Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 16 January 2018[1]

Case C-483/16

Zsolt Sziber
v
ERSTE Bank Hungary Zrt

(Request for a preliminary ruling from the Fővárosi Törvényszék (Budapest High Court, Hungary))

(Consumer protection — Unfair terms in consumer contracts — Credit agreements denominated in a foreign currency — National legislation adding procedural requirements when the fairness of terms in consumer contracts is challenged)

1. The present case is yet another case set against the background of the large number of consumer credit agreements denominated in a foreign currency that, in the past, were concluded in some Member States, among them Hungary.

2. Essentially, the case constitutes a follow-up to the judgment of the Court of 30 April 2014 in *Kásler and Káslerné Rábai* ('*Kásler*').[2] The referring court asks the Court, in particular, whether the domestic legislation enacted by the Hungarian authorities in the wake of *Kásler* is compatible with Directive 93/13/EEC on unfair terms in consumer contracts.[3]

I. Legal framework

A. EU law

3. Article 7(1) of Directive 93/13 provides:

'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.'

1 Original language: English.

2 C-26/13, EU:C:2014:282. For other cases which involved consumer credit agreements denominated in foreign currency, see judgments of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, and of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703. See also my Opinion in *Gavrilescu*, C-627/15, EU:C:2017:690.

3 Council Directive of 5 April 1993 (OJ 1993 L 95, p. 29).

B. Hungarian law

1. Law IV of 1959 on the Civil Code

4. Article 239/A(1) of A Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law IV of 1959 on the Civil Code) — in force until 14 March 2014 — provided as follows:

'The parties may institute proceedings seeking a declaration of invalidity of the contract or of any term of the contract (partial invalidity) without having at the same time to request application of the consequences of the invalidity.'

2. Law V of 2013 on the Civil Code

5. Article 6:108 of A Polgári Törvénykönyvről szóló 2013. évi V. törvény (Law V of 2013 on the Civil Code) — in force since 15 March 2014 — states:

'1. No right may be based on an invalid contract, nor may a claim be brought for contractual performance. Further to an application to that effect by one of the parties, the court shall determine the other legal consequences of invalidity, in accordance with the provisions on limitation and adverse possession.

2. The parties may bring an action for a declaration of invalidity of the contract without also having to request application of the consequences of invalidity.

3. The court may rule on the legal consequences of invalidity and may also diverge from the parties' claims but may not apply a solution to which both parties are opposed.'

3. Law DH1

6. Article 1(1) of A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law XXXVIII of 2014 governing specific matters relating to the decision of the Kúria to harmonise the case-law on loan agreements concluded between credit institutions and consumers; 'Law DH1') provides:

'[This law is to apply] to consumer loan agreements concluded between 1 May 2004 and the date of entry into force of this Law. In the application of this Law the concept of "consumer loan agreement" shall cover any foreign exchange based (linked to, or denominated in, a foreign currency and repaid in forints) or forint based credit or loan agreement, or any financial leasing agreement, concluded between a financial institution and a consumer, if it incorporates standard contract terms or any contract term which has not been individually negotiated, containing a clause provided for in Article 3(1) or Article 4(1).'

7. Article 3 of that law states:

'1. In credit agreements concluded with consumers, terms — with the exception of contractual terms which have been individually negotiated — pursuant to which the credit institution stipulates that, for the purpose of paying out the amount of finance granted for purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was paid out, is to apply, shall be void.

2. Instead of the void term referred to in paragraph 1 … the official exchange rate set by the [National Bank of Hungary] for the foreign currency concerned shall apply in relation to the disbursement and repayment of the loan (including payment of the instalments and all the costs, fees and commissions expressed in foreign currency).'

8. Article 4 of Law DH1 provides:

'1. In the case of loan agreements concluded with consumers which include the right to amend the contract unilaterally, the terms of that contract — with the exception of those that have been negotiated individually — which permit the unilateral increase of the interest rate or the unilateral increase of costs and commissions shall be deemed to be unfair. …

2. The contractual terms referred to in paragraph 1 shall be void if the credit institution has not, within the period stipulated in Article 8(1), commenced civil proceedings or if the court has dismissed the action or discontinued the examination of the case, unless, in the case of the contractual terms concerned, it is possible to bring the proceedings referred to in Article 6(2) but those proceedings have not been commenced or, if they have been commenced, the court has not found the contractual term to be void under paragraph 2a.

2a. A contractual term as referred to in paragraph 1 shall be void if a court has found that it is void under the special law on the settlement of accounts in proceedings brought in the public interest by the supervisory authority.

3. In the cases referred to in paragraphs 2 and 2a, the credit institution shall carry out a settlement of accounts with the consumer as provided for in the special law.'

