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# Abusive clauses and remuneration for non-contractual use of capital – comments against the background of the CJEU judgment of 15 June 2023, C-520/21

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**Abstract:** One of the most important issues that is related to foreign currency-linked loans between banks and consumers is the rules for the settlement of parties in relation to the invalidity of a contract containing prohibited contractual provisions (abusive clauses). This is a problem that affects many European countries, especially those facing a shortage of housing. The CJEU judgment of 15 June 2023, C-520/21, which prejudged the admissibility of claims by both parties to an invalid loan agreement (usually a CHF-linked loan) for contractual abuse, is very relevant here. However, the basic problem is the translation of the CJEU's position into domestic law, including Polish law, which doesn't provide for any specific legal regulations concerning the parties' settlements in connection with the invalidity of the agreement, and the existing regulations don't explicitly provide a basis for pursuing a claim for remuneration for the use of the capital paid under a credit agreement declared invalid due to the use of abusive clauses in it.

**Key words:** remuneration, use of capital, Directive 93/13, abusive clause, foreign currency-linked loan

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## 1. Introduction

It's undisputed that Directive 93/13 of the Council of the European Communities of 5 April 1993 on unfair terms in consumer contracts[2] has set new standards in the fight against contractual abuse. Although it applies directly only to consumer trade (i.e. contracts concluded by entrepreneurs with consumers), its provisions allow a general direction to be set for the protection of the weaker party of economic trade. It also makes it possible to identify a number of new issues, which have not been given due attention so far. One such issue is the rules of settlements between the parties in connection with the invalidity of a contract containing prohibited contractual provisions (so-called abusive clauses).

Many of the new issues were addressed in the judgment of the Court of Justice of the EU (hereinafter: CJEU) of 15 June 2023[3], which deals with the rules of settlement of the parties in the event of the invalidity of a credit agreement linked to a foreign currency[4], insofar as it contains prohibited contractual provisions. In doing so, the Court prejudged the applicability of Directive 93/13 in the event that the contract is void, which was also questionable. Of particular interest is the passage concerning the admissibility of a bank's claim for remuneration for the use of capital disbursed on the basis of a credit agreement containing prohibited contractual provisions and declared invalid for this reason, what will be analysed. It must be theorised here that such a possibility, which is very widely represented in court proceedings by banks, doesn't exist, as it would be contrary to the purpose of Directive 93/13. In other words, a bank cannot claim against a consumer for lending a certain sum of money on the basis of a contract that contained abusive clauses relating to the conversion of the domestic currency into a foreign currency (usually the Swiss franc) and was subject to exchange rate risk on the part of the consumer (the so-called valorisation clause and exchange rate risk clause). The situation of consumers, on the other hand, is much better, as it is not *a limine* excluded to claim against the bank for amounts paid by the borrower under such an agreement, although the recovery of remuneration for the use of capital depends on the legal regulations in this matter in individual EU Member States; as far as the Polish legal system is concerned, this is in principle impossible.

Three types of loans (credits) may be distinguished, in which foreign currency is present (in various roles): indexed, denominated and foreign exchange[5]. In an index-linked loan, the amount of credit is stated in the domestic currency and is disbursed in that currency, but is converted into a foreign currency according to a contractual clause also based on the purchase rate of that currency applicable at the date of disbursement of the loan, with repayment in domestic currency. In a denominated loan, the amount of the loan is denominated in foreign currency and is disbursed in domestic currency according to a contractual clause based on the buying rate of the foreign currency applicable at the date the loan is disbursed, and the loan is repaid in domestic currency. In these two loans, therefore, the foreign currency is merely a yardstick for converting the amounts expressed in domestic currency. In a foreign currency loan, on the other hand, the loan amount is expressed in foreign currency and repayment is also made in that currency.

Thus, it's only in the latter case that the borrower's claim against the lender is expressed in foreign currency, i.e. the borrower can request the lender to pay the loan amount in foreign currency. In the other two cases, the borrower's claim against the lender

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[2] OJ EU 1993 L 95, p. 29; hereinafter: Directive 93/13.

[3] C-520/21, A. Szcześniak v. Bank M., ECLI:EU:C:2023:478.

[4] In practice known as franking agreements, as the vast majority of such agreements concluded in Poland and other countries were linked precisely to the Swiss currency.

[5] See, e.g., the judgment of the Supreme Court of Poland of 7 November 2019, IV CSK 13/19; SPUREK, J., in: SZANCIŁO, T. (ed.), *Kredyty powiązane z walutą obcą. Aspekty materialnoprawne i procesowe. Komentarz praktyczny*, Ed. Wydawnictwo C.H. Beck, Warszawa 2022, pp. 1–3; KRAJEWSKI, D., *Charakter prawny typowej umowy o kredyt denominowany do waluty innej niż waluta polska (cz. I) – glosy – V CSK 445/14 i IV CSK 377/10*, „Monitor Prawniczy" 2021, No. 21, p. 116.

for performance (i.e. payment of the amount of the loan) relates solely to the domestic currency; these are the cases addressed in this study. They are permissible, as can be seen, for example, from Article 69(1) and (2)(4a) of the Act of 29 August 1997 – Banking Law[6]; are also not prohibited by EU law. In these loans, the foreign currency is merely an instrument for converting the amount to be paid to the borrower and the instalments to be paid by the borrower to the lender.

This study, although it refers to Polish law, has a far broader and largely universal value as it is based on EU regulations, so the arguments presented herein refer to the legal systems of various European countries in which foreign currency-linked loans (credits) were granted on a large scale. Differences may arise from the internal regulations of individual EU Member States.

## 2. The nature of abusive clauses

The crux of the issue boils down to whether contractual provisions containing conversion clauses and exchange rate risk clauses that are inextricably linked to foreign currency constitute so-called abusive clauses and, if so, what effect their insertion has in a foreign currency-linked loan agreement. The thesis must therefore be that a contract containing such provisions cannot have legal effect.

Illegal contractual provisions are regulated in Articles 3-4 of Directive 93/13 and Articles $385^1$-$385^3$ of the Civil Code. They aim to protect the consumer against unfavourable terms in a contract between him and a professional. As a result of the analysis of these provisions (both the Directive and the Civil Code), it's possible to distinguish four prerequisites, the cumulative fulfilment of which determines whether a given provision of a model contract may be considered abusive:

1) the provision hasn't been individually agreed with the consumer and therefore hasn't been subject to negotiation, whereby it is not the negotiation of the contract as a whole, but the specific provision to be assessed for abusiveness,

2) the consumer's rights and obligations shaped in this way are in conflict with good practice,

3) the rights and obligations thus formed grossly infringe the interests of the consumer,

4) the contractual provision doesn't relate to the unambiguously formulated main benefits of the parties, including the price or remuneration.

