Anonymised version

Case C-776/19

Request for a preliminary ruling

Date lodged:

22 October 2019

Referring court:

Tribunal de grande instance de Paris (France)

Date of the decision to refer:

1 October 2019

Applicants:

VB

WA

Defendant:

BNP Paribas Personal Finance SA

TRIBUNAL

DE GRANDE

INSTANCE

DEPARIS

(REGIONAL COURT, PARIS)

[…] **INTERLOCUTORY JUDGMENT**

Delivered on Tuesday 1 October 2019

[…]

APPLICANTS

VB

[…] PARIS

WA

[…]PARIS

[…]

DEFENDANT

S.A. BNP PARIBAS PERSONAL FINANCE

[…] PARIS

[…] **[Or. 2]** […]

INTERLOCUTORY JUDGMENT

[…]

In accordance with an offer made on 19 June 2009, the acceptance of which is not disputed, VB and WA took out a first mortgage loan, called 'Helvet Immo', from BNP Paribas Personal Finance, for an amount of Swiss francs (CHS) 425 525.61, for an initial period of 25 years, in order to purchase an apartment for rental purposes.

The contract […] specified that the credit was financed by a loan taken out in Swiss francs by the lender on the international currency markets, which 'enables you to benefit from the interest rates defined herein'. It also stated that the credit was managed in both Swiss francs (the account currency) and in euros (the payment currency), and that two internal accounts, one in euros and the other in Swiss francs, were opened. As regards the 'exchange transactions', it was stated […] that 'as this is not an international credit transaction, your payments in respect of this loan can be made only in euros for repayment in Swiss francs'. […] It was also stated that the amount of the credit, including exchange charges, was fixed on the basis of EUR 1 = CHF 1.5096. The contract set out the exchange transactions to be carried out, including, in the event of default by the borrower, the possibility for the lender, unilaterally, to replace the Swiss franc by the euro […], and stated that the amount of the exchange charges would be 1.50% for each transaction **[Or. 3]**

The initial repayment amount, over the first 34 months, was EUR 1 033.91, then EUR 1 695.49 for the next 266 months: the amortisation depended on fluctuations in the euro/Swiss franc parity and the contract stated that if the exchange transaction entailed sum below the amount due in Swiss francs, the amortisation

would be ‘less rapid’, and any unpaid part of the capital would be added to the debit balance and, in the opposite case, that repayment of the credit would be more rapid. If the total amount of payments made did not allow the total balance to be settled over the initial loan period plus five years, payments would be increased in order to allow such settlement, within the limit of the INSEE consumer price index over the preceding five years. If, at the end of the fifth year of extension, a debit balance remained, payments would have to continue until the amount in question was settled in full.

The rate, initially set at 4.1%, was subject to review every five years, according to a formula […] with one part fixed at 2.25 and the other equal to the monthly average of the Swiss francs five-year SWAP rate in the preceding calendar month.

The contract provided for the possibility for the borrower to choose, at the time of the five-yearly rate review, an account currency in euros, either by choosing a fixed rate in euros, based on the monthly average rate of long-term State borrowing, plus 2.35%, or 2.55% or even 2.65% according to the remaining repayment period, or by choosing a variable rate in euros, the variable rate being based on a fixed component (2.35%) and the other on the Euribor monthly average.

Annexed to the contract were two simulations, the first relating to the impact of a 2-point increase or decrease in the interest rates taking place from the 61st repayment period on the amount of the payments, the duration and the total cost of the credit, and the second, entitled ‘information relating to the exchange transactions carried out in the context of the management of your credit’, simulated the variations of those factors if the euro should appreciate against the Swiss franc (EUR 1 = CHF 1.5896) and if it should depreciate (EUR 1 = CHF 1.4296).

Following a judicial investigation (a criminal investigation entrusted to an investigating judge), BNPPF was committed for trial before the tribunal correctionnel (Criminal Court) on 29 August 2017, charged with misleading commercial practice.

By a document served by a bailiff dated 22 February 2018, VB and WA brought proceedings against BNP Paribas before this court, claiming, in particular, that the terms establishing the financial mechanism of the loan contract were unfair.

By order of 23 January 2019, the judge responsible for preparing the case for trial […] ordered that the proceedings be stayed pending the definitive outcome of the criminal proceedings.

On an application to stay the proceedings pending a number of decisions of the Cour de cassation (Court of Cassation), the judge responsible for preparing the case for trial raised the suggestion that the CJEU might be requested to give a preliminary ruling on certain questions. **[Or. 4]**

In their final submissions, notified […] on 20 May 2019, VB and WA request the Court to [refer a number of questions to the Court of Justice of the European Union for a preliminary ruling in application of Article 267 TFEU].

[…] **[Or. 5]** […] **[Or. 6]** […] [questions for a preliminary ruling suggested by the plaintiffs in the main proceedings]

In its final submissions, notified […] on 20 May 2019, BNPPF requests the Court to […]

– hold that it is not appropriate to make a reference to the Court of Justice of the European Union for a preliminary ruling;

– consequently, reject VB's and WA's request to make a reference for a preliminary ruling to the Court of Justice of the European Union;

[…] **[Or. 7]** […]

GROUNDS OF THE DECISION:

[…] [national procedural considerations]

The questions for a preliminary ruling

A. Relevant Community law — general matters

As regards unfair terms in consumer contracts, in application of Directive 93/13/EEC of 5 April 1993, transposed into French law, at the time of the contract, by Article L. 132-1 of the Consumer Code, the principle of effectiveness of Community law requires that the court raise of its own motion the possible unfairness of a term (CJEU, *Pannon*, 4 June 2009, Case C-243/08), which is the elaboration of a more general principle of Community consumer law (CJEU, *Radlinger*, 21 April 2016, Case C-377/14), which precludes any procedural mechanism that would prevent the effective application of provisions designed to protect consumers, such as limitation (see, for example, CJEC, *Cofidis* v *Frédout*, 21 November 2002, Case C-473/00) now Article 4(2) of Directive 93/13 states, however, that 'assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the **[Or. 8]** price and remuneration, on the one hand, as against the services or goods supplie[d] in exchange, on the other, in so far as these terms are in plain intelligible language.'

