Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 March 2020[1]

Case C-81/19

NG,
OH
v
SC Banca Transilvania SA

(Request for a preliminary ruling from the Curtea de Apel Cluj
(Court of Appeal, Cluj, Romania))

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Unfair terms in consumer contracts — Foreign currency loans — Term on exchange rate — Article 1(2) — Term reflecting a general principle established by law — Article 6(1) — Legal consequences — Removal of unfair term — Contract incapable of continuing in existence without unfair term — Powers of national court)

I. Introduction

1. The subject matter of this preliminary ruling procedure is, once again, consumer protection against unfair terms in foreign currency loan agreements.

2. The term contested in the main proceedings requires the applicants in those proceedings to repay a loan denominated in Swiss francs in that currency. However, as a result of the sharp fall in the value of the Romanian leu (the currency in which the applicants receive their income), the amount which they have to repay has almost doubled over the years since the loan agreement was signed.

3. The order for reference does not explicitly raise the fundamental question of whether foreign currency loans granted to consumers can be regarded as compatible with EU law. That is because, although previous case-law of the Court suggests that the exchange rate risk inherent in such loan agreements cannot automatically be imposed on the consumer, it also follows from that case-law that that practice is not of itself unlawful.[2] According to that case-law, the decisive factor is whether the consumer was informed of the risk in plain intelligible language.[3]

1 Original language: German.

2 This fundamental question was clarified in the judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 41); see also, in that regard, Opinion of Advocate General Wahl in *Andriciuc and Others* (EU:C:2017:313, point 2).

3 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 40 and 41); of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 41); of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 68); and of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207, paragraph 48). The second question relates to this.

4. On the contrary, this case revolves around the legal consequences that a national court has to draw if it finds that a term governing the exchange rate risk is unfair. That is because, in the opinion of the referring court, all the legal consequences of unfairness highlighted in previous case-law result in an unreasonable burden on the consumer. The referring courts have encountered similar legal problems in a further three cases pending. [4]

II. Legal context

A. EU law

5. The framework of this case in EU law is formed by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Directive 93/13). [5]

6. Recitals 12 and 13 of Directive 93/13 state:

'[(12)] Whereas, however, as they now stand, national laws allow only partial harmonisation to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive;

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

7. Article 1(2) of Directive 93/13 includes the following rule:

'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.'

8. Article 3(1) of that directive provides:

'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.'

9. Article 4(2) of Directive 93/13 provides:

'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.'

4 See Opinion of Advocate General Szpunar in *Gómez del Moral Guasch* (C-125/18, EU:C:2019:695), and cases C-269/19, *Banca B.* (OJ 2019 C 238, p. 7) and C-346/19, *Credit Europe Ipotecar IFN and Credit Europe Bank* (OJ 2019 C 288, p. 19).

5 OJ 1993 L 95, p. 29.

10. Article 6(1) of that Directive is worded as follows:

'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.'

11. In accordance with Article 7(1) of Directive 93/13:

'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.'

B. National law

12. The Romanian Codul civil (Civil Code) and Codul comercial (Commercial Code), in the versions in force on the date of signature of the agreement, are relevant to this case.

13. Article 1578 of the Civil Code, which establishes the principle of monetary nominalism, provided as follows:

'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.'

14. Article 41 of the Commercial Code provided as follows:

'When the currency indicated in an agreement does not have the status of legal or commercial tender in the country and when the exchange rate of that currency has not been determined by the parties themselves, payment may be made in the currency of the country, in accordance with the exchange rate applicable on the day payment falls due and in the place of payment; if there is no exchange rate in that place, it shall be made in accordance with the rate of the closest market, except where the agreement contains an "effective" clause [requiring payment in that currency alone], or another similar clause.'

III. Facts and main proceedings

15. According to the findings of the referring court, on 31 March 2006, the applicants in the main proceedings, acting as consumers, concluded a loan agreement with SC Volksbank România SA (later Banca Transilvania) for 90 000 Romanian lei (RON).

