

Case C-609/19**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:**

13 August 2019

Referring court:

Tribunal d'instance de Lagny-sur-Marne (France)

Date of the decision to refer:

2 August 2019

Applicant:

BNP Paribas Personal Finance SA

Defendant:

VE

I. Summary of the dispute

- 1 On 10 March 2009, VE and his wife acquired a property and concluded with BNP Paribas Personal Finance ('BNP Paribas' or 'the lender') a mortgage loan of EUR 143 421.53, giving rise to a debt of CHF 216 566.51.

As a result of payment defaults, acceleration of the repayment term was declared.

- 2 On 16 January 2015, the compulsory sale of the property was ordered by court decision. On 20 March 2015, the property was sold at the price of EUR 55 000.
- 3 On 12 January 2017, BNP Paribas applied to the referring court for authorisation to attach the earnings of VE ('the borrower' or 'the consumer').

II. Arguments and forms of order sought**1. BNP Paribas**

- 4 BNP Paribas claims, inter alia, that the court should:

- rule that its claim amounts to a total of EUR 192 268.73, in accordance with the statement of account established on 21 February 2019;
- authorise the attachment of VE’s earnings;
- declare inadmissible VE’s application for a declaration of nullity of the loan on grounds of a misleading commercial practice, and, alternatively, reject it;

in the alternative:

- declare inadmissible VE’s claims based on unfair terms;
- rule that the clause in the loan stipulating Swiss francs as the accounting currency does not come within the scope of unfair terms, in that it defines the main subject matter of the contract and is drafted in plain, intelligible language;

in the further alternative:

- rule that the clause in the loan stipulating Swiss francs as the accounting currency is not unfair in that it does not cause any significant imbalance in the rights and obligations of the parties;
- declare unfounded VE’s claims based on unfair terms.

5 BNP Paribas submits that VE was informed of the variation in the exchange rate to which he was exposed and of its consequences on the repayment of his loan. BNP Paribas therefore takes the view that the contract contains no unfair terms.

2. VE

6 VE contends, *inter alia*, that the court should:

- refer a series of questions to the Court of Justice for a preliminary ruling;
- annul the HELVET IMMO agreement which he entered into;

in the alternative:

- review the unfairness of the following terms: ‘Description of your loan’ (Clause 1), ‘Financing of your loan’ (Clause 2), ‘Opening an internal account in euros and an internal account in Swiss francs to manage your loan’ (Clause 3), ‘Foreign exchange transactions’ (Clause 4), ‘Repayment of your loan’ (Clause 5), ‘Option to change the accounting currency’ (Clause 6), ‘Clause acknowledging information from the loan acceptance form’ (Clause 7), ‘Repayment of your loan’ (Clause 8), ‘Repayment of the principal’ (Clause 9);

- declare that each of the Clauses 1 to 9 are to be deemed null and void and exclude their application;
- reclassify the HELVET IMMO and INVEST IMMO agreements as euro-denominated, fixed-rate loan agreements as of their conclusion, apply an exchange rate of 1 euro to 1.50 Swiss francs and recalculate the balance due;

in the further alternative:

- if it is held that the implied indexation clause forms part of the main subject matter of the contract at issue, declare the contract null and void.
- 7 VE submits that the loan at issue exposes it to an unlimited foreign exchange risk, that the agreement does not refer to a foreign exchange risk and does not contain the words ‘foreign exchange risk’. He states that the simulations for informing borrowers were not communicated to him, even though the loan was offered during a period when the lender anticipated significant variations in the exchange rate.
- 8 Consequently, he requests that a number of questions be referred to the Court of Justice of the European Union for a preliminary ruling, in particular in order to assess whether the case-law of the Cour de cassation (Court of Cassation) (France) is compatible with the provisions of the Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). He seeks, in essence, a declaration that the loan is null and void, on account of what he regards as a misleading commercial practice. In the alternative, he maintains that the amount of the claim must be reduced on account of the unfairness of an implied indexation clause, the accounting and payment currency clauses, the absence of a reference to a ‘foreign exchange risk’, the redemption clause and the option to purchase clause.

