Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 27 April 2017 [1]

Case C-186/16

Ruxandra Paula Andriciuc and Others
v
Banca Românească SA

(Request for a preliminary ruling from the Curtea de Apel Oradea (Romania))

(Reference for a preliminary ruling — Unfair terms in consumer contracts — Directive 93/13/EEC — Articles 3(1) and 4(2) — Credit agreements denominated in a foreign currency — Terms exempt from assessment of their unfairness — Contractual terms relating to the definition of the main subject matter of the contract or the adequacy of the price which are drafted in plain intelligible language — Time for the assessment of whether there is a significant imbalance between the rights and obligations of the parties arising under the contract — Scope and level of detail of the information required to be provided by the bank)

1. By the present reference, the Curtea de Apel Oradea (Court of Appeal of Oradea, Romania) asks the Court, in the context of proceedings between a banking institution and several individual borrowers, as to the interpretation to be given to Article 3(1) and Article 4(2) of Directive 93/13/EEC. [2] The proceedings arise out of claims that certain allegedly unfair terms, incorporated into consumer credit agreements denominated in foreign currencies, in particular terms concerning 'foreign exchange risk' and the obligation to repay the loan in the foreign currency in which it was taken out, are invalid.

2. While the Court has already had occasion to provide certain clarifications as to the interpretation of the provisions of Directive 93/13 in the very specific context of credit agreements denominated in foreign currencies, it is invited by the present request for a preliminary ruling to provide further detail, firstly as to the relevant time for assessing whether there is a 'significant imbalance' to the detriment of the consumer, within the meaning of Article 3(1) of that directive, and secondly as to the

1 Original language: French.

2 Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

scope of Article 4(2) of the directive, which excludes terms defining the 'main subject matter' of a contract, amongst others, from the assessment of unfairness. More fundamentally, the reference provides an opportunity to rule on the lawfulness of foreign currency loans in themselves,[3] in a particularly sensitive context.[4]

Legal context

EU law

3. Article 1 of Directive 93/13 provides:

'1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.'

4. Under Article 3(1) of the directive, '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'.

5. Article 4 of Directive 93/13 is worded as follows:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. 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 supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language.'

6. Article 5 of the directive provides:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language …'

3 The present matter is therefore to be distinguished both from that which gave rise to the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282), which related to contractual terms determining the rates of exchange applicable, respectively, to the advance and repayment of the loan, and from that which gave rise to the judgment of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127), which related to terms permitting the lender to alter the rate of interest in certain circumstances and providing for it to apply a risk charge.

4 See point 1 of my Opinion in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:85). According to the information available to me, loans in Swiss francs appear to have been taken out by more than 50 000 households in Romania. It appears, furthermore, from information supplied in the context of this matter that the rate of exchange between the Swiss franc and the Romanian leu more or less doubled between 2007 and 2014. It is also important to note that, by decision of 7 February 2017, the Curtea Constituțională (Constitutional Court, Romania), sitting as a full court, ruled that Romanian legislation reducing the rate of exchange to be applied upon repayment of loans in Swiss francs, apparently so as to avoid and remedy situations of excessive indebtedness, was invalid. That court held, in particular, that in proceeding in that way, the legislature had infringed the principle of legal certainty and, consequently, acted in breach of constitutional rules. Finally, I note that other matters which are currently pending (see, inter alia, Case C-627/15, *Gavrilescu*; Case C-483/16, *Sziber*; Case C-38/17, *GT*; Case C-51/17, *Ilyés and Kiss*; Case C-118/17, *Dunai*; Case C-119/17, *Lupean and Lupean*; and Case C-126/17, *Czakó*), also relate to the practice of lending in foreign currencies.

Romanian law

Law No 193/2000

7. La Legea nr. 193/2000 privind clauzele abuzive din contractele încheiate între comercianți și consumatori (Law No 193/2000 on unfair terms in contracts concluded between sellers or suppliers and consumers), of 10 November 2000, in its republished version [5] ('Law No 193/2000'), is intended to transpose Directive 93/13.

8. Under Article 4 of that law:

'1. A contract term which has not been directly negotiated with the consumer is regarded as being unfair if, considered in isolation or together with other provisions of the contract, it causes, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance in the parties' rights and obligations.

…

6. 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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language.'

9. Under point 1(p) of the annex to Law No 193/2000, contract terms providing for 'the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded' are to be regarded as unfair. It is stipulated that 'this paragraph is without prejudice to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described'.

10. Point 2 of that annex provides:

'Subparagraphs 1(a), 1(p) and 1(t) do not apply to:

(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency or other international payment instruments.'

