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## Consumer mortgage loan agreements denominated in foreign currencies: Does one solution fit all? – commentary on the judgment of the Court of Justice of the European Union of 15 June 2023 in *A.S. v Bank M S.A.*, C-520/21

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Consumer protection in contracts concluded with credit institutions has received considerable attention in recent years from the national courts of various European countries, as well as from the Court of Justice of the European Union (CJEU). Unsurprisingly, the issue came to the forefront in the wake of the 2008 global financial crisis, when consumers generally struggled with loan repayments. The CJEU has played a leading role in the interpretation of the principal European legal instrument governing standard terms, namely Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Our analysis focuses primarily on the Court's judgment of 15 June 2023, which we critically assess as being detached from its social, legal, and economic context. In our view, the CJEU's attempt to bring one solution to fit all is irreconcilable with other national approaches. Moreover, its fundamental reference to the principle of *nemo auditor propriam turpitudinem allegans* is neither clear nor appropriate in our opinion when taking into consideration its uncodified nature in many national jurisdictions. Accordingly, we respectfully disagree with the CJEU's judgment of 15 June 2023 that Directive 93/13 bans lenders (in this case, Polish banks) from obtaining any remuneration for the capital advanced to, and enjoyed by, the borrower when a loan contract is declared void since it cannot continue in existence without the terms found to be unfair.

## Introduction

In its judgment of 15 June 2023, the Court of Justice of the European Union (CJEU) addressed the questions raised by the Polish common court in relation to the legal consequences of restitution following the nullity of a mortgage loan contract in Swiss francs with a consumer<sup>1</sup>. The total nullity of the contract established by the Polish referring court was based on the presence of an unfair term relating to the determination for each instalment of the exchange rate between the Polish currency and the Swiss franc to which the loan was attached. The determination was based on a conversion clause, which referred the consumer to the foreign currency exchange rate table (Polish: *tabela kursowa*) maintained by the bank on a revolving basis. Thus, the consumer had limited options in the matter and was restricted to purchasing foreign currency through this channel. In consequence, the referring court wished to ascertain whether, assuming the total nullity of the mortgage loan agreement, the claims of the consumer and/or the professional lender are limited to the sums paid by each party or, alternatively, whether the consumer and the lender may “pursue any other claims (including remuneration, compensation, reimbursement of expenses or indexation of the amount paid)”<sup>2</sup>. In more detail, the Polish court wished to clarify whether the practice by Polish banks of claiming additional remuneration due to the usage – without legal basis, since the contract was null and void – of the money granted to the borrower is or not in line with the protective effects of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts<sup>3</sup>. The referring court highlighted in this context the interpretation of Articles 6(1) and 7(1) of Directive 93/13 and the principles of effectiveness, legal certainty, and proportionality.

<sup>1</sup> See judgment of the Court (Fourth Chamber) of 15 June 2023, C-520/21, A.S. v Bank M S.A., ECLI:EU:C:2023:478, hereinafter: the Bank M. judgment.

<sup>2</sup> *Ibidem*, para. 29.

<sup>3</sup> OJ L 95/29, 21.4.1993.

In this paper, we intend to cast some critical views on the interpretive choices and outcomes in the Bank M. judgment. First, we give a brief overview of the case law of the CJEU in matters related to the dispute, along with a description of different judicial approaches in a number of Member States, in particular in Austria and Spain. Second, we provide a short explanation of the conditions underlying the expansion of mortgage loans in foreign currencies in Central and Eastern Europe, with a diverse set of public interventions to curb this phenomenon, with particular attention to Poland. Third, we present a synthesis of the facts of the case. Fourth and fifth, we summarise the position adopted by Advocate General A.M. Collins, and we give details on how the CJEU’s judgment coincided with and disagreed with the Advocate General’s conclusions. Sixth, we critically assess the Bank M. judgment from two perspectives, and finally, we offer our conclusions.

### I. Brief overview of the relevant CJEU case law in concerning conversion clauses in foreign currency mortgage loan agreements and selected national judicial approaches

The CJEU’s case law on unfair terms has developed over several decades. For present purposes, it suffices to note that, in the aftermath of the 2008 global financial crisis, it extended, among other consumer financial settings, to mortgage loan agreements linked to foreign currencies<sup>4</sup>. The problem on which we focus here refers to contracts concluded by a professional lender and a consumer, which may be either denominated in or indexed to a foreign currency<sup>5</sup>. A con-

<sup>4</sup> This topic has already attracted attention among legal academics. See, for instance, S. Grundmann, N. Badenhop, *Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?*, “European Review of Contract Law” 2023, vol. 19(1), DOI: <https://doi.org/10.1515/ercl-2023-2002>, pp. 1–36.

<sup>5</sup> The difference between the denominated and indexed loan agreement refers to the currency expressly named in the contract as the one chosen for the loan. More specifically, a loan denominated in a foreign currency

sumer who concludes such a loan agreement attached to the foreign currency in which she does not receive income or possess assets is thus exposed to exchange-rate risk. This may result in gains if local currency appreciates or losses in the case of depreciation (for other benefits that may be associated with such agreements, see below). In some cases, however, the consumer may be locked in to purchase foreign currency only through the lender's channel, determining its conversion rate within its activity domain.

Loans in foreign currencies are not novel and have attracted various public recommendations at the European Union level after the foreign exchange rate fluctuations became significant in the period following the 2008 global financial crisis. It is important to emphasise that the phenomenon is not only restricted to Central and Eastern Europe, as foreign currency loans were also present in France, Austria, Italy, Spain, and Greece, among others. For instance, the European Systemic Risk Board stated in its Recommendation of 21 September 2011 on lending in foreign currencies that financial institutions must pay attention to inform borrowers with relevant data to make a prudent and well-informed decision showing the impact of a severe depreciation of the local currency in the consumer's place of residence<sup>6</sup>. It should be noted, however, that the wave leading to problematic developments occurred predominantly in the first decade of the 21<sup>st</sup> century.

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implies that the loan amount is expressed in the foreign currency, although the funds are typically credited in the borrower's bank in the local currency and payments by a borrower are in the foreign currency (typically by conversion of a local currency payment at that time). In comparison, an indexed loan is expressed in local currency and payments are made also in local currency, albeit the relevant amounts are referenced to the foreign currency.

