

30 April 2014 (\*)

(Directive 93/13/EEC — Unfair terms in a contract concluded between a seller or supplier and a consumer — Articles 4(2) and 6(1) — Assessment of the unfairness of the contractual terms — Exclusion of terms relating to the main subjectmatter of the contract or the adequacy of the price and the remuneration provided they are drafted in plain intelligible language — Consumer credit contracts denominated in foreign currency — Terms relating to the exchange rate — Difference between the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to its repayment — Powers of the national court when dealing with a term considered to be unfair — Substitution of the unfair term by a supplementary provision of national law — Whether lawful)

In Case C-26/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Hungary), made by decision of 15 January 2013, received at the Court on 21 January 2013, in the proceedings

**Árpád Kásler,**

**Hajnalka Káslerné Rábai**

v

**OTP Jelzálogbank Zrt,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, A. Prechal (Rapporteur), F. Biltgen and K. Jürimäe, Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 5 December 2013,

after considering the observations submitted on behalf of:

- OTP Jelzálogbank Zrt, by G. Gadó, ügyvéd,
- the Hungarian Government, by K. Szíjjártó and Z. Fehér, acting as Agents,
- the Czech Government by S. Šindelková and M. Smolek, acting as Agents,
- the German Government, by J. Kemper and T. Henze, acting as Agents,
- the Greek Government, by G. Alexaki and L. Pnevmatikou, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the European Commission by K. Talabér-Ritz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 February 2014,

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 4(2) and 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, ‘the Directive’ or ‘Directive 93/13’).
- 2 The request has been made in proceedings between Mr Kásler and Ms Káslerné Rábai (‘the borrowers’) and OTP Jelzálogbank Zrt (‘Jelzálogbank’) concerning the allegedly unfair contractual term relating to the exchange rate applicable to repayments of a loan denominated in a foreign currency.

### Legal context

#### *EU law*

- 3 The twelfth, thirteenth, nineteenth, twentieth and twenty-fourth recitals in the preamble to Directive 93/13 state:

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

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 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, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subjectmatter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subjectmatter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; ...

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms ...

...

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

4 Article 1 of the Directive provides:

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

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

5 According to Article 3 of the Directive:

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

...

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.’

6 Article 4 of Directive 93/13 is worded as follows:

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

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

7 Article 5 of the Directive provides:

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

8 Under Article 6(1) of the Directive:

‘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’.

9 Article 7(1) of Directive 93/13 provides:

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

10 According to Article 8 of the Directive:

‘Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection’.

11 The annex to Directive 93/13 relating to the terms referred to in Article 3(3) thereof, contains, in point 1, a non-exhaustive list of terms which may be regarded as being unfair. In Point 1(j) are terms which have the object or effect of ‘enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract’. In Point 1(l), those which have the object or effect of ‘... allowing a ... supplier of services to increase [his] price without ... giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded’.

12 Point 2 of that annex relates to the scope of points (g), (j) and (l). Point 2(b) states, in particular, that ‘[s]ubparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately. Point 2(d) states that ‘[s]ubparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described’.

13 Article 209 of the Civil Code, in the version applicable at the time the loan agreement at issue was concluded in the case in the main proceedings ('the Civil Code'), provided:

'1. A standard contract term, or a term not individually negotiated in a consumer contract, shall be regarded as unfair if, in breach of the obligation to act in good faith and fairly, it unilaterally and unjustifiably establishes the contractual rights and obligations of the parties to the detriment of the co-contractor of the party imposing the contractual term in question.

...

4. The provisions concerning unfair contractual terms shall not be applicable to contractual terms that define the main subject-matter of the contract or to those that determine the balance between performance and consideration.

...'

14 With effect from 22 May 2009, Article 209(4) and (5) of the Civil Code was amended as follows:

'4. A standard contractual term, or a term not individually negotiated in a consumer contract, shall also be regarded as unfair simply on the ground that it is not in plain intelligible language.

