BRIEFING

European Parliament

Unfair terms in Swiss franc loans

Overview of European Court of Justice case law

SUMMARY

In the first decade of the 21st century, loans denominated in or indexed to foreign currencies, in particular the Swiss franc, became very popular in a number of EU Member States, including Greece, Croatia, Hungary, Austria, Poland, Romania, and Slovenia, and also in two non-EU countries, Montenegro and Serbia. For a certain period, in some Member States these loans became the most popular type of loan issued to consumers. By pegging loans to a stable foreign currency, banks could lend more money to the same consumer by virtue of interest rates being lower than those for the same type of loan expressed in the national currency.

However, when, as a result of the global economic crisis, the rate of exchange between the Swiss franc and these national currencies (zlotys, forints, kunas, etc.) soared, consumers found themselves trapped. Often, they had to repay as much as twice the value of the loan taken, and could not escape the unfavourable contract by simply selling the property they had bought, as this would cover only a fraction of their debt.

While certain Member States implemented mechanisms aimed at protecting consumers and bringing the situation under control, the case law of the European Court of Justice (ECJ), based on dynamic interpretation of the Unfair Terms Directive (93/13), has proved to be a significant factor in securing effective consumer protection. This briefing explains the legal significance of the relevant ECJ judgments, against the backdrop of the Swiss franc loan situation in Europe.

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Introduction

In a number of recent judgments, the European Court of Justice (ECJ) has been called upon by national courts to interpret the Unfair Terms Directive (93/13/EEC) with regard to foreign currency loans, especially those connected in some way to the Swiss franc (CHF), and commonly referred to as 'Swiss franc loans'. Whenever there are high interest rates in a given national currency, banks can offer, subject to legal and regulatory requirements, loans either in a foreign currency or loans linked in some way to a foreign currency (indexed or denominated in that currency). In the short term, this benefits debtors, as they **have access to credit subject to a lower interest rate**. However, in the long run, if the debtor has sources of income in the national currency, but takes a loan in a foreign currency, he or she may sooner or later become **exposed to risks connected to an unfavourable change in interest rates**. This is especially true for long-term obligations, such as mortgage loans, which are repaid over a period of 25 to 30 years (or even longer).[1] Alongside national currency loans, where no foreign currency is involved (the loan is paid out, expressed and paid back in the national currency, with interest being calculated in accordance with rates applicable to that currency), there are three main types of foreign currency loan:[2]

- **foreign currency loans** (e.g. in Swiss francs, or euros in Member States where the euro is not the currency), where the sum of the loan is expressed in a foreign currency and instalments are made in the foreign currency;
- **loans indexed (pegged) to a foreign currency**, where the loan's value is expressed in the national currency and the money made available to the consumer is in the national currency, but the consumer's debt to the bank is expressed in a foreign currency (usually according to the exchange rate on the day of making the loan available to the consumer); the instalments are paid in national currency, but their actual value (towards repayment of the debt) depends on the exchange rate on the day of payment of the instalment;
- **loans denominated in a foreign currency**, where the value of the loan is expressed in foreign currency (e.g. Swiss francs or euros), but is made available to the consumer in national currency (e.g. Polish zlotys – PLN); the consumer pays instalments in the national currency towards repaying a given debt expressed in foreign currency; the instalments are calculated on the basis of the exchange rate of the foreign currency;

The next section briefly explains the reasons why Swiss franc loans appeared on the financial markets in Europe and how exchange rate changes affected debtors with such loans. Following that, the briefing presents and analyses the relevant ECJ case law.

Swiss franc loans in central and eastern Europe

Mortgages denominated in or indexed to a foreign currency became popular in central and eastern Europe from December 2004 onwards.[3] Countries where such loans were systematically offered include **Greece, Croatia, Hungary, Austria, Poland, Romania** and **Slovenia**, and also two non-EU countries, **Montenegro** and **Serbia**. As of April 2011, these loans already constituted 40 % of the loan portfolio of commercial banks in Poland, with approximately two thirds of such loans pegged to the Swiss franc (CHF).[4] As of 31 December 2019, there were 451 630 loans in Poland denominated or indexed in the Swiss franc, and the total value of mortgage loans expressed in or pegged to the Swiss franc amounted to PLN 101.8 billion.[5] Both the value and number of Swiss franc loans are steadily diminishing (from 520 810 loans in December 2016 down to 451 630 at the end of 2020). Nonetheless, at the end of 2019 Swiss franc loans still represented 19.6 % of the value and 5.9 % of the number of mortgage loans in Poland.[6] In Romania, Swiss franc mortgage loans numbered 8 939 in June 2019, down from 10 021 in June 2018, with a balance worth 1.78 billion Romanian lei – RON (a drop from RON 1.96 billion the year before). Between 2005 and 2008, Polish banks granted loans that were merely pegged to the Swiss franc, but customers never received any Swiss francs on their accounts.[7] This meant that they were only 'virtual' foreign currency loans (for accounting purposes).[8] Although most popular in central and eastern Europe, 'Swiss franc loans' also appeared occasionally

in western Europe, for instance BNP Paribas offered a 'Helvet Immo' programme, aimed at granting CHF-pegged loans to buyers of real estate for rent.