The assessment whether a contractual provision is prohibited (Article $385^1$ § 1 of the Civil Code) is made according to the state at the moment of concluding the agreement[7]. In order to assess whether a provision is abusive, it isn't important how it is applied by the trader. This means that even if no negative consequences for the consumer have been drawn from the contested contractual provision in practice, this does not change the abusive nature of the provision if the above-mentioned prerequisites are met. Indeed, the subject of assessment is the provision itself, i.e. the normative content expressed in a specific form (usually in words), i.e. the norm or its element determining the rights or obligations of the parties[8], and its point of reference – the way the provision affects the rights and obligations of the consumer. The manner in which a provision is applied is a separate issue, which isn't explicitly addressed in the first sentence of Article $385^1$ § 1 of the Civil Code[9], nor is it

[6] Consolidated text: Official Journal of the Republic of Poland 2022, item 2324, as amended; hereinafter: PrBank.

[7] The resolution of 7 judges of the Supreme Court of Poland of 20 June 2018, III CZP 29/17, „Orzecznictwo Sądu Najwyższego Izby Cywilnej" (OSNC) 2019, No. 1, item 2.

[8] See the resolution of 7 judges of the Supreme Court of Poland of 20 November 2015, III CZP 17/15, OSNC 2016, No. 4, item 40.

[9] See the resolution of the Supreme Court of Poland of 20 June 2018, III CZP 29/17, OSNC 2019, No. 1, item 2.

addressed in Directive 93/13. Therefore, the effect is *ex tunc*, which means that events subsequent to the date of conclusion of the contract containing the abusive clauses are irrelevant to the nature of such contractual provisions (with the exception of the consumer's will, which will be discussed below). For example, it is irrelevant that the legislator introduced (*ex post*) the possibility to repay the loan in the currency to which it was indexed (valorised). Such an act was enacted and entered into force in Poland in 2011 – this was the so-called 'anti-spread law', which amended Article 69(3) of PrBank, allowing the borrower to repay the principal and interest instalments and to prepay the full or partial amount of the loan directly in a foreign currency.

Briefly referring to the aforementioned prerequisites, it should be pointed out that provisions of a contract the content of which the consumer had no real impact on are not individually negotiated, which in particular refers to provisions of a contract taken from the model contract proposed to the consumer by the contractual partner, whereby the burden of proof that a provision has been individually negotiated rests on the one who invokes it, i.e. on the entity which uses the given model contract. As it is emphasised, if the consumer had an influence on the content of the contractual provision, he should not be covered by (consumer) protection, as in a liberal society he should be held responsible for his own decisions[10]. In practice, if the trader uses a template agreement (general terms and conditions, rules and regulations, etc.) prepared by the trader, it is not negotiable. The borrower has no influence on the content of such a template. It's impossible to equate individual negotiation of a contract with the fact that the borrower, for example, chose a particular bank, having previously reviewed the offers of other banks as well, and selected the most favourable – in his opinion – offer, or determined the amount of credit[11]. If the consumer had no real influence on the content of the relevant contractual provision, this condition is fulfilled. In practice, the arrangements relate only to the sum of the loan amount.

Good morals and gross violation of consumer interests are general clauses. The essence of good morals is broadly understood respect for another human being. In relations with consumers, it should be expressed in the provision of information on the rights arising from the contract, not using the privileged position of a professional when concluding and performing the contract and treating the consumer fairly as an equal contractual partner. Actions aimed at failing to inform, confusing, misleading the consumer, taking advantage of the consumer's ignorance or naivety may therefore be regarded as contrary to good morals. These actions are commonly referred to as dishonest, unreliable, deviating in a negative way from the accepted standards of conduct[12]. On the other hand, a gross infringement of the consumer's interests occurs when the balance of interests of the parties to a contract has been grossly upset by one of them taking advantage of its advantage in formulating a specific model. The main consideration is whether it worsens his legal position in relation to that which, in the absence of a contract to the contrary, would result from the provisions of law, including dispositive norms. At the same time, the infringement of the consumer's interests resulting from the prohibited provision must be gross and therefore particularly significant. The term "grossly" should be applied to a significant deviation of the adopted regulation from the principle of a fair balance of rights and obligations[13]. With regard to

[10] JANSEN, N., in: JANSEN, N., ZIMMERMANN, R. (ed.), *Commentaries on European Contract Laws*, Ed. Oxford Academic, Oxford 2018, p. 966.

[11] See the judgment of the Supreme Court of Poland of 7 November 2019, IV CSK 13/19.

[12] See e.g. the judgments of the Court of Appeal in Warsaw: of 23 August 2011, VI ACa 262/11; of 8 February 2011, VI ACa 913/10.

[13] See e.g. the judgment of the Supreme Court of Poland of 27 February 2019, II CSK 19/18, „Monitor Prawa Bankowego" 2020, No. 6, p. 38; the judgments of the Court of Appeal in Warsaw: of 14 September 2011, VI ACa 291/11; of 14 December 2010, VI ACa 487/10; ZAGROBELNY, K., in: GNIEWEK, E., MACHNIKOWSKI, P. (ed.), *Kodeks cywilny. Komentarz*, Ed. Wydawnictwo C.H. Beck, Warszawa 2023, art. $385^1$, side bumber (Nb) 9–10.

these two prerequisites, it's therefore a question of values such as honesty, sincerity, trust, loyalty, reliability and professionalism. Provisions that violate these principles result in a violation of the equality of the parties to the contractual relationship and an unequal distribution of power and obligations between the contractual partners. This is extremely important if we are talking about the trader-consumer relationship, as the former – as a professional in a certain field of economic activity – is in a privileged position, has an advantage over the other party to the contractual relationship (the consumer).

It's accepted that, in order to establish that the performance of one party to a contract in favour of the other party is in the nature of the main performance, it isn't sufficient to establish that this performance is due to the other party to the contract for the service it provides in the performance of the contract concluded. The concept of "main performance of the parties" must be understood narrowly, with reference to the concept of the material elements (*essentialia negotii*). These elements can therefore include remuneration and price, as well as the counterperformance of the entrepreneur – goods, service[14]. Such provisions (defining the main benefits of the parties) are usually individually agreed, in which case the control characteristic of imposed provisions is in principle excluded[15]. It's therefore essential to determine whether a given contractual provision relates to an element of the contract without which it would be impossible to speak of a given type of contract.

