ECLI:EU:C:2021:470

Provisional text

JUDGMENT OF THE COURT (First Chamber)

10 June 2021 (*)

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

In Joined Cases C-776/19 to C-782/19,

REQUESTS for a preliminary ruling under Article 267 TFEU from the tribunal de grande instance de Paris (Regional Court, Paris, France) made by decisions of 1 and 2 October 2019, received at the Court on 22 October 2019, in the proceedings

VB,

WA (C-776/19),

XZ,

YY (C-777/19),

ZX (C-778/19),

DY,

EX (C-781/19)

v

BNP Paribas Personal Finance SA,

and

AV (C-779/19),

BW,

CX (C-780/19),

FA (C-782/19)

v

BNP Paribas Personal Finance SA,

Procureur de la République,

THE COURT (First Chamber),

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

Advocate General: J. Kokott,

Registrar: V. Giacobbo, Administrator,

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

after considering the observations submitted on behalf of:

– VB, WA, DY and EX, by C. Constantin-Vallet, avocat,

– XZ, YY, ZX, AV, BW, CX and FA, by A.-V. Benoit, C. Fabre and S. Szames, avocats,

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

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

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

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The requests have been made in proceedings between, first, VB, WA, XZ, YY, ZX, DY and EX, on the one hand, and BNP Paribas Personal Finance SA, on the other, and, second, AV, BW, CX and FA, on the one hand, and BNP Paribas Personal Finance and the Procureur de la République (Public Prosecutor, France), on the other, concerning the alleged unfairness of terms in mortgage loan agreements denominated in a foreign currency which provide, inter alia, that the Swiss franc is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower.

Legal context

EU law

3 The 16th and 24th recitals of Directive 93/13 state:

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

…

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.’

4 Article 3 of that directive provides:

‘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.

…’

5 As set out in Article 4 of that directive:

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

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

6 Article 5 of 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. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. …’

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

‘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 provides:

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

French law

9 Article 2224 of the code civil (Civil Code) provides:

‘The limitation period for bringing personal actions or actions involving moveable property shall be five years from the date on which the holder of a right became aware, or should have become aware, of the facts entitling him to exercise that right.’

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

10 In 2008 and 2009, VB, WA, XZ, YY, ZX, DY, EX, AV, BW, CX and FA (‘the applicants in the main proceedings’) each individually concluded with BNP Paribas Personal Finance a mortgage loan agreement denominated in a foreign currency and referred to as ‘Helvet Immo’. Those agreements, which had been marketed principally by intermediaries, were concluded in order to purchase immovable property or shares in property companies for varying amounts between 48 000 and 426 000 Swiss francs (CHF) (being between approximately EUR 44 000 and 389 000) and for periods of between 22 and 25 years.

11 It is apparent from the orders for reference that those agreements contained contractual terms according to which:

– the loans in question were financed by borrowings taken out in Swiss francs and managed in both Swiss francs (the account currency) and euros (the settlement currency);

– as regards exchange transactions, the payments in respect of the loans at issue could be made only in euros for repayment in Swiss francs;

– the exchange transactions to be carried out were listed in the loan agreements at issue in the main proceedings, and in the event of default by the borrower, the lender could unilaterally replace the Swiss franc by the euro;

– since the amortisation depended on fluctuations in the euro/Swiss franc exchange rate, the amortisation would be less rapid if the exchange transaction entailed a sum below the amount due in

Swiss francs and any unpaid capital would be added to the debit balance. In the opposite case, repayment of the loan would be quicker;

– if maintaining the amount of the payments in euros did not allow the total balance of the account to be settled over the remaining term plus five years, payments would be increased. If, at the end of the fifth year of extension, a debit balance remained, payments would have to continue until the amount in question was settled in full;

– the fixed interest rate initially agreed was subject to review every five years according to a predetermined formula and, upon review, the borrower could choose to change the account currency to euros by choosing to apply either a new increased fixed interest rate or a variable rate.