4. Law DH2

9. Article 37 of A [Kúriának a] pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law XL of 2014 on the provisions governing the settlement of accounts referred to in Law XXXVIII of 2014 on specific matters relating to the decision [of the Kúria] to harmonise the case-law on loan agreements concluded between credit institutions and consumers, and concerning a number of other provisions; 'Law DH2') states:

'1. In relation to contracts falling within the scope of this Law, the parties may apply to the court for a declaration of invalidity of the contract or of certain contractual terms ("partial invalidity") — irrespective of the grounds for such invalidity — only if they also request determination of the legal consequences of invalidity (namely, a declaration of validity or effectiveness of the contract up to the time of adoption of the judgment). Failing any such request — and after the opportunity to remedy the defects has been given but not taken — the application shall be inadmissible and the substance of the case may not be examined. If the parties request determination of the legal consequences of total or partial invalidity, they must also indicate what legal consequence the court should apply. As regards the application of the legal consequences, the parties must put forward an express, quantitatively defined claim which also includes the settlement of accounts between them.

2. Taking account of the provisions of paragraph 1 with regard to the contracts to which this Law applies, the action must be declared inadmissible without the parties being ordered to appear or the examination of the case must be discontinued in proceedings in progress for a declaration of total or partial invalidity of the contract under Article 239/A(1) of the [Civil Code, 1959] or Article 6:108(2) of the [Civil Code, 2013], provided that the conditions laid down in this Law are satisfied. The action shall not be declared inadmissible without an order for the parties to appear nor shall the examination of

the case be discontinued, if the party concerned, in addition to seeking a declaration of total or partial invalidity of the contract, has also sought another form of order in the same proceedings; in that case, the claim for a declaration of invalidity shall be deemed not to stand. The same course of action shall be followed in proceedings resumed after a stay has ended.

3. If in proceedings in progress the action may no longer be declared inadmissible without an order for the parties to appear, examination of the case must be discontinued if the party concerned does not seek in his application (or, where applicable, in his counterclaim), within 30 days of notification of the request sent to him by the court for rectification of the defects, determination of the legal consequences of total or partial invalidity of the contract, and does not indicate which legal consequence should be applied. The examination of the case shall not be discontinued if the party concerned, in addition to seeking a declaration of total or partial invalidity of the contract, has also sought another form of order in the same proceedings; in that case, the claim for a declaration of invalidity shall be deemed not to stand.'

10. In accordance with Article 37/A of that law, 'when determining the legal consequences of invalidity, the court, applying the provisions on the settlement of accounts laid down in this Law — taking as the basis the data in the settlement of accounts audited under Article 38(6) — shall stipulate the payment obligations of the parties'.

11. In accordance with Article 38(6) of Law DH2, the settlement of accounts shall be deemed to be audited if:

'(a) within the period laid down in this Law, the consumer has not submitted a complaint to the credit institution regarding the settlement of accounts or has not submitted a complaint alleging that the credit institution has not performed that settlement of accounts;

(b) within the period laid down in this Law, the consumer has not brought proceedings before the Pénzügyi Békéltető Testület [Hungarian Financial Arbitration Committee];

(c) within the period laid down in this Law, neither the consumer nor the credit institution have commenced the non-contentious proceedings referred to in Article 23(1) or the contentious proceedings referred to in Article 23(2) of this Law;

(d) the decision which brought to an end the non-contentious proceedings referred to in Article 23(1) or the contentious proceedings referred to in Article 23(2), brought by the consumer or the credit institution, has become final.'

5. Law DH3

12. Under Article 3(1) of Az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről szóló 2014. évi LXXVII. törvény (Law LXXVII of 2014 governing various matters relating to alteration of the foreign currency in which loan agreements with consumers are denominated and the provisions relating to interest; 'Law DH3'), 'loan agreements concluded with consumers shall be amended by operation of this Law, in accordance with its provisions'.

13. Article 10 of that law states:

'As regards foreign currency mortgage loan agreements and foreign currency based mortgage loan agreements concluded with consumers, the credit institution to which the debt is owed shall be required, within the period laid down for fulfilment of the obligation to settle accounts under [Law DH2], to convert into a loan denominated in forints the debt under a foreign currency mortgage loan

agreement or a foreign currency based mortgage loan agreement concluded with a consumer, or the total debt derived from that agreement (also including interest, fees, commissions and costs charged in the foreign currency), both of which must be calculated on the basis of the settlement of accounts under [Law DH2]. For the purposes of that conversion, whichever of the following two interest rates is the most favourable to the consumer on the reference date shall apply:

(a) the average exchange rate for the foreign currency concerned officially set by the National Bank of Hungary in the period from 16 June 2014 to 7 November 2014, or

(b) the exchange rate for the foreign currency concerned officially set by the National Bank of Hungary on 7 November 2014.'

14. Article 15/A of the same law provides:

'1. In proceedings in progress which were brought for a declaration of invalidity (or partial invalidity) of a loan agreement concluded with a consumer or for a determination of the legal consequences of invalidity, the provisions hereof relating to conversion into forints shall apply also to the amount of the consumer's debt derived from a foreign currency loan agreement or from a foreign currency based loan agreement, calculated in accordance with the settlement of accounts under [Law DH2].

2. The amount repaid by the consumer until the date of the judgment shall reduce the amount of the consumer's debt expressed in forints on the reference date for the settlement of accounts.

