ECLI:EU:C:2018:750

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

20 September 2018 (*)

(Reference for a preliminary ruling — Consumer protection — Unfair terms — Directive 93/13/EEC — Scope — Article 1(2) — Mandatory statutory or regulatory provisions — Article 3(1) — Concept of 'contractual term which has not been individually negotiated' — Term incorporated in the contract after its conclusion following the intervention of the national legislature — Article 4(2) — Plain and intelligible drafting of a term — Article 6(1) — Examination by the national court of its own motion as to whether a term is unfair — Loan contract denominated in a foreign currency concluded between a seller or supplier and a consumer)

In Case C-51/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest, Hungary), made by decision of 17 January 2017, received at the Court on 1 February 2017, in the proceedings

OTP Bank Nyrt.,

OTP Faktoring Követeléskezelő Zrt.

v

Teréz Ilyés,

Emil Kiss,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Rosas, C. Toader, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: E. Tanchev,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 22 February 2018,

after considering the observations submitted on behalf of:

– OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt., by A. Lendvai, ügyvéd,

– Ms Ilyés and Mr Kiss, by P. Dantesz, ügyvéd,

– the Hungarian Government, by M. Z. Fehér, acting as Agent,

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

– the European Commission, by A. Tokár and A. Cleenewerck de Crayencour, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2), Article 3(1) and Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), as well as point 1(i) of the annex thereto.

2 The request has been made in proceedings between OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt. (together, 'OTP Bank') and Ms Teréz Ilyés and Mr Emil Kiss (together, 'the borrowers') concerning an application for a declaration that certain terms in a loan contract denominated in Swiss francs (CHF), disbursed and repaid in Hungarian forints (HUF), are unfair.

Legal context

EU law

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

'… the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; … therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the [European Union] are party; … in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'.

4 Article 1(2) of that directive provides:

'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.

…

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.’

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 supplies in exchange, on the other, in so far as these terms are in plain intelligible language.’

7 Article 6(1) of Directive 93/13 provides:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

8 Article 7(1) of that directive is worded as follows:

‘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.’

9 The annex to Directive 93/13, entitled ‘Terms referred to in Article 3(3)’, contains point 1(i), which is worded as follows:

‘Terms which have the object or effect of:

…

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract’.

Hungarian law

The Law on credit institutions

10 Pursuant to Paragraph 203 of the hitelintézetekről és a pénzügyi vállalkozásokról szóló 1996. évi CXII. törvény (Law CXII of 1996 on credit institutions and financial undertakings, 'the Law on credit institutions'):

'1. The financial institution must inform both its current and potential customers, in a plain intelligible manner, of the conditions for using the services they provide, and the amendments to those conditions …

…

6. In the case of contracts concluded with retail customers granting a foreign currency loan or containing an option to purchase real property, the financial institution must explain to the customer the risk he bears in the contractual operation and the customer shall append his signature to confirm that he is aware thereof.'

Law DH 1

11 Paragraph 1(1) of the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers, 'Law DH 1') provides:

'This Law shall apply to loan agreements concluded with consumers between 1 May 2004 and the date of entry into force of this Law. For the purposes of this Law, the concept of loan agreements concluded with consumers shall cover any foreign exchange based (linked to, or denominated in, a foreign currency and repaid in Hungarian forints) or Hungarian 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 for the purposes of Paragraph 3(1) or Paragraph 4(1).'

12 Paragraph 3(1), (2) and (5) of that law provides that:

'1. In loan agreements concluded with consumers, terms — with the exception of contractual terms which have been individually negotiated — pursuant to which the financial 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 subparagraph 1 — without prejudice to subparagraph 3 — the official exchange rate set by the National Bank for the foreign currency concerned shall apply in relation to the disbursement and the repayment of the loan (including payment of the instalments and all the costs, fees and commissions expressed in foreign currencies).

...

5. The financial institution must clear accounts with the consumer in accordance with the provisions of a special law.'

13 Paragraph 4 of that law 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. A contractual term as referred to in subparagraph 1 shall be void if the credit institution has not … commenced civil proceedings or if the court has dismissed the action or discontinued the examination of the case, unless it is possible to bring the proceedings …, in respect of the contractual term, 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 subparagraph 2a.

2a. A contractual term as referred to in subparagraph 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 subparagraphs 2 and 2a, the credit institution shall carry out a settlement of accounts with the consumer as provided for in the special law.'

