Case C-81/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

1 February 2019

Referring court:

Curtea de Apel Cluj (Romania)

Date of the decision to refer:

27 December 2018

Applicants at first instance:

NG

OH

Defendant at first instance:

SC Banca Transilvania SA

Subject matter of the main proceedings

Appeals brought, first, by NG and OH, the applicants at first instance and, second, by SC Banca Transilvania SA, defendant at first instance, against the civil judgment of 9 February 2018 by the Tribunalul Specializat Cluj (Cluj Specialist Tribunal) partially upholding the appellants' action by which they sought, in so far as is relevant to the reference for a preliminary ruling, a declaration that terms in the loan agreement with SC Volksbank România SA (to which the defendant is the successor in law) were unfair and, accordingly, invalid, and that the CHF-RON exchange rate be set at its value at the date of signature of the agreement and that sums paid in excess as a result of the devaluation of the national currency against the Swiss franc be repaid.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and in particular Article 1(2) thereof, the Court's case-law relating to the Directive and the principle of effectiveness.

Questions referred

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

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

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

Provisions of European Union law and case-law relied on

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: Article 1, Article 3(1), Article 4, Article 5, Article 6(1), Article 7(1) and point 1(i) of the Annex.

Judgments of the Court in Cases C-618/10, *Banco Español de Crédito*; C-92/11, *RWE Vertrieb*; C-397/11, *Jőrös*; C-34/13, *Kušionová*; C-280/13, *Barclays Bank*; C-51/17, *OTP Bank and OTP Faktoring* and C-186/16, *Andriciuc and Others*, and the Court's order in Case C-119/17, *Lupean and Lupean*.

Provisions of national law relied on

The Civil Code, in the version in force at the date of signature of the agreement, Article 1578 of which enshrines the principle of monetary nominalism: 'The debt arising under a money loan shall always be limited to the amount set out in the agreement. Where there is an increase or a decrease in the value of the currency before the due date for payment, the debtor must repay the sum received by way of loan and shall be obliged to repay that sum only in currency that is legal tender at the time of payment.'

Article 41 of the Commercial Code, in the version in force on the date of signature of the agreement, according to which: 'When the currency indicated in an agreement does not have the status of legal or commercial tender in the country and when the exchange rate of that currency has not been determined by the parties themselves, payment may be made in the currency of the country, in accordance with the exchange rate applicable on the day payment falls due and in the place of payment; if there is no exchange rate in that place, it shall be made in accordance with the rate of the closest markets, except where the agreement contains an "efectiv" clause [requiring payment in that currency alone], or another similar clause'.

Brief outline of the facts and the main proceedings

1 In March 2006 the applicants concluded a loan agreement with SC Volksbank România SA for an amount of RON 90 000 (Romanian lei), for a term of 192 months, with annual current interest of 7.75% and with actual annual interest (hereinafter: 'DAE') of 8.42% per annum. The loan was secured by a mortgage on the applicants' home. The fixed monthly instalment was to be RON 825.46 and the total cost of the loan amounted to RON 114 533.71.

2 In order to refinance the loan, on 15 October 2008 the parties signed a second loan agreement for the amount of CHF 65 000 (Swiss francs), for a term of 192 months, with annual current interest of 3.99%, and a DAE of 7.02% per annum. On the date when that agreement was signed, the value of the Swiss franc was RON 2.4481, the combined income of the applicants was RON 6 400 and the balance on the first loan, which was being refinanced, was RON 63 480.17. The total costs of the loan in CHF were CHF 103 531.12, of which CHF 65 000 was capital, CHF 23 264.48 was interest and CHF 15 266.64 was fees. The monthly instalments amounted to CHF 450.43, to which was added the management fee. The first instalment paid by the applicants was CHF 603.43, which accounted for 35.04% of their total income. The loan was also secured by a mortgage on immovable property owned by the applicants.

3 In the general terms and conditions of the 2008 loan agreement, Clause 4.1 of the 'Payments' section stated: 'all payments made pursuant to the agreement shall be made in the currency of the loan, except in the cases expressly mentioned in the

special terms and conditions or general terms and conditions' (hereinafter: the 'disputed term').

4 Under an addendum signed on 29 October 2010 it was established that the interest rate was to be variable, in accordance with the following formula: Three-month Libor rate + margin of 3.39 percentage points per annum, annual DAE of 6.3%. The total amount to be repaid was calculated at CHF 100 602.09. A second addendum, signed on the same day, set the current interest rate at 3.49%, fixed for the first 86 months, and provided that it was to be variable after 86 months, in accordance with the following formula: Three-month Libor rate plus margin of 3.14 percentage points per annum, annual DAE of 3.77%. The total amount to be repaid was CHF 89 680.16.