5. The provisions concerning unfair contractual terms shall not be applicable to contractual terms that define the main subject-matter of the contract or to those that determine the balance between performance and consideration, provided that those terms are in plain intelligible language.'

15 Article 231 of 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.'

16 Under Article 237 of the Civil Code:

'1. In the event of ineffectiveness of the contract, the situation existing before it was entered into must be restored.

2. If it is impossible to restore the situation existing before the conclusion of the contract, the court may declare the contract applicable until it has adjudicated. An ineffective contract may be declared valid if it is possible to eliminate the cause of ineffectiveness, particularly in the case of disproportion between the performances required of each party in a usurious contract, by eliminating the disproportionate advantage. In such cases, it will be necessary to order the restitution of any performance outstanding, if need be without consideration.'

17 Article 239 of the Civil Code provides:

'1. In the event of partial ineffectiveness of the contract, the contract will fail in its entirety only if the contracting parties would not have concluded it without the ineffective part. Provisions to the contrary may be laid down by legislation.

2. In the event of partial ineffectiveness of a contract concluded with a consumer, the contract shall fail in its entirety only if it is impossible to perform it without the ineffective part.'

18 According to Article 239/A(1) of the Civil Code:

'The parties may institute proceedings seeking a declaration of ineffectiveness of the contract or of any term of the contract (partial ineffectiveness) without having at the same time to request application of the consequences of the ineffectiveness.'

19 Article 523 of the Civil Code is worded as follows:

'1. By means of the loan contract, the financial institution or other creditor gives a commitment to make available to the debtor a specified sum of money and the debtor to return the amount borrowed in accordance with the provisions of the contract.

2. Save as otherwise provided by legislation, if the creditor is a financial institution, the debtor is obliged to pay interest (bank loan).'

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

20 On 29 May 2008, the borrowers concluded an agreement for a 'mortgage loan denominated in foreign currency secured by a guarantee *in rem* [mortgage]' ('the mortgage loan') with Jelzálogbank.

21 Under Clause I/1 of the agreement, Jelzálogbank advanced to the borrowers a loan amounting to 14 400 000 Hungarian florints ['HUF'], it being stipulated that 'the amount of the loan in foreign currency will be determined at the buying rate for the foreign currency applied by the bank on the date of advance of the funds'. Under Clause I/1, 'after the funds have been advanced, the amount of the loan, the related interest, the administration fees and default interest and other charges will be determined in the foreign currency'.

22 At the buying rate of exchange applied by Jelzálogbank on the date of advance of the funds, the amount lent was fixed at 94 240.84 Swiss francs ['CHF']. The borrowers were to repay that sum over 25 years, by monthly instalments falling due on the fourth day of each month.

23 Under Clause II of the agreement, the loan was subject to a nominal interest rate of 5.2% which, together with administration fees of 2.04% resulted in an annual percentage rate of charge (APR) of 7.43% as at the date of conclusion of the agreement.

24 Under Clause III/2 of that agreement ('Clause III/2'), 'the lender is to determine the amount in HUF of each of the monthly instalments due by reference to the selling rate of exchange for the foreign currency applied by the bank on the day before the due date.'

25 The borrowers brought an action against Jelzálogbank claiming that Clause III/2 was unfair. They submitted that that term, in that it authorises Jelzálogbank to calculate the monthly repayment instalments due on the basis of the selling rate of exchange for the currency applied by the bank,

whereas the amount of the loan advanced is determined by the latter on the basis of the buying rate of exchange that it applies for that currency, confers an unjustified benefit on Jelzálogbank within the meaning of Article 209 of the Civil Code.

