

FOREIGN EXCHANGE LOAN CONTRACTS AND UNFAIR TERMS – DISCUSSING THE CJEU’S JUDGEMENT IN THE ANDRICIUC CASE*

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1. Introduction

In these days, lending in foreign currencies is one of the most complex economic and social problems, which arises several legal questions not only in those Member States of the European Union, where such contractual constructions have been applied, but in relation to the judicial practice of the Court of Justice of the European Union (hereinafter CJEU). The study was inspired by the CJEU’s new judgement¹, which was recently published, in September 2017. This judgement facilitates to examine some problematic questions in detail, with reference to the interpretation of Directive 93/13/EEC² and with regard to the specialities of the Hungarian regulatory environment.³

Notwithstanding the fact, that both the Hungarian legislator and the bodies applying law intended to close the debates on the lending in foreign currencies, statistics show the opposite. Between 1st November 2013 and 31st 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 2016.⁴ These numbers clearly indicate that debtors are not able to accept the solution proposals, which were worked up by the legislator as the remedy of the problems arisen. Instead, they steadily argue the fairness of the contracts and certain contract terms.

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¹ Judgement of the Court in the case C-186/16 Ruxandra Paula Andriciuc and Others v Banca Românească SA. of 20 September 2017, ECLI:EU:C:2017:703

² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993, 29–34.

³ In the past few years, the interpretation of the different articles of the Directive 93/13/EEC became again a core question of the European law. See MICKLITZ, Hans-Wolfgang–REICH, Norbert: The court and sleeping beauty: The revival of the unfair contract terms directive (UCTD). *Common Market Law Review*, June 2014, 771–808.

⁴ http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/devizahiteles_peres_eljarasok_2013._november_1.-2017._augusztus_31.pdf.
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Although the lending in foreign currencies and the related difficulties got especially big attention and media publicity in Hungary, these problems also appear in other Member States of the EU.⁵ Questions reappear in the field of foreign currency loans and the opens again the seemingly closed debates. The most recent example of this process is the CJEU's judgement in *Andriciuc et al.* (C-186/16), which gave hope for the Hungarian debtors at first sight. However, after the thorough examination of the judgement it is obvious that there is no meaningful changing in the CJEU's judicial practice on the lending in foreign currency. In the following pages we introduce the core statements of the case, in order to justify our previous ascertainment.

2. 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 the *Banca Românească SA* (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 contract term, which prescribes that debtors⁶ 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 contract term was completed with another one, which authorised 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 (infringement of contract).

According to the applicants' standing point, with the above mentioned contract terms the Bank fully put the exchange 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 express information were not given to the debtors.⁷ Since the debtors found both contract terms unlawful, in 2004 they took a legal action against the Bank before the District Court, Bihor, Romania (*Tribunalul Bihor*). In their action they ask the Romanian court to ascertain the nullity of the above mentioned contract terms and to oblige the Bank to work out a new loan

⁵ See PANN, Johannes–SELIGER, Reinhardt–ÜBELEIS, Julia: Foreign currency lending in Central, Eastern and Southeastern Europe: the case of Austrian banks. *Finanzmarktstabilitätsbericht*, Vol. 20 (2010), 60–80.; BUSZKO, Michal–KRUPA, Dorota: Foreign Currency Loans in Poland and Hungary – A Comparative Analysis. *Procedia Economics and Finance*, 30 (2015), 124–136.

⁶ In this study we use the expression “debtor” instead of “borrower” used by the CJEU.

⁷ In the above mentioned period, the exchange rate of the Swiss franc compared to other foreign currencies fluctuated significantly. Despite, financial institutions emphasised the advantages of the applied product and currency and did not provide information about potential risks and the chance of their occurrence.

repayment schedule, which is applicable for each loan contract and which provides the conversion of the credit amount (in 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 dismissed the action and stated that a contract term, which prescribes for the debtors to pay back the loan in the same currency as that in which they had been concluded, shall not be regarded as unfair even if it had not been individually negotiated with the consumers.