12 For the applicants in the main proceedings in Cases C-776/19, C-778/19, C-779/19 and C-780/19, two simulations were annexed to the loan offer illustrating the impact of exchange rate fluctuations on the amount and duration of the loan. The first simulation related to the impact of a two-point increase or decrease in the interest rate taking place from the 61st instalment on the amount of the payments, the duration and the total cost of the loan. The second, headed 'information relating to the exchange transactions carried out in the context of the management of your credit', simulated how those elements would vary if the euro should appreciate against the Swiss franc (in Case C-776/19, EUR 1 = CHF 1.5896; in Case C-778/19, EUR 1 = CHF 1.57; in Case C-779/19, EUR 1 = CHF 1.59; in Case C-780/19, EUR 1 = CHF 1.66) and if the euro should depreciate (in Case C-776/19, EUR 1 = CHF 1.4296; in Case C-778/19, EUR 1 =CHF 1.41; in Case C-779/19, EUR 1 = CHF 1.43; in Case C-780/19, EUR 1 = CHF 1.5).

13 No simulation was provided by the lender to the applicants in the main proceedings in Cases C-777/19, C-781/19 and C-782/19.

14 Due to the unfavourable movement in exchange rates since the date on which the agreements at issue in the main proceedings were concluded, the applicants in the main proceedings encountered difficulties in repaying the mortgage loans taken out. Subsequently, in the period between 2015 and 2018, each of those applicants brought proceedings against BNP Paribas Personal Finance before the referring court, claiming, inter alia, that the terms establishing the financial mechanism provided for in the 'Helvet Immo' agreements were unfair.

15 In addition, following a judicial investigation, BNP Paribas Personal Finance was committed for trial before the tribunal correctionnel (Criminal Court, France) on 29 August 2017, charged with misleading commercial practice. By judgment of 26 February 2020, the 13th Criminal Chamber of the tribunal de grande instance de Paris (Regional Court, Paris) convicted that bank of misleading commercial practice. According to information provided by the parties to the main proceedings during the hearing before the Court, BNP Paribas Personal Finance has brought an appeal against that judgment, which is therefore not final.

16 The applicants in the main proceedings are claiming before the referring court, inter alia, that the terms establishing the financial mechanism provided for in the loan agreements at issue are unfair. BNP Paribas Personal Finance argues that the claims brought by the applicants in the main proceedings alleging that those contractual terms are unfair are time-barred and, in any event, unfounded.

17 As regards, first, the question whether the claims brought by the applicants in the main proceedings are time-barred, the referring court states that application of the five-year limitation period under Article 2224 of the French Civil Code would lead to a finding that the claims are time-

barred. According to national case-law, that period begins to run from the date of acceptance of the loan offer.

18 In that context, the referring court is unsure whether application of such a limitation period to claims brought by consumers in order to assert their rights under Directive 93/13 is compatible with the principle of effectiveness. In the referring court's view, given that the exchange rate may remain stable during the first years of an agreement and deteriorate only later during the life of the agreement, it cannot be ruled out that borrowers would not be able to assert their rights.

19 As regards, second, the assessment of the unfairness of the terms of the agreement, the referring court notes that the loan agreements at issue in the main proceedings contain several terms forming part of a currency conversion mechanism, which has the effect that the foreign exchange risk is borne by the borrower.

20 In that context, the referring court asks in particular whether, on account of the fact that those contractual terms relate to the foreign exchange risk, they should be regarded as forming part of the main subject matter of the loan agreements at issue in the main proceedings, which cannot, on that basis, be regarded as unfair provided they are plain and intelligible. In that regard, the question also arises as to the effect on the classification of those contractual terms of another term inserted in the loan agreements at issue in the main proceedings allowing the borrower to exercise an option to convert the loan into euros on predetermined dates.

21 As regards the criteria for assessing whether a contractual term is plain and intelligible and whether there is a significant imbalance in the contracting parties' rights and obligations arising under that contract, the referring court notes that the applicants in the main proceedings received information regarding the impact of fluctuations in the euro/Swiss franc exchange rate on the cost of the loan concerned. However, nowhere in the loan agreements at issue in the main proceedings is the foreign exchange risk mentioned.

22 The referring court also states that, in national case-law, contractual terms such as those at issue in the main proceedings have been regarded as plain and intelligible on the ground, inter alia, that the borrowers received information regarding exchange transactions carried out during the term of the loan agreement concerned and the impact of fluctuations in the euro/Swiss franc exchange rate on the duration of that agreement and on the payments necessary to settle the account balance.