In the jurisprudence of the Polish Supreme Court, the prevailing view is that the clauses in a PLN indexed/denominated credit agreement to a foreign currency, and therefore also the clauses included in the model contracts, shaping the indexation (conversion) mechanism, define the borrower's main benefit[16]. The CJEU's case law also emphasises that contractual terms falling within the concept of "main subject matter of the contract" within the meaning of Article 4(2) of Directive 93/13 must be regarded as those which define the essential performance of the contract in question and which therefore characterise that contract[17]. Provisions (referred to as "exchange rate risk clauses") that involve the borrower-consumer being exposed to the risk of fluctuations in the exchange rate and the associated risk of an increase in the cost of the credit are also considered to be such provisions[18]. It should therefore be assumed that the valorisation clause concerns the main performance of both the lender and the borrower – as regards the former, the amount of credit to be provided to the borrower, and as regards the latter, the amount of credit instalments to be made up in total for the total amount of credit and interest. The exchange rate risk clause, on the other hand, concerns the borrower, as it determines the amount of the loan to be repaid by the borrower (this amount varies depending on the fluctuation of the exchange rate).

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[14] See e.g. judgments of the Court of Appeal in Warsaw: of 2 February 2011, VI ACa 910/10; of 29 December 2010, VI ACa 403/10.

[15] See e.g. ŁĘTOWSKA, E., *Prawo umów konsumenckich*, Ed. Wydawnictwo C.H. Beck, Warszawa 1999, s. 331; OLEJNICZAK, A., in: KIDYBA, A. (ed.), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna*, Ed. Wolters Kluwer Business, Warszawa 2014, art. $385^1$, Nb 6.

[16] See the judgments of the Supreme Court of Poland: of 4 April 2019, III CSK 159/17; of 9 May 2019, I CSK 242/18; of 11 December 2019, V CSK 382/18, „Orzecznictwo Sądu Najwyższego Izby Cywilnej – Zbiór Dodatkowy" (OSNC-ZD) 2021, No. 2, item 20; of 21 June 2021, I CSKP 55/21; of 3 February 2022, II CSKP 459/22; see also KUBIAK-CYRUL, A., in: ZAŁUCKI, M. (ed.), *Kodeks cywilny. Komentarz*, Ed. Wydawnictwo C.H. Beck, Warszawa 2024, p. 879.

[17] See the judgments of the CJEU: of 30 April 2014 r., C-26/13, Kásler and Káslerné Rábai, ECLI:EU:C:2014:282; of 26 February 2015, C-143/13, Matei; of 23 April 2015, C-96/14, Van Hove, ECLI:EU:C:2015:262; of 20 September 2017, C-186/16, Andriciuc and others, ECLI:EU:C:2017:703.

[18] See the judgments of the CJEU: of 20 September 2017, C-186/16; of 20 September 2018, C-51/17, OTP Bank and OTP Faktoring, ECLI:EU:C:2018:750; of 14 March 2019, C-118/17, Dunai, ECLI:EU:C:2019:207; of 3 October 2019, C-260/18, Dziubak, ECLI:EU:C:2019:819.

The provisions of the agreement (rules and regulations), specifying both the rules for converting the amount of the loan granted into PLN upon disbursement of the loan and the instalments to be repaid into foreign currency, allowing the bank to freely shape the foreign currency exchange rate, have already been examined by the Supreme Court of Poland on many occasions[19]. It was explained that such provisions are in the nature of prohibited contractual provisions. The inconsistency with good practice and the infringement of consumer interests in this case consists in making the amount of the bank's benefit and the amount of the consumer's benefit dependent on the bank's free decision. Such provisions, which empower the bank to unilaterally set exchange rates, are non-transparent and leave room for arbitrary action by the bank. They thus burden the borrower with unpredictable risks and violate the equality of the parties. Furthermore, the unclear and unverifiable determination of the exchange rate constitutes an additional, hidden remuneration for the bank, which may be of considerable importance for the counterparty and the amount of which is freely determined by the bank. The level of the loan to be disbursed and, in particular, the level of the instalment debt (and that already repaid) is known to the consumer *post factum*, after the corresponding amount has been debited from his account for servicing the mortgage loan taken out.

This is determined by the exchange rate risk clause just mentioned. Foreign exchange (currency) risk is the change (in this case in the amount of the benefit) due to fluctuations in the exchange rate of one currency against another. Fluctuations in the exchange rate affect settlements between entities that settle in a foreign currency and those that use a foreign currency to convert the benefit amount. Depending on the direction of the change in the exchange rate, this results in a worsening of the financial situation of one party and an improvement of the financial situation of the other party. The source of the exchange rate risk is primarily the impossibility of accurately predicting the direction of fluctuations in the currency exchange rate (appreciation or depreciation) and the magnitude of these fluctuations. It's therefore not a question of the mechanism itself for converting the domestic currency into another currency (mainly CHF) and vice versa, but of introducing a link between the amount of the loan granted and the repayments and the exchange rate of the domestic currency against the other currency. The borrower must be clearly informed that, by signing a loan agreement linked to a foreign currency, he bears a certain exchange rate risk which, from an economic point of view, may prove difficult for him to bear in the event of a fall in the value of the currency in which he is paid in relation to the foreign currency in which the loan was granted. To this end, the trader must outline the possible exchange rate fluctuations and risks involved in taking out a loan in foreign currency[20]. In fact, it's emphasised that the transmission of information (knowledge) of a specific content by a professional entity to its client becomes a legally relevant phase[21]. Article 4(2) of Directive 93/13 must therefore be interpreted as meaning that the requirement that the terms of the contract be expressed in plain and intelligible language obliges financial institutions to provide borrowers with sufficient information to enable them to make informed and prudent decisions. That requirement implies that the condition relating to exchange rate risk must be understood by the consumer both formally and grammatically, as well as with regard to its concrete scope, so that a reasonably well-informed and reasonably observant and prudent average consumer is able not only to be aware of the possibility of a fall in the value of the domestic currency in relation to the foreign currency in

[19] See e.g. judgments of the Supreme Court of Poland: of 22 January 2016, I CSK 1049/14, OSNC 2016, No. 11, item 134; of 4 April 2019, III CSK 159/17, „Orzecznictwo Sądów Polskich" 2019, No. 12, item 115; of 7 November 2019, IV CSK 13/19; of 2 June 2021, I CSKP 55/21; of 27 July 2021, V CSKP 49/21.

[20] The judgment of the CJEU of 20 September 2018, C-51/17; similarly, the judgment of the CJEU of 20 September 2017, C-186/16.