5 Between 5 September 2010 and 16 October 2016, in extensive correspondence between the parties, the applicants requested the bank to take specific steps to eliminate the effects of the significant increase in the exchange rate, borne solely by the applicants for the term of the agreement.

6 While, at the rate applicable on 16 October 2010, when CHF 1 was equal to RON 2.4481, the amount obtained by way of loan was equivalent to RON 159 126, on 13 April 2017, with CHF 1 equal to RON 4.2598, the same amount in Swiss francs corresponded to RON 276 887. The changes in the exchange rate have resulted in an additional cost to the applicants (in terms solely of the principal debt, net of fees and interest) of RON 117 760 (CHF 27 664 at the current rate, and CHF 48 102 at the rate at the date the loan was granted).

7 Before the Tribunalul Specializat Cluj, the applicants contended that there was a significant imbalance between the rights and obligations assumed by the parties, challenging, inter alia, the fact that they alone bore the exchange risk.

8 They pointed out that, in 2008, it was the bank that had suggested to them that they should convert the loan from [Romanian] lei to Swiss francs, because the interest payments were much lower. At the time of signature of the 2008 agreement, the bank asked for three accounts to be opened (one in CHF, one in EUR and one in RON); these accounts were for the payment of the instalments in accordance with the instructions issued by the lender. The applicants claimed that they had not at any time understood how the mechanism functioned and that they had not actually received any amounts in Swiss francs, stating that they had always deposited sums in lei and had also received the loan in lei. They claim that they did not have any particular interest in seeking a loan in CHF, since they did not receive income in that currency and did not know anything about the currency.

9 The applicants argue that they did not actually receive the amount in Swiss francs and that they were persuaded, through the promise of advantages, to sign the documents to refinance the loan in RON by means of a further loan in CHF. They consider that the banks used a safe-haven currency in a crisis period, transferring the risk to customers, and that although the bank was aware of the risk that the

applicants were running it did not fulfil its obligations to provide information, advice and warnings before the loan was converted from RON to CHF.

10 It was in those circumstances that the applicants, who take the view that Articles 3 and 4 of Directive 93/13/EEC are fully applicable in the present case, asked the court to rebalance the bank loan agreement described above by freezing the exchange rate under the agreement at the exchange rate on the date when the agreement was concluded and to order the defendant to repay the excess amounts received.

11 According to the applicants, because of the bank's failure to inform them about the risk of a rise in the value of the CHF, and the fact that it was impossible, in practice, to negotiate the content of the term requiring the loan to be repaid in the same currency in which it was granted, the bank obtained an unfair advantage.

12 The Tribunalul Specializat Cluj partially granted the application, but rejected the appellants' request that the exchange rate be set at the rate applicable at the date on which the agreement was concluded.

13 The Tribunalul Specializat Cluj recognised the possibility of analysing the disputed term from the point of view of fairness, since the principle of monetary nominalism, laid down by the Civil Code and incorporated in the agreement by the above-mentioned term, is supplementary in nature and not mandatory. Nevertheless, the court held that the term is drafted in plain, intelligible language, so that any consumer could have foreseen that they might be exposed to the risk of fluctuations in the exchange rate, that the applicants had accepted this risk in full knowledge of the facts, and that the seller or supplier had fulfilled the obligation to provide information.

14 The Court found that it had not been shown that the bank had information to give to the applicants as regards the exchange rate risk to which they would be exposed that would have been sufficient to create an imbalance in the future as regards performance of the agreement, or that the bank had not acted in good faith in relation to the inclusion of such a term.

15 Both the applicants and the bank have brought an appeal before the referring court, the Curtea de Apel Cluj (Court of Appeal, Cluj).

The key arguments of the parties to the main proceedings

16 On appeal, the applicants requested that the exchange rate be set as at 15 October 2008 and that the sums representing the difference between the exchange rate on the date of signature of the agreement and the rate on the date on which each instalment was paid be reimbursed, plus statutory interest.

17 The bank maintains that the exchange rate risk is implicitly assumed by the consumer because the exchange rate, which cannot be known in advance by the

seller or supplier, is influenced by external factors outside its control. According to the bank, the term relating to the currency of the loan forms part of the main subject matter of the agreement and constitutes a transposition of the nominalist principle, and is therefore outside the scrutiny of the courts for the purpose of determining whether it is unfair.

