Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

14 March 2019*

(Reference for a preliminary ruling — Consumer protection — Unfair terms in consumer contracts — Directive 93/13/EEC — Article 1(2) — Article 6(1) — Loan contract denominated in a foreign currency — Exchange difference — Substitution of a legislative provision for an unfair term declared void — Exchange rate risk — Continued existence of the contract after the unfair term has been deleted — National system for a uniform interpretation of law)

In Case C-118/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Budai Központi Kerületi Bíróság (Central District Court, Buda, Hungary), made by decision of 9 January 2017, received at the Court on 7 March 2017, in the proceedings

Zsuzsanna Dunai

v

ERSTE Bank Hungary Zrt,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, J. Malenovský, C.G. Fernlund and L.S. Rossi, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– ERSTE Bank Hungary Zrt, by T. Kende, ügyvéd,

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

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

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

after hearing the Opinion of the Advocate General at the sitting on 15 November 2018,

* Language of the case: Hungarian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point 3 of the operative part of the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282), of the powers conferred on the European Union in order to ensure a high level of consumer protection and the fundamental EU principles of equality before the law, non-discrimination, the right to an effective judicial remedy and the right to fair legal process.

2 The request has been made in the course of proceedings between Mrs Zsuzsanna Dunai and ERSTE Bank Hungary Zrt ('the bank') concerning the allegedly unfair contractual term providing that the exchange rate applicable at the time of the advance of a loan denominated in a foreign currency is based on the buying rate practiced by the bank whereas the exchange rate applicable at the time it is paid off is based on the selling rate.

Legal context

European Union law

Directive 93/13/EEC

3 Under the 13th and 21st recitals of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29):

'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;

…

Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions'.

4 Article 1(2) of that directive provides:

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

5 Article 3(1) of Directive 93/13 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.'

6 Under Article 4 of that directive:

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

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

7 Article 6(1) of that directive states:

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

8 According to 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.’

Hungarian law

The Basic Law

9 Paragraph 25(3) of the Alaptörvény (Basic Law) states:

‘The Kúria [(Supreme Court, Hungary)] shall ensure … the standardised application of the law by the courts and shall adopt decisions with a view to ensuring consistent interpretation of the law which shall be binding on those courts.’

The DH 1 Law

10 Under Paragraph 1(1) of the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. Törvény (Law No XXXVIII of 2014 on the resolution of certain issues relating to the decision adopted by the Kúria [(Supreme Court)] with a view to ensuring consistent interpretation of the provisions of civil law concerning loan contracts concluded by credit establishments) (‘the DH 1 Law’):

‘The present law shall apply to loan contracts concluded with consumers between 1 May 2004 and the date of entry into force of the present law. For the purposes of the present law, loan contracts concluded with consumers shall cover any foreign exchange based (linked to, or denominated in, a foreign currency and repaid in forint) or forint based credit or loan agreement, or any financial leasing agreement, concluded between a financial institution and a consumer, if it incorporates standard contract terms or any contract term which has not been individually negotiated, containing a clause provided for in Article 3(1) or Article 4(1).’

11 Paragraph 3(1) and (2) of the DH 1 Law provides:

‘(1) In loan contracts concluded with consumers, terms — with the exception of contractual terms which have been individually negotiated — pursuant to which the financial institution stipulates that, for the purpose of paying out the amount of finance granted for purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was paid out, is to apply, shall be void.

(2) Instead of the void term referred to in subparagraph 1 — without prejudice to subparagraph 3 — the official exchange rate set by the National Bank for the foreign currency concerned shall apply in relation to the disbursement and the repayment of the loan (including payment of the instalments and all the costs, fees and commissions expressed in foreign currencies).’

12 Paragraph 4 of that law provides:

‘(1) In the case of loan contracts concluded with consumers which include the right to amend the contract unilaterally, the terms of that contract — with the exception of those that have been negotiated individually — which permit the unilateral increase of the interest rate or the unilateral increase of costs and commissions shall be deemed to be unfair.

(2) A contractual term as referred to in subparagraph 1 shall be void if the credit institution has not commenced civil proceedings or if the court has dismissed the action or discontinued the examination of the case, unless it is possible to bring the proceedings, in respect of the contractual term, but those proceedings have not been commenced or, if they have been commenced, the court has not found the contractual term to be void under subparagraph 2a.

