Reports of Cases

OPINION OF ADVOCATE GENERAL
Jääskinen
delivered on 17 September 2015 [1]

Case C-312/14

Banif Plus Bank Zrt.
v
Márton Lantos and Mártonné Lantos

(Request for a preliminary ruling from the Ráckevei Járásbíróság, (Hungary))

(Admissibility — Investor protection — Foreign currency denominated loan agreement — Notion of a financial instrument under Article 4(1) point 17 of Directive 2004/39/EC — Notion of investment services under Article 4(1), point 2, of Directive 2004/39 — Circumstances in which providers of such services are obliged to assess their suitability for clients — Validity of agreements that breach these requirements — Sanctions under Article 51 of Directive 2004/39)

I – Introduction

1. By this order for reference the Ráckevei Járásbíróság, Hungary, (District Court of Ráckeve) seeks, among other things, guidance on the types of instruments that fall within the scope of Directive 2004/39. [2] It also asks whether a duty to assess the suitability of investment services and financial products for individual clients follows from the same directive. The Court has been asked to do so in the context of a dispute over a foreign currency denominated loan, entered into to finance the purchase of a car. However, due to a lack of precision in the description of both the pertinent facts and the national legal framework, the reference is in my opinion inadmissible.

2. This said, the preliminary reference touches on a difficult social and economic problem of major importance in many Member States. Unfortunately, the order for reference and the main litigation do not present an appropriate opportunity for developing the Court's case-law on this issue, which should take place in the context of EU consumer protection law, and in particular Directive 2008/48, [3] rather than investor protection law.

1 — Original language: English.

2 — Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ 2004 L 145 p. 1.

3 — Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008 L 133 p. 66. In contrast, 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 and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ 2014 L 60 p. 34, which contains a chapter on foreign currency loans, is clearly not applicable in the case to hand.

II – Legal framework

A – *EU law*

1. Directive 2004/39

3. Recitals 2 and 31 of Directive 2004/39 state as follows:

‘(2) In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of these developments the legal framework of the Community should encompass the full range of investor-oriented activities. To this end, it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. In view of the preceding, Directive 93/22/EEC should be replaced by a new Directive.

…

(31) One of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties).’

4. Article 1 of Directive 2004/39 states as follows:

‘1. This Directive shall apply to investment firms and regulated markets.

2. The following provisions shall also apply to credit institutions authorised under Directive 2000/12/EC, when providing one or more investment services and/or performing investment activities:

…

Chapter II of Title II excluding Article 23(2) second subparagraph,

…’

5. Article 4 (1), points 2, 6, and 17 of Directive 2004/39 contain the following definitions:

‘(2) “Investment services and activities” means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;

…

(6) “Dealing on own account” means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

…

(17) “Financial instrument” means those instruments specified in Section C of Annex I’.

6. Under Title II, Chapter II, of Directive 2004/39, in Section 2, entitled '[p]rovisions to ensure investor protection' appears Article 19, which is entitled '[c]onduct of business obligations when providing investment services to clients'. Its paragraphs 4, 5 and 9 state as follows:

'4. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.

5. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

In case the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format.

In cases where the client or potential client elects not to provide the information referred to under the first subparagraph, or where he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client or potential client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him. This warning may be provided in a standardised format.

…

9. In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of clients and/or information requirements, this service shall not be additionally subject to the obligations set out in this Article.'

7. Article 51(1) of Directive 2004/39 obliges Member States to ensure that appropriate administrative measures can be taken or administrative sanctions imposed against the person responsible where the provisions adopted in the implementation of the directive have not been complied with. Member States are to ensure that all measures taken are effective, proportionate and dissuasive.[4]

8. The '[i]nvestment services and activities' listed in Section A of Annex I include '[d]ealing on own account'. Among the ancillary services listed in Section B are '[f]oreign exchange services where these are connected to the provision of investment services'. Among the financial instruments listed in Section C are '[o]ptions, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash'.

4 — This is stated to be without prejudice to the procedures for withdrawal of authorisation or the right of Member States to impose criminal sanctions.