23 In that context, given that the seller or supplier has greater means than the consumer to foresee economic developments and the foreign exchange risk, the referring court is unsure as to what specific information concerning the foreign exchange risk is to be provided to a borrower who is not aware of the economic forecasts that may have an impact on changes in the exchange rate between the account currency and the settlement currency and on the associated risks. In that regard, the question also arises as to the burden of proving that a contractual term is plain and intelligible, since the communication of certain information is disputed in the main proceedings.

24 In those circumstances, the tribunal de grande instance de Paris (Regional Court, Paris) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Directive 93/13, interpreted in the light of the principle of effectiveness, preclude, in [cases] such as [those] in the main proceedings, the application of limitation rules, in the following cases: (a) for a declaration that a term is unfair; (b) for any restitutions; (c) where the consumer is the applicant; and (d) where the consumer is the defendant, including to a counter-claim?

(2) If the answer to the first question is wholly or partly negative, does Directive 93/13, interpreted in the light of the principle of effectiveness, preclude, in [cases] such as [those] at issue in the main proceedings, the application of national case-law which fixes the starting-point of the limitation period at the date of acceptance of the loan offer, rather than at the date on which serious financial difficulties arise?

(3) Do terms such as those at issue in the main proceedings, which provide in particular that the Swiss franc is the account currency and the euro the settlement currency, and have the effect that the exchange risk is borne by the borrower, come within the main subject matter of the agreement within the meaning of Article 4(2) of Directive 93/13, where there is no dispute as to the amount of the exchange charges and where there are terms providing for the possibility for the borrower, on fixed dates, to exercise an option to convert the loan into euros according to a predetermined formula?

(4) Does Directive 93/13, interpreted in the light of the principle of effectiveness of [EU] law, preclude national case-law in which a term or set of terms, such as those at issue in the main proceedings, are considered to be "plain [and] intelligible" for the purposes of the directive, on the grounds that:

– the preliminary loan offer sets out in detail the exchange transactions carried out during the life of the credit and makes clear that the euro/Swiss franc exchange rate will be that applicable two working days before the date of the event that determines the transaction and which is published on the website of the European Central Bank;

– it is stated in the offer that the borrower agrees to the Swiss franc/euro and euro/Swiss franc exchange transactions necessary for the functioning and repayment of the loan, and that the lender will convert the balance of the monthly payments after payment of the charges associated with the credit into Swiss francs;

– the offer states that, if the exchange transaction results in a sum lower than the amount payable in Swiss francs, the amortisation of the capital will be less rapid and any unpaid capital in respect of a repayment period will be entered on the debit side of the account in Swiss francs, and that it is made clear that the amortisation of the capital of the loan will change according to upwards or downwards variations in the exchange rate applied to the monthly payments that that change may result in the extension or reduction of the loan amortisation period and, where appropriate, alter the total repayment cost;

– the articles "internal account in euros" and "internal account in Swiss francs" describe the transactions carried out in each payment period to the credit and the debit of each account, and the contract explains in transparent terms the actual functioning of the foreign currency conversion mechanism;

and although there is no express reference in the offer to the "exchange risk" which is borne by the borrower since he does not receive income in the account currency, or any explicit reference to the "interest rate risk"?

(5) If the answer to the fourth question is in the affirmative, does Directive 93/13, interpreted in the light of the principle of effectiveness of [EU] law, preclude national case-law according to which a term or set of terms, such as those at issue in the main proceedings, are "plain [and] intelligible" for the purposes of the directive, when in addition to the elements referred to in the fourth question there is only a simulation of a reduction of [5 to 6%] of the payment currency by

reference to the account currency, in an agreement having an initial duration of [22 to 25] years, without any reference to terms such as “risk” or “difficulty”?

(6) Is the burden of proving the “plain [and] intelligible” nature of a term for the purposes of Directive 93/13 borne, including in respect of the circumstances attending the conclusion of the contract, by the professional party or by the consumer?

(7) If the burden of proving the plain and intelligible nature of the term is borne by the professional party, does Directive 93/13 preclude national case-law in which it was held that, in the presence of documents relating to sales techniques, it is for the borrowers to prove, first, that they were the addressees of the information contained in those documents and, second, that it was the bank that communicated that information to them, or, conversely, does it require that that evidence constitutes a presumption that the information contained in those documents was transmitted, including orally, to borrowers, a rebuttable presumption that it is for the professional party, which must assume responsibility for the information communicated by the intermediaries which it has chosen, to rebut?