11. The referring court states that Article 4(6) and point 2 of the annex referred to above were introduced by Law No 363/2007, which entered into force on 31 December 2007 and that, before the entry into force of Law No 363/2007, point 1(p) of the annex was in the following terms:

'Contractual terms which allow the price to be determined at the time of delivery, or to be increased at the time of delivery, by comparison with that agreed when the contract was concluded, shall be regarded as unfair unless the consumer has the right to cancel the contract if he considers the final price to be too high in relation to that initially agreed.'

5 Most recently republished in the *Monitorul Oficial al României*, Part I, No 543, of 3 August 2012.

The Civil Code

12. Article 1578 of the Civil Code, in the version in force on the date on which the contracts were concluded, provided:

'The obligation arising from a money loan is always limited to the same numerical sum shown in the contract.

Whenever the value of a currency increases or decreases, before the due date for payment, the debtor must return the sum lent and is obliged to return that sum only in the currency used at the time of payment.'

13. Article 970 of the Civil Code, in the version in force on the date on which the contracts were concluded, was in the following terms:

'Contracts must be performed in good faith.

They are binding not only in regard to what is specifically provided for therein but also as regards all consequences which arise therefrom — according to their nature — in accordance with equity, custom or law.'

Law No 190/1999

14. Article 8 of Law No 190/1999 on mortgage lending for investment in immovable property ('Law No 190/1999'), in the version in force on the date on which the contracts at issue were concluded, provided:

'Before signature of a mortgage loan agreement for investment in real property, the authorised institution shall provide the borrower with a written offer containing all the terms of the contract and stating the period for which the offer is valid, which must not be less than 10 days from receipt of the offer by the potential debtor.'

15. Article 14(1) of Law No 190/1999 is in the following terms:

'In a mortgage loan agreement for investment in immovable property, the amount of the loan granted may be denominated in leu or in a convertible currency and may be made available to the borrower in one or more payments.'

Regulation No 3

16. The referring court states that Article 4 of Regulation No 3 of the Banca Națională a Romaniei (National Bank of Romania), of 12 March 2007, on the limitation of credit risk in credit arrangements intended for individuals, entered into force on 22 August 2008 and provides:

'Lenders must inform clients, by means of a statement in repayment schedules relating to credit agreements or, where there is no repayment schedule, by means of a separate statement in the credit agreement, of the possibility that the sums due will increase in the event of a change in the exchange rate or the interest rate, or in the event of an increase in the cost of the credit arrangement arising from the commissions and other charges relating to the administration of the credit arrangements for which provision is made in the agreement.'

The main proceedings, the questions referred and the procedure before the Court

17. It is apparent from the facts of the main proceedings, as set out by the referring court, that between April 2007 and October 2008, Ms Ruxandra Paula Andriciuc and 68 other individuals ('the borrowers') concluded loan agreements in Swiss francs with the bank Banca Românească SA ('the bank') with a view to acquiring immovable property, refinancing other credit arrangements or meeting personal needs.

18. Under Article 1(2) of the agreement signed by each of the borrowers, they were obliged to make monthly repayments of the loans in Swiss francs. Article 8(2) of the agreement provided that 'all payments made by the borrower by way of repayment of the loan must be made in the currency in which the loan was advanced'. Furthermore, Articles 9(1) and 10(3)(9) of the contract comprised two terms permitting the bank, once the monthly payments had fallen due or in the event that the borrower failed to comply with the obligations arising from the contract, to debit the borrower's account and, if necessary, to carry out any conversion of the balance available on the borrower's account into the currency of the contract, at the bank's exchange rate as it stood on the day of that operation. Pursuant to those terms, any difference in the exchange rate was borne entirely by the borrower.

19. According to the borrowers, the bank was in a position to foresee the movement and fluctuations in the exchange rate for the Swiss franc. They maintain that, in failing to inform them in a transparent manner as regards such fluctuations, the bank acted in breach of its obligations to inform, warn and advise, and of its duty to draft contractual terms in plain and intelligible language, so as to enable the borrower to understand the obligations arising from the contract which he has concluded.

20. Taking the view that the terms requiring the loan to be repaid in Swiss francs and casting the foreign exchange risk on the borrowers were unfair terms, on 2 April 2014 the borrowers brought an action before the Tribunalul Bihor (Bihor Tribunal, Romania) on that basis, seeking, essentially, a declaration that those terms were completely invalid as well as an order requiring the bank to produce, for each credit agreement, a new repayment schedule providing for the conversion of the loan into Romanian leu, at the exchange rate which had been in force when the credit agreement was concluded.