(2a) A contractual term as referred to in subparagraph 1 shall be void if a court has found that it is void under the special law on the settlement of accounts in proceedings brought in the public interest by the supervisory authority.

(3) In the cases referred to in subparagraphs 2 and 2a, the credit institution shall carry out a settlement of accounts with the consumer as provided for in the special law.’

The DH 2 Law

13 Paragraph 37(1) of the Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law No XL of 2014 on the provisions governing the settlement of accounts referred to in Law XXXVIII of 2014 on specific matters relating to the decision of the Kúria (Supreme Court) to harmonise the case-law on loan agreements concluded between credit institutions and consumers, and concerning a number of other provisions) (‘the DH 2 Law’) states:

‘In relation to contracts falling within the scope of this Law, the parties may apply to the court for a declaration of invalidity of the contract or of certain contractual terms (“partial invalidity”) — irrespective of the grounds for such invalidity — only if they also request determination of the legal consequences of invalidity (namely, a declaration of validity or effectiveness of the contract up to the time of adoption of the decision). Failing any such request — and after the opportunity to remedy the defects has been given but not taken — the application shall be inadmissible and the substance of the case may not be examined. If the parties request determination of the legal consequences of total or

partial invalidity, they must also indicate what legal consequence the court should apply. As regards the application of the legal consequences, the parties must put forward an express, quantitatively defined claim which also includes the settlement of accounts between them.'

The DH 3 Law

14 Under Paragraph 10 of the az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről szóló 2014. évi LXXVII. Törvény (Law No LXXVII of 2014 on the resolution of issues relating to changing the currency in which certain loan contracts are denominated and the rules regarding interest) ('the DH 3 Law'):

'As regards foreign currency mortgage loan contracts and foreign currency based mortgage loan contracts, the financial institution to which the debt is owed shall be required, within the period laid down for fulfilment of the obligation to settle accounts under [the DH 2 Law], to convert into a loan denominated in Hungarian forints the debt under a foreign currency mortgage loan agreement or a foreign currency based mortgage loan agreement concluded with a consumer, or the total debt derived from that agreement (also including interest, fees, commissions and costs charged in the foreign currency), both of which must be calculated on the basis of the settlement of accounts under [the DH 2 Law]. For the purposes of that conversion, whichever of the following two interest rates is the most favourable to the consumer on the reference date shall apply:

(a) the average exchange rate for the foreign currency concerned officially set by the National Bank of Hungary in the period from 16 June 2014 to 7 November 2014, or

(b) the exchange rate set by the National Bank of Hungary on 7 November 2014.'

15 Paragraph 15/A of that law provides:

'(1) In proceedings in progress which were brought for a declaration of invalidity (or partial invalidity) of a loan contract concluded with a consumer or for a determination of the legal consequences of invalidity, the provisions hereof relating to conversion into forints shall apply also to the amount of the consumer's debt derived from a foreign currency loan contract or from a foreign currency based loan contract, calculated in accordance with the settlement of accounts under [the DH 2 Law].

(2) The amount repaid by the consumer until the date of the decision shall reduce the amount of the consumer's debt expressed in Hungarian forints on the reference date for the settlement of accounts.

(3) When a loan agreement concluded with a consumer is declared valid, the specific contractual rights and obligations of the parties resulting from the settlement of accounts under [DH 2 Law] must be established in accordance with the provisions of this Law.'

The Hpt Law

16 Paragraph 213(1) of the 1996. évi CXII. törvény a hitelintézetekről és a pénzügyi vállalkozásokról (Law No CXII of 1996 on credit institutions and financial undertakings) ('the Hpt Law') provides:

'Any loan contract concluded with a consumer which fails to mention

…

(c) the whole cost connected with the contract, including interest, commission and the value of these expressed as a percentage,

…

shall be null and void.'

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

17 On 24 May 2007, Mrs Dunai concluded a loan contract with the bank denominated in Swiss francs (CHF), although, according to the terms of that contract, the loan should have been advanced in Hungarian florints (HUF), by applying the CHF-HUF exchange rate based on the bank buying rate on that day, which resulted in a payment of HUF 14 734 000, the resulting amount of the loan in Swiss francs being CHF 115 573. That contract also provided that the loan repayments be made in Hungarian florints, the applicable exchange rate being however the selling rate practiced by the bank.