(8) May the existence of a significant imbalance be characterised in [agreements] such as [those] at issue in the main proceedings in which both parties bear an exchange risk, when, first, the professional party has greater means than the consumer to foresee the exchange risk and when, second, the risk borne by the professional party is subject to an upper limit while that borne by the consumer is not?’

25 By decision of the President of the Court of Justice of 19 November 2019, Cases C-776/19 to C-782/19 were joined for the purposes of the written and oral parts of the procedure.

Consideration of the questions referred

The first and second questions

26 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation which makes the submission of a claim by a consumer for a declaration that a term in a contract concluded between a seller or supplier and that consumer is unfair or for repayment of sums paid but not due, on the basis of unfair terms for the purposes of that directive, subject to a five-year limitation period which begins to run from the date of acceptance of the loan offer.

27 In that regard, it should be noted that, in accordance with settled case-law, in the absence of specific EU rules governing the matter, the rules implementing the consumer protection provided for by Directive 93/13 are a matter for the domestic legal order of the Member States in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 83 and the case-law cited).

28 As regards the principle of effectiveness, which is the only principle referred to in the present case, it should be noted that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be

analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see, inter alia, judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 85 and the case-law cited).

29 In addition, the Court has stated that the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, particularly the rights deriving from Directive 93/13, implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, which applies, inter alia, to the definition of detailed procedural rules relating to actions based on such rights (see, to that effect, judgment of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 49 and the case-law cited).

30 As regards the analysis of the characteristics of the limitation period at issue in the main proceedings, the Court has stated that that analysis must cover the duration of the limitation period and the detailed rules for its application, including the mechanism adopted to start the period running (see, to that effect, judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 61 and the case-law cited).

31 First, as regards the application of a limitation period to claims made by consumers in order to assert their rights under Directive 93/13, it should be noted that, according to the Court's case-law, reasonable time limits for bringing proceedings, laid down in the interests of legal certainty, are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order if such time limits are sufficient in practical terms to enable a consumer to prepare and bring an effective action (see, inter alia, judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 62 and the case-law cited).

32 The Court has recognised that consumer protection is not absolute and that in the interests of legal certainty it is compatible with EU law to lay down reasonable time limits for bringing proceedings (see, inter alia, judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 56, and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 82 and the case-law cited).

33 However, highlighting the protection which Directive 93/13 confers on consumers, the Court has held that that directive precludes national legislation which prohibits a national court, after expiry of a limitation period, from finding that a term inserted into a contract concluded between a seller or supplier and a consumer is unfair (see, to that effect, judgments of 21 November 2002, *Cofidis*, C-473/00, EU:C:2002:705, paragraph 38, and of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale,* C-698/18 and C-699/18, EU:C:2020:537, paragraph 55).

34 In the present case, the request for a preliminary ruling concerns two distinct situations, namely, first, the application of a limitation period to an application brought by a consumer for a declaration that a term in an agreement concluded between a seller or supplier and that consumer is unfair and, second, the application of such a period to a claim brought by that consumer for repayment of sums paid but not due, on the basis of unfair terms for the purposes of Directive 93/13.

35 As regards, first, the application of a limitation period to an application brought by a consumer for a declaration that a term in an agreement concluded between a seller or supplier and that consumer is unfair, it should be borne in mind, in the first place, that, under Article 6(1) of Directive 93/13, unfair terms in a contract concluded between a seller or supplier and a consumer are not binding on that consumer.

36 In the second place, given the nature and significance of the public interest constituted by the protection of consumers, Directive 93/13, as is apparent from Article 7(1) thereof, read in conjunction with its 24th recital, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. To do this, it is for the national courts to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects (see, to that effect, judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraphs 52 and 53 and the case-law cited).

37 In the third place, it is apparent from case-law that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. The Court has concluded that the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in had that term not existed, with the result that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts (see, to that effect, judgments of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 61 and 62, and of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 54).

38 Against that background, it should be held that, in order in particular to ensure effective protection of the rights which the consumer derives from Directive 93/13, he or she must be able to raise, at any time, the unfairness of a contractual term not only as a means of defence, but also in order to obtain a declaration by the court that a contractual term is unfair, with the result that an application brought by a consumer for a declaration that a term in an agreement concluded between a seller or supplier and a consumer is unfair cannot be subject to any limitation period.

