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Foreign Exchange Loan Contracts – A Romanian Case from a Hungarian Perspective[1]

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Abstract. The period in which the daily news reports were about the economic crisis, its impacts, and the foreign currency crisis is behind us. However, sometimes new information appears, which in a given case gives hope for those hundreds of thousands who fell victim to thoughtless loan constructs denominated in a foreign currency. Our study concerns the CJEU's recent judgement in the case of Andriciuc et al. (C-186/16), published in September 2017, in which the CJEU answered the questions submitted by the Court of Appeal of Oradea. People expected that the judgement would not only change the situation of the Romanian debtors but would affect all debtors living all over Europe. Accordingly, the study intends to compare the Hungarian and Romanian regulatory environment and the results and solution proposals of the judicial practice by the analysis of the judgement. Recently, new civil codes came into force both in Hungary and Romania; our examination extends to the relevant substantive law provisions as well. Fundamental dogmatic changes occurred in both countries' civil law regulation relating to foreign exchange loan contracts. However, instead of the examination and comparison of the national regulation and practice, our analysis shall primarily concern the CJEU's recent judgement, which, despite the lack of new statements, could have an impact on both the Hungarian and Romanian regulatory environment.

Keywords: foreign exchange loan contract, loan denominated in a foreign currency, unfair contract term, the Kásler case, the Andriciuc case

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Introductory Remarks

In the past few years, after the global economic crisis, lending in foreign currencies has become one of the core questions of European economic policy. Although the gravity of the situation could be felt from the beginning, the significance and the complexity of this problem became obvious after the initial economic issue expanded into a social one. Due to foreign exchange loans, not only economic but several legal questions arose in the Member States of the European Union,[2] where such contractual constructs have been applied, and in the judicial practice of the Court of Justice of the European Union (hereinafter: CJEU).

In those jurisdictions where the economic problems caused by foreign exchange loans were the gravest, the demands for a solution arose the strongest,[3] prompting national legislators to take steps. Nevertheless, the solutions worked out by the different national legislators do not necessarily overlap since not only the regulatory framework for such loans but also the applied lending practices were different in the Member States.[4]

In Hungary, the search for solutions and the sorting out of problems arisen in relation to the loan contracts denominated in a foreign currency already started in the judicial practice during the year 2013. Several applications were sent to the courts; most of them asked for stating the invalidity of the given loan contract, although their legal grounds were different. Some actions referred to the fact that the contract is incompatible with the law or it was concluded by circumventing the law (illegal contracts) or the contract is manifestly in contradiction to good morals (immoral contract).[5] Other actions referred to the 'gross disparity in value'[6] or the debtor's mistake,[7] while in some other cases the claimant debtors argued the unfairness of the stipulation that facilitates the financial institution's right to amend the contract unilaterally.[8] Moreover, a significant amount of the applicants asked for stating the invalidity of the contract upon the unfair nature of a certain contractual term. With regard to this, a question arose as to whether a contractual term which shifts unilaterally the burden of foreign exchange risk to the consumer is unfair or not.[9]

2 Pann–Seliger–Übeleis 2010. 60, Buszko–Krupa 2015. 124.

3 As *Fazekas* commented, the increase of foreign exchange loans could be experienced not only in Hungary but in the Baltic countries, i.e. Estonia, Latvia, and Lithuania. Similar constructs were also known and used in Poland, Bulgaria, and Romania. See: Fazekas 2016. 84–90.

4 About the lending constructs which were applied in the banking practice, see: Kriston 2015. 229.

5 See articles 6:95 and 6:96 of Act V of 2013 on the (Hungarian) Civil Code (hereinafter HCC).

6 See Article 6:98 of the HCC.

7 See Article 6:90 of the HCC.

8 Cf. Article 6:191 of the HCC. For the context of the foreign exchange loan contracts and contract amendment, see: Harmathy 2016. 537–547.

9 About the relevant Hungarian judicial practice, see: Fazekas 2016. 83.

Since the legal grounds of the actions were very different, the judgements showed also a decided difference in their theoretical and dogmatical approach to foreign exchange loan contracts. In order to unify the divergent judicial practice, in December 2013, the Curia of Hungary (the supreme court of the country, hereinafter: Curia) adopted the uniformity decision no 6/2013 PJE on issues of principle that arose in connection with such loan contracts.[10] Although this uniformity decision (which is to be examined later in detail) was a milestone in the process of solving those problems which arose in relation to the loan contracts, several questions remained unanswered. After the CJEU's judgement in the landmark Kásler case (C-26/13),[11] the consolidation of jurisprudence in matters of loan contracts where the lent amount was denominated in a foreign currency started. As the instrument of this consolidation, another uniformity decision (2/2014 PJE) appeared, and the Hungarian Parliament systematically amended the applicable regulatory framework.