As regards the assessment of the essential subject matter of the contract, in connection with contracts for loans indexed and/or repayable in foreign currencies, the CJEU has held, first, that the exception to the review of the unfairness of a term provided for in Article 4(2) of that directive must be strictly

interpreted (CJEU, 30 April 2014, *Kasler and Others* v *OTP Jelzalogbank Zrt*, Case C-26/13, paragraph 42) and, second, that:

'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.'

In *Andriciuc* (CJEU, 20 September 2017, Case C-l86/16), it was stated that, conversely, the term providing that the loan must be repaid in the same foreign currency as that in which it was taken out (paragraph 40), forms part of the main subject matter of an agreement for a loan in Swiss francs that is repayable in Swiss francs.

As to whether a term is 'plain [and] intelligible', the CJEU has made clear, in particular (CJEU, 20 September 2018, *OTP Bank* v *Ilyes and Kiss*, Case C-51/17, paragraph 78] that:

'In the light of the foregoing, the answer to the third question is 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 **[Or. 9]** *of such a term with regard to his financial obligation*.' (emphasis added)

As regards a sanction, Article 6 of the directive provides that: '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.'

As regards the burden of proving that the seller or supplier has fulfilled its obligations, the CJEU has stated, in relation to consumer credit, that that burden is borne by the seller or supplier and not by the consumer (see CJEU, *Crédit Agricole Consumer Finance* v *Bakkaus*, 18 December 2014, Case C-449/13).

In the interest of clarity, the relevant Community and national law will be examined in greater detail with respect to each of the questions.

B. The limitation plea raised by BNP Paribas and the associated questions

The defendant claims […] that the borrower's requests are 'manifestly time-barred' and that there is therefore no need to submit questions for a preliminary ruling.

It is therefore necessary to examine that point, and the possible need to request the Court of Justice to give a ruling on that question as well, before the other points.

1. The relevant elements of Community and national law

In Community law, the question of the conformity of time limits imposed on consumers was addressed, in particular, in the judgment in the judgment in *Cofidis* v *Frédout*, 21 November 2002, Case C-473/00, where the CJEU ruled (paragraph 36) that 'a procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a seller or supplier is unfair is therefore liable, in proceedings in which consumers are defendants, to render application of the protection intended to be conferred on them by the Directive excessively difficult.'

In a judgment of 29 October 2015 (*BBVA SA* v *Lopez*, Case C-8/14), the CJEU ruled that while the existence of a time limit within which a consumer could raise the unfairness of a contractual term, in repossession proceedings, was not in itself contrary to Community law,

'39 It should be found that the contested transitional provision, in so far as it provides that the time limit begins to run in the present case without the consumers concerned being personally informed of the possibility to raise a new ground of objection in enforcement proceedings which were already in progress before the entry into force of that law, is not such as to guarantee full enjoyment of that period and, therefore, the effective exercise of the new right recognised by the legislative amendment concerned. **[Or. 10]**

40 Taking into account the progress and the special features and complexity of the proceedings and the applicable legislation, there is a significant risk that the time

limit will expire without the consumers in question being able effective and usefully to exercise their rights through legal action because they are unaware of or do not appreciate the exact extent of their rights.'

Furthermore, the Grand Chamber of the Court (CJEU [GC], *Naranjo and Others* v *Cajasur Banco and Others*, 21 December 2016, C-154/15) examined the case-law of the Spanish Tribunal Supremo (Supreme Court), which limited in time, for reasons based on the principle of legal certainty, the effects of a declaration that a term in numerous mortgage loan agreements was unfair, in such a way that payments made before the date of its decision could not be challenged. It considered that such a judicial rule, which it distinguished from a 'reasonable' limitation period, was contrary to EU law since it resulted in consumers, contrary to the wording of the directive, being bound by the term that was declared to be unfair (see paragraphs 70 to 75).

In national law, the defendant relies on […] various decisions of this court and of the cour d'appel de Paris (Court of Appeal, Paris) applying, where the action is brought by the borrower, the five-year limit period laid down in Article 2224 of the Civil Code, and causing the limitation period to beginning to run from the date of acceptance of the loan offer, so that the claims submitted to them were time-barred.

However, *as regards the applicability of the limitation period to claims brought on the basis of the directive*, the First Civil Chamber of the Cour de cassation (Court of Cassation) recently delivered the following decision (*1st Civ., 13 March 2019, Appeal No 17-23.169* […]

'***– The limitation period:***

[…] ***[Or. 11]*** **[…]**

… The cour d'appel (Court of Appeal) was correct to find that the application for the terms at issue to be deemed to be non-existent could not be analysed as an application for a declaration that those terms are null and void and could not therefore be subject to the five-year limitation period; […]

However, the judgment does not address the possibility that claims for repayment of excess interest charged in application of the term declared to be unfair may be time-barred, so that, even if that case-law had to be applied, it would not wholly settle the question.