18 The exchange rate risk connected with fluctuations in the exchange rate of the currencies concerned, which took the form of a depreciation of the florint in relation to the Swiss franc, was borne by Mrs Dunai.

19 Since the parties to the main proceedings concluded the contract at issue in the main proceedings by notarial act, default by the debtor was sufficient for that contract to become enforceable, in the absence of any litigation proceedings before a Hungarian court.

20 On 12 April 2016, at the request of the bank, the notary ordered the enforcement of the contract. Mrs Dunai filed an objection to that enforcement before the referring court, claiming that the contract was null and void on the ground that it did not specify, in accordance with Article 213(1)(c) of the Hpt Law, the difference between the exchange rate applicable when the funds were released and the exchange rate applicable when the loan was paid off.

21 The bank contended that the opposition should be dismissed.

22 The referring court states that, during the course of 2014, the Hungarian legislature adopted several laws relating to loan contracts denominated in a foreign currency and designed to implement a decision of the Kúria (Supreme Court) adopted in proceedings to safeguard the uniformity of the civil law, on the basis of Paragraph 25(3) of the Basic Law, following the delivery of the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282). By that decision, the Kúria (Supreme Court) had, inter alia, held terms, such as those included in the loan contract at issue in the main proceedings, according to which the buying rate applies when the funds were released, whereas the selling rate applies for the purposes of repayment, to be unfair.

23 According to the referring court, those laws, which are applicable to the case in the main proceedings, provide in particular for the deletion, in such contracts, of terms which allow the bank to apply its own currency buying and selling rates, and for the replacement of those rates by the official exchange rate set by the National Bank of Hungary for the corresponding currency. That intervention of the legislature resulted in eliminating the difference between the various exchange rates based on those buying and selling rates.

24 The referring court states that, as a result of that ad hoc legislation, the court seised of the case can no longer find that the loan contract denominated in a foreign currency is invalid since that legislation has put an end to the situation giving rise to a ground for invalidity, which thus means that the contract is valid and, consequently, the consumer is obliged to bear the financial cost resulting from the exchange risk. In view of the fact that it is precisely that obligation which the consumer sought to avoid by bringing an application against the bank, it would be against her interests for the referring court to hold that contract to be valid.

25 From the view expressed by the referring court, it is clear that the Hungarian legislature expressly altered the content of loan contracts in such a way as to influence courts to rule in favour of banks. The court questions whether that situation is compatible with the Court's interpretation of Article 6(1) of Directive 93/13.

26 As regards the decisions that the Kúria (Supreme Court) can adopt in order to ensure uniformity of interpretation of civil law, which include, in particular, Decision No 6/2013 PJE of 16 December 2013, stipulating, according to the referring court, that loan contracts such as that at issue in the main proceedings must be considered to be valid, that court states that, at the time of the adoption of those decisions by the Kúria (Supreme Court), neither recourse to the court designated by law nor compliance with the requirements of a fair trial are guaranteed. However, and although the procedure regulating their adoption is not adversarial, those decisions are binding on courts seised in adversarial proceedings.

27 The referring court makes reference, in that context, to points 69 to 75 of the Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session, which took place in Venice (Italy) on 16 and 17 March 2012, from which it is apparent that the decisions adopted in Hungary under the 'standardisation' procedure may be contested from a human rights standpoint.

28 In those circumstances, the Budai Központi Kerületi Bíróság (Central District Court, Buda, Hungary) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Should point 3 [of the operative part] of the judgment [of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282),] be interpreted as meaning that a national court may remedy the fact that a term of a contract concluded between a seller or supplier and a consumer is invalid where the continuation of the contract is contrary to the economic interests of the consumer?

(2) Is it consistent with the powers conferred on the European Union in order to ensure a high level of consumer protection and with the fundamental EU principles of equality before the law, non-discrimination, the right to an effective judicial remedy and the right to fair legal process, for the parliament of a Member State to alter, by the adoption of an act, private law contracts in similar categories concluded between a seller or supplier and a consumer?