Due to loans denominated in foreign currencies, problems also arose in Romania. Several applications were sent to courts, and the search for an appropriate solution started not only at judicial level but by the legislator as well. During the years 2015 and 2016, several acts were adopted by the Romanian Parliament, which aimed directly or indirectly at the consolidation of the situation of debtors who had owed lenders based on foreign exchange loan contracts. These legal provisions, which were also examined by the Romanian Constitutional Court, did not bring satisfactory solutions for the consumers. This is the reason why Romanian courts also turned to the CJEU and sent questions for a preliminary ruling. Similar to the Kásler case for Hungarians, Matei[12] was a landmark case for the Romanian consumers. However, a new judgement appeared, which gave new hope for both Hungarian and Romanian debtors.

In the next few pages, we will review the CJEU's judgement in the case of Andriciuc et al. (C-186/16),[13] which was recently published, in September 2017. This judgement facilitates the examination of some problematic questions in detail, with reference to the interpretation of Directive no 93/13/EEC[14] and with regard to the particularities of both the Hungarian and Romanian regulatory environment.[15]

10 The text of the operative part of the uniformity decision no 6/2013 PJE is available at the following link: http://www.lb.hu/en/uniformity-decisions. About the analysis of the uniformity decision, see: Czugler 2014. 36.

11 Judgement of the Court in the case C-26/13 Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt. of the 30th of April 2014, ECLI:EU:C:2014:282. For a detailed analysis of the judgement, see: Somssich 2014. 83.

12 Judgement of the Court in the case C-143/13 Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România S.A. of the 26th of February 2015, ECLI:EU:C:2015:127.

13 Judgement of the Court in the case C-186/16 Ruxandra Paula Andriciuc and Others v Banca Românească S.A. of the 20th of September 2017, ECLI:EU:C:2017:703.

14 Council Directive no 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, pp. 29–34.

15 In the past few years, the interpretation of the different articles of Directive no 93/13/EEC became again a core question of the European law. See Micklitz–Reich 2014. 771.

1. The Dispute in the Main Proceedings and the Questions Referred by the National Court for Preliminary Ruling

Between April 2007 and October 2008, the applicants of the main proceeding concluded loan contracts with *Banca Românească S.A.* (hereinafter: Bank), denominated in Swiss francs (CHF), with a view, among others, to acquiring immovable property and refinancing other credit arrangements. Each of these agreements contained the contractual term, which prescribes that debtors are required to make monthly payments on the loans in the same currency as that in which they had been concluded. It meant that debtors had to pay in Swiss francs although they received their income in Romanian lei (RON) in these years. This contractual term was complemented by another one, which authorized the Bank to debit the debtor's account and, if necessary, to carry out any conversion of the balance available on the debtor's account into the currency of the contract at the Bank's exchange rate as it stood on the day of that operation when the monthly payments had fallen due or the debtor failed to comply with the obligations arising from the agreement (breach of contract).

According to the applicants' statements, by the application of the above-mentioned contractual terms, the Bank fully placed the exchange rate risk on the debtors. In accordance with their argumentation, the Bank could foresee the changings and fluctuations in the exchange rate of the Swiss franc, but such information was not disclosed to the debtors.[16] Since the debtors considered both contractual terms unlawful, in 2014, they took a legal action against the Bank before the County Court of Bihor, Romania (*Tribunalul Bihor*). In their application, they asked the Romanian Court to ascertain the nullity of the above mentioned contractual terms and to oblige the Bank to work out a new loan repayment schedule, which is applicable for each loan contract and which provides the conversion of the credit amount (initially stated in a foreign currency) into Romanian lei at the exchange rate which was in force at the time of the conclusion of the loan contract.

The Romanian Court of First Instance rejected the application and stated that a contractual term, which provides for the debtors to pay back the loan in the same currency as that in which the contract had been concluded, shall not be regarded as unfair even if it had not been individually negotiated with the consumers.

16 In the above-mentioned period, the exchange rate of the Swiss franc fluctuated significantly compared to other foreign currencies. In spite of this, financial institutions emphasized the advantages of the applied product and currency and did not provide information about risks or potential hazards and the chance of their occurrence.