As regards the starting-point of the limitation period, in other areas the case-law is more flexible: thus, an earlier decision of the First Civil Chamber accepts that, in the case of a breach of the banker's duty to notify [the borrower], time may begin to run only when the first problems in making repayments become evident (1st Civ., 9 July 2009, Appeal No 08-10.820, Bull. 2009, I, No 172). The recent case-law of the Commercial Chamber, in relation to the duty to provide advice, establishes that rule more clearly, with respect to interest-only loans, that is, those

where the capital is repayable at the end of the loan (see Com., 6 March 2019, Appeal No 17-22.668 […]; Com., 13 February 2019, Appeal No 17-14.785[…]). […]

2. Questions raised by the court

As regards the relevance of these questions for the outcome of the dispute, they are clearly relevant, since the loan agreement was entered into in 2008: therefore, if (i) the limitation period is applicable and (ii) the five-year limitation period begins to run when the contract is signed, the claims are time-barred on the ground that they were lodged by writ of 13 October 2016.

The *first question* concerns the compatibility of a limitation period with the principle of effectiveness of Community law, where the consumer is the applicant: some decisions indicate that the existence of a limitation period is not in itself incompatible with Community law, while declaring the device invalid in the light of the facts of the case (*BBVA* v *Lopez*, C-8/14); however, both the judgment in *Cofidis* (C-473/00) and the judgment of the Grand Chamber in *Naranjo* (C-154/15) underline the difficulties to which the existence of such time limits may give rise for a consumer who is unaware of his rights, both from the point of view of the effectiveness of Community law and from that of the principle, laid down in the directive, that consumers cannot be bound by unfair terms.

In addition, the distinction between cases in which the consumer is the applicant, and those in which he is the defendant, although traditional, is open to question, since, if the consumer ceases to make repayments, whether intentionally or because of a **[Or. 12]** genuine inability to meet his commitments, he will be the subject either of other proceedings or of a counter-claim.

It is therefore appropriate to stay the proceedings and to refer the following question to the CJEU:

***First question*: Does Directive 93/13, interpreted in the light of the principle of effectiveness, preclude, in a case such as that in the main proceedings, the application of limitation rules, in the following cases: (a) for a declaration that a term is unfair; (b) for any restitutions; (c) where the consumer is the applicant; and (d) where the consumer is the defendant, including to a counter-claim?**

The *second question* arises only if the answer to the first question is wholly or partly negative. If limitation applies one of those situations, the question then arises as to when time begins to run, in particular in the light of the decisions referred to by BNP Paribas in which the starting-point is fixed at the date on which the contract is signed.

In fact, in the case of a contract with an initial duration of 25 years, and as the limitation period in French law is five years, there might be a risk that borrowers would not be aware of their rights and would not be aware of the very existence of

a difficulty with the exchange rate if that rate remained stable during the first years and deteriorated, for example, after four or five years, then entailing serious difficulties.

[…]

It is therefore also appropriate to stay the proceedings and to refer the following question to the CJEU:

***Second question*: If the answer to the first question is wholly or partly negative, does Directive 93/13, interpreted in the light of the principle of effectiveness, preclude, in a case such as that at issue in the main proceedings, the application of national case-law which fixes the starting-point of the limitation period at the date of acceptance of the loan offer, rather than at the date on which serious financial difficulties arise?**

C. The question whether the terms at issue are to be classified as relating or not relating to the main subject matter of the contract

The classification of the terms at issue as relating or not relating to the main subject matter of the contract is relevant for the examination of the substance of the dispute, since the answer to that question determines whether the unfairness of the terms at issue can be examined if they are 'plain [and] transparent'. **[Or. 13]**

1. Relevant elements of Community and national law

In Community law, there seems to be a tension between, on the one hand, the judgment in *Kasler*, 30 April 2014 (Case C-26/13) and, on the other hand, subsequent case-law, in particular the decisions in *OTP Bank*, 20 September 2018, Case C-51/17, and *Dunai* v *Erste Bank*, 14 March 2019, Case C-l18/17.

As stated above, the judgment in *Kasler*, first of all, established the principle that the reduction of the review of the unfairness of contractual terms provided for in Article 4(2) is to be interpreted strictly, since it is stated that:

'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.'

The judgment in *Dunai*, on the other hand, states (paragraph 48) that:

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

The reasoning employed in the judgment in *Kasler* does not seem to allow the conclusion that, in themselves, the terms relating to the exchange risk constitute either a 'good' or a 'service', or indeed 'remuneration' within the meaning of Article 4(2), which must be interpreted strictly.

As regards national law, the First Civil Chamber, in a set **[Or. 14]** of judgments delivered in February 2019 (see, for example, 1st Civ., 12 December 2018 Appeal No 17-18.491) considered that the terms in question concerned the main subject matter of contracts such as those at issue in the main proceedings.

2. Question raised by the court

As this case concerns an agreement in which, like in *Kasler* but unlike in *Andriciuc* (C-186/16), the sums were to be repaid in national currency, the question of the validity of the principles laid down in the judgment in *Kasler* therefore arises.

Must the reasoning employed in the judgment in *Kasler*, according to which it seems that the term (although very important in the scheme of the agreement) does not form part of the 'main subject matter' of the agreement within the restrictive meaning placed on that term by Article 4(2), since the dispute is not over the exchange charges (1.5%), or must it be considered, on the contrary, that, as in *OTP* and *Dunai*, the terms dealing with the exchange risk come, for that reason alone, within the main subject matter of the agreement?