- 26 The court of first instance upheld that action. That judgment was then upheld on appeal. In its judgment, the court of second instance held, in particular, that, in a loan transaction such as that at issue in the dispute before it, Jelzálogbank did not make any foreign currency available to its clients. On the contrary, it held that Jelzálogbank linked the monthly repayment instalments in Hungarian florints to the current rate for Swiss francs to ensure stability of repayment of the loan advanced in HUF. Jelzálogbank did not provide any mercantile financial services relating to the buying or selling of foreign currency, so that it is not entitled to apply an exchange rate for the repayment of the loan different from that used on the date of advance of the sum borrowed, and no payment can be required for a notional provision of services. That court also held that Clause III/2 was not drafted in plain intelligible language because it was impossible to determine the basis for the difference in the method of calculating the amount of the sum lent and the amount of the loan repayment instalments.
- 27 Jelzálogbank then brought an appeal in cassation before the referring court against the judgment of the court of second instance. It argued, in particular, that Clause III/2, in so far as it enables the bank to obtain income representing the consideration payable in respect of the loan in foreign currency obtained by the borrowers and as it covers the expenses incurred by the credit institution in purchasing foreign currency on the market, falls within the ambit of the exception under Article 209(4) of the Civil Code, for which reason there may be no review of whether it is unfair under Article 209(1) of the Civil Code.
- 28 The borrowers contended that such an examination is necessary. In that regard, they submitted that Jelzálogbank may not invoke the particularities of banking practice against them and or pass on to them the expenses that the bank incurs as a result of such practices, mixing the banks' sources of income with the sum lent. By concluding the loan agreement, the borrowers consented to the loan being advanced in national currency, that is, in HUF. Furthermore, Clause III/2 is not in plain language.
- 29 The referring court considers, first of all, that a question arises whether the notion of a term defining 'the main subjectmatter of the contract', within the meaning of Article 4(2) of Directive 93/13, covers every element of the consideration to be paid in cash by the borrower, including sums resulting from the difference between the exchange rate applicable to the advance of the funds and the repayment of the loan, or whether only the payment of the nominal rate of interest, in addition to the grant of the loan, is covered by that notion.
- 30 If the stricter interpretation of the first exception in Article 4(2) of Directive 93/13 were to be adopted, it would then be necessary to examine whether the obligation to pay the difference between the exchange rates may be regarded as relating to the adequacy of the service and its remuneration or its price, and therefore as forming part of the 'remuneration' within the meaning of Article 4(2) of Directive 93/13 and the second exception laid down therein.
- 31 In that context, the question also arises whether, if the remuneration constitutes consideration for a service composed of several different elements, the second exception, in order to be applicable, requires examination of whether the remuneration at issue, in the present case the payment due on account of the difference in exchange rates, corresponds to a real provision supplied directly by the bank to the consumer.
- 32 In addition, as regards the requirement that only terms drafted in plain, intelligible language may fall within Article 4(2) of Directive 93/13, the referring court takes the view that it must interpret national law in accordance with the aims of that directive and examine the unfairness of the terms that do not satisfy that requirement, even though that requirement had not yet been transposed into national law at the time the loan agreement was concluded.
- 33 However, the exact purport of that requirement remains uncertain. It could be understood as meaning that all contractual terms must be linguistically and grammatically intelligible. However, it could also mean, in a wider sense, that the economic reasons for using the term and its relationship with the other contractual terms must be clear and intelligible to the consumer.
- 34 Finally, if Clause III/2 were found to be unfair, the question also arises whether the principle deriving from Article 6(1) of Directive 93/13 and affirmed in paragraph 73 of the judgment in Case C-618-10 *Banco Español de Crédito* EU:C:2012:349 also applies when, as in the case in the main proceedings, the loan agreement cannot continue in existence if the ineffective contractual terms are deleted. If that should be the case, the Kúria asks whether that principle precludes the national court from amending that term in order to eliminate its unfairness, in particular by substituting a supplementary provision of national law, as the court of appeal has done.
- 35 In those circumstances, the Kúria decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Must Article 4(2) of [Directive 93/13] be interpreted as meaning that, in the case of a loan denominated in a foreign currency but advanced in the national currency and repayable by the consumer solely in national currency, the contractual term concerning the rate of exchange of the currency, which was not individually negotiated, may fall within the 'definition of the main subjectmatter of the contract'?
- If not, on the basis of the second expression used in Article 4(2) of [Directive 93/13], must it be considered that the difference between the buying rate of exchange and the selling rate of exchange constitutes remuneration whose equivalence with the service provided cannot be analysed from the viewpoint of unfairness? In this regard, does the question whether there has in fact been a foreign exchange transaction between the financial entity and the consumer have any impact?
- (2) If it were to be necessary to interpret Article 4(2) of [Directive 93/13] as meaning that the national court may, regardless of the provisions of its national law, examine the unfairness of the contractual terms referred to in that article, provided that such terms are not drafted in a clear intelligible manner, must it be considered, in the light of the latter requirement, that the contractual terms must in themselves appear to be grammatically clear and intelligible to the consumer or, in addition, must the economic reasons for using the contractual term and its relationship with the other contractual term also be clear and intelligible?
- (3) Must Article 6(1) of [Directive 93/13] and paragraph 73 of the judgment of the Court of Justice in Case C-618/10 *Banco Español de Crédito* EU:C:2012:349 be interpreted as meaning that the national court is not entitled to eliminate, for the benefit of the consumer, [the terms] of ineffectiveness of an unfair term included in the general conditions of a loan contract concluded with a consumer, amending the contractual term in question and completing the contract, even when, otherwise, if such a term is deleted, the contract cannot continue in existence on the basis of the remaining contractual terms? In that regard, is it relevant that national law contains a supplementary provision that is to govern the legal question at issue if the invalid term is omitted?'