2. Directive 2008/48

9. Article 1 of Directive 2008/48, entitled ‘Subject matter’, states as follows:

‘The purpose of this Directive is to harmonise certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers.’

10. Article 2 of Directive 2008/48, entitled ‘Scope’, states as follows:

‘1. This Directive shall apply to credit agreements.

2. This Directive shall not apply to the following: …

(h) credit agreements which are concluded with investment firms as defined in Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (9) or with credit institutions as defined in Article 4 of Directive 2006/48/EC for the purposes of allowing an investor to carry out a transaction relating to one or more of the instruments listed in Section C of Annex I to Directive 2004/39/EC, where the investment firm or credit institution granting the credit is involved in such transaction;’

…

11. Article 3 of Directive 2008/48, entitled ‘Definitions’, states as follows:

‘For the purposes of this Directive, the following definitions shall apply:

…

(c) “credit agreement” means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments;’

B – *National law*

12. Article 231 of the Civil Code of the Republic of Hungary [5] (‘the Civil Code’) provides the following:

‘1. Unless otherwise provided, monetary debts must be paid in the currency that is legal tender at the place of performance of the obligation.

2. Debts determined in another currency or in gold will be converted on the basis of the rate of exchange (price) applied at the place and on the date of the payment.’

13. The Kúria, in its capacity as the Hungarian Supreme Court, in judgment 6/2013 PJE, established a binding interpretation of national case-law concerning foreign currency denominated loan agreements. On the basis of Article 231 of the Civil Code, the Kúria classified loans denominated in a foreign currency as currency loans. It noted that as a result of those currency loans a foreign currency liability exists, but that, in contrast to a genuine currency loan (which contains an enforcement clause effective

5 — A Magyar Köztársaság Polgári Törvénykönyvről szoló 1959. évi IV. (Ptk.).

in a foreign currency), in a foreign currency denominated loan, a currency is specified as the currency in which payment obligations are to be met, but the currency in which the payments are actually made is the forint. Consequently, the Kúria interpreted that transaction as meaning that the monetary flow registered in foreign currency is fictitious and the monetary flow in Hungarian forint is real.

III – Facts, procedure and questions referred

14. The order for reference states that on '11 June 2008, on the basis of Paragraph 523 of Law IV of 1959 of the Civil Code of the Republic of Hungary…, the financial institution Banif Plus Bank Zrt. ("the bank"), the applicant, entered into a foreign currency denominated loan agreement with the first defendant, a client of Hungarian nationality. The purpose of the loan agreement was to specify the terms relating to the making available of an amount of money (supply of a service) and to the loan repayments (consideration). The terms of the loan agreement included the essential contractual stipulations relating to the fictitious monetary flow (registered) in foreign currency and the real monetary flow in forints.'

15. The order for reference continues to state that at 'the time the loan was granted, the bank calculated the equivalent amount in foreign currency of the amount that it was to advance in forints, in accordance with the exchange rate applicable on a date which had been previously determined and in accordance with Article 231 of the Civil Code. [Next,] the bank purchased from the client that currency, which (had been registered as) chargeable to him, using the actual exchange rate for purchases of foreign currency that was applicable at the time of the advance of the loan (transaction at the prevailing exchange rate) and paid the equivalent amount in forints to the client. [Later,] the bank sold to the client the registered currency in exchange for forints, using the actual exchange rate for sales of foreign currency that was applicable at the time of the repayment of the loan (transaction at the future exchange rate applicable at the time of repayment), in order that the client could meet, in foreign currency, his repayment obligation, which was registered in foreign currency.'

16. The order for reference adds that given 'that the foreign currency denominated loan agreement, which is the subject of the main proceedings, has a money-market dimension (consisting of the loan), and a possible capital-markets dimension (consisting of the currency exchange rate transactions), doubts arise as to the interpretation of the concepts of financial instrument and investment activity carried out through a financial instrument.'

