Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

10 June 2021 *

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Mortgage loan agreement denominated in a foreign currency (Swiss francs) – Article 4(2) – Main subject matter of the contract – Terms exposing the borrower to a foreign exchange risk – Requirements of intelligibility and transparency – Article 3(1) – Significant imbalance – Article 5 – Contractual term that is in plain, intelligible language)

In Case C-609/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal d'instance de Lagny-sur-Marne (District Court, Lagny-sur-Marne, France) made by decision of 2 August 2019, received at the Court on 13 August 2019, in the proceedings

BNP Paribas Personal Finance SA

v

VE,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, acting as Judge of the First Chamber, C. Toader, M. Safjan and N. Jääskinen (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: V. Giacobbo, Administrator,

having regard to the written procedure and further to the hearing on 28 October 2020,

after considering the observations submitted on behalf of:

– BNP Paribas Personal Finance SA, by P. Metais and P. Spinosi, avocats,

– VE, by C. Constantin-Vallet and M. Le Bot, avocats,

– the French Government, by A.-L. Desjonquères and E. Toutain, acting as Agents,

* Language of the case: French.

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

– the European Commission, by C. Valero, N. Ruiz García and M. Van Hoof, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3 and 4 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between BNP Paribas Personal Finance SA and VE concerning the alleged unfairness of terms in the mortgage loan agreement denominated in a foreign currency concluded between the two parties to the main proceedings which stipulate, inter alia, that payments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, for an extension of the term of that agreement and for an increase in monthly instalments.

Legal context

3 According to the sixteenth recital of Directive 93/13:

'Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

4 Under Article 1(2) of that directive:

'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 [European Union] are party, particularly in the transport area, shall not be subject to the provisions of this directive.'

5 Article 3 of that directive is worded as follows:

'1. 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.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

…'

6 Article 4 of the directive provides:

'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.'

7 Under Article 5 of Directive 93/13:

'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. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. …'

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

8 By notarised document of 10 March 2009, VE and his wife acquired a property and, to that end, concluded with BNP Paribas Personal Finance a mortgage loan agreement denominated in a foreign currency and referred to as 'Helvet Immo'.

9 That agreement provided for a loan to be taken out at a rate of 4.95%, repayable, in principle, in 276 fixed instalments, denominated in Swiss francs and repayable in euro. On the date of conclusion of the said agreement, the loan amounted to EUR 143 421.53, that is to say, 216 566.51 Swiss francs (CHF).

10 It is apparent from the order for reference that that same agreement provided for the repayment of the monthly instalments at fixed intervals in euro and for their conversion into Swiss francs to contribute to interest payment and principal repayment. The costs in connection with the credit, such as insurance, were charged in euro.

11 Specifically, the agreement at issue in the main proceedings included contractual terms according to which:

– the term of the loan would be extended by five years and the scheduled instalments in euro would be allocated first to interest when changes in the exchange rate increased the cost of the loan for the borrower;

– if maintaining the amount of repayments in euro did not allow the full balance of the account to be repaid over the initial remaining term, plus five years, monthly instalments would be increased.

12 As a result of unpaid monthly instalments, acceleration of the repayment term was declared and the enforcement judge of the tribunal de grande instance de Libourne (Regional Court, Libourne, France) ordered the compulsory sale of the property concerned on 16 January 2015.

13 By application of 12 January 2017, BNP Paribas Personal Finance applied to the referring court for authorisation to attach VE's earnings. That bank sought, inter alia, authorisation to attach VE's earnings for the sum of EUR 234 182.61, that is EUR 185 695.26 by way of principal and EUR 48 487.35 by way of interest, expenses and ancillary costs.

14 Before that court, BNP Paribas Personal Finance is submitting that VE's claims asserting that certain terms of the loan agreement at issue in the main proceedings are unfair are inadmissible in so far as they are time-barred and, in any event, unfounded. The bank maintains, inter alia, that VE was informed of the variation in the foreign exchange rate and of its consequences on the repayment of the loan at issue in the main proceedings.