Swiss franc mortgages were popular because of the **very low interest rates** for loans expressed in Swiss francs as compared with mortgages in national currencies. For instance, in Poland, in July 2008 the LIBOR 3M basic rate stood at 2.79 %, and the average margin applied by banks for CHF loans amounted to 1.5 %, allowing loans to be subject to a 4.2 % interest rate. In contrast, the WIBOR 3M basic rate, applicable to loans denominated in Polish zlotys (PLN), amounted to 6.66 % which, added to the average margin (1.5 %), gave an annual interest rate of 8.16 %, almost double the interest rate for 'franc loans'. This had a direct impact upon monthly instalments which, for a loan of PLN 300 000, would amount to PLN 2 100 on a Polish zloty loan and PLN 1 400 on a 'Swiss franc loan'.[9]

However, **since late 2008, the value of the Swiss franc against other currencies such as the Polish zloty, the Hungarian forint (HUF) and the Croatian kuna (HRK) has changed radically**. For instance, the exchange rate between the Polish zloty and the Swiss franc soared from PLN 1.96 per Swiss franc (in August 2008) to PLN 3.21 in February 2009, and PLN 4.29 in January 2015.[10] The reasons for the radical appreciation of the CHF were twofold: the financial crisis that began in 2006 and the Swiss National Bank's decision of 15 January 2015 to unpeg the exchange rate.[11]

Table 1 – Changes in CHF exchange rates for selected currencies

Period	EUR	USD	GBP	PLN	SEK	DEM
2007-2017	+42.5 %	+14.8 %	+75.5 %	+67.2 %	+48.7 %	---
1997-2007	---	+26.3 %	+3. 8%	-11.5 %	+5 %	-4.6 %
1987-1997	---	-7.6 %	+1.7 %	+296.5 %*	+21.2 %	+0.5 %
1977-1987	---	+56.2 %	+58.5 %	---	+95.3 %	+18.6 %
1967-1977	---	+107.9 %	+169.8 %	---	+91.1 %	+12.3 %

EUR: euro; USD: US dollar; GBP: pound sterling; PLN: Polish zloty; SEK: Swedish krona; DEM: Deutsche Mark.

Source: S.J. Adamczyk and J. Czabański (2018), abridged and adapted.

Anti-spread rules and conversion programmes

Countries where many consumers took out Swiss franc credits have attempted to regulate the issue in various ways so as to remedy the risks to which consumers are exposed. In **Poland**, a 2008 Financial Supervision Authority recommendation required banks to enable consumers to repay the credit in the foreign currency; this became possible as of 1 July 2009.[12] Banks were to stop using two types of exchange rate – a general one (with smaller spreads) and a specific one only for repayment of loans (with higher spreads). However, banks responded by demanding excessive fees for the preparation of an annex to the original loan agreement, allowing repayment of the loan in the foreign currency.[13] As a result, few consumers actually benefited from the recommendation.[14] Finally, in 2011, Poland adopted the **Anti-Spread Act**, to address loans indexed and denominated in a foreign currency, allowing consumers to pay instalments in the foreign currency.[15] This allowed them to purchase Swiss francs or euros on the market, instead of having to accept arbitrary exchange rates imposed by the banks.[16] As this right was enshrined in law, banks could no longer charge an exorbitant fee for allowing consumers to start repaying in the foreign currency.[17]

The first country to provide relief from Swiss franc credits was **Hungary**, doing so just two months before the Swiss National Bank unpegged the CHF exchange rate. The Hungarian law was prepared in November 2014 and implemented in February 2015, benefiting some 1.3 million households. The conversion was made at the CHF/HUF exchange rate on 7 November 2014, regardless of the

exchange rate at the time of borrowing. This reduced the value of Swiss franc denominated loans from CHF 14.8 billion (end of 2014) to CHF 3.8 billion (after conversion).[18]

Other countries followed Hungary's lead – Croatia, Cyprus, Montenegro, Romania and Serbia[19] – using either a state-sponsored conversion model (e.g. Hungary and Croatia) or a private-sector model (Romania).[20] In **Romania**, the parliament passed legislation unanimously in 2016 converting Swiss franc mortgages to the lei. One year later, however, this was declared unconstitutional by the Romanian Constitutional Court. In the end, the Romanian private-sector conversion programme was implemented: participation by individual banks was voluntary, the specific conditions were kept secret by the banks, and researchers assume that the costs to consumers were higher than in Hungary and Croatia.[21] The **Croatian conversion law**, implemented on 30 September 2015, differed from Hungary's as it offered the possibility to convert loans to either the euro or the kuna, but in the latter case loans were to be pegged to the euro (instead of the Swiss franc). As a result, borrowers were 'placed ... in the same position that they would have been in, had their loans been denominated in euros from the very beginning (or denominated in kuna with currency clauses linking payments to euros)'.[22] The exchange rate applicable was that of the time of making the loan available to consumers, not at the time of legislation (as in Hungary). The legislation affected some 55 000 households, as 40 % of mortgages in Croatia were denominated in CHF.[23]

