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Substantive consequences of an unfair term concerning double indexation clause in mortgage loan agreement under Directive 93/13/EEC

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Abstract:

Aim: This paper consists of a legal analysis pertaining to a situation in which national adjudicating body declares the nullity of the double indexation clause applied in mortgage loan agreements. The research aim is to identify substantive consequences thus arising while drawing on the European Union law implemented into the Polish legal system. In view of the discrepancies and divergences with regard to the interpretation of Directive 93/13/EEC offered by national courts, and in particular by Polish common courts, those aspects need an analysis of the European Court of Justice case-law.

Design / Research methods: The paper was written using the dogmatic method of law analysis, which allows for a comprehensive study of common courts' practice and its compliance with European Union law.

Conclusions / findings: In conclusion, it appears that in the case of declaration of nullity of the clause laid down in the mortgage loan agreement, such clause shall be recognised as void upon the beginning of its application, without the possibility to restore it by an adjudicating body with a different provision (amending its content).

Originality / value of the article: Although the subject of this paper has both practical and theoretical importance, it has not been exhaustively studied and described by the legal doctrine. It could offer a suitable instrument for law practitioners as well as encourage further academic explorations.

Implications of the research: The paper may exert a significant impact on common courts' judgements and their compliance with European Union law.

Keywords: unfair terms, mortgage loan contract, Swiss Franc, declaration of nullity, temporal effect of the declaration of nullity of an unfair term, European Court of Justice, Directive 93/13/EEC.

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1. Introduction

There are currently 868,32 thousand people in Poland who have a mortgage loan linked to the Swiss franc exchange rate, with a total amount of these loans to be paid off being at PLN 141,60 billion [BIK, 2017]. In light of a substantial increase in this currency exchange rate in relation to the Polish zloty ultimately leading to an increase in the value of the capital outstanding to the level comparable to that on the day of loan disbursement, a legal discourse was launched about possible instruments which would allow for creditors' debt to be reduced. Eventually, in spite of failing to implement a systemic solution, the content of mortgage agreements linked to foreign currency exchange rates was analysed in detail. What the analysis found was, inter alia, double indexation mechanisms of prohibited nature which, irrespective of foreign exchange risk relating to a possible increase in the foreign currency price, affected the creditors' situation in a manner that was contrary to good practices, exposing from the very start creditors to additional costs of the loan.

In view of the legal flaws found in the indexation clauses concluded under mortgage agreements, the instrument allowing for reducing the debt obligation is an action for their annulment and the possibility of applying for reimbursement of loan instalments already paid in excess, with the value of the loan being calculated using the buying rate on the first day of loan disbursement, thereby without taking into account the rise in the Swiss franc exchange rate. Conditional on the extent of the consequences arising from unfair contractual clauses and their content in the context of the essential elements of a mortgage agreement, certain portion of the agreements, according to some representatives of the doctrine, should be regarded as absolutely void (Czabański, 2017). Both views find their justification in the present wording of Articles 385^1 and 58 of the Civil Code (CC). In terms of declaring the double indexation clause itself void, the effect of finding it unfair is that it is not binding ex lege and ex tunc on the consumer. With respect to the other provisions, the parties are bound by the remainder of the agreement.[1] This suggests that if there is no double indexation clause, the agreement has to be interpreted as an agreement for a loan that is not indexed by a foreign currency. Moreover, it should be noted that currently there are no decisions of statutory ranking which would allow for implementing substitute clauses in lieu of the illegal ones.

[1]In fine Article 385^1 § 2 of the Civil Code.

The above notwithstanding, one discerns that there is a lack of uniform interpretation as regards the application of the legislation referring to the substantive consequences arising from finding the double indexation clause invalid. Some Polish common courts have come to the conclusion that in order to maintain further indexation of the loan, despite the indexation clause of prohibited nature being included in the mortgage agreement, it is possible to substitute it with a new provision, not provided for earlier in the agreement, which would involve having the loan indexed by the average exchange rate of the National Bank of Poland, which, however, merely allows for recovering the difference for the spread charged. This measure, according to some courts, may be applied with *ex tunc*, as well as future effect. [I C 1713/15]

The discrepancy in the interpretation of the substantive effects arising from illegal contractual terms is not *novum* for the European Union law, already being the subject matter of an earlier discourse which unfolded in other Member States, including for instance Spain. Since the Member States' courts are bound by how the European Union law is interpreted by CJEU and the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, it is paramount to analyse the conclusions provided, inter alia, in the judgment of the CJEU of 21 December 2016 passed in a joined case referring to mortgage loans linked to the Swiss franc currency.