## The questions referred for a preliminary ruling

### *The first question*

- 36 By its first question, the referring court asks essentially whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the expressions ‘the main subjectmatter of the contract’ and ‘the adequacy of the price and remuneration on the one hand, as against the services or goods supplied, on the other’ cover a term, incorporated into a credit agreement denominated in a foreign currency, concluded between a seller or supplier and a consumer and not individually negotiated, such as that at issue in the main proceedings, pursuant to which the selling rate of exchange of that currency applies for the purpose of calculating the loan repayment instalments.
- 37 According to settled case-law, the need of the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see, in particular, Case C-279/12 *Fish Legal and Shirley* EU:C:2013:853, paragraph 42).
- 38 The same is true for the terms in Article 4(2) of Directive 93/13, since that provision does not contain any express reference to the law of the Member States for the purpose of determining its meaning and scope.
- 39 Moreover, the Court has consistently held that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, a situation that leads to his agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (see, in particular, Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* EU:C:2010:309, paragraph 27 and the case-law cited).
- 40 As regards such a position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair. In that context, it is for the national court to determine, taking account of the criteria laid down in Articles 3(1) and 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (see, to that effect, Case C-472/10 *Invitel* EU:C:2012:242, paragraph 22, and Case C-92/11 *RWE Vertrieb* EU:C:2013:180, paragraphs 42 to 48).
- 41 However, Article 4(2) of Directive 93/13, read in conjunction with Article 8 thereof, allows the Member States, provide, in the legislation transposing that directive, that an ‘[a]ssessment of the unfair nature’ is not to apply to the terms to which that provision relates, on condition that they are drafted in plain, intelligible language. It follows from that provision that the terms to which it refers are not the subject of an assessment of their unfairness, but, as the Court stated, come within the area covered by that directive (see, to that effect, *Caja de Ahorros y Monte de Piedad de Madrid* EU:C:2010:309, paragraphs 31, 35 and 40).
- 42 Article 4(2) of Directive 93/13 thus laying down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, that provision must be strictly interpreted.
- 43 That exception covers, in the first place, terms that concern the ‘main subjectmatter of the contract’.
- 44 In the case in the main proceedings, the referring court is unsure whether Clause III/2, in that it provides that the selling rate of exchange of a foreign currency is to apply for the purposes of calculating the repayment instalments of a loan denominated in that currency, falls within the ‘main subjectmatter’ of the loan agreement, within the meaning of that provision.
- 45 In that regard, although it is for the national court alone to rule on the classification of that term in accordance with the particular circumstances of the case, the fact remains that the Court has jurisdiction to elicit from the provisions of Directive 93/13, in this case the provisions of Article 4(2), the criteria that the national court may or must apply when examining a contractual term (see, to that effect, in particular, *RWE Vertrieb* EU:C:2013:180, paragraph 48 and the case-law cited).
- 46 The Court has already held that Article 4(2) of the Directive is intended solely to establish the detailed rules and the scope of the substantive assessment of contract terms that have not been individually negotiated and that describe the essential obligations of contracts concluded between a seller or supplier and a consumer (*Caja de Ahorros y Monte de Piedad de Madrid* EU:C:2010:309, paragraph 34).
- 47 The fact that a term has been negotiated by the co-contracting parties, in the context of their contractual freedom and of market conditions, cannot constitute a criterion making it possible to assess whether that term falls within the ‘main subjectmatter of the contract’ within the meaning of Article 4(2) of Directive 93/13.
- 48 As is clear from Article 3(1) of that directive and the twelfth recital in the preamble thereto, terms not individually negotiated do not, as a matter of principle, fall within the scope of that directive. Therefore, the question whether they are excluded from the scope of Article 4(2) does not arise.
- 49 However, taking account also of the fact that Article 4(2) of Directive 93/13 represents a derogation and the ensuing necessity of its being interpreted strictly, contractual terms falling within the notion of the ‘main subject-matter of the contract’, within the meaning of that provision, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it.
- 50 By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the ‘main subject-matter of the contract’ within the meaning of Article 4(2) of Directive 93/13.
- 51 It is for the referring court to determine, having regard to the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context, whether the term setting the exchange rate for the monthly repayment instalments constitutes an essential element of the debtor’s obligations, consisting in the repayment of the amount made available by the lender.
- 52 In the second place, Article 4(2) of Directive 93/13 covers the terms relating to ‘the adequacy of the price and remuneration on one hand, as against the services or goods supplied, on the other’ or, in accordance with the nineteenth recital in the preamble to that directive, the terms ‘which describe ... the quality/price ratio of the goods or services supplied’.
- 53 In the case in the main proceedings, the referring court wishes to know whether Clause III/2, in so far as it provides that the selling rate of exchange of a foreign currency is applicable for the purpose of calculating the repayment instalments of a loan while, according to other terms of the loan