3. When a loan agreement concluded with a consumer is declared valid, the specific contractual rights and obligations of the parties resulting from the settlement of accounts under [Law DH2] must be established in accordance with the provisions of this Law.'

II. Facts, procedure and the questions referred

15. On 7 May 2008, Mr Zsolt Sziber concluded, jointly with Ms Mónika Szeder in their capacity as consumers, with ERSTE Bank Hungary Zrt. ('ERSTE Bank') a loan agreement denominated in Swiss francs but the amount of which was paid out and repayable in Hungarian forints, and a mortgage agreement which was annexed to the loan agreement. The loan agreement provided that the bank's selling rate of exchange was applicable for the purpose of calculating the repayment instalments of the loan, while the amount advanced was converted into Hungarian forints on the basis of the bank's buying rate of exchange. It also gave the credit institution the right to amend the agreement unilaterally (by increasing the interest rate, commissions and costs).

16. Considering that contract to be unlawful, Mr Sziber brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary). In his application, subsequently amended, Mr Sziber claimed primarily that the agreement was invalid in its entirety on a number of grounds: (i) because it did not include the amounts of the various instalments, in particular, the respective amounts of capital and interest, so that the obligation under the contract was impossible to perform; (ii) because an amount in foreign currency may not be paid into a forint credit account; (iii) because the exchange rate applicable to the foreign currency conversion was not clearly stipulated in the contract; (iv) because the credit institution did not carry out a responsible credit assessment in relation to the examination of the debtor's creditworthiness, taking account of, inter alia, the exchange rate risk; and (v) because the consumer could not evaluate the extent of the exchange rate risk on the basis of the unclear and unintelligible information provided to him.

17. In the alternative, Mr Sziber sought a declaration that only some of the terms of the contract were unfair and thus invalid. In particular, he claimed that the clause in point VII.2 of the agreement was unfair insofar as the magnitude of the exchange risk could not be fully appreciated by the consumer, who was not given clear and intelligible information. The clause in point VIII.13 of the agreement was, in his view, unfair because official information from the bank had become part of the contract, the bank having thus been given the right to complete the contract, thereby creating an imbalance in the parties' rights and obligations. Mr Sziber also argued that the terms included in sections II.1 (calculation of the instalments in accordance with the bank's official information), III.2 (interest rate and the degree of variation of the interest rate) and III.3 (right to increase the interest rate) of the agreement were unfair and thus void.

18. In that regard, Mr Sziber submitted that he had been unable to evaluate the extent of the exchange rate risk. Furthermore, he contended that the unfairness of the terms relating to (i) the calculation of the instalments in accordance with the credit institution's official information, (ii) the interest rate and the degree of variation of the interest rate and (iii) the right to increase the interest rate, rendered those terms null and void.

19. During the proceedings, however, some of the applicable domestic laws were amended and additional rules were introduced. Indeed, a large number of actions — similar or equivalent to that brought by Mr Sziber — had been commenced before Hungarian courts. On 16 June 2014, taking into account the judgment of the Court of Justice in *Kásler*,[4] the Kúria (Supreme Court, Hungary) ruled that certain contractual terms in consumer credit agreements were unfair. Nonetheless, the Kúria (Supreme Court) did not declare those agreements null and void, deciding that certain terms could be amended. In particular, it decided that the buying and selling rates applied in foreign exchange loan contracts as rates of conversion had to be replaced by the official foreign exchange rate of the Hungarian National Bank. The sums in excess paid by the consumer in the past had to be refunded by the credit institution.[5]

20. Given that the conclusion of loan contracts denominated in foreign currency was common practice, the Hungarian legislature decided to codify the case-law of the Kúria (Supreme Court) and adopted specific procedural rules to deal with the consequences of that case-law. In particular, Laws DH1, DH2 and DH3 referred to in points 6 to 14 above ('the national legislation at issue') were adopted.

21. In the light of the new legal framework, the referring court took the view that, in the case at hand, the application of ERSTE Bank's selling rate of exchange for the conversion of the periodic instalments and that bank's right to unilaterally amend the contract were invalid. Consequently, the sums paid by Mr Sziber to ERSTE Bank in application of those terms were paid unduly and had to be refunded. Moreover, insofar as Mr Sziber had any additional claim, the referring court invited him to amend his application in line with the provisions of Article 37 of Law DH2. However, Mr Sziber did not react to that request.

4 Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282.

5 Decision 2/2014. PJE, Magyar Közlöny, 2014, No 91.

22. Because of Mr Sziber's failure to amend his application, the Fővárosi Törvényszék (Budapest High Court) considered itself unable to rule on the substantive aspects of the remainder of the case. In accordance with Article 37 of Law DH2, examination of the case should have been discontinued. However, entertaining doubts as to the correct interpretation of some provisions of EU law and the compatibility of certain national rules with those provisions, that court decided, by order of 29 August 2016, to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the following provisions of EU law, namely, [Article 169 TFEU]; Article 38 of the Charter of Fundamental Rights of the European Union [("the Charter")] …; Article 7(1) and (2) of [Directive 93/13], read in the light of Article 8 of that directive and recital 47 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, be interpreted