16. In order to refinance the agreement of 31 March 2006, the parties signed a second loan agreement on 15 October 2008 for the amount of 65 000 Swiss francs (CHF). That was equivalent to approximately RON 159 126 or approximately EUR 33 488.[6] The applicants receive their income in Romanian lei.

17. Clause 4.1 of the general terms and conditions of the second loan agreement stated: 'All payments … shall be made in the currency of the loan, except in the cases expressly mentioned in the special terms and conditions or general terms and conditions' ('contested term').

6 Exchange rate on the date of signature of the agreement (31 March 2008).

18. As a result of the fall in value of the leu and the rise in value of the Swiss franc between October 2008 and April 2017, the amount to be repaid rose by RON 117 760 (approximately EUR 24 772).

19. Whereupon the applicants brought an action in the Tribunalul Specializat Cluj (Specialist Tribunal, Cluj, Romania). They contend that the bank failed to fulfil its obligation to provide adequate information on the exchange rate risk, and that, moreover, bearing that risk had unreasonably disadvantaged them. Therefore, essentially they have requested that the exchange rate be frozen at the rate that applied on the date of signature of the agreement.

20. The defendant contends that the contested term is based on the principle of monetary nominalism enshrined in Article 1578 of the Civil Code and, therefore, cannot be assessed as to unfairness in accordance with Article 1(2) of Directive 93/13.

21. The court of first instance dismissed the action. Although it held that the contested term was subject to substantive assessment, it also held that the bank had fulfilled its obligation to provide adequate information, as it could not have predicted the considerable variations in the exchange rate.

22. Further to appeals lodged by both parties, the dispute is now pending before the referring court, the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania). That court has raised doubts with regard to the interpretation of Directive 93/13 in terms of its scope, the obligation of sellers or suppliers to provide information and the legal consequences of any unfair terms.

IV. Request for a preliminary ruling and proceedings before the Court

23. By order of 27 December 2018, received by the Court on 1 February 2019, the Curtea de Apel Cluj (Court of Appeal, Cluj) referred the following questions to the Court for a preliminary ruling in accordance with Article 267 TFEU:

‘(1) Must Article 1(2) of [Directive 93/13] be interpreted as not precluding any analysis, with regard to unfairness, of a contractual term that reproduces a supplementary rule from which the parties could have derogated, but did not in fact do so as there was no negotiation in that regard, as in the present case analysed here with regard to the clause requiring repayment of the loan in the same foreign currency as that in which it was granted?

(2) In a context where, when being granted a loan in a foreign currency, the consumer was not given calculations/estimates relating to the economic impact that any exchange rate fluctuation would have as regards the overall payment obligations arising under the agreement, can it reasonably be maintained that such a term, under which the exchange risk is borne entirely by the consumer (in accordance with the nominalist principle), is clear and intelligible and that the seller or supplier/bank has complied in good faith with the obligation to provide information to the other party to the agreement, in circumstances in which the maximum degree of indebtedness of consumers established by the Banca Națională a României (National Bank of Romania) has been calculated by reference to the exchange rate prevailing on the date when the loan was granted?

(3) Do [Directive 93/13] and the case-law based on it and the principle of effectiveness preclude a contract from continuing unchanged after a term relating to the party that bears the exchange rate risk has been declared unfair? What change would make it possible to disapply the unfair term and comply with the principle of effectiveness?’

24. The applicants, the Federal Republic of Germany, Romania and the European Commission submitted written observations in the preliminary ruling procedure before the Court. The applicants and defendant in the main proceedings, Romania and the Commission were represented at the hearing on 6 February 2020.

V. Legal assessment

25. The three questions referred concern the three consecutive review stages that a national court must complete for the purpose of substantive assessment of pre-formulated contractual terms in accordance with Directive 93/13.