17. In those circumstances, the national court referred the following questions for a preliminary ruling:

'(1) Must it be held that, pursuant to Article 4(1)(2) (investment services and activities), Article 4(1)(17) (financial instruments) and Annex I, Section C, point (4) (forward currency contracts, derivative instruments), of [Directive 2004/39], the offer of an (exchange rate) transaction to a client which, under the legal form of a foreign currency denominated loan agreement, consists of a spot transaction at the time of the advance of the loan and a forward transaction at the time of repayment, which is carried out by converting into forint a registered amount of foreign currency and which exposes the client's loan to the effects and risks (currency risk) of capital markets, constitutes a financial instrument?

(2) Must it be held that, pursuant to Article 4(1)(6) (dealing on own account) and Annex I, Section A, point (3) (dealing on own account), of [Directive 2004/39], the carrying out of proprietary trading in respect of the financial instrument described in the first question constitutes an investment service or activity?

(3) Must the financial institution perform the suitability check required by Article 19(4) and (5) of [Directive 2004/39], taking into account that the forward currency contract — which is an investment service relating to financial derivative instruments — was offered as part of another

financial product (namely a loan agreement) and that the derivative instrument in itself constitutes a complex financial instrument? Must it be held that Article 19(9) of [Directive 2004/39] is not applicable because, as the risks assumed by the client with regard to the loan and to the financial instrument are fundamentally different, the suitability assessment is essential inasmuch as the transaction contains a derivative instrument?

(4) Does the circumvention of Article 19(4) and (5) of [Directive 2004/39] lead to the annulment of the loan agreement between the bank and the client?'

18. Written observations were received from the defendants, Mr Márton Lantos and Mrs Mártonné Lantos, the Hungarian, German, Polish and United Kingdom Governments, and the Commission. There was no hearing.

IV – Admissibility

19. In my opinion, the order for reference is inadmissible for the following reasons.

20. I recall that the information supplied in the order for reference must give the Court, the Member States, and others entitled to submit observations, a clear understanding of the factual and legal context of the main proceedings, and set out the reasons why the national court is unsure as to the interpretation of relevant provisions of EU law, and considers it necessary to refer a question to the Court for a preliminary ruling. It is important to underline that the information provided in the order for reference serves not only to ensure that the Court can supply a useful answer, but equally to give the governments of the Member States and other interested parties the option of presenting their observations in conformity with Article 23 of the Statute of the Court. [6]

21. Those requirements concerning the content of a request for a preliminary ruling are set out explicitly in Article 94 of the Rules of Procedure, and are also reflected in the Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. [7] It is apparent, in particular from point 22 of those recommendations, that a request for a preliminary ruling must 'be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a *clear understanding* of the factual and legal context of the main proceedings' (my emphasis).

22. The order for reference serves as the basis for the proceedings before the Court. Thus, it is essential that the national court should give, in the order for reference itself, the factual and regulatory context of the case in the main proceedings and at least a minimum amount of explanation of the reasons for the choice of the provisions of EU law it seeks to have interpreted and of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it. [8] The Court has held that the national courts are bound to observe the requirements concerning the content of a request for a preliminary ruling 'scrupulously', [9] but in my opinion the order for reference in the main proceedings does not do so.

6 — See order in *Herrenknecht*, C-366/14, EU:C:2014:2353, paragraphs 14, 15 and 17 and case-law cited.

7 — OJ 2012 C 338, p. 1.

8 — Order in *Talasca* (C-19/14, EU:C:2014:2049), paragraph 20 and case-law cited.

9 — _ Ibid paragraph 21.

23. The limited factual information provided in the order for reference is reproduced in points 14 to 16 of this Opinion.[10] Hence, there is a large amount of factual information absent from the order for reference that needs to be to hand before the questions referred can be meaningfully answered. Here I have in mind, for example, the exact contractual provisions that are in dispute, and a detailed description of what has happened between the parties for them to have ended up in litigation over their respective legal rights and obligations.[11] The order for reference lacks even any information on the foreign currency in which the agreement was struck.[12]

24. The Commission states in its written observations that it has studied the case file of the national court, so the factual lacuna has been, for the Commission, partly filled. However, the case file has not been transmitted to the Member State governments. They have had to make decisions on whether to intervene in the case on the basis of the order for reference, and general knowledge about foreign currency loans granted to consumers.