21. By its judgment No 280/COM of 30 April 2015, the Tribunalul Bihor (Bihor Tribunal) dismissed the action.

22. The borrowers brought an appeal against that judgment before the referring court which, entertaining doubts as to the interpretation of certain provisions of Directive 93/13, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 3(1) of Directive 93/13 be interpreted as meaning that the significant imbalance in the parties' rights and obligations arising from the contract must be evaluated strictly by reference to the time when the contract was concluded or does that imbalance also extend to the case where, during the performance of the contract, whether it is performed at regular intervals or continuously, performance by the consumer has become excessively burdensome in comparison with the time when the contract was concluded because of significant variations in the exchange rate?

(2) Must the plainness and intelligibility of a contractual term, within the meaning of Article 4(2) of Directive 93/13, be understood to mean that that term must provide not only for the grounds of its incorporation in the contract and the term's method of operation, or must it also provide for all the possible consequences of the term as a result of which the price paid by the consumer may vary, for example, foreign exchange risk, and in the light of Directive 93/13 may it be considered that the bank's obligation to inform the customer at the time of granting the credit relates solely

to the conditions of credit, namely, the interest, commissions, and guarantees required of the borrower, since such an obligation may not include the possible overvaluation or undervaluation of a foreign currency?

(3) Must Article 4(2) of Directive 93/13 be interpreted as meaning that the expressions "the main subject matter of the contract" and "adequacy of the price and remuneration, on the one hand, as against the services or goods supplie[d] in exchange, on the other" include a term incorporated in a credit agreement entered into in a foreign currency concluded between a seller or supplier and a consumer, which has not been negotiated individually, pursuant to which "the credit must be repaid in the same currency"?'

23. Observations have been lodged by the borrowers, the bank, the Romanian and Polish Governments and the Commission.

24. A hearing was held on 9 February 2017, which was attended by the borrowers, the bank, the Romanian Government and the Commission.

Analysis

25. Before giving individual consideration to the questions referred, I wish first of all to make some observations as to the admissibility of the present reference, a matter which has been raised by the bank.

26. Indeed, the bank doubts the admissibility of the referred questions. It argues that the questions referred were neither necessary — having regard to the existing case-law in the field — nor relevant — having regard to the nature of the main proceedings. The reference for a preliminary ruling is really directed, it maintains, to achieving an individual solution with a view to the concrete resolution of the main proceedings.

27. In this regard, it suffices to point out, first, that references for a preliminary ruling have the benefit of a presumption of relevance and, secondly, that is not obvious that the questions referred in the present case are of no utility to the referring court, which is best placed to judge the expediency of the reference.[6]

28. In this regard, it is well established that the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[7]

29. Turning, those observations having been made, to the substance of the questions referred in this case, they concern, first, the approach to be taken, under Directive 93/13, to a change occurring after the conclusion of the contract, secondly, the assessment of the plainness and intelligibility of contractual terms in that context, and thirdly, the definition of what falls within 'the main subject matter of the contract' and the 'adequacy of the price' for the purposes of Article 4(2) of the directive.

6 Even where there is case-law of the Court resolving the point of law at issue, national courts and tribunals remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so (see, in particular, judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 32 and the case-law cited)).

7 For a recent application of these principles, reference is made to the judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraphs 29 to 34).

30. It seems to me, as was suggested by the Romanian Government, that it is appropriate to consider these questions in reverse order. The question of the applicability of Article 4(2) of Directive 93/13, which excludes certain contractual terms from the assessment of unfairness, and that of whether the terms at issue are 'in plain and intelligible language' arise before any substantive assessment of the fairness of those terms. [8]

31. Against that background, it is important to observe that, 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 93/13, in this case Articles 3(1) and 4(2), the criteria that the national court may or must apply when examining contractual terms with regard to those provisions. [9]

The third question: applicability of Article 4(2) of Directive 93/13

32. By its third question, the referring court asks, essentially, whether the contractual term under which the loan must be repaid in the same currency as that in which it was granted — and which, in the view of the borrowers, cast the 'foreign exchange risk' on to the consumer — falls within Article 4(2) of Directive 93/13.

33. After making a number of preliminary remarks on the scope of that provision, in the light of the lessons derived from the case-law, I will consider the case of loan agreements such as those to which the main proceedings relate.

Preliminary remarks on the scope of Article 4(2) of Directive 93/13

34. Under Article 4(2) of Directive 93/13, terms relating to 'the definition of the main subject matter of the contract' and to 'the adequacy of the price and remuneration, on the one hand, as against the services or goods supplie[d] in exchange, on the other' are exempt from being assessed for unfairness. This provision is based on the idea that the core of the contractual relationship (essentialia negotii) must not, in principle, be affected by outside intervention, [10] and in particular by the intervention of the courts.

35. The Court has, in its most recent case-law, had occasion to provide certain important clarifications as to the scope of that provision and the criteria which the national court may or must apply when examining contractual terms with regard to them.

