ECLI:EU:C:2017:703

JUDGMENT OF THE COURT (Second Chamber)

20 September 2017 (*)

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Article 3(1) and Article 4(2) — Assessment of the unfairness of contractual terms — Loan agreement concluded in a foreign currency — Exchange rate risk born entirely by the consumer — Significant imbalance in the parties' rights and obligations arising under the contract — Time at which the imbalance must be assessed — Scope of the concept of terms drafted in 'plain intelligible language' — Level of information to be procured by the bank)

In Case C-186/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania), made by decision of 3 March 2016, received at the Court on 1 April 2016, in the proceedings

Ruxandra Paula Andriciuc and Others

v

Banca Românească SA,

THE COURT (Second Chamber),

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

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 9 February 2017,

after considering the observations submitted on behalf of:

– Ruxandra Paula Andriciuc and Others, by G. Piperea, A. Dimitriu, L. Hagiu and C. Şuhan, avocaţi,

– Banca Românească SA, by R. Radu Tureac, V. Rădoi and D. Nedea, avocaţi,

– the Romanian Government, by R.-H. Radu, L. Liţu, M. Chicu and E. Gane, acting as Agents,

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

– the European Commission, by C. Gheorghiu and G. Goddin and by D. Roussanov, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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).

2 The request has been made in proceedings between Ms Ruxandra Paula Andriciuc and 68 other persons and Banca Românească SA (‘the Bank’) concerning the alleged unfair terms incorporated in loan agreements providing, in particular, for the repayment of loans in the same foreign currency as that in which they were disbursed.

Legal context

EU law

3 Article 1 of Directive 93/13 provides:

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

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

4 Under Article 3(1) of the directive:

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

5 Article 4 of the directive is worded as follows:

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

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

6 Article 5 of that directive provides:

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

Romanian law

7 Article 1578 of the Cod Civil (Civil Code), in the version in force at the date on which the agreements at issue in the main proceedings were concluded, provides:

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

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

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

8 It is apparent from the order for reference that between 2007 and 2008 the applicants in the main proceedings who, during that period, received their income in Romanian lei (RON), concluded loan agreements with the Bank denominated in Swiss francs (CHF) with a view to acquiring immovable property, refinancing other credit arrangements or meeting personal needs.

9 Under Article 1(2) of each of those agreements, the applicants in the main proceedings were required to make monthly payments on the loans in the same currency as that in which they had been concluded, that is in Swiss francs, with the consequence that the risk of fluctuations requiring an increase in the monthly repayments if the exchange rate of the Romanian leu fell against the Swiss franc was born entirely by the applicants. Furthermore, those agreements contained two clauses, in Article 9(1) and Article 10(3)(9) respectively, authorising the Bank, once the monthly payments had fallen due or in the event that the borrower failed to comply with the obligations arising from the agreements, to debit the borrower's account and, if necessary, to carry out any conversion of the balance available on the borrower's account into the currency of the contract at the Bank's exchange rate as it stood on the day of that operation. Pursuant to those terms, any difference in the exchange rate was borne entirely by the borrower.

10 According to the applicants in the main proceedings, the Bank was in a position to foresee the movement and fluctuations in the exchange rate for the Swiss franc. The exchange risk was not fully explained since, unlike other foreign currencies used as a reference currency for loans, the Bank did not point out that the Swiss franc fluctuated significantly against the Romanian leu.

11 More generally, the presentation was made in a biased manner, emphasising the advantages of that type of product and the currency used, while failing to point out the potential risks or the likelihood of those risks materialising. In that connection, the applicants in the main proceedings claim that by failing to inform them in a transparent manner about such fluctuations, the Bank acted in breach of its obligations to inform, warn and advise, and its duty to draft contractual terms in

plain and intelligible language, so as to enable a borrower to understand the obligations arising from the contract which he has concluded.