[21] See GNELA, B., *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym*, Ed. Wolters Kluwer Polska, Warszawa 2013, p. 228.

which the loan was denominated or indexed, but also to assess the – potentially significant – economic consequences of such a condition on his financial obligations[22].

It's important to note that, in practice, this risk was almost entirely passed on to the consumer by the banks, given the exchange rate at the time the loan was granted and the lack of any limitation in this respect, giving the bank the opportunity to gain unlimited benefits at the expense of the consumer. During the period of granting the so-called franking credits (especially the years 2006-2009), the CHF exchange rate (including to the Polish currency) was very low. From the bank's point of view, this was an extremely advantageous situation. Borrowers weren't really interested in how many Swiss francs they would receive, as they never intended to use this currency; what mattered to them was the amount they would receive in the domestic currency. The very low CHF exchange rate meant that the specific amount in domestic currency that the borrower was to receive gave a much higher amount in francs than if the exchange rate was at today's levels. It was clear that the CHF exchange rate would rise, but the scale of this rise was unknown; this meant an increase both in the nominal amount of the capital to be repaid by the borrower and in the amount of the loan instalment, which still depended on LIBOR. In the case of a loan granted at a low CHF exchange rate, the risk on the bank's side was reduced to a fall in the value of the Swiss franc to "0"[23], however, this was purely theoretical, as such a possibility did not exist (there was no possibility for the CHF exchange rate to fall to such a level). On the other hand, the exchange rate risk on the part of the client (borrower) was unlimited. Indeed, the foreign currency-linked loan agreements didn't contain any limitation on the subject, in particular the so-called "circuit breaker", i.e. a specific level of the domestic currency to the CHF at which the sum of the loan and loan instalments (after conversion into domestic currency) would stop rising. Characteristically, foreign currency-linked loans stopped being granted in Poland when the CHF exchange rate started to rise. Granting a loan at such a high foreign currency exchange rate (e.g. PLN 4.6/CHF) would definitely increase the bank's risk and significantly reduce the consumer's risk.

The CJEU case law also emphasises that there is a significant contractual imbalance to the detriment of the consumer if unlimited exchange rate risk is imposed on the consumer[24]. And it is the exchange rate risk clause, and not the indexation clause referring to the bank's exchange rate (set at will by the bank), that is the source of the problem in question. This is due to the introduction of unlimited exchange rate risk on the part of consumers into credit agreements, the issue of valorisation mainly concerns the so-called currency spread.

## 3. The effect of the indexation clause and the exchange rate risk clause

The elimination of abusive contractual provisions from the credit agreement between the parties therefore raises the necessity to assess whether the agreement in its remaining scope is maintainable. This is extremely important, as it determines whether it is reasonable to consider pursuing a claim relating to the use of someone else's money.

The provisions constituting indexation clauses as well as those related to the exchange rate risk are abusive, which means that they are from the outset, by operation of law, rendered ineffective in favour of the borrower, unless he subsequently gives his informed and free consent to these clauses and thereby restores their retroactive effectiveness[25]. As explained in the case law of the Supreme Court of Poland, if the

[22] The judgment of the CJEU of 20 September 2018, C-51/17.
[23] As the vast majority of franking credits were granted at a time when the CHF to PLN exchange rate was in the range of PLN 1.8-2.2/CHF, the theoretical bank risk was around PLN 2 per Swiss franc.
[24] See the judgment of the CJEU of 10 June 2021, C-776/19 – C-782/19, BNP Paribas Personal Finance and BNP Paribas Personal Finance i Procureur de la République, ECLI:EU:C:2021:470.
[25] See the resolution of 7 judges of the Supreme Court of Poland – legal principle of 7 May 2021, III CZP 6/21, OSNC 2021, No. 9, item 56.

elimination of an illicit contractual provision leads to such a deformation of the contractual regulation that the content of the rights and obligations of the parties can't be reconstructed on the basis of its remaining content, it can't be assumed that the parties remain bound by the remaining part of the contract. This corresponds to Article 6(1) of Directive 93/13, which stipulates that unfair terms in contracts concluded by sellers or suppliers with consumers shall not be binding on the consumer and that the contract shall continue to be binding on the parties for the rest of its content, if this is possible after the unfair terms have been excluded from it[26].

In the judgment of 29 April 2021[27] the CJEU held that Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as, on the one hand, not precluding a national court from merely removing an unfair term from a contract concluded between a trader and a consumer, where the deterrent objective of that directive is attained by the national statutory provisions governing its use, in so far as that term constitutes a distinct contractual obligation which is capable of being reviewed individually for unfairness. On the other hand, those provisions preclude the referring court from merely removing an unfair element of a term in a contract between a trader and a consumer where such removal would amount to altering the content of that term by changing its substance.

Although the view has been expressed in the case law of the Polish courts that the application of the indexation mechanism and the introduction of exchange rate risk means that the credit agreement should be maintained as a credit agreement in domestic currency bearing interest at the LIBOR rate (and thus characteristic of foreign currency credit), the position prevails by far that, once such clauses have been eliminated, it isn't possible to maintain the agreement as intended by the parties, which argues in favour of its complete invalidity[28]. Also, the elimination of abusive conversion clauses does not lead to the CHF-indexed loan being maintained as a loan in domestic currency (here: zloty) bearing interest at the LIBOR rate[29]; the same applies to a loan denominated in CHF[30]. The difference between these loans is fundamental, as in the case of a denominated loan, it is not possible to determine the amount of the bank's consideration at the conclusion of the contract, because unless a conversion clause applies (due to its abrogative nature), it is not possible to convert the amount determined in foreign currency into the amount in domestic currency at the time the contract is concluded. There is therefore no determination of the material elements (*essentialia negotii*) of the credit agreement, which means that the contract is not concluded at all. It's therefore not necessary to refer to the impossibility of converting the instalments to be paid by the borrower, although this problem is also relevant. However, in the case of an index-linked loan, as long as the amount of the bank's benefit (expressed in domestic currency) is known, the abusiveness of the conversion clauses in relation to instalments makes it impossible to determine the amount of the borrower's benefit (both as regards individual instalments and the full amount of the loan)[31]. However, as indicated above, the exchange rate risk clause (irrespective of the conversion clause) prejudices the nullity of such an agreement anyway.

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[26] See judgments of the Supreme Court of Poland: of 27 July 2021, V CSKP 49/21; of 2 June 2021, I CSKP 55/21; of 3 February 2022, II CSKP 459/22.

[27] C-19/20, Bank BPH, ECLI:EU:C:2021:341.

[28] See e.g. the judgments of the Supreme Court of Poland: of 11 December 2019, V CSK 382/18; of 25 October 2023, II CSKP 835/23; of 12 September 2024, II CSKP 189/24.