<sup>6</sup> Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (ESRB/2011/1) (OJ C 342/1, 22.11.2011). It has been preceded by some analysis mostly focused on financial stability. See European Central Bank, *Financial Stability Review*, June 2010, <https://www.ecb.europa.eu/pub/pdf/fsr/financialstabilityreview201006en.pdf> (access: 14.6.2026), pp. 161–169.

The relevant CJEU case law concentrated on foreign currency mortgage loan agreements, with the focus on similar legal grounds stemming from Directive 93/13 and which started with the Árpád Kásler case in 2014<sup>7</sup>. One of the questions asked in this case referred to the issue of replacing the unfair – and thus invalid – clause with supplementary national rules under Article 6(1) of Directive 93/13. It was answered in the affirmative, but only in very limited circumstances: the absence of the invalid term would lead to the nullity of the contract as a whole, with especially dire consequences for the consumer<sup>8</sup>. Further, the CJEU took the position in the Zuzsanna Dunai case in 2019 that an unfair term related to the exchange rate difference may provide good grounds for the invalidity of the entire agreement if it restores the consumer to the legal and factual situation that she would have enjoyed without that term<sup>9</sup>. The latter directly refers to its previous judgment in Gutiérrez Naranjo and Others in 2016 in which the CJEU ruled that such restoration to the situation prior to the existence and effects of the unfair term comprises an unfettered right of the consumer to seek and obtain restitution of advantages wrongly obtained by the professional<sup>10</sup> leading to the full restoration of the legal and economic situation the consumer would have enjoyed in the absence of the unfair term.

The decisive ruling of the CJEU for the Polish legal landscape is related to the judgment in the so-called Dziubaks' case in 2019<sup>11</sup>. In our opinion, this judgment has been misunderstood and overzealously interpreted by the Polish com-

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<sup>7</sup> See judgment of the Court (Fourth Chamber) of 30 April 2014, C-26/13, Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, ECLI:EU:C:2014:282.

<sup>8</sup> *Ibidem*, para. 85.

<sup>9</sup> See judgment of the Court (Third Chamber) of 14 March 2019, C-118/17, Zuzsanna Dunai v ERSTE Bank Hungary Zrt, ECLI:EU:C:2019:207, para. 45.

<sup>10</sup> See judgment of the Court (Grand Chamber) of 21 December 2016, C-154/15, C-307/15 and C-308/15, Gutiérrez Naranjo and Others, ECLI:EU:C:2016:980.

<sup>11</sup> See judgment of the Court (Third Chamber) of 3 October 2019, C-260/18, Kamil Dziubak, Justyna Dziubak v Raiffeisen Bank International AG, ECLI:EU:C:2019:819.

mon courts. This led them to an almost automatic determination of the unfairness of conversion clauses. The main reason was that the CJEU severely constrained the ability of national courts to fill gaps of the invalid clauses with some general principles of civil law, principles of equity, or established customs<sup>12</sup>, which led to the conclusion that “the court takes the view that annulment would give rise to unfavourable effects for the consumer if the latter has not consented to them being upheld”<sup>13</sup>. However, the CJEU goes too far in stating in the Bank M. judgment that “the argument that the inclusion of such clauses in a loan agreement renders that agreement invalid clearly prevails in national case-law”<sup>14</sup>, as it fails to take into account several attempts by the Polish Supreme Court to clarify the matters left unanswered in certain cases by the CJEU due to institutional uncertainty – a topic which we examine in more detail in the following section.

As a side note, it is worth mentioning that such conversion terms are now assessed against these criteria, a decade after most of them were agreed upon. That said, it is also important to observe that if one assumes that the construction of a loan indexed or denominated in a foreign currency is not questionable from the perspective of a certain legal system, this general assumption must be taken into account in assessing the fairness of the conversion clause. It is therefore necessary to consider what a “fair” clause in this type of agreement should look like, since indexed or denominated loan agreements are permissible as such, as Article 23 of the Mortgage Credit Directive makes clear<sup>15</sup>. This issue has been addressed differently in some EU Member States, in particular Austria and Spain.

In the former’s case, the Supreme Court of Austria ruled on 25 August 2020 that the method of calculating the value of a loan instalment based on the exchange rate tables issued by banks was an acceptable method of calculating its value<sup>16</sup>. It means that in Austria, referring to the exchange rate tables in foreign currency loan agreements does not exceed the threshold of fair behaviour in consumer contracts (!). But one may find it, in fact, as unsurprising because it touches upon the fundamental issues related to mortgage lending in general. The essence appears to lie in the long-term relationship within which all repayment parameters are impossible to predict at the time of conclusion, and hence it is not possible to eliminate all associated risks.

The Supreme Court of Spain, in some instances, has refused to classify foreign currency denomination terms as non-transparent and, for this reason, unfair. Thus, in the recent judgment of 27 April 2023, the Supreme Court observed that “with the proven facts, an alleged lack of transparency that could lead to a declaration of unfairness cannot be justified, when it is clear that the borrower was informed sufficiently in advance of the operation of the loan in foreign currency and its risks”. And in the same vein, “there are no predetermined means to obtain the result sought by the requirement of material transparency: a sufficiently informed consumer. Adequate knowledge of the clause, of its transcendence and its impact on the execution of the contract, so that the consumer can make his economic decision after having been fully informed, is an irreplaceable result, although it can be achieved by a variety of means”<sup>17</sup>.

<sup>12</sup> *Ibidem*, para. 62.

<sup>13</sup> *Ibidem*, para. 68.

<sup>14</sup> Bank M. Judgment, para. 19.

<sup>15</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010 (OJ L 60/34, 28.2.2014).

<sup>16</sup> Judgment of the Supreme Court of Austria of 25 August 2020, OB. 37/20D.

<sup>17</sup> The Spanish Supreme Court, in the decisions of 20 September 2022 and 28 March 2023, insisted that transparency required that the consumer is made aware that the foreign currency risk may both lead to higher monthly payments and to a higher total amount of the loan that needs to be reimbursed. In its decisions of 9 February and 20 July 2021, the Spanish Supreme Court did not consider the loan contracts denominated in foreign currency to be non-transparent, given the convincing

Nevertheless, in the majority of cases that have reached the Supreme Court of Spain<sup>18</sup>, that court has opted for “rewriting” such loan agreements, redenominating them in euros by reference to the evolution of the EURIBOR variable interest rate. As a result, apart from some exceptions, borrowers are to return in euros the amount of the capital provided by the lender plus the interest initially agreed, although its variation is referenced to the EURIBOR according to the instalment schedule initially agreed. By means of this solution, borrowers are not only freed from the exchange-rate risk that had materialised against them but also benefit from a lower interest rate – compared with an ordinary euro loan – that was associated with the foreign currency loan in question. However, this second advantage is somewhat eroded by the variability of the interest rate linked to the EURIBOR.

