

## REQUEST FOR A PRELIMINARY RULING (C-198/20)

in the subject of consumer mortgage loans denominated and indexed to Swiss franc (CHF) -  
POLAND

- SUMMARY OF POLISH BANK ASSOCIATION'S WRITTEN OBSERVATIONS

### 1. SUBJECT MATTER OF THE REQUEST FOR A PRELIMINARY RULING

1. In May 2020 the District Court for Warsaw-Wola in Warsaw referred further questions concerning the interpretation of the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ("**Directive 93/13**"). The case was filed in the Court of Justice of the European Union under the signature C-198/20. The issues raised in the preliminary questions are important for banks in Poland, as well as for banks and other entrepreneurs in the entire European Union.
2. The dispute before the referring court concerns a mortgage loan agreement indexed to Swiss franc for residential purposes, concluded by four borrowers, three of whom granted power of attorney to conclude the agreement and were not interested in its content at all. The fourth borrower, acting at the same time as a proxy, directly stated before the referring court that he did not read the agreement and currently considers his actions as unwise. Despite being aware of the lack of diligence in their own interests, the borrowers demanded that the referring court declare the loan agreement to be invalid and - as it seems from the content of the referral - demanded that the bank return the sum of the repaid instalments, despite the fact that they have not repaid the equivalent of the principal paid to them so far.
3. The referring court has doubts as to whether a person who concludes a long-term contract resulting in a significant burden on the household budget, without fulfilling the basic acts of diligence as regards familiarization with its contents and consequences, deserves consumer protection.

The questions aim to determine whether:

- a. consumer protection is, regardless to the circumstances, available to every consumer?  
**(first question)**
  - b. the referring court may refuse protection to a consumer who has been negligent in familiarising himself with the content of the agreement before its signing or, although he has familiarised himself with the content of the agreement, has failed to clarify any potential doubts?  
**(second and third question)**
4. The case in which questions were referred for a preliminary ruling is one of nearly 30.000 cases on foreign currency loans currently pending before Polish courts. By invoking the provisions of Directive 93/13, borrowers demand the invalidation of agreements in their entirety or the invalidation of provisions relating to indexation. The number of loan agreements in Swiss franc in banks' portfolios (and consequently the scale of the problem) is estimated at over 400 thousand.
  5. In the first case (i.e. when consumers invoke the abusiveness of a specific provision and demand the invalidation of the agreement) they demand from the banks the return of all the instalments paid, stating that they would not even have to give back the principal made available to them and that they would retain the ownership of the real estate purchased with the loan funds, considering the grounds for such statement in the alleged statute of limitations for bank's claim under Polish law. According to Polish law, the limitation period for banks is 3 years and for consumers 10 or 6 years, depending on the date the claim arose. Borrowers argue (in banks' opinion - completely unjustifiably) that the three-year limitation period for banks' claims for the return of the amount

of principal began to run on the date of loan disbursement and expired before anyone started questioning these agreements. Indexed loans, on the other hand, began to be questioned for the most part in 2015.

6. The second demand raised by borrowers (elimination of the indexation mechanism), which comes down to demanding further performance of the agreement without provisions relating to indexation, means the conversion of a foreign currency loan into a PLN loan at the historical rate, which is about 50% lower than the current rate. By demanding the abolition of indexation, consumers also expect to maintain low interest rates specific to CHF (LIBOR). This means converting a foreign currency loan into a free loan in PLN (or even a loan with a negative interest rate).
7. The demands of borrowers undeniably threaten the stability of the financial sector. The authorities supervising the financial sector in Poland stated that the invalidity of agreements concluded in the years 2007-2008 will generate a sector's loss of **about 40 billion zlotys (10 billion euros)**. This loss would be at least twice as high if all the agreements concluded in the years 2002-2012 were challenged. If, in addition - according to the consumer community's arguments - the banks' restitution claims (including the repayment of the principal made available on the basis of the agreement) were to become time-barred, the loss would amount to 60 billion zlotys, taking into account only the agreements concluded in the years 2007-2008. It would be more than twice as high for the entire foreign currency loan portfolio.
8. Granting consumers' claims would provide unjustified, extraordinary benefits to Swiss franc borrowers. If banks could not even recover the principal of the loan, in practice it would be as if the banks had made a donation to borrowers for the purchase of real estate.