as precluding rules of national law (and their application) that impose additional requirements prejudicial to a party to proceedings, whether applicant or defendant, who in the period from 1 May 2004 to 26 July 2014, has, in the capacity of a consumer, entered into a credit agreement containing an unfair contractual term allowing a unilateral increase in interest rates, costs or commissions or containing a bid-offer spread,

on account of the fact that in accordance with those additional requirements, in order for the rights arising from the invalidity of those contracts concluded with consumers to be upheld before the courts and, in particular, in order for the court to be able to examine the substance of a case, a civil procedural document must be presented (primarily a claim, amendment of a claim or a plea of invalidity relied on by way of defence contesting the order against the consumer, amendment of that plea, a counterclaim by the defendant or amendment of that counterclaim) with certain mandatory content,

whereas a party to proceedings who has not entered into a credit agreement or who in that period has, in the capacity of a consumer, entered into a credit agreement of a different kind from that described above, does not have to present such a document satisfying certain mandatory requirements as to content?

(2) Regardless of whether the Court of Justice answers Question 1, which is formulated in more general terms than this second question, in the affirmative or the negative, must the provisions of EU law listed in Question 1 be interpreted as precluding the following obligatory additional requirements [(a) to (c)] from applying to a party to proceedings who has, in the capacity of a consumer, entered into a credit agreement, as referred to in Question 1:

(a) in judicial proceedings, a claim, an amendment of a claim or a plea of invalidity relied upon by way of defence contesting the order against the consumer, amendment of that plea, a counterclaim by the defendant or an amendment of that counterclaim which must be presented by a party to proceedings, whether applicant or defendant, that has entered into a credit agreement, in the capacity of a consumer, as referred to in Question 1, will be admissible, that is to say, will be examined as to its substance, only if, in that document,

the party not only requests the court to declare invalid in whole or in part the consumer credit agreement referred to in Question 1, but also requests the court to apply the legal consequences associated with total invalidity,

whereas another party to proceedings who has not, in the capacity of a consumer, entered into a credit agreement or who in that period has, in the capacity of a consumer, entered into a credit agreement of a different kind from that described above, does not have to present such a document satisfying certain mandatory requirements as to content?

(b) in judicial proceedings, a claim, an amendment of a claim or a plea of invalidity relied upon by way of defence contesting the order against the consumer, amendment of that plea, a counterclaim by the defendant or amendment of that counterclaim that must be presented by a party to proceedings, whether applicant or defendant, who in the capacity of a consumer has entered into a credit agreement, as referred to in Question 1, will be admissible, that is to say, will be examined as to its substance, only if, in that document,

the applicant does not, in addition to seeking a declaration that the credit agreement entered into with consumers, as referred to in Question 1, is wholly invalid, request the court to apply, among legal consequences associated with total invalidity, that of judicially restoring the situation as it stood before the credit agreement was concluded,

whereas another party to proceedings who has not, in the capacity of a consumer, entered into a credit agreement or who in that period has, in the capacity of a consumer, entered into a credit agreement of a different kind from that described above, does not have to present such a document satisfying certain mandatory requirements as to content?

(c) in judicial proceedings, a claim, amendment of a claim or a plea of invalidity relied upon by way of defence contesting the order against the consumer, amendment of that plea, a counterclaim by the defendant or amendment of that counterclaim that must be presented by a party to proceedings, whether applicant or defendant, who has, in the capacity of a consumer, entered into a credit agreement, as referred to in Question 1, will be admissible, that is to say, will be examined as to its substance, only if that document includes,

for the period from the beginning of the contractual legal relationship to the date the application is lodged, a settlement calculation, extremely complex from the mathematical point of view (as prescribed by national provisions), that must be made also taking into account the rules regulating currency conversion into forints,

and that must include a detailed breakdown, arithmetically verifiable, indicating the payments due under the credit agreement, payments made by the applicant, the payments due leaving aside the void clause, and the difference between those figures; and specifying the grand total that the party who, in the capacity of a consumer, entered into the credit agreement, as referred to in Question 1, still owes the credit institution or paid in excess,

whereas another party to proceedings who has not, in the capacity of a consumer, entered into a credit agreement or who in that period has, in the capacity of a consumer, entered into a credit agreement of a different kind from that described above, does not have to present such a document satisfying certain mandatory requirements as to content?

(3) Must the provisions of EU law listed in Question 1 be interpreted as meaning that infringement of those rules by means of the imposition of the additional requirements listed in Questions 1 and 2 at the same time constitutes an infringement of Articles 20, 21 and 47 of [the Charter], taking into account likewise (in part in Questions 1 and 2 as well) that the courts of the Member States must apply EU law in the field of consumer protection even in cases without any cross-border elements, that is to say, in purely internal situations, in accordance with the judgments of the Court of Justice of 5 December 2000, *Guimont*, C-448/98, EU:C:2000:663, paragraph 23, and of 10 May 2012, *Duomo Gpa and Others*, C-357/10 to C-359/10, EU:C:2012:283, paragraph 28, and the order of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraph 39? Or must this be regarded as a cross-border situation merely because the credit agreements referred to in Question 1 are "foreign currency based credit agreements"?'