2. Legal nature of double indexation clause

In the mortgage loans provided by the banks, the amount of the creditor's debt depended on the foreign currency exchange rate. In its very idea, the indexation of a contractual service by having adopted a specific criterion was by no means new. It is a common practice in global trade to make the amount of service dependent on a variety of factors, such as, for instance, the price per quintal of rye or even ounce of gold (Czabański 2016:2). However, what raises reasonable doubts is the application of two different indexation criteria for the service. With respect to loan disbursement, the bank's obligation was calculated by having it converted at the buying rate, while the creditor's debt at the selling rate of the foreign currency. This mechanism led to the bank's increasing the value of the capital to be repaid, irrespective of a possible rise of this currency exchange rate. Moreover, the selling rate applied by the bank tended to diverge from the average market rate at which the currency was sold.

An example of the double indexation clause may look as follows: "The loan amount denominated in the currency of indexation at the end of 31 December 2017, at the buying rate of the currency given in the bank's exchange rate table, is CHF 355,000.00. The principle-interest and interest instalments are paid in the Polish zloty after its prior conversion at the selling CHF rate taken from the bank's exchange rate table valid on the payment day at 2.50 p.m.".

The construction of the above mechanism, formulated by the banks in a likewise manner, was at first the subject matter of proceedings before the Court for Competition and Consumer Protection of Warsaw (SOKiK). In its judgments, the court recognized the nullity of the double indexation clauses, banning the banks from their future application. [XVII AmC 5344/11; XVII AmC 1351/09; XVII AmC 426/09] A few reasons were indicated for declaring the clauses void. Some of them argued that the provisions formulated usually failed to define precisely the way of determining the currency exchange rate indicated in the standard contract, i.e. they were characterized by vagueness allowing the bank to set those rates freely. Consumers had no influence on the amount of the rates applied, unlike the bank which made the loan available to them. This situation meant that it was possible for only one party to the agreement to determine freely the amount of the service to be provided. In addition, it was shown that the spread applied tended to differ substantially from the average NBP exchange rate, thus intensifying the bank's profit. In these situations, assuming that the said provisions were not individually agreed on before the agreement conclusion, imply that the provisions laid down in the agreement referring to double indexation were in their nature illegal, i.e. they violated good practice and amounted to a gross violation of creditors' interests.[2] Good practice is to be understood as "the rules of conduct in accordance with ethics and socially accepted principles of morality." [II CKN 1097/00; I CKN 473/01] They are "equivalent to the principles of social co-existence, encompassing the rules binding not only in common trade but also in relationships in which professionals take part." [II CKN 1097/00; I CKN 473/01] Moreover, activities which are contrary to good practice are considered to be those within which "such contractual clauses are drawn by the partner of the consumer which disturb the contractual balance of the parties of this relationship." [I CK 832/04] What appears essential is to determine whether "the clauses included in the agreement exceed the limits delineated by the legislator as regards the contractual reliability on the part of the author of the standard agreement in terms of how the rights and obligations of the parties of the consumer

[2]i.e met the conditions of abusiveness laid down in Article 385^1 § 1 of the Civil Code.

relationship of obligations are being structured." [I CK 832/04] Once those judgments were passed, some creditors decided to institute individual court proceedings against the banks with a view to avoiding the negative effects arising from loan indexation.

3. The reduction upholding indexation validity

As regards the cases at issue, no uniform interpretation has been developed so far pertaining to the application of the law governing the effects brought about by unfair contractual provisions.[3] Some courts dismiss creditors' civil actions, despite recognizing the problem of a violation of consumer's interests by the double indexation clause included in the agreement, it being the subject matter of the dispute. As an example of such decisions is the judgment of Warsaw Regional Court (SO) of 22 June 2017 [XXVII Ca 3477/16] in which the Court applied the concept of the so called reduction upholding validity of the indexation clause (Czabański, 2017b).