The debtors brought an appeal against that judgement. The Court of Appeal of Oradea (*Curtea de Apel Oradea*) disputed the interpretation of the applicable provisions of Directive no 93/13/EEC, wherefore it made a request for a preliminary ruling. In its request, it submitted the following three questions:

a) The first question referred to Article 3 (1) of Directive no 93/13/EEC. It enquired if the significant imbalance in the parties' rights and obligations arising from the contract must be examined strictly at the time of the conclusion of the contract or it can also be examined during the performance of the contract, with regard to the circumstances of the case and to the significant variations in the exchange rate.

b) The Court's second question tended to the interpretation of Article 4 (2) of Directive no 93/13/EEC. It queried the CJEU as to the interpretation of the plainness (clearness) and intelligibility of a contractual term and also referred to the extent (scope and level) of the obligation to provide information. The question was whether the notion of a plain and intelligible contractual term includes only those reasons and facts which pertain to the base of the parties' contract or it should also cover every potential consequence upon which the debtor's contractual obligation may be subject to change. These latter include the exchange rate risk. In this context, the core of the question was if the obligation to provide information should cover only the conditions of the loan (e.g. interests, charges, and guarantees required of the debtor) or it should also include the possible overvaluation or undervaluation of a foreign currency.

c) The third question also tended to Article 4 (2) and asked whether the expressions 'the main subject matter of the contract' and 'adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other,' may be used for a term incorporated in a loan contract in a foreign currency which has not been negotiated individually and pursuant to which 'the credit must be repaid in the same currency'.

In the subsequent points of our study, we will review the CJEU's standpoint on the above-mentioned three questions. Since the CJEU inverted the order of the questions submitted by the Romanian Court and moved logically backwards in the course of the preliminary ruling, we also present the answers given by the CJEU in compliance with the CJEU's judgement.

2. About the Third Question, or What Is the 'Main Subject Matter of the Contract'?

In some other similar cases, the CJEU already examined the question regarding the interpretation of the expression 'the main subject matter of the contract' stated in Article 4 of Directive no 93/13/EEC. This is quite important since the unfairness

of those contractual terms which fall into the scope of this expression cannot be examined according to the Directive. These contractual terms are exempt from being assessed for unfairness provided that they are in plain and intelligible language.[17] Accordingly, in order to assess the fairness of a certain contractual term, one should use a two-step test. Firstly, it should be examined if the given contractual term might be deemed as 'the main subject matter of the contract' or not, according to the Directive.

The first case, in which the CJEU dealt with the notion of 'main subject matter of the contract', was the Caja de Ahorros (C-484/08).[18] According to the judgement, a contract term falls into the scope of the above mentioned notion if it has not been individually negotiated and it describes the essential obligations in a contract concluded between a seller or supplier and a consumer.[19] The general notion of the 'main subject matter of the contract' given by the CJEU was clarified in the judgement of the Kásler case. In its judgement, the CJEU stated that the consumer protection mechanism created by Directive no 93/13/EEC is based on the principle which declares that a consumer is in a much weaker position than the other contractual party (seller or service provider). This 'information imbalance'[20] (i.e. the consumer's defencelessness) appears both in the negotiating position of the consumer and in the level of information available since sellers (or suppliers) often institute such conditions over which the consumer has very little influence or none at all.[21] With regard to this, the examined expression – as an exception to the mechanism for reviewing the substance of unfair terms – shall be strictly interpreted.[22]

Summing up the settled case-law of the CJEU, a certain contractual term falls into the scope of 'the main subject matter of the contract' if it lays down the *essential* obligations of the contract and, as such, characterizes it. However, a contractual term does not fall into the scope of the expression if it is merely *ancillary* compared to the terms laying down essential obligations.[23] During the determination of the essential or ancillary nature of a certain contractual term, both the nature and the general scheme of the given contract (e.g. loan contract) and its legal and factual context shall be taken into account. [24]

17 Directive no 93/13/EEC, Article 4 (2).

18 Judgement of the Court in the case C-484/08 Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) of the 3rd of June 2010, ECLI:EU:C:2010:309.

19 Caja de Ahorros, para 34.

20 Gárdos-Nagy 2013. 377.

21 Kásler, para 40.

22 See in particular Kásler, para 42, Matei, para 49 and Judgement of the Court in the case C-96/14 Jean-Claude Van Hove v CNP Assurances SA of the 23rd of April 2015, ECLI:EU:C:2015:262, para 31.

