Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 December 2015 *

(References for a preliminary ruling — Directive 2004/39/EC — Articles 4(1) and 19(4), (5) and (9) — Markets in financial instruments — Concept of 'investment services and activities' — Provisions to ensure investor protection — Conduct of business obligations when providing investment services to clients — Obligation to assess the suitability or appropriateness of the service to be provided — Contractual consequences of non-compliance with that obligation — Consumer credit contracts — Foreign currency denominated loan — Advancement and reimbursement of loan in domestic currency — Terms relating to the exchange rate)

In Case C-312/14,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Ráckevei járásbíróság (District Court, Ráckeve, Hungary), made by decision of 27 May 2014, received at the Court on 1 July 2014, in the proceedings

**Banif Plus Bank Zrt.**

v

**Márton Lantos,**

**Mártonné Lantos,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, F. Biltgen, J. Malenovský, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr and Mrs Lantos, by I. Kriston, ügyvéd,

— the Hungarian Government, by M.Z. Fehér and G. Szima, acting as Agents,

— the German Government, by T. Henze and A. Lippstreu, acting as Agents,

* Language of the case: Hungarian.

— the Polish Government, by B. Majczyna, acting as Agent,

— the United Kingdom Government, by M. Holt, acting as Agent, assisted by B. Kennelly, Barrister,

— the European Commission, by I. Rogalski and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2015,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4(1) and 19(4), (5) and (9) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

2 The reference has been made in proceedings between Banif Plus Bank Zrt. ('Banif Plus Bank') and Mr and Mrs Lantos concerning a foreign currency denominated consumer loan.

### Legal context

*European Union law*

Directive 93/13/EEC

3 Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides:

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

4 Article 4(2) of that directive provides:

'Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.'

5 Article 6(1) of that same directive provides:

'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.'

Directive 2004/39

6 Recitals 2 and 31 in the preamble to Directive 2004/39 state:

‘(2) … it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection …

…

(31) One of the objectives of this Directive is to protect investors. …’.

7 According to Article 1 of that directive:

‘1. This Directive shall apply to investment firms and regulated markets.

2. The following provisions shall also apply to credit institutions authorised under [Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1)], when providing one or more investment services and/or performing investment activities:

— …

— Chapter II of Title II excluding Article 23(2) second subparagraph;

— …’

8 Article 4(1)(2), (6) and (17) of Directive 2004/39 contains the following definitions:

‘…

(2) “Investment services and activities” means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;

…

(6) “Dealing on own account” means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

…

(17) “Financial instrument” means those instruments specified in Section C of Annex I.’

9 The investment services and activities listed in Section A of Annex I thereto includes ‘dealing on own account’. According to the wording of Section B(2) and (4) of that annex, the term ‘ancillary services’ comprises ‘[g]ranting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction’ and ‘[f]oreign exchange services where these are connected to the provision of investment services’, whilst Section C(4) lists ‘[o]ptions, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments’.

10 Article 19 of that directive is in Section 2, entitled 'Provisions to ensure investor protection', of Title II, Chapter II. Conduct of business obligations when providing investment services to clients. It is entitled 'Conduct of business obligations when providing investment services to clients'. Article 19(4), (5) and (9) provides:

'4. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.

5. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

…

9. In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of clients and/or information requirements, this service shall not be additionally subject to the obligations set out in this Article.'

11 Article 51(1) of Directive 2004/39 provides that Member States are to ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of that directive have not been complied with; those measures are to be effective, proportionate and dissuasive.

Directive 2008/48/EC

12 According to Article 2(1) and (2) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66, corrigenda OJ 2009 L 207, p. 14, OJ 2010 L 199, p. 40, and OJ 2011 L 234, p. 46):

'1. This Directive shall apply to credit agreements.

2. This Directive does not apply to:

…

(h) credit agreements which are concluded with investment firms as defined in Article 4(1) of [Directive 2004/39] or with credit institutions as defined in Article 4 of Directive 2006/48/EC [of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006 L 177, p. 1)] for the purposes of allowing an investor to carry out a transaction relating to one or more of the instruments listed in Section C of Annex I to [Directive 2004/39], where the investment firm or credit institution granting the credit is involved in such transaction;

…'

13 Article 3 of Directive 2008/48, headed ‘Definitions’, provides:

‘For the purpose of this Directive:

…

(c) “credit agreement” means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments;

…’

14 Chapter II of that directive, entitled ‘Information and practices preliminary to the conclusion of the credit agreement’, includes Article 4, entitled ‘Standard information to be included in advertising’, Article 5, entitled ‘Pre-contractual information’ and Article 8, entitled ‘Obligation to assess the creditworthiness of the consumer’. Chapter IV thereof, entitled ‘Information and rights concerning credit agreements’, includes Article 10, entitled ‘Information to be included in credit agreements’, and Article 11, entitled ‘Information concerning the borrowing rate’.