That question must also be assessed by reference to the application of the FIM Directive (2004/39), since, in the judgment in *Lantos* shortly after the judgment in *Kasler* (CJEU, 3 December 2015, Case C-312/14), the Court had precluded the application of the obligations of the FIM directive in currency agreements, on the grounds, in particular, that:

‘56 In fact, subject to verification by the referring court, those transactions are restricted to converting the amounts of the loan and the monthly instalments denominated in the foreign currency in question (the currency in which payment obligations are to be met) into the domestic currency (the currency in which the payments are actually made), on the basis of the exchange rates for the purchase and sale of the foreign currency.

57 Transactions such as this serve no other function than to be *the manner of performing the fundamental payment obligations under the loan agreement, consisting in the lender’s making the capital available and the borrower’s repayment of the capital together with interest*. Those transactions do not have as their purpose the completion of an investment, as the consumer is seeking only to secure funds with a view to purchasing a consumer good or a service, not, for example, to manage a foreign exchange risk or speculate on a currency’s exchange rate.’

If it were now established that terms relating to the exchange risk in loan agreements come within the main subject matter of the agreement, the question might arise whether the application of obligations analogous to those of the MIF Directive, in particular the obligation to ascertain whether the product offered to the borrower in those agreements was adequate might arise — even though it seems difficult to characterise them as financial products, as certain of the applicants seem to envisage.

A credit agreement like the one at issue in the main proceedings includes a form of bet on the development of parity between the account currency and the payment currency, in which the bank’s interests and the creditor’s **[Or. 15]** interests are opposed, which strongly resembles speculation (the difference is that the currencies were borrowed, not bought). That applies *a fortiori* because the agreement at issue contains not only provisions on the exchange risk but also […] options which, at fixed intervals, allow the financial conditions of the agreement to be altered according to predetermined conditions.

Furthermore, since terms without which the agreement could not continue to exist (see, for example, judgment in *Dunai*, Case C-118/17, paragraph 52) generally come within the main subject matter of the agreement, the applicants rely on the existence of an option to convert the agreement to a euro agreement on specific dates and contend that the terms at issue do not constitute the ‘main subject matter’ of the agreement, since it is expressly envisaged that the agreement might continue in the national currency. It does not appear that the CJEU has been called upon to rule on the possible impact on the analysis of such terms.

It is therefore appropriate to stay the proceedings and to refer the following question to the CJEU:

***Third question*: Do terms such as those at issue in the main proceedings, which provide in particular that the Swiss franc is the account currency and**

the euro the settlement currency, and have the effect that the exchange risk is borne by the borrower, come within the main subject matter of the agreement within the meaning of Article 4(2) of Directive 93/13, where there is no dispute as to the amount of the exchange charges and where there are terms providing for the possibility for the borrower, on fixed dates, to exercise an option to convert the loan into euros according to a predetermined formula?

D. The assessment of the 'plain [and] intelligible' nature of the term

The assessment of the 'plain [and] intelligible' nature of the term is essential for the outcome of the dispute if the terms at issue constitute the main subject matter of the agreement, but also if they do not, since the obligation for the seller or supplier to provide 'plain intelligible' information must also be taken into account in the assessment of the existence or absence of a significant imbalance.

[…] **[Or. 16]** […].

1. The matters to be communicated to the borrower (a specific warning about the exchange rise, simulations, and any criteria to be met by such simulations)

(a) Elements of Community law and of national law

In Community law, the CJEU has held that, in order for a term to be 'plain [and] intelligible' within the meaning of Directive 93/13, it must satisfy stringent criteria, set out in particular in the decision of the CJEU of 20 September 2018, *OTP Bank v Ilyes and Kiss*, Case C-51/17:

'73 In that regard, in the context of loan contracts denominated in a foreign currency, it is apparent from the Court's case-law 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 *cannot be reduced merely to it being formally and grammatically intelligible* (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 44 and the case-law cited).

74 As regards foreign currency lending, like that at issue in the main proceedings, it must be noted, as the European Systematic Risk Board stated in its Recommendation ESRB/2011/1 of 21 September 2011 on lending in foreign currencies (OJ 2011 C 342, p. 1), that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions *and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate* (Recommendation A — Risk awareness of borrowers, paragraph 1) (judgment of 20 September 2017, Andriciuc and Others, C-186/16, EU:C:2017:703, paragraph 49).

75 More specifically, the borrower must, first, *be clearly informed of the fact* that, in entering into a loan agreement denominated in a foreign currency, *he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a depreciation of the currency in which he receives his income in relation to the foreign currency in which the loan was granted. Second, the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency* (see, to that effect, judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, EU:C:2017:703, paragraph 50).

76 Finally, as stated in the twentieth recital of Directive 93/13, it is important that the consumer should actually be given an opportunity to examine all the terms of the contract. Information, provided in sufficient time before concluding a contract, on the terms of the contract and the consequences of **[Or. 17]** concluding it, is of fundamental importance for a consumer in order to decide whether he wishes to be bound by the terms previously drawn up by the seller or supplier (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 70 and the case-law cited).

77 In the present case, in the light of the foregoing, it is for the referring court to take into account, inter alia, the presence in the loan contract at issue of paragraph 10 thereof, entitled "*Declaration of notification of risk*", the wording of which was set out in paragraph 19 of the present judgment, read in conjunction with any additional information provided before the conclusion of that contract. In that last regard, it is apparent from the information before the Court that the borrowers received, inter alia, an additional information sheet relating to the foreign exchange risk, *containing examples of specific calculations of the risk in the event of a depreciation of the Hungarian forint in relation to the Swiss franc*, which it is nonetheless for the referring court to ascertain.