(3) If the answer to the previous question is in the affirmative, is it consistent with the powers conferred on the European Union in order to ensure a high level of consumer protection and with the fundamental EU principles of equality before the law, non-discrimination, the right to an effective judicial remedy and the right to fair legal process, for the parliament of a Member State to alter, by the adoption of an act, various parts of loan contracts denominated in a foreign currency, supposedly for consumer protection purposes but triggering an effect which is in fact contrary to the fair interests of consumer protection, in that the loan contract remains valid following those alterations and the consumer is required to continue to bear the costs resulting from the foreign exchange risk?

(4) With regard to the content of contracts concluded between a seller or supplier and a consumer, is it consistent with the powers conferred on the European Union in order to ensure a high level of consumer protection and with the fundamental EU principles of the right to an effective judicial remedy and the right to fair legal process in respect of any civil law matter for the standardisation panel of the highest court of a Member State to direct the rulings of courts hearing such proceedings by means of "decisions adopted with a view to ensuring uniform interpretation of the law"?

(5) If the answer to the previous question is in the affirmative, is it consistent with the powers conferred on the European Union in order to ensure a high level of consumer protection and with the fundamental EU principles of the right to an effective judicial remedy and the right to fair legal process in respect of any civil law matter for the standardisation panel of the highest court of a Member State to direct the rulings of courts hearing such proceedings by means of "decisions adopted with a view to ensuring uniform interpretation of the law" where the appointment of judges as members of the standardisation panel is not carried out transparently, in accordance with predetermined rules, where the procedure before that panel is not public, and where it is not possible to know a posteriori the procedure followed, namely the expert evidence and academic works relied on and the way in which the various members have voted (for or against)?'

The proceedings before the Court

29 By document lodged at the Court Registry on 30 January 2019, Mrs Dunai requested the reopening of the oral part of the procedure.

30 In support of that request, she claims, in essence, that, in his Opinion, the Advocate General expressed doubts about the precise meaning of the fourth and fifth questions relating to the decisions adopted, by the Kúria (Supreme Court), to ensure uniform interpretation of the law. In that regard, Mrs Dunai considers that it is necessary to provide to the Court a description of the elements knowledge of which is, according to her, essential for the Court to appreciate the real significance of those questions, which relates, in particular, to the fact that the Hungarian courts are under no obligation, either in practice or in accordance with a rule of national law, not to take into consideration a decision adopted to ensure uniform interpretation of the law where that decision is contrary to EU law.

31 According to Article 83 of the Rules of Procedure of the Court, the latter may, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

32 In this case, the Court considers, after hearing the Advocate General, that it has all the information necessary to give judgment. It concludes, moreover, that the elements put forward by Mrs Dunai do not constitute new facts for the purposes of Article 83 of the Rules of Procedure of the Court.

33 In those circumstances, there is no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

Questions 1 to 3

34 By its first to third questions, which should be examined together, the referring court asks, in essence, whether Article 6(1) of Directive 93/13 must be interpreted as meaning that it precludes national legislation which prevents the court seised of the case from granting an application for the cancellation of a loan contract denominated in a foreign currency on the basis of the unfair nature of a term of the contract which imposes on the consumer the costs connected with the difference between the buying rate and the selling rate of the currency concerned, even if that court considers that the continued existence of that contract would conflict with the interests of the consumer, since

that latter continues to bear the financial burden relating to the possible reduction in the value of the national currency, which serves as the currency of payment, in relation to the foreign currency in which the loan must be repaid.

35 First of all, it should be pointed out that, although the first to third questions refer only to the term relating to exchange difference as an unfair term which justifies, according to the applicant in the main proceedings, the cancellation of the loan contract, it is apparent from the request for a preliminary ruling that the interested party invokes the unfair nature of that term in order to avoid exchange rate risk. It can therefore not be excluded, as the Advocate General stated in point 57 of his Opinion, that, in the main proceedings, the question of the application of a term relating to the exchange rate risk is always relevant, particularly since the referring court could be tasked with assessing of its own motion the unfair nature of such a term (see, to that effect, judgment of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 53 and the case-law cited). Therefore, in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it, it is necessary to answer the first three questions also in connection with an examination of an application for cancellation of a loan contract, such as that at issue in the main proceedings, based on the unfair nature of a term relating to the exchange rate risk.