12 Taking the view that the terms providing for the repayment of the loans in Swiss francs, in so far as they placed the exchange risk on the borrowers, were unfair terms, the applicants in the main proceedings brought an action before the Tribunalul Bihor (District Court, Bihor, Romania) seeking a declaration that those terms were completely invalid together with an order requiring the Bank to produce, for each loan agreement, a new repayment schedule providing for the conversion of the credit into Romanian lei, at the exchange rate which had been in force when the loan agreements at issue in the main proceedings were concluded.

13 By judgment of 30 April 2015, the Tribunalul Bihor (District Court, Bihor) dismissed the action. That court held that, even though it was not negotiated with the borrowers, the term providing for the repayment of loans in the same currency as that in which the loan agreements had been concluded was not unfair.

14 The applicants in the main proceedings brought an appeal against that decision before the referring court. They argue that the significant imbalance between the rights and obligations of the parties was caused by the depreciation of the Romanian leu against the Swiss franc which took place after the conclusion of the agreements, and that the Court has never given a ruling on a question of that nature in its judgments relating to the interpretation of Article 3(1) of Directive 93/13 on the definition of 'significant imbalance'.

15 The referring court observes that, in the present case, from the moment when the loans at issue in the main proceedings were disbursed, the exchange rate of the Swiss franc has increased considerably and that the applicants in the main proceedings suffered the effects of that increase. Therefore, according to that court, it is important to know whether in accordance with the Bank's duty to inform and advise it should have informed clients about a possible future increase or decrease in the exchange rate of the Swiss franc at the time of conclusion of the loan agreements, and whether the term at issue in the main proceedings, in order to be regarded as having been drafted in plain intelligible language within the meaning of Article 4(2) of Directive 93/13, was also required to set out all the consequences which might arise which would be likely to affect the price paid by the borrower, such as the exchange risk.

16 The referring court therefore considers that it is necessary to clarify the interpretation of Article 4(2) of Directive 93/13 which provides for an exception to the mechanism for reviewing the substance of unfair terms laid down under the system of consumer protection put in place by that directive.

17 In those circumstances, the Cortea d'Appel Oradea (Court of Appeal, Oradea, Romania) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

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

(2) Must the plainness and intelligibility of a contractual term, within the meaning of Article 4(2) of Directive 93/13, be understood to mean that that term must provide not only for the grounds of its incorporation in the contract and the term's method of operation, or must it also provide for all the possible consequences of the term as a result of which the price paid by the consumer may vary, for example, foreign exchange risk, and in the light of Directive 93/13 may it be considered that the bank's obligation to inform the customer at the time of disbursement of the loan relates solely to the conditions of credit, namely, the interest, commissions, and guarantees required of the borrower, since such an obligation may not include the possible overvaluation or undervaluation of a foreign currency?

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

Consideration of the questions referred

Admissibility of the questions referred for a preliminary ruling

18 The Bank challenges the admissibility of the questions referred for a preliminary ruling. The referring court does not need an interpretation of the provisions of Directive 93/13 for the resolution of the dispute in the main proceedings and in any event, as relevant case-law already exists, the interpretation of the rules of law at issue are now clear. Furthermore the questions are formulated in such a manner that, in reality, they seek an individual solution for the resolution of the specific dispute in the main proceedings.

19 In that regard, it is necessary to state at the outset that, in accordance with the settled case-law of the Court, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where questions submitted concern the interpretation of EU law, the Court is bound, in principle, to give a ruling (judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 29 and the case-law cited).

20 In the context of the instrument of cooperation between the Court of Justice and national courts that is established by Article 267 TFEU, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court for a preliminary ruling, under Article 267 TFEU, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure, are not satisfied or where it is quite obvious that the interpretation of a provision of EU law, or the assessment of its validity, which is sought by the national court, bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 50 and the case-law cited).

21 In the present case, 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 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 32 and the case-law cited).

22 On the other hand, although it is for the national court alone to rule on the classification of allegedly unfair 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 Article 3(1) and Article 4(2), the criteria that the national court may or must apply when examining contractual terms with regard to those provisions (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 48, and 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraph 28).