78 In the light of the foregoing, the answer to the third question is 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***.' (emphasis added)

In domestic law, as regards 'Helvet Immo' agreements without simulations, the Cour de cassation (Court of Cassation) has delivered, in particular, the following decisions:

1st Civ., 3 May 2018, Appeal No 17-13.593 […]

[…] **[Or. 18]** *[…]* [extract from the judgment]

To the same effect: 1st Civ., 20 February 2019, Appeal No 17-31.065 […] [extract from the judgment]

As regards *offers to which a simulation was attached*, the First Civil Chamber has delivered, in particular, the following decision:

1st Civ., 12 December 2018, Appeal No 17-18.491

[…] **[Or. 19]** *[…]* [extract from the judgment]

(b) Questions raised by the court

In the judgments which it delivered on 20 February 2019, the First Civil Chamber of the Cour de cassation (Court of Cassation), approving the analysis of the Cour d'appel (Court of Appeal), considered that the terms at issue were 'plain [and] intelligible', for the following reasons, in the case of agreements in which there was no simulation:

– the preliminary loan offer sets out the exchange transactions carried out during the life of the credit and states that the euro/Swiss franc exchange rate will be the rate applicable two working days before the date of the event that determines the transaction and which is published on the website of the European Central Bank;

– it is stated in the offer that the borrower agrees to the Swiss franc/euro and euro/Swiss franc exchange transactions necessary for the functioning and repayment of the credit, and that the lender will convert the balance of the monthly payments after payment of the charges associated with the credit into Swiss francs;

– the offer states that, if the exchange transaction results in a sum lower than the amount payable in Swiss francs, the amortisation of the capital will be less rapid and any unpaid capital in respect of a repayment period will be entered on the debit side of the account in Swiss francs, and that it is made clear that the amortisation of the capital of the loan will change according to variations in the exchange rate applied to the monthly payments, upwards or downwards, that that change may entail the prolongation or reduction of the loan amortisation period and, where appropriate, alter the total repayment cost;

– the articles 'internal account in euros' and 'internal account in Swiss francs' describe the transactions carried out in each payment period to the credit and the debit of each account, and the contract explains in transparent terms the actual functioning of the foreign currency conversion mechanism in transparent terms;

As regards the contracts to which a simulation is annexed, the following ground was also set out: **[Or. 20]**

– annexed to the loan offer was a simulation, with figures, on the basis of which the influence of the exchange rate fluctuations on the capital borrowed and the ensuing duration of the loan could be assessed.

It should be observed, however, that in those cases the Avocat Général attached to the First Civil Chamber had delivered the following Opinion […], agreeing with this court's case-law preceding the judgment in *OTP*:

'That difference between the two sets of judgments seems to me to be sufficiently important to justify, as the court decided, the two situations being treated separately.

It seems to me that the former judgments, unlike the latter, fail to have regard to the European Court's interpretation of the criteria of plainness and intelligibility in Article 4(2) of Directive 93/13, which is applicable to agreements entered into previously, in that they specified, solely in the light of the loan offer and the information in the projected amortisation table, that the term at issue put the consumer in a position to evaluate the economic consequences for his financial obligations.

Although, at the formal and grammatical level, it may be accepted that the contractual provisions are accessible to a reasonably well informed and reasonably observant and circumspect consumer, they do not in themselves make it possible to evaluate sufficiently to which the variations in the exchange rates expose him, if he receives his income in the payment currency and not in the foreign currency of payment.

Conversely, provided that that consumer is given a simulation of variations in the exchange rate, with examples showing figures, he is in a position to be aware of the economic consequences caused by a depreciation in the domestic payment currency against the foreign currency.'

Those decisions issued by the highest French court, and the partly contrary Opinion of the Avocat Général attached to that court, give rise to serious difficulties of interpretation for this court, in proceedings which concern more than 1 000 cases before the 9th Civil Chamber of the tribunal de Paris (Regional Court, Paris) alone.

Whether or not a simulation was provided, the expression 'exchange risk' does not appear anywhere in the offer […].

The closest reference is found […] in the paragraph 'Exchange transactions', which deals with the opposite situation to that which has arisen, namely the situation in which the borrower no longer received income in euros and would have to obtain euros in order to repay the loan, and would thus bear the risk.

Mention may also be made of the references, in a different part of the offer, […] concerning the fact that the amortisation of the capital will be 'less rapid' where 'the exchange transaction results in a sum less than the amount payable in Swiss francs'. **[Or. 21]**

The Community case-law seems to require not only that it is possible to infer from references in the agreement and the documentation the existence of an exchange risk and its impact, which the Cour de cassation (Court of Cassation) seems to have regarded as sufficient, but that those risks are *explicit*, so that they may be understood not only by specialised judges but also by consumers with an average level of ability and attention.

In the judgment in *Andriciuc* (20 September 2017, Case C-186/16) the Court of Justice had ruled that:

'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 requires that, in the case of loan agreements, financial institutions must provide borrowers with sufficient information to enable them to take prudent and well-informed decisions. In that connection, that requirement means that a term under which the loan must be repaid in the same foreign currency as that in which it was contracted 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*.'

