provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented, inter alia, by the effects arising from the principle of equity or from established customs, which are neither supplementary provisions nor provisions applicable where the parties to the contract so agree - however, it should be noted that the current direction of the CJEU case law is definitely heading towards softening such a position.

62. In this context, it is worth referring to the recent case law of the CJEU, which, in its judgment of 2 September 2021 in case C-932/19, considered the possibility of replacing an unfair term with provisions of national law.

63. 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. By way of introduced provisions, the legislature has proposed a solution according to which 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. The provision introduced requires courts to use the 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.

64. In the cited judgment, the CJEU held 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. Importantly, in the context of the question referred for a preliminary ruling, the CJEU came to the conclusion 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.

65. The CJEU has therefore consistently confirmed that the objective of Directive 93/13 is to restore the contractual balance between the parties while preserving the validity of the agreement, and not to massively cancel all agreements containing prohibited clauses.

66. In the current CJEU case law (C-19/20, C-932/19) there is a noticeable trend that breaks with the view of the "primacy" of consumer's will as regards the further fate of a contract containing prohibited clauses (C-260/18). Nevertheless, it is consistently ignored in the case law of national courts. This is primarily due to the erroneous assumption that the consumer’s will is of sole importance for the question of declaring the contract invalid. Meanwhile, in light of the judgment cited above, the consumer’s will is relevant as regards the acceptance of a prohibited

term, waiver of the protection afforded to the consumer under Directive 93/13 and confirmation by the consumer that he wishes to be bound by a term that meets the prerequisites of abusiveness. Such a situation must be distinguished, however, from a situation in which the consumer clearly indicates that he wishes to use the protection to which he is entitled and does not accept an unlawful term. Declaration accompanying such an action, expressing the demand for upholding the contract or invalidating the contract has no relevance in case of an objective interpretation of provisions of Directive 93/13. As a result of the demand for declaring a contract term as non-binding due to its abusiveness, the national court should assess the effect of such a statement by the consumer in the light of provisions of national law, which cannot be modified by the will of one of the parties to the proceedings.

67. In this context, it should also be pointed out that in the CJEU case law it is consistently accepted that the priority should be to restore the contractual balance between the parties, while maintaining the contract in force after eliminating the unfair provision from it. The CJEU has expressed itself in such a tone many times before, for instance in the Dunai case (C-118/17), pointing out that in so far as the Hungarian legislature remedied the problems connected with the practice of contracts including terms relating to exchange difference, by imposing their replacement and safeguarding the validity of contracts, such an approach corresponds to the objective pursued by the Union legislature in the context of Directive 93/13, and in particular Article 6(1) thereof, that is restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not cancelling all contracts containing unfair terms (see, to that effect, judgment of 15 March 2012, Pereničová and Perenič, C-453/10, EU:C:2012:144, paragraph 31). It is therefore desirable to find an appropriate remedy in opposition to automatically prejudging the collapse of the loan agreement.

68. The Court has repeatedly clarified that Article 6(1) of Directive 93/13 cannot be interpreted as meaning that, when assessing whether a contract can continue to exist after the removal of unfair terms, the court hearing the case can base its decision solely on a possible advantage for the consumer of the invalidation of the contract as a whole. Therefore, in the light of criteria laid down by national law, it is necessary, in a specific case, to examine the possibility of preserving the validity of a contract certain terms of which have been declared invalid and, in accordance with the objective approach adopted by the Court, it is not admissible for the situation of one of the parties to the contract to be regarded under national law as the decisive criterion determining the fate of the contract (see, similarly, judgments: of 15 March 2012, Pereničová and Perenič, C-453/10, EU:C:2012:144, paragraphs 32, 33; of 3 October 2019, Dziubak, C-260/18, EU:C:2019:819, paragraphs 40, 41; and of 29 April 2021, Bank BPH, C-19/20, EU:C:2021:341, paragraphs 56, 83, 90).

69. The will of the consumer cannot prevail over the assessment, which falls within the sovereign powers of the national court before which the dispute is pending, of whether the application of measures provided for by the applicable national provisions enables to restore the legal and factual situation of the consumer as it would have been in the absence of that unfair term.

70. The CJEU made it clear 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.

71. The CJEU ruling of 3 March 2020 Marc Gómez del Moral Guasch v. Bankia SA C-125/18 should also be recalled here, in which the Court, analysing, inter alia, the possibility of filling the gap created in the contract after the elimination of an unfair contractual term, stated that "*Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index applicable in the absence of an agreement to the contrary between the parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences".*

72. Therefore recourse to Article 358 § 2 of the Civil Code, i.e. the average exchange rate of a foreign currency announced by the National Bank of Poland as a foreign currency converter, should be regarded not only as reasonable in the context of positions cited above, but also as a measure implementing the objectives of Directive 93/13. Such a solution will undoubtedly demonstrate the court's use of appropriate and effective measures in the interests of consumers and competitors, as referred to in Article 7(1) of Directive 93/13, i.e. measures which do not give consumers excessive benefits and, at the same time, will serve as a deterrent to sellers or suppliers from using certain terms, *ergo* the objective of Directive 93/13 will be achieved,

which is, in fact, to restore the real balance between the rights and obligations of the parties without the necessity to invalid all contracts containing unfair terms.

73. In the context of the above, i.e. the validity of the concept of applying the average exchange rate of a foreign currency announced by the National Bank of Poland as a foreign currency converter in loan agreements referring to the exchange rate table, the size of the economic effect of such a solution for the entire banking sector should be mentioned.