Law DH 2

14 It is apparent from the order for reference that, by adopting the 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 rules relating to the settlement of accounts referred to by Law XXXVIII of 2014, regulating specific matters relating to the decision of the Kúria (Supreme Court) to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers, and other provisions, 'Law DH 2'), the Hungarian legislature, inter alia, required credit institutions to rectify financially, by means of settlement of accounts, advantages wrongly obtained, to the consumer's detriment, by those institutions on the basis of unfair terms.

Law DH 3

15 Under Paragraph 3(1) of the az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről szóló 2014. évi LXXVII. törvény (Law LXXVII of 2014 regulating various matters relating to the amendment of the currency of denomination of consumer loan contracts and to the rules governing interest, 'Law DH 3'):

'Loan agreements concluded with consumers shall be amended by operation of this Law, in accordance with its provisions.'

16 Paragraph 10 of that law provides;

'As regards foreign currency mortgage loan agreements and foreign currency based mortgage loan agreements, the financial 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 DH 2], to convert into a loan denominated in Hungarian 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 DH 2]. 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.'

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

17 On 15 February 2008 the borrowers concluded with ELLA Első Lakáshitel Kereskedelmi Bank Zrt., the predecessor in law to OTP Bank, a loan denominated in Swiss francs, but disbursed and repaid in Hungarian forints ('the loan contract at issue'). The loan contract at issue, secured by a non-ancillary pledge, was denominated in Swiss francs on the basis of the exchange rate of the day. The loan contract contained terms stipulating, first, a difference between the exchange rate applicable to the disbursement of the loan and that applicable to the repayment of the loan, respectively the buying rate and the selling rate used by OTP Bank and its predecessor in law ('the difference in exchange rates'), and, secondly, a power to make unilateral amendments in favour of the lender, allowing it to increase the interest rate, costs or commissions ('the power to make unilateral amendments').

18 Paragraph 4.7.1 of the loan contract stated that 'the debtor is required to fulfil the payment obligations to which he is subject, denominated in the currency of the loan, by transfer of the exchange value in Hungarian forints to the "credit" account … opened with [OTP Bank] for the purposes of this loan. The debtor is required to fulfil the applicable payment obligations at the latest on the day the debt becomes due, in accordance with the selling rates of the currency concerned, published under the provisions of the internal regulations, ensuring to replenish the account referred to above, at the latest on the due date, up to the exchange value in Hungarian forints. The creditor shall convert into Hungarian forints the debtor's payment obligations denominated in a foreign currency in accordance with the rates referred to in this paragraph on the due date and it shall debit that sum from the "credit" account in Hungarian forints.'

19 Paragraph 10 of the loan contract at issue, entitled 'Declaration of notification of risk', was worded as follows:

'In relation to the loan risks, the debtor declares that he is aware of and understands the detailed information relating to this matter provided to him by the creditor, and is aware of the risk of taking out a foreign-currency loan, a risk which he alone bears. With regard to the foreign exchange risk, he is aware, in particular, that, if during the term of the contract there were variations in the exchange rate between the Hungarian forint and the Swiss franc which were unfavourable (that is to say, in the event of depreciation of the exchange rate of the Hungarian forint as opposed to the exchange rate at the time of disbursement), it might even happen that the exchange value of the repayment instalments, which are fixed in foreign currency and payable in Hungarian forints, would increase significantly. By signing this contract, the debtor confirms that he is aware that the economic repercussions of this risk lie entirely with him. He also declares that he has carefully

assessed the possible effects of the foreign exchange risk and that he accepts them, having weighed up the risk in the light of his solvency and economic situation, and that he will not be able to make any claim on the bank as a consequence of the foreign exchange risk.'

20 On 16 May 2013 the borrowers brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary) for annulment of the loan contract at issue, on the ground, inter alia, that they were not able to evaluate the extent of the foreign exchange risk, since the contractual term concerned had not been drafted in plain intelligible language.

21 Furthermore, on 22 July 2013 OTP Bank terminated the loan contract owing to the borrowers' failure to perform it.

22 In OTP Bank's view, its predecessor in law complied in full with its obligation to provide information in respect of the foreign exchange risk, in accordance with the obligations imposed by Paragraph 203 of the Law on credit institutions.

23 The Fővárosi Törvényszék (Budapest High Court) upheld the borrowers' claim by judgment of 11 March 2016. It noted, first, that the conclusion of a loan contract in a foreign currency was at the time more favourable and cheaper than that of a contract denominated in Hungarian forints. Secondly, OTP Bank should have been aware, having regard to the incipient economic crisis, that recourse to the Swiss franc as a safe-haven currency presented considerable risks, but it failed to warn the borrowers in that regard. In addition, the contractual term relating to the foreign exchange risk was not drafted in plain intelligible language. That court decided to convert the borrowers' outstanding debt into Hungarian forints, as if the loan contract at issue had been denominated in that currency.