Some countries, notably Poland and Greece, have not taken measures to assist consumers who have found themselves in economic distress. For instance in April 2019, the **Greek Supreme Court** dismissed an action seeking to allow debtors to repay in euros according to the exchange rate at the time of taking credit, finding that banks had given them sufficient warning of the risk of taking out Swiss franc loans. In Poland, a conversion law was discussed, but a proposal never materialised.

ECJ case law on foreign currency loans for consumers

Legal background and need for dynamic interpretation

The involvement of the ECJ in disputes between banks and debtors who have taken out foreign currency loans stems from the EU's adoption in 1993 of the Unfair Terms Directive, since implemented in all EU Member States. That directive prohibits unfair terms in consumer contracts, but its scope is limited in three ways. First, it applies only to consumers understood as natural persons acting outside any economic or professional activity. Legal persons, even if they are non-profit NGOs, are not protected by the directive. Sole traders who have taken out loans to start their economic activities are also beyond the directive's remit. Second, the directive applies only to terms that were not individually negotiated with consumers. This includes, in particular, standard terms drafted in advance, but also terms prepared one-sidedly by the bank, even for just one consumer. However, if the consumer had actually negotiated certain terms in the contract (and the bank can prove it in court), the directive is not applicable. Third, the directive's protection extends only to terms that do not describe the main subject matter of the directive, i.e. only to 'non-essential' elements (the *accidentalia negotii*). Therefore, for the directive to be invoked it is necessary to analyse, first, whether the terms of the loan contract referring to a foreign currency actually describe its main subject matter (in which case the directive does not apply) or, on the contrary, its non-essential elements (in which case the directive does apply). The risk of courts in various Member States arriving at diverging interpretations of the notion of an 'unfair term' with regard to 'Swiss franc credits' is always present, hence the need for an **interpretive intervention of the ECJ, to provide for harmonious application of the directive** across the EU. The Court cannot, however, intervene on its own motion, but must wait for a national court to seek guidance through the preliminary reference procedure (Article 267 TFEU). When such guidance is sought, the Court is further bound by the scope of the question and the facts of the case. The interpretation provided by the Court in this procedure helps to harmonise understanding of the directive across the EU.

Below, ECJ judgments concerning Swiss franc mortgages are presented in chronological order.

Kásler v *OTP* (C-26/13, 30.4.2014)

The facts of the case were as follows: Mr and Mrs Kásler took out a 25-year mortgage loan denominated in CHF. The contract provided that they would receive a loan amounting to HUF 14.4 million, but that 'the amount of the loan in [Swiss francs] will be determined at the buying rate for the [Swiss franc] applied by the bank on the date of advance of the funds'. Furthermore, according to the contract, 'after the funds have been advanced, the amount of the loan, the related interest, the administration fees and default interest and other charges will be determined in the foreign currency'. Monthly instalments were to be paid in Hungarian forints, but the exact amount to be paid was determined by the bank 'by reference to the selling rate of exchange for the foreign currency applied by the bank on the day before the due date'. Mr and Mrs Kásler considered that the clause allowing the bank to calculate the monthly instalments in forints, on the basis of its own HUF/CHF exchange rate, was unfair. Specifically, they considered that the bank was gaining an unfair advantage on the spread between the buying and selling exchange rate, as the loan was disbursed according to the buying rate, whereas the instalments were to be repaid according to the selling rate of Swiss francs by Jelzálogbank. The Káslers took Jelzálogbank to the Hungarian courts, and in the end the case found itself before the Hungarian Supreme Court, which posed the ECJ a number of questions regarding the interpretation of the Unfair Terms Directive. Specifically, the court wanted to know whether a term of a mortgage loan contract denominated in a foreign currency, providing that the debt is to be repaid in national currency according to the rate of exchange of the foreign currency, falls within the '**definition of the main subject-matter of the contract**' (and as such, would not be subject to evaluation as to its fairness according to Article 4(2) of the directive). It also asked, were the term not part of the contract's main subject-matter, whether the **spread** between the foreign currency buying and selling rates should be considered **remuneration** of the bank (and, as such, also escape the unfairness test); whether the notion of '**clear and intelligible**', as required by the directive, referred to grammatical clarity only, or also to the economic sense of a term; and whether the national court could eliminate the unfair term and replace it with another (in a situation where, if the term was deleted and not replaced the contract could not continue to exist, but a national default rule[24] could replace it, allowing the contract to continue.