15 VE considers that he was misled by BNP Paribas Personal Finance as regards the nature of the loan agreement at issue in the main proceedings, since that agreement exposed him to an uncapped foreign exchange risk. Specifically, VE seeks a declaration that that agreement is void as well as a dismissal of the bank's application for attachment of his earnings. In the alternative, he submits that the amount of the claim must be reduced on account of the unfairness of an implied indexation clause, the account and payment currency clauses, the repayment clause and the option to purchase clause contained in that agreement as well as the absence of any reference, in that agreement, to a 'foreign exchange risk'.

16 The referring court notes that the loan agreement at issue in the main proceedings contains several terms forming part of a currency conversion mechanism, which have the effect of incorporating the foreign exchange risk into the monthly instalments paid by the consumer. Those terms relate to the rules for allocating payments to interest, the operation of the accounts in Swiss francs (the account currency) and in euro (the payment currency) as well as the extension of the term of the loan for a period of five years.

17 In that context, the referring court raises the question of the discretion which it enjoys in examining the terms of the loan agreement at issue in the main proceedings. It is unsure, in particular, whether they should be regarded as an indivisible whole constituting the main subject matter of that agreement and, on that basis, as incapable of being considered to be unfair provided that they are plain and intelligible or, conversely, whether those terms may be individually regarded as unfair, with the exception, as is apparent from the case-law of the Court, of the term providing for repayment of the loan in a foreign currency.

18 As regards the criteria for assessing whether a contractual term is plain and intelligible, the referring court observes that VE received a considerable amount of information, before taking out the loan at issue in the main proceedings, which emphasised, in particular, the stable nature of the euro – Swiss franc exchange rate. It seems that the foreign exchange risk resulting from the combined application of several terms of the loan agreement at issue in the main proceedings is not mentioned at all in that agreement.

19 The referring court also states that national legislation and the case-law require the courts to examine the loan offer in an objective manner, by reference, for example, to quantitative simulations showing the consequence that changes in the exchange rates between the euro and foreign currencies would have on the cost of the loan in question. In that context, the referring court is uncertain as to the scope of the concept of 'transparency', as interpreted by the Court, and as to the information to be provided to a borrower who does not know the economic forecasts capable of having an impact on changes in those exchange rates or the risks associated with them. In that regard, the question also arises as to whether the seller or supplier acted in good faith in the light of his or her expertise as regards the analysis of certain foreseeable changes.

20 In those circumstances, the tribunal d'instance de Lagny-sur-Marne (District Court, Lagny-sur-Marne, France) decided to stay the proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

'(1) Must Article 4(2) of Directive 93/13 be interpreted as meaning that terms stipulating repayments at fixed intervals allocated first to interest and providing for an extension of the term of the contract and for an increase in payments in order to pay the account balance, which [may] increase significantly as a result of exchange rate variations, constitute the main subject matter of a loan denominated in a foreign currency and repayable in the national currency, and that those terms cannot be considered in isolation?

(2) Must Article 3(1) of Directive 93/13 be interpreted as meaning that terms stipulating payments at fixed intervals allocated first to interest and providing for an extension of [the] term [of the contract] and for an increase in payments in order to pay the account balance, which may increase significantly as a result of exchange rate variations, cause a significant imbalance in the rights and obligations of the parties to the contract, in particular in that they expose the consumer to a disproportionate foreign exchange risk?

(3) Must Article 4 of Directive 93/13 be interpreted as requiring that the plainness and intelligibility of the terms of a loan agreement denominated in a foreign currency and repayable in the national currency be assessed by referring, at the time of conclusion of that agreement, to the foreseeable economic context, in the present case the consequences of the economic difficulties of the years 2007 to 2009 on exchange rate variations, taking into account the professional lender's expertise and knowledge, as well as its good faith?

(4) Must Article 4 of Directive 93/13 be interpreted as requiring that the plainness and intelligibility of the terms of a loan agreement denominated in a foreign currency and repayable in the national currency be assessed by ascertaining that a lender, having [the] expertise and knowledge of a seller or supplier, has communicated to the consumer only objective and abstract information, inter alia quantitative information, which does not take into account the economic context capable of affecting exchange rate variations?'