24 OTP Bank brought an appeal against that judgment before the referring court, which is the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest, Hungary), on the ground that the court of first instance did not take into account the provisions of Hungarian law which had entered into force since the borrowers' action had been brought, inter alia those of Law DH 2, and the procedural requirements which they contained and which the consumer must meet as an applicant in proceedings relating to a loan contract denominated in a foreign currency.

25 The borrowers, on the other hand, seek to have the judgment of the Fővárosi Törvényszék (Budapest High Court) upheld. In their view, Paragraph 3(1) and Paragraph 4(1) of Law DH 1 classify, in principle, as abusive any term providing for a difference in exchange rates or a power to make unilateral amendments, whereas the other terms of the contract, inter alia those relating to information about exchange-related risks, do not fall within those provisions and should be assessed on a case-by-case basis.

26 The referring court recalls that Law DH 1 was adopted following, on the one hand, Decision No 2/2014 PJE of the Kúria (Supreme Court, Hungary) (*Magyar Közlöny* 2014/91, p. 10975), delivered i safeguard uniformity of civil law and, on the other hand, the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282). Paragraph 3(1) of that law provides that terms of loan agreements concluded with consumers which relate to the difference in exchange rates and which have not been individually negotiated are void. That law requires such a term to be replaced, with retroactive effect, by a provision providing for the application of the official exchange rate of the currency concerned set by the National Bank of Hungary.

27 Furthermore, it is apparent from the order for reference that, in the decision referred to in the previous paragraph, the Kúria (Supreme Court) decided that 'a term in a consumer contract for a

foreign currency loan under which the foreign exchange risk is borne without any limit by the consumer — in return for a more favourable interest rate — is a contractual term which refers to the main subject matter the unfairness of which, as a general rule, cannot be examined. This term may be examined and declared unfair only if, at the time the contract is concluded, and taking account of the text of the contract and the information received from the financial institution, its content was neither clear nor intelligible to an average consumer, who is reasonably well informed and reasonably observant and circumspect. Contractual terms relating to the foreign exchange risk shall be unfair, and consequently the contract will be wholly or partially invalid, where the consumer, owing to the inadequacy of the information received from the financial institution or the delay in receiving such information, has reason to believe that the foreign exchange risk is not genuine or that he bears the risk only to a limited extent.'

28 Subsequently, the Hungarian legislature, in adopting Law DH 2, imposed on credit establishments the obligation to rectify, by means of settlement of accounts, the amounts wrongly collected on the basis of the unfair terms referred to in Paragraphs 3 and 4 of Law DH 1. Law DH 3, for its part, provided that the loans concerned would be definitively converted into Hungarian forints, in accordance with the exchange rate laid down in Paragraph 10 thereof, in order to eliminate future exchange-related risks.

29 The referring court notes that, in adopting laws such as Law DH 1 and Law DH 3, the Hungarian legislature attempted to address the issue arising from the conclusion of a considerable number of loan contracts denominated in a foreign currency, inter alia by annulling the difference in exchange rates and imposing the application of the exchange rate set by the National Bank of Hungary. However, that court states that, even though that rate is more favourable to the consumer than that provided for in the loan contract, the fact remains that the risk of fluctuation in the exchange rate of the foreign currency in relation to the repayment currency is, in the event of a rise in the value of the foreign currency or a depreciation of the national currency, still borne by the borrower.

30 Nevertheless, first, such a replacement of contractual terms by provisions laid down by national law could have the result, according to the referring court, that those terms are no longer covered by Directive 93/13, as they are not 'contractual terms which have not been individually negotiated' within the meaning of that directive. Secondly, should those terms be classified as 'contractual terms' within the meaning of that directive, the term relating to the foreign exchange risk could fall within the exclusion laid down by Article 1(2) of the directive, since it may constitute a contractual term which 'reflects mandatory statutory or regulatory provisions' within the meaning of that provision, and would therefore not be subject to the provisions of Directive 93/13.

31 Should the exclusion laid down by Article 1(2) of Directive 93/13 not be applicable in the present case, the referring court notes that it must assess whether the term relating to the foreign exchange risk is drafted in plain intelligible language, in so far as the borrowers received only general information in respect of the foreign exchange risk.