39 As regards, second, the application of a limitation period to a claim brought by a consumer for repayment of sums paid but not due, on the basis of unfair terms for the purposes of Directive 93/13, it is sufficient to note that the Court has previously held that Article 6(1) and Article 7(1) of that directive do not preclude national legislation which, while providing that an action for a declaration of nullity of an unfair term in a contract concluded between a seller or supplier and a consumer is not subject to a time limit, subjects the action to enforce the restitutory effects of that finding to a limitation period, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 58, and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 84).

40 Accordingly, it should be held that the application of a limitation period to claims for restitution brought by consumers in order to enforce rights which they derive from Directive 93/13 is not, in itself, contrary to the principle of effectiveness, provided that its application does not make it in practice impossible or excessively difficult to exercise the rights conferred by that directive.

41 Second, as regards the duration of the limitation period applicable to a claim brought by a consumer for repayment of sums paid but not due, on the basis of unfair terms for the purposes of

Directive 93/13, the Court has previously had occasion to rule on the compatibility with the principle of effectiveness of limitation periods similar to that at issue in the main proceedings, which were of three and five years' duration and applied to actions seeking to enforce the restitutory effects of a finding that a contractual term was unfair. According to the Court, provided they are established and known in advance, those periods are, in principle, sufficient to enable the consumer concerned to prepare and bring an effective action. Accordingly, periods of three to five years are not, in themselves, incompatible with the principle of effectiveness (see, to that effect, judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraphs 62 and 64, and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 87 and the case-law cited).

42 Consequently, it should be held that, provided that it is established and known in advance, a five-year limitation period such as that at issue in the main proceedings that is applied to a claim brought by a consumer for repayment of sums paid but not due, on the basis of unfair terms for the purposes of Directive 93/13, does not appear such as to make it in practice impossible or excessively difficult to exercise the rights conferred by Directive 93/13. A period of such a duration is, in principle, sufficient in practical terms to enable a consumer to prepare and bring an effective action in order to enforce the rights that he or she derives from that directive, in the form, inter alia, of a claim for restitution based on the unfairness of a contractual term.

43 However, as regards, third, the starting point of the limitation period at issue in the main proceedings, there is a real risk that the consumer will not be able to rely, during that period, on the rights conferred on him or her by Directive 93/13 (see, to that effect, judgment of 5 March 2020, *OPR-Finance*, C-679/18, EU:C:2020:167, paragraph 22 and the case-law cited).

44 It is apparent from the information provided by the referring court that the five-year limitation period laid down in Article 2224 of the Civil Code begins to run, according to the case-law of the French courts, from the date of acceptance of the loan offer in question.

45 In that regard, it is necessary to take account of the weaker position of the consumer vis-à-vis the seller or supplier as regards both bargaining power and level of knowledge, which leads the consumer to accept terms drawn up in advance by the seller or supplier, without being able to influence their content (see, to that effect, judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 66 and the case-law cited). Similarly, it is important to recall that consumers may be unaware of the unfairness of a term in a mortgage loan agreement or not appreciate the extent of their rights under Directive 93/13 (see, to that effect, judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, Case C-224/19 and C-259/19, EU:C:2020:578, paragraph 90 and the case-law cited).

46 A limitation period may be compatible with the principle of effectiveness only if the consumer has had the opportunity to become aware of his or her rights before that period begins to run or expires (see, to that effect, judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 45; of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 67; and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 91).

47 The application of a five-year limitation period, such as that at issue in the main proceedings, to a claim brought by a consumer for repayment of sums paid but not due, on the basis of unfair terms for the purposes of Directive 93/13, which begins to run from the date of acceptance of the loan offer, is not capable of affording that consumer effective protection, since that period is likely to have expired even before the consumer becomes aware of the unfair nature of a term in the

contract at issue. Such a period makes it excessively difficult for the consumer to exercise the rights deriving from Directive 93/13 and therefore infringes the principle of effectiveness (see, by analogy, judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraphs 67 and 75, and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 91).

48 In the light of the foregoing, the answer to the first and second questions is that Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation which makes the submission of a claim by a consumer:

– for a declaration that a term in an agreement concluded between a seller or supplier and that consumer is unfair subject to a limitation period;

– for repayment of sums paid but not due, on the basis of such unfair terms, subject to a five-year limitation period, where that period begins to run from the date of acceptance of the loan offer such that, at that time, the consumer may have been unaware of all of the rights that he or she has under that directive.