23. Given that the referring court declared itself unable to rule on the case because of the lack of action on the applicant's part, the Court inquired whether the case was still pending before that court. By letter of 27 October 2016, the Fővárosi Törvényszék (Budapest High Court) answered affirmatively, explaining that the outcome of the case (examination of the substance of the case or dismissal on procedural grounds) depends on the answers that the Court gives to the questions referred.

24. In the present proceedings, written observations have been submitted by ERSTE Bank, the Hungarian Government and the Commission. They also presented oral argument at the hearing held on 24 October 2017.

III. Analysis

A. Jurisdiction of the Court and admissibility

25. Before dealing with the substance of the case, it is necessary to address certain questions of jurisdiction and admissibility.

26. First, the wording of the original request raised doubts as to whether the case is still pending before the referring court, a requirement necessary under Article 267 TFEU for referring a question to the Court.[6] However, as the referring court has subsequently clarified that the case is still pending, I do not consider that this raises any further issues.

27. More importantly, however, despite the written observations submitted to the Court and the holding of an oral hearing, it is still unclear which provisions of EU law are applicable to the main proceedings.

28. To begin with, as concerns the interpretation of the Treaty provision on consumer protection — currently Article 169 TFEU — it must be pointed out that such a provision is mainly addressed to the institutions, bodies, offices and agencies of the Union. Without any explanation from the referring court as to why and how that provision may be applicable in a situation such as that of Mr Sziber, I do not believe that the Court is able to give a useful interpretation of it. Similarly, failing any elaboration on the part of the referring court concerning the relevance of Articles 20 ('Equality before the law), 21 ('Non-discrimination'), 38 ('Consumer protection') and 47 ('Right to an effective remedy and to a fair trial') of the Charter in the case at hand, the Court should in my view refrain from attempting to give a ruling on those provisions.

29. Furthermore, Directive 2008/48/EC[7] is not applicable to the main proceedings, as Article 2(2)(a) of that directive states that it does not apply to credit agreements secured by a mortgage, which is the case with Mr Sziber's agreement.

30. Finally, it is not easy to identify the claims based on Directive 93/13 — whose provisions were certainly applicable *before* the adoption of the national legislation at issue — on which, *after* that legislation entered into force (and Mr Sziber had duly received the bank's settlement of accounts[8]), the referring court would still have to rule in the main proceedings. Mr Sziber's inaction when, following the adoption of the national legislation at issue, he was asked by the referring court to amend his application, also raises doubts as to the subsistence of any outstanding claim based on the alleged unfairness of the contractual terms.

6 See judgment of 21 April 1988, *Pardini*, 338/85, EU:C:1988:194, paragraphs 10 and 11. See also my Opinion in *Gavrilescu*, C-627/15, EU:C:2017:690, in particular points 36 to 40.

7 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).

8 Pursuant to Article 21(3) of Law DH3, credit institutions had to send their customers a settlement of accounts by 1 February 2015.

31. Fundamentally, the national legislation at issue applies to all loan agreements entered into by a credit institution and a consumer between 1 May 2004 and 26 July 2014, denominated in a foreign currency (agreement in a foreign currency or agreement given in a foreign currency and reimbursed in Hungarian forints) or in Hungarian forints, that include the terms declared or presumed unfair therein. Those terms are deleted (and, where appropriate, replaced by other terms) and the agreements denominated in a foreign currency are converted into agreements denominated in Hungarian forints. The credit institutions are required to send to consumers a settlement of accounts to determine the ensuing financial consequences. The amounts overpaid by the consumers are to be refunded to them.

32. Against that backdrop, it would seem that the national legislation at issue has already had the effect, in the case of Mr Sziber, of rendering the contractual terms that he considered unfair null and void. What remains in support of his claims before the referring court appears, by and large, to be based on domestic provisions unrelated to any applicable provisions of EU law (including, as far as I can see, Directive 93/13): the allegations concerning the credit institution's failure to carry out a responsible credit assessment in relation to the examination of the debtor's creditworthiness, the impossibility of paying the various instalments because their amounts are not indicated, and the impossibility of paying an amount in a foreign currency into a forint credit account.

33. On that basis, it seems to me that the request is inadmissible because the description of the legal and factual context is not sufficiently detailed to allow the Court to give a useful answer under Article 267 TFEU.

34. That said, I shall nevertheless address the substantive issues raised by the referring court, in the case the Court were to disagree with me on the procedural issues discussed above. I will concentrate my analysis on the compatibility of Article 37 of Law DH2 with Article 7(1) of Directive 93/13, on the assumption that, notwithstanding the application of the national legislation at issue, Mr Sziber still has, in the main proceedings, valid claims based on that directive.

B. Substance

1. The first and second questions

35. By its first and second questions, which can be examined together, the referring court essentially asks whether Article 7(1) of Directive 93/13 precludes national rules that introduce requirements such as those in Article 37 of Law DH2 for actions brought by consumers who in a specific period have entered into credit agreements containing unfair contractual terms.