Concerning the scope of the notion of the '**main subject-matter of a contract**' under the Unfair Terms Directive, the Court did not provide a definite answer, requesting the national court to verify whether the term in question laid down an 'essential obligation' of the consumer, which 'characterised' the contract. Thus, it remained for the national court to decide, and the guidance provided by the Court was not conclusive ('main subject matter' and 'essential obligation' seem, by and large, to be synonymous notions). However, the ECJ was clearer on whether the spread between (buy and sell) exchange rates could be treated as **remuneration** of the bank, indicating clearly that it could not. On the question of transparency of a contractual term, as required by the directive, the Court clearly indicated that this was not limited to purely grammatical and linguistic clarity, but that a term must also set out **transparently** the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and the one provided for by other contractual terms relating to the advance of the loan. The term must enable the consumer to evaluate, on the basis of clear, intelligible criteria, the economic consequences for the consumer deriving from it. Finally, on the question of the national court **rewriting the contract**, the Court made it clear that the national court could not do so. It could however replace the unfair term with a default (fallback) rule of national law that would govern the contract had the parties not agreed otherwise. The Court clearly indicated that a default provision of national law was 'presumed not to contain unfair terms', and therefore using it as a substitute for an unfair term was 'fully justified' for the purposes of the Unfair Terms Directive.

Andriciuc v *Banca Românească* (C-186/16, 20.9.2017)

Roxana Andriciuc and a number of other consumers, all of whom earned their income in Romanian lei, took out a number of loans with Banca Românească SA, all of which were denominated in Swiss

francs. The loans served to acquire immovables, refinance other credits and meet personal needs. The loans were paid out in RON, but monthly repayments had to be made in Swiss francs (in line with the principle that the loan was denominated in that currency). If the consumers were late in repayment of an instalment, the bank could charge their account in lei, according to the franc/lei exchange rate, applied by the bank itself. Ms Andriciuc and other consumers brought a court case against the bank, claiming that the exchange risk was not fully explained to them. More specifically, the bank had not warned them that the franc/leu exchange rate was subject to significant fluctuations. They also contended that the bank had made them the loan offer in a biased manner, focusing on the advantages but concealing the potential risks. This led to a violation of the duty to draft contractual terms in plain and intelligible language so that the consumer understands their economic function, as required by the *Kasler* judgment.

Concerning the **relevant timeframe for assessing the unfairness** of a contract, the ECJ pointed out that this must be limited to the moment when the contract is concluded and must include all circumstances about which the business could have known, including those concerned with the future performance of the contract. The Court explicitly pointed out that the national court should, when evaluating this, take into account the expertise and knowledge of the bank with regard to exchange rate risks, which could produce a possible 'significant imbalance'.

In contrast to the earlier *Kasler* judgment, in *Andriciuc* the ECJ finally gave a definite answer as to the definition of the notion of the '**main subject-matter**' of a contract in the context of loans denominated in a foreign currency. It ruled that such a term 'lays down an essential obligation characterising that contract' and, as a consequence, the foreign-currency clauses as such *cannot* be regarded as unfair, provided that they are drafted in plain and intelligible language. On this latter requirement, the Court developed its *Kasler* judgment, indicating that 'financial institutions must provide borrowers with sufficient information to enable them to take **prudent and well-informed decisions**'. This means that the average consumer must be made aware of the currency risks and be able to assess the potential economic consequences of such a term.

Sziber v *ERSTE Bank Hungary* (C-483/16, 31.5.2018)

Two Hungarian consumers, Mr Sziber and Ms Szeder took out a loan from ERSTE Bank that was paid out and repayable in Hungarian forints, but denominated in Swiss francs. The terms of the contract provided that the bank's selling rate of exchange was applicable for the purpose of calculating the repayment instalments of the loan, while the amount paid out to the consumers was converted into Hungarian forints on the basis of the bank's buying rate of exchange. The ERSTE Bank also had the right to **amend the contract unilaterally** – it was allowed to increase the interest rate, commissions and costs incumbent upon the consumers. Mr Sziber took the ERSTE Bank to court, initially demanding that the contract be declared void in its entirety. In the alternative, he sought a declaration that only some of the terms of the contract were unfair and therefore void. Mr Sziber argued that he had been unable to evaluate the extent of the exchange rate risk.

While the proceedings were on-going, the ECJ decided the *Kásler* case (see above), leading to a large number of lawsuits against banks brought by Hungarian consumers. On 16 June 2014 the Hungarian Supreme Court (HSC) gave a ruling to the effect that terms providing for the application of the bank's rate of exchange were unfair, and must be replaced by the official foreign exchange rate of the Hungarian National Bank (which provided for lesser spreads, and was therefore better for consumers). Banks had to repay the difference. The HSC decision was codified by the Hungarian parliament as legislation. Following the new legislation, the national court where Mr Sziber's case was pending found that the term of contract providing for the application of ERSTE Bank's rates of exchange and its right to unilaterally amend the contract were void, and any payments made by the consumer on that basis needed to be refunded to him. However, because some other aspects of the case required clarification (in particular the amount Mr Sziber was demanding from the bank), and as Mr Sziber did not respond to a request from the court to amend his application, according to

Hungarian legislation the case should have been closed. The national court wanted to know whether such procedural arrangements were in line with the directive.