32 In that context, the referring court is uncertain whether, in proceeding with the examination of that term, it would be permissible for it also to take account of any other unfair terms, as they appeared in the contract at the time of its conclusion, even though, at a later date, they were annulled and, where necessary, replaced pursuant to provisions of national law.

33 Finally, regarding the identification of unfair terms by the national court of its own motion, the referring court states that the Kúria (Supreme Court) interpreted the Court's case-law having regard, as the Court did, to the observance of the principle that the parties have the right to delimit

the subject matter of an action, according to which an action should proceed on the basis of the facts and pleadings set out by the parties, having regard to the claim made. Thus, the referring court is uncertain whether it has the power, or indeed the obligation, to assess whether any terms that have not been relied on by the consumer in support of his claim, in his capacity as an applicant, are unfair.

34 In those circumstances, the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a contractual term which places the foreign exchange risk on the consumer and which, owing to the removal of an unfair contractual term which established a bid-offer spread and the obligation to bear the corresponding foreign exchange risk, has become part of the contract with *ex tunc* effects as a consequence of the intervention of the legislature following disputes concerning validity which affected a large number of contracts considered to be a "term which has not been individually negotiated" within the meaning of Article 3(1) of Directive 93/13 and which therefore falls within the scope of the directive?

2. If a contractual term which places the foreign exchange risk on the consumer falls within the scope of Directive 93/13, is the exclusion in Article 1(2) of the directive to be interpreted as also referring to a contractual term which reflects mandatory statutory provisions within the meaning of paragraph 26 of the [judgment of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180)], which have been adopted or have come into force after the conclusion of the contract? Does that exclusion also extend to a contractual term which has become part of the contract with *ex tunc* effects after the conclusion of the contract as a consequence of a mandatory statutory provision which remedies the invalidity caused by the unfairness of a contractual term which makes it impossible to perform the contract?

3. If, according to the replies to the above questions, it is possible to examine the unfairness of a contractual term which places the foreign exchange risk on the consumer, is it to be understood that the requirement for plain intelligible language to which Article 4(2) of Directive 93/13 refers is also met if the obligation to provide information required by law and formulated in necessarily general terms is fulfilled in the terms set out in the facts, or is it also necessary to communicate information concerning the risk to the consumer of which the financial institution is aware or to which it might have access at the time the contract is concluded?

4. Is the fact that, at the time the contract was concluded, the contractual terms relating to the power to make unilateral amendments and to the bid-offer spread — which, years later, turned out to be unfair — appeared in the contract together with the term relating to the assumption of the foreign exchange risk, so that, as a cumulative effect of those terms, the consumer had no means of foreseeing how the payment obligations or the mechanism for varying them would evolve, relevant from the point of view of the requirement for clarity and transparency and of the provisions in point 1(i) of the Annex to Directive 93/13? Or rather, should contractual terms subsequently declared to be unfair be disregarded in the assessment of the unfairness of the term which places the foreign exchange risk on the consumer?

5. If the national court declares that the contractual term which places the foreign exchange risk on the consumer is unfair, is it required, when determining the legal effects in accordance with the rules of national law, also to take into account, of its own motion, while respecting the right of the parties to present argument in *inter partes* proceedings, the unfairness of other contractual terms which have not been relied on by the applicants in their action? Does the principle that the court

should act of its own motion in accordance with the case-law of the Court of Justice also apply if the applicant is a consumer or, having regard to the position occupied by the supplementary provisions in the whole proceedings and to the particular features of the proceedings, does the principle that the parties have the right to delimit the subject matter of an action, in that case, preclude examination by the court of its own motion?'

Consideration of the questions referred

Admissibility of the questions referred

35 OTP Bank submits that the first to fourth questions are inadmissible on the grounds, in essence, that they are hypothetical and that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose. According to OTP Bank, the referring court started from the incorrect premiss that Laws DH 1 and DH 3 had the effect of placing the foreign exchange risk linked to loan contracts denominated in a foreign currency on consumers. Those laws, as well as the decisions of the Kúria (Supreme Court), inter alia its Decision No 2/2014 PJE, did not have the effect of imposing the *ex tunc* amendment of terms relating to the foreign exchange risk that were already present in existing contracts. In addition, the Kúria (Supreme Court) has held that it is for the national court to assess the plainness and intelligibility of the wording of each term put before it, pursuant to Article 4(2) of Directive 93/13. The provisions of Laws DH 1 and DH 3 did not alter the content of that decision of the Kúria (Supreme Court).