agreement, the amount advanced is converted into national currency on the basis of the buying rate of exchange of the foreign currency, contains a pecuniary obligation for the consumer, that is to say, the obligation to pay, in the context of the repayment instalments of the loan, the difference between the selling and buying rates of the foreign currency, which may be treated as ‘remuneration’ for the service supplied, the adequacy of which may not be examined as regards unfairness under Article 4(2) of Directive 93/13.

54 In that connection, it is clear from the wording of Article 4(2) of Directive 93/13 that the second category of terms that cannot be examined as regards unfairness is limited in scope, for that exclusion concerns only the adequacy of the price or remuneration as against the services or goods supplied in exchange.

55 As the Advocate General has observed in point 69 of his Opinion, the exclusion of a review of contractual terms as to the quality/price ratio of a supply of goods or services is explained by the fact that no legal scale or criterion exists that can provide a framework for, and guide, such a review.

56 In that context, the Court has previously held that that exclusion does not apply to a term concerning a mechanism for amending the prices of the services provided to the consumer (*Invitel* EU:C:2012:242, paragraph 23).

57 In the circumstances, it must be stated, in addition, that the exclusion of the assessment of the unfairness of a term being limited to the adequacy of the price and the remuneration on one hand as against the services or goods supplied on the other, it cannot apply where there is a challenge to the variation between the selling rate of exchange of a foreign currency, which must be used in accordance with that term in order to calculate the repayment instalments, and the buying rate of exchange of that currency, which must be used in accordance with other terms of the loan agreement in order to calculate the amount of the loan advanced.

58 Moreover, that exclusion cannot apply to terms that, like Clause III/2, merely determine the conversion rate of the foreign currency in which the loan agreement is denominated, in order to calculate the repayment instalments, without however any foreign exchange service being supplied by the lender in making that calculation and do not, therefore, constitute ‘remuneration’, the adequacy of which as consideration for a service supplied by the lender could be assessed to determine its unfairness pursuant to Article 4(2) of Directive 93/13.