## 2. POLISH BANK ASSOCIATION'S ANSWER PROPOSAL

9. Borrower being a natural person who concludes a contract "for purposes which are outside his trade, business or profession" has the status of consumer (Article 2(b) of Directive 93/13).
10. Not in every situation a person who has the status of a consumer should be granted protection. Granting this protection requires establishing that a term in a contract concluded by a consumer may be considered unfair to that consumer.
11. In assessing whether a contract term may be regarded as unfair, the national court should, on the basis of Articles 3 and 4 of Directive 93/13, take account of all the circumstances surrounding the conclusion of the contract, the type of contract and the personal characteristics of the consumer in order to properly determine whether (i) in given circumstances, protection should be granted to the model consumer, that is to say, a "*reasonably well informed, reasonably observant and circumspect*" person, (ii) whether the consumer in question surpasses the average consumer model, since a provision which is not sufficiently clear and transparent to the average consumer can - in a particular case, to a person with specific knowledge and experience - be fully transparent, and whether (iii) the consumer in question has carried out acts of basic diligence, such as thorough familiarisation with the contract.
12. Even if a contract term meets the conditions for being considered unfair, the court is entitled to assess whether granting protection to a consumer or granting him protection within the requested scope would be contrary to the objective of Directive 93/13 and would violate the basic principles of the legal order, including the prohibition of the abuse of law.

13. In view of the above, Polish Bank Association proposes that all questions should be given a following joint answer:

*“The national court, when it declares the status of consumer within the meaning of Directive 93/13, can refuse to grant protection to a consumer who, at the stage of concluding the contract, has given up familiarizing himself with its content or clarifying doubts which he had after familiarizing himself with the contract, in particular if the court considers that, in seeking that protection, the consumer is committing an abuse of law.”*

### 3. RATIONALE FOR POLISH BANK ASSOCIATION’S POSITION

#### 3.1 PREREQUISITES FOR GRANTING PROTECTION TO A CONSUMER

14. A borrower being a natural person who concludes a contract to fulfill his housing needs (and thus acts "for purposes which are outside his trade, business or profession") has the status of consumer (Article 2(b) of Directive 93/13).
15. This does not mean, however, that in all situations, a person who has the status of consumer can effectively invoke its rights under Directive 93/13 and that it should be afforded consumer protection. The “status” of a consumer within the meaning of Article 2(b) of Directive 93/13 which conditions the application of Directive 93/13 is a different issue than the fulfillment of prerequisites for protection in a specific case, even if a specific consumer has such a status.
16. Protection may be granted to a person with consumer status if the conditions of Article 3 and Article 4(1) of Directive 93/13 are met and within the limits set by the fundamental principles of the European Union legal order.
17. According to Article 3(1) of Directive 93/13, in order for contract terms to be considered unfair, they must be regarded, inter alia, as *"contrary to the requirement of good faith"*. In addition, under Article 4(1) of Directive 93/13, account must be taken of the nature of the goods or services for which the contract was concluded and of all the circumstances attending the conclusion of the contract.
18. The nature of goods and services is directly referred to in paragraph 2(b) and (c) of the **Annex** to Directive 93/13, which provides guidance as to what provisions usually create a significant imbalance in the rights and obligations of parties contrary to the requirement of good faith<sup>1</sup>.
19. The provisions of the **Annex** extend the limits of the admissible freedom for entrepreneurs active in the financial services market to determine the amount of consumer’s performance. The European legislator has decided that **provisions which relate to the determination of consumer's performance by the entrepreneur in, inter alia, currency purchase or sale transactions**, trading in securities, financial instruments, i.e. such provisions which bind the value of consumer's performance (price) to changes in the stock exchange quotation, index or rate of the financial market, independent of the entrepreneur, over which the entrepreneur has no control, **should not be considered unfair**. In case of such provisions, the entrepreneur's freedom is limited by the financial market (factors independent of the bank), and moreover, due to the volatility of the market, it is not possible or justified to determine in advance for many years ahead one unchanging price or method of its setting.