26. The first question referred concerns the outline of the scope of Directive 93/13 (Section A).

27. The referring court then raises the question as to whether the contested term is 'clear and intelligible' within the meaning of Article 4(2) of the directive. As the criteria for that assessment by the Court have already been established in *Andriciuc*[7] *and Lupean*,[8] in which very similar terms to the contested term were presented, brief reference to existing case-law suffices for the purpose of these proceedings (Section B).

28. The case then focuses on any legal consequences that must be drawn if the contested term is found to be unfair (Section C).

A. Scope of Directive 93/13 (Question 1)

29. By its first question, the referring court essentially asks if a contractual term that reflects a general principle established by law is subject to the provisions of Directive 93/13.

30. According to Article 1(2) of Directive 93/13, contractual terms which 'reflect' 'mandatory' statutory or regulatory provisions are excluded from its scope. The referring court, which is exclusively competent for assessing the facts in that regard,[9] found that the contested term reflects the principle of nominalism established in Article 1578 of the Civil Code.

31. For that reason, it has raised doubts as to the outline of the scope of the directive.

1. Wording of Article 1(2) of Directive 93/13

32. The referring court holds that the fact that Article 1578 of the Civil Code is not a mandatory provision, and cannot therefore be regarded as 'mandatory' within the meaning of Article 1(2) of Directive 93/13, is particularly problematic here, referring in that context to ambiguities in the Romanian version of the directive: whereas the German version uses the term 'binding' in Article 1(2), which can include both mandatory and supplementary provisions, the term 'obligatorii' used in the Romanian version appears to be used in Romanian law solely to designate mandatory statutory or regulatory provisions.

33. However, it follows unequivocally from the overall scheme of the directive that the term 'mandatory' does not refer to the conventional difference in civil law between mandatory (and hence 'binding') and supplementary (and hence 'optional') provisions. It has to be noted in this context that the terms used in Directive 93/13 are terms in EU law and, consequently, must be given an autonomous interpretation.[10] The meaning of the term 'obligatorii' in Romanian law is therefore

7 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703).

8 Order of 22 February 2018 (C-119/17, not published, EU:C:2018:103).

9 See judgment of 3 April 2019, *Aqua Med* (C-266/18, EU:C:2019:282, paragraph 32 and the case-law cited).

10 Judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 37), and of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 50).

irrelevant to the interpretation of that term in Article 1(2) of Directive 93/13. On the contrary, it is apparent from the 13th recital to the directive that that term encompasses all rules which are supplementary and therefore, according to the law, also apply between the contracting parties provided that no other arrangements have been established. [11]

34. The fact that the parties were not in fact afforded the opportunity at the conclusion of the contract to exclude the rule is of no importance in terms of answering the question referred. That is a precondition to and not a criterion by which the application of Directive 93/13 is excluded. Otherwise, no contractual terms within the meaning of Article 3(1) of Directive 93/13 would exist. That is because that provision requires that the term concerned 'has not been individually negotiated'.

35. Thus, I conclude that supplementary provisions of law, such as Article 1578 of the Civil Code, may also in principle be 'mandatory' provisions within the meaning of Article 1(2) of Directive 93/13.

2. Spirit and purpose of the exclusion in Article 1(2) of Directive 93/13

36. However, it still does not follow from this that a contractual term such as that contested in the main proceedings does not fall within the scope of the directive.

37. On the contrary, the Court's settled case-law illustrates the effort it makes to include teleological aspects when deciding if a contractual term is subject to substantive assessment in accordance with Article 1(2) of Directive 93/13.

38. According to the case-law of the Court, exclusion from the scope of Directive 93/13 is justified by the fact that it may be supposed that the national legislature has already struck a balance between all the rights and obligations of the parties to certain contracts and that, as a rule therefore, statutory provisions do not include unfair terms. [12]

39. In my opinion, this is informed not simply by the thought that it would be superfluous in such cases to check for unfairness. On the contrary, this is also intended to preclude any inadmissible interference in the competence of the Member States. That is because, as is apparent from its 12th recital, the purpose of Directive 93/13 is not to harmonise national civil law on prohibited transactions. For that reason, as stated in Article 4(2) of Directive 93/13, substantive assessment shall relate neither to the main subject matter of the contract nor to the adequacy of the price and remuneration. That is because those aspects are usually regulated by the national legislature in the provisions of civil law governing transactions that are by default invalid.