59 In the light of the foregoing, the answer to the first question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that:

- the expression the ‘main subjectmatter of a contract’ covers a term, incorporated in a loan agreement denominated in foreign currency concluded between a seller or supplier and a consumer and not individually negotiated, such as that at issue in the main proceedings, pursuant to which the selling rate of exchange of that currency is applied for the purpose of calculating the repayment instalments for the loan, only in so far as it is found, which it is for the national court to ascertain having regard to the nature, general scheme and stipulations of the contract and its legal and factual context, that that term lays down an essential obligation of that agreement which, as such characterises it;
- such a term, in so far as it contains a pecuniary obligation for the consumer to pay, in repayment of instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be considered as ‘remuneration’, the adequacy of which as consideration for a service supplied by the lender cannot be the subject of an examination as regards unfairness under Article 4(2) of Directive 93/13.

#### *The second question*

60 By its second question, the referring court asks essentially whether Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term must be drafted in plain intelligible language must be understood as requiring not only that the relevant term should be grammatically clear and intelligible to the consumer, but also that the economic reasons for using that term and its relationship with other contractual terms should be clear and intelligible to him.

61 If the referring court were to consider that, having regard to the answer given to the first question, Clause III/2 falls within the ‘main subjectmatter of the contract’, within the meaning of Article 4(2) of Directive 93/13, an assessment of the unfairness of that term may be avoided only if it is drafted in clear and intelligible language.

62 In order to safeguard in practice the objectives of consumer protection pursued by the Directive, any transposition of Article 4(2) must be complete, with the result that the prohibition of the assessment of the unfairness of the terms relates solely to those which are drafted in plain, intelligible language (*Caja de Ahorros y Monte de Piedad de Madrid* EU:C:2010:309, paragraph 39).

63 However, it is apparent from the order for reference that Article 209(4) of the Civil Code, a provision intended to transpose Article 4(2) of Directive 93/13 into national law, did not lay down that requirement that contractual terms be drafted in clear intelligible language.

64 In that connection, it must be recalled that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (Case C-351/12 *OSA* EU:C:2014:110, paragraph 44).

65 In that context, the Court has also stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (*OSA* EU:C:2014:110, paragraph 45).

66 If, taking account of that principle of consistent interpretation thus defined, the referring court were to consider that the national provision intended to transpose Article 4(2) of that directive may be understood as meaning that it includes the requirement that contractual terms are to be drafted in plain intelligible language, the question arises of the scope of that requirement.

67 In that connection, it must be held that that requirement appears in Article 5 of Directive 93/13, which provides that contractual terms in writing must ‘always’ be drafted in plain, intelligible language. The twentieth recital in the preamble to Directive 93/13 states in that regard that the consumer should actually be given an opportunity of examining all the terms of the contract.

68 It follows that that requirement of plain, intelligible language applies in all cases, including that in which a term falls within Article 4(2) of Directive 93/13 and therefore avoids the assessment of its unfairness referred to in Article 3(1) thereof.

69 It also follows that that requirement as it appears in Article 4(2) of Directive 93/13 has the same scope as that referred to in Article 5 of that

directive.

- 70 As regards Article 5, the Court has already held that information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier (see, *RWE Vertrieb* EU:C:2013:180, paragraph 44).
- 71 The requirement of transparency of contractual terms laid down by Directive 93/13 cannot therefore be reduced merely to their being formally and grammatically intelligible.
- 72 On the contrary, as has already been recalled out in paragraph 39 of this judgment, the system of protection introduced by Directive 93/13 being based on the idea that the consumer is in a position of weakness *vis-à-vis* the seller or supplier, in particular as regards his level of knowledge, the requirement of transparency must be understood in a broad sense.
- 73 As regards a contractual term, such as Clause III/2, which allows the seller or supplier to calculate the level of monthly repayment instalments owed by the consumer in accordance with the selling rate of exchange of the foreign currency applied by that seller or supplier, which has the effect of increasing the costs of the financial service at the consumer's expense, apparently without an upper limit, it follows from Articles 3 and 5 of Directive 93/13 and Points 1(j) and (l) and 2(b) and (d) of the annex thereto, that it is of fundamental importance for the purpose of complying with the requirement of transparency, to determine whether the contract sets out transparently the reason for and the particularities of the mechanism for converting the foreign currency and the relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it (see, by analogy, *RWE Vertrieb* EU:C:2013:180, paragraph 49).
- 74 As regards the particularities of the mechanism for conversion of the foreign currency such as those set out in Clause III/2, it is for the referring court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.
- 75 Having regard to all the foregoing, the answer to the second question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that, as regards a contractual term such as that at issue in the main proceedings, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.