74. As indicated in the Polish Financial Supervision Authority's position formulated in connection with the decision of the Supreme Court in the full composition of the Civil Chamber of 11 May 2021 (III CZP 11/21)[12], *each variant of legal solutions related to residential loans indexed/denominated to CHF currency will have, from the point of view of the banking sector, severe financial consequences counted in billions of zlotys. Each of these variants will therefore result in significant, negative consequences for the banking sector, while the extremely pessimistic variants, from the banks' point of view, may have dramatic consequences, which would take more than 25 years to make up from the banks' current profit.*

75. The Polish Financial Supervision Authority clearly indicates the gross injustice of the concept according to which principal installments would bear interest at the LIBOR rate if the loan agreement indexed to Swiss franc was declared invalid and, consequently - recognizing as a benefit due the repayment of instalments without taking into account the indexation to a foreign currency (which assumes, hypothetically, that a benefit based on a PLN loan was granted) entails a severe sanction for the lender. What is particularly important, however, is that it unjustifiably puts the borrower in a much more advantageous position in relation to a borrower who uses a loan granted in Polish zloty, bearing a higher WIBOR interest rate. The issue of settling an invalid loan agreement is closely related to the economic profit which the borrower achieves as a result of using bank's capital without interest.

76. Each variant of legal solutions related to residential loans indexed/denominated to CHF currency will have, from the point of view of the banking sector, severe financial consequences counted in billions of zlotys. Each of these variants will therefore result in significant, negative consequences for the banking sector, while the extremely pessimistic variants, from the banks' point of view, may have dramatic consequences, which would take more than 25 years to make up from the banks' current profit. These consequences will be felt not only by the banking sector, but primarily by consumers not involved in the ongoing dispute.

[12] Polish Financial Supervision Authority's position on the direction of resolving legal questions presented by the First President of the Polish Supreme Court concerning residential mortgage loans denominated or indexed to a foreign currency, formulated in connection with the decision of the Supreme Court in the full composition of the Civil Chamber of 11 May 2021.

77. Undoubtedly, the implementation of, from the banks' point of view, even the least severe variants will have a clear deterrent effect, because the consequences of each of them amount to billions of zlotys, which - in each case - constitute significant amounts in comparison with the annual results of the banking sector. According to data presented by the Polish Financial Supervision Authority, the collapse of contracts with no return of capital entails a cost of PLN 234 billion, which is 130% of banks' funds. Thus, maintaining the line of case law by which the courts will declare loan agreements as invalid will have tragic economic consequences for the banking sector. Therefore, following the principles of rationality and taking into account the need to ensure the stability of the financial sector, it is once again reasonable to refer to Article 358 § 2 of the Civil Code, i.e. the average exchange rate of a foreign currency announced by the National Bank of Poland, to "supplement" the legal relationship between the parties. According to the report prepared by the Polish Financial Supervision Authority, the variant consisting in maintaining the contract in force with conversion to PLN and application of the interest rate envisaged for PLN loans (WIBOR) will involve a cost of PLN 34.5 billion, which in relation to banks' own funds will represent 19%. The variant based on this solution also represents 4 times the banks' adjusted income in 2020[13], and, consequently, also following an economic analysis, it must be concluded that such a solution is a measure severe for the banking sector, but nevertheless has a deterrent effect on sellers or suppliers against the use of certain terms within the meaning of Directive 93/13.

78. It should also be underlined that the implementation of negative variants, let alone extreme ones, may eventually turn against broad social groups that are beneficiaries of the efficient, stable and undisturbed functioning of the banking sector in Poland. This observation clearly indicates the importance of possible legal decisions of the CJEU in this regard. The strong capital position of banks, which translates into the possibility of financing enterprises and participating in the growth that has been the feature of the Polish economy in recent years, constitutes a significant capital, built by the efforts of the banking sector and public institutions responsible for cooperation with and supervision of this sector, in particular the institutions comprising the network of financial security - the National Bank of Poland, the Ministry of Finance, the Bank Guarantee Fund and the Financial Supervision Authority. This capital is particularly important in the current economic situation, which has been significantly impacted by the COVID-19 pandemic. This situation creates for the economy, on the one hand, challenges for the successful overcoming of which the active participation of a strong, well-capitalized banking sector will

[13] Polish Financial Supervision Authority's position on the direction of resolving legal questions presented by the First President of the Polish Supreme Court concerning residential mortgage loans denominated or indexed to a foreign currency, formulated in connection with the decision of the Supreme Court in the full composition of the Civil Chamber of 11 May 2021.

be crucial, and on the other hand - also opportunities, the exploitation of which will depend on the ability of the banking sector to actively support the economy.

IV. ANSWER PROPOSAL

79. Recapitulating all of the abovementioned remarks, it is reasonable to answer the third question as follows:

In the light of Articles 6 and 7 of Directive 93/13/EEC, if the court comes to the conclusion that declaring the contract invalid would be particularly unfavourable to the consumer and, despite having been encouraged to do so, the parties fail to reach an agreement on the fulfilment of the contract, the court may fill the gap in the contract, created after the unfair terms have been 'removed' from it, with non-supplementary rules of national law, in particular by applying a reference to the average exchange rate published by the central bank (the National Bank of Poland), as that guarantees the correct implementation of the objectives of Directive 93/13/EEC, i.e. the restoration of the real balance between the rights and obligations of the parties by means of appropriate and proportional measures.