What the Regional Court did in the first place during the proceeding was to assess the legal character of the double indexation clause. Firstly, the court indicated that the agreement was in fact a standard contract, while its provisions on the loan indexation had not been negotiated by the parties. Next, following the Court of First Instance, which declared the nullity of the clauses, awarding the creditors the overpayments demanded by them, the Regional Court affirmed that the indicated provisions did not lay down the principal service of the parties, and, most crucially, that the double indexation clause structured the rights and obligations of the plaintiff in a manner that was against good practice, thus violating the consumer's interests. (Czabański, 2017c) In this respect, the Regional Court held that these provisions were of the kind which made the form of rights and obligations dependent on the will of just one party and simultaneously allowed this party to develop them discretionarily, implementing neither frameworks nor limits, while making no references to any objective factors (Czabański, 2017c). Thus, as regards the decision on whether or not the double indexation clause implemented in the agreement was unfair, the Court came to the same conclusion as the Court of First Instance, namely that the clause was of an illegal nature. However, the Regional Court differed in its assessment of the substantive effects of these unfair terms as regards the continuation of the agreement.

[3] precisely in the area of the interpretation of Article 385^1 and 58 of the Civil Code.

In its assessment of legal consequences for the wording of the agreement, the Regional Court concluded that what should be considered unfair was the loan indexation method regarding the application of the exchange rates set by the bank, including thus resulting spread. However, as for the rest, the indexation itself of the loan to foreign currency should be retained retroactively and in the future on the grounds that the parties' intention to have the loan indexed was present at the very beginning of the agreement coming into force. In view that one of the clauses which was outside the scope of the clause directly indicating that the loan was to be converted according to the buying rate and repaid at the bank's selling rate, indicating in a general way that the loan in the agreement was Swiss-franc indexed, the Regional Court stated that it was sufficient for the loan indexation to maintain its validity, despite the fact that the clause failed to indicate which exchange rate had been meant. In other words, it was recognized that the loan indexation itself, without specifying precisely the exchange rate that would be binding while determining the value of payments, was fully acceptable (Łętowska, 2002: 343). The mechanism which the court employed is in the doctrine referred to as a measure of reduction upholding validity.

Stating its further reasons, the court indicated that the provisions implemented in 2011 (over five years since the conclusion of the disputed agreement) and contained in point 4 Article 69 of the Banking Law essentially affirmed that it was permissible to provide foreign currency-indexed loans, which gave support to the interpretation adopted by the Regional Court. Moreover, the court made a reference to the possibility of using standards of non-statutory rank in conjunction with Article 354 of the Civil Code (proper performance of obligation based, inter alia, on the principles governing social coexistence and established customs). It was emphasized at the end that referring to the customary while considering the issue of indexation clauses was not new given that this construction dates back to the time before the Second World War, as can be seen even based on Article 41 of the Act of 28 April 1936 – on the Law on Bills. [XXVII Ca 3477/16]

Finally, in dismissing the creditor's claim, the court stated that for the purpose of using the illegal nature of the indexation clause constructed in the agreement, the plaintiff should alternatively demand from the bank that it repay the amounts collected for the spread itself. It was, therefore, the court's view that the possible consequence of the illegal nature of the indexation clauses contained in the agreement was the ex tunc application of the average NBP rate for converting the instalments paid into Swiss francs and subsequently calculating further instalments according to this exchange rate. The indexation itself should, however, continue to be binding.

Apart from the above judgment, there were other judgments passed subsequently by common courts in which the principle of reduction upholding validity was maintained or which failed to follow the rules laid down in Article 385^1 of the Civil Code. To illustrate the point, one may cite the judgment of the Court of Appeal of Wrocław [I ACa 1439/17] upholding the judgment of the Regional Court of Wrocław of 24 May 2017 [I C 905/16]. As decided in the case pertaining to a loan indexed to the Swiss franc exchange rate, linking the loan payment to a foreign exchange rate set in advance by the bank is permitted with all the essential elements being covered under it. This is so because the borrower knows what amount he or she obtained and agrees to the specific conditions under which the loan is to be repaid following its denomination. The method used for this denomination has been sufficiently outlined allowing for the bank's activities to be supervised, provided one becomes acquainted with the relevant tables.

Similar conclusions were drawn by the Regional Court of Warsaw in judgment of 17 September 2018. [I C 1215/17] Dismissing the borrowers' claims, the court found that in this type of loan agreements which were denominated in Swiss francs there were no grounds for declaring the agreements to be contrary to the principles of social coexistence. In light of the fact that the plaintiffs filled out the loan application, they were briefed about the risks involved in the exchange rate and variation of interest rate (which they confirmed by declaring that in writing), one cannot possibly assume that violation of the principles of social coexistence indeed occurred. With respect to the indexation clauses, although they were declared unfair, it was deemed possible to continue the performance of the agreement provisions based on the average NBP exchange rate of which *nota bene* no word had been mentioned in the agreement.