36. First, it has held that Article 4(2) of Directive 93/13 must be strictly interpreted, since it lays down an exception to the mechanism for reviewing the substance of unfair terms provided for by Directive 93/13. [11]

37. Secondly, it has emphasised that the expressions used in Article 4(2) of Directive 93/13 must be given an autonomous and uniform interpretation, which must take into account the context of that provision and the purpose of the legislation in question. [12]

8 See for a similar approach, judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 41 and 42).

9 See, in particular, judgments of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 48); of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 45); and of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 53).

10 See my Opinion in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:85, point 33).

11 See, in particular, judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 42); of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 49); and of 23 April 2015, *Van Hove* (C-96/14, EU:C:2015:262, paragraph 31).

12 See judgment of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 50 and the case-law cited).

38. In relation, first, to the expression 'main subject matter of the contract', this refers to terms that lay down the *essential obligations* of the contract and, as such, *characterise it*. Terms which are ancillary to those that define the very essence of the contractual relationship cannot fall within the main subject matter of the contract. It is important to emphasise that, in distinguishing what is 'essential' from what is 'ancillary' in a given contract, *it is necessary to have regard to the nature, general scheme and stipulations* of the loan agreement at issue and to its legal and factual *context*.[13]

39. The Court has also stated that terms relating to price and remuneration are limited in scope, since they do not relate to the adequacy of the price as against the remuneration. Since no scale or criterion exists that can provide a framework for, and guide the court in carrying out a review, the exclusion from the assessment of unfairness cannot come into play.[14]

Do terms requiring a loan to be repaid in a certain currency relate to the main subject matter of the contract or the adequacy of the price and remuneration?

40. In the present case, it is necessary to determine whether a term which has not been individually negotiated, and which is incorporated in a loan agreement concluded in a foreign currency between a seller or supplier and a consumer, under which the loan must be repaid in that same currency, falls within either of the exclusions set out in Article 4(2) of Directive 93/13.

41. Taking account of the limited scope of the exclusion concerning terms relating to price and remuneration, referred to in point 39 above, I think it is inconceivable that the term requiring the loan to be repaid in the currency in which it was granted could be excluded on the second ground.

42. On the other hand, in my view that term does relate to the main subject matter of the contract. It seems to me that a term requiring a loan to be repaid in the currency in which it was granted constitutes an essential element of the debtor's obligation to repay the amount made available to him by the lender.

43. In general terms, it should be observed that, in the case of a loan agreement, the essential obligation of the bank is to make the amount loaned available, while that of the borrower is to repay the principal and interest (which represents the price of the loan). Those obligations are inextricably linked to the currency in which the loan was granted, and it is impossible to regard only the numerical amounts stated, and not the reference currency, as relating to the main subject matter of the contract.[15]

44. The fact that a loan is required to be repaid in a particular currency quite evidently constitutes one of the cornerstones of a loan agreement, and in particular a loan denominated in a foreign currency. By a loan agreement, the lender agrees, principally, to make a certain sum of money available to the borrower. For his part, the borrower agrees, principally, to repay, generally with interest, that sum according to the schedule provided for. Those essential obligations therefore relate to a sum of money which must necessarily be defined by reference to a particular standard of value, namely the currency of advance and repayment stipulated in the loan agreement.

13 See, in particular, judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 49 and 50); of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraphs 53 and 54); and of 23 April 2015, *Van Hove* (C-96/14, EU:C:2015:262, paragraph 33).

14 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 54 and 55), and of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraphs 55 and 56).

15 For a more detailed examination of the 'essential obligations' which characterise a loan agreement, I refer if I may to my Opinion in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:85, points 56 to 65).

45. That conclusion is, to my mind, reinforced by the fact that, in the absence of any indication as to the currency in which a loan is to be repaid, it is presumed that it must be repaid in the same currency as that in which the loan was granted. By virtue of the principle of monetary nominalism, a legal rule which is widespread, particularly in legal systems in the civil law tradition, a monetary obligation must be extinguished by payment of the numerical sum stated in the agreement between the parties, which is not to be overridden on grounds of value. This rule, which appears inter alia in Article 1578 of the Romanian Civil Code (see point 12 above), prohibits the courts, in principle, from intervening so as to take account of fluctuations in the value of money, whether upward or downward, by adjusting the amount due on the day for payment. When questioned at the hearing in this regard, the Romanian Government confirmed that, in the absence of any indication in the loan agreement as to the currency in which a loan is to be repaid, the conclusion must be that it is to be repaid in the same currency as that in which the loan was advanced.

46. In relation, moreover, to the loans at issue in the main proceedings, having regard to the nature, general scheme and provisions of the contract, the obligation to repay in Swiss francs is, in my view, an essential obligation.