23 Kásler, para 50, Van Hove, para 33, Matei, para 54.

24 Kásler, paras 50–51, Matei, paras 53–54, Van Hove, para 37, Andriciuc et al., para 30.

The opinion of Advocate General Wahl, in accordance with the judgement in the Kásler case,[25] emphasized that in the case of a loan agreement the bank's essential obligation is to make the amount loaned available. In parallel with this duty, the debtor's essential obligation is to repay the principal and interest (which represents the price of the loan).[26] Since these obligations are not separable from the currency of the loan, an approach according to which 'the main subject matter of the contract' covers only the numerical sum but does not include the foreign currency exchange rate used as a reference to calculating the amount due for repayment is not acceptable.

Furthermore, the question arises as to whether the determination of the currency in which the debtor shall fulfil the monthly payments is a necessary condition with regard to the loan contract or not. If it is, it shall be deemed as an essential feature of the contract, and therefore it falls into the scope of the above examined expression.

It is also worthy to mention that during the main procedure and the preliminary ruling both the Romanian bank and the Romanian government referred to the fact that the above examined contractual terms, which prescribe for the debtors to pay back the loan in the same currency as that in which they had been concluded, were in conformity with the principle of *monetary nominalism* stated in Article 1587 of the Romanian Civil Code (*Codul civil*) in force at that time. According to the above-mentioned article, an obligation arising from a money loan is always limited to the same numerical sum shown in the contract. The debtor is obliged to pay back the sum lent in the currency of the loan, according to the exchange rate at the time of repayment, even if the value of a currency changes (increases or decreases) before such payment becomes due.[27]

This provision stood at the basis of the defendant's argumentation since those terms which reflect mandatory statutory or regulatory provisions of either of the EU's member states do not fall into the scope of the provisions of Directive no 93/13/EEC. Though the contractual term examined in the case of Andriciuc et al. refers to a certain regulatory provision of the Romanian Civil Code and therefore it is exempted from the application of the Directive's provisions, the CJEU stated that this exclusion is only applicable if both prescribed conditions are fulfilled. Thus, the exemption applies insofar as the certain contractual term reflects a mandatory statutory or regulatory provision. In its judgement in the Andriciuc et al. case, the CJEU stated that the examination of these conditions falls within the jurisdiction of the national courts. In its judgement, the CJEU prescribed for the Romanian court the strict interpretation of the above-mentioned terms in order to maintain and ensure the consumer protection mechanism created by the Directive.[28]

25 Kásler, para 51.
26 Opinion of Advocate General Nils Wahl (27 April 2017), para 43.
27 Andriciuc et al., para 7.
28 Andriciuc et al., paras 27–31.

3. About the Second Question, or What Does the Clarity and Intelligibility of a Contractual Term Mean?

The second question submitted by the Romanian Court to the CJEU closely relates to the problem examined in the previous point of the study. As it was mentioned before, the method of assessing the fairness of a certain contractual term can be divided into two steps. According to the provisions of Directive no 93/13/EEC, the assessment of the unfairness of the terms is not possible if they fall into the scope of the definition of 'the main subject matter of the contract' provided that these terms are in plain and intelligible language.[29] According to the CJEU's judgement, the above examined terms should expressly be deemed as 'the main subject matter of the contract', wherefore it is necessary to examine if these terms were in plain and intelligible language, i.e. they were transparent for the debtors.

The criterion of clarity and intelligibility was also examined by the CJEU in many cases. In this case, the following must be examined: what is the extent of the consumer's awareness to be expected and of the seller's or service provider's obligation to disclose information?

With regard to the criterion of clarity and intelligibility, the CJEU stated in its judgement in the Kásler case that the requirement of transparency cannot be restricted to the linguistic and grammatical intelligibility[30] of the contractual terms (i.e. it is not enough if a consumer is able to interpret the contractual terms grammatically, according to the general meaning of the words).[31] Transparency includes the real content of the contract since consumers are in a weaker position when it comes to acquiring information as compared to the position of the sellers or suppliers. Consequently, the requirement of transparency should be interpreted in a broader sense and the seller (or supplier) should set out transparently, in plain and intelligible language, the specific functioning of the mechanism to which the given contractual term refers.[32]

In the case of loan contracts, a contractual term is transparent if it sets out 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 in such a way that the consumer is in a position to evaluate on the basis of clear and intelligible criteria and the economic consequences for him which derive from it.[33]

In its judgement in the Kásler case, the CJEU also stated that the Bank should have explicitly given information about the use of different exchange rates and its reasons

29 Directive no 93/13/EEC, Article 4 (2).

30 The linguistic and grammatical intelligibility means the narrower approach of the criterion of clarity and intelligibility.