40. It is true that this may mean that a contractual rule that would be regarded as unfair according to the criteria set out in Article 3 of Directive 93/13 cannot be contested to the extent that the national legislature permits such a term in consumer contracts. Nevertheless, that ultimately conceals behind it the question of whether it would be desirable to restrict or even prohibit foreign currency consumer loans at EU level. However, that is not, in any event, the case as EU law currently stands. [13]

11 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 29).

12 Judgments of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraph 28), and of 3 April 2019, *Aqua Med* (C-266/18, EU:C:2019:282, paragraph 33). Cf. also the 13th recital to the directive.

13 This is illustrated in particular by the existence of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, Article 23 of which contains rules, which the Member States are required to transpose, governing minimum protection for consumers entering into foreign currency loans. For reasons of timing, that directive does not apply in the main proceedings (OJ 2014 L 60, p. 34).

41. However, the Court has ruled that the assumption that the legislature intends to establish a reasonable balance between the parties for the contract concerned in the form of statutory provisions is a presumption [14] and, as such, it can be refuted. [15]

42. Consequently, only terms that reflect statutory provisions adopted specifically for the type of contract concerned or which are applicable to it based on a reference standard are excluded from substantive assessment. That is because the national legislature could only strike a balance between the parties inasmuch as it envisaged the specific arrangement between the parties. [16]

43. The Court has likewise ruled that provisions of a general nature are not automatically covered by the presumption that they have been subject to a specific assessment by the legislature with a view to establishing that balance. [17]

44. Although this means that a rule in a national provision is subject to an indirect unfairness assessment, that cannot be regarded as inadmissible interference in the competence of the Member States, as the provision concerned can continue to apply in the other areas that fall within its scope. That is because assessments under Directive 93/13 only apply to consumer contracts.

45. In light of that, it is for the referring court to consider if the legislature intended Article 1578 of the Civil Code to establish a reasonable balance between the seller or supplier and consumers.

46. It has to be noted in this context that the Romanian Government emphasised at the hearing that this provision is not specifically tailored to consumer credit agreements. The guiding principle behind the rule in Article 1578 of the Civil Code is that of contracting parties *pari passu*. According to information provided by the Romanian Government, the new Civil Code no longer includes any such rule, but instead it does include special provisions on consumer credit agreements.

47. If, in light of this, the referring court concludes from its assessment that the provision is not intended to create a balance between consumers and sellers or suppliers, the presumption would be regarded as refuted. Then there would be no justification for dispensing with substantive assessment.

3. Intermediate conclusion

48. It follows from the foregoing that Article 1(2) of Directive 93/13 must be interpreted as meaning that a contractual term that reflects a general principle established by law is subject to the provisions of the directive, unless the national legislature enacted the statutory provision concerned with the intention of establishing a reasonable balance between the rights and obligations of the parties to the type of contract concerned. It is for the national court to make the necessary findings in that regard.

14 Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 61).

15 See, to that effect, judgments of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraphs 27 and 28), and of 3 April 2019, *Aqua Med* (C-266/18, EU:C:2019:282, paragraph 36).

16 See judgment of 21 March 2013, *RWE Vertrieb* (C-92/11, EU:C:2013:180, paragraphs 27 and 29).

17 Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 61).

B. Requirements in terms of contractual terms in 'plain and intelligible' language and good faith (Question 2)

49. By its second question, the referring court wishes to know, first, whether a contractual term under which the exchange rate risk is ultimately borne entirely by the consumer can be regarded as 'clear and intelligible' within the meaning of Article 4(2) of Directive 93/13 if the consumer was not given calculations illustrating the impact that variations in the exchange rate would have on the instalments owed by him or her and, second, whether such a term can be regarded as being in good faith where the maximum degree of indebtedness on which credit checks are based was calculated solely by reference to the exchange rate on the date of signature of the agreement.