Responding to the national court, the ECJ ruled that the directive did not in principle, preclude **national legislation from laying down specific procedural requirements** in respect of actions brought by consumers who concluded foreign-currency loan agreements. The Court added that, in principle, **EU law did not harmonise the procedures that applied for the assessment of an allegedly unfair contractual term**, and that those procedures were therefore a matter for the national legal order. However, such procedures could not be less favourable than those governing similar situations subject to domestic law (principle of equivalence). Furthermore, the procedures must guarantee effective judicial protection (as required by Article 47 of the Charter of Fundamental Rights). What was important, was that this procedure should lead to the restoration of the legal and factual situation that the consumer would have been in had that unfair term had not existed. The national law could for instance provide for a right to restitution of advantages wrongly obtained by the trader using unfair terms to the consumer's detriment. The Court also confirmed that the directive applied to situations **without a cross-border element**.

VE v *WD* (C-227/18, 8.9.2018)

VE, a consumer, borrowed from WD, a business, a sum of money expressed in HUF to finance a car purchase. The loan was pegged to the CHF. When the monthly instalments grew from approximately 26 000 HUF to 38 000 HUF between 2012 and 2015, the consumer took WD to court alleging that the requirement of transparency of consumer contracts had been breached. The Hungarian court wished to know if it was enough to inform the consumer about the exchange rate mechanism, but without warning them that there was effectively no ceiling on the sum to be repaid in national currency. In its order, the ECJ found that the loan agreement in question, which placed the risk of currency fluctuations on the consumer, passed the directive's plain language test even if it did not warn the consumer that there was actually no ceiling on the possible rate, and hence the amount due by the consumer in the national currency was not predictable upfront. It is, however, necessary to inform the consumer clearly of the possibility of a rise or fall in the foreign currency in which the loan has been taken out, and it must be possible for him or her to assess the economic consequences, potentially significant, of the exchange rate risk on the financial obligations. Furthermore, it is necessary for the consumer's obligation to be 'clearly determined' – for this it is sufficient that the contract provide for a mechanism to calculate these amounts, as well as the applicable exchange rate, setting them out in a transparent manner.

OTP Bank v *Ilyés and Kiss* (C-51/17, 20.9.2018)

Two Hungarian consumers, Ms Ilyés and Mr Kiss concluded a loan agreement with ELLA Bank (later OTP Bank) denominated in Swiss francs but disbursed and repaid in Hungarian forints. As in the above cases, the bank's rates of exchange, and consequently also spreads, were applicable, and the bank also guaranteed itself the right to modify the contract unilaterally. The consumers brought a court case, demanding an annulment of the entire contract. In the meantime, however, the OTP Bank rescinded the contract unilaterally because the consumers stopped repaying the instalments. The national court of first instance ruled in favour of the consumers and converted their outstanding debt into Hungarian forints, as if the loan contract at issue had been denominated in that currency. The OTP Bank brought an appeal, pleading that the court had not taken into account the procedural requirements incumbent upon consumers, as stipulated by national legislation. The court of second instance noted that the new Hungarian legislation required the bank's exchange rate to be replaced, retroactively, with the exchange rate of the National Bank of Hungary. However, as the national court pointed out, even though the central bank's rate was more favourable to the consumer than that provided for in the loan contract, the fact remained that the **risk of fluctuation in the exchange rate** of the foreign currency in relation to the repayment currency was, in the event of a rise in the value of the foreign currency or a depreciation of the national currency, still borne by the consumer.

The **replacement of the unfair term with a different one, not fully favourable to the consumer, gave rise to doubts on the part of the national court**. This was because such a term, being a default term of national law, would no longer be subject to the scrutiny of the Unfair Terms Directive. Instead, it would even enjoy the presumption of fairness in line with its Article 1(2). The court was also wondering whether other unfair terms, replaced by terms provided for by the new Hungarian legislation, could still be examined as to their fairness or not. Finally, the court had doubts regarding the HSC case law, which required national courts to follow the principle that the parties had the right to delimit the subject matter of an action, i.e. to specify their claims made on the basis of the alleged facts. Thus, the referring court was uncertain as to whether it had the power, or indeed the obligation, to assess whether any terms that had not been relied on by the consumers in support of their claim, in their capacity as applicants, were unfair.