36. At the outset, it should be borne in mind that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.[9] As far as that weaker position is concerned, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. That provision must be regarded as a provision of equal standing to that of national rules that have, within the domestic legal system, a mandatory character.[10] Its aim is to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.[11]

9 See judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 39, and of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 44.

10 See judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 54 and the case-law cited.

11 See judgments of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 40, and of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 45.

37. Given the nature and significance of the public interest constituted by the protection of consumers, who are at a disadvantage vis-à-vis sellers or suppliers, Directive 93/13, as is apparent from Article 7(1) thereof, read in conjunction with its 24th recital, obliges the Member States to provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'.[12] However, in the absence of harmonisation of the national procedures for the enforcement of the rights consumers enjoy under Directive 93/13, the rules providing for the admissibility of claims based on the alleged unfairness of terms included in consumer contracts are a matter for the national legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness).[13]

38. Against that background, it seems clear that the questions referred in the present case cannot be answered in the abstract, but require an in-depth and case-specific assessment of the relevant domestic rules.

39. That is, in principle, an assessment which the national court is best placed to make. Indeed, there may be relevant aspects of the national rules at issue of which the Court may not have been made aware. Moreover, the interplay between the specific rules at issue and other key provisions or principles of the Member State in question may also be unclear to the Court. That is particularly so in a case such as the present, where — despite the submissions lodged by the parties and the holding of a hearing — a lack of clarity regarding certain factual aspects of the dispute as well as the scope and meaning of the relevant domestic rules still persists.

40. Notwithstanding that fact, I shall take a position on the doubts, expressed by the referring court, regarding the compatibility with Directive 93/13 of rules such as those at issue in the main proceedings, on the basis of my understanding of the relevant factual and legal context.

41. To my mind, the crucial issue in the present proceedings is the following: do national rules, such as Article 37 of Law DH2, ensure that the principles of equivalence and effectiveness are complied with?

42. The referring court draws the Court's attention to some specific aspects of the national rules at issue. An action lodged by the consumer seeking the annulment of the alleged unfair terms, when the action concerns the contracts covered by the national legislation at issue, is admissible (or may continue if already pending) only if the applicant: (i) requests the court to apply the legal consequences associated with the invalidity of the contract, (ii) requests the court to apply, among legal consequences associated with invalidity, that of a declaration of validity or effectiveness of the contract up to the time of adoption of the judgment, and (iii) submits an express, quantitatively defined claim which also includes the settlement of accounts between them (hereinafter, collectively, 'the procedural requirements at issue').

43. The national court emphasises that those requirements need not be fulfilled in an action for annulment lodged by consumers acting outside the scope of the national rules at issue and, furthermore, may make it more difficult for consumers to exercise their rights under Directive 93/13.

44. If that is so, the first issue that needs to be addressed is whether the criterion of equivalence is fulfilled.

12 Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 78.

13 See, to that effect, judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 46 and the case-law cited.

(a) The principle of equivalence

45. It must thus be ascertained whether the national legislation at issue is, in a situation such as that of Mr Sziber, *no less favourable* than that governing similar domestic actions. To my mind, the comparable situation is that of a consumer who has entered into a loan contract with a credit institution and seeks the total or partial annulment of that contract on grounds based on provisions of national law other than Article 37 of Law DH2[14] (for example, rules of mandatory character set out in the civil or commercial codes).

46. In the latter type of proceedings — governed as far as I understand by Article 239/A of the old Civil Code (until 14 March 2014) and by Article 6:108 of the new Civil Code (as from 15 March 2014) — the procedural requirements at issue do not have to be fulfilled in order for the action to be considered admissible (or for continuation to be allowed of proceedings that are ongoing at the time of the entry into force of the new legislation). Accordingly, it can safely be said that those requirements demand from the applicant an additional effort in specifying the 'what and why' of his claims.

47. However, that does not mean that the criterion of equivalence is not fulfilled. Indeed, it would be erroneous, in my view, to examine the procedural requirements at issue in isolation from the relevant context, as the referring court appears to do.

48. The Court has stated that, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, account must be taken of the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.[15]

49. I would emphasise that the procedures laid down in the national legislation at issue are, taken as a whole, different from those provided for in comparable situations. The Hungarian legislature has not simply introduced new (and arguably stricter) requirements of admissibility for consumers who wish to have access to the 'ordinary' procedures before the courts: those requirements were introduced for the purpose of giving access to new and different procedures which, in the areas governed by those laws, replace the ordinary procedures.

50. This means that the assessment of the equivalence of the national rules at issue in the main proceedings must necessarily take into account the purpose and essential characteristics of the new procedures as compared with similar domestic procedures.[16] The correct approach to take, in the present case, is thus to examine whether the new procedures (of which the procedural requirements at issue constitute one aspect) *taken as a whole*[17] afford consumers a protection of the rights they derive from Directive 93/13 that is as effective, practical and timely as that afforded by the ordinary procedural rules.