50. This question will only be relevant if the referring court finds that Directive 93/13 applies. That is because assessment of a term against the transparency requirement enacted in Article 4(2) of Directive 93/13 depends on whether the directive applies.

51. Assessment of the transparency requirement is especially important in the case of terms such as that contested in the main proceedings. That is because it follows from the case-law in that regard that a term under which a loan denominated in a foreign currency is to be repaid in that currency may under certain circumstances concern the 'main subject matter of the contract' within the meaning of Article 4(2) of Directive 93/13.[18] However, according to that provision, any such term may only be assessed for unfairness if it is not in plain and intelligible language.[19]

52. The Court has already established the criteria by which, first, a term is to be regarded as clear and intelligible within the meaning of Article 4(2) of Directive 93/13 in connection with terms similar to the term contested in this case.

53. They require the referring court to assess in particular whether the consumer was able, based on the information provided by the seller or supplier, to estimate the impact that a sharp fall in the value of the currency in which he or she receives his or her income and an increase in the foreign interest rate may have on the loan instalments. In specific terms, the seller or supplier must expressly inform the consumer that, in entering into a loan agreement denominated in a foreign currency, he or she is exposing himself or herself to an exchange rate risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he or she receives his or her income.[20]

54. Furthermore, the referring court must assess whether the seller or supplier informed the consumer of all the relevant circumstances which could have been known to it at the time and which affect the future performance of the contract.[21] In that connection, case-law requires regard to be had to all of the circumstances of the case in the main proceedings, taking account in particular of the expertise and knowledge of 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.[22]

18 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 41), and order of 22 February 2018, *Lupean* (C-119/17, not published, EU:C:2018:103, paragraph 21).

19 See judgments of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 68), and of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207, paragraph 48).

20 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 50), and order of 22 February 2018, *Lupean* (C-119/17, not published, EU:C:2018:103, paragraph 25).

21 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 54), and order of 22 February 2018, *Lupean* (C-119/17, not published, EU:C:2018:103, paragraph 27).

22 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 56), and order of 22 February 2018, *Lupean* (C-119/17, not published, EU:C:2018:103, paragraph 29).

55. Even though, in light of this, the seller or supplier cannot be expected to predict or calculate the actual future fall in the value of the currency concerned, that does not absolve it of its comprehensive obligation to provide information about the potential risks of variations in the exchange rate and the fact that they must be borne entirely by the borrower.

56. With regard, second, to whether a term contrary to the requirement of good faith gives rise to a significant and unjustified imbalance to the detriment of the consumer, it follows from the case-law of the Court that the national court must assess in particular whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations. [23]

57. In light of the above considerations, fair and equitable dealing includes, in particular, comprehensive information for the consumer about potential risks. It is for the national court to assess if the reference to the maximum degree of indebtedness was capable, in the present case, of concealing the risks. That is because, inasmuch as the maximum degree of indebtedness is calculated based on the exchange rate at the time of signature of the agreement, the consumer must also be advised, based on the above considerations, that compliance with that maximum degree says nothing about whether he or she will be able to discharge his or her financial obligations if the currency falls in value.

58. If such a maximum degree is mandatory under national law, a static assessment confined to the exchange rate when the loan was granted might even be regarded as circumvention of that maximum degree.

59. Therefore, the answer to the second question is that the requirement laid down in Article 4(2) of Directive 93/13, that a contractual term in a loan agreement denominated in foreign currency under which the consumer ultimately bears the exchange rate risk must be in plain and intelligible language, presupposes that the consumer is comprehensively informed of the possibly considerable financial impact of such a term on his or her financial obligations. This applies irrespective of whether the actual fall in value of the currency concerned could have been predicted at the time of signature of the agreement. It is for the national court to make the necessary findings in that regard.