Consideration of the questions referred

The first question

21 By its first question, the referring court asks, in essence, whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the concept of the 'main subject matter of the contract', within the meaning of that provision, covers terms of the loan agreement which stipulate that

repayments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, for an extension of the term of the agreement and for an increase in monthly instalments.

22 BNP Paribas Personal Finance submits that, pursuant to Article 1(2) of Directive 93/13, the term stipulating that payments at fixed intervals are allocated first to interest is not subject to the provisions of that directive. That term reflects, in fact, the provisions of Article 1343-1 of the code civil (French Civil Code) and applies to the parties by default, that is to say in the absence of other arrangements established by them.

23 However, where a court of a Member State is hearing a dispute relating to an allegedly unfair contractual term which reflects a provision of national law which is supplementary in nature, it is required to examine, as a matter of priority, the effect of the exclusion from the scope of that directive laid down in Article 1(2) thereof, and not the effect of the exception to the assessment of whether contractual terms are unfair provided for in Article 4(2) of that directive (order of 14 April 2021, *Credit Europe Ipotecar IFN and Others*, C-364/19, EU:C:2021:306, paragraph 42).

24 Article 1(2) of Directive 93/13 excludes from the scope of that directive contractual terms which reflect 'mandatory statutory or regulatory provisions'.

25 In this respect, the Court has already ruled that this expression covers not only mandatory provisions of national law that apply between the parties to the contract independently of their choice, but also those that are supplementary in nature, that is to say, those that apply by default, in the absence of other arrangements established by the parties (see, to that effect, judgments of 26 March 2020, *Mikrokasa et Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty*, C-779/18, EU:C:2020:236, paragraphs 50 to 53, and of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraphs 23 to 25 and 28).

26 It follows that it is for the referring court to ascertain first and foremost, before examining the effect of the exception to the assessment of whether contractual terms are unfair provided for in Article 4(2) of Directive 93/13, whether the term stipulating that payments at fixed intervals are allocated first to interest is excluded from the scope of Directive 93/13 pursuant to Article 1(2) thereof.

27 Having clarified that point, it must be noted, as regards the concept of the 'main subject matter of the contract', within the meaning of Article 4(2) of Directive 93/13, to which the first question relates, that, in accordance with that provision, assessment of the unfair nature of contractual terms is to 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 those terms are in plain, intelligible language. The court may therefore review the unfairness of a term which relates to the definition of the main subject matter of the contract only if that term is not plain and intelligible.

28 In that regard, the Court has held that Article 4(2) of Directive 93/13 lays down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, and that that provision must therefore be strictly interpreted (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 34 and the case-law cited).

29 As regards the category of contractual terms that come within the concept of the 'main subject matter of the contract' within the meaning of Article 4(2) of Directive 93/13, the Court has also held that those terms must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within that concept (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 32 and the case-law cited).

30 It is for the referring court to examine, having regard to the nature, general scheme and the stipulations of the loan agreement at issue in the main proceedings as well as its legal and factual context, whether the terms referred to in the first question constitute an essential element of the debtor's obligations, consisting in the repayment of the amount made available to it by the lender (see, to that effect, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 33 and the case-law cited).

31 That said, it is nevertheless for the Court to elicit from Article 4(2) of Directive 93/13 the criteria applicable in that examination (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 33).

32 In that regard, as concerns loan agreements denominated in a foreign currency and repayable in the national currency, the Court has stated that the exclusion of the assessment of the unfairness of terms relating to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, cannot apply to terms that merely determine the conversion rate of the foreign currency in which the loan agreement is denominated, in order to calculate the repayment instalments, without however any foreign exchange service being supplied by the lender in making that calculation and do not, therefore, constitute 'remuneration', the adequacy of which as consideration for a service supplied by the lender could be assessed to determine its unfairness pursuant to Article 4(2) of Directive 93/13 (judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 58).

33 The Court has also stated, without, however, limiting this finding solely to loan agreements denominated in a foreign currency and repayable in that currency, that contractual terms which relate to the foreign exchange risk define the main subject matter of that agreement (see, inter alia, judgments of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 68 and the case-law cited, and of 14 March 2019, *Dunai*, C-118/17, EU:C:2019:207, paragraph 48).