36 In that regard, in the first place, as regards the term concerning the exchange difference at issue in the main proceedings, it is apparent from the reference for a preliminary ruling that the legislation referred to in the first three questions includes the DH 1, DH 2 and DH 3 Laws, as set out in paragraphs 9 to 14 of the present judgment, which were adopted after the conclusion of the loan contracts covered by them for the purposes of implementing a decision of the Kúria (Supreme Court) adopted following the judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282). Those laws classify, in particular, terms relating to the exchange difference included in loan contracts as defined in those laws as being unfair and void, replace, with retroactive effect, those terms with terms applying the official exchange rate fixed by the National Bank of Hungary for the corresponding currency, and convert, with prospective effect, the outstanding amount of the loan into a loan denominated in the national currency.

37 As regards those terms, which, in accordance with those laws, were retroactively included in the loan contracts concerned, the Court held, in paragraphs 62 to 64 of its judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750), that such terms, which reflect mandatory statutory provisions, cannot fall within the scope of Directive 93/13, since that directive does not apply, in accordance with Article 1(2) thereof, to conditions contained in contracts between a seller or supplier and a consumer which are determined by national legislation.

38 Nevertheless, the three questions referred relate not to the contractual terms included *a posteriori* as such by that legislation in the loan contracts, but to the impact of that legislation on the protection guarantees resulting from Article 6(1) of Directive 93/13 in relation with the term concerning the exchange difference included initially in the loan contracts at issue.

39 In that regard, it should be noted that Article 6(1) of that directive requires the Member States to provide that unfair terms do not bind consumers and that the contract will remain binding for the parties according to the same terms, if it can continue to exist without the unfair terms.

40 In so far as the Hungarian legislature remedied the problems connected with the practice of credit institutions consisting in concluding loan contracts including terms relating to exchange difference by modifying those terms by legislative means and by safeguarding, at the same time, the validity of loan contracts, such an approach corresponds to the objective pursued by the Union legislature in the context of Directive 93/13, and in particular Article 6(1) thereof. That objective consists in restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not in cancelling all contracts containing unfair terms (see, to that effect, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 31).

41 Nevertheless, as regards Article 6(1) of that directive, the Court has also held that it must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer, and that it has the consequence of restoring the consumer to the legal and factual situation that he would have been in in the absence of that term (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 61).

42 Although Article 7(1) of Directive 93/13 does not preclude the Member States from using legislation to put an end to the use of unfair terms in contracts concluded with consumers by sellers or suppliers, the fact remains that the legislature must, in that context, respect the requirements deriving from Article 6(1) of that directive.

43 The fact that certain contractual terms were, by means of legislation, declared to be unfair and void and replaced by new terms, in order to allow the continued existence of the contract at issue, cannot have the result of weakening the protection guaranteed to consumers, as pointed out in paragraph 40 of the present judgment.

44 In this case, in so far as the action brought by Mrs Dunai is based on the term relating to exchange difference which was included initially in the loan contract concluded with the bank, it is for the referring court to ascertain whether the national legislation, which declared terms of that nature to be unfair, allowed the legal and factual situation in which Mrs Dunai would have been in the absence of such an unfair term to be restored, in particular by giving rise to a right to restitution of advantages wrongly obtained, to her detriment, by the seller or supplier on the basis of that unfair term (see, to that effect, judgment of 31 May 2018, *Sziber*, C-483/16, EU:C:2018:367, paragraph 53).

45 It follows that Article 6(1) of Directive 93/13 does not preclude national legislation preventing the court seised of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference, such as that at issue in the main proceedings, provided that the finding that such a term is unfair allows the legal and factual situation that the consumer would have been in in the absence of that unfair term to be restored.

46 In the second place, as regards the terms relating to exchange rate risk, it should be noted, firstly, that the Court already held, in paragraphs 65 to 67 of the judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750), that the considerations set out in paragraph 36 of the present judgment do not mean that such terms are, in their entirety, also excluded from the scope of application of Directive 93/13, in view of the fact that the amendments stemming from Paragraph 3(2) of the DH 1 Law and Paragraph 10 of the DH 3 Law were not intended to address in full the issue of the exchange rate risk in respect of the period between the time when the loan contract at issue was concluded and its conversion into Hungarian forints, pursuant to the DH 3 Law.