It is doubtful whether both approaches could in general be reconciled with some recent CJEU case law<sup>19</sup>. Regrettably, the Polish common courts did not dare to go beyond the limited boundaries they demarcated for themselves in order not to intervene in the contents of loan agreements, as only in some limited number of cases they decided to maintain the contractual relationship when there was some possibility to refer to the exchange rate tables issued by the National Bank of Poland in cases of fallbacks of the original banking tables. However, there were several attempts to curb this situation. We will refer to this shortly, with a particular focus on Poland.

evidence that the borrowers possessed and actively managed deposits in foreign currencies.

<sup>18</sup> See decisions of the Spanish Supreme Court of 15 November 2017, 31 October 2018, 16 March 2021, 24 May 2022, 10 April 2023, 18 September 2023 (eight decisions on different foreign currency loans), 19 September 2023, 20 September 2023.

<sup>19</sup> See, for instance, judgment of the Court (Seventh Chamber) of 29 April 2021, C-19/20, I.W. and R.W. v Bank BPH S.A., ECLI:EU:C:2021:341.

## 2. The phenomenon of the expansion of mortgage loans in foreign currencies in Central and Eastern Europe with heterogeneous public interventions

With reference to the geographical origin of the dispute, it is important to note that foreign currency loans became very popular in Poland and other Central and Eastern European countries (e.g. Hungary, Croatia) in the first decade of the 21<sup>st</sup> century, as tying the loans to foreign currencies had various benefits. In short, the Swiss franc and the euro started to dominate the mortgage market in that part of Europe. In particular, consumers in those countries were benefiting from significantly lower interest rates in comparison to the long-term loans in the domestic currency, and from more favourable credit assessments in terms of repayment capacity. It should also be noted that the floating exchange rate of local currencies towards the Swiss franc or euro was generally appreciating or stable because the economic prospects were encouraging at that time and there were expectations that those countries would soon join the eurozone. It is also important to reiterate that, in the case of loans denominated in or indexed to a foreign currency in Poland, only the exchange-rate risk ultimately materialised. It is worth emphasising that for many years some Polish consumers benefited from significantly lower interest rates set by foreign central banks, which placed them in a more advantageous position compared with borrowers concluding long-term mortgage agreements linked exclusively to the Polish currency.

However, those bright prospects changed dramatically since the outbreak of the 2008 global financial crisis, as the local currencies plummeted against the Swiss franc and the euro. This placed numerous borrowers in jeopardy of repaying their mortgage loan obligations, albeit the rate of non-performing loans in that regard did not peak significantly in some countries, e.g. in Poland. The latter may be proof of consumer resilience and willingness to absorb the losses at least in the short term after the initial currency shock.

Nevertheless, some countries intervened domestically by converting foreign currency loans

into local ones with a fixed exchange rate in order to save the stability of their financial market. This took place in Hungary<sup>20</sup>. In the case of Poland, the legislative intervention was limited to allowing consumers to purchase foreign currency via channels other than only banking ones. A special fund was established for struggling borrowers. But the most contentious matters were left to the Polish common courts, as a compromise was unreachable, with banks and consumers taking widely diverging positions.

As already mentioned, to state that the Polish common courts have taken a unanimous view on conversion clauses does not take into account the complex position of the Supreme Court in Poland after the *Dziubaks'* judgment. It is necessary to mention that the structural changes to the Supreme Court introduced after 2015, with the clear goal of allowing the executive branch to exert control, or at least influence, over the highest independent judicial body, exacerbated the situation over the years and made the Supreme Court incapable of taking action in the field. To make the story short, the bone of contention was about the appointments of new Supreme Court judges via a process that has been regarded as not impartial, as well as the establishment of an additional disciplinary chamber packed with political cronies to discipline the legal profession, in particular judges themselves. The period of inactivity reached its peak with an initiative by the newly appointed President of the Supreme Court, who in 2021 started the process of issuing so-called guidance for common courts in such matters. The latter is adopted in the form of a resolution of the full Civil Chamber of the Supreme Court. Although it has no formally binding effect on lower courts, in practice provides clarity to

common courts' adjudication. Regrettably, the resolution was not adopted, as the Civil Chamber decided to refer several preliminary questions to the CJEU<sup>21</sup>. The latter focused on the matters related to the structural changes connected to the newly appointed judges to the Supreme Court and other changes introduced in that respect. However, the CJEU dismissed these questions and left them unanswered as it found them inadmissible for the reason that the matters raised in the preliminary questions were not decisive for the dispute<sup>22</sup>.

Due to the still unclear institutional position of the Supreme Court, its current judgments do not generally address this topic, but are restricted to some limited formalistic issues adjudicated by the standard panel of three judges. For instance, the Supreme Court has judged a matter related to court procedure whether a divorced couple who made a mortgage loan agreement while married are allowed to sue the bank separately or jointly<sup>23</sup>.

The Supreme Court is also inclined to refer further preliminary questions to the CJEU on other contentious issues, i.a. concerning the so-called right of detention – a common practice to hold the debtors' assets by banks until everything is cleared by the parties of a null and void loan contract – to be in compliance or not with Directive 93/13 is a good example<sup>24</sup>.

### 3. Main facts of the Bank M. case and the referral to the CJEU

The present dispute arises from a mortgage loan contract entered into by A.S. and his wife with a Polish bank, Bank M., in 2008. The contract allowed the monthly payment to be made in Polish currency after converting the instalment

<sup>20</sup> The overview of different public approaches in Central and Eastern Europe, e.g. in Poland, Hungary, and Croatia, is provided by J. Beldowski, W. Wojciechowski, *The Poisonous Fruit of Foreign Currency Loans for Consumers in Selected Central European States: The Dilemma for Macroeconomic Policy*, [in:] *Consumer Law and Economics*, K. Mathis, A. Tor (Eds.), Cham 2021, DOI: [https://doi.org/10.1007/978-3-030-49028-7\\_11](https://doi.org/10.1007/978-3-030-49028-7_11), p. 227 ff.

<sup>21</sup> See resolution of the Polish Supreme Court of 2 September 2021, III CZP 11/21.