4. The Council Directive on unfair terms in consumer contracts and the reduction upholding indexation validity

Apart from the regulation of the forms of illegal contractual provisions and the available instruments designed for consumer protection contained in the Civil Code and other acts of law, it is worth looking into the EU legal system in the context of which the national legislation should seek harmonization. After all, the discrepancies in the interpretation of existing provisions may suggest that no effective transposition was taking place regarding the provisions of Council Directive 93/13/EEC (Directive) on unfair terms in consumer contracts.

The issue of validity of illegal contractual terms is regulated in Article 6 (1) of the Directive.

Within the meaning of this article, "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms." This article (together with Article 7 (1) of the Directive providing for that it was necessary for Member States to ensure adequate and effective means to prevent the buyer's or seller's continued use of unfair terms in contracts) was analysed by the CJEU, with a mortgage loan proceeding, encompassing two joined cases, providing the fabric of the analysis and presented in judgment of 21 December 2016.

In the aforementioned cases, the CJEU was asked for a preliminary ruling seeking to, inter alia, establish whether the effect of a provision being void should be calculated as of the day on which a particular provision was found to be of an illegal nature, and whether the effects produced while the provision was in force should be deemed void at that time until the time of it being declared void. Providing its preliminary ruling, the Court of Justice proceeded to the interpretation of the Directive provisions at issue and held as follows. In order to ensure effective and adequate means of consumer protection while concluding contracts containing clauses of an illegal nature, the CJEU asserted that the responsibility of the national court lied solely in excluding the use of an unfair contractual term so as to render it impossible for the term to have a binding effect on the consumer. CJEU came to the same conclusion in the proceedings against Banco Espanol de Credito [C-618/10] At the same time, the European Court of Justice made it very clear that the national court did not have power to modify the content of this term. The Court's further assessment was that giving a full effect to the provisions protecting consumers' interests provided for in the Directive required that the national court observe all the consequences brought about by having declared the contractual provision concerned to be void, without having to shift on the creditor the burden of taking action with a view to producing the effects demanded by the creditor. Secondly and most importantly, the CJEU concluded [C-618/10, (60)] that "the national court may not revise the content of unfair terms lest it contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms." The similar conclusion appeared in (31) of CJEU judgment of 21 January 2015 in the proceedings against spanish banks Unicaja Banko and Caixabank. [C-482/13; C-484/13; C-485/13; C-487/13] Drawing on these consideration, the European Court of Justice affirmed that "Article 6(1) of

Directive 93/13 must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed. […] It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts […]. The absence of such restitutory effect would be liable to call into question the dissuasive effect that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) of that directive, is designed to attach to a finding of unfairness in respect of terms in contracts concluded between consumers and sellers or suppliers." [C-618/10, (60-63)]

In transposing the findings made by the CJEU onto the ground of the already cited decision made by the Regional Court which applied the interpretation involving the reduction upholding the indexation validity, one has to consider this ruling to be contrary to the interpretation of the Directive provisions. This is on account of the aforementioned judgment of the European Court of Justice with regard to the national court's jurisdiction being "exclusively and only" to exclude the unfair contractual term. The CJEU clearly stressed that the national court had no authority to interfere with the content of the term itself. And yet this is precisely what happened in the case of the judgment passed by the Regional Court, which on the one hand found failure in the measure of value applied to the Swiss franc exchange rate set by the bank, while, on the other hand, maintained that this gap should be filled by a new indexation criterion, it being the average NBP exchange rate. Moreover, nowhere in the agreement a reference was made to this exchange rate nor was the so called severability clause constructed which would require that this indexation criterion be implemented in case the original relevant provision were to be found void.

Further to that, what should also be considered wrongful is shifting the burden of proof as to which indexation criterion is appropriate onto the creditor. Having recognized an unfair nature of a double indexation clause, simultaneously finding that the amounts demanded by the creditor to be repaid as the result of his overpayments were only partially justified, (which was submitted by the bank as a precaution), then it is the bank which should bear the burden of proof, as being the one to produce legal effects in this respect, as to which indexation criterion is legitimate. In line with the judgment of the European Court of Justice, the consequence arising from applying unfair

contractual provisions is the obligation of repaying the amounts due, which should be considered by the national court *ex officio*. In summing up, the provisions of the Directive dismiss the possibility of using the reduction upholding loan indexation, as they order the entire illegal mechanism to be excluded from the agreement, while taking into account *ex tunc* and future effects as regards the continuation of the agreement in a modified form.