47 The referring court appears however to rely on the premiss that it is not possible for it, under the provisions of the DH 1, DH 2 and DH 3 Laws, to cancel the loan contract at issue in the main proceedings where the unfair nature of a term relating to the exchange rate risk is established, and questions whether such an impossibility is compatible with Article 6(1) of Directive 93/13.

48 In that regard, it should be noted, secondly, that, concerning contractual terms relating to exchange rate risk, it follows from the Court's case-law that such terms, in so far as they define the main subject matter of the loan contract, come within Article 4(2) of Directive 93/13, and escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction considers, following a case-by-case examination, that they were drafted by the seller or supplier in plain intelligible language (see, to that effect, judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 68 and the case-law cited).

49 If, thirdly, the referring court considers that the term relating to exchange rate risk at issue in the main proceedings is not drafted in plain intelligible language for the purposes of Article 4(2), it is for it to examine whether that term is unfair and, in particular, whether, despite the requirement of good faith, it causes a significant imbalance in the rights and obligations of the parties to the contract to the detriment of the consumer at issue (see, to that effect, judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 64).

50 Fourthly, as regards the consequences of the potentially unfair nature of such a term, Article 6(1) of Directive 93/13 requires, as was noted in paragraph 39 of the present judgment, Member States to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

51 As regards, fifthly, the question whether a loan contract such as that at issue in the main proceedings must be cancelled in its entirety where it is concluded that one of its terms is unfair, it must be noted, first, as has already been pointed out in paragraph 40 of the present judgment, that Article 6(1) of Directive 93/13 seeks to restore the balance between the parties, and not to cancel all contracts containing unfair terms. Secondly, that contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible (judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 71 and the case-law cited), which is to be determined objectively (see, to that effect, judgment of 15 March 2012, *Pereničová and Perenič*, C-453/10, EU:C:2012:144, paragraph 32).

52 In this case, as was already noted in paragraph 48 of the present judgment, the term relating to the exchange rate risk defines the main subject-matter of the contract. Therefore, in such a case, the continuation of the contract does not appear to be legally possible, which is however to be determined by the referring court.

53 In that regard, it seems to follow from the information provided by the referring court that the national legislation at issue in the main proceedings, in this case Paragraph 37(1) of the DH 2 Law, implies that consumers, where they invoke the unfair nature of a term other than that relating to the exchange difference or that permitting the unilateral increase of the interest rate, of costs and commissions, must also conclude that the court seised of the case declare the contract to be valid until the date of its decision. Therefore, that provision prevents, in breach of Article 6(1) of Directive 93/13, consumers from not being bound by the unfair term concerned, where appropriate, by means of the cancellation of the contract at issue in its entirety if that contract cannot continue in existence without that term.

54 Moreover, it should also be noted that, although the Court accepted, in its judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraphs 83 and 84), that a national court may substitute a supplementary provision of domestic law for an unfair contractual term in order to ensure the continued existence of the contract, it follows from the Court's case-law that that possibility is limited to cases in which the cancellation of the contract in its entirety would expose the consumer to particularly unfavourable consequences, such that the latter would be penalised (see, to that effect, judgments of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 74, and of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 61).

55 In the case in the main proceedings, it is apparent from the findings made by the referring court that the continuation of the contract would be contrary to the interests of Mrs Dunai. The substitution referred to in the previous paragraph of the present judgment appears therefore not to be applicable in this case.

56 In the light of the foregoing, the answer to the first three questions is that Article 6(1) of Directive 93/13 must be interpreted as meaning that:

– it does not preclude national legislation which prevents the court seised of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference, such as that at issue in the main proceedings, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had that unfair term not existed; and

– it precludes national legislation which prevents, in circumstances such as those at issue in the main proceedings, the court seised of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to exchange rate risk where it is found that that term is unfair and that the contract cannot continue to exist without that term.

Questions 4 and 5

57 By its fourth and fifth questions, which should be examined together, the referring court asks, in essence, whether EU law, in particular the principles of effective judicial protection and due legal process, precludes, in the light of the EU objective of ensuring a high level of consumer protection, the lower national courts being formally bound, in the exercise of their judicial functions, by general and abstract decisions adopted by a supreme court, such as the Kúria (Supreme Court), to ensure uniform interpretation of the law.