<sup>22</sup> Order of the CJEU of 9 January 2024, ECLI:EU:C:2024:38.

<sup>23</sup> See resolution of the Polish Supreme Court of 19 October 2023, III CZP 12/23.

<sup>24</sup> See decision of the Polish Supreme Court of 6 October 2023, III CZP 126/22.

to the Swiss currency using the exchange rate set out by the bank itself.

In May 2021, A.S. filed a lawsuit before the Polish courts requesting that several clauses of the foreign currency loan agreement be declared null and void and, consequently, that the petitioner be reimbursed for the amounts paid through instalments and other fees. In that petition, the plaintiff claimed that the lender made an undue profit through the conversion of the instalments from the local currency to the Swiss franc. In its response to the claim, the lending bank argued that A.S.'s request should be dismissed because the terms of the mortgage loan contract were not unfair. Furthermore, it argued that, in any case, it was the bank itself that would eventually be entitled to reimbursement of money from A.S. in the event of nullity of the contract, both for the nominal amount of the loan and as compensation for the use (without legal basis, once the contract had been declared void) made by borrowers of the loaned amount, and the unjust enrichment enjoyed as a consequence. In other words, the bank asked for an additional amount because it had "frozen" the amount granted as a loan to A.S. and had incurred various costs as a result, e.g., regulatory ones, as the funds were not used efficiently – the essence of banking activity throughout the world.

Taking into account the status of Polish case law on the widely established unfairness of terms, including exchange rate tables inserted within such foreign currency loans, the referring court confirmed that this currency conversion clause is likely to be struck down. But the Polish common courts do not appear unanimous in relation to the effects of such unlawful effect, with the majority assuming that expelling such a contract term invalidates the contract as a whole with *ex tunc* effect, that is, as if the contract had never been concluded. This means that the parties may request restitution of everything that has been performed under such a null and void contract, but it is not crystal-clear what restitution means in monetary terms. The referring court raised some doubts as to whether, through such a claim, other amounts beyond what was initially paid may be

obtained because of a court declaration of nullity of a foreign currency loan agreement.

As a result, the referring court asked the CJEU whether, in light of Directive 93/13, in particular Article 6(1) and 7(1) thereof and of the principles of effectiveness, legal certainty, and proportionality, national legislation may be interpreted as meaning that, where a loan agreement between a bank and a consumer is declared void *ab initio* on the ground that it contains unfair terms, the parties may also claim benefits exceeding the sums paid in strict performance of the agreement. In other words, the CJEU was asked to clarify whether in accordance with Directive 93/13 the lending bank can obtain more than the amount of the loan capital, more specifically through the channel of remuneration or compensation for the use (without legal basis, since the contract was void from the start) of the loaned capital by the borrowers of since 2008, the year in which the now voided contract was concluded.

#### 4. The position of Advocate General A.M. Collins

In his Opinion of 16 February 2023, Advocate General A.M. Collins began by recalling a proposition that the objective of Directive 93/13 is to protect the consumer by means of minimum harmonisation of the rights of consumers against unfair terms, so that national legislative provisions and the case law interpreting them may legitimately grant the consumer broader and more extensive rights than those provided for in Directive 93/13<sup>25</sup>. Hence, in the Advocate General's view, it is fully compatible with the Directive that consumers may exercise against the bank other claims that would mean that the overall amount that consumers would receive would exceed the reimbursement of the loan instalments paid<sup>26</sup>. The Advocate General reiterated that this stance would discourage banks from introducing unfair terms

<sup>25</sup> See opinion of Advocate General A.M. Collins, C-520/21, delivered on 16 February 2023, hereinafter: the Opinion.

<sup>26</sup> *Ibidem*, para. 55.

in their contracts with consumers in the future. Such claims, in his view, are the exclusive province of national laws and national rules, and no explicit limit to them is articulated. The Court's later judgment, however, explicitly mentions the principle of proportionality as a necessary benchmark to this effect.

Contrarily, the lending bank who inserted unfair terms in the loan contract is barred from pursuing similar claims, according to the Advocate General's opinion: if the lender were allowed to do so, any sum beyond the repayment of the principal of the loan and, more specifically, any claim aimed at remunerating the lender for the use made by the consumer of the money placed at the borrower's disposal, would essentially deprive Directive 93/13 of its effectiveness<sup>27</sup>. Moreover, the dissuasive effect that must characterise all the legal consequences for the protection of consumers enshrined in Directive 93/13 would be seriously undermined. In the same vein, a fee (remuneration) for the capital lent in the event that the contract is declared null and void as a result of unfair terms inserted in the loan contract would mean that lenders could be tempted to introduce in the contracts they offer terms incompatible with the requirements of Directive 93/13, as they would be able to extract a profit from them. Moreover, making consumers' right to be free from unfair terms conditional on the payment of a (potentially high) remuneration to the lender could create an undesirable scenario in which it would be more attractive for consumers to continue to comply with the contract with unfair terms than to react against the unfairness pursuant to Directive 93/13<sup>28</sup>.

Last, it has been argued that since the nullity of the mortgage loan contract in foreign currency is a consequence of the inclusion by the bank of unfair clauses in the contract, if the party responsible for the unlawfulness were to obtain some type of economic advantage derived from the situation created by the unlawful conduct itself, the legal principle *nemo auditur propriam tur-*

*pitudinem allegans* would be infringed<sup>29</sup>. Hence the Advocate General concluded that Directive 93/13 must be interpreted as not precluding the consumer from being able to claim against the lender, in the event of the nullity of a loan contract on the ground that it contains unfair terms, the reimbursement of sums additional to those paid to the lender in execution of the null contract, and also to the amount of interest for late payment at the statutory rate. In fact, these additional claims will be aligned as a rule with the goals and objectives of Directive 93/13. Their scope and validity are referred, however, to the rules of the applicable national law, including some flexibility for the national courts to reject them if they constitute an abuse of rights<sup>30</sup>. Conversely, in relation to the lender, the conclusion of the Advocate General is exactly the opposite: Directive 93/13 strictly prohibits the bank from claiming any amount greater than the nominal amount of the loan paid to the consumer and the default interest that would have accrued from the date of the request for payment addressed by the lender to the borrower once the nullity of the contract has been established<sup>31</sup>.