25. Moreover, as several governments have pointed out in their written observations, the facts that have been transmitted are, in some respects, unintelligible. A consequential problem has thereby arisen for the coherence of the questions referred.

26. First, the Hungarian Government points out that the national court refers to national provisions on investment loans and foreign currency swap contracts without specifying whether the arrangement in issue falls within one of these categories. Secondly, the German Government makes reference to the fact that the order for reference indicates that the loan contract in foreign currency would consist of a cash purchase at the date the loan is forwarded and a forward purchase at the date of reimbursement. According to this government, it is difficult to understand why the national referring court is of the view that a forward currency purchase is in issue when it explains that the exchange rate of the date of reimbursement applies. The Hungarian Government also has difficulties in understanding whether the national court claims that the arrangement before the parties constitutes a forward foreign currency transaction (on an OTC market) or whether it simply intends to refer to the legal definition of this notion.[13]

27. Secondly, there is insufficient consistency and factual precision to enable the Court to decide whether the measure described in the order for reference constitutes a 'financial instrument', for the purposes of Directive 2004/39. As pointed out in the written observations of Germany and the United Kingdom, there is a lack of clarity in terms of the type of transaction that the bank has entered into with the debtor, and a measure of ambiguity. The German Government adds that the order for reference sometimes gives the impression that the purchase and sale of foreign currency will take place, but at the same time a fictitious flow of foreign currency is described. It is unclear which currency purchases and payment flows have actually taken place. According to the United Kingdom, it is unclear whether the arrangement consists of two separate instruments or one hybrid one, and whether there really is a combination of a spot transaction and a forward transaction and not a combination of two spot transactions.

10 — For the sake of completeness I add that there is a brief description of the parties' diverging views on the legal problem to hand, including very brief reference to their competing views on the applicability of Directive 2004/39. A summary of some apparently pertinent provisions of Hungarian law also appear in the document, but nothing more.

11 — According to the observations of the debtors, the main litigation seems to concern recovery of the loan by the bank. Mr Márton Lantos is the principal debtor but Mrs Mártonne Lantos has also been sued by the bank on the basis of national provisions concerning joint liability of spouses for credit relating to matrimonial property. Their observations also include a description of the contractual terms, with only a brief discussion of the pertinent clauses of the loan contract. The latter is annexed to the written observations of debtors..

12 — While the order for reference is silent on the foreign currency in issue, according to various written observations the arrangements were made in Swiss francs.

13 — Personally, I have difficulties in understanding why the debtors needed a loan from the bank if they were able to sell to the bank the relevant sum in Swiss francs. It is stated in in the reference that '[Next], the bank purchased from the client that currency'. However, the Commission notes, on the basis of the national case file, that a loan in Swiss francs was granted but it was advanced and repayable in Hungarian forints. According to the observations of the debtors, the set-up in issue amounts, at least partially, to an instrument concerning investment in Swiss francs.

28. In addition to this, the pertinence of the national provisions referred to in the order for reference is unclear, there being no exposition of how they are linked to the, purportedly, pertinent provisions of EU law. As a result, it is difficult for those without a deep knowledge of Hungarian law to understand the reference. [14]

29. And finally, the question of whether the bank is required to conduct the suitability test prescribed by Articles 19(4) and (5) of Directive 2004/39, or if it is exempted from so doing by Article 19(9) of the same directive, is impossible to answer due to insufficient information in the order for reference. What the Court is required to do here is to determine whether Directive 2004/39 applies, or another EU legal instrument designed to protect consumer interests, such as Directive 2008/48. As will be seen from the discussion below, it is my impression from the information available that the dispute in issue does not appertain to Directive 2004/39, but is rather governed by Directive 2008/48. Further, I observe that national legislation implementing Directive 2004/39 applies to investment loans. [15] On the other hand, such loans do not fall within the scope of Directive 2008/48, but nor are they defined as financial services or financial instruments in Directive 2004/39. This said, I do not believe that the Court has sufficient information before it to answer Question 3.