*Hungarian law*

15 Law No CXXXVIII. of 2007 on investment firms, commodities exchange operators and the rules governing the activities they are liable to pursue (a befektetési vállalkozásokról és az árutőzsdei szolgáltatókról, valamint az általuk végezhető tevékenységek szabályairól szóló 2007. évi CXXXVIII. törvény) is aimed, inter alia, at transposing Directive 2004/39 into Hungarian law.

16 Paragraph 4 of that law, in the version applicable to the facts in the main proceedings, contains the following definitions:

‘…

(6) investment loan: loan granted for the purpose of purchasing a financial instrument, where the lending institution participates in the transaction;

…

(11) exchange agreement (swap): any complex agreement concerning the exchange of a financial instrument which is, as a rule, made up of a cash purchase operation and a forward purchase operation or several forward operations and generally involving exchange of cash flows;

…

(50) financial instrument: instrument representing a monetary claim, other than securities, issued in series, which are negotiated on the money market;

…

(60) commodity derivative: an instrument the value of which depends on the value of an underlying financial instrument and which is the subject of a separate negotiation;

…’

17 Article 19 of Directive 2004/39 was implemented through Paragraphs 40 to 45 of that law.

18 Article 231 of the Civil Code, in the version applicable to the facts in the main proceedings, provides:

‘1. Unless otherwise provided, monetary debts must be paid in the currency that is legal tender at the place of performance of the obligation.

2. A debt denominated in another currency or in gold must be converted at the rate prevailing in the place and on the date of payment.’

19 Article 523 of the Civil Code reads as follows:

‘1. Under a loan agreement, the financial institution or any other lender shall make the agreed amount available to the borrower; the borrower shall reimburse that amount in accordance with the agreement.

2. Save where otherwise provided, if the lender is a financial institution, the debtor shall pay interest (bank loan).’

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

20 On 11 June 2008, Mr Lantos entered into a foreign currency denominated consumer credit agreement with Banif Plus Bank for the purpose of purchasing a motor vehicle. Mrs Lantos, in her capacity as spouse of Mr Lantos, is bound by the obligations under that agreement, which has been categorised by the referring court as a loan agreement within the meaning of Article 523 of the Civil Code.

21 That agreement included certain clauses relating to so-called ‘fictitious’ monetary flow in foreign currency and the ‘real’ monetary flow in Hungarian forints (HUF).

22 The referring court describes the contractual currency conversion mechanism in the following terms:

‘At the time the loan was granted, [Banif Plus Bank] calculated the equivalent amount in foreign currency of the amount that it was to advance in Hungarian forints, in accordance with the exchange rate applicable on a date which had been previously determined and in accordance with Article 231 of the Civil Code. [Next,] the bank purchased from the client that currency, which (had been registered as) chargeable to him, using the actual exchange rate for purchases of foreign currency that was applicable at the time of the advance of the loan (transaction at the prevailing exchange rate) and paid the equivalent amount in Hungarian forints to the client. [Later,] the bank sold to the client the registered currency in exchange for forints, using the actual exchange rate for sales of foreign currency that was applicable at the time of the repayment of the loan (transaction at the future exchange rate applicable at the time of repayment), in order that the client could meet, in foreign currency, his repayment obligation, which was registered in foreign currency.’

23 The referring court further observes that the Kúria (Supreme Court), in its judgment 6/2013 PJE, which was delivered in order to ensure consistency of the case-law relating to civil-law matters, classified ‘loans denominated in a foreign currency’ as currency loans within the meaning of Article 231 of the Civil Code. The latter court noted that as a result of those currency loans a foreign currency liability exists, but that, in contrast to a genuine currency loan under which there is an actual advance of the loan, in a foreign currency denominated loan, the currency in question is merely used as a unit of account but the currency in which the payments are actually made is the Hungarian forint. Consequently, the monetary flow registered in foreign currency is fictitious and the monetary flow in Hungarian forints is real.