31 Kásler, para 75.

32 Andriciuc et al., paras 45–46 and Kásler, para 75.

33 Kásler, paras 73 and 75.

(i.e. why the buying rate of exchange was used in the case of the loan's disbursement and why the selling rate was used in the case of the conversion of the monthly debt payments). As many scholars emphasized, the lending practices were different in the Member States. This difference between the Hungarian and Romanian lending practice has great significance in the case in question. Namely, in the Kásler case, the financial institution applied a foreign exchange lending construct, according to which the loan's disbursement and the repayment are counted in a different currency. This financial method complied with Hungarian regulations since neither the previous Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter: HCC [1959]) nor the legal regulation in force, Act V of 2013 on the Hungarian Civil Code (hereinafter: HCC), barred parties from distinguishing between the 'denominated currency' and the 'paid currency' of a loan contract. On the contrary, in the case of Andriciuc et al., parties agreed in such a lending construct where the 'denominated currency' and 'paid currency' do not differ, i.e. the disbursement and the repayment is carried out in the same currency (Swiss francs).

In the case of Andriciuc et al., grasping the meaning of the fluctuation in exchange rate was from the beginning expected from the debtors. Nevertheless, the Bank should expressly inform the clients that they must bear the risk of the exchange rate and that this duty could become more burdensome during the paying back of the debt, in particular when the currency in which the debtors get their monthly income depreciates.

In our view, AG Wahl's opinion delivered in the case of Andriciuc et al. is justified. As he stated, the bank, having regard to its expertise and knowledge in the area, is obliged to draw the consumers' attention to the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer debtor does not receive his income in that currency. However, the bank is not under an obligation to inform the consumer about those facts and circumstances which the bank itself could not have foreseen even if it acted with prudent diligence.[34]

In the judgement of Andriciuc et al., it was also stated that the examination of the clarity and intelligibility of a certain contract with regard to all relevant circumstances of the case falls within the jurisdiction of the national courts. Accordingly, the Romanian court should examine, if debtors were informed by the bank about all facts and circumstances (e.g. the total cost of the loan) which could influence their decision. During this examination, it will be important if a reasonably well-informed, reasonably observant and circumspect consumer[35] can estimate the costs. Namely, it is essential to allow the consumer to become

34 Opinion of AG Wahl (C-186/16), paras 67–68.

35 The standard of the average consumer, i.e. who is 'reasonably well-informed, reasonably observant and circumspect', was explicitly employed by the CJEU. See Kásler, para 74; Van Hove, para 47; Durovic 2016. 60; Leone 2017. 8.

aware, before the contract is concluded, of all contractual conditions and relating circumstances since the consumer can make a deliberate decision on the contract conclusion only based upon this information in his or her possession.[36]

This requirement was already worded in the *Recommendation of the European Systemic Risk Board* (hereinafter: ESRB) in 2011.[37] In the field of the risk awareness of borrowers (debtors), the ESRB recommends national supervisory authorities and the Member States to:

> [R]equire the financial institutions to provide borrowers with adequate information regarding the risks involved in foreign currency lending. As it is worded, such information should be sufficient to enable borrowers 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.[38]

4. Clear and Intelligible Contractual Terms – A Hungarian Perspective

The requirement of clarity and intelligibility was also a core question in the Hungarian judicial practice. The previously referred uniformity decision (6/2013 PJE) of the Curia stated that '[t]he statutory obligation of the financial institution to provide information had to extend to the possibility of exchange rate change and its impact on the payments'. Furthermore, the Curia stated that this obligation should not extend to the extent of the exchange rate change.[39] This expectation is lawful since the extent of the exchange rate change is an unforeseeable and objective circumstance. The Hungarian legal standpoint expressly mentions that financial institutions shall make the debtors understand the changeability of the exchange rate in the course of the repayment of the loan. This obligation is a necessary element of the duty to provide information, prescribed in general by the HCC.[40] However, this obligation should (and could) not extend to inform the debtor about the numeric change of the exchange rate.

The CJEU's judgement in the Kásler case has not only great impact on the case-law of the CJEU, but it gives new impetus to working out the legal solutions applicable to lending in foreign currencies in Hungary. In 2014, the Curia passed

36 Andriciuc et al., paras 46–48.

37 Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (ESRB/2011/1), OJ C 342, 22.11.2011, pp. 1–47.