V – Analysis

A – *Preliminary observations*

30. In the event that the Court nevertheless considers the preliminary questions admissible, I shall briefly discuss the legal issues that in my opinion may be relevant to answering them.

31. First, I shall adopt a hypothesis to the effect that the case concerns a foreign currency denominated loan given to a physical person, and more precisely, to a consumer. Indeed, the written observations of the defendants in the main proceedings show that the purpose of the loan arrangement was to finance purchase of a car. [16]

32. I recall that Advocate General Wahl observed in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:85, point 1) that the: 'present case arises against the background of the supply of consumer credit agreements denominated in foreign currency. The use of agreements of this kind, which is a relatively common practice in some EU Member States and which may, at first sight, be regarded as attractive by borrowers because the interest rate is lower than the rate generally applied, has caused problems for many individuals, following the international financial crisis in the 2000s, on account of the sharp depreciation of certain currencies in relation to the foreign currency concerned (in particular the Swiss franc). Those individuals have been required to repay monthly instalments

14 — I observe that the written observations of Hungary describe the legal framework in greater detail than the order for reference but that government considers the reference as inadmissible, inter alia, because of the lack of clarity relating to the pertinence of the national provisions referred to therein.

15 — See Article 4, point 6, of Law CXXXVIII of 2007, which entered into force on 1 December 2007, transposing into Hungarian law Directive 2004/39 (a befektetési vállalkozásokról és az árutőzsdei szolgáltatókról, valamint az általuk végezhető tevékenységek szabályairól szóló 2007. évi CXXXVIII. Törvény).

16 — In the written observations of the defendants in the main proceedings it is submitted that Mr Márton Lantos agreed on 11 June 2008, with the bank, a consumer credit agreement denominated in Swiss francs in order to finance acquisition of a motor vehicle.

denominated in domestic currency that are much higher than they would have had to pay if the repayments had been calculated on the basis of the historical rate of exchange applicable when the loan was advanced. The setbacks observed have been such that, as a knock-on effect, there has been a significant impact on the banking sector in some Member States.' [17]

33. Indeed, the Hungarian legislator has reacted to the aggravated debt burden of Hungarian households with a legislative package mainly aimed at protecting indebted homeowners. The measures adopted enable, among other initiatives, final repayment of foreign currency debts at fixed preferential exchange rates by means of a government-backed scheme, and prescribed forced conversion of mortgage loans issued in foreign currency. Furthermore, they have limited the use of residential real estate as collateral, and provided for interest-rate subsidised loans in forints, as well as social support for debtors facing eviction due to difficulties met in the repayment of foreign currency loans. [18]

34. Secondly, it is useful to recall the basic concepts of the law of monetary obligations, namely those of *money of account* defining the measure of the monetary obligation and *money of payment* being the mode of performance. [19] The differentiation of money of account from money of payment by means of a currency clause enables the creditor to transfer the risk of depreciation of the external and/or internal value of the money of payment to the debtor who can simultaneously profit from a lower nominal rate of interest. This is why foreign currency denominated loans are widely used in certain Member States. The use of a currency clause means that the debtor incurs an obligation to pay an unascertained but ascertainable sum of money. Yet, we are faced with a monetary obligation which can be liquidated by paying the relevant sum of money in the money of payment. [20]

35. On the basis of the above, the factual situation to hand appears to amount to a loan issued by the bank to a consumer where the agreed money of account is the Swiss franc, the value of which determines the capital of the loan and its instalments, while the money of payment is the Hungarian forint.

B – *Notions of a financial instrument and an investment service (Questions 1 and 2)*

36. The order for reference indicates that the national referring court is of the view that the fictitious flows of Swiss francs in issue amount to a financial instrument, here obviously a derivative instrument such as a forward currency transaction between the bank and the client, the former having acted on its own account, and obviously on an OTC market [21] or similar setting.