36 As regards the fifth question, OTP Bank submits that the Court has previously held that, under Article 6(1) of Directive 93/13, the national court is required to examine of its own motion the unfairness of a contractual term. As the parties are in agreement on that aspect, it bears no relation to the actual facts of the case.

37 It must be borne in mind at the outset that, according to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment of 17 April 2018, *Krüsemann and Others*, C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paragraph 24 and the case-law cited).

38 As regards OTP Bank's claim that Laws DH 1 and DH 3 do not change the consumer's situation in respect of the foreign exchange risk and that, consequently, the questions are hypothetical, it must be noted that the referring court states, in essence, that the adoption of those laws has, at the very least, some impact on that risk.

39 Admittedly, it is apparent from the information submitted to the Court, including the order for reference itself, that the existence of such a risk stems from the very nature of the contract, which, in the present case, finds specific expression in paragraph 4.7.1 of the loan contract at issue, according to which the debtor is required to fulfil the payment obligations to which he is subject, denominated in the currency of the loan, by transfer of the exchange value in Hungarian forints, calculated in accordance with the selling rates of the currency on the due date.

40 However, according to the referring court, Paragraph 3(2) of Law DH 1, pursuant to which the void term on the difference in exchange rates is to be replaced by a provision providing for the application of the official exchange rate set by the National Bank of Hungary for the corresponding currency, and Paragraph 10 of Law DH 3, according to which loan contracts denominated in a foreign currency are to be automatically converted into contracts denominated in Hungarian forints, the exchange rate at the time of that conversion being set on the basis of an average, still have the effect that, in practice, the foreign exchange risk continues to be borne by the consumer.

41 The presumption of relevance referred to in paragraph 37 of the present judgment cannot be rebutted by the mere fact that one of the parties in the main proceedings disputes the referring court's interpretation of provisions of national law and, as a result, the relevance of the question referred for a preliminary ruling to the resolution of the dispute in the main proceedings. The national court alone has jurisdiction to find and assess the facts in the case in the main proceedings and to interpret and apply national law (judgment of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 36 and the case-law cited).

42 As regards the fifth question, the referring court asks, in essence, whether the Court's case-law relating to the obligation, for the national court, in certain circumstances, to raise of its own motion grounds which the parties have not raised before it is also applicable in a case such as that in the main proceedings, in which the consumer is not the defendant but the applicant.

43 In that regard, it need merely be recalled that, even when there is case-law of the Court resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so, and the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 21 and the case-law cited).

44 In the present case, it is not quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, nor that the problem is hypothetical, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

45 It follows that the questions referred for a preliminary ruling are admissible.

The first question

46 By its first question, the referring court asks, in essence, whether the concept of 'term which has not been individually negotiated' in Article 3(1) of Directive 93/13 must be interpreted as meaning that it covers inter alia a contractual term amended by a mandatory national statutory provision, such as Paragraph 3(2) of Law DH 1, read in conjunction with Paragraph 10 of Law DH 3, adopted after the conclusion of a loan contract with a consumer, for the purposes of removing a term which is null and void from that contract, by imposing the application of an exchange rate set by the National Bank for the calculation of the outstanding amount of the loan.

47 According to Article 3(2) of that directive, a term is always to 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.

48 In the present case, owing to the fact that the terms at issue in the main proceedings were imposed by the national legislature, it is clear that the parties to the contract did not individually negotiate them.

49 Consequently, the answer to the first question is that the concept of 'term which has not been individually negotiated' in Article 3(1) of Directive 93/13 must be interpreted as meaning that it covers inter alia a contractual term amended by a mandatory national statutory provision adopted after the conclusion of a contract with a consumer, for the purpose of removing a term which is null and void from that contract.

The second question

50 As a preliminary point, it must be noted, as already stated in paragraph 39 of the present judgment and as is apparent from the file submitted to the Court, that, in the present case, a foreign exchange risk stems from the very nature of the loan contract at issue, in particular from paragraph 4.7.1 thereof. However, according to the referring court, the retention of that foreign exchange risk also results, at least in part, from the application of Paragraph 3(2) of Law DH 1, read in conjunction with Paragraph 10 of Law DH 3, in so far as those provisions of national law carry out an automatic amendment of current contracts, consisting of replacing the exchange rate of the currency in which the loan contract was denominated with an official exchange rate set by the National Bank of Hungary.