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<sup>1</sup>Commission notice — Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts – paragraph 3.4.7.

20. In the context of conversion clauses (i.e. provisions concerning the rate used to settle the loan agreement), special attention should be paid to paragraph 2(c) of the Annex to Directive 93/13. Restrictions on unilateral shaping of contract terms and price changes are excluded in this paragraph of the Annex as regards contracts for the sale and purchase of currencies. It should be noted that the purchase and sale of currencies has many features in common with the so-called conversion clauses, which refer to bank rate tables. The conversion clauses are in fact a price list of separate currency exchange services which are only related (servant) to the loan agreement. These clauses give the service provider the necessary freedom to shape the terms and conditions of foreign exchange transactions. In court cases involving foreign currency loans, these clauses are regarded by the Polish courts as unfair under Directive 93/13 (and Polish legislation) due to the hypothetical (since the actual manner of use of the clauses is not examined, to the knowledge of the PBA none of the proceedings have shown that the rate applied by banks is significantly different from the market rate) possibility that the exchange rate can be freely determined. It appears, however, that the content of paragraph 2(c) of the Annex shows that, in the case of financial services, a certain level of supplier's freedom to determine the price (particularly in the area of foreign exchange transactions) is necessary and should not constitute grounds for declaring the clause prohibited.
21. Article 4(1) of Directive 93/13 requires that account must be taken not only of the nature of the services for which the contract was concluded but also of all the circumstances attending the conclusion of the contract. Such a circumstance is, *inter alia*, the fact that the borrower was not interested in knowing the content of the agreement at the stage of its conclusion (he did not read the agreement) or did not seek to clarify the doubts.
22. Among other circumstances which need to be taken into account are those that affect the assessment of whether a given borrower corresponds to or exceeds the model of an average consumer (e.g. is a person who has knowledge and experience of the subject matter of the contract). If a particular consumer is an expert in a given field (surpasses the model consumer), the clarity of a contract term needs to be assessed taking into account this specialised knowledge. The consumer has its own tools (knowledge, experience) to understand the contract term and the assessment of his actions should be made taking into account such circumstances. The opposite reasoning would lead to the conclusion that a consumer who perfectly understands the consequences of the contract, if for any reason he ceases to be interested in the further performance of the contract, could raise the allegation of lack of clarity resulting even in the contract's fall.
23. It is also necessary to take into account all external circumstances related to mortgage loans indexed or denominated in a foreign currency, in particular publicly available information about exchange rates and exchange rate risk.
24. In 2006 the banking supervisory authority issued a recommendation (Recommendation S I) concerning, *inter alia*, information obligations of banks towards their clients, including consumers. In accordance with the recommendation, according to the state of affairs actual in the years 2006-2009, the banking supervision authority in Poland considered a 20% change in the exchange rate to be a strong depreciation and the information given to consumers and relating to such a value to be fully sufficient.
25. Furthermore, in accordance with the then applicable provisions of the Banking Law Act, banks were only obliged to publish an exchange rate table showing the rates applied by the banks (Article 111).

26. Banks were publishing on their websites and in their branches the exchange rates used by the banks, every consumer could familiarize himself with the historical data for many years back. The consumer could also compare the rates applied by the banks with the purchase, sale and average rates published by the National Bank of Poland.
27. Taking into account all circumstances related to the conclusion of the contract, including (i) negligence on the part of consumer as regards familiarisation with the contract or consumer's specific knowledge and experience, as well as (ii) the fact that the bank, at the conclusion of the agreement, provided information on the exchange rate risk in a manner that was consistent with the recommendations of the supervisory authority at the time, (iii) the fact that historical exchange rates (allowing to observe the volatility for several or dozen years back from the conclusion of the agreement) were published both by the National Bank of Poland (including on the website of the National Bank of Poland), as well as by the banks (in their branches and on their websites), (iv) the type of contract and the dependence of exchange rates on market conditions external to the entrepreneur, is necessary for the correct assessment by the national court whether the contract terms are fair or whether there has been a violation of the requirements of good faith and a significant imbalance of the parties.
28. In conclusion, disregarding basic principles of prudence (in particular, non-reading of the contract by the consumer) makes it impossible to find the conversion clauses abusive. Such a conclusion (lack of abusiveness) would also be true if the consumer read the contract, as the information contained in the contract - taking into account the type of contract and the publicly available information - fully complied with the then applicable, normative standard of information and made the conversion provisions clear.