The debtors brought an appeal against that judgement. The Court of Appeal of Oradea (*Curtea de Apel Oradea*) disputed the interpretation of the relating provisions of Directive 93/13/EEC, therefore it made a request for a preliminary ruling. In its request it submitted the following three questions:

a) The first question referred to the Article 3(1) of Directive 93/13/EEC. It argued, 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 also can 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 questions tended to the interpretation of the Article 4(2) of the Directive 93/13/EEC. It asked for the interpretation of the plainness (clearness) and intelligibility of a contractual term and also examined the extension (scope and level) of the obligation to provide information. It was a question, whether the plain and intelligible contract term includes only those reasons and facts, which keep the base of the parties' contract or it should cover every potential consequence, upon which the debtor's contractual obligation can change. These latter include the exchange rate risk. In this context, it was a question, 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 include the possible over-valuation or undervaluation of a foreign currency.

c) The third question also tended to the 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" include 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 review the CJEU's standing point on the above mentioned three questions. Since the CJEU turned 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.

3. About the third question or what is the “main subject matter of the contract”?

In some other similar cases, CJEU already examined the question, how should the expression “the main subject matter of the contract” stated in the Article 4 of Directive 93/13/EEC be interpreted. This is quite important, since the unfairness of those contractual terms which fall into the scope of this expression can not be examined according to the Directive. These contract terms are exempt from being assessed for unfairness, provided that in they are in plain and intelligible language.⁸ Accordingly, in order to assess the fairness of a certain contract term, we should make a two-step examination. First, it should be examined, if the given contractual term shall be deemed as “the main subject matter of the contract” or not, according to the Directive.

In its previous judgement *Kásler* (C-26/13)⁹, which has Hungarian relevancy, CJEU stated that consumer protection mechanism created by Directive 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). The “information imbalance”¹⁰, i.e. the consumer’s defencelessness appears both in its negotiation position and in the level of information, since sellers and service providers often apply such conditions, which the consumer can influence a little or not at all.¹¹ With regard to this, the expression “the main subject matter of the contract” (as an exception to the mechanism for reviewing the substance of unfair terms) shall be strictly interpreted.¹²

According to the settled case-law of the CJEU it can be stated that a certain contractual term falls into the scope of the above mentioned notion, if it lays down the *essential* obligations of the contract and, as such, characterises it.¹³ However, a contract term does not falls into the scope of the expression “the main subject matter of the contract”, if it is merely *ancillary* compared to the terms laying down

⁸ Directive 93/13/EEC, Article 4(2).

⁹ Judgement of the Court in the case C-26/13 *Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* 30 April 2014, ECLI:EU:C:2014:282. The detail analysis of the judgement see: SOMSSICH, Réka: Az Európai Bíróság ítélete a fogyasztókkal kötött szerződésekben alkalmazott tisztességtelen feltételekről. *JeMa*, 2014/4, 83–91. and FAZEKAS, Judit: Gondolatok a devizaalapú hitelszerződések jogi háttéréről és a tisztességtelen általános szerződési feltételek érvénytelenségi kontrolljáról. *Jog, Állam, Politika*, 2016/4., 84–90.

¹⁰ GARDOS, István–NAGY, András: A devizahitel jogi alapkérdései. *Hitelintézeti Szemle*, 2013/5., 377.

¹¹ *Kásler*, para 40.

¹² See, in particular *Kásler*, para 42 and Judgement of the Court in the case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA*. of 26 February 2015, ECLI:EU:C:2015:127, para 49 and Judgement of the Court in the case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA* of 23 April 2015, ECLI:EU:C:2015:262, para 31.