Brief summary of the reasons for the request for a preliminary ruling

18 The referring court indicates that there is a lack of uniformity in the national case-law regarding the ways in which the principle of monetary nominalism should be taken into account, as a supplementary rule of national law, when carrying out the determination required by the Court in paragraph 29 of the judgment in Case C-186/16, *Andriciuc and Others*.

19 According to the first view, which is the prevailing view, national case-law subsequent to the judgment in *Andriciuc and Others* took the view that the inclusion of the principle of monetary nominalism in loan agreements, in the absence of any other arrangements between the parties in that respect, removes the term relating to exchange risk from scrutiny by the courts for the purpose of determining whether it is unfair. Consequently, in the light of the provisions of Article 1578 of the former Civil Code (reproduced in Article 2164 of the new Civil Code), the amount to be repaid was to be determined in relation to the amount actually received as a loan, even where there may have been changes in the currency's value, as the repayment obligation is stipulated in the same number of monetary units as expressed in the agreement, notwithstanding any variation between the time when the agreement was concluded and the time when payment fell due.

20 In support of that view, the national courts have underlined the fact that the Court of Justice drew no distinction between rules that apply between the contracting parties irrespective of their choice and rules that are supplementary in nature; the Court indicated that both mandatory rules and supplementary rules applicable by operation of the law when no other agreement has been reached between the contracting parties in that respect are excluded from the scope of Directive 93/13. It was also stated that this interpretation derives from the thirteenth recital to Directive 93/13, the provisions of Article 1(1) of Directive 93/13 and from the Court's judgment in Case C-92/11, *RWE Vertrieb* (paragraphs 25-28).

21 Another factor cited in support of that approach is Decision No 62/2017 by the Curte Constituțională (Constitutional Court), on the constitutionality of the Lege pentru completarea Ordonanței de urgență a Guvernului nr. 50/2010 privind contractele de credit pentru consumatori (law supplementing Decree-Law No 50/2010 on consumer credit agreements), which provided for loans taken out in CHF to be converted into lei at the CHF/RON exchange rate applicable at the date of the agreement. The Curtea Constituțională held, essentially, that the part of the Civil Code laying down the nominalist principle is supplementary in nature, so

that the parties have the possibility of derogating from it. However, in the absence of any derogating provisions, the rule generally applicable applies, namely Article 1578 of the Civil Code. By virtue of the principle of monetary nominalism, the sum granted as a loan must be repaid exactly, irrespective of any increase or reduction in its value, so that both contracting parties assume the risk that during performance of the agreement the amount repaid by the borrower may be higher or lower, at the time of recovery, than at the time of payment, when compared to another currency regarded as a reference point. The Curtea Constituțională declared the provisions submitted for its examination to be unconstitutional, stymieing the legislative authority's attempt to regulate the issue of loans taken out in Swiss francs.

22 The referring court states that, following the Court's order in *Lupean and Lupean*, that first view has not altered to any significant extent.

23 According to the second view developed in the case-law (although it is a minority one), the Court of Justice left it to the referring court to determine whether or not a particular case fell outside the Directive's scope. Accordingly, the courts commented that although, in the order in *Lupean and Lupean*, the Court of Justice refers to the earlier ruling in the judgment in *Andriciuc and Others*, it no longer considered it necessary to take account of the principle of monetary nominalism. Those courts inferred, by implication, that the Court of Justice considered that, even if Article 1578 of the Civil Code was or might be applicable, that could not constitute a legitimate obstacle for the national court, which must carry out a substantive analysis of the terms challenged as unfair.

24 In accordance with that interpretation, the national courts have found that it has not been demonstrated during the proceedings that debtors had been offered a genuine opportunity to negotiate the margin under those terms, and that therefore the agreement transposing a supplementary rule was an agreement in appearance only, whereas in reality it became, through unfair conduct on the part of the seller or supplier, an agreement imposing a mandatory rule. This put the debtors in the position of legally bound consumers, without offering them any alternative. It was therefore absolutely imperative for them, in that capacity, to be able to afford the protection of their legitimate rights, in so far as the arguments relating to the effectiveness of Directive 93/13 had to prevail.

25 In those arguments it was also maintained that, in order to be able to assert that there was an 'absence of other arrangements established by the parties', within the meaning of paragraph 79 of the judgment of the Court of Justice in Case C-34/13, *Kušionová*, such an agreement had to be possible in open and constructive negotiations between the parties. If that possibility did not exist in practice and if no aspect of the agreement was negotiated (the burden being upon the seller or supplier to demonstrate the existence of any such negotiations), then the supplementary rule applies, not because the borrowers/consumers did not wish to preclude its application, but because at no time did they have a genuine possibility of excluding it, since the content of the agreement was prepared unilaterally in

advance by the seller or supplier. It was concluded that the term at issue may form the legitimate subject of a complaint and does not absolve the seller or supplier from the obligation to provide information laid down by a specific law. To accept otherwise would mean that the seller or supplier would be absolved of the obligation imposed on it by the specific law to provide information, and that it could have recourse to generally applicable law. However, generally applicable law should be applied only in cases where the specific law does not lay down other rules.