The third question

49 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 concept of the 'main subject matter of the contract', within the meaning of that provision, covers terms of the loan agreement which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower.

50 Article 4(2) of Directive 93/13 provides that assessment of the unfair nature of contractual terms is to relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as those terms are in plain, intelligible language. The court may therefore review the unfairness of a term which relates to the definition of the main subject matter of the contract only if that term is not plain and intelligible.

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

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

53 It is for the referring court to examine, having regard to the nature, general scheme and the stipulations of the loan agreements at issue in the main proceedings as well as their legal and factual context, whether the terms referred to in the third question constitute an essential element of the debtor's obligations, consisting in the repayment of the amount made available to it by the lender

(see, to that effect, judgment of 3 October 2019, *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 33 and the case-law cited).

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

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

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

57 In that connection, it must be observed that, under a loan agreement, the lender undertakes, in particular, to make available to the borrower a certain sum of money and the latter undertakes, in particular, to repay that sum, usually with interest, on the scheduled payment dates. Therefore, the essential obligations of such a contract relate to a sum of money which must be determined by the stipulated currency in which it is paid and repaid. Thus, the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to the very nature of the debtor's obligation, thereby constituting an essential element of a loan agreement (judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 38).

58 It is therefore for the referring court to determine, taking account of the criteria set out in paragraphs 55 to 57 above, whether the terms of the agreements at issue in the main proceedings, which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower, relate to the very nature of the debtor's obligation to repay the amount made available to him or her by the lender, irrespective of whether the consumer's objection also concerns the exchange charges.

59 Furthermore, it should be stated that the existence, in a loan agreement denominated in a foreign currency, of another term allowing the borrower to exercise an option to convert the loan into euros on predetermined dates cannot mean that terms relating to the foreign exchange risk thereby take on an ancillary dimension. The fact that the parties are able to amend, at certain stages, one of the essential terms of the agreement enables the borrower to alter the terms of his or her loan *ex nunc*, without that having a direct effect on the assessment of the essential obligation characterising the agreement at issue.

60 In the light of all of the above considerations, the answer to the third question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which

provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower come within that provision where those terms lay down an essential element characterising the agreement.

The fourth and fifth questions

61 By its fourth and fifth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(2) of Directive 93/13 must be interpreted as meaning that, in the context of a loan agreement denominated in a foreign currency, the requirement of transparency of the terms of that agreement, which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower, is satisfied where the seller or supplier has provided the consumer with information relating to the impact on the consumer's financial obligations of any appreciation or depreciation of the euro against the foreign currency in which the loan is denominated.

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

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

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

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

66 The question whether, in the present case, the requirement of transparency has been observed must be examined by the referring court in the light of all the relevant information, including the promotional material and information provided in the negotiation of the loan agreements at issue in

the main proceedings, not only by the lender itself, but also by any other person who, on behalf of that professional, participated in the marketing of the loans concerned.

67 Specifically, it is for the national court, when it considers all the circumstances surrounding the conclusion of the loan agreement, to ascertain whether, in the case concerned, all the information likely to have a bearing on the extent of his or her commitment has been communicated to the consumer, enabling the consumer to estimate in particular the total cost of the loan. First, whether the terms of the agreement are drafted in plain, intelligible language enabling an average consumer, as described in paragraph 64 above, to estimate such a cost and, second, the fact of failing to mention in the loan agreement the information regarded as being essential with regard to the nature of the goods or services which are the subject matter of that agreement play a decisive role in that assessment (see, to that effect, judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 52 and the case-law cited).

68 In the present case, the referring court states that, before entering into their loans, the applicants in the main proceedings received information regarding the impact of fluctuations in the exchange rate between the euro and the Swiss franc on the duration of the agreement and on the repayments necessary to settle the account balance. However, no mention was made of the foreign exchange risk.

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

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

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

72 It follows that, in order to comply with the requirement of transparency, the information communicated by the seller or supplier must enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, not only to understand that, depending on exchange rate fluctuations, changes in the exchange rate between the account currency and settlement currency may have unfavourable consequences for his or her financial obligations, but also to understand, in the context of taking out a loan denominated in a foreign currency, the actual

risk to which he or she is exposed, throughout the term of the agreement, in the event of a severe depreciation of the currency in which the borrower receives his or her income as against the account currency.