The CJEU, on 20 September 2018, in its judgment in *OTP Bank* v *Ilyes and Kiss*, Case C-51/17), had provided important clarification of the actual requirements which that entails:

'74 financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions *and should at least encompass the impact on instalments of a* ***severe depreciation of the legal tender*** *of the Member State in which a borrower is domiciled and of an* ***increase of the foreign interest rate***;

75 [the consumer] must, first, *be clearly informed of the fact that*, in entering into a loan agreement denominated in a foreign currency, *he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a depreciation of the currency in which he receives his income in relation to the foreign currency in which the loan was granted. Second, the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency*.' (emphasis added)

Although, in *OTP*, the borrowers had received (paragraph 77) a sheet constituting 'notification of the risk', that is not the case here. The offer does not use — except in the paragraph mentioned above — the word 'risk' or any equivalent expression, such as 'danger' or 'difficulty', that might alert an average consumer to the consequences of an unfavourable variation in the Swiss France exchange rate if he receives his income in euros. **[Or. 22]**

It is therefore appropriate to stay the proceedings and to submit the following question to the CJEU:

***Fourth question*: Does Directive 93/13, interpreted in the light of the principle of effectivity of Community law, preclude national case-law in which a term or set of terms, such as those at issue in the main proceedings, are considered to be 'plain [and] intelligible' for the purposes of the directive, on the grounds that:**

– the preliminary loan offer sets out in detail the exchange transactions carried out during the life of the credit and makes clear that the euro/Swiss franc exchange rate will be that applicable two working days before the date of the event that determines the transaction and which is published on the website of the European Central Bank;

– it is stated in the offer that the borrower agrees to the Swiss franc/euro and euro/Swiss franc exchange transactions necessary for the transaction and repayment of the credit, and that the lender will convert the balance of the monthly payments after payment of the charges associated with the credit into Swiss francs;

– the offer states that, if the exchange transaction results in a sum lower than the amount payable in Swiss francs, the amortisation of the capital will be less rapid and any unpaid capital in respect of a repayment period will be entered on the debit side of the account in Swiss francs, and that it is made clear that the amortisation of the capital of the loan will change according to upwards or downwards variations in the exchange rate applied to the monthly payments that that change may result in the extension or reduction of the loan amortisation period and, where appropriate, alter the total repayment cost;

– the articles 'internal account in euros' and 'internal account in Swiss francs' describe the transactions carried out in each payment period to the credit and the debit of each account, and the contract explains in transparent terms the actual functioning of the foreign currency conversion mechanism in transparent terms;

and although there is no express reference in the offer to the 'exchange risk' which is borne by the borrower since he does not receive income in the account currency, or any explicit reference to the 'interest rate risk'?

If that fourth question should be answered in the affirmative, the question then arises of the *effect of the simulations* attached to the offer in certain cases (including this case), in particular the simulation entitled 'information relating to the exchange transactions which will be carried out in the course of managing your credit', which simulate the variations of those elements in the event of an appreciation of the euro against the Swiss franc and a depreciation of the euro by reference to the exchange rate on the date of the agreement […]. Those simulations seem to be absent in the present case (although the agreement was concluded at a time when they were generally attached).

In fact, the Avocat Général in the abovementioned cases, applying case-law of this court that preceded the judgment in *OTP*, had considered that that simulation was sufficient in itself to satisfy the conditions laid down in that judgment (Case C-51/17). **[Or. 23]**

However, while it cannot be disputed that that information, in particular the duration of the credit and the total cost of the credit, provides useful additional information by comparison with agreements in which that information does not appear, it should be observed *at the outset* that those simulations, too, do not use terminology of such a kind as to alert borrowers to the existence of 'risks', 'dangers' or 'difficulties' within the meaning of paragraphs 74, 75 and 77, in particular, of the judgment in *OTP* (Case C-51/17).

Nor does the very neutral title of the simulation relating to the exchange rate ('information relating to the exchange transactions which will be carried out in the course of managing your credit') reveal that the page in question includes simulations of variations in the exchange rates, unlike the preceding page ('simulation of changes in the interest rate of your credit' […]).

[…]

It is therefore appropriate to stay proceedings and to submit the following question to the CJEU:

***Fifth question*: If the answer to the fourth question is in the affirmative, does Directive 93/13, interpreted in the light of the principle of effectiveness of Community law, preclude national case-law according to which a term or set of terms, such as those at issue in the main proceedings, are 'plain [and] intelligible' for the purposes of the directive, when in addition to the elements referred to in the fourth question there is only a simulation of a reduction of 5.29% of the payment currency by reference to the account currency, in an agreement having an initial duration of 25 years, without any reference to terms such as 'risk' or 'difficulty'?**

2. Status of the elements of the criminal proceedings, in particular of the training pamphlets and the arguments, and the burden of proof

a) Elements of Community law and of national law

In Community law, it has been held that whether or not a term is unfair must be assessed by reference, 'at the time of conclusion of the contract, *to all the circumstances attending the conclusion of the contract*' **[Or. 24]** (CJEU, 20 September 2018, *OTP Bank v Ilyes and Kiss*, Case C- 51/17, paragraph 83).

Furthermore, it was stated in that judgment that 'financial institutions *must provide borrowers with adequate information* to enable them to take well informed and prudent decisions' (paragraph 74).

That choice of words suggests that the burden of proving the plain and intelligible nature of the term is borne by the professional party; however, it does not appear that the CJEU has taken a clear stance on that point.

In the related field of consumer credit, on the other hand, it has been held that, in application of Directive 2008/48/EC (see CJEU, *CA CF v Bakkaus*, 18 December 2014, Case C-449/13 paragraphs 27 to 32, especially paragraph 28), the burden of proving that the lender's obligations under that directive had been fulfilled was borne by the lender, which was required to retain evidence that such obligations had been fulfilled.

In national law, it should be borne in mind that a judicial investigation resulted in two investigating judges considering, in an order of 29 August 2017 […], that there was 'sufficient evidence' against BNPPF for them to be guilty of misleading commercial practices (within the meaning of Directive 2005/29/EC, transposed in Article L. 121-2 of the Consumer Code in the version applicable), concerning, specifically, the exchange risk.