26 According to that line of case-law, the interpretation of nominalism as advocated by the seller or supplier is not based on the circumstances taken into account at the time of adoption of the rule and is unrelated to the purpose for which it was adopted, because it fails to have regard to the origins of that mechanism, which was designed primarily to protect debtors in a period of monetary inflation.

27 Some courts have taken the view that if the exchange rate risk is to be borne by consumers alone, who receive their income in lei, that means that the seller or supplier has insulated itself against any possible loss, preserving the purchase value of the instalments to be paid, a proposition which is fully in line with value principle, in contrast to the nominalist principle. That argument stems from the idea that the granting of a loan in a foreign currency is nothing more than a contractual term providing for indexation, reflecting an intention to maintain, over time, the real value of the debt. This mechanism, which is specific to the value principle, constitutes a derogation from the statutory supplementary nominalist principle and should render evocation of the latter principle redundant.

28 The referring court states that the majority opinion of the Romanian courts, which is based on the content of paragraphs 28 and 29 of the judgment in *Andriciuc and Others*, according to which the term obliging the consumer to repay the loan in the same foreign currency as that in which it was granted cannot be reviewed by the Court for the purpose of determining whether it is unfair, reduces to the point of elimination the distinction between mandatory rules and supplementary rules. It essentially argues that both types of rule enjoy the same legal treatment and cannot be subject to any analysis as to whether they are unfair, within the meaning of Article 1(2) of Directive 93/13.

29 According to the referring court, that majority interpretation is based on a fundamental discrepancy between the Romanian language version and the French language version of the judgment in *Andriciuc and Others*. Indeed, while the French version of the judgment refers, in paragraphs 27 and 28 respectively, to **mandatory** provisions (dispositions législatives ou réglementaires impératives' and 'cette disposition doit être impérative"), the Romanian version refers to **obligatory** rules (respectively "actul [...] respectivă trebuie să fie obligatorie [this provision must be obligatory]' and 'actele cu putere de lege sau normele administrative obligatorii [obligatory statutory or regulatory provisions').

30 There is therefore a very significant difference between those two language versions, with negative consequences for the uniformity of Romanian judicial practice. It is clear from the approaches adopted in legal literature that the concepts of a mandatory rule and an obligatory rule do not overlap, since all mandatory rules are obligatory, but the reverse is not the case. The supplementary rules from which the contractual counterparties have not derogated are binding on the parties, but they remain supplementary rules, and, although binding, do not become mandatory rules. They constitute a separate category that is autonomous and has clearly defined features.

31 In the context examined, the distinction between mandatory and supplementary rules is not merely formal, but is substantive, since the exception under Article 1(2) of Directive 93/13 must be interpreted restrictively and limited to terms which contain **mandatory** rules. However, the Romanian version, which refers to "norme obligatorii [obligatory rules]', goes beyond the intention of the Court of Justice and the wording of Article 1(1) of Directive 93/13 and includes both mandatory rules and the default rules from which the parties have not derogated.

32 The referring court states that that substantive linguistic difference, which has important legal consequences, is also apparent in the wording of Directive 93/13, as there is a difference between the French version and the Romanian version of the content of Article 1(2). It therefore argues that only the Court of Justice is able to clarify which of the two is the correct variant, on the basis of the purpose and the objectives of that Directive.

33 This is the context in which it has been considered necessary to refer the first question.

34 Paragraph 29 of the judgment in *Andriciuc and Others* requires the national court to conduct an analysis, and the first step of this entails verifying whether or not the term reflects the provisions of national law. If that proves to be the case, the court must then go on to examine subsequent conditions, relating to the clear and intelligible nature of the term and the requirements concerning good faith, in connection with which the information provided by the lender in the negotiation of the loan agreement is relevant. It was therefore considered necessary to refer the other two questions for preliminary ruling.

35 However, even as regards those subsequent conditions, judicial practice is not uniform.

36 According to one line of case-law, which is a minority view but which seems to have been followed to a large extent by the Tribunalul Specializat Cluj when it ruled at first instance in the main proceedings, actions such as that brought by the applicants must be rejected, not because it has been found that the principle of monetary nominalism is applicable, but because the bank had acted in good faith and complied with the relevant obligation to provide information. This line of

case-law is based on the premiss that, even if it were established that all the conditions for declaring the term null and void were met, the consequence cannot be that the exchange rate must be fixed at the rate in force when the agreement was concluded but, in accordance with the judgment of the Court of Justice in Case C-618/10, *Banco Español de Crédito*, that the national supplementary rules are applicable, namely those set out in Article 1578 of the former Civil Code.