51 Thus, it must be considered that, by its second question, the referring court asks, in essence, whether Article 1(2) of Directive 93/13 must be interpreted as meaning that the scope of that directive covers terms amended by the effect of mandatory provisions of national law, adopted after the conclusion of a loan contract concluded with a consumer and intended to remove a term which is null and void from that contract, by imposing an official exchange rate set by the National Bank for the calculation of the outstanding amount of the loan, while retaining the foreign exchange risk placed on the consumer in the event of depreciation of the national currency in relation to the foreign currency in which the loan was taken out.

52 It should be recalled that Article 1(2) of Directive 93/13, which covers terms which reflect mandatory statutory or regulatory provisions, establishes an exclusion from the scope of that directive. The Court has already held that that exclusion requires two conditions to be met. First, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraphs 27 and 28 and the case-law cited).

53 That exclusion from the application of the rules of Directive 93/13 is justified by the fact that, in principle, it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts (see, to that effect, judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 28).

54 However, the Court has also held that a national court must take account of the fact that, having regard to the purpose of that directive, namely the protection of consumers against unfair terms included in contracts concluded with consumers by sellers or suppliers, the exception provided for in Article 1(2) of the directive is to be strictly construed (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 31 and the case-law cited).

55 As regards, in particular, that purpose and the general scheme of Directive 93/13, given the nature and significance of the public interest which constitutes the basis of the protection guaranteed to consumers, the directive requires Member States, first, under Article 6(1) thereof, to lay down 'that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer' and, secondly, as is apparent from Article 7(1) thereof, to provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers' (see, to that effect, judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 98 and the case-law cited).

56 Concerning, more specifically, Article 6(1) of Directive 93/13, the Court has previously held that while that provision requires the Member States to lay down that unfair terms are not to be binding on the consumer, 'as provided for under their national law', the fact remains that the regulation by national law of the protection guaranteed to consumers by Directive 93/13 may not alter the scope and, therefore, the substance of that protection (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 64 and 65).

57 In the present case, it is common ground that Paragraph 3 of Law DH 1 and Paragraph 10 of Law DH 3 were adopted after the conclusion of loan contracts denominated in a foreign currency, the national legislature having considered the term on the difference in exchange rates generally included in such contracts to be unfair and having decided, in that context, to replace the exchange rate set in accordance with the contractual arrangements with an exchange rate set by the National Bank of Hungary.

58 It is apparent from the information before the Court that those laws were adopted in a specific context, in that they were based on Decision No 2/2014 PJE of the Kúria (Supreme Court) delivered to safeguard the uniformity of the law, by which that court ruled on the unfairness or the presumption of unfairness of terms on the difference in exchange rates and the power to make unilateral amendments contained in credit or loan contracts denominated in a foreign currency and concluded with consumers.

59 It follows from the order for reference that both that decision of the Kúria (Supreme Court) and Law DH 1 are based on the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282).

60 The Court held, in paragraph 82 of that judgment, that, in certain circumstances, the substitution for an unfair term of a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13, since, according to settled case-law, that provision is intended to substitute, for the formal balance established by the contract between the rights and obligations of the parties, an effective balance re-establishing equality between them, and not to annul all contracts containing unfair terms.

61 If it were not permissible for a national court to replace an unfair term, without which the contract concerned could not continue in existence, with a supplementary provision of national law, that court would be required to annul the contract in its entirety. This might expose the consumer to particularly unfavourable consequences, since the consequence of such an annulment is that, in general, the outstanding balance of the loan becomes due forthwith, to a degree likely to be in excess of the consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be discouraged from inserting such terms in the contracts it offers (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 83 and 84).

62 As regards the case in the main proceedings, it is apparent from the information before the Court that, by replacing, pursuant to Paragraph 3(2) of Law DH 1 and Paragraph 10 of Law DH 3, the term relating to the difference in exchange rates with a term providing that the exchanged rate set by the National Bank of Hungary, in force on the due date, is applicable between the parties to the contract, the national legislature intended to establish certain conditions relating to the obligations contained in that type of loan contract.

63 In that regard, the Court has previously held that Article 1(2) of Directive 93/13 must be interpreted as meaning that that directive is not applicable to conditions contained in the contract between a seller or supplier and a consumer which are determined by national legislation (see, to that effect, order of 7 December 2017, *Woonhaven Antwerpen*, C-446/17, not published, EU:C:2017:954, paragraph 31).

64 It follows that contractual terms, such as those referred to in paragraph 62 of the present judgment, which reflect mandatory statutory provisions, cannot fall within the scope of Directive 93/13.

65 However, such a consideration does not mean that another contractual term, such as that relating to the foreign exchange risk, is, in its entirety, also excluded from the scope of that directive and cannot therefore be examined in the light of the directive.