The ECJ explained that the concept of a term that has not been individually negotiated also extended to terms imposed by mandatory rules of national law, and replacing the original terms of contract. However, this finding does not mean that the directive can be used to evaluate such terms: the **scope of the directive does not cover terms that reflect mandatory provisions of national law, inserted after the conclusion of a loan contract**, concluded with a consumer and intended to remove a term that is null and void from that contract. In the case at hand it means that the Hungarian mandatory rules, imposing an exchange rate set by the National Bank of Hungary instead of the commercial bank’s exchange rate, were not subject to scrutiny under the directive. Nonetheless, this does not mean that a term of contract relating to foreign exchange risk (i.e. the denomination of the loan contract to a foreign currency) is excluded from the unfairness test. This is because the fact that some terms that reflect statutory provisions fall outside the scope of the directive does not mean that the validity of other terms, which are included in the same contract and not covered by statutory provisions, may not be assessed by the national court in the light of that directive. The ECJ also developed its interpretation of the requirement for a contractual term to be drafted in **plain intelligible language** in the case of foreign-currency loans. It ruled that banks and other financial institutions must provide consumers with adequate information to enable them to take well-informed and prudent decisions. The consumer must be sufficiently well informed by the bank to be able to understand the foreign exchange risk not only at formal and grammatical level, but also in terms of its actual effects. The bank's explanations should allow the 'average consumer' not only to 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 he or she should also be able to assess the potentially significant economic consequences of such a term with regard to his or her financial obligations towards the bank. The ECJ added that the plainness and intelligibility of the contractual terms should 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, regardless of the fact that some of those terms have later on been declared or presumed to be unfair and annulled by legislation. Therefore, such terms, even if later replaced or removed, should still be taken into account when evaluating the unfairness of other terms (which have not been removed or replaced by national legislation). The ECJ also ruled that it is for the national court to identify of its own motion, in the place of the consumer in his capacity as an applicant, any unfairness of a contractual term, provided the legal and factual elements necessary for that task are available to it. Therefore, the HSC ruling, requiring the national court to stick to what the consumer actually demanded, was not in conformity with the directive.

Dunai v *ERSTE Bank Hungary* (C-118/17, 14.3.2019)

Ms Dunai concluded a loan contract with ERSTE Bank Hungary denominated in Swiss francs, but advanced, according to the terms of that contract, in forints, applying the CHF-HUF exchange rate based on the bank buying rate on that day. The consumer was to repay the loan in forints, but these instalments would be converted to francs according to an exchange rate that was lower than the selling rate practiced by ERSTE Bank. The entire risk of exchange rate changes was borne exclusively by the consumer. The loan contract had the legal form of a notarial deed, and the bank was entitled

to **commence proceedings, in the event of default, without any litigation**. On 12 April 2016, at the request of the bank, a notary ordered the enforcement of the contract. Ms Dunai objected before a court, claiming that the contract was null and void on the grounds that it did not specify, in accordance with the requirements of Hungarian law, the difference between the exchange rate applicable when the funds were released and the exchange rate applicable when the loan was paid off. The case eventually came to the Hungarian Supreme Court, which posed the ECJ a number of questions. In reply to these, the ECJ ruled that the directive allowed for national legislation that prevents the court hearing the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference, provided that a finding that terms that agreement were unfair would restore the legal and factual situation that the consumer would have been in had that unfair term not existed. On the other hand, the directive **precludes** national legislation that prevents the court seized of the case from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to exchange rate risk, where it is found that that term is unfair and that the contract cannot continue to exist without that term. Finally, the directive, read in the light of Article 47 of the Charter, **does not preclude** a supreme court of a Member State from adopting, in the interest of ensuring uniform interpretation of the law, binding decisions concerning the modalities for implementing that directive, in so far as those decisions do not prevent the competent court from ensuring the full effect of the norms laid down in that directive and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the Court in that regard, which it is for the referring court to determine.

GT v *HS* (C-38/17, 5.6.2019)

In 2006, a consumer took out a loan from a company for the purchase of a car. The loan was denominated in Swiss francs, but the amount of the loan was established on the basis of the sum required in forints, applying the exchange rate in force at the time the funds were released. A note setting out the exchange rate applicable to the released funds had been signed only by the company, but not by the consumer, and was sent to him only after the contract had been signed. According to the contract, the loan was to be repaid in forints, but the amount of the instalments depended on the CHF/HUF exchange rate applicable at the time the instalments were paid. This meant that the consumer bore the currency risk. In 2013, as it considered that the borrower had failed to comply with his repayment obligation, the company terminated the loan agreement and brought proceedings against the borrower before the national court, seeking an order that the borrower pay back the outstanding capital loan and interest. The consumer claimed that the contract was invalid, on the grounds that it did not indicate the subject matter of the loan, as the CHF/HUF exchange rate applied when the funds were released was not specified in the agreement note, which was signed only by the company.

The national court pointed out that was obliged to follow the interpretive resolutions of the HSC, which were binding on lower courts. Under one such resolution, the unilateral fixing of the exchange rate by the bank (in an agreement note) should be treated as a contractual term, and the fact that the consumer did not sign that note was to be considered as legally irrelevant. Asked about the conformity of such an interpretation with the directive, the ECJ explained that, in principle, such national law was valid. Indeed, it was possible, under the Directive, for the parties to agree that the bank would determine the exchange rate in an agreement note. However, the relevant term of the contract must be drafted in plain and intelligible language and it must not be unfair to the consumer (within the meaning of Article 3(1) of the directive). The mechanism for calculating the total amount lent and the exchange rate applicable must be indicated transparently, so that a reasonably well-informed and reasonably observant and circumspect consumer may evaluate, on the basis of clear, intelligible criteria, the economic consequences of the contract. Therefore, the term of contract empowering the bank to set the exchange rate in a separate document must itself be subject to a verification of its fairness. If it turns out to be unfair, the contract will remain valid only if it can exist without that term.