### 5. The Bank M. judgment

Generally speaking, in its judgment, the CJEU sought to shed light on the restrictions deriving from Directive 93/13 on the consequences of the total nullity of a business-to-consumer contract when it contains unfair terms without which the contract, pursuant to certain national laws and case law, cannot survive. It does so specifically in relation to loan agreements and in particular to mortgage loans in foreign currency. The CJEU appears to be providing a broad and general view on the constraints that the interpretation of Directive 93/13 imposes on the law of the Member States governing the consequences of the total nullity of the contract when the origin of this is

<sup>27</sup> *Ibidem*, para. 59.

<sup>28</sup> *Ibidem*, para. 52.

<sup>29</sup> *Ibidem*, para. 58.

<sup>30</sup> *Ibidem*, para. 65(1).

<sup>31</sup> *Ibidem*, para. 65(2).

to be found in the infringement of the rules transposing Directive 93/13.

Obviously, the total nullity of the contract and its legal effects is a matter that falls outside of the harmonising scope of Directive 93/13. Moreover, the case law of the CJEU had ostensibly left the determination of the total nullity of the contract in the presence of unfair terms and, *a fortiori*, the legal effects of an eventual nullity of this kind, to national legal provisions and courts. Consequently, the invalidity of the entire contract is not as such a kind of remedy, legal effect or legal sanction falling within the scope of Directive 93/13.

The Bank M. judgment reiterates that since Directive 93/13 does not regulate the consequences of contractual invalidity following the deletion of unfair terms, it must be up to the Member States to determine those consequences. However, it points out that it must always be in compliance with EU law and with the goals pursued by Directive 93/13. It seems to subject a relevant part of what belongs to various legal provinces within national civil law (the law of contract, the law on recovery of undue payment or quasi-contract, the law of unjust enrichment) to restrictions based on the protective requirements of Directive 93/13 in favour of the consumer<sup>32</sup>.

Following this path, the CJEU recalled a basic ingredient added by the Court itself in 2016 in its process of building case law on the text of Directive 93/13: full restoration of the factual and legal situation in which the consumer would have been if the unfair term had never existed<sup>33</sup>. Any insufficiency in this regard would, in the opinion of the CJEU, represent an inadmissible distortion of the deterrent or dissuasive effect that Directive 93/13 imposes with respect to the inclusion of unfair terms by banks in such contracts. Consequently, the CJEU concludes that those national legal systems which (i) effectively ensure the *de facto* and *de jure* restoration of the situation in which the consumer would have been had the contract not been concluded, and (ii) do

not jeopardise the deterrent effect of Directive 93/13, will be compatible with EU law<sup>34</sup>.

In view of the foregoing, the CJEU concludes that it is in accordance with Directive 93/13 and with the principle of effectiveness for a national law to authorise a claim by a consumer that exceeds the amount of the reimbursement of the instalments and the costs paid under the loan declared void, and also exceeds the amount of interest for late payment at the statutory rate calculated from the time of the request for payment made by the consumer to the lender<sup>35</sup>. In the opinion of the CJEU, this possibility does not call into question the principle of legal certainty, as it merely constitutes an application of the prohibition of unfair terms established by Directive 93/13<sup>36</sup>. The principle of proportionality is explicitly recalled by the CJEU as a reminder to national courts to verify that the application of national rules granting such additional claims does not go beyond what is necessary to achieve the objectives pursued by Directive 93/13<sup>37</sup>.

The CJEU reaches the opposite conclusion regarding the claims that the lender could raise beyond the strict restitution of the nominal amount lent to the consumer borrower and, where appropriate, of the default interest accrued from the claim for payment of that nominal amount addressed to the consumer. Any sum burdening the consumer and exceeding the above amounts would jeopardise the effectiveness of the protection afforded by EU law to the consumer against unfair terms, as well as the essential deterrent effect of Directive 93/13 on the incentives of traders to use, or refrain from using, unfair terms in their mass contracting models<sup>38</sup>. The argument is reinforced, again in line with the Advocate General's opinion, by bringing up the principle *nemo auditur propriam turpitudinem allegans*, as it cannot be allowed that the lender obtains any advantage or benefit from its unlawful conduct,

<sup>32</sup> Bank M. judgment, para. 61.

<sup>33</sup> *Ibidem*, paras 57–61.

<sup>34</sup> *Ibidem*, para. 58.

<sup>35</sup> *Ibidem*, para. 69.

<sup>36</sup> *Ibidem*, para. 72.

<sup>37</sup> *Ibidem*, para. 73.

<sup>38</sup> *Ibidem*, para. 79.

nor that the lender is compensated or indemnified for the disadvantages from such conduct<sup>39</sup>.

Finally, the CJEU disagrees with the view that depriving the banks of such a claim for the use of capital against the consumer would imply *de facto* that consumers obtain a free loan<sup>40</sup>. It also rejects the argument that proscribing any remuneration for the capital lent to consumers over long periods of time constitutes a threat to the stability of the financial markets, this being a factor to be considered in these matters<sup>41</sup>.

## 6. Critical comments on the Bank M. judgment

### 6.1. Does one solution fit all?

By their nature, CJEU judgments generally invoke a wider EU perspective unless they choose to self-limit or declare it to be narrow in scope. In this case, the Bank M. judgment appears to go beyond the realm of foreign currency loan contracts by extending its reach to the restitution between contracting parties when unfair terms are involved, regardless of the nature of the contracts and the services provided. Hence, the Bank M. judgment, in our opinion, shall be assessed critically as it appears to advocate a “one solution for all” view of the problem.

In most legal systems and traditions, total nullity is naturally accompanied by the reciprocal restitution of the performance exchanged and benefits conferred. In our context, this effect can have adverse consequences for the consumer, as she must repay immediately the amounts received under the loan. However, it should not be overlooked that, in the case of foreign currency loans, total nullity in and of itself entails an extremely favourable economic effect for the consumer: the consumer is free from all exchange rate risk since the contract was concluded, a risk that would have been borne by her had not the con-

tract been declared void. Indeed, the exchange rate risk between the local currencies of Central and Eastern Europe and the Swiss franc assumed by borrowers prior to 2008 materialised after the financial crisis, and very harshly to the detriment of borrowers. When the contracts that placed such risk on the shoulders of borrowers are later declared null and void, the exchange risk that materialised does not vanish, it is shifted back to lenders, the owners of the capital lent. Lenders have to bear thus the exchange rate risk and should do so in full and without any mitigation, according to the Bank M. judgment.