47. That conclusion follows both from the wording of the contractual terms at issue (see point 18 above) and from the factual and legal context in which the loan agreements at issue were concluded.

48. Two aspects of the background, particular to the main proceedings, seem to me to be decisive in this regard.

49. The first is that the foreign currency loan agreements at issue in the main proceedings are generally subject to a lower rate of interest than those in the national currency, precisely because and in consideration of the 'foreign exchange risk' to which they may give rise in the event of a fall in the value of the national currency. [16]

50. The second aspect which should be mentioned is that, as a matter of fact, the bank granted the loans in Swiss francs and that it is entitled to repayment of those loans in the same currency. At no point does the bank, as the Commission seems to suggest, carry out a currency exchange, the borrowers remaining free to make the monthly repayments in Swiss francs regardless of the source. The obligation to make the monthly repayments in Swiss francs is far from being an ancillary element of the contract. It does not relate to an ancillary payment arrangement, but to the very nature of the borrower's obligation.

51. In this regard, it should be observed that the circumstances giving rise to the present case differ from those which gave rise to *Kásler and Káslerné Rábai*. [17] In that case, not only was the loan denominated in Swiss francs and required to be repaid in the national currency (the Hungarian forint), but the monthly repayments were calculated according to the banking institution's own selling rate for that currency. Contrary to the approach advocated by the Polish Government, in my opinion there is a difference between credit agreements in foreign currencies and credit arrangements *index-linked* to foreign currencies. In the latter case, the repayment is always made in the national currency. It is, in my view, incorrect to equate a term requiring repayment in a foreign currency with a

16 See, in particular, Decision No 2/2014 PJE of the Kúria (Supreme Court, Hungary), delivered in the interests of a uniform interpretation of provisions of civil law, to which the judgment of 3 December 2015, *Banif Plus Bank* (C-312/14, EU:C:2015:794, paragraphs 43 to 45) makes express reference. In that decision, the Kúria (Supreme Court) held that, in principle, terms of a loan agreement denominated in a foreign currency under which, in consideration of a more favourable rate of interest than was offered in relation to loans denominated in the national currency, the risk of appreciation of the foreign currency was borne entirely by the consumer, related to the main subject matter of the contract.

17 See judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282).

so-called 'monetary' term. To recharacterise the contract at issue as a credit agreement which was merely 'index-linked to a foreign currency' would fail to give due weight to the fact that the reference to the foreign currency is a central element in the reciprocal obligations of the parties in the conclusion of the loan agreement.

52. Hence, unlike a term relating to a mechanism for amending the prices of services provided to the consumer (such as that at issue in *Invitel*[18]) or of the services offered by the seller or supplier, the 'foreign exchange risk' is clearly one of the key features of a loan agreement in a foreign currency. Similarly, while, as the Court held in *Matei*,[19] the 'total cost of the credit' within the meaning of Article 3(g) of Directive 2008/48/EC,[20] cannot be equated with the 'main subject matter of the contract', the currency in which a loan is to be repaid is an essential obligation which characterises the loan agreement.

53. Finally, before concluding in relation to the third question referred, I think it is important briefly to address the question of whether, in the particular context of this case, Article 1(2) of Directive 93/13 can be invoked.

54. Under that provision, 'the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the [Union] are party …' are not subject to the provisions of the directive. This exclusion is justified by the fact that it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts.[21]

55. In this regard, the fact that the national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing that court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not it has referred to those points in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute.[22]

56. In the present case it has been observed, in particular by the Romanian Government and the bank, that the question arises of whether the terms at issue are no more than a reflection of the principle of monetary nominalism enshrined in Article 1578 of the Romanian Civil Code (see point 12 above).

57. The Court has confirmed that Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term included in a contract concluded by a seller or supplier with a consumer falls outside the scope of that directive only if that contractual term reflects the content of a mandatory statutory or regulatory provision, which is a matter for the national court to determine.[23]

18 See judgment of 26 April 2012, *Invitel* (C-472/10, EU:C:2012:242).

19 Judgment of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127).

20 Directive 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).

21 See, in particular, judgment of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 28) and the 13th recital of Directive No 93/13.

22 See, for example, judgments of 27 October 2009, *ČEZ* (C-115/08, EU:C:2009:660, paragraph 81 and the case-law cited), and of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 71 and the case-law cited).

23 See, for example, judgment of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraph 80).

58. In the present case, there is room for doubt, first, as to whether the principle of monetary nominalism was absolutely applicable on the date of conclusion of the contracts at issue and, secondly, as to whether the alleged unfairness arises solely from national law or from the combined effect of national law and the terms at issue. Having regard to the restricted scope of the exclusion provided for by Article 1(2) of Directive 93/13, it is not certain that that exclusion would apply, as Article 1578 of the Civil Code could be regarded as a suppletive rule. In any event, it is for the national court alone to make the necessary verifications in this regard.