III. The agreement and the legal framework

1. The loan at issue

- 9 Under the terms of the agreement at issue, the lender grants a fixed rate loan denominated in Swiss francs. The loan is repaid by payments in euros, but those monthly instalments are converted into Swiss francs to repay the principal and interest into an account denominated in Swiss francs.
- 10 It is stated in the offer that, if changes in the exchange rate increase the cost of the loan for the consumer, the monthly instalments will first be allocated to interest and the term of the loan will be extended by five years. It is also stated that ‘the amount of your repayments in euros will also remain unchanged but the term of your loan will be extended. However, if maintaining the amount of your

repayments in euros does not allow the full balance of your account to be repaid over the initial remaining term, plus 5 years, your repayments in euros will then be increased’.

- 11 In the present case, VE borrowed a sum of EUR 143 421.53; that sum corresponds to CHF 216 566.51. After the sale of the property, the price of which was credited against the outstanding capital, the lender requested the attachment of VE’s earnings for the sum of EUR 192 268.73.

2. *European Union law*

- 12 The referring court considers that the act of EU law applicable in the present case is Directive 93/13, in particular Articles 3 and 4 thereof.
- 13 According to the Opinion of Advocate General Wahl in *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:85, point 91 and paragraph 2 of the conclusion of the Opinion): ‘*the examination of whether the contractual terms are plain and intelligible must take account of all the circumstances of the individual case, including the information given to the consumer when the contract was concluded, and must cover, in addition to the strictly formal, linguistic aspect, a precise assessment of the economic consequences of those terms and any links that might exist between them*’.
- 14 In the judgment of 20 September 2017, *Andriuc and Others* (C-186/16, EU:C:2017:703, paragraph 51 and point 2 of the operative part), the Court held that for a term comparable to that at issue to be plain and intelligible it ‘*must be understood by the consumer both at the formal and grammatical level, and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would be aware both of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, and would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations. It is for the national court to carry out the necessary checks in that regard*’.
- 15 The Court recalled that since ‘*the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, that requirement of plain and intelligible drafting of contractual terms and, therefore, the requirement of transparency laid down by the directive must be understood in a broad sense*’ (judgment of 20 September 2017, *Andriuc and Others* (C-186/16, EU:C:2017:703, paragraph 44 and the case-law cited)). In paragraph 46 of that judgment, the Court specifies that that issue must be examined by the referring court.
- 16 The Court has also held that ‘*a term in a loan agreement ... as a consequence of which the entire exchange rate risk is transferred to the borrower, and which is not drafted transparently, with the result that the borrower is unable to assess, on the basis of clear and intelligible criteria, the financial consequences of signing*

that agreement, is liable to be regarded as unfair by the national court' (order of 22 February 2018, *Lupean* (C-119/17, not published, EU:C:2018:103, paragraph 31 and point 2 of the operative part).

- 17 Finally, in the judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750), the Court held that '*Article 4(2) of Directive 93/13 must be interpreted as meaning that the requirement for a contractual term to be drafted in plain intelligible language requires financial institutions to provide borrowers with adequate information to enable them to take well-informed and prudent decisions. In that regard, that requirement means that a term relating to the foreign exchange risk must be understood by the consumer both at the formal and grammatical level and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations*' (paragraph 78 and point 3 of the operative part). The Court stated in the same judgment that '*Article 4 of Directive 93/13 must be interpreted as requiring that the plainness and intelligibility of the contractual terms be assessed 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*' (paragraph 83 and point 4 of the operative part); finally, the Court added that it was for the national court to identify of its own motion the unfairness of such a term (paragraph 91 and point 5 of the operative part).

3. National law

- 18 The referring court is ruling in the present case in relation to an attachment of earnings. In that regard, it exercises the powers of the court responsible for enforcement and must therefore examine the merits and the amount of the claim.
- 19 Article L. 132-1 of the code de la consommation (Consumer Code), now Article L. 212-1 of that code, transposes Directive 93/13 into French law. That article provides:

'In contracts concluded between sellers or suppliers and persons who are not sellers or suppliers or who are consumers, terms the purpose or effect of which is to cause a significant imbalance in the rights and obligations of the parties to the contract, to the detriment of the person who is not a seller or supplier or who is a consumer, are unfair.

A Council of State decree ... shall determine a list of terms which must be regarded as unfair; in the event of a dispute concerning a contract which contains such a term, the seller or supplier must adduce evidence of the fairness of the term at issue.