Dziubak v *Raiffeisen Bank* (C-260/18, 3.10.2019)

The most recent ECJ judgment on Swiss franc loans is the *Dziubak* case. Mr and Mrs Dziubak took out a 40-year loan from Raiffeisen bank. The contract was denominated in Polish zlotys, but indexed to the Swiss franc. The loan was disbursed in PLN at an exchange rate not lower than the PLN-CHF buying rate in accordance with the exchange rate table in force at the bank at the time the funds were disbursed; the loan debt balance was expressed in CHF at that rate. The monthly loan repayments were expressed in CHF and on each subsequent loan repayment date were debited to a bank account in PLN, this time at the PLN-CHF selling rate in accordance with the Raiffeisen's exchange rate table. The interest rate was fixed at a variable rate and set as the sum of the 3-month LIBOR CHF benchmark and Raiffeisen's fixed margin. Mr and Mrs Dziubak took the bank to court requesting a declaration of nullity of the contract on the basis of the unfairness of the indexing mechanism, which, in their view, allowed the bank to arrange the exchange rate at its discretion and arbitrarily, thereby allowing it to unilaterally alter the contract. On the other hand, they considered the contract could not exist without the indexing term, because without it a correct exchange rate could not be arranged. In the alternative, they claimed that the contract could be performed without the unfair term, by considering it to be a loan for PLN but with an interest rate provided for in that contract based on the variable LIBOR and the bank's fixed margin (LIBOR being much lower than WIBOR, the Warsaw Interbank Offered Rate). In its preliminary reference, the Polish court observed that without the indexation term it would indeed be impossible to determine the exchange rate and therefore to perform the loan agreement.

Replying to the preliminary reference, the ECJ ruled that the directive did not preclude a national court, after finding that certain terms of a loan agreement indexed to a foreign currency and subject to an interest rate directly linked to the interbank rate of the currency concerned were unfair, from taking the view, in accordance with its domestic law, **that the contract could not continue in existence without those terms** because the effect of their removal would be to alter the nature of the main subject matter of the contract. In such an event, the contract is annulled in its entirety. As regards the consequences of such nullity, they must be assessed in the light of the existing or foreseeable circumstances at the time when the dispute arose and with regard to the wishes expressed by the consumer in that regard as the decisive factor. The gaps in the contract, caused by the removal of the unfair terms, may not be filled by the national court solely on the basis of national provisions of a **general nature** (in the case at hand, referring to 'principles of social life' and 'established customs'). Finally, the unfair terms contained in a contract may not be upheld where their removal would mean that contract would be annulled and such an annulment would have unfavourable consequences for the consumer (unless the consumer agreed to uphold the contract).

Lintner v *UniCredit Bank Hungary* (Case C-511/17, 11.3.2020)

Ms Lintner concluded a mortgage loan agreement with UniCredit bank. The loan was in Hungarian forints, but indexed to the Swiss franc. The contract contained a number of clauses allowing the bank to introduce unilateral modifications to the contract. Ms Lintner considered this unfair and took the bank to court. Having lost in first instance, she appealed successfully. The court of second instance found the terms invoked by her to be unfair, but additionally identified a number of other terms it considered unfair too. The court of first instance, to which the case returned, harboured doubts as to the extent of the *ex officio* examination of the unfairness of the terms. It therefore asked the ECJ whether the directive required an examination ex officio the unfairness of all of the terms of the contract, or whether it should not go beyond what the consumer demanded in her application (principle of *ne eat iudex ultra petita partium*). In its second and third questions, the national court asked whether – should the first question be answered in the negative – the court is nonetheless obliged to examine the unfairness of other terms of the contract if it is examining the unfairness of a specific term (questioned by the consumer).

In its judgment, the ECJ ruled that the national court is not obliged to screen the entire contract in search of unfair terms; it must examine only those terms that are connected to the subject-matter

of the dispute (i.e. within the boundaries of the consumer's action). Concerning the second and third question, the Court ruled that whereas the national judge must take into account the entire contract in order to verify the fairness of the terms questioned by the consumer, it is not obliged to evaluate the fairness of such terms.