59. In the light of all of those considerations, I propose that the Court's answer should be that Article 4(2) of Directive 93/13 must be interpreted as meaning that it is for the referring court to assess, having regard to the nature, the general scheme and the stipulations of the loan agreements concerned, as well as the legal and factual context in which those matters are to be viewed, whether the term in question, under which the loan must be repaid in the same currency as that in which it was advanced, reflects statutory provisions of national law, within the meaning of Article 1(2) of that directive. If not, the referring court must regard that term as falling within the 'main subject matter of the contract', which exempts the term from assessment of its potential unfairness. That may be the case in relation to a term incorporated in a loan agreement under which the borrower is required to repay the sum in the same currency in which it was advanced.

The second question referred for a preliminary ruling: whether the contractual terms are in 'plain and intelligible language'

60. The referring court asks the Court to determine whether the inclusion of a contractual term, here a term obliging the consumer to repay the loan granted to him in the same currency, must be accompanied by comprehensive information as to the economic consequences which might arise from that term.

61. In this regard it is necessary, first of all, to emphasise that the requirement for contractual terms binding a consumer and a seller or supplier to be drafted in plain intelligible language must be observed even where the term falls within Article 4(2) of Directive 93/13.[24] The terms referred to in that provision, while they come within the area covered by the directive, escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language.[25] In other words, regardless of the conclusion the national court reaches as to the applicability of Article 4(2) of Directive 93/13 to the terms at issue, the requirement for them to be drafted in 'plain intelligible language' applies.

62. Secondly, it is now well established that the requirement for the terms of contracts concluded with consumers to be drafted in plain intelligible language, which must be analysed in the light of the 20th recital of Directive 93/13[26] and which has the same scope as that referred to in Article 5 of the directive, is of fundamental importance and implies that *the consumer acquires actual knowledge* of all the terms. It is on the basis of the information provided by the seller or supplier that the consumer decides whether he wishes to conclude a contract with the seller or supplier.[27]

24 Judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 68).

25 See judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraph 32).

26 That recital requires that 'contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail'.

27 See judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 66 to 70 and the case-law cited).

63. Finally, it is also well established that that requirement must be understood in a broad sense; it cannot be reduced to a formal and grammatical matter but implies that the consumer is able to foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it, such as a possible change in the charges borne by him.[28] Against that background, it is important to take into account the level of attention which can be expected of an average consumer, who is reasonably well informed and reasonably observant and circumspect.[29]

64. In this regard, it seems to me to be crucial, particularly where there are especially onerous financial obligations such as those which may characterise long term loans, for the seller or supplier to provide the consumer with sufficient information to enable him to enter into the contract with full knowledge.

65. More specifically, where a seller or supplier offers a consumer a standard loan agreement, the seller or supplier must set out, through readily intelligible information, its potential consequences for the economic situation of the consumer. The consumer must, amongst other things, be in a position to understand that he is agreeing, in consideration of certain financial advantages (such as a low rate of interest, for example) to bear a certain level of risk. It should be pointed out that, as regards loans which do not relate to immovable property, there are, in addition to the general obligation to provide information imposed by Directive 93/13, more specific obligations laid down by the consumer credit directives.[30]

66. To return to the present case, while the average consumer, who is reasonably observant and circumspect, is, in principle, able to grasp that a currency exchange rate is subject to fluctuation, he must on the other hand be clearly informed of the fact that, in entering into a loan agreement denominated in a foreign currency, he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income.[31]

67. Against that background, the seller or supplier, here the bank, must be required to set out, having regard to its expertise and knowledge in the area, the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency.

68. However, in my view it would be unreasonable for the seller or supplier to be required to inform the consumer, when the credit agreement is concluded, of the occurrence of subsequent events or developments which it could not have anticipated. Sellers or suppliers cannot be required to provide consumers with information other than that which is or should objectively be within their knowledge when the contract is concluded.

69. In the present case, there being nothing to show that the bank was in a position to anticipate a change — indeed, a historic change — in the rate of exchange between the Romanian leu and the Swiss Franc as large as that which has occurred since 2007, and that it deliberately omitted to inform borrowers, it seems to me that it would be clearly unreasonable for the seller or supplier alone to be required to bear the foreign exchange risk. Nevertheless, it is for the national court to verify that the consumers had properly understood the content of the terms of the loan agreement and thus that they were fully able to assess its economic consequences.

28 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 71 and 72); of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 73); and of 9 July 2015, *Bucura* (C-348/14, not published, EU:C:2015:447, paragraphs 51, 52, 55 and 60).