A decree adopted under the same conditions shall determine the types of terms which, having regard to the seriousness of the disturbance they cause to the balance of the contract, must be regarded irrefutably as unfair within the meaning of the first paragraph.

These provisions apply whatever the contract form or medium. This is the case, in particular, for purchase orders, invoices, performance bonds, delivery notes or slips, travel vouchers or tickets, containing stipulations which may, or may not, have been freely negotiated, or references to general terms fixed in advance.

Without prejudice to the rules of interpretation provided for in Articles 1156 to 1161, 1163 and 1164 of the civil code, the unfairness of a term shall be assessed 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. It shall also be assessed in the light of those contained in another contract where the conclusion or performance of those two contracts are legally dependent upon one another.

Unfair terms are deemed to be null and void.

Assessment of the unfair character of the terms within the meaning of the first paragraph shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price or remuneration as against the goods sold or services provided in so far as these terms are in plain, intelligible language.

The contract shall continue to be applicable in all its provisions other than those deemed to be unfair if it is capable of continuing in existence without those terms.

The provisions of this article are public policy rules’.

- 20 The penultimate paragraph of that provision transposes Article 4(2) of Directive 93/13 and forms the basis of the relevant domestic case-law.
- 21 The Court of Cassation has held that terms defining the main subject matter of the contract cannot be considered unfair, provided that those terms are drafted in plain, intelligible language (settled case-law).
- 22 In 2017, in two cases in which the dispute concerned a loan similar to the loan at issue, the Court of Cassation recalled that it was for the court adjudicating on the substance to ascertain of its own motion the existence of a significant imbalance.
- 23 In 2018, in a case relating to a loan comparable to the loan at issue, the Court of Cassation held that the term providing for ‘the conversion into Swiss francs of the balance of the monthly payments after payment of the incidental loan charges [defined] the main subject matter of the contract’. Moreover, it ruled that that term was plain and intelligible for the following reasons: ‘repayment of the loan takes place by means of conversion of fixed loan instalments paid in euros, ... such

conversion takes place at an exchange rate which may rise or fall, ... such changes may lead to an extension or reduction in the repayment period for the loan and, in some circumstances, alter the total repayment cost’.

- 24 By fifteen decisions delivered on 20 February 2019, the Court of Cassation approved judgments of the Courts of Appeal ruling that the Helvet Immo loan defined the main subject matter of the contract, holding that ‘the foreign exchange risk inherent in that type of loan [had] an impact on repayment of the loan’. In those cases, the judgments under appeal described in detail the mechanism of the Helvet Immo loan referred to in point III.1 of the present decision and held that ‘the contract [set out] in a transparent manner the actual operation of the foreign currency conversion mechanism’ and that the term in that respect was plain and intelligible. Those decisions expressly refer to the judgment of the Court of Justice of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750).
- 25 Some of those recent decisions refer to a ‘communication accompanied by numerical simulations of the effect of exchange rate variations on the repayment plan’, but the question of whether or not that information was provided had no bearing on the decision. In his Opinion, the Advocate General proposed that the question of whether or not that information is provided, as also required by the subsequent legislation (Article L. 312-8 of the Consumer Code, now Article L. 313-25 of that code), be used to assess whether the contractual terms at issue are plain and intelligible.

IV. Reasons for the referral

1. The main subject matter of the contract

- 26 The contract at issue contains several terms, presented as forming part of a currency conversion mechanism, which have the effect of incorporating the foreign exchange risk into the monthly instalments paid by the consumer. The amount of the monthly instalments paid in euros is fixed. In the event of changes in the exchange rate, the repayment represents a smaller amount in Swiss francs than the sum indicated to the consumer when the loan was taken out. That amount is first allocated to interest.
- 27 That contract is therefore a loan denominated in a foreign currency and repayable in the national currency which has not been individually negotiated. As EU law transposed into national law now stands, the mechanism in question forms part of the main subject matter of the contract.
- 28 The terms at issue relate to the rules for allocating payments to interest, the operation of the accounts in Swiss francs, the accounting currency, and in euros, the payment currency, as well as the extension of the term of the loan. It follows that, in the event of an adverse change in the exchange rate, the consumer is liable to pay a capital sum in euros greater than the amount borrowed and that his

monthly instalments will almost exclusively repay interest, thereby reducing the outstanding capital only in a residual manner.