[29] The judgment of the Supreme Court of Poland of 10 May 2022, II CSKP 285/22.

[30] The judgment of the Supreme Court of Poland of 13 May 2022, II CSKP 293/22.

[31] However, in its judgment of 13 October 2022, OSNC 2023, No. 5, item 50, the Supreme Court of Poland pointed out that the elimination of the conversion clause from the loan agreement indexed to the foreign currency exchange rate makes it impossible to determine the extent of mutual benefits in accordance with the will of the parties, and above all the amount of the consumer's obligation towards the bank.

The annulment of a contract (here: a credit agreement) falls within the scope of the sanction that Directive 93/13 provides for in relation to the use of unfair contract terms by a trader. It should be emphasised that the protection guaranteed to consumers by the provisions of that Directive is aimed, inter alia, at achieving the preventive effect referred to in Article 7 thereof, i.e. discouraging traders from using unfair contractual terms in their contracts. In the judgment of 6 March 2019[32] The CJEU has ruled out that a national court may change the content of unfair terms in contracts. It's therefore not legitimate to replace the prohibited terms with other terms, consisting for example of a reference to the exchange rate applied by the National Bank of Poland. Such a solution would run counter to the preventive objectives of Directive 93/13[33].

The case-law of the CJEU also accepts that Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as precluding national case-law according to which a national court may declare unfair not the entirety of a term of a contract concluded between a consumer and a trader, but only the elements of that term which give it an unfair character, with the result that the term remains, after the removal of such elements, partially effective, where such removal would amount to a modification of the content of that term which affects its substance, which it's for the referring court to verify. Where it's possible to declare a term null and void, the national court may not replace the unfair terms (abusive clauses) by a national provision of a dispositive or general nature, the will expressed by the consumer being of central importance. In general, therefore, the national court should declare a contract void if the consumer has been informed of and consented to the consequences of such a determination, unless it would have a particularly adverse effect on him or her[34].

In other words, there is no yardstick that could replace an illicit contractual provision related to the conversion of amounts. What is important here, which has not been pointed out in the case law also of the CJEU, is that the replacement of the valorisation clause by another provision, e.g. referring to the average exchange rate of the central bank of the country concerned (or any other), would only eliminate the so-called currency spread. The problem of exchange rate risk would still remain, as it would not be eliminated or even reduced in such a situation.

**4. Restitutionary effect**

In view of the subject matter of the article, the restitutionary effect[35], which stems from Article 6(1) in conjunction with Article 7(1) of Directive 93/13, understood in view of its objectives, i.e. consumer protection, is of key importance. It's linked to the invalidity of the contract. The CJEU first presented the concept of such effect more extensively in its judgment of 21 December 2016[36]. In this case, the Spanish Supreme Court accepted that the finding of abusiveness of "floor clauses", providing for a minimum rate below which the variable interest rate couldn't fall, didn't affect situations finally resolved by judicial decisions having res judicata, nor did it affect payments that had been made before the date of that court's judgment, with the result that only amounts that had been unduly paid on the basis

[32] C-70/17 i C-179/17, Abanca Corporación Bancaria and Bankia, ECLI:EU:C:2019:250**.**

[33] Se e.g. judgments of the Supreme Court of Poland: of 17 March 2022, II CSKP 474/22; of 19 May 2022, II CSKP 797/22; see also extensively CHRÓŚCIK, K., in: T. Szanciło (ed.), *Kredyty powiązane z walutą obcą. Aspekty materialnoprawne i procesowe. Komentarz praktyczny*, Wydawnictwo C.H. Beck, Warszawa 2022, pp. 157 et seq.

[34] See. e.g. judgments of the CJEU: of 14 March 2019, C-118/17; of 5 June 2019, C-38/17, GT, ECLI:EU:C:2019:461; of 3 March 2020, C-125/18, Gómez del Moral Guasch, ECLI:EU:C:2020:138; of 8 September 2022, C-80/21 – C-82/21, Deutsche Bank and Bank Millennium, ECLI:EU:C:2022:646**.**

[35] On this effect, see for more information on WĘGRZYNOWSKI, Ł., *Skutek restytucyjny z dyrektywy 93/13 a zasady rozliczeń stron w związku z nieważnością umowy zawierającej niedozwolone postanowienia umowne*, „Przegląd Prawa Handlowego" 2022, No. 5, pp. 47 et seq.

[36] C-154/15 i C-307/15, Gutiérrez Naranjo, ECLI:EU:C:2016:980.

of those clauses after that date had to be reimbursed. In the judgment referred to the CJEU held, however, that such a solution was contrary to Directive 93/13, leading to the deprivation of any consumer who had entered into a mortgage credit contract containing such a clause before the date referred to in the judgment, of the right to receive full reimbursement of the amounts he had unduly paid to the banking institution on the basis of that clause. Such protection therefore proves to be incomplete and insufficient and does not constitute either an adequate or effective measure within the meaning of Article 7(1) of Directive 93/13. In addition, it isn't possible to mitigate the restitutionary effect on account of possible economic disadvantages.

In the judgment of 12 January 2023[37], which concerned an illicit provision explicitly stipulating the main performance payable to the trader, so that the application of the restitutionary effect could breach the principle of the provision of services for consideration (the trader would fulfil the performance but wouldn't be entitled to be remunerated for it), the CJEU held that Article 6(1) of Directive 93/13 doesn't prevent the implementation of the restitutionary effect or the invalidity of the contract, even if this would lead to the trader not receiving any remuneration for his services. Only exceptionally, if the invalidity of the contract would expose the consumer to particularly unfavourable consequences, may the national court replace the unlawful provision by a provision of national law which is dispositive or applicable in the event of an agreement between the parties to that contract, as mentioned above. Even then, however, the national court may not supplement the contract with its own estimates of the level of remuneration it considers reasonable for the services provided.

This position means that the restitutionary effect is an absolute obligation on the trader to return the benefit obtained from the consumer as a result of an illicit contractual provision, and therefore the possibility of claiming the benefit on the basis of such a provision is excluded. In general, the CJEU emphasises that an illicit provision must, as a rule, be deemed never to have existed, so that it has no effect vis-à-vis the consumer. Therefore, a judicial declaration that a provision is illegal should have the effect of restoring the legal and factual situation in which the consumer would have been in the absence of the provision[38]. In particular, it involves the corresponding restitutionary effect on amounts paid under the prohibited provision[39]. It isn't the trader's interest and its protection that matters, only the consumer's interest and its protection. Indeed, the protection stemming from Directive 93/13 is clearly directed at the weaker party to the contractual relationship, which means, inter alia, that the provisions of the directive are interpreted taking into account the interests of consumers and not of the trader. Since the stronger party to the contract takes advantage of its privileged position, it must bear the consequences of, inter alia, the use of prohibited contract terms.