C. Legal consequences of the finding that the term is unfair (Question 3)

60. By its third question, the referring court wishes to know what consequences, if any, should be drawn if the term is found to be unfair in this situation, in order to guarantee the full effectiveness of the consumer's rights.

61. In its opinion, all the solutions suggested in previous case-law put the consumer at an unreasonable disadvantage. In the opinion of the referring court, freezing the exchange rate at the rate applicable on the date of signature of the agreement might offer a reasonable solution. However, it raises doubts as to whether Article 6(1) of Directive 93/13 and the case-law established on that provision preclude that approach.

23 Judgment of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 57), and order of 22 February 2018, *Lupean* (C-119/17, not published, EU:C:2018:103, paragraph 30).

62. According to Article 6(1) of Directive 93/13, the national courts are required in principle to declare unfair terms to be inapplicable and to maintain the contract as to the remainder. The Court has repeatedly emphasised in this context that this does not empower the national courts to modify the contract by revising the content of that term.[24] According to the case-law, removing the unfair term replaces the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them.[25]

63. Obviously, simply removing an unfair term is subject to the proviso that the contract is reasonably capable of continuing in existence without it. However, if the national court concludes from its assessment that it is not possible to remove the term without substitution, it must in principle declare the entire contract to be invalid and order it to be rescinded.[26]

64. However, there may be cases in which, if the contract is annulled, the consumer is exposed to particularly unfavourable consequences. According to the case-law of the Court, that may apply in particular to loan agreements such as the agreement in this case. That is because, in general, the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities.[27]

65. The national court is of the opinion in this case that it is not possible to remove the contested term without substitution. It considers that annulment of the contract is also out of the question, as this would expose the consumer to particularly unfavourable consequences. That is because there is a risk that the consumer would have to repay the entire loan at once. As the nominal value of the outstanding debt is denominated in Swiss francs, the loan would have to be repaid, moreover, at the current exchange rate. Thus, the consumer would be doubly penalised.

66. The Court has previously held in such cases that it is permissible for the unfair term to be replaced by a supplementary provision of national law or a rule which the parties have opted for.[28] That is because the application of such a statutory provision or rule would in general restore the balance between the parties' reciprocal rights and obligations.[29]

67. However, that does not appear to offer a solution in this case. That is because Article 1578 of the Civil Code, which the referring court regards as the only provision to be considered, would not be an appropriate substitution for the contested term.

24 Judgments of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 73); of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 77); and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 53).

25 Judgments of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 40); of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 45); of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 80); and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraphs 56 and 59).

26 See, to that effect, judgments of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207, paragraphs 48 and 52), and of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraphs 44 and 45).

27 Judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 83 and 84), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 58).

28 See judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 80); of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraphs 56 and 59); and of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 58).

29 Judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 82), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 57).

68. First, Article 1578 of the Civil Code is in fact essentially identical in content to the contested term. It would therefore be illogical to replace the contested term with that provision. Second, the Court has ruled that only those statutory provisions meant to reflect the balance that the national legislature intended to establish between all the rights and obligations of the parties to certain contracts are considered for the purpose of plugging a gap.[30] However, the Romanian Government contended at the hearing that the legislature's intention in enacting Article 1578 of the Civil Code was not to strike a balance between the parties to a consumer credit agreement.[31]

69. Therefore, all that follows from previous case-law is simply what the national court may *not* do in a situation such as that in the present case: it may not assume that the consumer is bound by the unfair term,[32] but nor may it replace the term with a statutory provision such as Article 1578 of the Civil Code if it does not ensure a reasonable balance between the seller or supplier and the consumer. Nor may it modify the contract by revising the content of the unfair term or even annul the contract in its entirety.[33]

70. It does not answer the question of what the national court *can* do in that situation.[34]

71. The Romanian Government contended at the hearing that, in principle, Romanian law empowers the court to plug gaps in a contract with a supplementary rule, and that, in particular, a contract can be modified thus if the basis for the transaction no longer applies.