38 ESRB/2011/1, Section 1, Recommendation A – Risk Awareness of Borrowers.

39 Uniformity Decision no 6/2013 PJE, Operative Part, Point 3.

40 Hungarian Civil Code, Article 6:62, paragraph (1).

another uniformity decision (2/2014 PJE), which was strongly influenced by the CJEU's judgement. The uniformity decision nearly adopted the position of the CJEU stated in the judgement. According to Point 1 of the uniformity decision's operative part, 'the clause of a foreign exchange loan contract which stipulates that the risk of foreign exchange shall be taken without restrictions by the consumer (…) forms part of the main subject matter of the contract', wherefore its unfairness can only be examined if it was clear and intelligible for the consumer at the time of contract conclusion.[41]

The Curia's uniformity decisions have their significance not only on their own but via their effects on the unification of the interpretation of the law and produce a strong impact on the future formation of the regulatory environment. Article 205, paragraph (3) of the HCC [1959] already prescribed for the contractual parties a general duty to cooperate with each other at the time of the contract conclusion and to provide information about all those circumstances which are essential for the contract to be concluded. The new HCC took over the 'old' civil code's provision on the duty to provide information and complemented it at the same time. According to Article 6:62, paragraph (1) of the HCC in force, parties should cooperate not only at the time of contract conclusion but also during the fulfilment and the cessation of the contract.[42]

It is worthy to mention that not only did the prior HCC and does the one in force prescribe the duty to provide information, but particular acts have also dealt with the question. The provision of the HCC [1959] was complemented by Act CXII of 1996 on Credit Institutions and Financial Enterprises (hereinafter: CIFE), which is no longer in force.[43] The CIFE contained some provisions on the foreign exchange loan contracts concluded with consumers. Article 203, paragraph (6) of the CIFE prescribed that in these kinds of contracts the financial institution shall expressly specify the risks to which the consumer is exposed, and the consumer shall verify acknowledgement ('statement of risk acknowledgement') by his signature. In the case of foreign exchange loan contracts, the statement of risk acknowledgement must expressly refer to the risks in any fluctuation of exchange rates and its effects on the instalment payments.[44]

From the year 2009, consumer credit has been regulated by a single act:[45] Act CLXII of 2009 on consumer credit (hereinafter CCA), as amended in 2014.[46] The

41 About the uniformity decision no 2/2014 PJE, see Fazekas 2016. 90–91.

42 See Juhász 2017a, Juhász 2017b. 285.

43 The CIFE was superseded by Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises, which is presently in force.

44 CIFE, Article 203, paragraph (7), point a).

45 With this act, the Hungarian legislator implemented Directive no 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealed Council Directive no 87/102/EEC, OJ L 133, 22.5.2008, pp. 66–92.

46 See Act LXXVIII of 2014 on the amendment of the Act CLXII of 2009 on consumer credit and other related acts, Article 9.

relevant rules of the CCA are more or less in line with the CIFE's rules on the obligation to provide information. According to Article 21/A, paragraph (1) of the CCA, in the case of a loan contract which is concluded with consumers and either recorded or lent and repayable in foreign currency (i.e. 'foreign-currency-based' loan contract), the financial institution (creditor) must inform the consumer about the risks to which the consumer is exposed in relation to the contract. The consumer's acknowledgement shall be certified by the statement signed by the consumer, in which the consumer has acknowledged the risks. This statement should also contain the risks in any fluctuation of exchange rates and its effect on the instalment payments.[47]

5. About the First Question, or When Shall the Significant Imbalance Caused by the Unfair Contract Term Be Examined?

Returning to the CJEU's judgement in the Andriciuc case, we go further with the first question submitted by the Romanian Court for preliminary ruling. This question asked for the interpretation of Article 3 (1) of Directive no 93/13/EEC, which determined the time when the 'significant imbalance between the rights and obligations of the parties' arising under the contract shall be examined by the national courts. This question was also quite important since the significant imbalance existing between the parties' rights and obligations can cause the unfairness of a certain contractual term. It is also worthy to mention that this criterion can solely be examined if it does not fall into the scope of Article 4 (2) of Directive no 93/13/EEC.[48]

In relation to this question, AG Wahl properly drew attention in his opinion to the fact that a difference must be made between two possible situations:

a) There are cases where a certain contractual term causes a significant imbalance between the parties' obligations from the outset, but this becomes manifest to the parties only during the performance of the contract. He referred to the CJEU's judgement in RWE Vertrieb,[49] in which the CJEU established relevant statements in relation to the unfair contractual practice of a German gas supplier company. According to the CJEU's statement, although the information to be provided is different with regard to the peculiarities of the certain product, the omission to inform the consumer before the contract is concluded cannot, in principle, be