The prosecution produced, in a number of civil cases, documents […] suggesting, for example, that warnings about the exchange risk were removed from the bank's internal training documents and that the marketing material was designed to play down or even deny the existence of exchange risks.

The Cour d'appel de Paris (Court of Appeal, Paris), notably in a judgment of 6 January 2017 (RG No 15/14128) […], held that it was not proved that those documents and leaflets had been conveyed to the borrowers by the bank, rather than by the firm of wealth management advisers, and therefore did not take them into account.

(b) Questions raised by the court

The sixth question concerns the burden of proof, since the communication of certain information likely to influence the 'plain [and] intelligible' nature of the terms at issue is disputed:

***Sixth question*: Is the burden of proving the 'plain [and] intelligible' nature of a term for the purposes of Directive 93/13 borne, including in respect of the circumstances attending the conclusion of the contract, by the professional party or by the consumer? [Or. 25]**

Now that that background has been established, the question arises whether the professional seller or supplier bears the burden of proving the probative value of the evidence relating to the sales techniques, which are part of the 'circumstances attending the conclusion of the contract' (testimony of former employees, advertising material, training documents, etc.).

The reasoning followed by the Cour d'appel de Paris (Court of Appeal, Paris), notably in its judgment of 6 January 2017, requires applicants to prove, apart from the existence of sales strategies intended for the bank's marketing personal and for intermediaries, that they were the addressees of the arguments in question — as that type of communication is general made orally, and that it was the bank, rather than the intermediary (financial investment or other adviser) that communicated them.

In civil proceedings before the tribunal de grande instance (Regional Court) in France, it is very rare for parties or witnesses to be heard, for reasons mainly to do with the courts' workload, and such proof is in practice therefore very difficult or indeed impossible to adduce.

Different reasoning would consist in considering, first, that those elements give rise to a rebuttable presumption that the information contained in those documents was supplied, including orally, to borrowers and, second, that the fact that the information was communicated by a wealth management or other adviser is immaterial, since the professional seller or supplier must be responsible for the acts of the intermediaries whom it has chosen.

In fact, the professional seller or supplier is supposed to control the distribution channels for its products, whether with respect to the choice of intermediaries or of marketing material in the wide sense, and is in a position to have at its disposal evidence (for example, an instruction to remove a particular sheet that causes problems) that the evidence produced by the applicants was not actually used or was no longer used at the time of conclusion of the agreement.

It is therefore appropriate to stay proceedings and to submit the following question to the CJEU:

***Seventh question*: If the burden of proving the plain and intelligible nature of the term is borne by the professional party, does Directive 93/13 preclude national case-law in which it was held that, in the presence of documents relating to sales techniques, it is for the borrowers to prove, first, that they were the addressees of the information contained in those documents and, second, that it was the bank that communicated that information to them, or, conversely, does it require that that evidence constitutes a presumption that**

the information contained in those documents was transmitted, including orally, to borrowers, a rebuttable presumption that it is for the professional party, which must assume responsibility for the information communicated by the intermediaries which it has chosen, to rebut? [Or. 26]

E. The concept of significant imbalance

On the assumption that (a) the terms at issue do not come within the main subject matter of the agreement or (b) although they come within the main subject matter of the agreement, they are not drafted in a 'plain [and] intelligible' manner, the court would then be required to ascertain whether or not a significant imbalance exists.

1. Relevant elements of Community law and of national law

The assessment of the existence of a 'significant imbalance' in the rights and obligations of the parties must be carried out even if the court has held that the term was not 'plain [and] intelligible' — in other words, the fact that the term is not plain and intelligible does not suffice to characterise the existence of a significant imbalance, but is among the factors to be taken into account (see, by implication, CJEU, order in *Lupean*, Case C-119/17).

In order to assess the existence of such an imbalance, it is appropriate to take into account 'the expertise and knowledge of the seller or supplier', and also of imbalances which become apparent only during the performance of the agreement (CJEU, 20 September 2017, *Andriciuc*, Case C-186/16, paragraph 54).

The CJEU has stated, in particular, that:

'56 In that connection, it is for the referring court to assess, having regard to all of the circumstances of the case in the main proceedings, taking account in particular of the expertise and knowledge of the seller or supplier, in the present case the bank, as far as concerns the possible variations in the rate of exchange and the inherent risks in contracting a loan in a foreign currency, first, the possible failure to observe the requirement of good faith and second, the existence of a significant imbalance within the meaning of Article 3(1) of Directive 93/1.

57 In order to ascertain whether a term, such as that at issue in the main proceedings, causes a 'significant imbalance' in the parties' rights and obligations arising under the contract to the detriment of the consumer, contrary to the requirement of good faith, *the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations* (see, to that effect, judgment of 14 March 2013, Aziz, C-415/11, EU:C:2013:164, paragraphs 68 and 69).'

Because of its positions on the 'clear [and] intelligible' nature of the terms at issue, the Cour de cassation [Court of Cassation] did not adopt a stance on that question. **[Or. 27]**

2. Question of the court

It is indisputable […] [that] the bank has much greater means at its disposal than a consumer to foresee economic developments and the exchange risk.

In the present agreement, each of the parties bears a part of the exchange risk: the bank is the winner if the Swiss franc appreciates and the loser in the opposite situation.