72. It has to be noted in that context that the Court has emphasised in settled case-law that national courts which find that a term is unfair must draw all the consequences that follow under national law, in order to ensure that the consumer is not bound by those terms.[35]

73. In light of that, a national court cannot be prohibited in a situation such as that in the present case from plugging a gap in a contract left by the removal of the unfair term with a supplementary rule that restores the balance between the reciprocal rights and obligations of the parties, simply because one of the parties is a consumer. In the opinion of the referring court, that could be achieved by freezing the exchange rate at the rate that applied on the date of signature of the agreement.

74. That is because, as I shall show below, neither Article 6(1) of Directive 93/13 nor the case-law established on that provision preclude the power to replace the unfair term in a situation such as that in the present case.

75. First, it has to be recalled in this context that the judgment in *Banco Español de Crédito*,[36] which is the starting point of the case-law prohibiting the courts from modifying a contract, concerned a case in which the contract was capable of continuing in existence even without the unfair term. Article 6(1) of Directive 93/13 expressly provides in that case, that the term shall simply not be binding. Therefore, there is no room for a different legal consequence in such a case.

30 Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 60).

31 See points 43 and 46 of this Opinion, and judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 61).

32 Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 68).

33 Judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraphs 55 and 56).

34 This is illustrated in particular by the judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819).

35 Judgments of 15 March 2012, *Pereničová and Perenič* (C-453/10, EU:C:2012:144, paragraph 30); of 30 May 2013, *Jőrös* (C-397/11, EU:C:2013:340, paragraph 48); and of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 101).

36 Judgment of 14 June 2012 (C-618/10, EU:C:2012:349).

76. Then it has to be noted that the reason why case-law prohibits modification of the contract is that, were the contract open to modification, that would eliminate the dissuasive effect on sellers or suppliers of the straightforward non-application of unfair terms. That is because the sellers or suppliers would remain tempted to continue using those terms if their only fear was that the court would modify the contract to the extent necessary.[37] This runs counter to the long-term objective of Article 7(1) of Directive 93/13, which is to put an end to the use of unfair terms.

77. However, that reason does not apply in a situation such as that in the present case.

78. That is because, first, the court is required in a situation such as that in the present case to remove the term and plug the gap left in the contract with a rule that strikes a reasonable balance between the parties. Thus, it is not required to interpret and reduce the term to a permissible extent, thereby still taking maximum account of the interests of the seller or supplier. However, this is precisely the sort of approach that the referring courts had in mind in the cases in which the Court has previously rejected modification of the contract.[38] That is because, in those cases, the courts wanted to maintain the unfair term in part or for certain situations.

79. In a situation such as that in the present case, however, the court must take due account of the particular protection to which consumers are entitled. Instead of relying unilaterally on the actual intention of the user of a pre-formulated term, the court determines what would have reasonably been agreed.[39] That replaces the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them. According to the case-law, that is precisely the spirit and purpose of the rule in Article 6(1) of Directive 93/13.[40]

80. Second, it has to be found that the only conceivable alternative, namely annulment of the entire contract, would unilaterally penalise the consumer. Furthermore, the objective of the term, to pass the exchange rate risk to the consumer, would still be achieved.[41] Consequently, annulment of the entire contract would not dissuade a lender from including such terms in future contracts.[42]

81. Thus, it has to be found that the only conceivable alternative to modification of the contract, namely annulment, does not guarantee the dissuasive effect. Consequently, an assumed lack of dissuasive effect cannot be relied upon simultaneously to argue against modification of the contract. That applies a fortiori in that modification of the contract that takes account of the consumer's interests would indeed have a very dissuasive effect on the seller or supplier.[43]

82. Finally, categorically stripping the national court of its powers to plug a gap would ultimately mean that consumers in national legal systems that fundamentally recognise such powers would be worse off than other contracting parties. That is because, in a situation such as that in the present case, the court would be required to annul the contract, with all the unfavourable consequences indicated, because

37 Judgment of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 69); of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 79); and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 54).