51. Bearing in mind the context in which those provisions have been enacted, the new procedures seem to me to afford a protection of the rights that consumers derive from Directive 93/13 which is actually *more favourable* than that afforded by the ordinary procedural rules. That is because, as will be shown, those new rules combined the procedures that consumers and credit institutions would

14 Cf. Opinion of Advocate General Léger in *Levez*, C-326/96, EU:C:1998:220, points 62 and 69.

15 See judgment of 1 December 1998, *Levez*, C-326/96, EU:C:1998:577, paragraph 44. See also, by analogy, judgment of 5 December 2013, *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 34 and the case-law cited.

16 See, to that effect, judgment of 1 December 1998, *Levez*, C-326/96, EU:C:1998:577, paragraph 43.

17 See, to that effect, Opinion of Advocate General Kokott in *Margarit Panicello*, C-503/15, EU:C:2016:696, point 135.

normally have to go through when a loan is amended or annulled, thereby simplifying, accelerating and making less costly the resolution of their disputes. Indeed, just having a loan agreement amended or annulled is often not sufficient in order to settle a dispute between a consumer and the credit institution (as *Kásler*[18] illustrates well).

52. As mentioned, the present case is set against the background of the large number of consumer credit agreements denominated in a foreign currency which have, in the past, been concluded in Hungary and have subsequently given rise to a very large number of actions before domestic courts. Those agreements often included certain unfair terms. The Hungarian legislature — on the basis of the principles developed by the Kúria (Supreme Court) in its judgment of 16 June 2014,[19] which in turn drew the appropriate conclusions from the judgment of the Court in *Kásler*[20] — sought to resolve that situation once and for all through the adoption of Laws DH1, DH2 and DH3. The instrument chosen to that end was intended to give consumers in that specific situation a simpler and quicker way of enforcing their rights before the courts, while also respecting the rights of defence of the credit institutions concerned.

53. The unfair nature of certain contractual terms (those examined by the Court in *Kásler*) was thus either established by law or presumed by law and loan agreements denominated in a foreign currency were converted into agreements denominated in Hungarian forints. Specific procedures were also introduced to determine the legal and financial consequences stemming from the partial or total nullity of the contracts. To that end, the legislature essentially merged, into a single procedure, the separate procedures that consumers and credit institutions would normally have had to go through: the first procedure concerning the alleged unfairness of the terms and the ensuing effect on the partial or total invalidity of the contract, and the second procedure regarding the financial consequences stemming from the partial or total invalidity of the contract.

54. It seems to me that the Hungarian Government is quite right when it argues that — by merging the two abovementioned procedures into a single procedure, in which the assessment of certain aspects of the dispute (the unfairness of certain terms) is not left to the court but is established by the law, and the determination of the legal consequences of the court's findings are made simpler (by requiring the applicant to clarify his claims) — the protection of the rights that the consumers concerned derive from Directive 93/13 is, in the situations governed by the new laws, possibly more effective than the protection afforded by the ordinary rules. More generally, the new procedures seem to enhance legal certainty for both consumers and credit institutions, and avoid, where possible, complex and lengthy court proceedings that might have engulfed the domestic judicial system and given rise to inconsistent case-law.

55. In order for the new procedures to achieve their (legitimate) aim, it appears necessary to request that claimants make an additional effort to clarify what they are asking from national courts with regard to the possible nullity of the contract and the legal and financial consequences stemming therefrom. That is a fortiori the case here given that that effort of clarification is to be undertaken after the loan agreement has been amended in conformity with the law. The new requirements thus seem to me to be inherent in the specific system of judicial protection introduced by the national legislation at issue.[21] That system is, in the light of the circumstances of the cases concerned, indeed likely to be more favourable to consumers than that applicable in comparable domestic cases.

56. For those reasons, I take the view that the national rules at issue in the main proceedings are in line with the principle of equivalence.

18 Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282.

19 See, supra, note 5.

20 Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282.

21 Cf. Opinion of Advocate General Kokott in Joined Cases *Alassini*, C-317/08 to C-320/08, EU:C:2009:720, point 44.

(b) The principle of effectiveness

57. That said, it remains to be determined whether the procedural requirements at issue are also in line with the principle of effectiveness.

58. On the basis of the considerations set out above, that seems indeed to be the case. I have already explained that the national legislation at issue introduces procedures which, in the light of the circumstances of the case, are more likely to allow a simpler, quicker and less costly resolution of the disputes between consumers and credit institutions.

59. In any event, I can hardly see how the first two requirements listed in point 42 above could be considered to make it impossible or excessively difficult for consumers concerned by the new laws to enforce their rights under Directive 93/13. The effort required by the consumer, on the one hand, to request the national court to apply the legal consequences associated with the (total or partial) invalidity of the contract and, on the other hand, to request that court to apply, among the legal consequences associated with invalidity, that of a declaration of validity or effectiveness of the contract up to the time of adoption of the judgment, appear rather modest. It seems to me that those requirements do no more than ask consumers to formulate their requests to the court more clearly and explicitly.

60. After all, it would seem to me that — irrespective of the applicable legal framework — a consumer who finds himself in a situation such as that of Mr Sziber would necessarily have, at some point in the proceedings, to indicate to the national court his views on the legal and financial consequences stemming from the partial or total nullity of the loan agreement.