24 The referring court further observes that Banif Plus Bank has stated that it does not provide any investment services, or any ancillary services relating to investment services, or any services relating to commodities exchanges. The agreement at issue in the main proceedings is a consumer credit agreement with Banif Plus Bank within the scope of its lending operations, which are subject to detailed regulation by Law No CCXXXVII. of 2013 on credit institutions and financial enterprises (a hitelintézetekről és a pénzügyi vállalkozásokról szóló 2013. évi CCXXXVII. törvény), with the result that its validity does not fall to be assessed in the light of the provisions of either Law No CXXXVIII. of 2007 nor those of Directive 2004/39.

25 Mr and Mrs Lantos argued before the referring court that, in order to achieve an interpretation of Law No CXXXVIII. of 2007 consistent with Directive 2004/39, it was necessary to make a reference for a preliminary ruling, given that the Kúria (Supreme Court), in its judgment 6/2013 PJE, had based itself on the provisions of the Civil Code, in particular Article 231 thereof — which was not affected by the transposition of that directive — in order to hold that foreign currency denominated credit agreements had a capital-markets dimension.

26 In those circumstances, the Ráckevei járásbíróság (District Court, Ráckeve) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must it be held that, pursuant to Article 4(1)(2) (investment services and activities), Article 4(1)(17) (financial instruments) of and Annex I, Section C(4) (forward currency contracts, derivative instruments), to [Directive 2004/39], the offer of an (exchange rate) transaction to a client which, under the legal form of a foreign currency denominated loan agreement, consists of a spot transaction at the time of the advance of the loan and a forward transaction at the time of repayment, which is carried out by converting into forint a registered amount of foreign currency and which exposes the client’s loan to the effects and risks (currency risk) of capital markets, constitutes a financial instrument?

(2) Must it be held that, pursuant to Article 4(1)(6) (dealing on own account) of and Annex I, Section A(3) (dealing on own account), to [Directive 2004/39], the carrying out of proprietary trading in respect of the financial instrument described in the first question constitutes an investment service or activity?

(3) Must the financial institution perform the suitability check required by Article 19(4) and (5) of [Directive 2004/39], taking into account that the forward currency contract — which is an investment service relating to financial derivative instruments — was offered as part of another financial product (namely a loan agreement) and that the derivative instrument in itself constitutes a complex financial instrument? Must it be held that Article 19(9) of [Directive 2004/39] is not applicable because, as the risks assumed by the client with regard to the loan and to the financial instrument are fundamentally different, the suitability assessment is essential inasmuch as the transaction contains a derivative instrument?

(4) Does the circumvention of Article 19(4) and (5) of [Directive 2004/39] lead to the annulment of the loan agreement between the bank and the client?’

## The request seeking the reopening of the oral part of the procedure

27 After the close of the oral part of the present procedure on 17 September 2015 and after the Advocate General had delivered his Opinion, Mr and Mrs Lantos, by letter of 20 September 2015 lodged at the Registry of the Court on 25 September 2015, requested that the oral part of the procedure be reopened.

28 In support of that request they argue that the Opinion is vitiated by errors and inconsistencies and that it is necessary to reopen the oral part of the procedure so that the Court may request clarification from the referring court under Article 101 of its Rules of Procedure concerning the facts and rules under national law which the Advocate General has stated are lacking and make the request for a preliminary ruling inadmissible.

29 It must be borne in mind that, pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

30 In the present case, the Court, having heard the Advocate General, considers that it has sufficient information to give a ruling and that the case need not be decided on the basis of arguments which have not been debated between the parties.

31 It has, moreover, not been argued that one of the parties has, after the close of the oral part of the present procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court.

32 Moreover, the Court's power to request clarifications from a national court pursuant to Article 101 of its Rules of Procedure is merely an option of which the Court is free to avail itself or not in each case.

33 In addition, pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (see, inter alia, judgment in *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 29).

34 The application for the oral part of the procedure to be reopened must therefore be dismissed.

## Consideration of the questions referred

### *Admissibility*

35 Given that the governments of Member States have lodged written observations arguing that the reference for a preliminary ruling is inadmissible or expressed doubts about the admissibility of some of the questions referred, it should be pointed out that, according to the Court's consistent case-law, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, bound to give a ruling unless it is obvious that the request for a preliminary ruling is in reality designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgment in *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 17).