29 See, to this effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 74), and of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 75).

30 See, in particular, Articles 4 to 6 of Directive 2008/48.

31 See, in this regard, the Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (ESRB/2011/1) (OJ 2011 C 342, p. 1), Recommendation A – Risk awareness of borrowers, paragraph 1.

70. In this regard, the issues arising in the present case must be distinguished from those which gave rise to the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282).

71. The decisive issue in that case was whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed. [32] I reiterate that what was at issue in that case was not, directly, the fluctuation of exchange rates, but the fact that the monthly loan repayments were calculated in accordance with the bank's selling rate for the currency.

72. In conclusion, the requirement for a contractual term to be drafted in plain intelligible language entails that the term relating to the repayment of the loan in the same currency must be understood by the consumer both on a formal and grammatical level, and also in terms of its concrete effect, in the sense that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not be only aware of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, but also able to assess the potentially significant economic consequences of such a term for his financial obligations. That requirement cannot, however, go so far as to oblige the seller or supplier to anticipate and inform the consumer of subsequent changes which were not foreseeable, such as those manifested in the fluctuations of the exchange rates of the currencies at issue in the main proceedings, or to bear the consequences of such changes.

The first question: the time for assessing whether there is a 'significant imbalance'

73. The referring court wishes to know whether the 'significant imbalance' in the rights and obligations of the parties to the contract, within the meaning of Article 3(1) of Directive 93/13, must be evaluated solely by reference to the situation at the time when the contract was concluded, or whether regard can be had to a change which has taken place after the conclusion of the contract and has rendered the consumer's obligations excessively burdensome in comparison with the time when the contract was concluded.

74. As a preliminary remark, I think it should be pointed out that, as is apparent from the scheme of Directive 93/13 and the system of protection for which it provides, that question is meaningful only if it is concluded that the term at issue does not fall within Article 4(2) of the directive — because it does not relate either to the subject matter or to the price of the service, or because it is not drafted in plain intelligible language — and that the substantive issue of unfairness must therefore be considered. Otherwise, the question appears to be irrelevant.

75. In the event that it proves necessary for the Court to provide clarification as to the time at which the existence of a 'significant imbalance' in the rights and obligations of the parties, within the meaning of Article 3(1) of Directive 93/13, is to be assessed, [33] in my view it is clearly apparent both from the wording of the provisions of that directive and from the nature of the protection it confers on the consumer that the existence of such an imbalance must be assessed by reference to the circumstances and items of information available at the date of conclusion of the contract at issue.

32 See judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 74).

33 See, in particular, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164), and of 16 January 2014, *Constructora Principado* (C-226/12, EU:C:2014:10).

76. Firstly, in relation to the wording of the relevant provisions of that directive, under Article 3(1) thereof, the unfairness of a contractual term is to be assessed by reference to whether there is 'a significant imbalance in the *parties' rights and obligations arising under the contract*'. That provision a priori prevents any reference being made to events or developments taking place after the conclusion of the contract at issue.

77. Similarly, pursuant to Article 4(1) of the directive, 'the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, *at the time of conclusion of the contract*, to all the *circumstances attending the conclusion of the contract* and to all the other terms of the contract or of another contract on which it is dependent'. [34]

78. Those provisions indicate quite clearly that the unfairness of a contractual term is to be assessed by reference to the time of conclusion of the contract at issue.

79. Secondly, as regards the objective pursued by Directive 93/13, it is intended to ensure that the consumer is protected against the incorporation by sellers or suppliers of contractual terms which are found, having regard to the circumstances attending the conclusion of the contract and to its other terms, [35] to give rise to a significant imbalance between the parties to the contract. Against that background it is important to verify that the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to enter into the contract. [36]

80. While, under Directive 93/13, it is self-evident that the assessment of unfairness of a term — and thus of the existence of a significant imbalance between the parties to the detriment of the consumer — must take account of all the circumstances which could have been known to the seller or supplier at the time of conclusion of the contract, and which were such as to affect the future performance of the contract, that assessment cannot in any circumstances depend on the occurrence of events subsequent to the conclusion of the contract which are beyond the control of the parties.

81. In my view, while contractual terms creating an imbalance in favour of the seller or supplier must be censured under Directive 93/13, the seller or supplier nevertheless cannot be held responsible for developments subsequent to the conclusion of the contract which are beyond his control. If it were otherwise, not only would disproportionate obligations be imposed on the seller or supplier, but the principle of legal certainty would also be undermined.

82. In this regard, it is necessary to make a clear distinction between the situation in which a contractual term brings about an imbalance between the parties which only manifests itself during the performance of the contract from that in which, although there is no unfair term, the obligations borne by the consumer are, by reason of a change of circumstances which occurs after the conclusion of the contract and which is beyond the parties' control, perceived by the consumer as more onerous.