This is supplemented by the reasoning in the judgment of 15 June 2023, C-520/21, which provided the basis for the present study, as it is still the most applicable to the issue at hand. The Tribunal held that, in the context of a mortgage credit agreement being declared void in its entirety on the ground that it cannot continue to operate after the unfair terms contained in it have been removed, Directive 93/13 doesn't preclude an interpretation of national law according to which a consumer is entitled to claim from a credit institution compensation going beyond reimbursement of the monthly instalments and costs paid for the performance of that agreement and beyond payment of statutory default interest from the date of the demand for payment, provided that the objectives of Directive 93/13 and the

[37] C-395/21, D.V., ECLI:EU:C:2023:14.

[38] See e.g. the judgments of the CJEU: of 21 December 2016, C-154/15 and C-307/15; of 14 March 2019, C-118/17; of 16 July 2020, C-224/19 and C-259/19, Caixabank, ECLI:EU:C:2020:578; of 29 April 2021, C-19/20.

[39] See the judgments of the CJEU: of 21 December 2016, C-154/15 and C-307/15; of 9 July 2020, C-698/18, Raiffeisen Bank, ECLI:EU:C:2020:537; of 16 July 2020, C-224/19 and C-259/19.

principle of proportionality are respected. The key point here is that it is for the referring court (and, more broadly, the national court) to examine in the light of all the circumstances of the case pending before it, whether the relevant national rules enable the consumer to be restored, in law and in fact, to the position he would have been in in the absence of that contract. This may help to discourage traders from including unfair terms in their contracts with consumers since the inclusion of such terms entailing the invalidity of the contract in its entirety could have financial consequences that go beyond the reimbursement of the sums paid by the consumer and beyond the payment, where applicable, of default interest. This isn't contrary to the principle of legal certainty, as it constitutes a concrete implementation of the prohibition of unfair terms in Directive 93/13.

The restitutionary effect of the invalidity of the contract is not very doubtful, as it would be impossible to assume that in this situation the parties are not entitled to claim for the benefits rendered to the other party to the invalid contract. Nevertheless, the conclusion that Directive 93/13 does not exclude the consumer's ability to claim further compensation is a novelty in the discussion of the parties' settlement under that Directive, going beyond the restitutionary effect, which relates only to the return of a performance rendered to the other party to the contractual relationship. In the light of this position, the consumer may not only claim restitution of what he has paid on the basis of an abusive clause, but may at the same time claim further amounts (another issue is which and on what legal basis). To date, it has rather appeared from the CJEU case law that the deterrent effect is to be ensured by the realisation of the restitutionary effect only, and the Court has not commented on further effects. In other words, the aim was to ensure that traders did not gain unjustified advantages at the expense of consumers as a result of the use of abusive clauses in contracts. This was to restore the state of affairs that the consumer would have been in had they not entered into a contract containing such provisions. On the assumption that the consumer can demand further sums, the deterrent effect of Directive 93/13 is detached from the merely restorative effect. In the CJEU's view, an additional, independent claim by the consumer against the trader can therefore be derived from the objectives of this directive.

This is a far-reaching statement that puts the consumer in a much better position than the trader. With regard to the trader's claims against the consumer arising from the invalidity of the mortgage credit contract, the CJEU considered in the judgment referred that, as with the consumer's ability to pursue his claims, the trader's claims could only be admissible if they didn't jeopardise the objectives of Directive 93/13. However, granting a credit institution (including in particular the bank) the right to require the consumer to pay compensation going beyond the return of the capital paid for the performance of that contract and beyond the payment, if applicable, of default interest could undermine the deterrent effect intended by that directive. The effectiveness of the protection afforded to consumers by Directive 93/13 would be jeopardised if they were exposed, in relying on their rights under that directive, to the risk of having to pay such compensation. Such an interpretation would risk creating situations in which it would be more advantageous for the consumer to continue to perform a contract containing an unfair term rather than to exercise the rights he derives from that directive. A party must not be allowed to derive an economic benefit from his unlawful conduct and be compensated for the inconvenience caused by it.

The Tribunal therefore referred to the trader's various claims against the consumer, limiting them (in the context of the possibility of effective recovery) only to a claim for the reimbursement of the performance rendered (here: the amount of the credit) plus interest for the delayed reimbursement of that amount (as set out in the demand for payment). This is a typical restitution claim. No other claims are available to the trader. Indeed, the CJEU emphasised that a party cannot be allowed to derive economic benefit from its unlawful conduct and be compensated for the inconvenience caused by it. Similarly, the argument concerning the stability of the financial markets is irrelevant when interpreting Directive

93/13, as it is for banking institutions to organise their activities in a manner consistent with that Directive.

Consequently, in the context of a mortgage credit agreement being declared void in its entirety on the ground that it cannot continue to apply once the unfair terms contained in it have been removed, the CJEU held that Directive 93/13 precludes an interpretation of national law according to which a credit institution is entitled to claim compensation from a consumer over and above the reimbursement of the capital paid for the performance of that agreement and over and above the payment of statutory default interest from the date of the demand for payment.

**5. Admissibility of the claim for damages**

In the light of the above considerations, the situation clarifies for a bank (and more broadly: a trader) whose claims are limited to a demand for the reimbursement of the capital and interest, the commencement date of which is determined by a demand for payment[40]. In other words, the bank is only entitled to a claim related to the restitutionary effect, plus interest for the consumer's delay in paying this amount. Any other claim by the trader would be contrary to the purpose and substance of Directive 93/13.

The situation of the consumer is much more interesting, with regard to whom the CJEU – as a party harmed by the contractual abuse – allowed for the possibility of claiming "further compensation", beyond the restitution of the services rendered. Consequently, the consumer may have claims beyond the scope of restitution. It is significant in this regard that the Court has not clarified what these claims would be (neither in terms of legal substance nor in terms of amount), leaving this issue to national legislation. Insofar as such claims cannot be derived from EU law, having regard to the purpose of Directive 93/13, it is permissible to establish in national law an effective measure allowing the consumer to assert a claim beyond the 'ordinary' restitution claim.