¹³ 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 3 June 2010, ECLI:EU:C:2010:309, para 34 and *Van Hove*, para 33 and *Kásler*, para 49.

essential obligations.¹⁴ In the course of determining, whether a certain contractual term is essential or ancillary, 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.¹⁵

The opinion of Advocate General Wahl delivered on 27 April 2017 emphasised that in the case of a loan agreement, the essential obligation of the bank is to make the amount loaned available, while that of the debtor is to repay the principal and interest (which represents the price of the loan).¹⁶ (The same was stated in the above mentioned Kásler case.¹⁷) 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 excludes the reference foreign exchange, is not acceptable.

Moreover, it is a question, 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 expression “the main subject matter of the contract”.

It is also worthy to mention that in the course of the main procedure and the preliminary ruling, both the Romanian bank and the Romanian government referred to the fact that the above examined contractual term, which prescribes for the debtors to pay back the loan in the same currency as that in which they had been concluded, was conform with the principle of *monetary nominalism* stated in Article 1587 of Romanian Civil Code (*Codul civil*) existing 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, accordingly the exchange rate at the time of payment, even if the value of a currency changes (increases or decreases) before the due date for payment.¹⁸

This provision was 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 93/13/EEC. Though the contract term examined in the case *Andriuc et al.* (C-186/16) reflects to a certain regulatory provision of the Romanian civil code and therefore it exempts from the application of the Directive’s provisions, CJEU stated that this exclusion is only applicable, if both prescribed conditions fulfil. Thus, the exemption applies insofar as the certain contractual term reflects a mandatory statutory or regulatory provision. In its judgement in *Andriuc et al.* (C-186/16) the CJEU stated that the examination of these conditions falls within the competence of the national courts. In its judgement the CJEU prescribed for the

¹⁴ Kásler, para 50, Van Hove, para 33, Matei, para 54.

¹⁵ Kásler, para 50–51, Matei, para 53–54, Van Hove, para 37, *Andriuc et al.*, para 30.

¹⁶ Opinion of Advocate General Nils Wahl (27 April 2017), para 43.

¹⁷ Kásler, para 51.

¹⁸ *Andriuc et al.*, para 7.

Romanian court the strict interpretation of the above mentioned terms in order to maintain and ensure the consumer protection mechanism created by the Directive.¹⁹

4. About the second question or what does the clarity and intelligibility of a contractual term means?

The second question submitted by the Romanian court to the CJEU closely relates to the problem examined in the previous point of the study. Then it was mentioned that the method of assessing the fairness of a certain contract term can be divided into two steps. According to the provision of Directive 93/13/EEC the assessment of the unfair nature 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.²⁰ As it was mentioned before, according to the CJEU’s judgement, the above examined terms should expressly be deemed as “the main subject matter of the contract”, therefore 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, similarly to the notion “the main subject matter of the contract”, was examined for many times by the CJEU. In the course of this process it should be examined, what is the extent either of the consumers’ 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, CJEU has already stated in the case *Kásler* (C-26/13) that the requirement of transparency can not be restrict to the linguistic and grammatical intelligibility nature²¹ of the contract terms, i.e. it is not enough, if a consumer is able to interpret the contract terms grammatically, according to the general meaning of the words.²² Transparency includes the real content of the contract, since as it was mentioned before, consumers are in weaker (detrimental) position in the having of information compared to the position of the sellers or service providers. Consequently, the requirement of transparency should be interpreted in a broad sense and the seller (or service provider) should set out transparently, in plain and intelligible language the specific functioning of the mechanism to which the given contractual term refers.²³

In the case of loan contracts, it means that the contract should 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 that provided for by other contractual terms relating to the advance

¹⁹ Andriciu et al., para 27–31.

²⁰ Directive 93/13/EEC, Article 4(2).

²¹ The linguistic and grammatical intelligibility means the narrower approach of the criterion of clarity and intelligibility.

²² *Kásler*, para 75.