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

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

75 In the second place, the relevant factors for the purposes of the assessment referred to in paragraph 67 above include the language used by the financial institution in the pre-contractual and contractual documentation. In particular, the absence of terms or explanations expressly informing the borrower of the existence of specific risks associated with loan agreements denominated in a foreign currency may confirm that the requirement of transparency, as resulting, inter alia, from Article 4(2) of Directive 93/13, is not satisfied.

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

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

78 In the light of the foregoing, the answer to the fourth and fifth questions is that Article 4(2) of Directive 93/13 must be interpreted as meaning that, in the context of a loan agreement denominated in a foreign currency, the requirement of transparency of terms of that agreement, which provide that the foreign currency is the account currency and the euro the settlement currency

and which have the effect that the foreign exchange risk is borne by the borrower, is satisfied where the seller or supplier has provided the consumer with sufficient and accurate information to enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, to understand the specific functioning of the financial mechanism in question and thus to evaluate the risk of potentially significant adverse economic consequences of such terms on his or her financial obligations throughout the term of the agreement.

The sixth and seventh questions

79 By its sixth and seventh questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 93/13 must be interpreted as precluding the burden of proving that a contractual term is plain and intelligible, for the purposes of Article 4(2) of that directive, from being borne by the consumer, and whether that is also the case as regards the transmission of information contained in documents relating to sales techniques used by the seller or supplier or by another person who participated, on behalf of that seller or supplier, in marketing the loans in question.

80 In that regard, it should be noted that Directive 93/13 contains no provision relating to the burden of proof as regards the plain and intelligible nature of a contractual term for the purposes of Article 4(2) of that directive.

81 Therefore, as is apparent from the case-law cited in paragraph 27 above, such rules implementing the consumer protection provided for by Directive 93/13 are a matter for the domestic legal order of the Member States in accordance with the principle of the procedural autonomy of the Member States, whereby those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness).

82 In that regard, it should be noted that Directive 93/13 is intended, inter alia, to protect consumers in order to rebalance the asymmetry between the position of the seller or supplier and that of the consumer in the contractual relationship. That asymmetry results from the consumer's weaker position vis-à-vis the seller or supplier as regards both bargaining power and level of knowledge, which leads the consumer to accept, as pointed out in paragraph 45 above, terms drawn up in advance by the seller or supplier, without being able to influence their content.

83 Similarly, as has already been noted in paragraph 78 above, in order to satisfy the requirement of transparency, resulting in particular from Article 4(2) of Directive 93/13, the seller or supplier must provide the consumer with sufficient and accurate information to enable the consumer to evaluate the risk of potentially significant adverse economic consequences of contractual terms on his or her financial obligations.

84 From that point of view, it should be noted that observance of the principle of effectiveness and the attainment of the underlying objective of Directive 93/13, consisting in protecting consumers by rebalancing the asymmetry between the position of the seller or supplier and that of the consumer, could not be ensured if the burden of proving that a contractual term is plain and intelligible, for the purposes of Article 4(2) of that directive, is borne by the consumer.

85 Indeed, as the French Government and the European Commission pointed out, in essence, in their written observations, the effective exercise of the rights conferred by Directive 93/13 could not be ensured if consumers were required to prove a negative fact, namely that the seller or suppler did

not provide them with all the information necessary to satisfy the requirement of transparency, as resulting in particular from Article 4(2) of Directive 93/13.

86 On the contrary, the effective exercise of the rights conferred by Directive 93/13 may be ensured where the seller or supplier is, in principle, required to prove to the court that its pre-contractual and contractual obligations, relating in particular to the requirement of transparency of contractual terms, as resulting in particular from Article 4(2) of Directive 93/13, have been fulfilled. Consumer protection may thus be ensured, without disproportionately interfering with the right of the seller or supplier to a fair trial (see, by analogy, judgment of 18 December 2014, *CA Consumer Finance*, C-449/13, EU:C:2014:2464, paragraph 28).

87 In that regard, it should also be made clear, as regards the 'documents relating to sales techniques', specifically referred to in the seventh question, that the obligation on the seller or supplier to prove that its pre-contractual and contractual obligations have been fulfilled must also include proof that the information contained in such documents has been provided to the consumer by the seller or supplier, or by any other person who participated, on behalf of that seller or supplier, in marketing the loans at issue. That is the case, in particular, where it is considered that those documents may be useful for assessing whether a contractual term is plain and intelligible for the purposes of Article 4(2) of Directive 93/13.