17 — Advocate General Wahl further explained (in footnote 2 of the Opinion) that according to the referring court in that case the debts of Hungarian households with credit institutions amounted to 32.56% of the gross national product (GNP), according to data for the second half of 2012 from the Magyar Nemzeti Bank (National Bank of Hungary), and, among them, the equivalent of 18.54% of the GNP, a sum of HUF 5 289 billion, related to loans in foreign currencies like the one at issue in the main proceedings in Kásler. With specific regard to loans denominated in Swiss francs, they have been offered on a large scale not only in Hungary, but also in other Member States including Poland and Croatia.

18 — See among other initiatives Act LXXV of June 2011 on fixing the exchange rate used for the calculation of instruments of foreign exchange denominated mortgage loans and the forced sale of residential properties, Government Decree No 341/2011 on housing interest subsidy and Act CLXXIII of 2013 on an exchange rate cap facility.

19 — *Mann on the Legal Aspect of Money*, Proctor, Ch., Kleiner, C., and Mohs, Fl. (eds.), Seventh edition, Oxford University Press, Oxford 2012, at page 127.

20 — *Mann on the Legal Aspect of Money*, at page 104. Directive 2014/17, Article 4(28), defines a 'foreign currency loan' as a credit agreement where the credit is either denominated in a currency other than that in which the consumer receives the income or holds the assets from which the credit is to be repaid or denominated in a currency other than that of the Member State in which the consumer is resident.

21 — The order for reference refers to several national provisions on forward currency transactions carried out on the over-the-counter (OTC) market.

37. Here I need to start from a fundamental point. The purpose of Directive 2004/39 is to protect investors.[22] An investor in the sense of that directive is somebody who invests or intends to invest his own or borrowed capital in a financial instrument with a view to gaining revenue, or at least protecting the value of his capital. The case file indicates that the client did not intend to invest any capital but his purpose was to borrow from the bank the sum needed for financing the acquisition of a durable consumer good, namely a car. I am not convinced, if that is the point the debtors want to make in their observations, that there would have been an investment in Swiss francs, by either of the parties. Although not legally decisive for the resolution of the dispute, in my opinion investment protection under Directive 2004/39 is not intended to cover situations in which consumers are financing consumption, in contradistinction to investments, which in economic terms are a form of saving.

38. This said, the referring national court and the defendant in the main proceedings give the impression that they are building on the approach that there would be a forward currency transaction amounting to a derivative contract in the sense of Directive 2004/39, Annex I, Section C, point (4).[23] In my opinion this approach is not legally sustainable, for the reasons I shall explain below.

39. I recall that according to Article 4(1)(2) of Directive 2004/39 'Investment services and activities' means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I. 'Dealing on own account' means, according to Article 4(1)(6) of the Directive 2004/39, trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments. 'Financial instrument' means, according to Article 4(1)(17), those instruments specified in Section C of Annex I.

40. The arrangement in issue (a foreign currency denominated loan granted to a consumer, or its forward transaction component, if this latter can be legally separated from the loan) is only capable of being captured by one provision of Directive 2004/39, that is, point 4 of Section C of Annex I to the directive. Under its terms, financial instruments include '[o]ptions, futures, swaps, forward rate agreements and *any other derivative contracts* relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash' (my emphasis).

41. In my opinion, it is not necessary to undertake an analysis of the precise category into which the financial arrangements in issue fall, among those listed in Point 4 of Section C of Annex I. They are all derivative contracts or instruments, and as pointed out in the written observations of Poland, derivate instruments are those which can be used for hedging or speculative purposes because *a future price, rate or value* of the underlying asset *is fixed beforehand*.[24]

22 — See recitals 2 and 31 of Directive 2004/39.

23 — See point 16 above. Moreover, the defendants in the main proceedings claim that the arrangement contains a mixed contract embodying, on the one hand, a credit contract and, on the other, a forward exchange rate transaction and a transfer of currency risk, these latter elements being financial services concerning financial instruments.