34 In the present case, the terms of the loan agreement at issue in the main proceedings, which form part of a currency conversion mechanism, have the effect of incorporating the foreign exchange risk into the monthly instalments paid by the borrower. The terms referred to in the first question relate to the rules for allocating payments to interest, the operation of the accounts in Swiss francs (the account currency) and in euro (the payment currency) as well as the extension of the term of the loan for a period of five years.

35 In that connection, it must be observed that, under a loan agreement, the lender undertakes, in particular, to make available to the borrower a certain sum of money and the latter undertakes, in particular, to repay that sum, usually with interest, on the scheduled payment dates. Therefore, the essential obligations of such a contract relate to a sum of money which must be determined by the stipulated currency in which it is paid and repaid. Thus, the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to the

very nature of the debtor's obligation, thereby constituting an essential element of a loan agreement (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 38).

36 Although the contractual terms referred to in the first question form part of the financial mechanism which expresses the foreign exchange risk that characterises a loan denominated in a foreign currency and repayable in the national currency, they do not relate directly to the amount loaned or to the interest on the loan to be repaid, or to the fixing of the account currency and the payment currency. Those terms govern the consequences of changes in the exchange rate by specifying the reimbursement rules applicable according to exchange rate variations, with the result that they could be regarded as ancillary repayment arrangements which do not form part of the 'main subject matter of the contract' within the meaning of Article 4(2) of Directive 93/13.

37 However, it is apparent from the information provided by the referring court that the terms relating to the conditions for the repayment of the loan at issue in the main proceedings give concrete expression to the foreign exchange risk arising from variations in the exchange rate between the account currency and the payment currency as well as the interest rate attached to it, which characterises that loan.

38 It is therefore for the referring court to determine, taking account of the criteria identified in paragraphs 32 to 37 above, whether the terms of the agreement at issue in the main proceedings, which stipulate that repayments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, for an extension of the term of that agreement and for an increase in monthly instalments, and which thus give concrete expression to the foreign exchange risk, relate to the actual nature of the debtor's obligation to repay the amount made available to it by the lender.

39 In the light of all the foregoing, the answer to the first question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that terms of the loan agreement which stipulate that repayments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, for an extension of the term of that agreement and for an increase in monthly instalments come within that provision where those terms lay down an essential element characterising the agreement.

The third and fourth questions

40 By its third and fourth questions, which it is appropriate to examine together and before the second question, the referring court asks, in essence, whether Article 4(2) of Directive 93/13 must be interpreted as meaning that, in the context of a loan agreement denominated in a foreign currency, the requirement of transparency of the terms of that agreement which provide that payments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, for an extension of the term of the agreement and for an increase in monthly instalments, is satisfied where the seller or supplier has provided the consumer with objective and abstract information concerning the effect that the possible appreciation or depreciation of the euro against the foreign currency may have on that consumer's financial obligations, without that seller or lender having provided the consumer with information concerning the economic context capable of having an impact on exchange rate variations.

41 According to settled case-law on the requirement of transparency, information provided before the conclusion of a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he or she wishes to be contractually bound to a seller or supplier by the terms previously drawn up by the latter (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 49 and the case-law cited).

42 It follows that the requirement of transparency of contractual terms, as resulting from Article 4(2) and Article 5 of Directive 93/13, cannot be reduced merely to their being formally and grammatically intelligible. As the system of protection introduced by that directive is based on the idea that consumers are in a weak position vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, the requirement, laid down by the directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent, must be understood in a broad sense (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 50 and the case-law cited).

43 Consequently, that requirement must be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but also that an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 51 and the case-law cited).

44 That means, in particular, that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms, so that the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from the contract (see, to that effect, judgment of 27 January 2021, *Dexia Nederland*, C-229/19 and C-289/19, EU:C:2021:68, paragraph 50 and the case-law cited).