In addition, it should be noted that in the doctrine the principle of contractual loyalty is also expressly stressed (Kohutek 2000: 34), which assumes that we face infringement of the principles of social coexistence if an entrepreneur influences, by a contractual provision, consumers' rights and obligations, failing to take into account their rightful interests. One can discern that the provisions implemented into the Polish legal order concerning unfair contractual terms constitute an element of a broader system designed to protect consumers from being abused by stronger entrepreneurs as a result of the possibility of developing unilaterally the content that is binding on the parties of contractual arrangements (Gudowski 2017: 258).

4.1 Partial harmonization of the provisions of the Council Directive under the national legal system

It is worth noting that the interpretation of the national court applying the reduction upholding indexation validity used in the aforementioned decision is not the only interpretation adopted by the Polish common courts. Although some of them adopt this concept, there are other which settle differently the dispute arising from finding the terms of the double indexation clause unfair. Given the acceptance of the second concept which corresponds to the judgment of the European Court of Justice cited earlier, it will be of interest to shed some light on the interpretation of the Council Directive as applied by other courts.

In this respect, of particular interest is the judgment passed by the District Court of Warsaw (SR) [VI C 1713/15] which examined exactly the same standard agreement used by the same bank to which the previously discussed judgment upholding the reduction principle, pertained. In this judgment the District Court held that the clause on double indexation of the loan was illegal and was not binding on the plaintiff within this scope. The court based its decision first on the same findings which led the Regional Court in the previous judgment to declaring the clause illegal, i.e. the provision was characterized by making references to nonobjective factors allowing the bank to be the only one to determine within its own discretion the value measure. The spread applied by

the bank was identified by the District Court as the bank's commission which the plaintiff could not estimate, while its amount depended solely on the bank." In other words, the character itself of the loan indexation principle applied was once again recognized as being contrary to good practice and grossly harming the creditors' interests.

However, the above decision produced other substantive effects with regard to the shape of the agreement in force. Unlike the judgment passed by the Regional Court, the District Court held that "the clauses indicated should be removed from the agreement, while there are no grounds for implementing another value measure in their place. The agreement continues to be effective, with no modification needed, apart from repealing the unfair clauses. The Court may not modify the agreement by amending a term declared illegal. This is the case even when the economic effect of the judgment is for the plaintiff to receive a loan on terms more favourable than those existing on the market. Having excluded from the agreement the clause does not change the nature of the obligation, as it merely results in having indexation discontinued. In view of the creditor being no longer bound by an unfair clause, he – in accordance with the principle of nominalism– is obligated to repay the loan in its nominal amount and according to the schedule and interest rates laid down in the agreement."

At this point, one should note that the findings made by the District Court fully conform to the requirements laid down in the Council Directive, in particular as regards Article 6 (1) sentences 1 and 2, which hold that in its remainder, the agreement should continue to be binding if it is capable of continuing in existence without the unfair terms. In the context of the decision passed by the Regional Court discussed earlier, if one were to follow this decision, without the court's interference in terms of rendering the indexation method more precise, it would not be possible to determine the further part of the agreement, which would continue to be Swiss franc-indexed. For it would prove impossible to determine at which rate to calculate the value of each instalment and which moment would be binding for it. What is more, adopting this solution would fail to remedy the negative effects in terms of the original loan calculation at the buying rate applied by the bank and the amount to be repaid calculated according to the selling rate. Facing an equal impediment, not to mention being contrary to the Directive, would be to determine the value of overpaid interest calculated originally at the selling rate, and not the average NBP rate, based on the capital originally calculated also using the selling rate set by the bank.

Having dismissed the application of the reduction concept, the District Court held the plaintiff's demand to be legitimate as to being awarded the payment of overpaid instalments which represented the difference between the value denominated in Polish zloty, which the plaintiff really paid as the result of the indexation mechanism, and the value of those instalments determined as if the loan was not indexed from the day of its disbursement, in other words, as if it was a loan denominated in Polish zloty. The interest itself remained unchanged for the rules applied to it did not evince an illegal nature.