47 CCA, Article 21/A, paragraph (2).

48 Cf. the 2nd point of the study.

49 Judgement of the Court in the case C-92/11 RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV. of the 21st of March 2013, ECLI:EU:C:2013:180.

compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges (e.g. change in price) and of their right to terminate the contract if they do not wish to accept the variation, but they will not be informed of the reasons of the changes.[50] That is, the contractual term, which was applied by the parties during the conclusion of the contract, already gave birth at this time to the significant imbalance between the parties, and therefore it was deemed unfair.

b) In other cases, the unfairness of a given contractual term does not arise at the time of the conclusion of the contract but appears because of the changes in circumstances, which may occur during the fulfilment of the contract. By reason of these changes, the extent of the obligation borne by the consumer changes, which the consumer perceives as excessive, i.e. such changes raise the significant imbalance between the contractual parties posteriorly.

The case of Andriciuc et al. is a good example for this case since the domestic currency's devaluation caused extra costs for the debtors. Nevertheless, it can also be stated that at the time of contract conclusion neither the debtors (consumers) nor the financial institution could reasonably be expected to foresee the exact measure of the changes in the exchange rate. The unpredictability of change in circumstances as an objective factor causes change in the parties' obligations. However, according to our view, these changes do not break the contractual balance since the financial institution that has lent to the debtor a certain quantity of currency units is entitled to the return of that same number of units.[51] The risk of the fluctuation or the significant change of exchange rates was known by the debtors at the time of contract conclusion, so the CJEU stated that the existence of significant imbalances between the parties' rights and obligations shall be examined at the time of contract conclusion. Moreover, the national court shall ascertain whether the financial institution was, with regard to all circumstances, observant of the requirement of good faith and fairness and whether the significant imbalance between the parties' rights and obligations existed at the time of contract conclusion.

Besides the CJEU's judgement, it is worthy to pay attention to Article 970 of the 'old' Romanian Civil Code, which was in force at the time of the main procedure. This article stated that contracts oblige the parties to fulfil not only the obligations expressly stipulated within them but to meet all those other requirements which – according to the nature of the contract – arise therefrom in accordance with equity, custom, or law.[52]

On the one hand, the above-mentioned provision primarily concerns contractual freedom, i.e. the Romanian legislator intended to make sure the

50 RWE (C-92/11), paras 51–53 and 55.
51 Opinion of AG Wahl (C-186/16), para 87.
52 'Old' Romanian Civil Code, Article 970.

parties could determine the content of the contract freely. On the other hand, among the contractual principles, the legislator puts the principle 'pacta sunt servanda' before the application of 'clausula rebus sic stantibus'[53] since the Romanian obligation law declares the obligatory nature of the legal transaction (*principiul forței obligatorii*) as a principle. According to this, a transaction between the parties has legal binding force, i.e. they shall compulsorily comply with the pact.[54] With regard to the transaction's binding force, parties are obliged to fulfil all contractual obligations since the balance and stability of relationships of economic exchange can be ensured only in this way.[55] It means that courts had no right to evaluate the change of circumstances even if the change was outside the parties' action (objective), was unforeseeable, and caused detrimental changes in the position of either of the parties. Such changes in the contractual circumstances did not facilitate the amendment of the contract by the court since only the parties have the right to amend the existing contract by their consent.[56]

The new Romanian Civil Code[57] (hereinafter: RCC), which came into force on the 1st of October 2011, brings changes in the above-mentioned provisions. With regard to the legal harmonization and implementation duty prescribed by the EU, Article 1271 of the RCC breaks through the principle of monetary nominalism and introduces the *theory of imprevision* based on the French model (*théorie de l'imprevision*).[58] Although the new RCC facilitates the intervention into contractual relations,[59] this possibility is not unlimited. Article 1271, paragraph (3) of the RCC determines four conditions, according to which the court has the right either to amend the contract and share the losses and advantages between the contractual parties or terminate the contract. The conditions, which must be fulfilled at the same time, are the following:

a) a change occurs in the circumstances after the contract conclusion;

b) this possibility of that change could not have been foreseen at the time of contract conclusion;

c) the debtor did not assume the risk of such change in circumstances, and it cannot be presumed that he would have assumed this risk;

d) the debtor made an attempt in reasonable time and good faith at negotiating a reasonable and equitable correction to the contract.