As regards the way in which the intricacies of loans in a foreign currency are dealt with, the Bank M. judgment suffers from acute formalism and insufficient attention to the economic characteristics of loan agreements. The latter are essentially just exchanges of money flows between the parties. In the most traditional model of a loan agreement (with or without a mortgage), the lender exchanges an immediate flow of money (the borrowed capital) for periodic cash flows during the whole term of the loan. This arrangement of the amount and time sequence of flows naturally (i) involves “financing” being granted to the borrower, who with the advancement of funds can undertake consumption or investment decisions that would not be within his or her reach given his or her wealth and income, and (ii) provides some return or remuneration to the lender, in the form of interest, and, eventually, other fees to the lender in exchange for the financing granted to the borrower.

Any loan contract thus is just an agreed scheme of money flows between the parties to the contract. All “abnormal” vicissitudes, that is, all contingencies or circumstances other than the regular performance of the contract as initially foreseen, can be seen as nothing more than alterations (in timing of the flows, in the amount of the flows, or in both) in the exchange of monetary flows agreed in the contract. For example, if the borrower defaults on the contract and the lender terminates it or causes it to mature early, the flow of periodic instalments initially scheduled and defaulted on by the borrower is replaced by an

<sup>39</sup> *Ibidem*, para. 81.

<sup>40</sup> Bank M. judgment (first sentence), para. 80.

<sup>41</sup> Bank M. judgment (second sentence), para. 80.

immediate payment to be made by the borrower consisting of the total amount due less the reduction in interest that will result from the shorter duration of the financing in view of the early maturity, plus any interest for late payment until actual payment takes place. In other words, the amount and timing of the monetary flows payable by the borrower are altered as a consequence of the borrower's default and the lender's decision to accelerate the loan. In this respect, a credit contract, being a purely financial exchange, markedly departs from other contracts involving the exchange of goods and/or services of various kinds. The latter, by their very nature, are subject to a large number of contingencies (destruction, harm, increase in value due to investment, decrease in value due to use, misuse, or obsolescence). Many of these complicating factors, moreover, are idiosyncratic to a given good or service or an individual contractual relationship.

However, the CJEU seems to disregard these fundamental differences across contractual types and relationships, which are crucial for determining how the consequences of contractual invalidity should be organised. It also overlooks the specific features of credit agreements and the special nuances of foreign currency mortgage loans. The *Bank M.* judgment seems to set one solution to fit all contracts in a way that leaves limited interpretative margin, apparently at least, to the national courts in the narrow and closed framework envisioned by the CJEU.

This rigid understanding of the requirements of Directive 93/13 on national legal regimes runs counter to an adaptive approach to a contract problem. In particular, it is not well-adapted to a sound understanding of foreign currency loans and their issues. It seems clear to us that there are many other feasible solutions as regards the determination of the net flow of payments as restitution following the nullity of the loan in foreign currency that make it possible to satisfy, even with a wide margin of safety, all goals and safeguards enshrined in Directive 93/13. In this sense, the *Bank M.* decision embodies restrictions on the margin of action of national legislators and judges that go well beyond what is required by

fidelity to the text and the effective attainment of the objectives of Directive 93/13.

For example, assuming that the borrower did not make any payment and using, for the sake of concreteness, the timing of the individual case underlying the *Bank M.* decision, it seems that if the borrower received an amount of money in 2008 and repays the same amount – or in fact, a lower one taking into account the possible claims for damages addressed by the consumer against the lender – in 2023, she has not only been reinstated to the factual and legal situation she had before the loan contract was concluded, but she is placed in a much better position than the initial one: she has enjoyed for 15 years a sum of money to be repaid, in the same amount or even a lower one, and only in 2023. This in itself generates a significant gain to the consumer, as the accumulated inflation in Poland over the last 15 years exceeds 70%. Comparing this borrower to a similar one who took an equivalent mortgage loan in Polish currency, apart from the fact that, with high likelihood, the latter obtained a loan of a smaller amount, the Polish currency borrower would not enjoy the same benefits as the one who took the loan in Swiss francs (*sic!*).

As regards the principle of effectiveness and the deterrent effect against the use of unfair terms, in this case it also seems clear that being released from the exchange rate risk between the Polish currency and the Swiss franc is in itself a powerful incentive for the consumer to seek legal redress, leading to a judicial decision holding the credit contract as void. One would anticipate that consumers who took loans in Swiss francs to be highly motivated to exercise their consumer rights, as the Polish currency has lost about 100% of its value against the Swiss franc from 2008 until today.

Restitution after the declaration of contractual nullity aims at the full restoration of the original situation of the parties. In the context of nullity after a finding of unfairness in contract terms, this should happen, naturally, giving proper weight to the principles of equivalence and effectiveness, as well as to the requirements that derive from the effective achievement of the protective and

dissuasive objectives of Directive 93/13. At the same time, it is not indifferent who is responsible for the contractual nullity due to the inclusion of unfair standard terms. It is for this reason that, in our opinion, both the Advocate General and the CJEU agree in holding that the lender and the borrower should be in different positions regarding the respective limitations to subsequent claims accompanying mere restitution.

In short, the solution offered by the CJEU for foreign currency loans has ultimately proved to be enormously favourable *ex post* to consumers. This outcome, which is so beneficial *ex post* for the economic situation of the affected consumers, is imposed on the Member States under the guise of being the only solution that complies with the requirements of Directive 93/13 in cases of total nullity of the contract. We do not think this is correct. There are, and have been, other plausible alternatives for determining the cash flows to be exchanged *ex post* after following nullity, which scrupulously respect the reintegration of the consumer's position *ante contractus*, the principle of effectiveness of EU protection against unfair terms, and also the deterrent effect of Directive 93/13.

However, it is not just the rigid and biased solution to the problems raised by foreign currency loans that is open to criticism. As already indicated, the process of constructing such a solution is highly debatable, as it ignores the very substance of loan agreements and how this affects the legal consequences that follow various avenues of ineffectiveness or, in general, legal intervention upon such agreements. In contractual and financial matters, bad economics cannot make good law.

It is thus regrettable that the CJEU decided not to cast more light on the matter of proportionality that may be taken into account by the Polish common courts to assess “whether and to what extent upholding the consumer's claims (...) goes beyond what is necessary to achieve the objectives (of Directive 93/13)”<sup>42</sup>. The principle of proportionality may be interpreted freely by

lower common courts in Poland, and guidance from the Supreme Court is unlikely to emerge as long as the institutional turbulences are not entirely solved.