38 Judgments of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250), and order of 24 October 2019, *Topaz* (C-211/17, not published, EU:C:2019:906).

39 See, with regard to that criterion, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraphs 68 and 69), and of 20 September 2017, *Andriciuc and Others* (C-186/16, EU:C:2017:703, paragraph 57), and order of 22 February 2018, *Lupean* (C-119/17, not published, EU:C:2018:103, paragraph 30).

40 See point 62 of this Opinion.

41 See point 65 of this Opinion.

42 See, to that effect, judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 83 and 84), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 58).

43 See points 78 and 79 of this Opinion.

one of the parties is a consumer, whereas in the same situation, in an area other than consumer law, it could use a supplementary rule to restore a reasonable balance between the parties. Any such solution is undesirable both from the perspective of equal treatment and from the perspective of consumer protection.

83. Moreover, that solution essentially corresponds to the conclusion drawn by the Court in *Abanca Corporación Bancaria and Bankia*.[44]

84. Although the Court emphasised in its judgment in that case that a national court cannot maintain an unfair term in part,[45] as that would in fact reduce it to a permissible extent, thereby taking unilateral account of the interests of the seller or supplier,[46] it has, however, ruled that the court may replace the unfair term with a statutory rule adopted after the contract was signed.[47] However, all that ultimately means is that the court plugs the gap left in the contract by removing the unfair term.

85. Consequently, in a situation such as that in the present case, Article 6(1) of Directive 93/13 and the case-law established on it do not preclude such powers of the court.

86. To conclude, it has to be noted at this point that it is for the national court to assess which rule is able to establish a reasonable balance between the parties. The above considerations illustrate that both consumer protection and penalty aspects play a role within the framework of Article 6(1) of Directive No 93/13. At the same time, however, the Court underlines the need for an effective balance. That means that the rule must be proportionate in light of all the circumstances which are relevant to the particular case.

87. In light of all the foregoing, I conclude that Article 6(1) of Directive 93/13 does not prevent a national court from removing an unfair term and substituting it with a supplementary rule that replaces the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them, if

– the contract concerned cannot be maintained if the unfair term is removed without substitution;

– annulment of the contract would have particularly unfavourable consequences for the consumer; and

– there is no supplementary provision under national law and no provision that the parties to the contract concerned have opted for which could act as a substitute for the term removed.

VI. Summary

88. In light of the foregoing considerations, I suggest that the Court answer the order for reference from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) as follows:

(1) Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a contractual term that reflects a general principle established by law is subject to the provisions of the directive, unless the national legislature enacted the statutory provision concerned with the intention of establishing a reasonable balance between the rights and obligations of the parties to the type of contract concerned. It is for the national court to make the necessary findings in that regard.

44 Judgment of 26 March 2019 (C-70/17 and C-179/17, EU:C:2019:250).

45 Judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 55).

46 See point 78 of this Opinion.

47 Judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 59).

(2) The requirement laid down in Article 4(2) of Directive 93/13, that a contractual term in a loan agreement denominated in foreign currency under which the consumer ultimately bears the exchange rate risk must be in plain and intelligible language, presupposes that the consumer is comprehensively informed of the possibly considerable financial impact of such a term on his or her financial obligations. This applies irrespective of whether the actual fall in value of the currency concerned could have been predicted at the time of signature of the agreement. It is for the national court to make the necessary findings in that regard.

(3) Article 6(1) of Directive 93/13 must be interpreted as meaning that a national court is not prevented from removing an unfair term and substituting it with a supplementary rule that replaces the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them if, *first*, the contract concerned cannot be maintained once the unfair term has been removed without substitution; *second*, annulment of the contract would have particularly unfavourable consequences for the consumer; and, *third*, there is no supplementary provision under national law and no provision that the parties to the contract concerned have opted for which could act as a substitute for the term removed.