However, there might be an imbalance in the exposure to the exchange risk: BNP's exposure is limited to the amount borrowed (at worst, the entire sum remaining payable would be repaid, at the end of five years, by a single euro ….) the borrower's exposure does not seem to be limited in the same way, even if the interpretation that the total amount of the repayments would be subject to an upper limit by the duration of the extension, which is very much open to debate, were accepted. That imbalance may be aggravated by the fact that the bank receives more interest the more the repayment is delayed.

It is not possible for [this] court, moreover, owing to the structure of the agreement and the number of variables involved, to model the consequences of variations in the exchange rates and the interest rates and the likelihood that such variations will occur.

Conversely, the possible gain for the consumer is limited to the capital borrowed, less the capital sums repaid during the first five years. The bank also maintains that the borrowers have enjoyed a more favourable interest rate.

It is therefore appropriate to stay the proceedings and to submit the following question to the CJEU:

***Eighth question*: May the existence of a significant imbalance be characterised in an agreement such as that at issue in the main proceedings in which both parties bear an exchange risk, when, first, the professional party has greater means than the consumer to foresee the exchange risk and when, second, the risk borne by the professional party is subject to an upper limit while that borne by the consumer is not?**

[…]

ON THOSE GROUNDS:

The Tribunal (Regional Court), […] **[Or. 28]**

STAYS proceedings until the Court of Justice of the European Union has given a preliminary ruling on the following question:

***First question*: Does Directive 93/13, interpreted in the light of the principle of effectiveness, preclude, in a case such as that in the main proceedings, the application of limitation rules, in the following cases: (a) for a declaration that a term is unfair; (b) for any restitutions; (c) where the consumer is the applicant; and (d) where the consumer is the defendant, including to a counter-claim?**

***Second question*: If the answer to the first question is wholly or partly negative, does Directive 93/13, interpreted in the light of the principle of effectiveness, preclude, in a case such as that at issue in the main proceedings, the application of national case-law which fixes the starting-point of the limitation period at the date of acceptance of the loan offer, rather than at the date on which serious financial difficulties arise?**

***Third question*: Do terms such as those at issue in the main proceedings, which provide in particular that the Swiss franc is the account currency and the euro the settlement currency, and have the effect that the exchange risk is borne by the borrower, come within the main subject matter of the agreement within the meaning of Article 4(2) of Directive 93/13, where there is no dispute as to the amount of the exchange charges and where there are terms providing for the possibility for the borrower, on fixed dates, to exercise an option to convert the loan into euros according to a predetermined formula?**

***Fourth question*: Does Directive 93/13, interpreted in the light of the principle of effectivity of Community law, preclude national case-law in which a term or set of terms, such as those at issue in the main proceedings, are considered to be 'plain [and] intelligible' for the purposes of the directive, on the grounds that:**

– the preliminary loan offer sets out in detail the exchange transactions carried out during the life of the credit and makes clear that the euro/Swiss franc exchange rate will be that applicable two working days before the date of the event that determines the transaction and which is published on the website of the European Central Bank;

– it is stated in the offer that the borrower agrees to the Swiss franc/euro and euro/Swiss franc exchange transactions necessary for the transaction and repayment of the credit, and that the lender will convert the balance of the monthly payments after payment of the charges associated with the credit into Swiss francs;

– the offer states that, if the exchange transaction results in a sum lower than the amount payable in Swiss francs, the amortisation of the capital will be less rapid and any unpaid capital in respect of a repayment period will be

entered on the debit side of the account in Swiss francs, and that it is made clear that the amortisation of the capital of the loan will change according to upwards or downwards variations in the exchange rate applied to the monthly payments that that change may result in the extension or reduction of the loan amortisation period and, where appropriate, alter the total repayment cost;

– the articles 'internal account in euros' and 'internal account in Swiss francs' describe the transactions carried out in each payment period to the credit and the debit of each account, and the contract explains in transparent terms the actual functioning of the foreign currency conversion mechanism in transparent terms;

and although there is no express reference in the offer to the 'exchange risk' which is borne by the borrower since he does not receive income in the account currency, or any explicit reference to the 'interest rate risk'?

***Fifth question*: If the answer to the fourth question is in the affirmative, does Directive 93/13, interpreted in the light of the principle of effectiveness of Community law, preclude national case-law according to which a term or set of terms, such as those at issue in the main proceedings, are 'plain [and] intelligible' for the purposes of the directive, when in addition to the elements referred to in the fourth question there is only a simulation of a reduction of 5.37% of the payment currency by reference to the account currency, in an agreement having an initial duration of 25 years, without any reference to terms such as 'risk' or 'difficulty'?**

***Sixth question*: Is the burden of proving the 'plain [and] intelligible' nature of a term for the purposes of Directive 93/13 borne, including in respect of the circumstances attending the conclusion of the contract, by the professional party or by the consumer?**

***Seventh question*: If the burden of proving the plain and intelligible nature of the term is borne by the professional party, does Directive 93/13 preclude national case-law in which it was held that, in the presence of documents relating to sales techniques, it is for the borrowers to prove, first, that they were the addressees of the information contained in those documents and, second, that it was the bank that communicated that information to them, or, conversely, does it require that that evidence constitutes a presumption that the information contained in those documents was transmitted, including orally, to borrowers, a rebuttable presumption that it is for the professional party, which must assume responsibility for the information communicated by the intermediaries which it has chosen, to rebut?**

***Eighth question*: May the existence of a significant imbalance be characterised in an agreement such as that at issue in the main proceedings in which both parties bear an exchange risk, when, first, the professional**

party has greater means than the consumer to foresee the exchange risk and when, second, the risk borne by the professional party is subject to an upper limit while that borne by the consumer is not?

[…]