²³ Andriciu et al., para 45–46 and *Kásler*, para 75.

of the loan, so that the consumer is in a position to evaluate, on the basis of clear and intelligible criteria, the economic consequences for him which derive from it.²⁴

In its judgement in *Kásler* (C-26/13), the CJEU exposed that the bank should have explicitly given information about the using of different exchange rates and its reasons, 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. In the case *Andriuc et al.* (C-186/16), grasping the meaning of the fluctuation in exchange rate was from the beginning expected from the debtors. Nevertheless, Bank should expressly inform the clients that they must take the risk of exchange rate and 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 *Andriuc et al.* (C-186/16) is right. In this opinion he exposed that 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 should not inform the consumer about those facts and circumstances, which the bank could not foresee even if it acted having prudential diligence.²⁵

In the judgement *Andriuc et al.* (C-186/16) CJEU also stated that the examination of the clarity and intelligibility of a certain contract with regard to the case's all relevant circumstances, falls within the competence of the national courts. In the referred case the court should examine, if the 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 consumer²⁶ can estimate the costs. Namely, it is essential to let the consumer to be aware still before the contract conclusion of all contractual conditions and relating circumstances, since the consumer only upon these information in his or her possession can make a deliberated decision on the contract conclusion.²⁷

This requirement was already worded in the *Recommendation of the European Systemic Risk Board* (hereinafter ESRB) in 2011.²⁸ In the field of the risk awareness of borrowers (debtors) the ESRB recommends for the national

²⁴ *Kásler*, para 73 and 75.

²⁵ Opinion of AG Wahl (C-186/16), para 67–68.

²⁶ 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 and Van Hove, para 47 and DJUROVIC, Mateja: *European Law on Unfair Commercial Practices and Contract Law*. Hart Publishing, Oxford and Portland, Oregon, 2016, p. 60. and LEONE, Candida: *Of Private Law, Market Regularisation and Telling Them Apart in the EU. Amsterdam Law School Legal Studies Research Paper*, No. 28 (2017), 8.

²⁷ *Andriuc et al.*, para 46–48.

²⁸ 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, 1–47.

supervisory authorities and the Member States “to require 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.”²⁹

5. Clear and intelligible contract terms – a Hungarian perspective

Finding solutions and arranging the problems arisen in relation to the lending in foreign currencies has already started in the judicial practice during the year 2013. Those decisions, which appeared within the frame of the highest judicial forum and which served the uniformisation of the relating judicial practice, covered both the requirement of transparency and the contractual parties’ duty to provide information.

The *uniformity decision 6/2013 PJE* of the *Curia of Hungary* (hereinafter *Curia*) was published in December, 2013. In this decision 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”. The decision also stated that this obligation should not extend to the extent of the exchange rate change.³⁰ This latter expectation is lawful, since the extent of the exchange rate change is an unforeseeable and objective circumstance. The Hungarian legal standing point expressly mentions that financial institutions shall make the debtors understand the changeability of the exchange rate in the course of the paying. This obligation is a necessary element of the duty to provide information, prescribed in general by the Act No. V of 2013 on the Civil Code.³¹ However, this obligation should (and could) not extend to inform the debtor about the numeric change of the exchange rate.

The above many times mentioned judgement in *Kásler (C-26/13)*, which has big importance in the settled judicial practice of the CJEU, gave new impulse to the working-out of the legal solutions on the lending in foreign currencies in Hungary. In 2014, the *Curia* passed another uniformity decision (*2/2014 PJE*), which was strongly influenced by the CJEU’s judgement in *Kásler (C-26/13)*. The uniformity decision nearly took over the standing point of the CJEU, stated in the judgement. According to the 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”, therefore its unfairness can only be examined, if it was clear and intelligible for the consumer at the time of contract conclusion.³²

²⁹ ESRB/2011/1, Section 1, Recommendation A – Risk awareness of borrowers.

³⁰ Uniformity Decision 6/2013 PJE, Operative Part, Point 3.

³¹ Hungarian Civil Code, Article 6:62, paragraph (1).

³² About the uniformity decision 2/2014 see FAZEKAS, 90–91.