23 The reference for a preliminary ruling is therefore admissible.

The third question

24 By its third question, which it is appropriate to examine first, the referring court asks essentially whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the expressions 'main subject matter of the contract' and 'the adequacy of the price and remuneration on the one hand, as against the services or goods supplied in exchange, on the other', within the meaning of that provision, cover a term, incorporated into a loan agreement denominated in a foreign currency which is concluded between a seller or supplier and a consumer and not individually negotiated, such as that at issue in the main proceedings, pursuant to which the loan must be repaid in the same currency.

25 It should be noted at the outset that the fact that the national court has, formally speaking, worded the question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions (judgments of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 71, and of 15 February 2017, *W and V*, C-499/15, EU:C:2017:118, paragraph 45).

26 In the present case, in their written submissions the Romanian Government and the Bank relied on the possibility that the term at issue in the main proceedings merely reflects the principle of monetary nominalism enshrined in Article 1578 of the Romanian Civil Code, so that, pursuant to Article 1(2) of Directive 93/13, that term does not fall within its scope.

27 In that connection, it must be recalled that Article 1(2) of Directive 93/13 introduces an exclusion into the scope of the directive which covers terms which reflect mandatory statutory or regulatory provisions (judgment of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 76, and, to that effect, judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 25).

28 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 (judgment of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 78).

29 Thus, in order to establish whether a contractual term is excluded from the scope of Directive 93/13, it is for the national court to determine whether that term reflects provisions of national law that apply between the parties to the contract independently of their choice or which are supplementary in nature and therefore apply by default, that is to say in the absence of other arrangements established by the parties (see, to that effect, judgments of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 26, and of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 79).

30 In the present case, as the Advocate General observed in point 59 of his Opinion, it is for the referring court to assess, having regard to the nature, the general scheme and the stipulations of the loan agreements concerned, as well as the legal and factual context in which those matters are to be viewed, whether the term in question, under which the loan must be repaid in the same currency as that in which it was advanced, reflects statutory provisions of national law, within the meaning of Article 1(2) of Directive 93/13.

31 In carrying out the necessary checks, the 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 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 77).

32 If the referring court were to find that the term at issue in the main proceedings is not covered by that exception, it must then examine whether it falls within the concept of ‘main subject matter of the contract’ or ‘the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other’, within the meaning of Article 4(2) of Directive 93/13.

33 Although it is true that that examination is for the national court alone, as stated in paragraph 22 of the present judgment, it is, however, for the Court of Justice to elicit from that provision the criteria applicable in that examination.

34 In that connection, the Court has ruled 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, that provision must be strictly interpreted (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 42, and of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraph 31). Furthermore, the expressions ‘main subject matter of the contract’ and ‘the adequacy of the price and remuneration on the one hand, as against the services or goods supplied in exchange, on the other’, in Article 4(2) of Directive 93/13, must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 50).

35 As far as concerns the category of contractual terms falling within the concept of ‘main subject matter of the contract’, within the meaning of Article 4(2) of Directive 93/13, those terms must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it (judgments of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 34, and of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraph 33).

36 By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the concept of 'main subject matter of the contract', within the meaning of that provision (judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 50, and of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraph 33).

37 In the present case, a number of elements in the documents before the Court indicate that a term, such as that at issue in the main proceedings, incorporated into a loan agreement concluded in a foreign currency between a seller or supplier and a consumer without being individually negotiated, on terms by which the loan must be repaid in the same currency, is covered by the notion of 'main subject matter of the contract' within the meaning of Article 4(2) of Directive 93/13.

38 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, as the Advocate General observed in point 46 et seq. of his Opinion, the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to very nature of the debtor's obligation, thereby constituting an essential element of a loan agreement.

39 It is true that the Court held in paragraph 59 of the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282) that the 'main subject matter of the contract' covers a term incorporated in a loan agreement denominated in a foreign currency concluded between a seller or supplier and a consumer which was not individually negotiated, pursuant to which the selling rate of exchange of that currency applies for the calculation of the loan repayments, only if it is established, which is for the national court to ascertain, that that term lays down an essential obligation of that agreement which, as such, characterises it.