66 As recalled in paragraph 54 of the present judgment, Article 1(2) of Directive 93/13 is to be strictly construed. Thus, the fact that some terms which reflect statutory provisions fall outside the scope of that directive does not mean that the validity of other terms, which are included in the same contract and are not covered by statutory provisions, may not be assessed by the national court in the light of that directive.

67 In the present case, it is apparent from the file submitted to the Court that the amendments stemming from Paragraph 3(2) of Law DH 1 and Paragraph 10 of Law DH 3 were not intended to address in full the issue of the foreign exchange risk in respect of the period between the time when the loan contract at issue was concluded and its conversion into Hungarian forints, pursuant to Law DH 3.

68 In respect of contractual terms which address the issue of the foreign exchange risk and which are not covered by those statutory amendments, it follows from the Court's case-law that such terms fall within the scope of Article 4(2) of Directive 93/13, and escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain intelligible language (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 43).

69 Furthermore, the fact that conditions relating to the difference in exchange rates are thus excluded from the scope of Directive 93/13 pursuant to Article 1(2) thereof does not prevent the requirements stemming from Article 6(1) and Article 7(1) of that directive and the Court's case-law, as recalled inter alia in paragraphs 32 to 34 of the judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367), from remaining applicable for all other areas covered by that directive and, in particular, for the procedural rules serving to ensure that rights which individuals derive from that directive are respected.

70 In the light of the foregoing, the answer to the second question is that Article 1(2) of Directive 93/13 must be interpreted as meaning that the scope of that directive does not cover terms which

reflect mandatory provisions of national law, inserted after the conclusion of a loan contract concluded with a consumer and intended to remove a term which is null and void from that contract, by imposing an exchange rate set by the National Bank. However, a term relating to the foreign exchange risk, such as that at issue in the main proceedings, is not excluded from that scope by virtue of that provision.

The third question

71 By its third question, the referring court asks, in essence, whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement for contractual terms to be drafted in plain intelligible language entails that the credit institution must provide detailed information about the foreign exchange risk, including a risk analysis in respect of the economic consequences which might arise from a depreciation of the national currency in relation to the foreign currency in which the loan was denominated.

72 In that regard, although it is for the national court alone to rule on the classification of terms in accordance with the particular circumstances of the case, the fact remains that the Court has jurisdiction to elicit from the provisions of Directive 93/13, in this case the provisions of Article 4(2) thereof, the criteria that the national court may or must apply when examining a contractual term (judgment of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraph 28 and the case-law cited).

73 In that regard, in the context of loan contracts denominated in a foreign currency, it is apparent from the Court's case-law that Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement for a contractual term to be drafted in plain intelligible language cannot be reduced merely to it being formally and grammatically intelligible (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 44 and the case-law cited).

74 As regards foreign currency lending, like that at issue in the main proceedings, it must be noted, as the European Systematic Risk Board stated in its Recommendation ESRB/2011/1 of 21 September 2011 on lending in foreign currencies (OJ 2011 C 342, p. 1), that 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 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 49).

75 More specifically, the borrower must, first, be clearly informed of the fact that, in entering into a loan agreement denominated in a foreign currency, he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a depreciation of the currency in which he receives his income in relation to the foreign currency in which the loan was granted. Second, the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 50).

76 Finally, as stated in the twentieth recital of Directive 93/13, it is important that the consumer should actually be given an opportunity to examine all the terms of the contract. Information, provided in sufficient time before concluding a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer in order to decide

whether he wishes to be bound by the terms previously drawn up by the seller or supplier (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 70 and the case-law cited).

77 In the present case, in the light of the foregoing, it is for the referring court to take into account, inter alia, the presence in the loan contract at issue of paragraph 10 thereof, entitled 'Declaration of notification of risk', the wording of which was set out in paragraph 19 of the present judgment, read in conjunction with any additional information provided before the conclusion of that contract. In that last regard, it is apparent from the information before the Court that the borrowers received, inter alia, an additional information sheet relating to the foreign exchange risk, containing examples of specific calculations of the risk in the event of a depreciation of the Hungarian forint in relation to the Swiss franc, which it is nonetheless for the referring court to ascertain.

78 In the light of the foregoing, the answer to the third question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement for a contractual term to be drafted in plain intelligible language requires financial institutions to provide borrowers with adequate information to enable them to take well-informed and prudent decisions. In that regard, that requirement means that a term relating to the foreign exchange risk must be understood by the consumer both at the formal and grammatical level and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations.