36 In the present case, the questions referred by the referring court concern the interpretation of provisions of EU law, namely Articles 4(1) and 19(4), (5) and (9) of Directive 2004/39.

37 Moreover, although the order for reference is somewhat succinct and marked by certain ambiguities arising, inter alia, from the fact that the referring court seems to endorse Mr and Mrs Lantos's line of argument as a basis for its questions, the fact remains that the Court has the necessary factual and legal elements it needs in order to be able to provide a useful answer to those questions.

38 It is apparent both from the order for reference and the written observations submitted to the Court that the loan agreement at issue in the main proceedings is characterised by the capital lent and the monthly instalments payable being denominated in a foreign currency, whilst the capital was paid out in domestic currency (Hungarian forints) and the reimbursement payments must be made in that currency.

39 As observed by the referring court, the agreement does not give rise to any actual currency flows or exchanges between Banif Plus Bank and Mr and Mrs Lantos, as the domestic currency is the only payment currency for both the lender and the borrowers, whilst the foreign currency serves as a unit of account.

40 The file submitted to the Court also indicates that the agreement contains clauses relating to the conversion of the capital lent and the monthly instalments into domestic currency. Those clauses provide that the amount of that capital is fixed on the basis of the purchase price of a currency on the date when the funds are advanced, whilst the amount of each monthly instalment is determined on the basis of the sale price of that currency on the date each monthly instalment is calculated.

41 In that context the referring court's questions are aimed principally at asking the Court whether, as Mr and Mrs Lantos argue, such an agreement, in containing terms relating to the exchange rate and having the effect of transferring the foreign exchange risk to the borrowers, comes within the scope of Directive 2004/39 since, under those clauses, Banif Plus Bank provides an investment service, with the result that, as a credit institution referred to in Article 1(2) of that directive, it was inter alia required to assess the suitability or appropriateness of the service to be provided pursuant to the relevant provision of Article 19 of that directive. Mr and Mrs Lantos further argue that, as no such assessment was made, the agreement in question should be held to be null and void.

42 The reference for a preliminary ruling is therefore admissible.

*Substance*

Preliminary observations

43 It should be observed at the outset that, in the earlier case which gave rise to the judgment in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282), the Kúria (Supreme Court) also asked the Court about the conditions of application of Directive 93/13 in the specific context of foreign currency denominated consumer loan agreements. The Kúria (Supreme Court), by judgment 2/2014 PJE, which was delivered in order to ensure uniform interpretation of the provisions of civil law, held that the clauses concerning the terms relating to the exchange rate, in so far as they introduce an asymmetry between the purchase price of the currency, applied when the loan is advanced, and its sale price, applied for the calculation of the monthly instalments, could be reviewed in order to determine whether they were unfair and in fact had to be held to be unfair given, inter alia, that the bank charges the client a fee equal to the difference between those exchange rates without providing a service to the client in return.

44 By contrast, in that same decision, the Kúria (Supreme Court) held that, in principle, the clauses of a foreign currency denominated loan agreement, such as the one at issue in the main proceedings, having as their effect that, in return for a more favourable interest rate than that offered on domestic currency denominated loans, the risk of currency appreciation rests entirely with the consumer,

concern the principal subject-matter of the agreement for the purposes of the national legislation aimed at transposing Article 4(2) of Directive 93/13, with the result that those clauses cannot be examined with a view to determining whether or not they are unfair.

45 Moreover, the Kúria (Supreme Court), in its judgment 6/2013 PJE, which was delivered in order to ensure uniform interpretation of the provisions of civil law, held that the conclusion of such a foreign currency denominated loan agreement does not give rise to the obligations to provide information laid down in Articles 40 to 42 of Law No CXXXVIII. of 2007, transposing Article 19 of Directive 2004/39, since, under such an agreement, the lender does not provide any of the investment services listed in Article 5 of that law, but rather disburses capital which may or may not be earmarked for a given financing project. Articles 40 and 42 of Law No CXXXVIII. of 2007 nevertheless do apply where such a loan also functions as an investment operation in so far as financial instrument-related investment services are provided in respect of the borrower's funds.