45 The question whether, in the present case, the requirement of transparency has been observed must be examined by the referring court in the light of all the relevant information, including the promotional material and information provided, in the negotiation of the loan agreement at issue in the main proceedings, not only by the lender itself but also by any other person who, on behalf of that professional, participated in the marketing of the loan concerned.

46 Specifically, it is for the national court, when it considers all the circumstances surrounding the conclusion of the loan agreement, to ascertain whether, in the case concerned, all the information likely to have a bearing on the extent of his or her commitment has been communicated to the consumer, enabling the consumer to estimate in particular the total cost of the loan. First, whether the terms of the agreement are drafted in plain, intelligible language enabling an average consumer, as described in paragraph 43 above, to estimate such a cost and, secondly, the fact of failing to mention in the loan agreement the information regarded as being essential with regard to the nature of the goods or services which are the subject matter of that agreement play a decisive role in that assessment (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 52 and the case-law cited).

47 In the present case, the referring court notes that VE received a considerable amount of information before the loan at issue in the main proceedings was taken out. It states, however, that that information was based on the assumption that the euro – Swiss franc exchange rate would remain stable. However, no mention was made of the foreign exchange risk.

48 As regards loan agreements denominated in a foreign currency, such as that at issue in the main proceedings, it should be noted, in the first place, that any information provided by the seller or supplier which seeks to inform the consumer about the functioning of the exchange mechanism and the risk associated with it is relevant for the purposes of that assessment. Details of the risks faced by the borrower in the event of a severe depreciation of the legal tender of the Member State in which the borrower is domiciled and an increase in foreign interest rates are factors of particular importance.

49 In that regard, as the European Systemic Risk Board stated in its Recommendation ESRB/2011/1 of 21 September 2011 on lending in foreign currencies (OJ 2011 C 342, p. 1), financial institutions must provide borrowers with adequate information to enable them to take well informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate (Recommendation A – Risk awareness of borrowers, paragraph 1) (judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 74 and the case-law cited).

50 The Court has held, in particular, that the borrower must be clearly informed that, in entering into a loan agreement denominated in a foreign currency, the borrower is exposing him or herself to a certain foreign exchange risk which may be economically difficult to bear in the event of a depreciation of the currency in which the borrower receives his or her income. In addition, the seller or supplier must set out the possible variations in the exchange rate and the risks inherent in entering into such an agreement (see, to that effect, judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 75 and the case-law cited).

51 It follows that, in order to comply with the requirement of transparency, the information communicated by the seller or supplier must enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, not only to understand that, depending on exchange rate variations, changes in the exchange rate between the account currency and the payment currency may have unfavourable consequences for his or her financial obligations, but also to understand, in the context of taking out a loan denominated in a foreign currency, the actual risk to which he or she is exposed, throughout the term of the agreement, in the event of a severe depreciation of the currency in which the borrower receives his or her income as against the account currency.

52 In that context, it is important to point out that quantitative simulations, to which the referring court refers, may constitute a useful piece of information if they are based on sufficient and accurate data and contain objective assessments which are communicated to the consumer in plain, intelligible language. It is only on those conditions that such simulations may enable the seller or supplier to draw the consumer's attention to the risk of potentially significant adverse economic consequences of the contractual terms at issue. Like any other information relating to the scope of the consumer's commitment communicated by the seller or supplier, quantitative simulations must help the consumer to understand the actual scope of the risk, in the long term, associated with possible exchange rate variations and thus the risks inherent in entering into a loan agreement denominated in a foreign currency.

53 Accordingly, in the context of a loan agreement denominated in a foreign currency that exposes the consumer to a foreign exchange risk, the requirement of transparency cannot be satisfied by communicating to the consumer information – even a large amount of information – if that information is based on the assumption that the exchange rate between the account currency and the payment currency will remain stable throughout the term of the agreement. That is the case, in particular, where the consumer has not been informed by the seller or supplier of the economic context liable to have an impact on exchange rate variations, with the result that the consumer was not given the opportunity to understand in concrete terms the potentially serious consequences on his or her financial situation which might result from taking out a loan denominated in a foreign currency.