Unsurprisingly, the interpretation of the Bank M. judgment in Poland does not prevent the consideration of whether its scope encompasses a typical claim based upon the unjust enrichment law, namely the valorisation of the amount at stake. As a result, a new preliminary question has been lodged at the CJEU that delves into the nature of such a claim in relation to Directive 93/13<sup>43</sup>. Hence, we reckon that the cat-and-mouse game will continue, as one solution does not fit all.

## 6.2. What *nemo auditor propriam turpitudinem allegans* conveys?

The Bank M. judgment relies on the precept *nemo auditor propriam turpitudinem allegans* in order to reject that a professional who inserted an unfair term in the contract may recover by way of restitution or by exercising any other claim any contractual advantage, since the trader or firm “cannot be compensated for the loss of a profit similar to that which it hoped to derive from that contract”<sup>44</sup>. In particular, the CJEU proclaims in general terms: “a party cannot be allowed to derive economic advantages from his/her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct”<sup>45</sup>.

The above-mentioned *nemo auditor* principle is ascribed to the set of common principles of European private law. Being in favour of seeking common roots among the Member States, we would like to point to the fact that this attempt is still vague and has not been embodied in a shared set of principles agreed by the Member States apart from the output of certain academic research<sup>46</sup>. Among them, we could point,

<sup>42</sup> Bank M. judgment, para. 73.

<sup>43</sup> See decision of the Polish Regional Court in Warsaw of 29 July 2023, XXVIII C 18858/21.

<sup>44</sup> Bank M. judgment, para. 82.

<sup>45</sup> *Ibidem*, para. 81.

<sup>46</sup> See, for instance, J. Basedow, *General Principles of European Private Law and Interest Analysis: Some Reflections in the Light of “Mangold” and “Audiohux”*,

for instance, to the *Ius Commune* project within which a series of books devoted to the common law of Europe have been produced. To the best of our knowledge, it has been discussed only as a shared principle under the theme “illegal contract” within the relevant framework of unjust enrichment based on English law scholarship<sup>47</sup>.

Moreover, this principle is not unanimously understood and received across the Member States’ substantive laws, apart from a rather vague general position showing a dislike for claims based on the unlawful conduct of the person making them. In the case of nullity, it could be understood as entailing the rejection of some restitutionary claims brought by the party taking advantage of its unlawful conduct. However, the jurisdictions that have codified this principle insist on its exceptional character and application<sup>48</sup>. For instance, Paragraph 817 of the German Civil Code clarifies the matter of a violation of law and good morals such that “recovery is excluded if the supplier is also guilty of such a breach, unless the performance consisted [of] the incurrance of a liability”<sup>49</sup>. More in line with the facts of the Bank M. judgment, Article 211(2) of the Dutch Civil Code emphasises that “where (...) transferred property cannot be reclaimed,

the nullity of the contract does not result in the nullity of the transfer”<sup>50</sup>.

The principle of *nemo auditur propriam turpitudinem allegans* is not codified in the Polish Civil Code, though. This does not mean that it is rejected, but that it imposes further scrutiny on the quest to search for its equivalence. Nevertheless, there are a few avenues that can be pursued. First, one can search for its equivalent in Article 488(2) of the Polish Civil Code, as it refers to the possibility of refraining from rendering performance until the other party offers the reciprocal performance. But it is worth mentioning that loan agreements are not recognised yet in Polish law as “reciprocal obligations” (!). Second, one could further seek traces in the principle of *compensatio lucri cum damno*, which is widely recognised in Polish case law, but its essence lies in the purely compensatory nature of the damages claim. Last, but not least, one may invoke the principle of “clean hands” (Polish: *zasada czystych rąk*), which means that only the person who does not abuse his or her rights may refer to Article 5 of the Polish Civil Code. The latter provides for the general principle that “one may not use his or her right in a manner which would be contrary to its social and economic purpose or to the principles of community coexistence”<sup>51</sup>. However, this general principle must be reconciled with another rule stemming from Article 358<sup>1</sup>(3) of the Polish Civil Code that “in the case of a substantial change of money’s purchasing power after the creation of an obligation, a court of law may, having weighed the parties’ interests, according to the principles of community coexistence, change the amount or the manner of rendering the pecuniary obliga-

“European Review of Private Law” 2016, vol. 24(3), DOI: <https://doi.org/10.54648/ERPL2016023>, pp. 331–351. See also N. Reich, *General Principles of EU Civil Law*, Cambridge 2013, DOI: <https://doi.org/10.1017/9781780685304>, p. 216.

<sup>47</sup> See H. Beatson, E. Schrage, M. Chen-Wishart (Eds.), *Cases, Materials and Texts on Unjustified Enrichment*, Oxford–Portland 2003, pp. 374–375.

<sup>48</sup> For further references, see F. Gómez, S. Canudas, *Comentario a la sentencia del Tribunal de Justicia de la Unión Europea de 15 de junio de 2023 (Bank M.): nulidad total del contrato por causa de abusividad de una cláusula y restricciones a las pretensiones del prestamista que exceden de la reintegración del nominal prestado*, “InDret” 2023, no. 3, p. 659.

<sup>49</sup> The German original stands as follows: “Die Rückforderung ist ausgeschlossen, wenn dem Leistenden gleichfalls ein solcher Verstoß zur Last fällt, es sei denn, daß die Leistung in der Eingehung einer Verbindlichkeit bestand; das zur Erfüllung einer solchen Verbindlichkeit Geleistete kann nicht zurückgefordert werden.”

<sup>50</sup> The Dutch original stands as follows: “Is ingevolge her vorige lid terugvordering van eenovergedrangengoed uitgesloten, danbrengt de nietigheid van de overgekomenkomstniet de nietigheid van de overdrachtmede.”

<sup>51</sup> Please note that this provision has been translated a bit differently in para. 6 of Bank M. judgment, namely “a right may not be exercised in a manner which would be contrary to its social and economic purpose or to the principles of society. Any such act or omission by the rightsholder shall not be treated as an exercise of the right and shall not be protected.”

tion, even if they have already been determined in a ruling or in a contract”.

No doubt that the set of solutions applied to the nullity of the contract and associated with the *nemo auditor* principle may offer some advantages in terms of dissuasive effects of contracts whose conclusion is morally or socially repulsive. It is also unquestionable that the deterrence character of this principle may go in line with the values of the national legal systems within the European Union. In the end, contracts are instruments to create and promote wellbeing in society, and if they do not create welfare, it is just right to discourage those that reduce social welfare.