83. The first situation corresponds for example to that which the Court had occasion to consider in its judgment of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180), concerning the ability of the seller or supplier unilaterally to vary, by virtue of the incorporation of a standard term, the price of a service (the supply of gas). In that case, the 'subsequent development' to the contract in question was in reality the implementation of a contractual term which had been unfair from the outset, because it created a significant imbalance between the parties.

34 My italics.

35 See, in particular, judgment of 16 January 2014, *Constructora Principado* (C-226/12, EU:C:2014:10, paragraph 24 and the case-law cited).

36 See, in particular, judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 69).

84. The second situation, in which there is no unfair term but, by reason of a change of circumstances, the obligations borne by the consumer are perceived by him as excessive, is not, by contrast, within the scope of the protection conferred by Directive 93/13. [37]

85. That seems to me to be the situation where a loan agreement in a foreign currency requires the monthly loan repayments to be made in that same currency, and thus 'casts the burden' of the foreign exchange risk on the consumer in the event of a fall in the value of the national currency in relation to that currency.

86. It does not appear that such a term creates a significant imbalance in itself. Indeed, it has to be observed that the variation in the exchange rate, which, I reiterate, may rise as well as fall, is a factor beyond the control of the parties to the loan agreement. The fact that, as a result of a change in the exchange rate, the contractual performance required of the borrower becomes more onerous, when it is converted into national currency, cannot result in the foreign exchange risk being transferred to the lender.

87. Furthermore, in order for a finding of a significant imbalance to be made, a difference must be found to exist between the amount lent and the amount repaid. In fact, no such difference exists: the banking institution lent a certain number of currency units and is entitled to the return of that same number of units.

88. In other words, the fact that a foreign exchange risk is cast on the consumer does not, in itself, create a significant imbalance, since the seller or supplier (in this case the bank) does not control the exchange rate which will be in force after the conclusion of the contract.

89. While the existence of a significant imbalance must also be assessed by reference to events which were known or foreseeable to the seller or supplier at the time of conclusion of the contract, the same cannot apply to supervening events which occur during the life of the contract and are outside the control of the parties.

90. In conclusion, and in the event that it is considered necessary to answer the first question, I propose that the Court's answer should be that Article 3(1) of Directive 93/13 must be interpreted as meaning that whether there is a significant imbalance in the parties' rights and obligations arising under the contract must be assessed by reference to all the circumstances that the seller or supplier could reasonably have envisaged at the time of conclusion of the contract. On the other hand, whether such an imbalance exists is not to be assessed by reference to developments subsequent to the conclusion of the contract, such as variations in the exchange rate, which are outside the seller or supplier's control and which he could not have anticipated.

Conclusion

91. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Curtea de Apel Oradea (Court of Appeal of Oradea, Romania) as follows:

(1) Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that it is for the referring court to assess, having regard to the nature, the general scheme and the stipulations of the loan agreements concerned, as well as the legal and factual context in which those matters are to be viewed, whether the term in question, under which the loan must be repaid in the same currency as that in which it as advanced, reflects statutory provisions of national law, within the meaning of Article 1(2) of that directive. If

37 Directive 93/13 is intended only to discourage and sanction the use by sellers or suppliers of terms creating a significant imbalance, not to govern legal situations of unforeseeability, which can potentially be addressed by national law.

not, the referring court must regard that term as falling within the 'main subject matter of the contract', which exempts the term from assessment of its potential unfairness. That may be the case in relation to a term incorporated in a loan agreement under which the borrower is required to repay the sum in the same currency in which it was advanced.

(2) The requirement for a contractual term to be drafted in plain intelligible language entails that the term relating to the repayment of the loan in the same currency must be understood by the consumer both on a formal and grammatical level, and also in terms of its concrete effect, in the sense that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, but also able to assess the potentially significant economic consequences of such a term for his financial obligations. That requirement cannot, however, go so far as to oblige the seller or supplier to anticipate and inform the consumer of subsequent changes which were not foreseeable, such as those manifested in the fluctuations of the exchange rates of the currencies at issue in the main proceedings, or to bear the consequences of such changes.

(3) Article 3(1) of Directive 93/13 must be interpreted as meaning that whether there is a significant imbalance in the parties' rights and obligations arising under the contract must be assessed by reference to all the circumstances that the seller or supplier could reasonably have envisaged at the time of conclusion of the contract. On the other hand, whether such an imbalance exists is not to be assessed by reference to developments subsequent to the conclusion of the contract, such as variations in the exchange rate, which are outside the seller or supplier's control and which he could not have anticipated.