- 29 The referring court therefore raises the question of the discretion which it enjoys in relation to those terms: must they be regarded as an indivisible whole constituting the main subject matter of the contract and, on that basis, incapable of being considered unfair, provided that they are plain and intelligible? Conversely, must it be held that those terms may be individually regarded as unfair, with the exception, already laid down in the case-law, of the term providing for repayment in a foreign currency?

2. The borrower's knowledge of the foreseeable economic context as an element in assessing whether the term is plain and intelligible

- 30 It appears that the borrower received a considerable amount of information before taking out his loan. The documents in the file show that that information emphasised the stable nature of the euro — Swiss franc parity. The consumer could therefore take the view that the risk of his commitment related to other matters, also communicated by the lender, such as the cost of the currency conversion or the fixed nature of the interest rate.
- 31 The loan offer sets out in detail a mechanism according to which monthly instalments in euros repay a loan denominated in Swiss francs. The foreign exchange risk arises from the interplay between various terms. VE points out that the expression 'foreign exchange risk' is not used in the offer.
- 32 It is clear from the documents put before the court that, in times of financial market stress, certain currencies, in particular the Swiss franc, represent 'safe-haven currencies', protecting those who hold them from the fluctuations inherent in such a context. In the light of the documents before the court, that fact could have been known to the lender when the loan was taken out, which is likely because of its own competence and knowledge as a professional lender.
- 33 The national legislation and the case-law require the courts to examine an offer in an objective manner, without taking into account such a context, for example by reference to numerical simulations showing the consequence of changes in the exchange rate on the cost of the loan, but without necessarily requiring that information. The case-law of the Court of Justice refers to the concept of transparency in the examination of whether a term forming part of the main subject matter of the contract is plain and intelligible.
- 34 The referring court therefore raises the question of the specific meaning of that concept for a borrower, who is unaware of the consequences of economic stress on changes in the exchange rate and who should have been informed, or not, of the additional risk thus represented by the economic context in which he entered into his commitment.

- 35 Indirectly there arises the question of assessing the lender's good faith, whose expertise could have led it to analyse that foreseeable change. In that regard, VE provides economic forecasts from the Swiss central bank pre-dating the loan, which he now believes were known to the lender.

Questions referred for a preliminary ruling

- 36 The tribunal d'instance de Lagny-sur-Marne (District Court, Lagny-sur-Marne) (France) is referring the following questions to the Court of Justice of the European Union for a preliminary ruling:
1. Must Article 4(2) of Directive 93/13 be interpreted as meaning that terms stipulating repayments at fixed intervals allocated first to interest and providing for an extension of the term of the contract and for an increase in payments in order to pay the account balance, which [may] increase significantly as a result of exchange rate variations, constitute the main subject matter of a loan denominated in a foreign currency and repayable in the national currency, and that those terms cannot be considered in isolation?
 2. Must Article 3(1) of Directive 93/13 be interpreted as meaning that terms stipulating payments at fixed intervals allocated first to interest and providing for an extension of [the] term [of the contract] and for an increase in payments in order to pay the account balance, which may increase significantly as a result of exchange rate variations, cause a significant imbalance in the rights and obligations of the parties to the contract, in particular in that they expose the consumer to a disproportionate foreign exchange risk?
 3. Must Article 4 of Directive 93/13 be interpreted as requiring that the plainness and intelligibility of the terms of a loan agreement denominated in a foreign currency and repayable in the national currency be assessed by referring, at the time of conclusion of that agreement, to the foreseeable economic context, in the present case the consequences of the economic difficulties of the years 2007 to 2009 on exchange rate variations, taking into account the professional lender's expertise and knowledge, as well as its good faith?
 4. Must Article 4 of Directive 93/13 be interpreted as requiring that the plainness and intelligibility of the terms of a loan agreement denominated in a foreign currency and repayable in the national currency be assessed by ascertaining that a lender, having [the] expertise and knowledge of a seller or supplier, has communicated to the consumer only objective and abstract information, inter alia quantitative information, which does not take into account the economic context capable of affecting exchange rate variations?