The Curia's uniformity decisions have their significance not only on their own, but their ambitions on the legal unification have also strong impact on the formation of the regulatory environment. Article 205 paragraph (3) of the previous Hungarian Civil Code (Act No. IV. of 1959) prescribed for the contractual parties as a general duty to cooperate each other at the time of the contract conclusion and to provide information about all those circumstances, which is essential with regard to the contract to be concluded. The new Hungarian Civil Code took over the "old" civil code's provision on the duty to provide information and complement it. According to the Article 6:62 paragraph (1) of the operative Civil Code parties should not only at time of contract conclusion, but during the fulfilment and the cessation of the contract.³³

It is worthy to mention that not only the prior and the Civil Code in force prescribe the duty to provide information, but single acts also dealt with the question. The provision of the "old" civil code was completed by the Act CXII of 1996 on Credit Institutions and Financial Enterprises (hereinafter CIFE), which is already not in force anymore.³⁴ The CIFE contained some provisions on the foreign exchange loan contract concluded with consumer. Article 203 paragraph (6) of the CIFE prescribed that in these kind of contracts the financial institution shall expressly specify in the contract 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 contract, the statement of risk acknowledgement compulsory shall contain the risks in any fluctuation of exchange rates and its effect on the instalment payments.³⁵

From the year 2009, consumer credit has been regulated by a single act.³⁶ The Act CLXII of 2009 on consumer credit (hereinafter CCA) was amended in 2014.³⁷ The relating rules of the CCA are more or less conform with the CIFE's rules on the obligation to provide information. According to the Article 21/A paragraph (1) of the CCA, in the case of a loan contract, which is concluded with consumer and either recorded or lended and repayable in foreign currency (i.e. "foreign currency based loan contract"), financial institution (creditor) shall 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

³³ See JUHÁSZ, Ágnes: *The Borders of the Duty to Disclose Information in a Contractual Relationship* In: KÉKESI, Tamás (ed.): MultiScience – XXXI. microCAD International Multidisciplinary Scientific Conference, Miskolc, 2017; JUHÁSZ Ágnes: Az együttműködési és tájékoztatási kötelezettséghez kapcsolódó egyes kérdésekről. *Publicationes Universitatis Miskolciensis, Sectio Iuridica et Politica*, Tomus XXXV. (2017), 285–301.

³⁴ The CIFE was superseded by the Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises, which is at present in force.

³⁵ CIFE, Article 203, paragraph (7), point a).

³⁶ With this act the Hungarian legislator implemented the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22. 5. 2008, 66–92.

³⁷ See Act LXXVIII of 2014 on the amendment of the Act CLXII of 2009 on consumer credit and other related acts, Article 9.

consumer, in which the consumer acknowledged the risks. This statement also should contain the risks in any fluctuation of exchange rates and its effect on the instalment payments.³⁸

6. 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 *Andriuc* (C-186/16), we go further with the first question, which was submitted by the Romanian court for preliminary ruling. This question asked for the interpretation of the Article 3(1) of Directive 93/13/EEC, which determined the time when the significant imbalance between the rights and obligations of the parties arising under the contract can be examined by the national courts. The question was quite important, since the above mentioned imbalance existing between the parties' rights and obligations can cause the unfairness of a certain contract term. It is also worthy to mention that this criterion can solely be examined, if it does not fall into the scope of the Article 4(2) of the Directive 93/13/EEC.³⁹

In relation to this question, AG Wahl properly drew the attention in his opinion that between two types of the cases shall be made a distinction:

a) There are cases, in which the certain contractual term brings the significant imbalance between the parties from the beginning, but it manifests for the parties only during the performance of the contract.

Here can be mentioned the case C-92/11⁴⁰, in which the CJEU established relevant statements in relation to the unfair contractual practice of a German gas supplier company. The German company, the RWE Vertrieb was obliged to conclude gas supply contracts with consumers accordingly the legal provisions. At the same time, with regard to the dispositive nature of these provisions and the principle of contract freedom, it also had the right to apply single contract terms. In the referred case, those contracts were examined, which were concluded with consumers and the company applied its own general contract terms. These terms stipulated that the company has the right to amend unilaterally the price of the gas without providing information for the consumer about the reasons, conditions and the extent of the amendment. The company was only obliged to inform the consumers about the amendment and about their right to terminate the contract, if they would not accept the amendment passed by the company. In addition, the significant imbalance between the parties was increased by the fact that consumers had no possibility at that time to change the person of the gas supplier.