However, having said that, it is necessary to return to the fundamental functions of loan agreements, where the borrower enjoys the capital in the agreed period, and puts it to use to fulfil some of his or her needs, e.g. housing. In this case, we encounter a paradox as the consumers (at least in the absence of factors that could make the entire transaction truly undesired by the borrowers) find value in the service (financing) provided to them, but disagree with the cost associated with it. In other words, these are contracts that bring value and enhance social welfare, but they may be flawed by the presence of some unfair term that is detrimental to the consumer. But surely the detriment does not lie in receiving money from the lender. Moreover, it should be borne in mind that foreign currency loan agreements in the EU were, and remain, lawful contracts at the time concluded if they follow the national legal regime, as they are not prohibited as such by EU law<sup>52</sup>. In other words, in the European legal regime, it is not foreign currency agreements themselves that shall be wiped out from the market, but it is just some unfair terms detected in them.

If so, the reference to the *nemo auditor* principle appears to be mistakenly applied in the Bank M. judgment. It is more reasonable to read-just the flows of money between the parties in order to meet the objectives pursued by *ex post* judicial intervention while not destroying the

value already brought by the loan agreement, as well as not inducing the consumer to take undue advantage of his or her rights. Finally, it is important to bear in mind that national legal orders develop their own mechanisms to govern the consequences of the nullity of contractual relations, and such solutions shall be respected unless clearly incompatible with the goals of EU law. It is thus surprising that the CJEU, being aware of the mass process in Poland of annulling such contracts in court for the benefit of consumers, imposes a straitjacket that stiffly limits the freedom of Polish common courts to adjudicate on the matter.

As a result, it is expected that the problem of foreign currency loans will bounce back to the CJEU, as we anticipate that Polish common courts will be asking for further guidance in such a restrictive environment, as has already been indicated with some examples.

## Conclusion

The protection of consumers in contracts concluded with credit institutions has been strongly expanded and enhanced by the CJEU in the Bank M. case. The CJEU ruled on the consequences of the total nullity of a mortgage loan contract in a foreign currency when the nullity originates from the presence of an unfair term related to the determination of the relevant exchange rate. The central question in the Bank M. case was whether the professional lender can claim amounts exceeding the amount of the loan advanced to the consumer under the contract deemed to be null and void, on the one hand, and whether the consumer can do the same with respect to the instalments, fees, and other commissions paid to the lender, on the other.

The Advocate General and the CJEU are in unison as to consumers having the right to claim amounts in addition to the reimbursement of the loan instalments paid in case of nullity of the contract due to unfair terms. This possibility does not undermine the principle of effectiveness of Directive 93/13 and may even encourage the exercise of consumer rights as well as discourage

<sup>52</sup> See, for instance, Recital 30 to the Mortgage Credit Directive.

banks from including unfair terms in their contracts. For the lender, the Advocate General and the CJEU see eye to eye but reach the opposite result. Both Advocate General and CJEU hold that Directive 93/13 prohibits the lender from claiming any amount in excess of the value of the capital loaned and the interest for late payment accrued after the consumer has been ordered to pay once the contract has been declared null and void.

We have sought to present fairly the reasons for the position expressed by the CJEU. We have also endeavoured to show that the approach chosen by the CJEU was not the only available route compatible with the protective objectives

of Directive 93/13. In our view, the Bank M. judgment was adopted largely without sufficient regard to the social, legal, and economic context of credit agreements, including foreign currency loans, and fails to ensure coherence and consistency within EU consumer protection law. Accordingly, we respectfully disagree with the CJEU's judgment of 15 June 2023 insofar as it holds that Directive 93/13 bans lenders (in this case, Polish banks) from obtaining any remuneration for the capital advanced to, and enjoyed by, the borrower where the loan agreement is declared void because it cannot subsist without the unfair terms.

### Abstrakt

#### **Umowy konsumenckiego kredytu hipotecznego w walutach obcych – czy jedno rozwiązanie pasuje do wszystkich? Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej z dnia 15 czerwca 2023 r. w sprawie A.S. przeciwko Bank M S.A., C-520/21**

**Słowa kluczowe:** środki ochrony prawnej; Trybunał Sprawiedliwości; umowy kredytowe; ochrona konsumenta; nieuczciwe postanowienia umowne; nieważność umowy i jej skutki

Ochrona konsumentów w umowach zawieranych z instytucjami kredytowymi w ostatnich latach przyciągała znaczną uwagę sądów krajowych w różnych państwach europejskich, a także Trybunału Sprawiedliwości Unii Europejskiej (TSUE). Nie jest to zaskakujące, zważywszy na nasilenie problemu po globalnym kryzysie finansowym z 2008 r., kiedy – ogólnie rzecz biorąc – konsumenci zmagali się ze spłatą zobowiązań kredytowych. Trybunał odegrał wiodącą rolę w interpretacji głównego europejskiego instrumentu prawnego regulującego stosowanie standardowych postanowień umownych, tj. dyrektywy Rady 93/13/EWG z dnia 5 kwietnia 1993 r. w sprawie nieuczciwych warunków w umowach konsumenckich. W analizie skupiamy się przede wszystkim na wyroku z dnia 15 czerwca 2023 r. Krytycznie wskazujemy, że jest on oderwany od kontekstu społecznego, prawnego i ekonomicznego. Dążenie TSUE do przyjęcia jednego rozwiązania dla wszystkich sytuacji pozostaje nie do pogodzenia z różnymi podejściami krajowymi. Ponadto jego podstawowe odwołanie do zasady *nemo auditur propriam turpitudinem allegans* nie jest naszym zdaniem ani jasne, ani właściwe, biorąc pod uwagę jej niekodyfikowany charakter w wielu krajowych porządkach prawnych. W związku z tym, zachowawszy należyty szacunek, nie zgadzamy się z glosowanym wyrokiem TSUE, zgodnie z którym dyrektywa 93/13 zakazuje kredytodawcom (w tym przypadku bankom polskim) otrzymywania jakiegokolwiek wynagrodzenia z tytułu udostępnionego kapitału, z którego korzystał kredytobiorca, w sytuacji gdy umowa kredytu zostaje uznana za nieważną, ponieważ nie może ona nadal obowiązywać bez postanowień uznanych za nieuczciwe.

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