54 In the second place, the relevant factors for the purposes of the assessment referred to in paragraph 46 above include the language used by the financial institution in the pre-contractual and contractual documentation. In particular, the absence of terms or explanations expressly informing the borrower of the existence of specific risks associated with loan agreements denominated in a foreign currency may confirm that the requirement of transparency, as resulting, inter alia, from Article 4(2) of Directive 93/13, is not satisfied.

55 In the third and final place, it should be borne in mind that a finding that a commercial practice, which the parties to the main proceedings discussed at the hearing before the Court, is unfair may also be one element among others on which the national court may base its assessment of the unfairness of terms in a contract concluded between a seller or supplier and a consumer (see, to that effect, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 43).

56 However, that element cannot establish, automatically and on its own, that the requirement of transparency arising from Article 4(2) of Directive 93/13 is not satisfied, which is a question to be considered in relation to all the circumstances of the particular case (see, to that effect, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 44 and the case-law cited).

57 In the light of the foregoing, the answer to the third and fourth questions is that Article 4(2) of Directive 93/13 must be interpreted as meaning that, in the context of a loan agreement denominated in a foreign currency, the requirement of transparency of terms of that agreement, which stipulate that payments at fixed intervals are allocated first to interest and that provide, in order to pay the account balance, for an extension of the term of the agreement and for an increase in monthly instalments, is satisfied where the seller or supplier has provided the consumer with sufficient and accurate information to enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, to understand the specific functioning of the financial mechanism in question and thus to evaluate the risk of potentially significant adverse economic consequences of such terms on his or her financial obligations throughout the term of the agreement.

The second question

58 By its second question, the referring court asks, in essence, whether Article 3(1) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which stipulate that payments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, which may increase significantly as a result of variations in the exchange rate between the account currency and the payment currency, for an extension of the term of the agreement

and for an increase in monthly instalments, cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer, where those terms expose the consumer to a disproportionate foreign exchange risk.

59 It should be noted, first of all, that, under Article 3(1) of Directive 93/13, a non-negotiated term of a contract concluded between a consumer and a seller or supplier is to 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.

60 It should also be noted that, according to settled case-law, the jurisdiction of the Court extends to the interpretation of the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, and in particular when examining whether a term is unfair within the meaning of Article 3(1) of that directive, whereby it is for that court to determine whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (see, to that effect, judgment of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 91 and the case-law cited).

61 As regards the assessment of whether a contractual term is unfair, it is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (see, inter alia, judgment of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 53 and the case-law cited).

62 Thus, the transparent nature of a contractual term, as required under Article 5 of Directive 93/13, is one of the elements to be taken into account in the assessment of whether that term is unfair, which is for the national court to carry out pursuant to Article 3(1) of that directive (judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 49 and the case-law cited).

63 In the present case, the contractual terms at issue in the main proceedings, in a loan agreement denominated in a foreign currency, stipulate that payments at fixed intervals are allocated first to interest and provide, in order to pay the account balance, which may increase significantly as a result of variations in the exchange rate between the account currency and the payment currency, for an extension of the term of that agreement and for an increase in monthly instalments. Accordingly, in the event of a severe depreciation of the national currency against the foreign currency, those terms place the foreign exchange risk on the consumer.

64 In that regard, it is apparent from the Court's case-law that, in the context of a loan agreement denominated in a foreign currency, such as that at issue in the main proceedings, the national court must assess, having regard to all the circumstances of the case in the main proceedings, taking account in particular of the expertise and knowledge of the seller or supplier, as far as concerns possible exchange rate variations and the inherent risks in taking out a loan in a foreign currency, first, the possible failure to observe the requirement of good faith and, second, the existence of a significant imbalance within the meaning of Article 3(1) of Directive 93/13 (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 56).

65 As regards the requirement of good faith, it should be noted, as is apparent from the 16th recital of Directive 93/13, that, in making that assessment, account must be taken in particular of the strength of the bargaining positions of the parties and the question whether the consumer had an inducement to agree to the term concerned.