### **3.2 LIMITS OF CONSUMER PROTECTION**

29. In each case the application of Directive 93/13 requires taking into account that the EU consumer protection system does not operate in isolation from the basic principles of the legal order (both EU and national), which include inter alia the principle of proportionality, the principle of legal certainty, and the prohibition of abuse of the law. These principles set limits to the principle of effectiveness of EU law.
30. It would be irreconcilable with the fundamental principles of the legal order to grant protection under Directive 93/13 to a consumer who has completely abandoned care of his own interests, i.e. in particular (i) has not read the loan agreement or (ii) has read the agreement but has not understood its terms and yet has not sought to clarify his doubts. It would lead to the release of consumers from any responsibility for the decision to conclude a contract and would enable them to evade the obligation to perform the contract at any time when the consumer considers that he is not interested in the continuation of the contract for any reason.
31. The referring court focuses on the question of familiarisation with the content of the contract and taking certain acts of diligence by the consumer so that the decision to be bound by a multiannual contract could be considered responsible (and the consumer - "reasonably well informed, reasonably observant and circumspect"). However, this issue is of a broader nature and, in the opinion of the Polish Bank Association, should not be limited to examining whether the consumer has shown any foresight at the negotiation stage.
32. The analysis of this issue also requires taking into account whether the infringements alleged by the consumer had an impact on his situation. If the consumer has an education or professional experience in the field of foreign exchange transactions, he cannot legitimately claim that the contract does not provide comprehensive information about the exchange rate risk. Such an

allegation should be considered as an instrumental reference to the Directive only to evade the effects of the materialisation of the exchange rate risk of which the borrower was fully aware.

33. It is also worth noting an important circumstance, which the referring court points out in its justification for preliminary questions, namely the inadequacy of Directive 93/13 for long-term loan agreements.
34. Directive 93/13 does not take into account the specificity of long-term financial contracts, which may lead to undermining contractual relations which have been performed by the parties for decades without any disputes or misunderstandings. This leads to a violation of legal certainty.
35. At the moment of changes on the currency market (independent of banks), which caused the reduction of benefits resulting from currency agreements, the questioning of loan agreements began, with reference to Directive 93/13. In the opinion of PBA, such situation constitutes a specific abuse of instruments provided for by Directive 93/13. Long-term (20 or 30 year) loan agreements are questioned (including their invalidation in entirety) under the pretext of bank's freedom in shaping the exchange rate table.
36. Granting the allegations of consumers who, several years after the conclusion of the contract, claim that there has been an alleged violation of good faith and a gross violation of their interests, violates the principle of legal certainty. The current claims of consumers are made under significantly changed market conditions due to which consumers today do not consider the concluded contracts to be economically beneficial.
37. These claims are contrary to the purpose of Directive 93/13. This purpose is to protect the consumer against abuse by the entrepreneur, including against the exploitation of the information advantage by the entrepreneur. However, it is not the purpose of Directive 93/13 to enable consumers to free themselves from the risk of which they knew or could have known if they had taken reasonable diligence during the conclusion of the contract.
38. Invoking the provisions of Directive 93/13 contrary to its purpose or in a way that violates fundamental principles of the legal order constitutes an **abuse of law**. The principle of prohibition of abuse of law is well established in the case law of the Court of Justice (judgments of 2 May 1996 (C-206/94), of 9 March 1999 (C-212/97), of 23 March 2000 (C-373/97), of 21 February 2006 (C-255/02), of 12 September 2006 (C-196/04), of 5 May 2007 (C-321/05), of 22 November 2017 (C-251/16), of 10 July 2019 (C-273/18)).
39. This case law prohibits the derivation of unjustified advantages from EU law, whether it be treaty law, regulations or directives.