Banca Transilvania SA (Case C-81/19, 9.7.2020)

In 2008, two Romanian consumers took out a loan, denominated in Swiss francs, in order to refinance an earlier loan in Romanian lei. In the following years, the amount to be repaid by the consumers almost doubled as a result of the change in the CHF/RON exchange rate. The consumers took the Banca Transilvania to court, arguing that a number of terms in their contract were unfair: first, a term providing that payments were to be made in the currency of the loan, but that the consumers could ask the bank for the loan to be denominated in a different currency, without the bank being obliged to grant such a request; and second, a term that provided that the bank was authorised by the consumer to discharge the payment obligations due by using its own exchange rate. The consumers also argued that bank had not fulfilled its duty to warn them about the risks inherent in a foreign currency loan. The national court of appeal submitted two questions to the ECJ. First, whether the directive also applies to contractual terms that reflect a national default rule, and second, what would be the consequences of finding that a term relating to the foreign exchange rate is unfair. It its judgment the ECJ explained that the directive does not apply to national default rules, i.e. those rules of private law that apply if the parties did not decide otherwise on a given matter. This is because those rules, established by the legislator, are deemed to reflect a fair balance between the parties. On the second question, the ECJ pointed out that since the term in question reflects a national default rule, it falls outside the directive and therefore there is no need to answer the question.

Concluding remarks

The ECJ case law on Swiss franc mortgages is a prime example of the **dynamic interpretation of EU law** aimed at addressing challenges that could not have been envisaged at the time of drafting. The Unfair Terms Directive, proposed in 1990, enacted in 1993 and implemented by 1996 was meant to grant protection to consumers with regard to standard contract terms, imposed by businesses against the requirements of good faith and fair dealing. Thanks to the broad formulation of the directive's rules, and especially the use of so-called 'general clauses' (good faith, fair dealing), the ECJ and national courts have been able to adapt the directive to challenges that have arisen long after its enactment. What is even more interesting, is that the Member States where the problem at issue arose (Poland, Hungary, Romania, Croatia and, Slovakia) were not even EU Member States at the time when the directive was adopted (1993); some were candidate countries (Poland) but others attained this status only later. The potential for dynamic interpretation of the directive reveals its resilience with regard to changing socio-economic circumstances, even three decades after its enactment, but at the same time testifies to the willingness of the Court of Justice (and the national courts, in submitting preliminary references) to seek solutions ensuring the maximum effectiveness of EU private law. Whereas national legislatures in all the Member States concerned attempted to address the hardship faced by consumers in the wake of the change in Swiss franc exchange rates, ultimately it has been for the Court of Justice to offer flexible solutions based on a generous construction of the directive's rules.

ENDNOTES

1 S.J. Adamczyk and J. Czabański, 'Opłacalność kredytu powiązanego z kursem CHF w świetle teorii ekonomicznych i danych historycznych', in J. Ostaszewski and M. Wrzesiński (eds.), *Etyka, sprawiedliwość i racjonalność w dorobku nauki o finansach w latach 1918-2018*, Szkoła Główna Handlowa, 2018, p. 23.

2 Rzecznik Finansowy, Analiza prawna wybranych postanowień umownych stosowanych przez banki w umowach kredytów indeksowanych do waluty obcej lub denominowanych w walucie obcej zawieranych z konsumentami, 2016, pp. 8.-9; E. Kowalewska, 'Spłata kredytów denominowanych lub indeksowanych w walucie innej niż waluta polska', *Finanse, Rynki Finansowe, Ubezpieczenia*, Vol. 5 (89), 2017, pp. 490-493.

3 D. Rogoziński, 'Orzecznictwo Sądu Najwyższego w sprawie kredytów waloryzowanych kursem waluty obcej a prawidłowa implementacja jurysdykcyjna dyrektywy 93/13/EWG', *Journal of Insurance, Financial Markets and Consumer Protection*, No. 4, 2018, p. 4.

4 Rogoziński, op. cit. p. 4.

5 Aktualności BIK: Portret frankowicza (4 February 2020).

6 Ibid.

7 Rzecznik Finansowy, p. 4.

8 D. Rogoziński, op.cit., p. 7.

9 Rzecznik Finansowy, op. cit., p. 3.

10 Data according to Bankier.pl website, CHF/PLN exchange rate.

11 Rzecznik Finansowy, p. 4.

12 Kowalewska, op.cit., p. 487-488.

13 Ibid., p. 488.

14 Ibid.

15 Ibid. p. 486.

16 Rzecznik Finansowy, op. cit., p. 9.

17 Kowalewska, op. cit., p. 488.

18 A. Fischer and P. Yeşin, Foreign currency loan conversions and currency mismatches, SNB Working Papers 4/2019, p. 12.

19 Ibid., p. 2.

20 Ibid., p. 9.

21 P. Yeşin, op.cit., p. 11, 14.

22 Ibid., p.12-13.

23 Ibid., p. 13.

24 Private law rules are commonly classified as **mandatory** or **default**. Parties may depart from default but not from mandatory rules. If parties did not decide on a given issue in their contract or the term is invalid, the default rule takes its place, **supplementing** the agreement. Conversely, if a contract does not comply with a mandatory rule, either the contract is completely invalid or the mandatory rule replaces the contractual term concerned (**correcting** the parties' agreement).

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