In relation to the above mentioned contract term the CJEU concluded that although the information to be provided is different with regard to the peculiarities of the certain product, the lack of information on the point before the contract is

³⁸ CCA, Article 21/A, paragraph (2).

³⁹ C.f. the 2nd point of the study.

⁴⁰ Judgement of the Court in the case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*. of 21 March 2013, ECLI:EU:C:2013:180.

concluded cannot, in principle, be 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 of the reasons of the changes not.⁴¹ That is, the contract term, which was applied by the parties during the conclusion of the contract, already brought at this time 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 it 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 change, which the consumer perceives as excessive, i.e. such changes raise the significant imbalance between the contractual parties posteriorly.

The case *Andiciuc et al.* (C-186/16) examined in the study can be an example for this case, since the devaluation of the domestic currency caused extra costs for the debtors. Nevertheless, it also can be stated that at the time of contract conclusion, neither the debtors (consumers), nor the financial institute could reasonably be expected to foresee the exact measure of the changes in the exchange rate. The unforeseeability of change in circumstances as an objective factor cause changing in the parties' obligations by all means. However, according to our view, these changes do not break the contractual balance, since the financial institute lent to the debtor a certain number of currency unit and financial institution is entitled to the return of that same number of units.⁴² The risk of the fluctuation or the significant changing in exchange rates was known by the debtors at the time of contract conclusion, so CJEU stated that existence of significant imbalance 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.

7. Consequences

The problem of the foreign exchange loans has continued to be a contentious issue, not only in Hungary, but in other countries across Europe. Debtors still trust that new and more favourable circumstances and possibilities emerge. Therefore, debtors have great expectations of both the national courts and the CJEU.

The CJEU returns to the question of the foreign exchange loans from time to time. It is well-demonstrated by the case introduced and analysed in the study. However, in view of the judgements taken by the CJEU, a question arises: can be

⁴¹ RWE (C-92/11), para 51–53 and 55.

⁴² Opinion of AG Wahl (C-186/16), para 87.

any new element in the adjudication of the foreign exchange loans at European level?

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 emerging of cases which would bring significant changes in the already evolved judicial practice is far too little. It is well-demonstrated by CJEU's recent judgement in *Andriuc et al.* (C-186/16). Although the CJEU answered to the questions submitted by the Romanian court for preliminary ruling, the given answers are mostly based on the CJEU's previous case-law, e.g. on the judgement in *Kásler* (C-26/13). Moreover, the judgement does not contain any new and relevant statement.⁴³ However, a concrete turn presumably can not be expected. In those countries, where the economic problems caused by the foreign exchange loans and the demands on the solution arose the strongest (e.g. Romania, Bulgaria, Hungary and Poland)⁴⁴, national legislators have already taken steps. Nevertheless, the solutions worked out by the different national legislators are not necessarily overlapping.

It is possible that some cases relating to foreign exchange loan emerge and reach Luxembourg in the future. If a Member State decide to create its own clear and mandatory regulation, the turning to the CJEU for preliminary ruling in foreign exchange loan cases is no longer necessary and justifiable.

⁴³ 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 93/13/EEC. About the request see: GADÓ Gábor: A fogyasztókkal kötött szerződésekben alkalmazott tisztességtelen feltételekről. *Gazdaság és Jog*, 2017/4, 18–23.

⁴⁴ As *Fazekas* commented, the increasing of foreign exchange loans could be experienced not only in Hungary, but in the Baltic countries, i.e. Estonia, Latvia and Lithuania. Similar constructions were also known and used in Poland, Bulgaria and Romania. See FAZEKAS, 73.