46 The present request for a preliminary ruling concerns solely the interpretation of Directive 2004/39.

47 That being said, there may be provisions of other EU law measures on consumer protection which are relevant to a case such as the one at issue in the main proceedings.

48 They include provisions of Directive 93/13, which lays down the mechanism for reviewing the substance of unfair terms, as provided for in the system of consumer protection put in place by that directive (see, to that effect, judgment in *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 42).

49 There are also the EU rules on consumer credit, including Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48) and Directive 2008/48, which contain provisions aimed at protecting consumers by imposing certain obligations on the lender with respect to information to be provided to the consumer.

The first and second questions

50 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 4(1)(2) of Directive 2004/39 must be interpreted as meaning that an investment service or activity within the meaning of that provision encompasses certain foreign exchange transactions, effected by a credit institution under clauses of a foreign currency denominated loan agreement such as the one at issue in the main proceedings, consisting in fixing the amount of the loan on the basis of the purchase price of the currency applicable when the funds are advanced and in determining the amounts of the monthly instalments on the basis of the sale price of that currency applicable when each monthly instalment is calculated.

51 In that regard, although it is for the national court alone to rule on the classification of those terms in accordance with the particular circumstances of the case, the fact remains that the Court has jurisdiction to elicit from the provisions of Directive 2004/39, in this case Article 4(1)(2), the criteria that the national court may or must apply to that end (see, to that effect, judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos*, C-604/11, EU:C:2013:344, paragraph 43).

52 That being so, there is nothing preventing a national court from asking the Court to rule in such a classification, as the referring court has done here by its first and second questions, although it is for the national court to make the findings of fact necessary for that classification in the light of all the material in the file in its possession.

53 The question arises in the present case as to whether the transactions effected by a credit institution, consisting in converting amounts expressed in a foreign currency into the domestic currency for the purpose of calculating the amount of a loan and repayment instalments in accordance with clauses on exchange rates contained in a loan agreement, may be classified as 'investment services or activities' within the meaning of Article 4(1)(2) of Directive 2004/39.

54 Under that provision, investment services and activities encompass any of the services and activities listed in Section A of Annex I thereto relating to any of the instruments listed in Section C of Annex I.

55 Yet it is clear that the transactions at issue in the main proceedings do not come within the scope of Section A, consisting as they do of exchange activities which are entirely incidental to the granting and repayment of a foreign currency denominated consumer loan.

56 In fact, subject to verification by the referring court, those transactions are restricted to converting the amounts of the loan and the monthly instalments denominated in the foreign currency in question (the currency in which payment obligations are to be met) into the domestic currency (the currency in which the payments are actually made), on the basis of the exchange rates for the purchase and sale of the foreign currency.

57 Transactions such as this serve no other function than to be the manner of performing the fundamental payment obligations under the loan agreement, consisting in the lender's making the capital available and the borrower's repayment of the capital together with interest. Those transactions do not have as their purpose the completion of an investment, as the consumer is seeking only to secure funds with a view to purchasing a consumer good or a service, not, for example, to manage a foreign exchange risk or speculate on a currency's exchange rate.

58 Moreover, and contrary to the assertions of Mr and Mrs Lantos, those transactions do not come specifically within the scope of 'dealing on own account' as referred to in Section A(3) of Annex I to Directive 2004/39.

59 Under Article 4(1)(6) of Directive 2004/39, 'dealing on own account' means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments.

60 In the present case, however, subject to verification by the referring court, the foreign exchange transactions effected by a credit institution under a loan agreement such as the one at issue in the main proceedings do not concern trading resulting in the conclusion of transactions in one or more financial instruments.

61 In fact, these types of foreign exchange transactions serve merely to secure the granting and repayment of the loan.

62 Nor can it be argued that transactions effected under a loan agreement such as the one at issue in the main proceedings come within the scope of 'ancillary services' as referred to in Section B of Annex I to Directive 2004/39.

63 Although under Section B(2) of Annex I the grant of a loan or credit may constitute an ancillary service, that will be so only where the credit or loan is granted to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction. Yet in the present case it is common ground that the purpose of the loan at issue in the main proceedings is not to enable such a future transaction to be effected.

64 By contrast, credit agreements granted by a credit institution and coming within the scope of Section B(2) do have such a purpose and therefore fall outside the scope of Directive 2008/48, as provided for in Article 2(2)(h) thereof.