Apart from the above decision, further judgments were passed in its wake ,dismissing the principle of the reduction upholding validity of double indexation clause. By the judgment of the Regional Court of Warsaw of 27 August 2018 [XXIV C 241/17] the agreement for a Swiss franc-indexed loan was annulled in its entirety. As found by the courts, this kind of clauses does not provide for any limitations as to the rates applicable in the banks and set by them in exchange rate tables. These agreements contain no information suggesting that the rate applied is to be "market-based, fair and reasonable." Similar conclusions were also drawn by the Regional Court of Łódź [III Ca 1709/17] upholding the judgment passed by the District Court of Łódź of 12 July 2017 [III C 327/17], which ultimately put the seal on the rule banning the measure entailing the reduction upholding validity of an illegal contractual provision and the assessment of unfairness of a contractual provision on the day on which the agreement was concluded.

5. Summary

The loans linked to the Swiss franc exchange rate, including this currency denominated and indexed loans, were equipped with a double indexation mechanism. After further verification of this mechanism it was found that banks failed to inform creditors properly about the specific features included in this mechanism, while on top of that they authoritatively laid down the exchange rated applied in the agreement. This generated additional profit on the part of the banks, to which in fact could be no limits, for the agreements concluded did not specify the criteria according to which the banks would set their rates, on occasions seemingly employing, for instance, merely the hour of their announcement by the board. This situation raised legitimate doubts whether the said mechanisms were not in their nature illegal contractual provisions. Ultimately, this classification was affirmed first *in abstracto* in the decisions of the Court for Competition and

Consumer Protection, and subsequently in individual proceedings concerning finding the provisions void and awarding relevant payment.

As was shown later on, diverging decisions were issued in the course of the proceedings because of the lack of a common interpretation as to the effects produced by declaring the double indexation clause void. Some of these courts held that in spite of declaring the double indexation clause void, the loan should continue to be foreign currency indexed. In order to achieve this aim, according to the view of one of the courts passing judgment in this kind of case, it would be necessary to implement an average NBP exchange rate in place of the clause. This concept is referred to as the theory of reduction upholding validity.

From the rulings following this interpretation one can infer that the courts adopted an erroneous premise in that they assumed that since the loan amount was denominated in Polish zloty "down to the last Grosz," then the rules of repayment were also clear. It should, however, be emphasized that the creditors' obligation in this situation continues to be vague in terms of the obligation amount, and remains as it was originally set according to the exchange rate adopted arbitrarily by the bank. This, in turn, implies that any attempts at converting the obligation using other exchange rates will not be capable of reversing the negative effect which took place at the moment of disbursing the loan.

With respect to the divergent interpretations presented above, Council Directive 93/13/EEC proves to be of assistance, as implemented into the Polish legal system *in fine* within the content of Article 3851 of the Civil Code. In the case settled by the European Court of Justice, it was found that declaring the contractual clause concerned void produces effects retroactively and ex officio. This means that the national court may not remedy a void provision by introducing a different criterion for it to remain valid, being authorized only to declare the provision concerned void. As to the remainder, the court's jurisdiction ends with taking into consideration the creditor's calculations, provided they are demonstrated correctly, of the amount of overpaid instalments, considering the loan provided to be denominated in Polish zloty from its disbursement.

The findings made suggest that while the provisions of the Directive have been formally implemented into the national system, it is still difficult to assert that a full harmonisation in this area with the Union legislation ensued. As already demonstrated, under the same standard of contract and while taking into consideration unfairness of the same clause, conflicting decisions with regard to substantive effects of an illegal contractual provision may coexist. Nor is it possible,

however, to suggest that the said harmonization has failed to take place to whatever extent, as some national courts are beginning to refer to the provisions of the Directive, in particular Article 6(1) and a preliminary ruling in a similar case issued by the European Court of Justice.

In light of diverging interpretations, it is necessary to harmonise the existing case law, which should result in employing Article 177 § 1 point 3^1 of the Civil Procedure Code allowing for an ongoing proceeding to be suspended if the decision concerning the case depends on the outcome of the proceeding pending before the Court of Justice of the European Union. In view of the proceeding pending as the result of the question raised by the Regional Court of Warsaw [C-260/18], the CJEU will soon directly decide whether one can assume, under existing legal regulations, that if the effect of recognizing specific contractual provisions as illegal entails a complete dissolution of an agreement, it is possible to fill in the gaps based not on a supplementary provision constituting a clear substitution of the unfair term, but based on the provisions of the national law which provide for completing the effects of a legal act worded in its content also by the effects arising from the principles of coexistence, equity or accepted customs. The settlement of the case pertaining directly to the Polish legal system should put limits on all the decisions so far in existence and ensure a uniform interpretation.

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