In particular, a claim for damages is possible by the consumer, both for the costs incurred in relation to the conclusion of the contract (*damnum emergens*) and for the loss of benefits (*lucrum cessans*) in relation to the loss of the opportunity to dispose of the capital paid in as loan instalments (even if only in relation to the receipt of capital interest). In doctrine, it's permissible for the exploited person to assert further claims of a compensatory nature, although this is sometimes combined with the expiry of two years from the conclusion of the contract, when the claims for exploitation expire (Article 388 § 2 of the Civil Code)[41], and thus a claim for a reduction in the benefit of the exploited party or an increase in the benefit due to him, or, in cases where both would be unduly difficult, a claim for rescission of the contract.

*Complementary damages* are currently referred to as a specific claim for compensation for the immoral use of one's advantage in the conclusion of a contract, compensation for the fact that, following the conclusion of the contract, the weaker party is worse off than he would have been if the contract hadn't been concluded[42]. The prerequisites for such liability must be met, namely: the event, the damage caused by the event and a normal (adequate) causal link between the event and the damage.

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[40] This position has been confirmed in the decisions of the CJEU: of 11 December 2023, C-756/22, Bank Millennium, ECLI:EU:C:2023:978; of 12 January 2024, C-488/23, mBank, ECLI:EU:C:2024:45, issued against the background of banks' claims for compensation consisting in the judicial indexation of the benefit of the capital paid out in the event of a significant change in the purchasing power of a given currency after the payment of this capital to the consumer.

[41] See e.g. LONGCHAMPS DE BERIER, R., *Uzasadnienie projektu kodeksu zobowiązań*, Ed. Komisja Kodyfikacyjna, Warszawa 1936, p. 49; REMBIELIŃSKI, A., in: Winiarz, J. (ed.), *Kodeks cywilny z komentarzem*, Vol. I, Ed. Wydawnictwo Prawnicze, Warszawa 1989, p. 352.

[42] GREBIENIOW, A., *Remedies for Inequality in Exchange. Comperative Perspectives for the Evolution of the Law in the 21st Century*, „European Review of Private Law" 2019, No. 1, pp. 23–24.

As the loan agreement in the situation at hand is invalid, claims can't be asserted under the *ex contractu* regime[43], The contract is void *ex tunc*, but only on the basis of a tort (in the *ex delicto* regime). Since the contract is invalid ex tunc, it's a fiction as if it hadn't been concluded at all, so that the parties were never bound by the bond. The use of abusive clauses constitutes an infringement of the law, and therefore unlawful behaviour on the part of the perpetrator (trader). Therefore, insofar as the previously described prerequisites for the abusiveness of a contractual provision exist, we are dealing with a tort. It therefore remains for the injured party (the consumer) to prove the damage and the normal causal link between the tort and the damage.

In practice, however, this type of claim is relatively rare, due to the difficulty of proving the amount of damage and one that would be in a normal causal relationship with the trader's unlawful act. It's far more common for the right holder to use the provisions on wrongful performance, which relate to the invalidity of the contract (Article 410 § 2 of the Civil Code[44]), and therefore limited to a claim for restitution. In such a case, the claimant must demonstrate the extent of the wrongful service and not the amount of the damage, which is usually much easier. It's possible to assert a claim on both of these grounds, i.e. as reimbursement of the wrongful service and as damages. This is to the advantage of the claimant, as if he/she invokes partially different factual and legal grounds, the court is obliged to refer to each of them, and thus assess the legitimacy of the claim based on all the grounds indicated. From the consumer's point of view, it is irrelevant whether the amount claimed is awarded by the court as damages or as reimbursement of wrongful service. Obviously, it is the most favourable to pursue two claims – restitution (including the return of wrongful service) and damages (over and above the claim for restitution).

## 6. Admissibility of claiming remuneration for the use of capital

Another option for the consumer that operates in the public sphere is to claim remuneration for the use of capital, i.e. amounts paid to the bank on the basis of an invalid credit agreement. Since the Polish legislator hasn't introduced a specific legal regulation concerning settlements from an invalid contract, the legal basis for such a claim must be sought. This is because Articles 224-225 of the Civil Code, which regulate, inter alia, remuneration for non-contractual use, aren't applicable, but of things and it is not possible to translate these provisions into the use of capital. This is because this is a special regulation provided for in the law of property related to the use of a thing, on the basis of which the owner is entitled to counterclaims related to outlays on the thing against its holder, so-called ancillary claims (including just compensation for non-contractual use), while the latter is entitled to counterclaims related to outlays on the thing against the owner. These provisions can't be applied (even *per analogiam*) to claims concerning the use of someone else's capital. The court may apply certain provisions *per analogiam* only if it becomes convinced that there is a legal lacuna in the legal system that should be filled precisely by analogy.

It seems that the starting point for any further claims by the consumer should be the provisions on unjust enrichment (Articles 405 et seq. of the Civil Code) – on the one hand, the consumer has been impoverished (he has lost the possibility to use the capital from instalments and other charges paid on the basis of an invalid credit agreement) at least by the interest that he would have obtained if he had deposited this money in a bank account; on the other hand, the bank is enriched because it obtained capital for which it didn't have to pay and and which he could turn (use). These provisions are applicable to undue

[43] The basic premise for *ex contract* liability is a valid contract that hasn't been performed or has been improperly performed.

[44] According to this provision, a benefit isn't due, inter alia, if the legal transaction obligating the performance was invalid and didn't become valid after the performance of the service.

consideration (Article 410 § 1 and 2 of the Civil Code) and form the basis of the parties' settlement in the event of the invalidity of the contract. This is a particular form of unjust enrichment, whereby 'benefit' against the background of Article 410 § 2 of the Civil Code should be understood in the same way as this concept is generally understood - as a conscious and intentional behaviour of the debtor aimed at releasing him from the debt in a manner consistent with the content of the obligation[45].

As is rightly pointed out, it would be systemically inconsistent to apply the sanction of absolute nullity and then take into account the benefit on the basis of other legal regulations[46]. However, the claim itself arises from the definition of undue benefit, which exhibits specific features in relation to unjust enrichment[47]. First of all, in the case of wrongful performance, there is no need to establish enrichment and impoverishment, as these prerequisites arise from the very concept of wrongful performance. Consequently, the fact that an undue payment has been made justifies a claim for compensation[48], and therefore each party is entitled to a separate claim for repayment of the performance made under the invalid contract. Moreover, the invalidity of the contract excludes the extinguishment of the obligation to repay despite the possible absence of enrichment (Article 409 of the Civil Code)[49].