65 Moreover, Section B(4) of Annex I to Directive 2004/39 refers to '[f]oreign exchange services where these are connected to the provision of investment services'.

66 It is clear from that reference that foreign exchange services of themselves do not constitute investment services coming within the scope of Section A of Annex I to that directive.

67 The foreign exchange transactions at issue in the main proceedings are not linked to an investment service within the meaning of Article 4(1)(2) of Directive 2004/39, but rather to a transaction which itself does not constitute a financial instrument as defined in Article 4(1)(17) of that directive.

68 Given the material in the file submitted to the Court and subject to verification by the referring court, contrary to the assertions of Mr and Mrs Lantos, the foreign exchange transactions effected by a credit institution in the performance of a loan agreement such as the one at issue in the main proceedings do not relate to one of the financial instruments referred to in Section C of Annex I to Directive 2004/39, particularly not futures.

69 As usually construed in finance law, futures are a type of commodity derivative by which two parties undertake respectively to purchase and to sell, on a subsequent date, a so-called 'underlying' asset at a price which is fixed at the time of conclusion of the agreement.

70 A consumer loan agreement such as the one at issue in the main proceedings does not have as its purpose the sale of a financial asset at a price which is fixed at the time of conclusion of the agreement.

71 As a first point, in an agreement such as the one at issue in the main proceedings, there is no distinction to be drawn between the loan agreement itself and a future currency sales transaction, since the latter serves solely to perform the fundamental obligations under the agreement, namely the payment of the capital and the scheduled payments, it being understood that the transaction in itself is not a financial instrument.

72 The clauses of such a loan agreement relating to currency conversion accordingly do not constitute a financial instrument distinct from the operation which is the object of that agreement, but merely a term of the agreement which is an inseparable part of its performance.

73 Thus, a case such as the one at issue in the main proceedings is fundamentally different from the one which gave rise to the judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos* (C-604/11, EU:C:2013:344), which concerned a futures type of financial instrument, being a so-called 'swap' agreement aimed at protecting bank customers against fluctuations in variable interest rates to which they had been exposed as a result of a subscription for certain financial products with those banks.

74 As a second point, in a loan agreement such as the one at issue in the main proceedings, the value of the currencies to be taken into account for the calculation of the repayments is not fixed in advance because it is determined on the basis of the sale price of those currencies on the due date of each monthly instalment.

75 It follows, subject to verification by the referring court, that foreign exchange transactions effected by a credit institution in the performance of a foreign currency denominated loan agreement such as the one at issue in the main proceedings cannot regarded as investment services, with the result that that institution inter alia is not subject to any obligations to assess the suitability or appropriateness of the service to be provided as laid down in Article 19 of Directive 2004/39.

76 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 4(1)(2) of Directive 2004/39 must be interpreted as meaning that, subject to verification by the referring court, an investment service or activity within the meaning of that provision does not encompass certain foreign exchange transactions, effected by a credit institution under clauses of a foreign currency denominated loan agreement such as the one at issue in the main proceedings, consisting in fixing the amount of the loan on the basis of the purchase price of the currency applicable when the funds are advanced and in determining the amounts of the monthly instalments on the basis of the sale price of that currency applicable when each monthly instalment is calculated.

The third and fourth questions

77 In view of the answer given to the first and second questions, there is no need to answer the third and fourth questions.

78 The third and fourth questions presuppose that the foreign exchange transactions at issue in the main proceedings may be categorised as investment services or activities within the meaning of Article 4(1)(2) of Directive 2004/39.

79 In so far as relevant, it may be recalled in respect of the fourth question that the Court has held previously that it is for the internal legal order of each Member State to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39, subject to observance of the principles of equivalence and effectiveness (judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos*, C-604/11, EU:C:2013:344, paragraph 58).

**Costs**

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**Article 4(1)(2) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC must be interpreted as meaning that, subject to verification by the referring court, an investment service or activity within the meaning of that provision does not encompass certain foreign exchange transactions, effected by a credit institution under clauses of a foreign currency denominated loan agreement such as the one at issue in the main proceedings, consisting in fixing the amount of the loan on the basis of the purchase price of the currency applicable when the funds are advanced and in determining the amounts of the monthly instalments on the basis of the sale price of that currency applicable when each monthly instalment is calculated.**

[Signatures]