#### *The third question*

- 76 By its third question, the referring court asks essentially whether, in a situation such as that at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer may not continue in existence after the deletion of the unfair term, Article 6(1) of Directive 93/13 must be interpreted as meaning that it precludes national law which authorises the national court to cure the invalidity of the unfair term by substituting a supplementary provision of national law.
- 77 In that connection, the Court has held that Article 6(1) of Directive 93/13 must be interpreted as precluding a rule of national law which allows a national court, if it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to adjust that contract by revising the content of that term (*Banco Español de Crédito* EU:C:2012:349, paragraph 73).
- 78 Thus, given the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness *vis-à-vis* sellers or suppliers, Directive 93/13 requires Member States, as is apparent from Article 7(1) thereof, read in conjunction with the twenty-fourth recital in the preamble thereto, to provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers' (*Banco Español de Crédito* EU:C:2012:349, paragraph 68).
- 79 If it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (*Banco Español de Crédito* EU:C:2012:349, paragraph 69).
- 80 However, it does not follow, in a situation such as that in the main proceedings, that Article 6(1) of Directive 93/13 precludes the national court, in accordance with the principles of the law of contract, from deleting an unfair term and substituting for it a supplementary provision of national law.
- 81 On the contrary, replacing an unfair term with such a provision which, as is clear from the thirteenth recital in the preamble to Directive 93/13, is presumed not to contain unfair terms, in that it leads to the result that the contract may continue in existence in spite of the fact that Clause III/2 has been deleted and continues to be binding for the parties, is fully justified in the light of the purpose of Directive 93/13.
- 82 The substitution of an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13, since, according to settled case-law, that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, not to annul all contracts containing unfair terms (Case C-453/10 *Pereničová and Perenič* EU:C:2012:144, paragraph 31, and *Banco Español de Crédito* EU:C:2012:349, paragraph 40 and case-law cited).
- 83 However, if, in a situation such as that at issue in the main proceedings, it was not permissible to replace an unfair term with a supplementary provision, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised.
- 84 In general, the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the

consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts.

- 85 Having regard to all those considerations, the answer to the third question is that Article 6(1) of Directive 93/13 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.

#### **Costs**

- 86 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 (Fourth Chamber) hereby rules:

1. **Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that:**
  - **the expression the ‘main subjectmatter of a contract’ covers a term, incorporated in a loan agreement denominated in foreign currency concluded between a seller or supplier and a consumer and not individually negotiated, such as that at issue in the main proceedings, pursuant to which the selling rate of exchange of that currency is applied for the purpose of calculating the repayment instalments for the loan, only in so far as it is found, which it is for the national court to ascertain having regard to the nature, general scheme and stipulations of the contract and its legal and factual context, that that term lays down an essential obligation of that agreement which, as such characterises it;**
  - **such a term, in so far as it contains a pecuniary obligation for the consumer to pay, in repayment of instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be considered as ‘remuneration’ the adequacy of which as consideration for a service supplied by the lender cannot be the subject of an examination as regards unfairness under Article 4(2) of Directive 93/13.**
2. **Article 4(2) of Directive 93/13 must be interpreted as meaning that, as regards a contractual term such as that at issue in the main proceedings, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.**
3. **Article 6(1) of Directive 93/13 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.**

[Signatures]