It's important in this regard that Article 410 § 2 of the Civil Code contains a closed catalogue of four cases (conditions) giving rise to the obligation to return the undue benefit, which are mutually exclusive; thus, there is no possibility of their concurrence, and therefore each factual situation may correspond to only one of them[50]. Insofar as this provision omits the cause of invalidity of a legal act[51], which means that in such a situation, it isn't possible to apply an expansive interpretation and create new claims that are not provided for by the legislation. Indeed, the national legislator introduced specific claims, on the basis of a specific provision, so it would be unreasonable to claim that further claims, which the legislator didn't explicitly provide for, can be derived from this.

It isn't possible to refer directly to Article 405 of the Civil Code, since the basis here is Article 410 of the Civil Code, which defines undue benefit and refers to the provisions on unjust enrichment. The completeness and distinctiveness of the regime of undue benefits is strengthened by the exclusions listed in Article 411 of the Civil Code[52]. In particular, if the obligation to reimburse the wrongful service has been extinguished on the basis of Article 411 point 1 of the Civil Code, it'll still meet the requirements of Article 405 of the Civil Code,

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[45] See JANTOWSKI, L., in: BALWICKA-SZCZYRBA, M., SYLWESTRZAK A. (ed.), *Kodeks cywilny. Komentarz*, Ed. Wolters Kluwer Polska, Warszawa 2024, p. 793.

[46] See WĘGRZYNOWSKI, Ł., *Zasady rozliczeń stron w razie nieważności umowy zawierającej niedozwolone postanowienia umowne. Glosa do wyroku TSUE z 16 marca 2023 r., C-6/22*, „Europejski Przegląd Prawa i Stosunków Międzynarodowych" 2023, No. 4, pp. 249-250.

[47] See DUBIS, W., *Bezpodstawne wzbogacenie i nienależne świadczenie jako źródła stosunków zobowiązaniowych*, in: GNIEWEK, E. (ed.), *O źródłach i elementach stosunków cywilnoprawnych. Księga pamiątkowa ku czci prof. Alfreda Kleina*, Ed. Kantor Wydawniczy „Zakamycze" Kraków 2000, p. 91.

[48] See e.g. the judgments of the Supreme Court of Poland: of 24 November 2011, I CSK 66/11; of 28 August 2013, V CSK 362/12; of 15 May 2014, II CSK 517/13; of 11 May 2017, II CSK 541/16.

[49] The judgment of the Supreme Court of Poland of 7 February 1974, I CR 497/73.

[50] See e.g. the judgments of the Supreme Court of Poland: of 25 November 2015, IV CSK 29/15; of 16 June 2016, V CSK 581/15; of 27 July 2018, V CSK 401/17.

[51] See FUCHS, D., MALIK, A., in: FRAS, M., HABDAS, M. (ed.), *Kodeks cywilny. Komentarz. Tom III, Zobowiązania. Część ogólna (art. 353-534)*, Ed. Wolters Kluwer Polska, Warszawa 2018, p. 375.

[52] Pursuant to this provision, it is not possible to demand the return of a benefit: (1) if the person performing the service knew that he wasn't obliged to perform the service, unless the performance was subject to reimbursement or in order to avoid coercion or in the performance of an invalid legal transaction; (2) if the performance of the service satisfies the principles of social coexistence; (3) if the performance was performed to satisfy a time-barred claim; (4) if the performance was performed before the claim became due and payable.

but this provision can't then be applied. In such a situation, Article 405 of the Civil Code can't be applied to the remuneration for non-contractual use, as Article 411 of the Civil Code would be pointless. What is more, if such a possibility were allowed, the consumer could demand payment for *de facto* the same thing – interest for delayed return of the wrongful service and remuneration for the use of the capital, i.e. the amount of the wrongful service.

The inapplicability of the provisions on undue benefit and unjust enrichment to remuneration for the use of capital, or any other provisions, means that the interest of the right holder (i.e. the consumer) is not fully protected in this situation. It should be noted, as was mentioned, that the issue of the consumer's additional claims was left by the CJEU to the national court, which should assess it on the basis of national legislation. These regulations may therefore be different in each Member State, if they exist at all, of course. In Polish law there are no specific regulations similar to Articles 224-225 of the Civil Code, which would govern additional claims by a consumer to whom a trader has applied an unauthorised contract term, thereby adversely affecting the consumer. In the case of a monetary claim (due to the invalidity of a contract), the legislator seems to have considered the three following claims to be sufficient: for undue performance, for damages and for interest, and thus classic claims relating to the invalidity of a legal act.

Such additional claims cannot be derived from the provisions of Directive 93/13, as it does not regulate at all the settlements of the parties in connection with the invalidity of the contract. The same applies to other acts of EU law. There is no doubt, however, that national rules may also be applied in this regard, in so far as they pursue the aims and objectives of that directive. Accordingly, the national court should apply the national regulations, but taking into account the interpretation of the directive developed by the CJEU.

## 7. Summary

The CJEU judgment of 15 June 2023, C-520/21, is very important for the application of the provisions of Directive 93/13, as it prejudged the admissibility of claims by both parties to an invalid credit agreement (in practice, this is a credit linked to a foreign currency, usually the CHF) in relation to contractual abuse. The Tribunal granted very narrow powers to the bank and very broad powers to the consumer, which creates a new field of discussion against the background of individual national orders in the context of the application of Directive 93/13. The main problem, however, is the translation of the CJEU's position into national law, as the Tribunal has given no guidance on this matter. It must therefore be considered that the national legislator has considerable leeway. For example, Polish law does not provide for any specific legal regulations concerning the parties' settlements in connection with the invalidity of a contract, and the existing regulations do not explicitly provide a basis for claiming remuneration for the use of the capital paid by the consumer to the bank on the basis of a credit agreement declared invalid due to its use of abusive clauses (valorisation clause and exchange rate risk clause).

However, in view of the pro-EU interpretation of the provisions, the question arises as to whether such regulations contained in national law are compatible with EU law. It's apparent from that judgment that the answer is in the affirmative, that is to say, that national law doesn't need to lay down specific rules in that regard. It should be noted that the CJEU accepted in the judgment in question that a pro-EU interpretation of national law is possible (and even advisable), according to which the consumer is entitled to demand from the credit institution (and more specifically from the bank) compensation beyond the reimbursement of the 'classic' restitution claims, i.e. the monthly instalments and costs paid for the execution of this contract, as well as the statutory default interest from the date of the demand for payment. And although the national legislator has considerable discretion in this matter, the legal regulations must take into account the objectives of Directive 93/13 and the principle of proportionality. Significantly, it does not follow from any point in the

judgment that only the permissibility of claiming such compensation prejudices the objectives of that directive. Polish law provides for several claims that can be pursued by an injured consumer, but compensation for the use of capital is not one of them. Such *a* solution does not contradict *a limine* with the CJEU judgment of 15 June 2023.

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