58 First of all, it is true that, in order to clarify its doubts concerning the conformity with EU law of the standardisation procedure at issue in the main proceedings, the referring court refers, in its grounds put forward in support of its fourth and fifth questions, not only to the powers of the EU for the purposes of ensuring a high level of protection and to the principles of the right to an effective judicial remedy and the right to a fair trial, but also to several concrete provisions of EU law, such as Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). The fact remains that those questions concern, in a very general way, the organisation of the Hungarian judicial system and the means it provides to guarantee the uniformity of national case-law.

59 As was in essence stated by the Advocate General in points 103 and 106 of his Opinion, first, that aspect appears to present only a very tenuous link with the dispute in the main proceedings, which relates to the request by a consumer to be released from the loan contract she had entered into, on the basis of the unfair nature of a term included in that contract, and, secondly, it appears to follow from the elements provided by the referring court that it is now the DH 1, DH 2 and DH 3 Laws which bind the Hungarian courts with respect to the protection of consumers against unfair terms such as those at issue in the main proceedings, and no longer the decisions of the Kúria (Supreme Court) on that matter, since those laws were adopted in order to implement those decisions.

60 In view of those elements, it should therefore be concluded that, by its fourth and fifth questions, the referring courts seeks to establish whether Directive 93/13, read in the light of Article 47 of the Charter, precludes a supreme court of a Member State from adopting, to ensure uniform interpretation of the law, binding decisions concerning the modalities of the implementation of that directive.

61 In that regard, an answer in the affirmative to those questions could be necessary where, first, those decisions do not allow the court with jurisdiction to give full effect to the rules of Directive 93/13 by setting aside, where necessary of its own motion, any conflicting provision of national legislation, even one adopted subsequently, including any conflicting judicial practice, without it being necessary for that court to request or await the prior setting aside of such a provision by legislative or other

constitutional means, and, secondly, the possibility to make a reference for a preliminary ruling to the Court would be inhibited (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraphs 34, 40 and 41 and the case-law cited).

62 It is not apparent from the file before the Court that the referring court could not exclude such decisions where it considers it to be necessary in order to ensure the full effect of Directive 93/13, or, as is evidenced by the present procedure, that it could bring a reference for a preliminary ruling before the Court in that regard. Moreover, there is nothing in the file to suggest that the referring court would not be able, in this case, to offer the applicant in the main proceedings an effective remedy for the purpose of protecting the rights she can derive therefrom.

63 Moreover, as the Advocate General states, in essence, in point 113 of his Opinion, the Court held, in paragraph 68 of the judgment of 7 August 2018, *Banco Santander and Escobedo Cortés* (C-96/16 and C-94/17, EU:C:2018:643), that it cannot be excluded that, in their role of ensuring consistency in the interpretation of the law, and in the interests of legal certainty, the supreme courts of a Member State may, in compliance with Directive 93/13, elaborate certain criteria in the light of which the lower courts must examine the unfair nature of contractual terms.

64 Having regard to the above considerations, the answer to the fourth and fifth questions is that Directive 93/13, read in the light of Article 47 of the Charter, does not preclude a supreme court of a Member State from adopting, in the interest of ensuring uniform interpretation of the law, binding decisions concerning the modalities for implementing that directive, in so far as those decisions do not prevent the competent court from ensuring the full effect of the norms laid down in that directive and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the Court in that regard, which it is however for the referring court to determine.

Costs

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

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

1. **Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that:**

   – **it does not preclude national legislation which prevents the court seised of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference, such as that at issue in the main proceedings, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had that unfair term not existed; and**

   – **it precludes national legislation which prevents, in circumstances such as those at issue in the main proceedings, the court seised of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to exchange rate risk where it is found that that term is unfair and that the contract cannot continue to exist without that term.**

2. **Directive 93/13, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, does not preclude a supreme court of a Member State from adopting, in the interest of ensuring uniform interpretation of the law, binding decisions concerning the modalities for implementing that directive, in so far as those decisions do not prevent the competent court from ensuring the full effect of the norms laid down in that directive and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the Court in that regard, which it is for the referring court to determine.**

[Signatures]