88 As the referring court has rightly pointed out, it is ultimately for the seller or supplier to control the distribution channels for its products, whether with respect to the choice of intermediaries or of marketing material vis-à-vis the consumer. It should therefore be able to provide evidence that the documents at issue were not used or were no longer used at the date of conclusion of the agreement in order to prove that its pre-contractual and contractual obligations relating in particular to the requirement of transparency of contractual terms have been fulfilled.

89 It follows from the foregoing that the answer to the sixth and seventh questions is that Directive 93/13 must be interpreted as precluding the burden of proving that a contractual term is plain and intelligible, for the purposes of Article 4(2) of that directive, from being borne by the consumer.

The eighth question

90 By its eighth question, the referring court asks, in essence, whether Article 3(1) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer, where, first, the seller or supplier has greater means than the consumer to foresee the foreign exchange risk and, second, the risk borne by the seller or supplier is subject to an upper limit while that borne by the consumer is not.

91 It should be noted, first of all, that, under Article 3(1) of Directive 93/13, a non-negotiated term of a contract concluded between a consumer and a seller or supplier is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

92 It should also be noted that, according to settled case-law, the jurisdiction of the Court extends to the interpretation of the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, and in particular when

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

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

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

95 In the present case, the contractual terms at issue in the main proceedings, included in loan agreements denominated in a foreign currency, provide that both parties are to bear a foreign exchange risk, but that the risk borne by the seller or supplier, in this case the bank, is subject to an upper limit whereas the risk borne by the consumer is not. Accordingly, in the event of a severe depreciation of the national currency against the foreign currency, those terms place the foreign exchange risk on the consumer.

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

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

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

99 Therefore, in order to assess whether the terms of an agreement, such as those at issue in the main proceedings, cause, to the detriment of the consumer, a significant imbalance in the rights and

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

100 In the light of the seller or supplier's knowledge and greater means to foresee the foreign exchange risk, which may materialise at any time during the term of the agreement, and of the risk of exchange rate fluctuations that is not subject to an upper limit and which contractual terms such as those at issue in the main proceedings place on the consumer, it must be held that such terms may give rise to a significant imbalance in the parties' rights and obligations arising under the loan agreement concerned, to the detriment of the consumer.

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

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

103 In the light of the foregoing, the answer to the eighth question is that Article 3(1) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk, without being subject to an upper limit, is borne by the borrower, are liable to cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer, where the seller or supplier could not reasonably expect, in compliance with the requirement of transparency in relation to the consumer, that the consumer would have agreed, in individual contract negotiations, to a disproportionate foreign exchange risk as a result of those terms.

Costs

104 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 (First Chamber) hereby rules:

1. **Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation which makes the submission of a claim by a consumer:**

– **for a declaration that a term in a contract concluded between a seller or supplier and that consumer is unfair subject to a limitation period;**

– **for repayment of sums paid but not due, on the basis of such unfair terms, subject to a five-year limitation period, where that period begins to run from the date of acceptance of the loan offer such that, at that time, the consumer may have been unaware of all of the rights that he or she has under that directive.**

2. **Article 4(2) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower come within that provision where those terms lay down an essential element characterising the agreement.**

3. **Article 4(2) of Directive 93/13 must be interpreted as meaning that, in the context of a loan agreement denominated in a foreign currency, the requirement of transparency of terms of that agreement, which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower, is satisfied where the seller or supplier has provided the consumer with sufficient and accurate information to enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, to understand the specific functioning of the financial mechanism in question and thus to evaluate the risk of potentially significant adverse economic consequences of such terms on his or her financial obligations throughout the term of the agreement.**

4. **Directive 93/13 must be interpreted as precluding the burden of proving that a contractual term is plain and intelligible, for the purposes of Article 4(2) of that directive, from being borne by the consumer.**

5. **Article 3(1) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk, without being subject to an upper limit, is borne by the borrower, are liable to cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer, where the seller or supplier could not reasonably expect, in compliance with the requirement of transparency in relation to the consumer, that the consumer would have agreed, in individual contract negotiations, to a disproportionate foreign exchange risk as a result of those terms.**

[Signatures]

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* Language of the case: French.