53 Although the 'clausula rebus sic stantibus' is known in the Romanian civil law jurisprudence, it was unregulated until the adoption of the new Romanian Civil Code.

54 Veress 2017. 121.

55 Pătru 2011. 125.

56 This statement is based on the presentation titled 'The Reform of the General Rules on Contracts in the New Romanian Civil Code' presented by Emőd Veress in Hungarian language in Miskolc (Hungary) on the 9th of November 2017.

57 Law No 287/2009 on the Civil Code.

58 Culda 2008. 19, Lachièze 2012. 181–184, Lutzi 2016. 94–97, Rösler 2007. 500–502.

59 Article 1271 of RCC.

The change in circumstances, which is an external factor independent of the parties, i.e. an objective condition, has an impact on the contract existing between the parties. Moreover, as a result of the change in circumstances, the fulfilment of the contract is overly burdensome and obviously disadvantageous for one of the parties. However, beyond the change of circumstances, other conditions having subjective nature shall also be examined. On the one hand, the above-mentioned provision is not applicable if the debtor expressly assumed the risk of a change in circumstances. On the other hand, the lack of such intention of the debtor also excludes the application of the previously examined article. Since the Romanian law prefers the amendment of the contract by the parties' consent to amendment by a court, the debtor having regard to the requirement of good faith must attempt cooperation with the other party in order to amend the contract existing between them. The amendment of the contract by the court is only possible if the negotiations were not successful or the other party refused the attempted negotiations.[60]

6. Consequences

The problem of loans denominated in foreign currencies has continued to be a contentious issue not only in Hungary but in other countries across Europe. Notwithstanding the fact that both the national legislators and the bodies applying the law intended to close the debates on lending in foreign currencies, statistics show the opposite. In Hungary, between the 1st of November 2013 and the 31st of December 2016, more than 36,000 cases were submitted to the different courts from all over Hungary. About 19,000 of them came from the year 2016.[61] Similarly to this, Romanian courts also passed several judgements which relate to foreign exchange loan contracts. In the final decisions, the judges stated the unfairness of a certain contract term and the nullity of these clauses.[62]

These numbers of judicial cases clearly indicate that debtors are not able to accept the solution proposals which were developed by the legislator as the remedy to the problems arisen. Instead, they steadily argue the fairness of the contracts and certain contractual terms. Debtors still hope that new and more favourable circumstances and possibilities will emerge and therefore have great expectations of both the national courts and the CJEU, which returns to the question of loans denominated in a foreign currency from time to time. This is well-demonstrated by the case introduced and analysed in the study.

60 Gânfălean–Gheberta 2014, 63. See in detail: Pătru 2011. 128, Oglindă 2012. 233.

61 http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/devizahiteles_peres_eljarasok_2013._november_1.-2017._augusztus_31.pdf. (date of retrieval: 30 October 2017).

62 http://www.consumerchampion.eu/blog/end-loans-foreign-currency-romania (date of retrieval: 28 November 2017).

At first sight, the CJEU's judgement in Andriciuc et al.'s case gave hope for both Hungarian and Romanian debtors. However, after the thorough examination of the judgement, it is obvious that there is no meaningful change in the CJEU's judicial practice on lending in foreign currency. The CJEU's judicial practice on foreign exchange loans is uniform and mature, motions by Member States rarely reach the judicial body. It is one of the reasons why we are of the opinion that the chance for the emergence of cases which would bring significant changes in the already evolved judicial practice is far too little. This statement is supported by the CJEU's recent judgement in Andriciuc et al.'s case, where the judicial body answered to the questions submitted by the Romanian Court for preliminary ruling, but its answers were mostly based on its previous case-law, e.g. on the judgement in the Kásler case. Moreover, the judgement does not contain any new and relevant statements.[63]

In view of the judgements passed by the CJEU, a question arises: can any new element arise in the adjudication of litigation concerning loans denominated in a foreign currency at the European level? In our opinion, it may occur that some cases relating to foreign exchange loans will emerge and reach Luxembourg in the future. Nevertheless, if a Member State decides to create its own clear and mandatory regulation, addressing the CJEU for a preliminary ruling in foreign exchange loan cases is no longer necessary and justifiable.

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63 In February 2017, the Budapest-Capital Regional Court of Appeal (Hungary) submitted a request for preliminary ruling. The request (C-51/17) contains five questions, which refer to the interpretation of Directive no 93/13/EEC. About the request, see: Gadó 2017. 18–23.

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