24 — As Germany observes, there is no single legally binding EU law definition of derivative instruments but many EU law instruments refer to the notion. In financial and economic literature there are many definitions. For example, according to the definitions adopted by the International Monetary Fund there 'are two broad types of financial derivatives. In a forward contract, which is unconditional, two counterparties agree to exchange a specified quantity of an underlying item (real or financial) at an agreed-upon price (the strike price) on a specified date. In an option contract, the purchaser acquires from the seller a right to buy or sell, (depending on whether the option is a call or a put) a specified underlying item at a strike price on or before a specified date. Unlike debt instruments, financial derivatives do not accrue investment income; nor are principal amounts advanced that must be repaid.' See paragraph FD3 of *Financial Derivatives. A Supplement to the fifth edition (1993) of the Balance of Payments Manual*, International Monetary Fund, 2000). It can be consulted from a link at http://www.imf.org/external/pubs/ft/fd/2000/finder.pdf.

42. This implies the prospect of the actual price, rate or value of the underlying asset diverging from the contracted future one. That circumstance further creates in the derivative instrument an independent economic value different from a contract that merely requires execution, at a future date and at its actual value on the day of performance, of a transaction concerning the underlying asset. [25]

43. In the currency arrangements embedded in the loan set-up in the main proceedings, any liquidation of Swiss franc denominated monetary obligations was to take place in Hungarian forints at a rate applicable at the time of the repayment of the loan or its instalments. This pegging to the actual rate of the Swiss franc deprives the arrangement of the nature of a forward contract. This is because the supposed forward transaction part of the arrangement does not represent any different legal or economic value in relation to the loan agreement as such. [26] As Germany rightly observes, in essence it requires liquidation of a foreign currency denominated debt in national currency, but at the current rate at the date of payment, and thus represents no relevant difference in relation to a classical foreign currency loan.

44. Indeed, it seems that the alleged forward contract is merely a complicated way of formulating a foreign currency clause applicable to the loan and transferring the currency risk concerning depreciation of the national currency from the creditor to the debtor. [27]

45. As to Question 2, I recall that pursuant to Article 4(1)(2) of Directive 2004/39 'Investment services and activities' means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I. Hence, because, for the reasons described above, there is no financial instrument in the sense of Section C of Annex I to Directive 2004/39, the applicability of Section A of that annex is also excluded. In consequence the directive itself is not applicable.

46. Therefore, if Questions 1 and 2 are to be answered, in my opinion they should be answered to the effect that a loan expressed in foreign currency but advanced and repayable in national currency at the actual rate on the day of payment is neither itself, and nor does it contain, a financial instrument or a financial service in the sense of Directive 2004/39, and therefore the directive is not applicable to the arrangement.

C – *Interpretation of Article 19(9) of Directive 2004/39 (Question 3)*

47. Question 3 concerns the existence of an obligation by the financial institution to perform the suitability check required by Article 19(4) and (5) of Directive 2004/39. This would, according to the question, necessarily follow if a financial instrument had been offered as part of another financial product (namely a loan agreement). As I have explained above, in my view this characterisation of the arrangement seems legally incorrect and the directive is not applicable to the situation arising in the main litigation.

48. The national court asks moreover if Article 19(9) of Directive 2004/39 is applicable or not. Pursuant to Article 19(9) of Directive 2004/39, if investment services are 'already subject to other provisions of Community legislation or common European standards' in the pertinent fields, then the obligations of Article 19 are inapplicable. According to Question 3, the risks assumed by the client

25 — If A grants to B a loan of EUR 100 000 (money of account) repayable in US dollars (money of payment) at the rate applicable on the date of payment, B must pay back USD 100 000 if the rate of that date is 1 USD/EUR but USD 120 000 if the rate is 1.2 USD/EUR. If A and B agree in the loan contract the rate applicable to repayment to be 1.2 USD/EUR independently of the actual rate applicable on that date, something which legally amounts to a forward currency transaction, the forward currency transaction clause has on the day of repayment a value of zero dollars if the actual rate is 1.2 USD/EUR (because EUR 100 000 equals USD 120 000). However, if the rate on that date is 1 USD/EUR, the forward transaction part of the deal has a separate value of EUR/USD 20 000 because the creditor gets in addition of the capital of 100 000 euro (being equal to USD 100 000 payable by the debtor) also USD 20 000 (being an equal sum in euros) representing the difference between the fixed rate and the actual rate.