40 However, as the referring court also pointed out, in the case which gave rise to the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282), the loans, although denominated in foreign currency, had to be repaid in the national currency according to the selling rate of exchange applied by the bank, whereas in the case in the main proceedings, the loans must be repaid in the same foreign currency as that in which they were issued. As the Advocate General observes, in point 51 of his Opinion, loan agreements indexed to foreign currencies cannot be treated in the same way as loan agreements in foreign currencies, such as those at issue in the main proceedings.

41 In the light of those findings, the answer to the third question is that Article 4(2) of Directive 93/13 must interpreted as meaning that the concept of 'main subject matter of the contract' within the meaning of that provision, covers a contractual term, such as that at issue in the main proceedings, incorporated into a loan agreement denominated in a foreign currency which was not individually negotiated and according to which the loan must be repaid in the same foreign currency as that in which it was contracted, as that terms lays down an essential obligation characterising that contract. Therefore, that term cannot be regarded as being unfair, provided that it is drafted in plain intelligible language.

The second question

42 By its second question, the referring court asks whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term must be drafted in plain intelligible language means that the terms of a loan agreement, under which that loan must be repaid in the same foreign currency as that in which it was contracted, must only set out the reasons for its incorporation in the contract and the way in which it is implemented, or whether it must also specify all the consequences it may have for the price paid by the consumer, such as the exchange risk, and whether, in the light of that directive, the Bank's obligation to inform the borrower at the time the loan is issued is limited to the conditions of the loan, namely the interest rate, commission and the securities lodged by the borrower, without there being any obligation to mention the possibility of a rise or fall in the exchange rate of the foreign currency.

43 As a preliminary point, it must be recalled that the Court has already held that the requirement of plain and intelligible drafting applies even where a term falls within the definition of 'main subject matter of the contract' or the ' adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other' within the meaning of Article 4(2) of Directive 93/13 (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 68). The terms referred to in Article 4(2) 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 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 32).

44 As regards the requirement of transparency of contractual terms, as is clear from Article 4(2) of Directive 93/13, the Court has ruled that that requirement, also repeated in Article 5 thereof, cannot be reduced merely to their being formally and grammatically intelligible, but that, to the contrary, since the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, that requirement of plain and intelligible drafting of contractual terms and, therefore, the requirement of transparency laid down by the directive must be understood in a broad sense (see, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraphs 71 and 72, and of 9 July 2015, *Bucura*, C-348/14, not published, EU:C:2015:447, paragraph 52).

45 Therefore, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring also that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it (judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 75, and of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, paragraph 50).

46 That question must be examined by the referring court, in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement (see, to that effect, judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 75).

47 More specifically, it is for the national court, when it considers all the circumstances surrounding the conclusion of the contract, to ascertain whether, in the case concerned, all the information likely to have a bearing on the extent of his commitment have been communicated to the consumer, enabling him to estimate in particular the total cost of his loan. First, whether the

terms are drafted in plain intelligible language enabling an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer to estimate such a cost and, second, the fact related to the failure 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 contract play a decisive role in that assessment (see, to that effect, judgment of 9 July 2015, *Bucura*, C-348/14, not published, EU:C:2015:447, paragraph 66).

48 Furthermore, it is settled case-law that information, before concluding 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 he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier (judgments of 21 March 2013, *RWE Vertieb*, C-92/11, EU:C:2013:180, paragraph 44, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 50).

49 In the present case, as regards loans in currencies like those 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).

50 Thus, as the Advocate General observed in points 66 and 67 of his Opinion, first, the borrower must be clearly informed of the fact that, in entering into a loan agreement denominated in a foreign currency, he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income. 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, particularly where the consumer borrower does not receive his income in that currency. Therefore, it is for the national court to check that the seller or supplier has communicated to the consumers concerned all the relevant information enabling them to assess the economic consequences of a term, such as that at issue in the main proceedings, on their financial obligations.

51 In the light of the foregoing, the answer to the second question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term must be drafted in plain intelligible language requires, in the case of loan agreements, financial institutions to provide borrowers with sufficient information to enable them to take prudent and well-informed decisions. In that connection, that requirement means that a term under which the loan must be repaid in the same foreign currency as that in which it was contracted 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 be aware both of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, and would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations. It is for the national court to carry out the necessary checks in that regard.