66 As regards whether, contrary to the requirement of good faith, a term causes a significant imbalance in the contracting parties' rights and obligations arising under the contract, to the detriment of the consumer, the national court must assess whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations (see, inter alia, judgment of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 93 and the case-law cited).

67 Therefore, in order to assess whether the terms of an agreement, such as those at issue in the main proceedings, cause, to the detriment of the consumer, a significant imbalance in the rights and obligations of the parties to the loan agreement containing those terms, account must be taken of all the circumstances which could have been known to the professional lender at the time that agreement was entered into, having regard in particular to its expertise, as far as concerns possible exchange rate variations and the inherent risks in taking out such a loan, and which were such as to have an impact on the subsequent performance of that agreement and on the consumer's legal position.

68 In the light of the seller or supplier's knowledge of the foreseeable economic context capable of having an impact on exchange rate variations, of its greater means to foresee the foreign exchange risk, which may materialise at any time during the term of the agreement, and of the significant risk relating to foreign exchange variations that contractual terms such as those at issue in the main proceedings place on the consumer, it must be held that such terms may give rise to a significant imbalance in the parties' rights and obligations arising under the loan agreement concerned, to the detriment of the consumer.

69 Subject to the verifications to be carried out by the referring court, the contractual terms at issue in the main proceedings seem to place on the consumer, in so far as the seller or supplier has failed to comply with the requirement of transparency with regard to that consumer, a risk which is disproportionate in relation to the services provided and to the amount of the loan received, since the effect of applying those terms is that the consumer must ultimately bear the cost of changes in the exchange rate. Depending on those changes, the consumer may be in a situation in which, first, the outstanding capital due in the payment currency, in this case euro, is considerably higher than the sum initially borrowed and, secondly, the monthly instalments paid have, almost exclusively, covered the interest alone. That is the case, in particular, where the increase in the outstanding capital due in the national currency is not offset by the difference between the interest rate of the foreign currency and that of the national currency, whereby the fact that there is such a difference constitutes the principal advantage of a loan denominated in a foreign currency for the borrower.

70 In such circumstances, taking into account, in particular, the requirement of transparency resulting from Article 5 of Directive 93/13, it cannot be considered that the seller or supplier could reasonably expect, when dealing with the consumer in a transparent manner, that the consumer would have agreed to such terms in individual contract negotiations (see, by analogy, judgment of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 96), which it is nevertheless for the referring court to ascertain.

71 In the light of the foregoing, the answer to the second question is that Article 3(1) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which stipulate that payments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, which may increase significantly as a result of variations in the exchange rate between the account currency and the payment currency, for an extension of the term of the agreement and for an increase in monthly instalments, are liable to cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer, where the seller or supplier could not reasonably expect, in compliance with the requirement of transparency in relation to the consumer, that the consumer would have agreed, in individual contract negotiations, to a disproportionate foreign exchange risk as a result of those terms.

Costs

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

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

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 terms of the loan agreement which stipulate that repayments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, for an extension of the term of that agreement and for an increase in monthly instalments come within that provision where those terms lay down an essential element characterising the agreement.**

2. **Article 4(2) of Directive 93/13 must be interpreted as meaning that, in the context of a loan agreement denominated in a foreign currency, the requirement of transparency of terms of that agreement, which stipulate that payments at fixed intervals are allocated first to interest and that provide, in order to pay the account balance, for an extension of the term of the agreement and for an increase in monthly instalments, is satisfied where the seller or supplier has provided the consumer with sufficient and accurate information to enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, to understand the specific functioning of the financial mechanism in question and thus to evaluate the risk of potentially significant adverse economic consequences of such terms on his or her financial obligations throughout the term of the agreement.**

3. **Article 3(1) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which stipulate that payments at fixed intervals are allocated first to interest and which provide, in order to pay the account balance, which may increase significantly as a result of variations in the exchange rate between the account currency and the payment currency, for an extension of the term of the agreement and for an increase in monthly instalments, are liable to cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer, where the seller or supplier could not reasonably expect, in compliance with the requirement of**

transparency in relation to the consumer, that the consumer would have agreed, in individual contract negotiations, to a disproportionate foreign exchange risk as a result of those terms.

[Signatures]