26 — Assuming that there are no restrictions concerning capital movements or currency controls.

27 — However, it does not hedge the creditor against the depreciation of the relevant foreign currency against the national currency.

with regard to the loan and to the financial instrument are fundamentally different, and thus the suitability assessment is essential because the transaction contained a derivative instrument. Here again the question builds on the above explained assumption concerning the existence of a financial instrument that I do not share.

49. For these reasons, it is not necessary for the Court to answer this preliminary question. However, I make the following subsidiary observations.

50. The Court stated in the judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos* (C-604/11, EU:C:2013:344, at paragraph 48) that '… Article 19(9) of Directive 2004/39 must be interpreted as meaning, *firstly*, that an investment service is offered as part of a financial product only when it forms an integral part thereof at the time when that financial product is offered to the client and, *secondly*, that the provisions of EU legislation and the common European standards referred to by that provision must enable there to be a risk assessment of clients and/or include information requirements, which also encompass the investment service which forms an integral part of the financial product in question, in order for that service no longer to be subject to the obligations laid down in Article 19' (my emphasis).

51. Both conditions are fulfilled in the case to hand. *First*, the alleged forward currency contract formed an integral part of the loan arrangement at the time it was offered for the client. I emphasise that the purpose of the loan was to finance acquisition of a car, a circumstance which qualifies it as a consumer credit agreement. Therefore, it is not necessary to discuss if loans granted for investments in financial instruments would as such or *ex analogia* fall within the scope of Directive 2004/39.

52. Secondly, Directive 2008/48 on credit agreements for consumers lays down information requirements concerning loan arrangements of the kind in question.[28] Financial institutions are therefore obliged to provide information regarding loans implying foreign currency denominated obligations or transactions to clients, and assess their creditworthiness.

53. For these reasons the proper answer to Question 3 is that, pursuant to Article 19(9) of Directive 2004/39, a suitability assessment in accordance with that article is not required under circumstances such as those in the main proceedings.

D – *Civil law sanctions for breaches of Directive 2004/39 (Question 4)*

54. The referring court is querying in Question 4 whether circumvention of Article 19(4) and (5) of the directive would lead to the annulment of the loan agreement between the bank and the client.

55. Article 51(1) of Directive 2004/39 provides for the imposition of administrative sanctions against the person responsible when the provisions for the implementation of the directive have not been complied with. However, Directive 2004/39 does not entail an obligation to provide civil law sanctions.

56. As the Court observed in the judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos* (C-604/11, EU:C:2013:344, at paragraph 57), 'Article 51 of Directive 2004/39 … does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing

28 — Article 4 of Directive 2008/48 provides for extensive obligations with respect to advertising. Articles 5 and 6 set down obligations with respect to information that must be provided to the consumer prior to entry into a credit agreement. This information includes, in particular: the conditions governing the application of the borrowing rate (Article 5 (1) (f)); the obligation to enter any ancillary agreement to obtain credit or obtain in on the terms marketed (Article 5 (1) (k)). Finally, Article 8 requires creditors to assess the creditworthiness of consumers prior to entering into contracts with them.

Article 19(4) and (5) of Directive 2004/39, or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness'.

57. Therefore the answer to Question 4 would be that it is for the internal legal order of each Member State to determine the contractual consequences where an investment firm fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39, subject to the observance of the principles of equivalence and effectiveness.

58. The above subsidiary observations notwithstanding, the reference should in my opinion be declared inadmissible.

VI – Conclusion

59. For these reasons I propose that the Court declares inadmissible the request for a preliminary ruling from the Ráckevei Járásbíróság in Case C-312/14.