The first question

52 By its first question, which it is appropriate to answer last, the referring court asks essentially whether the significant imbalance that an unfair term creates between the rights and obligations of

the parties arising under the contract within the meaning of Article 3(1) of Directive 93/13 is to be examined only at the time of conclusion of the contract.

53 In that connection, the Court has already held, as stated in Article 4 of Directive 93/13, that in order to determine whether a contractual term is to be regarded as unfair, the national court must take account of the nature of the goods or services which are the subject matter of the contract and must take account 'at the time of conclusion of the contract' of all the circumstances attending its conclusion (see, to that effect, judgment of 9 July 2015, *Bucura*, C-348/14, not published, EU:C:2015:447, paragraph 48 and the case-law cited).

54 It follows, as the Advocate General observed in points 78, 80 and 82 of his Opinion, that the unfairness of a contractual term is to be assessed by reference to the time of conclusion of the contract at issue, taking account of all the circumstances which could have been known to the seller or supplier at that time, and which were of such a nature that they could affect the future performance of the contract, since a contractual term may give rise to an imbalance between the parties which only manifests itself during the performance of the contract.

55 In the present case it is clear from the order for reference that the term at issue in the main proceedings, incorporated into loan agreements denominated in a foreign currency, stipulates that the monthly repayments of the loan must be made in the same currency. In the event of the devaluation of the national currency against that currency, such a term therefore places all the exchange risk on the consumer.

56 In that connection, it is for the referring court to assess, having regard to all of the circumstances of the case in the main proceedings, taking account in particular of the expertise and knowledge of the seller or supplier, in the present case the bank, as far as concerns the possible variations in the rate of exchange and the inherent risks in contracting 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.

57 In order to ascertain whether a term, such as that at issue in the main proceedings, causes a 'significant imbalance' in the parties' rights and obligations arising under the contract to the detriment of the consumer, contrary to the requirement of good faith, the national court must assess for those purposes 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, to that effect, judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraphs 68 and 69).

58 In the light of the foregoing, the answer to the first question is that Article 3(1) of Directive 93/13 must be interpreted as meaning that the assessment of the unfairness of a contractual term must be made by reference to the time of conclusion of the contract at issue, taking account all of the circumstances which could have been known to the seller or supplier at that time, and which were such as to affect the future performance of that contract. It is for the referring court to assess, having regard to all of the circumstances of the case in the main proceedings, and taking account, in particular of the expertise and knowledge of the seller or supplier, in the present case the bank, with regard to the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, of the existence of a possible imbalance within the meaning of that provision.

Costs

59 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. **Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must interpreted as meaning that the concept of 'main subject matter of the contract' within the meaning of that provision, covers a contractual term, such as that at issue in the main proceedings, incorporated into a loan agreement denominated in a foreign currency which was not individually negotiated and according to which the loan must be repaid in the same foreign currency as that in which it was contracted, as that terms lays down an essential obligation characterising that contract. Therefore, that clause cannot be regarded as being unfair, provided that it is drafted in plain intelligible language.**

2. **Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term must be drafted in plain intelligible language requires that, in the case of loan agreements, financial institutions must provide borrowers with sufficient information to enable them to take prudent and well-informed decisions. In that connection, that requirement means that a term under which the loan must be repaid in the same foreign currency as that in which it was contracted 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 be aware both of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, and would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations. It is for the national court to carry out the necessary checks in that regard.**

3. **Article 3(1) of Directive 93/13 must be interpreted as meaning that the assessment of the unfairness of a contractual term must be made by reference to the time of conclusion of the contract at issue, taking account all of the circumstances which could have been known to the seller or supplier at that time, and which were such as to affect the future performance of that contract. It is for the referring court to assess, having regard to all of the circumstances of the case in the main proceedings, and taking account, in particular of the expertise and knowledge of the seller or supplier, in the present case the bank, with regard to the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, of the existence of a possible imbalance within the meaning of that provision.**

[Signatures]

* Language of the case: Romanian.