37 Thus, the nominalist principle indirectly plays a central role in the assessment of the requirements relating to whether the exchange risk is clear and intelligible and to the standards governing the obligation to provide information to the consumer.

38 The reason for the refusal to grant the consumers' demands was that, irrespective of the currency taken into consideration, the exchange rate fluctuates, and this is well known, including by less circumspect consumers who do not have specialist knowledge. There was therefore no need to give the consumer specific information in that respect.

39 Although it is a well known fact that exchange rates fluctuate, this does not mean that the seller or supplier knew how the exchange rate would change, especially over a long period, as in the case of the agreement in the main proceedings.

40 To conclude, in line with Decision No 62/2017 of the Curtea Constituțională, it was decided that the assessment of whether the exchange risk term was unfair does not entail any modification or adjustment of the agreement to the effect that the CHF/RON exchange rate is to be set at the rate applicable at the time the contract was concluded.

41 An opposing view, also a minority one, developed in national case-law, endorses the view that the courts may review legality. Under that view, the requirement that contractual terms must be transparent laid down by Directive 93/13 cannot be limited to the intelligibility of the terms from a formal and grammatical point of view, but must be construed broadly, from the point of view of an understanding of the consequences which performance of the contract may have for the consumer's assets.

42 Therefore, the assumption by the consumer of the risk in respect of exchange rate variations must be express and informed and must be based on specific examples provided by the seller or supplier, so that the consumer is able to assess the risk relating to changes in the exchange rate.

43 If examples and estimates have not been given, the requirements relating to the provision of a minimum amount of information to the consumer have not been fulfilled, since the consumer is not able to actually understand the nature of the transaction.

44 In the present case, the condition of significant imbalance between the rights and obligations of the parties would also be met, bearing in mind the insufficient information given. In a situation where the exchange rate changed by 130%

compared to the initial rate and even though it was impossible to foresee this development, the bank's obvious fault lies in its failure to provide the applicants with information regarding this risk, which is unavoidable and inherent in any loan granted in foreign currency over such a long period, in not having established a range of exchange rates, in order to make the burden generated by the agreement for the consumer fully apparent, and in not even having proposed a clause to cover the risk through insurance.

45 As regards good faith, it is argued that, in the context of consumer protection, it is assessed differently, using a very high standard. One of the essential elements on the basis of which good faith is assessed is the willingness of the seller or supplier and his ability to provide all the essential information regarding the nature and risks that may arise during the performance of the contract, to negotiate the core terms and thus give consumers the opportunity to understand the true nature of the transaction and to take out a banking product that is appropriate to meets their needs, is in line with the income they receive and with the risks which they can manage and withstand without undermining their ability to pay the instalments.

46 The credit product in question was presented by the bank as safe and preferable, in view of the stability of the Swiss franc. Given the lower interest and, therefore, the possibility of concluding higher loans, the seller or supplier thus found a way of increasing its market share and the profits it makes. Its intention is to protect itself against any financial risk and to have consumers who are not circumspect and who are not informed of all the implications and effects of the agreement bear that risk.

47 It was therefore found that a term obliging the consumer to make any payment made for the purposes of repaying the loan in the currency in which it was granted was an unfair term. To give effect to the principle of effectiveness, it was considered that the only possible solution would be to delete such a term from the agreement, while allowing the continuation of the contractual relationship through the payment of amounts due by reference to the exchange rate prevailing on the date on which the agreement was concluded. That is the only time and parameter on the basis of which the seller or supplier (the bank) undertook an assessment of the debt level of the debtors and their capacity to pay the instalments.

48 The referring court adds to the non-uniform case-law indicated above some observations concerning the benefits of referring the matter to the Court of Justice. Following the adoption of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014, specific mechanisms have been established to protect consumers against exchange risks, where the imbalance becomes significant, while consumers who took out bank loans in foreign currency before that time remain without any form of protection. The referring court wonders whether it is fair for those consumers to bear the consequences of a belated response by the legislature, which did not regulate this very widespread phenomenon, especially in former communist countries, where the average consumer's financial literacy has been lacking. This lack of financial literacy is

the result of the historical and economic context of the centralised state and the command economy, which prevented consumers from having any experience in taking out bank loans in a free market.