61. The same considerations should be valid, *mutatis mutandis*, for the third requirement listed in point 42 above. Under that requirement consumers are to submit an 'express' and 'quantitatively defined' claim.[22] In other words, they need only indicate the amount they consider they have overpaid and do so explicitly.

62. That does not seem to me to be a particularly demanding task for applicants, particularly since they can use, as a reference, the detailed settlement of accounts that the credit institution is to send to all consumers concerned by the national legislation at issue. It stands to reason that, if a consumer believes that he has claims additional to those reflected in the settlement of accounts that he has received and accepted (or that was declared final by a domestic court), he is required to produce that document, explain his views, and quantify the new claims.

63. In the light of the above, I do not see any element in the file which leads me to think that the new requirements may, in general, make it impossible or excessively difficult for consumers to exercise the rights they derive from Directive 93/13 in the field covered by the national legislation at issue.

64. True, it cannot be ruled out that, in certain cases, the new requirements may have unfavourable consequences for consumers wishing to take action before the domestic courts against alleged unfair terms included in the contracts falling within the scope of the national legislation at issue and not made or presumed void by it. That may indeed be the case of Mr Sziber: under the new rules his lack of action may cause his action to be dismissed, whereas under the ordinary rules the case might have continued. However, the fact that certain consumers, by reason of their passivity or inaction, may find

22 As explained at the hearing by the Hungarian Government and ERSTE Bank, the detailed rules concerning the settlement of accounts provided for in the national legislation at issue apply only to credit institutions and not to consumers.

the new procedures disadvantageous does not mean that the principle of effectiveness is not observed. Indeed, as the Court has consistently stated, the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for the total inertia on the part of the consumer concerned.[23]

65. The Court has also held that rules which are reasonably justified by principles such as legal certainty or the proper conduct of proceedings do not infringe the principle of effectiveness even if their breach may entail the dismissal, in whole or in part, of the action brought.[24] Similarly, it has found that the fact that national legislation introduced some additional steps for access to its domestic courts in certain specific circumstances does not necessarily prejudice the effective judicial protection of individuals' rights. That is so, in particular, where the restrictions introduced genuinely pursue objectives of general interest and are not disproportionate to that end.[25]

66. Therefore I take the view that, in the present case, the criterion of effectiveness is also fulfilled.

67. I would thus propose that the Court reply to the first and second questions that, on a proper construction, Article 7(1) of Directive 93/13 does not preclude national rules that introduce requirements such as those in Article 37 of Law DH2 for actions brought by consumers who in a specific period have entered into credit agreements containing unfair contractual terms.

2. The third question

68. By its third and final question, the referring court wishes to know whether the provisions of Directive 93/13 are also applicable to situations where there is no cross-border element. In that context, the referring court asks whether, in a situation such as that in the main proceedings, that cross-border element may be found in the fact that the credit agreement was denominated in a foreign currency.

69. The question appears to be based on a misunderstanding of the Court's case-law referred to in the order for reference.

70. It is a well-established principle of EU law that the Treaty provisions on the fundamental freedoms do not apply in 'purely internal situations'.[26] However, the present case does not concern the Treaty provisions on the fundamental freedoms but EU legislation that harmonises across the Member States a specific field of law. Consequently, the rules contained in the EU legislation concerned apply irrespective of the purely internal nature of the situation at issue in the main proceedings. The fact that the credit agreements at issue were denominated in a foreign currency is thus immaterial for the applicability of the provisions of Directive 93/13.

71. In the light of the foregoing, I propose that the Court answer the third question to the effect that the provisions of Directive 93/13 are also applicable to situations where there is no cross-border element.

23 Judgment of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraphs 62 and 63 and the case-law cited.

24 See, to that effect, judgment of 1 December 1998, *Levez*, C-326/96, EU:C:1998:577, paragraphs 19 and 33 and the case-law cited.

25 See, to that effect, judgment of 18 March 2010, *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraphs 61 to 66. In that regard, it should be borne in mind that there are obvious links between the principle of effectiveness and the fundamental right to effective judicial protection: see, inter alia, Opinion of Advocate General Kokott in Joined Cases *Alassini*, C-317/08 to C-320/08, EU:C:2009:720, point 42, and Opinion of Advocate General Jääskinen in *Liivimaa Lihaveis*, C-562/12, EU:C:2014:155, point 47.

26 See, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited. See also my Opinion in Joined Cases *Venturini*, C-159/12 to C-161/12, EU:C:2013:529, points 26 to 28.

IV. Conclusion

72. In conclusion, I propose that the Court declare the request submitted by the Fővárosi Törvényszék (Budapest High Court, Hungary) inadmissible.

73. In the alternative, I propose that the Court answer the questions referred for a preliminary ruling as follows:

– Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not preclude national rules that introduce procedural requirements such as those in Article 37 of Law XL of 2014 for actions brought by consumers who in a specific period have entered into credit agreements containing unfair contractual terms;

– the provisions of Directive 93/13 are also applicable to situations where there is no cross-border element.