The fourth question

79 By its fourth question, the referring court asks, in essence, whether Article 4 of Directive 93/13 must be interpreted as requiring that the plainness and intelligibility of the contractual terms be assessed 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, even though some of those terms have been declared or presumed to be unfair and annulled at a later time by the national legislature.

80 It is clear from the wording of Article 4(1) of Directive 93/13 that, in order to assess, in a situation in which the term in question relates to the definition of the main subject matter of the contract, whether that term is drafted in plain intelligible language within the meaning of Article 4(2) of that directive, account should be taken, inter alia, of all the terms of the contract that were included therein at the time of its conclusion, since it is at that moment that the consumer decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.

81 Accordingly, as regards the case in the main proceedings, the subsequent entry into force of Laws DH 1, DH 2 and DH 3, in so far as they made mandatory and *ex tunc* amendments to certain terms contained in the loan contract at issue, is not included among the circumstances which the referring court must take into account when assessing the transparency of the term relating to the foreign exchange risk.

82 It follows that it is for the referring court to take into account all of the circumstances of the case in the main proceedings as they existed at the time when the contract was concluded.

83 Consequently, the answer to the fourth question is that Article 4 of Directive 93/13 must be interpreted as requiring that the plainness and intelligibility of the contractual terms be assessed 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, notwithstanding that some of those terms have been declared or presumed to be unfair and, accordingly, annulled at a later time by the national legislature.

The fifth question

84 By its fifth question, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that it is for the national court to identify of its own motion, in the place of the consumer in his capacity as an applicant, any unfairness of the terms of a contract which the consumer has concluded with a seller or supplier.

85 According to Article 6(1) of Directive 93/13, Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

86 Furthermore, it is apparent from Article 7(1) of Directive 93/13, read in conjunction with the twenty-fourth recital thereof, that Member States must ensure that the courts or administrative authorities have at their disposal adequate and effective means of preventing the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. In that regard, the Court has recalled the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness *vis-à-vis* sellers or suppliers (judgment of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 33 and the case-law cited).

87 It should be recalled that, in the light of the foregoing, the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, provided that it has available to it the legal and factual elements necessary for that task (see, to that effect, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 43 and the case-law cited).

88 That obligation for the national court has been regarded as necessary for ensuring that the consumer enjoys effective protection, in view in particular of the not insignificant risk that he is unaware of his rights or encounters difficulties in enforcing them (see, to that effect, judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 31 and the case-law cited).

89 In addition, the Court of Justice has held that, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (see, to that effect, judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 35 and the case-law cited).

90 Accordingly, the protection intended by Directive 93/13 requires that the national court is to identify of its own motion, including, where necessary, in the place of the consumer in his capacity as an applicant, any unfairness of the terms in a contract concluded between a seller or supplier and

that consumer, provided that it has available to it the legal and factual elements necessary for that task.

91 It follows that the answer to the fifth question is that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that it is for the national court to identify of its own motion, in the place of the consumer in his capacity as an applicant, any unfairness of a contractual term, provided that it has available to it the legal and factual elements necessary for that task.

Costs

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

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

1. **The concept of 'term which has not been individually negotiated' in Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that it covers inter alia a contractual term amended by a mandatory national statutory provision adopted after the conclusion of a contract with a consumer, for the purpose of removing a term which is null and void from that contract.**

2. **Article 1(2) of Directive 93/13 must be interpreted as meaning that the scope of that directive does not cover terms which reflect mandatory provisions of national law, inserted after the conclusion of a loan contract concluded with a consumer and intended to remove a term which is null and void from that contract, by imposing an exchange rate set by the National Bank. However, a term relating to the foreign exchange risk, such as that at issue in the main proceedings, is not excluded from that scope under that provision.**

3. **Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement for a contractual term to be drafted in plain intelligible language requires financial institutions to provide borrowers with adequate information to enable them to take well-informed and prudent decisions. In that regard, that requirement means that a term relating to the foreign exchange risk must be understood by the consumer both at the formal and grammatical level and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations.**

4. **Article 4 of Directive 93/13 must be interpreted as requiring that the plainness and intelligibility of the contractual terms be assessed 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, notwithstanding that some of those terms have been declared or presumed to be unfair and, accordingly, annulled at a later time by the national legislature.**

5. **Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as meaning that it is for the national court to identify of its own motion, in the place of the consumer in his capacity as an applicant, any unfairness of a contractual term, provided that it has available to it the legal and factual elements necessary for that task.**

[Signatures]

* Language of the case: Hungarian.